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Syllabus

Contracts

(Revised June 2017)

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Contracts

COURSE SYLLABUS

The function of the Contracts examination is to determine whether candidates have acquired a proficiency in the major doctrines of Contract Law that apply in Canada. Proficiency includes not only knowledge of the legal rules, but their comprehension, demonstrated by an ability to apply the law to resolve practical problems. This requires an ability to spot issues, generalize from the cases and materials read, and an ability to explain why the outcome offered is correct. In other words, candidates are expected to do more than spot issues and regurgitate legal rules. Candidates are expected to solve legal problems. Students should be cautious about the application of material learned in another legal system and simply applying it to Canada. There are significant divergences in legal doctrine and application. This course intersects the law of tort, restitution, and remedies, all of which are featured in the materials.

Contract law is regarded as a foundational course in Canadian common law law school programs. An understanding of the issues surrounding contract formation, breach, and performance are essential to understand much of our commercial law, labour and employment law, securities law, and many other law subjects. Contract law is also used to understand common law methodology. This syllabus is designed to give candidates sufficient exposure to the law to grasp it, and on completion, to apply it competently in the practice of law.

MATERIALS

Required

Stephanie Ben-Ishai & David Percy, *Contracts: Cases and Commentaries*, 9th ed (Toronto: Carswell, 2014) [Ben-Ishai].

OR

Waddams, Girgis, McCamus, Neyers, & Waldron, *Cases and Materials on Contracts*, 5th ed (Toronto: Emond Montgomery, 2014) [Waddams].

Additional Cases included in the Reading List.

Supplementary Reading

John McCamus, *Law of Contracts*, 2d ed (Toronto: Irwin Law, 2012).

Stephen Waddams, *The Law of Contracts*, 6th ed (Aurora, Ont: Canada Law Book, 2010).

READING LIST

Introduction

Ben-Ishai chapter one; Waddams chapter one

An understanding of contract law gives us an opening on much of the social development within our society. Thus, historically, the emergence of a laissez-faire economy could not have been realized without development of a sophisticated means of exchanging goods, services and labour. Similarly, the importance of capital and its investment potential could not have been insured without a method of protecting forward exchange. The historian, Niall Ferguson, (*Empire*) has described this importance and the stabilizing effect that the common law, particularly contract law, had for the emergence of Britain's empire. In the latter stages of the 20th century the rise of the modern welfare state saw restraints placed on freedom to contract. However, today, as many question the continued sustainability of our current social structuring, contract law is once again rising in importance as a tool to allocate entitlements and as a way to create efficiency. In this first chapter you should review the current contemporary theories offered to provide explanatory accounts of contract law.

Formation of the Agreement

Ben-Ishai chapters two and three; Waddams chapter three

Much of contract doctrine is built upon a paradigmatic model of a contract; one that is negotiated between two parties of equal bargaining power, and which results in an individual contract with readily identified binding obligations. While this model may describe some contracts, contracting behaviour is far more widespread and does not typically follow this model. Consider the purchase of a coffee from a vending machine or the parking of a car in a public garage. There is no opportunity for bargaining; indeed, the contract is made with a machine. Nevertheless, it is the paradigmatic model, what is known as a synallagmatic contract, which informs our understanding of contract law, and from which other contracts are seen as deviation. The model is built on a number of constituent elements; offer, acceptance, and communication, intention to create legal relationships, consideration, privity, certainty of terms and capacity. In the first part of the course we will explore these elements.

Particular attention should be paid to the treatment of the tendering process. In *R v Ron Engineering & Construction (Eastern) Ltd* (**Ben-Ishai** page 33) (**Waddams** page 216) the Supreme Court drew a distinction between a contract which dealt with the tendering process, what was called Contract A, and the eventual successful bid, which was called Contract B. The creation of a tendering process contract, and what obligations it creates, has been the subject of a number of other decisions of the Supreme Court of Canada, including the following:

Double N Earthmovers Ltd v Edmonton City, 2007 SCC 3, [2007] 1 SCR 116.

Design Services Ltd v Canada, 2008 SCC 22, [2008] 1 SCR 737.

Tercon Contractors Ltd v British Columbia (Transportation and Highways), 2010 SCC 4, [2010] 1 SCR 69.

With respect to the formation of a contract, it may seem strange to still speak of postal rules which control when a contract is created and in which jurisdiction it is formed. In a time when electronic commerce is prevalent, you should review the Electronic Commerce Act of one of the provinces, and determine how rules of communication of offer and acceptance are dealt with. For example, the *Ontario Electronic Commerce Act*, SO 2000, c 17 treats e-mail as if it is a form of instantaneous communication and thus does not apply the postal rule. However, when the contract is formed depends upon how the recipient of the acceptance has structured their e-mail correspondence and when they are in receipt of the e-mail (see section 22).

In the Ben-Ishai section on Agreements to Negotiate (**Ben-Ishai** page 128) the case of *Empress Towers Ltd v Bank of Nova Scotia* alludes to the possibility that there is an obligation imposed to negotiate in good faith between contracting parties. (**Waddams** discusses the unenforceability of such agreements in the context of *Walford v Miles*, [1992] 2 AC 128 (HL) at 232. This is a contentious issue. The Supreme Court of Canada in *Martel Building Ltd v Canada*, 2000 SCC 60, [2000] 2 SCR 860 emphatically stated that a duty to bargain in good faith had not been recognized in Canadian law, and they left the issue to another day to determine whether such a duty should be imposed. Nevertheless, the Supreme Court of Canada has recognized that particular contracts can carry an implied duty to perform in good faith, or to discharge some existing contractual obligation in a good faith manner (see *Honda Canada Ltd v Keays*, 2008 SCC 39, [2008] 2 SCR 362, implied obligation of good faith dismissal). The Ontario Court of Appeal has on at least two occasions canvassed the arguments on whether there should be an obligation of good faith negotiation. Attention should now be made to the Supreme Court of Canada's decision in *Bhasin v. Hrynew* 2014 SCC 71 where the court spoke of good faith as a general organizing principle and illustrated their argument with cases cited above.

978011 Ontario Ltd v Cornell Engineering Co (2001), 53 OR (3d) 783, leave to appeal refused [2001] SCCA No 315. (Waddams page 806)

Oz Optics Ltd v Timbercon Inc (2011), 107 OR (3d) 509 (CA).

The Enforcement of Promises

Ben-Ishai chapter four; Waddams chapter three

Peculiar to the common law is the doctrine of consideration. The best way to think of consideration is to ask yourself, what has the promisee done or promised in return for the promise made by the promissor? Consideration is the primary way the common law distinguishes between purely gratuitous or voluntary promises, and bargained or contractual promises. It is the reason that the law usually insists that for a gift to be valid, there must be

both an intent and actual delivery; and that the law will not assist a volunteer to perfect an imperfect gift. A promise supported by consideration elevates a gift into a bargain and warrants the court's intervention. What forms a valid consideration is the subject of the first part of this chapter. Note that the value or adequacy of the consideration in terms of a need to have some degree of equivalency in the exchange of consideration is not a feature of the doctrine, and, thus, the doctrine does not seek to impose notions of substantive fairness between the parties to a contract. Inadequacy of the consideration may be evidence of some other problem with the contract and which may invoke the doctrine of unconscionability (discussed in **Ben-Ishai** chapter 11; **Waddams** chapter 6, page 587).

Having identified the need for consideration and what forms valid consideration, this chapter then identifies situations in which the law retreats from requiring consideration in sections on accord and satisfaction, promissory estoppel and waiver.

On the issue of whether a promise to pay or do more under an existing contract must be supported by new consideration, the casebook identifies two cases; *Gilbert Steel Ltd v University Construction Ltd* (**Ben-Ishai** page 184) (**Waddams** page 273) and *Greater Fredericton Airport Authority Inc v NAV Canada*. (**Ben-Ishai** page 192) (**Waddams** page 646). These cases cannot be reconciled. The former asserts the need for new consideration in such situations, whereas the latter would completely abrogate the need for new consideration but substitute a doctrine of economic duress in its place to deal with any issue of exploitative advantage. Nevertheless, the weight of Canadian authority still backs the former position. Consider now how the approach in *Gilbert Steel* may need to be reappraised in light of the implications that flow from *Bhasin v. Hrynew* 2014 SCC 71.

Privity of Contract

Ben-Ishai chapter five; Waddams chapter four

The doctrine of privity maintains that only those who provide consideration for the contract may sue to recover the benefits of the contract. The casebook outlines the doctrine and ways to use other forms of relationships, trust and agency, to circumscribe what appears to be a lack of consideration and the enforcement of the contractual benefits by a third party or stranger to the contract. In this area the Supreme Court of Canada has created two distinct exceptions that allow a third party to take benefit under the contract without providing consideration to the promisor; they are the employment and subrogation exceptions. In *Fraser River Pile & Dredge Ltd v Can-Dive Services Ltd* (**Ben-Ishai** page 322) (**Waddams** page 411) the Supreme Court spoke of a 'principled exception', suggesting that the doctrine of privity may be further eroded in other settings.

Brown v. Belleville (City) 2013 ONCA 148.

Contingent Agreements

Ben-Ishai chapter six; Waddams chapter eight

Contingent agreements are most commonly found in real estate transactions; a purchaser making their contract subject to financing, or planning consent, or building inspection, or to selling their existing home, being the most common examples. As your read this material you will soon realize that the majority's position in the Supreme Court of Canada's decision in *Barnett v Harrison* (**Ben Ishai** page 352) (**Waddams** 738) is rather unsatisfactory, and that the dissenting opinion of Laskin CJ is more in keeping with the reasonable expectations of the parties when these clauses are used in a contract. The reality is that the standard form contract used in real estate transactions in Canada has largely abrogated the law as presented by the majority in *Barnett v Harrison*, and makes explicit provision identifying in whose benefit the contingent clause has been inserted and what rights of unilateral waiver exist. You should review a standard form real estate agreement which you can find available on the internet.

Marshall v Bernard Place Corp (2002), 8 OR (3d) 97 (CA), sole discretion clause.

Representations and Terms

Ben-Ishai chapter seven; Waddams chapter nine

During the formation of a contract there may be many statements made by one party which has induced the other party to enter into the contract. Some of these statements will find their way into the contract as terms, or may be enforced as a collateral contract. Outside the contract, these statements may incur a liability in tort for either fraudulent or negligent misrepresentation. Beyond these substantive claims the other resort that a representee may have is in equity's doctrine of recession for an innocent misrepresentation.

A significant barrier to the granting of rescission is if the contract has been executed, or what is known as the rule in *Seddons Case*, or the rule in *Redican v Nesbitt* (mentioned **Ben-Ishai** page 943) (**Waddams** page 761). This aspect of rescission has been criticized. See *Ennis v Klassen* (1990), 70 DLR (4th) 321 (Man CA) and *S-244 Holdings Ltd v Seymour Building Systems Ltd*, [1994] 8 WWR 185 (BCCA).

After reading the section on innocent misrepresentation you will see that there is still an appreciable gap in the common law in that there is no remedy sounding in damages for an innocent misrepresentation. This gap has been filled by legislative provisions; the example in the casebook being *Alberta's Fair Trading Act* (**Ben-Ishai** page 392) (and see **Waddams**, Note, page 763). See the comparable provisions in the other provinces noted on Ben-Ishai page 396. By and large, the statutory provisions apply to consumer transactions and you should check the definition of consumer in the legislation to understand what transactions will be caught by the legislation.

The section of Ben-Ishai on concurrent liability assumes that you have knowledge of the law of negligence and the development of liability for negligent misrepresentation. (**Waddams**, pages 773-784) If you do not have this knowledge then you should review the Supreme Court of

Canada's decision in *Hercules Managements Ltd v Ernst & Young*, [1997] 2 SCR 165 as followed in *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42, [2011] 3 SCR 45.

See also *No 2002 Taurus Ventures Ltd v Intrawest Corp*, [2007] 11 WWR 85 (BCCA), entire agreement clause and the effect on a suit for negligent misrepresentation.

The section on the classification of terms includes the important analysis in *Hong Kong Fir* (**Ben-Ishai** page 442) (**Waddams** pages 721-729) which provides a classificatory structure of contractual terms into conditions, warranties and innominate terms. Canadian courts have adopted this approach. In *968703 Ontario Ltd v Vernon* (2002), 58 OR (3d) 215 (CA), the Ontario Court of Appeal offered additional criteria to establish when the substantial deprivation test of *Hong Kong Fir* is met.

Standard Form Contracts and Exclusion Clauses

Ben-Ishai chapter eight; Waddams chapter five

In this chapter we confront a profound difficulty with our synallagmatic contract model. A model built on the premise of equality of bargaining power and individual autonomy must admit that it is open for the parties to strike whatever bargain they may wish, and that absent any other considerations, the resulting contract should be enforced. Of course, many contracts are the product of a power imbalance between the parties, or may use standard forms that neither party really understood. It is not surprising then, to find that contracts created in these circumstances may unduly favour the interests of one of the parties. This is particularly so with the use of exclusion clauses or clauses that limits damages upon breach. The doctrine of notice attempts to deal with these clauses by requiring one party to take some efforts to bring them to the attention of the other party so that in the case of dispute, the law can safely assume that the onerous clause was assented to by the other contracting party.

The flawed doctrine of fundamental breach was another attempt to limit the reach of exclusion clauses even where the parties were aware of their existence, although may not have understood their reach. The doctrine was flawed, because as the article by Trebilcock suggests (**Ben-Ishai** page 480) (**Waddams** pages 558-586), one cannot automatically conclude that standard form agreements are unreasonable or unfair.

The decision in *Photo Production Ltd v Securicor Transport Ltd* (Ben-Ishai page 514) is widely understood to have interred the doctrine of fundamental breach in the United Kingdom. That was an easier step to take in the United Kingdom because there was a legislative provision, the Unfair Contract Terms Act 1977, that ameliorated the excesses the doctrine was designed to reach. In Canada, it may also now be safe to say that the doctrine has been interred. In addition to *Hunter Engineering Co Inc v Syncrude Canada Ltd* (**Ben-Ishai** page 518) (**Waddams** page 563) you should now also read *Tercon Contractors Ltd v British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 SCR 69. However, note the opinion of Binnie J (dissenting)

that there is still a residual doctrine grounded in public policy which may operate to override the enforcement of a contractual clause.

Mistake

Ben-Ishai chapter nine; Waddams chapter nine

Key to the understanding of the law relating to mistake is that many of the cases dealing with unilateral mistake as to terms could more accurately be dealt with as issues of offer and acceptance and as to the formation of a contract. Approached in this way there is little left for the doctrine of mistake other than common mistake in underlying assumption, and whether, where one party is aware of the other parties unilateral mistake in underlying assumption, there is an obligation upon the non-mistaken party to disabuse the mistaken party of his or her mistake.

The impact in Canada of the decision in *Great Peace Shipping v Tsavliris Salvage* (Ben Ishai page 582) (**Waddams** page 817) is still to be determined, but particular attention should be paid to the Ontario Court of Appeal's decision in *Miller Paving Ltd v B Gottardo Construction Ltd* and *Lee v. 1435375* (**Ben-Ishai** page 587) (**Waddams** page 825).

Frustration

Ben-Ishai chapter ten; Waddams chapter ten

In comparison to the law on mistake, the law on frustration is more developed. Legislatures have enacted Frustrated Contract Acts to ameliorate the harshness of the common law, and you should review the provisions of one of these *Acts*.

The Protection of Weaker Parties

Ben-Ishai chapter eleven; Waddams chapter six

There are essentially three doctrines that purport to intervene when there is evidence of a power imbalance, or some other conduct which has the appearance, or actual effect, of over bearing the other party's will. These are duress, undue influence, and unconscionability.

Duress to the person or to goods is relatively easy to define. However, economic duress is much more problematic. The decision in *Greater Fredericton Airport Authority Inc v NAV Canada* (**Ben Ishai** page 688) (**Waddams** page 646) canvasses the arguments. You may like to contrast this decision with the recent summary of economic duress in the United Kingdom given in *Kolmar Group AG v Traxpo Enterprises PVT Ltd*, [2010] EWHC 113 (Comm).

Undue influence has generated much debate in English courts over the issue of what constitutes a 'manifest disadvantage'. The decision in *Royal Bank of Scotland PLC v Etridge (No 2)* (**Ben Ishai** page 710) dealing with the situation where a wife has gone guarantor of her

husband's loan from a bank, has resulted in an elaborate set of procedures being imposed upon banks to take active steps to insure that the wife cannot raise a presumption of undue influence to avoid liability under the guarantee. These procedures are not pursued with the same vigour in

Canada. Waddams discussion of undue influence at page 587. See *CIBC Mortgage Corp v Rowatt* (2002), 61 OR (3d) 737 (CA), and *Bank of Montreal v Courtney* (2005), 261 DLR (4th) 665 (NSCA).

The doctrine of unconscionability is more developed in Canada than in other jurisdictions. One of the difficult issues to determine is whether the defendant must have actual or imputed knowledge of the infirmity, ignorance, need or distress of the other contracting party of which the defendant has taken advantage. Alternatively, is substantive disparity in the contractual exchange value, coupled with proof of infirmity, ignorance, need or distress, but without actual knowledge, enough to rescind the transaction? These same arguments carry over into the law on capacity and mental incompetence.

Illegality and Public Policy

Ben-Ishai chapter twelve; Waddams chapter seven

In this section particular attention should be paid to the Supreme Court of Canada's decision in *Shafron v KRG Insurance Brokers (Western) Inc*, 2009 SCC 6, [2009] 1 SCR 157, on restraint of trade, and the decision in *Still v Minister of National Revenue* (**Ben Ishai** page 775) (**Waddams** page 709). The latter case, although not strictly a contractual action, establishes a new approach to the effect of statutory illegality and has been commended by the Supreme Court of Canada in *Transport North American Express Inc v New Solutions Financial Corp*, 2004 SCC 7, [2004] 1 SCR 249.

Remedies

Ben-Ishai chapter thirteen; Waddams chapter two

Chapter thirteen of Ben Ishai and chapter two of Waddams provide good overviews of the remedies for breach of contract. If you need additional reference material two helpful books are Jamie Cassels and Elizabeth Adjin-Tettey, *Remedies: The Law of Damages*, 2d ed (Toronto: Irwin Law, 2008) and Jeffrey Berryman, *The Law of Equitable Remedies*, 2d ed (Toronto: Irwin Law, 2013).

In addition to the material in the casebook you should make note of the following.

Despite much academic interest generated over the decision in *Attorney-General v Blake* (**Ben-Ishai** page 818) (**Waddams** page 161), it has rarely been followed by awarding disgorgement damages for a pure breach of contract. A disgorgement approach is more often found in property disputes.

The Supreme Court of Canada has addressed the ability to recover damages for non-pecuniary losses arising from a breach of contract in *Fidler v Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 SCR 3.

The decision in *Wallace v United Grain Growers Ltd* (**Ben-Ishai** page 848) should be ignored and replaced with the Supreme Court of Canada's decision in *Honda Canada Ltd v Keays*, 2008 SCC 39, [2008] 2 SCR 362 (**Waddams** page 94).

On the issue of the appropriate test for causation and remoteness, see also the decision in *RBC Dominion Securities Inc v Merrill Lynch Canada Inc*, 2008 SCC 54, [2008] 3 SCR 79.

When reviewing the intersection of mitigation with a plea for specific performance, now see *Southcott Estates Inc v Toronto Catholic District School Board*, 2012 SCC 51, [2012] SCC 51 (**Ben-Ishai** page 907).

The appropriate form of mitigation in employment contracts has been the subject of the following two decisions: *Evans v Teamsters Local Union No 31*, 2008 SCC 20, [2008] 1 SCR 661 (**Ben-Ishai** page 912), and *Bowes v Gross Power Products Ltd* (2012), 351 DLR (4th) 219 (Ont CA).

On the issue of liquidated damages clauses see the short summary in *Super Save Disposal Ltd v Blazin Auto Ltd*, [2011] BCJ No 2496 (SC).

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Online Resources

The majority of case law and legislative resources needed by NCA students are available on CanLII, the free legal information resource funded by the Federation of Law Societies of Canada (**www.canlii.org**).

That includes all decisions of the Supreme Court of Canada, and all federal, provincial, territorial and appellate courts. Your registration fee also includes free access to the Quicklaw resources of Lexis Nexis. Your ID and password will be arranged and emailed to your email address on file a few weeks after the end of the registration session.

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