

Contemporary Contract Law Controversies

LAWS 4209

2015-2016

INSTRUCTOR: Professor M.H. Ogilvie
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OFFICE HOURS: Wednesday 2:30-5:00
or by appointment

REQUIRED TEXT: John D. McCamus, The Law of Contracts, 2nd ed. (Toronto: Irwin Law, 2012).

**BACKGROUND
READING:**

Students may wish to consult any of the texts listed in Additional Reading attached to this syllabus for assistance in both Class Presentation and Essay preparation.

EVALUATION:

Class Participation	20%
Class Presentation	30%
Essay	50%

Essays may be submitted in print at any time prior to the final submission date of the final class in Week Twelve and must be submitted in a printed hard copy to the Instructor.

PURPOSE OF THIS COURSE:

This course is designed to achieve three goals. The first goal is to study in depth certain aspects of contemporary Contract Law, especially controversial issues which arise from the foundational principles of Contract Law. The second goal is to acquire a deeper understanding of the foundational principles underlying Contract Law, which also underpin all economic, social and personal relationships, including honesty, promise-keeping and trustworthiness. The third goal is to acquire a greater understanding of the past, present and possible future of Contract Law within Canadian society and the Canadian economy. The materials selected to achieve these goals consist of key judicial decisions of the past two centuries. This approach reflects two observations. First, the deep and eternal wisdom of the common law is found in how courts resolve real-life disputes; and secondly, the fundamental bases of their resolution reflect the natural knowledge with which humanity is endowed about moral human relationships. Students are, therefore, capable by their very human nature, of reflecting deeply upon the foundational principles of the common law directly without external ideological assistance.

ALL STUDENT WORK IS SUBJECT TO THE CONTRACTUAL PROVISIONS CONTAINED IN THE CURRENT CARLETON UNIVERSITY UNDERGRADUATE CALENDAR AND TO THIS COURSE OUTLINE.

WEEK ONE: Introduction**WEEK TWO: Principles and Policies in Contract Law**

- McCamus, ch. 1.

WEEK THREE: Formation

- McCamus, ch. 2.

A. "Battle of the Forms":

- Butler Machine Tool Co. Ltd. v. Ex-Cello-O Corporation (England) Ltd. [1977] EWCA Civ 9.
- Tywood Industries Ltd. v. St. Anne-Nackawic Pulp and Paper Co. Ltd. 1979 CanLII 1792 (ONSC).
- Tekdata Interconnections Ltd. v. Amphenol Ltd. [2009] EWCA Civ 1209.
- M.H. Ogilvie, "Surely The Next to Last Shot in The Battle of the Forms!" (2011) 51 Can. Bus. L.J. 307.

B. Email Contracts:

- J. Pereira Fernandes SA v. Mehta [2006] EWHC 813 (Ch.).
- Golden Ocean Group Ltd. v. Salgaocar Mining Industries Ltd. [2012] EWCA Civ 265.
- Druet v. Girouard 2012 NBCA 40 (CanLII).
- M.H. Ogilvie, "The Statute of Frauds in an Email Age" (2014) 65 U.N.B.L.J. 404.

C. Comfort Letters:

- McCamus, pp. 119-130.
- Kleinwort Benson Ltd. v. Malaysia Mining Corp. Bhd. [1989] 1 All E.R. 785 (C.A.).
- Toronto-Dominion Bank v. Leigh Instruments Ltd. 1999 CanLII 3778 (ONCA).
- Paul Perell, "Lessons About Comfort Letters" (2001) 34 Can. Bus. L.J. 421.

WEEK FOUR: Consideration

- McCamus, pp. 215-263.
- Mindy Chen-Wishart, "In Defence of Consideration" (2013) 13 O.U.C.L.J. 209.

A. Practical Benefit:

- Gilbert Stree Ltd. v. University Construction Ltd. 1976 CanLII 672 (ONCA).
- Williams. v. Roffey Bros. Nicholls (Contractors) Ltd. [1989] EWCA Civ 5.
- NAV Canada v. Greater Fredericton Airport Authority Inc. 2008 NBCA 28 (CanLII).
- M.H. Ogilvie, "Of What Practical Benefit is Practical Benefit to Consideration?" (2011) 62 U.N.B.L.J. 131.

B. Part Payment:

- Foakes v. Beer [1884] UKHL 1 (BAILII).
- Collier v. P. & M.J. Wright (Holdings) Ltd. [2007] EWCA Civ 1329.
- M.H. Ogilvie, “Part Payment, Promissory Estoppel and Lord Denning’s ‘Brilliant Balance’” (2010) 49 Can. Bus. L.J. 287.
- M.H. Ogilvie, “Part Payment of a Debt and a Proposal for Final Settlement of the Law” (2012) 90 Can. Bar Rev. 199.

WEEK FIVE: Privity

- McCamus, pp. 303-330.
- Tweddle v. Atkinson [1861] EWHC QB J57 (BAILII)
- Dunlop Pneumatic Tyre Company Ltd. v. Selfridge and Company Ltd. [1915] UKHL1 (BAILII).
- Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd. 1999 CanLII 654 (SCC).
- Brown v. Belleville (City) 2013 ONCA 148 (CanLII).
- M.H. Ogilvie, “Re-Defining Privity of Contract: Brown v. Belleville (City)” (2015) 52 Alta. L. Rev. 731.
- Contracts (Rights of Third Parties) Act, (UK) 1999, c. 31.

WEEK SIX: Rules of Interpretation and Rules of Implication

- McCamus, pp. 745-795.
- A. Interpretation:
- Investors Compensation Scheme v. West Bromwich Building Society [1997] UKHL 28.
- Eli Lilly & Co. v. Novopharm Ltd. 1998 CanLII 791 (SCC).
- Dumbrell v. Regional Group of Cos. 2007 ONCA 59 (CanLII).
- Sattra Capital Corp. v. Creston Moly Corp. 2014 SCC 53 (CanLII).
- Geoff R. Hall, “A Curious Incident in The Law of Contract: The Impact of 22 Words from the House of Lords” (2004) 40 Can. Bus. L.J. 20.

B. Implied Terms:

- Attorney-General of Belize v. Belize Telecom Ltd. [2009] UKPC 10.
- M.H. Ogilvie, “Reconsidering the Interpretation and Implication Rules in The Law of Contract: An English-Canadian Comparison and a Proposal for a New Unified Rule” (2013) 28 B.F.L.R. 187.

WEEK SEVEN: Parole Evidence Rule

- McCamus, pp. 197-211.

- Hawrish v. Bank of Montreal 1969 CanLII 2 (SCC).
- Bauer v. Bank of Montreal 1980 CanLII 12 (SCC).
- Gallen v. Butterley 1984 CanLII 752 (BCCA).
- King v. OETIM 2011 MBCA 80 (CanLII).
- M.H. Ogilvie, "A Proposal to Replace the Parol Evidence Rule in Contract Law" (2013) 29 B.F.L.R. 85.

WEEK EIGHT: Exemption Clauses, Fundamental Breach and Entire Agreement Clauses

- McCamus, ch. 20.

A. Exemption Clauses and Fundamental Breach:

- Karsales (Harrow) Limited v. Wallis [1956] EWCA Civ 4 (BAILII).
- Hunter Engineering Co. v. Syncrude Canada Ltd. 1989 CanLII 129 (SCC).
- Tercon Contractors Ltd. v. British Columbia (Transportation and Highways) 2010 SCC 4 (CanLII).
- M.H. Ogilvie, "Exemption Clauses and Fundamental Breach in Contract" (2011) 89 Can. Bar Rev. 211.

B. Entire Agreement Clauses:

- M.H. Ogilvie, "Entire Agreement Clauses: Neither Riddle Nor Enigma" (2009) 87 Can. Bar Rev. 625.
- Matthew Barber, "The Limits of Entire Agreement Clauses" [2012] J.B.L. 486.
- Daniel McLauchlan, "The Entire Agreement Clause: Conclusive or a Question of Weight" (2012) 128 L.Q.R. 521.

WEEK NINE: Good Faith

- McCamus, ch. 21.

A. Duty to Cooperate:

- Dynamic Transport Ltd. v. O.K. Detailing Ltd. 1978 CanLII 215 (SCC).
- Gateway Realty Ltd. v. Arton Holdings Ltd. and LaHave (No. 3) 1991 CanLII 2707 (NSSC); 1992 CanLII 2620 (NSCA).
- CivicLife.com v. Canada (Attorney-General) 2006 CanLII 20837 (ONCA).

B. Exercise of Discretionary Powers:

- Mesa Operating Ltd. Partnership v. Amoco Canada Resources Ltd. 1994 ABCA 94 (CanLII).
- Shelanu Inc. v. Print Three Franchising Corp. 2003 CanLII 52151 (ONCA).
- Nareerux Import Co. Ltd. v. CIBC 2009 ONCA 764 (CanLII).

C. Evasion of Contractual Obligations:

- MDS Health Group Ltd. v. King Street Medical Arts Centre Ltd. 1994 CanLII 7528 (ONSC).
- Bhasrin v. Hrynew, 2014 SCC 71 (CanLII).
- John D. McCamus, “Abuse of Discretion, Failure to Cooperate and Evasion of Duty: Unpacking the Common Duty of Good Faith Contractual Performance” (2004) *Advocates’ Q.* 72.

WEEK TEN: Economic Duress

- McCamus, pp. 385-402.
- Gordon v. Roebuck 1992 CanLII 7443 (ONCA).
- Techform Products Ltd. v. Wolda 2001 CanLII 8604 (ONCA).
- R. v. Attorney General for England and Wales [2003] UKPC 22(BAILII).
- NAV Canada 2008 NBCA 28.
- M.H. Ogilvie, “Economic Duress: An Elegant and Practical Solution” [2011] J.B.L. 229.

WEEK ELEVEN: Frustration

- McCamus, ch. 14.
- Paradine v. Jane [1647] 4 (KB) (BAILII).
- Taylor v. Caldwell [1863] EWHC QB J1 (BAILII).
- Krell v. Henry [1903] 2 K.B. 740 (C.A.).
- Herne Bay Steam Boat Company v. Hutton [1903] 2 K.B. 683 (C.A.).
- Canadian Government Merchant Marine Ltd. v. Canadian Trading Co. 1922 CanLII 27 (SCC).
- Lord Strathcona Shipping Co. Ltd. v. Dominion Coal Co. [1925] UKPC 97 (BAILII).
- Davis Contractors Ltd. v. Fareham U.D.C. [1956] UKHL 3 (BAILII).
- National Carriers Ltd. v. Panalpina (Northern)Ltd. [1980] UKHL 8 (BAILII).
- Parrish & Heimbecker Ltd. v. Gooding Lumber Ltd. 1968 CanLII 228 (ONCA).
- Edwinton Commercial Corporation v. Tsavlis Russ (Worldwide Salvage and Tonnage) Ltd., The Sea Angel [2007] EWCA Civ 547.
- Frustrated Contracts Act, R.S.O. 1990, c. F. 34.

WEEK TWELVE: Conclusion

- Stephen Waddams, Principle and Policy in Contract Law. Competing or Complementary Concepts?, (Cambridge University Press, 2011) pp. 1-57, 209-230.

Additional Reading**I. History and Theory of the Law of Contract:**

- John Adams, Roger Brownsword, Key Issues in Contract, (Butterworths, 1995).
- John N. Adams and Roger Brownsword, Understanding Contract Law, 5thed., (Sweet & Maxwell, 2007)
- Peter A. Alces, A Theory of Contract Law (O.U.P., 2011).
- P.S. Atiyah, An Introduction to the Law of Contract, 6th ed., (O.U.P., 2006).
- P.S. Atiyah, The Rise and Fall of Freedom of Contract, (O.U.P., 1979).
- P.S. Atiyah, Essays on Contract, (O.U.P., 1986).
- Peter Benson (ed.), The Theory of Contract Law. New Essays, (Cambridge U.P., 2001).
- Roger Brownsword, Geraint Howells and Thomas Wilhelmsson, (eds.), Welfarism in Contract Law, (Dartmouth, 1994).
- Roger Brownsword, Contract Law. Themes for the Twenty-First Century, 2nd ed., (O.U.P., 2006).
- F. H. Buckley (ed.), The Fall and Rise of Freedom of Contract, (Duke U.P., 1999).
- Andrew Burrows and Edwin Peel (eds.), Contract Terms, (O.U.P., 2007).
- Hugh Collins, The Law of Contract, 4th ed., (Butterworths, 2003).
- Hugh Collins, Regulating Contracts, 2nd ed. (O.U.P., 2002).
- Richard Craswell and Alan Schwartz, Foundations of Contract Law, (O.U.P., 1994).
- Charles Fried, Contract As Promise, (Harvard U.P., 1981).
- Grant Gilmore, The Death of Contract, (Ohio State U.P., 1974).
- James Gordley, The Philosophical Origins of Modern Contract Doctrine, (O.U.P., 1991).
- James Gordley, Foundations of Private Law, Property, Tort, Contract, Unjust Enrichment, (O.U.P., 2007).
- Andrew Grubb (ed.) The Law of Contract, (Lexis Nexis, 2007)
- Dori Kimel, From Promise to Contract. Towards a Liberal Theory of Contract, (Oxford: Hart, 2003).
- A.T. Kronman and R.A. Posner, The Economics of Contract Law, (Little, Brown & Co., 1979).
- Richard Lawson, Exclusion Clauses and Unfair Contract Terms, 11th ed. (Sweet & Maxwell, 2014).
- Kim Lewison, The Interpretation of Contracts 5th ed., (Sweet & Maxwell, 2011).
- Ian R. Macneil, The New Social Contract, (Yale U.P., 1980).
- Jason W. Nyers, Richard Bronaugh and Stephen G.A. Pitel (eds.) Exploring Contract Law, (Hart, 2009).
- O.L.R.C., Report on Amendment of the Law of Contract, 1987.
- Harry N. Scheiber (ed.), The State and Freedom of Contract, (Stanford U.P., 1998).
- A.W.B. Simpson, A History of the Common Law of Contract, (O.U.P., 1975).
- Stephen A. Smith, Contract Theory (O.U.P., 2004).
- Barry J. Reiter and John Swan, Studies in Contract Law, (Butterworths, 1980).
- Kevin M. Teeven, A History of the Anglo-American Common Law of Contract, (Greenwood Press, 1990).
- Michael J. Trebilcock, The Limits of Freedom of Contract, (Harvard U.P., 1993).
- Stephen Waddams, Dimensions of Private Law. Categories and Concepts in Anglo-American Legal Reasoning, (Cambridge U.P., 2003).
- Stephen Waddams, Principle and Policy in Contract Law, Competing or Complementary Concepts?, (Cambridge U.P., 2011).

II. Textbooks:

(a) English:

- Cheshire, Fifoot and Furmston's Law of Contract, 16th ed., (O.U.P., 2012).
- Chitty on Contracts, 31st ed., (Sweet and Maxwell, 2012).
- Edwin Peel, Treitel on the The Law of Contract, 13th ed., (Sweet and Maxwell, 2011).

(b) Canadian:

- G.H.L. Fridman, The Law of Contract, 6th ed., (Carswell, 2011).
- Geoff R. Hall, Canadian Contractual Interpretation Law, 2nd ed. (Lexis Nexis, 2012).
- Bruce MacDougall, Introduction to Contracts, 2nd ed. (Lexis Nexis, 2012).
- John D. McCamus, The Law of Contracts, 2nd ed. (Irwin Law, 2012).
- John Swan and Jakub Adamski, Canadian Contract Law, 3rd ed. (Lexis Nexis, 2012).
- S.M. Waddams, The Law of Contracts, 6th ed., (Canada Law Book, 2010).