• HAS THE CONTRACT LAW DOCTRINE OF FRESH CONSIDERATION GONE STALE? •

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INTRODUCTION

Congratulations, you have signed a contract to supply aglets[1] to an international shoelace conglomerate. The demand is insatiable. Unexpectedly, your factory shuts down for weeks, disrupting your production and increasing prices. You approach the conglomerate, which agrees to pay you more for each aglet. You have emails showing the agreement for the adjusted price but you do not execute a new agreement.

Historically, courts would have found such a variation unenforceable on the technical argument that fresh consideration was not exchanged. The partie s would have needed to exchange something new of value to make the variation enforceable because consideration determined who was privy to a contract. If there was no fresh consideration, then there was no privity and the agreement could not be enforced. Consideration also served to reduce surprises and to delineate between binding agreements, gifts, and a mere promise.[2]

Some authors have commented that the law surrounding these "going-transaction adjustments" or variations (i.e. where parties have an existing contractual relationship) to be "needlessly confused and complicated".[3] Identifying these variations as new contracts is to misunderstand their function. Academics have also expressed concern that the doctrine of fresh consideration results in a "hunt and peck" approach, meaning it is applied inconsistently to reach whatever outcome the judge believes is fair.[4] Canadian courts have recognized these issues. But we have not yet seen a watershed change in the law.

One of the frequently cited cases dealing with fresh consideration is the Ontario Court of Appeal's decision, *Gilbert Steel Ltd. v University Construction Ltd.*[5] In that case, Wilson J.A. ruled that a subsequent oral agreement to pay higher prices for steel was unenforceable for "want of consideration".[6] True to the hunt and peck approach, within three years of *Gilbert*, the ONCA, with Wilson J.A. on the panel, decided a similar case and found a variation, without consideration, to be enforceable.[7] The Court did not refer to *Gilbert.* Even with these inconsistent decisions, courts have cited to *Gilbert* as the leading case.[8]

To add to the confusion, developments in the law make certain variations binding without fresh consideration. One example is promissory estoppel, where courts find reliance is enough to enforce agreements lacking consideration.[9] Insurance statutes

also permit an unnamed insured to recover indemnity and "shall be deemed to be a party to the contract and to have given consideration therefor".[10]

A survey of Canadian reported decisions highlights the doctrine's inconsistent application and that counsel have frequently failed to argue to reform it. It is time for counsel to go beyond the tight confines of the fresh consideration doctrine. Counsel should advance arguments to get rid of it all together. As Professor Waddams, Professor Reiter, Angela Swan, and Karl Llewellyn have proposed, courts should presume variations to a contract, without consideration, are enforceable save for economic duress or unconscionability.

HISTORICALLY, COMMON LAW COURTS STRICTLY APPLIED THE DOCTRINE OF FRESH CONSIDERATION

A binding contract traditionally requires an offer, acceptance, and consideration. Consideration requires each party to exchange something of value.[11] A party's act or promise must be bought or bargained for by another party's act or promise.[12] The consideration can be minimal. The classic example is a peppercorn for a castle.

Once the contract has been established, the parties will have a pre-existing duty to fulfill its terms. The common law doctrine of pre-existing duty was developed in the English courts approximately 400 years ago. Courts generally denied enforcing a promise to do something in addition to what a party was already bound to do.[13] They sought a true bargain, requiring an exchange, to find a variation enforceable.[14]

Courts continue to cite and apply (inconsistently) one of the seminal English decisions on pre-existing duty, *Stilk v Myrick.* [15] Stilk worked on Myrick's ship and promised to do anything needed during the voyage. Myrick's ship docked for an evening. Two men deserted. The captain promised to pay the remaining crewmembers the deserters' wages if they fulfilled the missing crewmembers' duties. Once they arrived at home port, the captain refused to pay the extra wages. Stilk sued Myrick. The court ruled in Myrick's favour, finding that the crew had a pre-existing duty to fulfill their roles even under an emergency. The court determined that no fresh consideration was exchanged to make the gratuitous promise to pay extra wages binding.

While *Myrick* has been referred to as a leading case on the doctrine of pre-existing duty, the decision is distinguishable today. It was reached out of fear that a crew could hold their captain to ransom on the high seas.[16] Many have questioned its relevance but courts continue to cite the decision.[17]

COURTS OF ENGLAND AND WALES MODIFY THE DOCTRINE OF FRESH CONSIDERATION

In 1989, the English and Wales Court of Appeal, in *Williams v Roffey Brothers & Nicholls (Contractors) Ltd*, reformed the need for fresh consideration when the contracting parties receive "practical benefits" from the variation.[18] In *Williams*, a building association hired a contractor to refurbish a block of flats. The contractor hired carpenters for the refurbishment. The carpenters fell behind schedule. The building contractor agreed to pay the carpenters more money to expedite the refurbishment. After they refurbished the flats, the contractor refused to pay the extra funds.

The Court determined that the variation was enforceable because it was mutually beneficial. The carpenters would receive the further payment and the contractor would avoid delay penalties. Glidewell L.J. acknowledged that some would object to the ruling because it conflicted with *Myrick*:

> It is not in my view surprising that a principle enunciated in relation to the rigours of seafaring life during the Napoleonic wars should be subjected during the succeeding 180 years to a process of refinement and limitation in its application in the present day.[19]

Russell L.J. and Purchas L.J. concurred. Russell L.J. wrote, "the variation was supported by consideration which a pragmatic approach to the true relationship

between the parties readily demonstrate." He emphasized that the parties' intention was clear based on the practical benefits received by each. Purchas L.J. observed, "the modern approach to the question of consideration would be that where there were benefits derived by each party to a contract of variation even though one party did not suffer a detriment this would not be fatal to the establishing of sufficient consideration to support the agreement."

COURTS IN NEW BRUNSWICK AND BRITISH COLUMBIA ADOPT WILLIAMS

New Brunswick

In 2008, the New Brunswick Court of Appeal ("**NBCA**") became the first Canadian appellate court to approve and build on the reasoning from *Williams* in *NAV Canada v. Greater Fredericton Airport Authority Inc.*[20] It ruled that, in the particular case, it would find a variation to an agreement enforceable, without fresh consideration. *NAV Canada* created the pathway for post-contractual modifications, unsupported by consideration, to be enforceable subject to economic duress.

NAV Canada ("**NAV**") was responsible to provide equipment to the Greater Fredericton Airport Authority Inc. ("**GFAA**"). GFAA was lengthening a runway and relocating its Instrument Landing System ("**ILS**"). NAV wanted to replace one of the ILS's existing components. The parties disagreed on who should pay for it.

NAV wrote to GFAA and advised that if GFAA did not agree to reimburse it, NAV would not order the component. GFAA agreed under protest to pay. After NAV purchased the component, GFAA refused to pay. Litigation ensued.

Robertson J.A. held that "a post-contractual modification, unsupported by consideration, may be enforceable so long as it is established that the variation was not procured under economic duress."[21] The onus is on the party seeking to enforce the modified term that: (i) economic duress did not occur; or (ii) the coerced party affirmed the modification.[22]

Economic duress is "dependent *initially* on two conditions precedent":[23] (1) the contractual variation must be extracted from pressure, such as a demand or threat; and (2) the coerced party had no practical alternative but to agree to the demand or threat. If these two conditions precedent are satisfied, the court considers whether the coerced party consented to the variation.[24]

Robertson J.A established that the NBCA will consider three factors in assessing consent:

1. Was the promise supported by consideration;
2. Did the coerced party promise under protest or without prejudice; and
3. If not, did the coerced party take reasonable steps to disaffirm the promise as soon as practicable.[25]

In applying the facts to the established test, the Court found that GFAA was a victim of economic duress. Among other things, NAV procured the contractual variation by threatening not to purchase the component unless GFAA paid for it and GFAA agreed to pay under protest.

To complicate matters and consistent with the hunt and peck approach, within a year of *NAV Canada*, the NBCA faced another contract variation case in *Harrity and Northeast Yachts 1998 Ltd. v Kennedy*.[26] In contrast to *NAV Canada,* the Court held a subsequent variation to an agreement was unenforceable for lack of consideration.

In *Harrity,* the plaintiff bought a yacht and signed an agreement of purchase and sale on the representation that the yacht's engine was new. After the sale finalized, the parties executed a bill of sale with an attached disclaimer of liability for misrepresentations. The purchaser soon realized that the yacht's engine was not new. She commenced an action. The defendants relied on *NAV Canada* to argue that the liability disclaimer was enforceable. The Court disagreed because the parties did not exchange fresh consideration.

The Court likely found the variation unenforceable because: (i) the purchaser was an unsophisticated party; (ii) the parties did not negotiate the variation in the contract; and (iii) the purchaser appeared to have been unaware of the variation.[27]

British Columbia

Ten years after the NBCA's decision in *NAV Canada,* the British Columbia Court of Appeal ("**BCCA**") did away with the requirement for fresh consideration, absent duress, unconscionability, or other public policy concerns in *Rosas v Toca*.[28] *Rosas* has since been described as a "significant" change in the common law.[29]

Ms. Rosas won over $4 million in a lottery. She loaned $600,000.00 to Ms. Toca to purchase a home. Each year, Ms. Toca stated that she would pay Ms. Rosas next year. Ms. Rosas, described as patient and generous, agreed to the extensions. The parties did not exchange fresh consideration. Seven years later, Ms. Rosas sued Ms. Toca for the loan. Ms. Toca successfully argued at trial that Ms. Rosas should have sued any time after the first anniversary of the loan. She argued that since they did not exchange fresh consideration for the extensions, Ms. Rosas was statute barred to advance her claim.

Bauman C.J.B.C., for the Court, foreshadowed what was coming on the first page of the decision:

> The time has come to reform the doctrine of consideration as it applies in this context, and modify the pre-existing duty rule, as so many commentators and several courts have suggested. When parties to a contract agree to vary its terms, the variation should be enforceable without fresh consideration, absent duress, unconscionability, or other public policy concerns, which would render an otherwise valid term unenforceable.[30]

Bauman C.J.B.C. wrote a thorough, extensive decision. He canvassed the legal landscape across Canada and commonwealth jurisdictions to observe that, "reforms to the doctrine of consideration appear to focus on the seriousness of the parties' intentions and the legitimate expectations of business parties."[31]

Citing with approval Professor Waddams, he wrote: "there is a strong case for assuming *prima facie* enforceability of such promises and for concentrating attention on what Professor Reiter called the only substantive issue, namely unconscionability."[32] He also cited Ms. Swan's commentary on *Williams*: "If the result of this development were that, as has been suggested, all modifying arrangements or undertakings made in the context of a commercial relation were to be enforced (absent some real reason not to) that would be a significant improvement over the existing situation."[33] Bauman C.J.B.C. also referred to Professor Reiter for the proposition that the pre-existing duty rule should be abolished.[34]

The Court ruled that the annual, gratuitous extensions were binding. No evidence of duress was tendered. The Court determined that Ms. Toca was liable for the loan.

Interestingly, the BCCA put the doctrine of fresh consideration in play – counsel did not advance the arguments. In light of this, it did not award costs for the appeal.[35]

ONTARIO HAS OPENED THE DOOR TO REFORMING THE DOCTRINE

The ONCA has expressed an openness to reform the doctrine but has not yet adopted *NAV Canada* or *Rosas*. In 2016, in one of its latest reported decisions to deal with a contractual variation, *Richcraft Homes Ltd v Urbandale Corp.*,[36] the Court held that the variation clarified an unclear term in the contract, constituting valid consideration.[37]

Two property development companies, Richcraft and Urbandale, entered into an agreement governing sales of lots to build homes. Under the original agreement, Richcraft had the right to purchase residential lots from the development. The agreement did not specify how many lots Richcraft could purchase. The parties entered into a subsequent agreement that clarified how the lots would be shared. A dispute arose.

Urbandale argued that the new agreement was unenforceable because the parties did not exchange fresh consideration. Richcraft countered that the rule in *Gilbert* should be abandoned following developments in *Williams* and *NAV Canada*. Citing a New Zealand case, Richcraft argued, "*Williams* has been taken to mean that where variations to a contract have been agreed to, so long as there is no extortion

or duress, '...the court will be willing to enforce the new promise even if that involves a rather artificial 'manufacturing' of consideration.'"[38]

Lauwers J.A., for the Court, observed that "the developing case law outside Ontario suggests that the time might be ripe for this court to reconsider the role that consideration plays in the enforceability of contractual variations"[39] but it distinguished *Gilbert*. The Court held that the new agreement clarified a term, creating certainty and a mutual benefit, which constituted "a functional form of consideration".[40] It did not overturn *Gilbert*.

Consistent with the hunt and peck approach, within a year, the Ontario Superior Court cited *Gilbert* and noted that "past consideration is not good consideration".[41] Charney J., however, acknowledged *Richcraft* and observed that the holding in *Gilbert* "has been the subject of some controversy and commentary in the ensuing years."[42]

THE OTHER ATLANTIC CANADIAN PROVINCES APPLY THE DOCTRINE OF FRESH CONSIDERATION INCONSISTENTLY

The Prince Edward Island Court of Appeal last addressed the issue of fresh consideration in 2012.[43] The dispute was over collecting on a debt. The Court cited with approval a passage from G.H.L. Fridman's textbook that "past consideration is no consideration" and that some form of different consideration, like the giving of security, would be necessary to make a variation binding.[44]

In 2009, the Nova Scotia Court of Appeal determined that an extension of time to commence construction of a building was sufficient fresh consideration to vary an agreement.[45] In 2019, in a case involving contract formation (not a variation), the Supreme Court of Nova Scotia ruled that a mutual benefit of one party transferring a derelict building and the land to another party at no cost amounted to sufficient consideration.[46]

In 2010, the Newfoundland and Labrador Court of Appeal determined that the absence of consideration was a factor to find a variation to a contract unenforceable based on economic duress.[47] In 2014, it similarly found that the lack of consideration and an agreement under protest resulted in the variation being unenforceable.[48]

None of the Atlantic Canadian courts have cited *Rosas*.

THE PRAIRIE PROVINCES ALSO APPLY THE DOCTRINE OF FRESH CONSIDERATION INCONSISTENTLY

In 2011, the Court of Queen's Bench of Manitoba (the "**MBQB**") ruled that a variation to a contract that only benefited one party was unenforceable for lack of consideration.[49] In 2020, the MBQB ruled that the re-offering of the same service when the original agreement expired amounted to sufficient consideration.[50]

In 2008, the Saskatchewan Provincial Court ruled that the defendant's promise to fix a mistake at no cost was fresh consideration. The Court found that the plaintiff had provided consideration by offering a forbearance if the defendant fixed the problem.[51] In 2017, the Court of Queen's Bench for Saskatchewan held that a promise to pay a debt later amounted to an unenforceable gratuitous promise.[52]

The reported decisions from the courts of Manitoba and Saskatchewan have not cited *Rosas*.

A few months after the decision in *Rosas* was released, the Court of Queen's Bench of Alberta cited the decision with approval.[53] This is the first and only instance an Alberta court cited *Rosas* with approval. Topolniski J. did not cite *NAV Canada*.

THE TAX COURT OF CANADA ADOPTS ROSAS

In 2018, the Tax Court of Canada (General Procedure) applied the decision in *Rosas* and found that fresh consideration was not necessary for a contractual variation to be binding.[54] In *De Vries,* the taxpayer claimed that the unpaid taxes, in part, related to whether a debt had been forgiven. The CRA claimed that the debt could not be forgiven because the taxpayer did not produce evidence of consideration.

On appeal, the Tax Court held that *Rosas* "should be applied in the case before me."[55] Paris J. determined that the parties' intentions were clear; they intended the debt relief to be binding and there was no evidence of economic duress.

FRESH CONSIDERATION REQUIRED IN CANADIAN EMPLOYMENT LAW

With employment contracts, Canadian courts are more stringent in requiring fresh consideration for a variation to be enforceable, especially if the adjustment is less favourable to the employee.

In early 2020, the BCCA ruled that a second employment agreement was unenforceable without fresh consideration.[56] Saunders J., for the Court, acknowledging *Rosas,* noted the "nuanced world of employer and employee contractual relationships."[57] She determined because the new agreement contemplated fresh consideration, but none was provided, it was unenforceable.

In Ontario, the ONCA has recognized that an imbalance in power exists between employers and employees, making fresh consideration in employment law especially important.[58] In 2015, the ONCA found a subsequent agreement, which was less favourable to the employee, unenforceable out of "simple fairness".[59] Strathy J. observed that "it is well-settled that a promise to perform an existing contract is not consideration. Fresh consideration was required."[60] However, in 2000, citing *Williams,* Mandel J. held that where an employee signs a contract that includes mutual benefits for the employer and employee, then "new or additional consideration" has been exchanged to make it enforceable.[61]

IN SUM: UNCERTAINTY PREVAILS

In Canada, the default common law position remains that fresh consideration is relevant. Despite this, the exceptions to this rule,[62] and the unevenness with which those exceptions have been applied, result in immense unpredictability in judgments.

In the employment law context, courts are concerned with the outcome – *i.e.*, whether the agreement is less favourable to the employee. The employer will almost certainly lose unless it provides obvious consideration that proves the employee accepted the variation. Employers need to be wary of duress based on the power imbalance.

Outside of the employment law context, in the United Kingdom and Nova Scotia, courts have looked for proof of at least some benefit to enforce the variation. In British Columbia, New Brunswick, Alberta, and the Tax Court, courts have approached some cases assuming a *prima facie* strong case of enforcing such variations, except for economic duress or unconscionability. Courts in Ontario, Newfoundland and Labrador, Prince Edward Island, Manitoba, and Saskatchewan seem to still look for fresh consideration and have not explicitly overruled *Gilbert* or the holding in *Myrick*.

In sum, the hunt and peck approach to fresh consideration is alive and well. Each court has its unique approach. Many times, it appears a judge will go to great lengths to find a variation binding (or not) for the sympathetic party, irrespective of consideration.

A SUGGESTION: ARGUE THAT FRESH CONSIDERATION HAS GONE STALE

To avoid these unpredictable outcomes, the onus is on Canadian counsel to argue that the doctrine of fresh consideration is stale. If given the opportunity, more Canadian courts might finally rid themselves of the hunt and peck approach and presume that a variation is binding, subject to duress or unconscionability. Indeed, the BCCA, on its own accord, took the initiative to dispel the fresh consideration doctrine. It should not be the Court's onus alone.

Therefore, if your aglet factory shuts down and costs are going through the roof, you have three options to improve your chances that a court will enforce the adjusted price: (i) exchange fresh consideration or show how the new agreement is mutually beneficial; (ii) operate your factory in British Columbia, which has effectively abandoned the doctrine of fresh consideration outside of the employment law context;

and/or (iii) retain persuasive counsel to convince your local judge that fresh consideration is stale and that the court should presume that the adjusted price is binding.

If you lose at first instance, request the Chief Justice of your appeal court to convene a five judge panel to determine the doctrine's faith for once and for all.

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1 Aglets are the metal or plastic tube fixed tightly around each end of a shoelace.

2 Angela Swan and Jakub Adamski, *Canadian Contract Law*, 3rd ed (Toronto: LexisNexis, 2012) at §2.24 to §2.28.

3 *E.g.,* Bauman C.J.B.C. cites to comments of Angela Swan and Karl Llewellyn about going-transaction adjustments in *Rosas v Toca*, 2018 BCCA 191 at para 118: "A third and hugely important class [of problems with the doctrine of consideration] is that of either additional or modifying business promises made after an original deal has been agreed upon. Law and logic go astray whenever such dealings are regarded as truly comparable to new agreements. They are not. No business man regards them so. They are going-transaction adjustments, as different from agreement-formation as are corporate organization and corporate management; and the line of legal dealing with them which runs over waiver and estoppel is based on sound intuition."

4 *NAV Canada v Greater Fredericton Airport Authority Inc*, 2008 NBCA 28, at para 29. Robertson J.A. cites to Professor Waddams' textbook and observed that: "We should not be seduced into adhering to a hunt and peck theory in an effort to find consideration where none exists, nor should we manipulate the consideration doctrine in such a way that it is no longer recognizable."

5 (1976) 12 OR (2d) 19 (CA) ("*Gilbert*").

6 *Ibid* at para 14.

7 *Owen Sound Public Library Board v Mial Development Ltd.,* (1979) 26 OR (2d) 459, 102 DLR (3d) 685, 1979 CarswellOnt 643 (CA). See the annotation by John Swan at 1979 CarswellOnt 643 that discusses *Gilbert*.

8 *E.g. NAV Canada v Greater Fredericton Airport Authority Inc.*, 2008 NBCA 28 at para 20.

9 *E.g.*, *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130; [1956] 1 All ER 256. See also the Australian decision, *Waltons Stores (Interstate) Ltd. v Maher* [1988] HCA 7.

10 *E.g. Insurance Act*, RSO 1990, c I.8, s 244 (emphasis added).

11 The terms of transaction can also be recorded in a "deed", a document "under seal", which obviates the need for consideration.

12 *Spruce Grove (Town) v Yellowhead Regional Library*, 1982 ABCA 369 at para 7.

13 S.M. Waddams, *The Law of Contracts*, 7th ed (Toronto: Thomson Reuters, 2017) at ¶135.

14 *Ibid* at ¶132.

15 [1809] EWHC KB J58; (1809) 170 ER 1168 ("*Myrick*").

16 See Purchas L.J.'s decision in *Williams v Roffey Brothers & Nicholls (Contractors) Ltd.* (discussed below).

17 *Ibid*. Also, *e.g.,* G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed (Toronto: Carswell, 2011) at 98-100.

18 *Williams v Roffey Brothers & Nicholls (Contractors) Ltd* [1989] EWCA Civ 5.

19 *Ibid*.

20 2008 NBCA 28 ("*NAV Canada"*). See also, *Rosas v Toca*, 2018 BCCA 191 at para 104.

21 *Ibid* at para 31.

22 *Ibid* at para 33.

23 *Ibid* at para 53 (emphasis in original).

24 *Ibid*.

25 *Ibid*.

26 2009 NBCA 60.

27 *E.g. Rosas v Toca*, 2018 BCCA 191 at para 112.

28 *Rosas v Toca*, 2018 BCCA 191 ("***Rosas***").

29 Thomas A. Posyniak, "The Welcome Demise of The Fresh Consideration Rule in British Columbia" (2019) 77:2 The Advocate (Vancouver) at 183-190.

30 *Rosas v Toca*, 2018 BCCA 191 at para 4.

31 *Ibid.* at para 165.

32 *Ibid.*, at paras 134 and 176.

33 *Rosas v Toca*, 2018 BCCA 191 at para 138.

34 *Ibid* at paras 135 and 176.

35 *Rosas v Toca,* 2018 BCCA 306 at para 2.

[36] 2016 ONCA 622.

[37] *Ibid* at para 47.

[38] *Antons Trawling v Smith*, [2003] 2 NZLR 23 at para. 90, cited at paragraph 71 of Richcraft's factum.

[39] *Ibid* at para 43.

[40] *Ibid* at para 47.

[41] *King Road Paving and Landscaping Inc v Plati*, 2017 ONSC 557 at para 65.

[42] *Ibid* at para 66.

[43] *Lewis v Central Credit Union Limited*, 2012 PECA 9.

[44] *Ibid* at para 22.

[45] *Gillis v New Glasgow (Town)*, 2009 NSCA 66 at para 12.

[46] *Corbin v Murchy,* 2019 NSSC 12 at paras 46 and 53.

[47] *Burin Peninsula Community Business Development Corporation v Grandy*, 2010 NLCA 69 at paras 37-38.

[48] *Hickey's Building Supplies Ltd v Sheppard*, 2014 NLCA 43 at paras 35-37. One of the latest decisions of Newfoundland and Labrador's first instance court dealing with fresh consideration focused on the mutual benefit of the parties relating to a variation to find it enforceable (*Michael Rossy Ltée v RioCan Holdings Inc*, 2017 CanLII 83638 (NLSC) at para 61).

[49] *Wilson v Hodson,* 2011 MBQB 187 at para 26. In 2012, the Manitoba Court of Appeal cited *NAV Canada* but did not endorse the findings as it determined it did not apply to the facts of the case *Heymanns' Construction (1998) Ltd v Sunrise School Division,* 2012 MBCA 45 at para 36.

[50] *Caisse Populaire Group Financier Ltée v 390 Assiniboine Ave Inc*, 2020 MBQB 31 at paras 64-66.

[51] *Newman v Heron Drilling (1987) Ltd.,* 2008 SKPC 122 at para 18.

[52] *Katsiris v Katsiris,* 2017 SKQB 292 at paras 22-25. This case has similarities to *Rosas* but the SKQB came to the opposite result. It concluded that the gratuitous promise to pay later was unenforceable for lack of consideration.

[53] *Servus Credit Union v Sulyok*, 2018 ABQB 860 at paras 83-84.

[54] *De Vries v The Queen,* 2018 TCC 166.

[55] *Ibid* at para 62.

[56] *Quach v Mitrux Services Ltd.,* 2020 BCCA 25 at para 13.

[57] *Ibid*.

[58] *Braiden v La-Z-Boy Canada Ltd, 2008 ONCA 464* at paras 49-50. See also *Holland v Hostopia.Com Inc.*, 2015 ONCA 762, at paras. 51-55.

[59] *Ibid* at paras 53-55.

[60] *Ibid* at para 52.

[61] *Chahal v Khalsa Community School*, 2000 CanLII 22602 at paras 76-78.

[62] *E.g.,* promissory estoppel or third party beneficiaries in insurance law.