Consideration

1. Importance

The common law distinguishes between gratuitous promises and those which can be the basis of a contractual obligation. What gives the latter their legal character

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2 I.e., promises to confer a benefit by gift, sometimes referred to as “donative promises”; see Eisenberg, “Donative Promises” (1979), 47 U. Ch. L. R. 1; or as “benevolent promises”; see Stoljar, “Enforcing Benevolent Promises” (1989), 12 Sydney L.R. 17; Stoljar, “Bargain and Non-bargain Promises” (1988), 18 U. West. Aus. L.R. 119. For an example of such a promise, see Sierra Pacific Holdings Ltd. v. Natterjack Animation Co. (1999), 25 R.P.R. (3d) 1, 1999CarswellBC867 (B.C.S.C. [In Chambers]).

is what is called "consideration". The essence of a valid, binding contract is the idea of a "bargain" between the parties. A contract consists of an exchange of promises, acts, or acts and promises, as a result of which each side receives something from the other. The attempt was made by Lord Mansfield in the eighteenth century to regard acts, or acts and promises, as a result of which each side receives something from the other as well as English. If there is no consideration there is no contract, and if there is no contract there is nothing upon which to found or create liability. In Steinberg v. Steinberg there was a gift of shares between husband and wife. Later the wife signed a promissory note for the value of the shares, this transaction being by way of a device to avoid certain tax liabilities. After the husband and wife separated some time later, the husband brought an action on the note. It was held that he could not sue as there was no consideration for the wife's promise to pay the sum in question.

2. Meaning

In Currie v. M consideration was the variation of an agreement to create so

This was expressed The principal reason is contained in a deed, per Megaw L J

3. Consideration, Gifts and Promises


4. Consideration and Morality

There is no doubt that this doctrine is now firmly established in Canadian law as well as English. If there is no consideration there is no contract, and if there is no contract there is nothing upon which to found or create liability. In Steinberg v. Steinberg there was a gift of shares between husband and wife. Later the wife signed a promissory note for the value of the shares, this transaction being by way of a device to avoid certain tax liabilities. After the husband and wife separated some time later, the husband brought an action on the note. It was held that he could not sue as there was no consideration for the wife's promise to pay the sum in question.

5. Consideration and the Morality of Promises

alid, binding contract is the idea of an exchange of promises, one side receives something from the other in the eighteenth century to ion, or to be entirely gratuitous, to be some material advantage given in exchange could be construed is now firmly established for what there is no contract, from which to found or create of shares between husband and wife the value of the shares, this tax liabilities. After the husband brought an action on the note. It is intended for the wife’s promise to pay the sum in question. Although some qualifications of the need for consideration has been admitted, by the common law and by statute, the doctrine of consideration remains one of the pillars of the law of contract. However, the nature and content of consideration have undergone change over the years.

2. Meaning

In Currie v. Misa in 1875 an English court provided a modern definition of consideration which has frequently been cited with approval by courts in Canada. Consideration was there said to consist in some right, interest, profit or benefit accruing to the one party or some forebearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other.

This was expressed by one Canadian judge in the following way:

The principal requisite and that which is the essence of every consideration, is that it should create some benefit to the party promising or some trouble, prejudice or inconvenience to the party to whom the promise is made.

11 Compare Schimnowski v. Schimnowski (1993), 87 Man. R. (2d) 10 (Man. Q.B.); additional reasons at (1993), 89 Man. R. (2d) 81 (Man. Q.B.); reversed (1994), 92 Man. R. (2d) 251 (Man. C.A.) where there was no consideration for the cheques given by the father to his son before the father’s death. Hence they were gifts; and the son could not sue the executor.

12 Below, pp. 118-135.


CONSIDERATION

Such statements reveal the essential ingredients of consideration as it has developed since the early days of truly contractual liability in the common law. The act or promise of one party must be, as Lennox J. said in *Loranger v. Haines*, "reciprocal undertakings". So if one party is neither giving anything, nor is promising to do or give anything, there is no consideration for the other party's act or promise. What is meant here by the expression "value" must not be taken in a literal, entirely materialistic sense. In most instances, of course, it will be money or money's worth that is involved. But it is not so exclusive. Consideration means something which is of some value in the eyes of the law. It must be real. This could include some act, or promise of an act, which is incapable of being given a monetary value, though it has value, some benefit, in the sense of advantage for the party who is the present or future recipient or beneficiary of the act. (including the situation when what the promisor does or does not do is for or to a third person, not a party to the contract, as long as this in some way will benefit the promisee).

This broad meaning or scope of "value" is illustrated by *Loranger v. Haines*, in which the plaintiff sued for specific performance of a contract to convey land. The plaintiff and the defendant were friends. The plaintiff wished to move and live next door to the defendant to Ontario, where the land he intended to build a house on. After the defendant had taken advantage of being given a monetary value, though it has value, some benefit, in the sense of advantage for the party who is the present or future recipient or beneficiary of the act. (including the situation when what the promisor does or does not do is for or to a third person, not a party to the contract, as long as this in some way will benefit the promisee).

21 Hance in *Meinzer v. Bourque Estate* (1994), 131 N.S.R. (2d) 244 (N.S.C.A.), since the deceased boyfriend of the plaintiff had received no benefit from the plaintiff, she was not entitled to claim the proceeds of a life insurance policy she said he had agreed to take out.


24 Above. Compare *Brooks Ltd. v. Claude Neon Gen. Advertising Ltd.* (1932) O.R. 205 (Ont. C.A.); *Westman v. Macdonald* (1941) 3 W.W.R. 821 (B.C.C.C.); *Press Box Inc. v. Berlin* (1988), 85 N.B.R. (2d) 288 (N.B.Q.B.); consideration for an option to purchase land was found in the optionee's entering into an agreement to leave the land, the lease, and the payment of rent under the lease.
consideration as it has developed in the common law. The act or gained for" by the act or promise value. To create an enforceable orange v. Haines, 18 "reciprocal anything, nor is promising to do or fer party's act or promise. 19 What ot be taken in a literal, entirely will be money or money's worth relation means something which is al. 21 This could include some act, given a monetary value, though it e for the party who is the present iding the situation when what the erson, not a party to the contract, see). 22 ustrated by Loranger v. Haines, 23 of a contract to convey land, plaintiff wished to move and live ve to appeal to S.C.C. refused (1981), 39 Piercey's Auto Body Shop Ltd. (1981), to (1990), 72 O.R. (2d) 254 (Ont. H.C.) efore no contract; St. Pierre v. St. Pierre i for transfer of home, set aside; contrast C.A.); leave to appeal to S.C.C. refused d. v. Cogan, above, at 259. The passage y J. in D.B. Holdings Ltd. v. Bellamy sk, Q.B.). (Ont. Gen. Div.) per Reilly J. There the receipt to harvest did not constitute considera- defendant from doing so. Contrast Fish S.C.A.), where the respondent's under- on for the transfer of a lobster licence to ... (2d) 244 (N.S.S.C.), since the deceased he plaintiff, she was not entitled to claim reed to take out.


next door to the defendant. In consequence of this, the plaintiff left Detroit and came to Ontario, where the land was situated; he did things to improve the lot on which he intended to build a house; he paid certain expenses in connection with his move to the land; and he undertook that if he ever wanted to leave the land in question he would give an option to the defendant to buy it from him. Under these circumstances, after the defendant had refused to honour the agreement, it was held that there was a valid contract supported by consideration, namely the acts of the plaintiff referred to above, and the action succeeded. Another example is provided by Spruce Grove v. Yellowhead Regional Library Board. 26 The plaintiff municipality transferred land to a library board for one dollar plus other good and valuable consideration on the undertaking of the board that it would build a library on the land. Whether such transfer was ultra vires the municipality depended upon whether the transaction was a gift or a sale; in other words, whether it constituted a valid contract. This raised the issue of consideration. The Alberta Court of Appeal held that a sale had taken place, therefore the transaction was not ultra vires. There was consideration because there was a promise given for a promise by both parties. The town agreed to provide the land, and the library board agreed to construct a building to be used as regional library headquarters. The promise made by each party met the classic test of "valuable consideration" stated in Currie v. Misa. Here, it might be said, the library board's promise involved a detriment to the board, although there might have been a benefit to the municipality. Similarly, in Bank of Nova Scotia v. Hallgarth, 27 a husband who was co-signer of a promissory note for a loan made by the bank to his wife, derived benefit from being relieved of financial pressure, while the bank suffered a detriment in that it gave up its right under previous arrangements with the wife.

Such cases also illuminate the distinction to be drawn between motive and consideration. Consideration in a colloquial sense may refer to the reasons why somebody does something—his motives for so acting. In the technical sense it has a more restricted connotation. Prior to the final formulation in modern times of the scope of the doctrine and concept of consideration, it was suggested that a motive for doing or promising something might suffice. For example, the "natural love and affection" which a parent might feel for a child, was sometimes held to be consideration for a promise to give something to the child. While this might be "good" consideration (and therefore could have some effect in situations involving equity), it was eventually held not to be valuable consideration, the only kind of consideration to which the common law gave effect. Such other consideration, which was not consideration at all in the eyes of the common law, merely constituted a motive for acting or promising to act. It was a reason why the party acting or promising would want to act or promise as he had done; it could not amount to the price or bargain for the other party's promise or act. So, in Loranger v. Haines, for example, it was vital for the court to differentiate true consideration for the defendant's promise to convey the land from any motive on his or the plaintiff's part which might have induced the making of such promise. The mere desire of the parties to live adjoining one another was not consideration; there had to be something of benefit to the party acting or promising to act. 28

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27 Above.
defendant or detriment to the plaintiff in return for the promise to convey. The same is indicated in the judgment of McGillivray J.A. in Johnson v. Forbes. In that case, the defendant promised to pay the plaintiff for his past voluntary services as agent for the defendant. But the promise was not expressed in precise terms. What was stated was that the plaintiff "would be taken care of". In an action brought by the plaintiff for some recompense for what he had done, it was held that there was no contract upon which an action could be founded. There was no consideration for the plaintiff's performance of services; the promise made by the defendant expressed "a moral obligation of gratitude", a motive for promising, not consideration. In Fobasco Ltd. v. Cogan, the fact that the parties did business together was the reason or motive behind the defendant's offer to permit the plaintiffs to use some of the defendant's season's tickets for baseball games purchased by the defendant. This was distinct from consideration.

Some uncertainty may be said to have been thrown upon this whole view of what is meant by consideration by Wilson J. in Slowm v. Union Oil Co. Consideration consisted of, or in, a promise intended to be binding, intended to be acted upon, and in fact acted upon. Insofar as this merely refers to an act which is given in return for a promise or another act from the other party, it does not appear to be revolutionary; as long as it is recalled that the act in question can be detrimental to one party without having to be beneficial to the other. If, on the other hand, this analysis or definition is meant to include or refer to a bare, valueless promise it may go too far. On the facts of the case in question, there was no need to look beyond the doing of an act by the promisee in return for the promise by the defendant company to pay the financial benefits in issue. Hence, it was not strictly necessary for the learned judge to employ any novel concepts of consideration.

3. Mutuality

Despite the suggestion of Wilson J., a valid contract requires that each party give something specific in return for the other's act or promise. There must be what has been termed "mutuality", revealing and establishing that the parties are bound to each other. Thus, a corresponding undertaking in Ontario Inc. the contra-purchaser was limited to occurred the vendor argued could not be obtained by destroying the mutuality of the trial judge and the Ontario taking that establishes r Brandon Gas & Power, one party undertook to p a buyer impliedly undertook the mutualty is illustrated by the operative reason for defendant in respect of the lot because the wife never re the bank. When she signs them, she was not aware that she was binding her what the documents mean.

In this regard two parties are sometimes called "first" for a prescribed or reason unless it is supported by a defensive, where a merchant finds that the offeror is no merchants, in the Uniform Commercial Code was also recommended b of goods, But the dange and the view has been injustice by permitting th if justice so requires in

30 Johnson v. Forbes, above, at 762.
32 Above, note 19, at 259.
34 As in Dale v. Manitoba, [1995] 10 W.W.R. 703 (Man. Q.B.); affirmed [1997] 8 W.W.R. 447 (Man. C.A.), when the plaintiff's reliance on the promise made by the promisee was consideration for that promise.
36 Young v. Canadian Nort.
38 (2008), 292 D.L.R. (4th) 868; Great Eastern Oil & Hickman (A.E.) Co. v. Ri distingushed in Case's In
40 (1991), 4 O.R. (3d) 526 (C)
41 Ontario Law Reform Con
42 U.C.C. § 2-205.
43 Draft Bill, s. 4.3; loc. cit.
44 Waddams, Law of Contr.
the promise to convey. The contract requires that each party or promise. There must be something that the parties are bound to each other. Thus, a promise to sell goods to another must be reciprocated by a corresponding undertaking by that other to buy them. In Romfo v. 12163793 Ontario Inc., the contract to purchase property included a clause under which the purchaser was limited to recovery of the deposit on default by the vendor. When this occurred the vendor argued unsuccessfully that specific performance of the contract could not be obtained by the purchaser. The latter argued that the deposit clause destroyed the mutuality of the parties’ obligations and so could be ignored. Both the trial judge and the Ontario Court of Appeal held the contrary. The required undertaking that establishes mutuality may be implied from the circumstances, as in Brandon Gas & Power Co. v. Brandon Creamery & Supply Co., in which, when one party undertook to provide all the goods or services the other party wanted, the buyer impliedly undertook that he would buy from no one else. The importance of mutuality is illustrated by the decision in Citibank Canada v. Cameron, in which the operative reason for denying the plaintiff a summary remedy against the defendant in respect of the loan made to the defendant’s wife by the plaintiff bank was because the wife never requested the loan, i.e., never undertook any liability to repay the bank. When she signed a promissory note and other documents without reading them, she was not aware that she was asking the plaintiff bank to do anything, and that she was binding herself to the bank in any way, since she did not understand what the documents meant.

In this regard two particular problems may be mentioned. One relates to what are sometimes called “firm offers.” A promise to keep an offer open for acceptance for a prescribed or reasonable period is not binding (where it is not made under seal) unless it is supported by consideration. The possibility that this might lead to injustice, as where a merchant acts to his detriment in reliance on such a promise only to find that the offeror is not bound, has led to a change in the law, at least as it affects merchants, in the Uniform Commercial Code in the United States; a change that was also recommended by the Ontario Law Reform Commission in relation to sale of goods. But the dangers of opening up the law in this way have also been stressed and the view has been expressed that it would be more suitable to prevent any injustice by permitting the enforcement of such a promise or offer to a limited extent “if justice so requires in view of the subsequent reliance of the promisee.”

42 U.C.C. §2-205.
adoption of such an approach, while understandable, is itself open to criticism. There may be grounds for eradicating the doctrine of consideration from the law. To treat so-called “firm offers” as justifying something akin to a contract, however, while leaving the law of consideration, in general, undisturbed, would be to permit an exception to the doctrine in a context in which, it might be thought, the parties are or should be well aware of the demands of the law. and may well have transacted with the deliberate purpose of not intending to create binding, legal obligations. A more appropriate remedy would be one in tort, where fraud, or possibly negligence, had induced the alleged loss.

A very special problem in this respect has arisen with regard to a promise by someone to donate money to a charitable organization or institution. Is such a promise not capable of constituting a contractual obligation that may be enforced if it is not honoured? Or can there be circumstances under which any such promise can achieve the status of a contract? For this there must be consideration for the promise (unless it is contained in a deed). The difficulty is to identify what possible consideration there can be for such a promise, so as to satisfy the requirement of mutuality.

The Canadian authorities, unlike earlier English decisions, appear to have found ways of circumventing this barrier to the enforceability of such promises by discovering something more than a charitable motive or intent as the wellspring of the donor’s promise.

In Sargent v. Nicholson, in reliance upon a document promising a subscription to the Y.M.C.A., that organization undertook certain liabilities in respect of a new building. It was held that this made the promise a binding contract which could not be revoked and was enforceable against the promisor. So, too, in Y.M.C.A. v. Rankin, where the only difference was that the building that was going to be constructed from the various subscriptions was not actually completed, although commitments had been entered into on the faith of the promise. Once the promise was acted upon to the extent of the making of such commitments, it was too late for the promise to give to be revoked. In Re Ross; Hutchinson v. Royal Institution for the Advancement of Learning a promise to pay a sum of money to McGill University towards the building of a gymnasium, if the University would provide an additional sum for the same purpose, was held to constitute an actionable contract. It was an offer made for consideration, as long as the University proceeded with the stipulated work. Hence, a subsequent agreement under which the promisor withdrew his earlier promise on condition that he made a fresh promise for a different sum of money, though this was to be given for an unrestricted purpose, was held to be a binding contract; each party had provided valuable consideration for the promises contained in the second agreement. In Re Loblaw, there was a promise by a testator to give money to Victoria University within two years, the money to be used for a specific purpose. This was held to be an actual undertaking of the will to benefit the charity. The testator’s or donor’s express intention to benefit the charity, while not to be achieved, there was a promise by a testator’s or donor’s express intention to give, unsupported by consideration, was sufficient there would seem to be no offer of a gift of money amenable to such a promise. Hence, in such a case the promise was held not to be enforceable.

In contrast a contract Sanatorium v. McArthur, in which no contract was held to exist, a campaign to build a sanatorium was undertaken at the request of the University, the University had paid the cost of the building, and a campaign was launched to raise the remaining funds. The University had paid the cost of the building, and a campaign was launched to raise the remaining funds. Judgment was given for the University. The defendant refused to contribute to the project, and the University sued for the money promised. In this case, the court held that there was no contract, as the money promised had not been given. The court held that there was no contract, as the money promised had not been given. The court held that there was no contract, as the money promised had not been given.

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45 Or statutory change has occurred; below, note 53.
46 Re Hudson (1885), 33 W.R. 819; Re Corey (1912), 29 T.L.R. 18.
48 (1916), 10 W.W.R. 482 (B.C.C.A.).
49 [1932] S.C.R. 57 (an appeal from Quebec, but the Supreme Court of Canada said it involved the common law).
purpose. This was held to be a good contract. But in this case there was never any actual undertaking of the work involved in achieving the purpose. The court took the view that there was an implied promise to undertake the purpose envisaged by the testator and such implied promise was consideration for the promise to give the money. While this might have been valid where a specific purpose had originally been mentioned by the parties, it would seem that if there were simply a general intent to benefit the charity, without the promise of money being tied to any particular end to be achieved, there would be no contract. All that would emerge from the testator’s or donor’s expression of willingness to give would be a gratuitous promise to give, unsupported by consideration, and therefore not actionable. This is what the Supreme Court decided in Governors of Dalhousie College v. Boutilier, where nothing was tied in with the offer of a gift of money. Crockett J. said: “There is no doubt . . . that an express agreement by the promisee to do certain acts in return for a subscription is a sufficient consideration for the promise of the subscriber.” But there would seem to be no basis for implying any such promise merely from the offer of a gift of money and that would mean that there was no consideration for such a promise. Hence, in that case, the general promise to give money was not enforceable.

In contrast a contract was held to have come into existence in Provincial Sanatorium v. McArthur. There the defendant signed a subscription list set up under a campaign to build a sanatorium for tuberculosis patients and promised to pay the treasurer of the commission, set up under a provincial statute to run the institution, the sum of $200 payable in three instalments. Under the statute the commission was empowered to solicit subscriptions from the public. When called upon to honour his pledge, the defendant refused on the ground that he was offended by a political article published in a local newspaper. He said he would give the money when the conditions under which he had promised to give, namely, the building and equipping of the sanatorium, were complied with and not before. When sued for the money, he pleaded inter alia that his promise was given without consideration and was therefore not binding. Judgment was given for the plaintiff. In other words, there was a binding contract. While the subscriptions of others was not consideration for the promise made by one subscriber, if a subscriber made a promise and it was acted on by the promisee, the promisor could not revoke his promise but he could be sued if the work had been completed. In this instance, the trial judge found that the defendant’s offer of money had been accepted and was used for the purpose for which the money was subscribed, namely, to set up a fund to build a sanatorium. It was too late to
revoke the promise after it had been accepted. While there was criticism of the judicial statements that an implied promise to use money subscribed for a particular purpose could be spelled out of a general intention to use the money charitably, nonetheless, if there was a specific purpose in mind at the time of the promise to subscribe, there could be an implied promise that the money would be used for such purpose.

It would seem, therefore, that a promise to give money to a charity may become an enforceable promise: (1) if the promisee completes the purpose the subscriber had in mind; (2) if the promisee begins to undertake the fulfillment of such purpose; (3) if nothing has yet been done, but there is a clear, if implied undertaking that money provided as a result of such promise will be used for the specific purpose the subscriber had in mind when he made his offer. In such circumstances, consideration for the promise to give exists.

4. Sufficiency

(a) Adequacy and sufficiency contrasted

The adequacy of the consideration is normally irrelevant. As was said in the English case of Bolton v. Madden, the adequacy of the consideration is for the parties to consider at the time of making the agreement, not for the Court when it is sought to be enforced.

This was cited with approval and adopted in Fleming v. Mair. In the later case of Robertson v. Robertson, it was emphasized that it was not necessary that the consideration and promise should be equivalent in actual value. In Scivoletto v. DeDonna, the plaintiff paid for a girl to come from Italy to Canada to marry his son. Instead, the defendant married her. Both plaintiff and defendant believed that when the girl did not marry the plaintiff's son the plaintiff was entitled to return her to Italy. They therefore agreed that the defendant would reimburse the plaintiff in respect of the passage money. It was held that this was an enforceable contract—the adequacy of the consideration for the promise, namely, that the plaintiff would not send the girl back to Italy, was irrelevant. An even stronger illustration is provided by Bank of Nova Scotia v. M ex-husband's creditors in order to pay his own ex-husband. In return for her offer to debtors agreed to accept the debtors, although, at first sight, seemingly the debtor with her husband, in a binding contract resulting In an English case, Ward v. Byham, a mother's promise to provide a home and support for grandparents.


57. [1973], L.R. 9 Q.B. 55 at 56 (Eng. Q.B.).


59. [1933], 6 M.P.R. 370 at 389 (N.B.C.A.).

60. So in 370105 Alberto Ltd. v. Brazos Petroleum Corp. (1992), [1993] 3 W.W.R. 186 (Alta. Q.B.), consideration was adequate because there was value in a business sense. See also MacKenzie v. Davis (2008), 335 N.B.R. (2d) 391 (N.B.Q.B.), above note 23, admission of liability for causing an accident in which plaintiff was injured was consideration for plaintiff's agreement to abandon action.