

LAWS 2202 D - Obligations

Instructor: Prof. Neil Sargent

A. Instructions

1. **Value:** This assignment is worth 40 percent of the course grade
2. **Due Date: Monday, March 7, 2011.** The assignment must be handed in to the department of law before the end of office hours on March 7. Papers may be sent by mail or courier, but may **not** be submitted by email. Extensions will not be given except for compelling personal reasons. You have over three weeks in which to complete the assignment so plan your time accordingly.
3. **Late assignments:** Late assignments will be penalized by one letter grade per day, e.g., from B- to C+. It is not worth losing marks in this way. So once again, plan your time accordingly.
4. **Length:** This is a research assignment. This means that the work you put in prior to writing the assignment will count every bit as much as the writing itself. I expect assignments to be no more than 10-12 double-spaced typed pages, including all footnotes and bibliography. I put a premium on the way you organize your material, rather than on length.
5. **Format:** The format should be type-written, double-spaced on *1/2 x 11 paper, using a single side only.

Please leave wide margins to allow room for comments.

Attach a **cover sheet** that includes your name, student number, course and section number, the professor's name, date of submission and the title of your paper.

Staple your paper in the top left hand corner. **DO NOT USE PAPER CLIPS OR PLASTIC COVERS, WHICH CAN EASILY FALL OFF.**

Use correct citation for materials referred to in your paper. Guidance for citation can be obtained from Northey, **Making Sense in the Social Sciences**. (Toronto: Oxford University Press, 1983). For legal citation rules you should refer to the most recent edition of the **Canadian Guide to Uniform Legal Citation**, published by Carswell.

In your written work you should always be careful to use gender-appropriate, inclusive and non-sexist language. For example, this would include attention to the use of female and male pronouns and the use of language that is free of stereotypic, pejorative and derogatory terms. For further reference, and for resources on the use of non-sexist language, see the materials referred to in the course outline.

6. **Originality:** Each student is responsible for submitting an original essay, which has not been submitted for any other course, or which utilizes material that has been previously submitted in any other course, or from any other paper. Students whose work is not original, or which plagiarizes from any other person's work, may be found to have committed the academic offence of plagiarism, which may have very serious consequences. If you have any questions about plagiarism or originality, or academic citation rules, please contact me either in person, or by email or by phone. It is always better to be sure than to be sorry after the event.

B. Objectives of the Assignment

The aim of the assignment is to require you to select a topic that is relevant to the issues of contract law discussed throughout the course so far, and to explore it **through your own research** as well as through our discussions in class and the course materials. In researching and writing the assignment I expect you to explore and discuss a number of issues arising out of the topic selected. I have deliberately given you open-ended topics to research, which involve not only research into what the legal rules or principles governing the issues under discussion may be, but also often a debate over what the legal rules or principles or policy governing these issues **should** be. In other words, there is a policy dimension or theoretical dimension to each of these topics that I expect you to discuss in your essays. We spend much of our time in class exploring these kinds of issues and debates in relation to particular topics. I expect you to do no less, and indeed, to do more, since I expect you to do further research beyond the class discussions and the course materials into these topics.

In your research essays, you may choose whether to remain objective and neutral with regard to the topics under discussion, or to enter into the debate by offering your own point of view. For myself, I prefer the second approach, because it leads you into discussing the relative strengths and weaknesses of the various positions in each debate, which is one of the primary objectives of this research essay assignment. However, if you do take a position in any debate, make sure that you do not address the issue in a one-sided way. A good debate or policy discussion involves looking at the arguments on all sides of a debate. Too one-sided a view of any issue tends to dismiss or undervalue the strengths of the arguments that may be made on the other side. Part of the purpose of the research process is to encourage you to discover this for yourselves. In reaching your own conclusion, therefore, make sure you have adequately addressed the arguments that may be presented against this position. In so far as you do so, your own argument will be strengthened, since the reader (myself) will be aware that you are familiar with the various positions in the debate, and can respond to countervailing arguments against your position rather than simply dismissing them or, worse, ignoring them. In this sense, I will be evaluating your essays on the quality of the arguments and discussion you present with respect to the topic you choose, rather than whether I happen to agree with your position or not.

C. Suggested Topics

1. According to the Will theory of contract, the terms of the contract express the intentions of the parties at the time the contract was made. The role of the court is to give effect to the voluntary agreement entered into by the parties by enforcing the terms of contract agreed upon by the parties at the time the contract was made. It is up to the parties to anticipate future contingencies and to protect against these by negotiating terms in the original contract itself.

In practice, however, as distinct from in theory, it may sometimes happen that circumstances change in such a way as to cause one of the parties to the contract to seek to modify or change the contract terms to take account of the changed circumstances, or even to get out of the contract altogether. We have seen instances of this in cases such as *Gilbert Steel v. University Construction*; *In re Baby "M"*, or in the case of *Pelech v. Pelech*.

What legal principles should apply in such circumstances? To what extent are the terms of the contract still binding on the parties despite the change in circumstances? Or might changed circumstances make some of the terms of the contract effectively unenforceable, as with the surrogate mother's emotional attachment to her child in the Baby M case? How far can one party to a contract rely on changed circumstances to persuade another party to renegotiate or modify the terms of the contract, as with an athlete seeking to renegotiate the terms of his or her contract with a professional hockey or football team, or with the steel supply company in the Gilbert Steel case? Can the party who wishes to renegotiate the terms of the contract, or to avoid their obligations under the contract as it was originally written, threaten to not perform their side of the contract in an effort to get the other party to agree to renegotiate the contract terms? If so, what legal remedies would be available to the other party if the first party does carry out their threat not to perform the contract, as with a professional hockey player who chooses to sit out, rather than play under the terms of his contract? On the other hand, if the other party does agree to renegotiate or modify the terms of the contract, is such an agreement enforceable as a contract itself? Can the party seeking the renegotiation sue the other party for breach of contract if the other party seeks to go back on its promise to renegotiate or modify the contract terms? Or could the party who agrees to

renegotiate the terms of the contract argue that they were forced into the agreement, and seek to rescind the renegotiation agreement on the basis of lack of consideration, or duress or coercion or unconscionability?

Discuss these issues in relation to the kinds of cases and instances we have discussed in class, such as the Gilbert Steel case, Pelech v. Pelech, the Baby M case, Llyods Bank v. Bundy, the contract between Quebec and Newfoundland over the Lower Churchill Falls power development, and cases involving professional athletes trying to renegotiate their contracts, as with Alexei Yashin and the Ottawa Senators, as well as the article by Macaulay, on "Non-contractual relations in business". How far does the Will theory of contract provide us with clear answers to these kinds of questions? Or is the Will theory itself always subject to variation in terms of changed expectations of the parties in light of changed circumstances.

2. In class we have discussed the marriage contract as a different kind of contract than that entered into by commercial parties for the purchase and sale of steel, for example. The marriage contract creates a formal legal status between the parties, which is different from the type of relationship entered into between the purchaser and seller of steel, whose relationship ends when the goods are delivered and payment has been made. Similarly, the relationship between parent and child is normally viewed as one based on formal legal status rather than on voluntary legal agreement or contract. To what extent, for example, is it permissible for a parent to unilaterally 'divorce' his or her child, or for the child to legally 'divorce' his or her parents? To what extent can the parents in a custody dispute, for example, reach a legally binding agreement between the two of them, as to which child shall have custody of the child, or be responsible for child care payments, etc? Does such an agreement have to be ratified by a court before it is legally enforceable? If so, why? What makes it different from a contract to purchase and sell steel, which does not have to be ratified by a court before it is legally enforceable?

Discuss the boundary between contract law and family law as it applies to such issues as parent child relations, especially with respect to such topics as the enforceability of surrogacy contracts, or agreements between a would-be mother and a sperm donor as to whether the sperm donor should have any access to or information about the child, following conception and birth? How far should new reproductive technologies such as surrogacy be regulated by contract law or by principles of family law. And what principles of family law should apply to such 'contracts'? In your answer consider such cases as Johnson Steeves v. Lee, both judgements in the Baby "M" case, and the debates in Canada and elsewhere over the legal enforceability of surrogacy agreements.

3. Discuss the objectives behind the various legal remedies for breach of contract, such as rescission, restitution, specific performance and damages. To what extent should the courts be concerned with minimizing the consequences of breach of contract for both parties, as opposed to protecting the 'innocent' party from the consequences of breach of contract by the non-performing party? Why are the courts ever concerned with protecting the interests of the contract breaker in situations such as Peevyhouse v. Garland Coal Company, where there has been a clear breach of contract by one party, with no legal justification for the breach? Are there any circumstances in which a court might wish to award 'punitive damages' for a deliberate breach of contract such as this? Or would an award of punitive damages be considered over-compensation, and economically wasteful, since it would effectively 'reward' the innocent party with more than they would have obtained had the contract been performed by the other party?

Along similar lines, why do courts generally prefer to award damages for contract breach, rather than an award of specific performance? Why is it that an award of specific performance is regarded as an exceptional remedy for breach of contract, only to be awarded in certain types of circumstances, where damages are not an appropriate remedy? What kinds of situations might arise in which an order of specific performance might be considered a more appropriate remedy for breach of contract than an award in damages? On the other hand, what are the perceived difficulties with an award of specific performance that make it a less efficient legal remedy for breach of contract than an award in damages?

Discuss these issues in relation to the cases and issues we have discussed in class, such as Peevyhouse v. Garland Coal Company, Hadley v. Baxendale, and the Baby "M" case, as well as other research materials on contract law, including chapter seven of Private Law, Social Life, which deals with remedies.