

LAW 108: CONTRACTS

2009-2010

Professor Andrew Newcombe

Location: Room 159
Times: Fall 2009 – Monday 9:00-11:00
Spring 2010 – Monday and Wednesday 10:30-12:00
Unit Value: 2 units

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COURSE MATERIALS

1. Swan, Reiter & Bala, *Contracts: Cases, Notes & Materials*, 7th ed. (Butterworths, 2006). Available at the university bookstore. Students may purchase a second hand text but should ensure that they purchase the 7th ed.
2. Supplementary materials, class notes and problems. Purchase at the CDC.

USEFUL REFERENCE TEXTS ON RESERVE

Fridman, *The Law of Contract*, 5th ed., 2006.
McCamus, *The Law of Contracts*, 2005.
Swan, *Canadian Contract Law*, 1st ed., 2006.
Waddams, *The Law of Contracts*, 5th ed., 2005.

INTRODUCTION

Contract law is concerned with the legal enforcement of promises made in an exchange relationship. Most of the materials that you will consider in this course involve circumstances where a promise was not kept and the ‘innocent’ party is seeking a remedy from a court. From this ‘pathological’ perspective, the assumed exclusive task of legal actors is to develop principles to resolve the dispute in a fair and efficient manner. While this is obviously an important aspect of contract law and this course, there are additional perspectives that you should keep in mind.

The first of these is the need to develop a prescriptive perspective with respect to contract law. In most cases, the parties want their respective promises to be enforced. Accordingly, it is important to be aware of the common causes of contract breakdown with a view to structuring agreements in order to avoid these.

Second, the reality is that in most cases parties do adhere to their promises. While undoubtedly this may be motivated by the threat of legal enforcement, in most cases the parties are oblivious to law and act in response to other interests or norms. Indeed, in many cases, the parties may knowingly decide not to pursue their legal rights. An awareness of these other interests is an extremely important consideration in assessing the utility and significance of contractual principles.

Finally, to say that contract law is concerned with the enforcement of promises made in the context of an exchange or bargain reveals important political and ideological dimensions of this area of the law. It reveals that contract law is intimately involved in the promotion and efficient operation of a market economy and emphasizes inter-related notions of formal (as opposed to substantive) equality, individualism (as opposed to collectivism or communitarianism), an ethic or morality of rights (rather than responsibility), the pursuit of self-interest (rather than altruism), wealth maximization (rather than other human needs) and so on. The ideological significance of contract law is apparent from the extent to which it is used as a metaphor for a wide variety of human activities (e.g. the ‘marriage contract’, the ‘social contract’ or more generally, ‘in the market for a partner’ or ‘the marketplace of ideas’). Accordingly, it is important that your prescriptive outlook include identifying and critically appraising the purposes, interests and values that underlie contract principles.

COURSE CONTENT

1. Overview

The course involves a consideration of the following questions and topics (although we do not necessarily consider the topics in this order):

a. Formation of Contract

Not all promises will be elevated to the status of contract such that they will be legally enforced. Determining which promises will be enforced involves a consideration of the topics of certainty and the ‘bargain theory’, which in turn involves the topics of offer, acceptance, formalities and consideration. In addition, in some instances, the law imposes contractual obligations in the absence of an express promise or bargain, which raises the topic of reliance and promissory estoppel.

b. Contractual Obligations

The task of ascertaining what obligations are owed under a contract turns on what communications or undertakings were made by the parties. This raises the topics of representations, warranties and terms as well as the parol evidence rule.

In some cases, one or both of the parties might have been operating under a misunderstanding or simply failed to clearly communicate their obligations. This raises the topics of mistake, frustration, uncertainty and interpretation.

c. Remedies for Breach

What remedies are available when a person fails to comply with their contractual obligations? The threshold question is who can seek a remedy, which raises the topic of third party beneficiaries. Compensating the ‘innocent’ person for their losses raises the topic of damages and in particular the various methods of calculating loss. In rare cases, the remedy may be an order compelling the person to perform their contractual obligations, which involves the topic of equitable remedies, specifically injunctions and specific performance.

d. Control of Contractual Power

What are the limits of freedom of contract? Are parties free to make unfair bargains? At what point does the law prevent one party from taking advantage of another? When do public policy considerations trump freedom of contract? What protections are needed in order to ensure freedom of contract? These questions raise the topics of capacity, duress, undue influence, unconscionability, illegality and consumer protection.

2. Direction

The following comments are intended to provide you with some very general direction in studying this area of the law.

a. Policy Factors

While there are exceptions, many of the principles of contract law are expressed in very general terms and thus appear to be highly indeterminate. It will assist you if you keep in mind the following underlying policy factors:

Contract law ought to:

- (i) enforce *voluntary obligations* that are assumed in a *bargain context*;
- (ii) avoid *imposing* contractual obligations;
- (iii) protect the *reasonable expectations* of contracting parties;
- (iv) protect the *reasonable reliance* on a promise by another;
- (v) avoid imposing *unfair surprise* (e.g. liability for damages) on a party to a contract;
and
- (vi) develop (and apply) rules that promote *commercial efficiency*.

b. Context

In considering both principles and their application in particular cases, you must be sensitive to contextual factors. For example, since many of the foundational principles of contract law are found in 19th century court decisions, an understanding of these cases requires that you be aware of the social, economic, environmental and political context within which they were made. To the extent that these principles have been modified over the past century, these modifications similarly reflect changes in the foregoing contexts. Hence, in applying principles and past decisions to current fact situations, it is essential that you keep these contextual factors in mind.

GENERAL LEARNING OBJECTIVES

After reading the assigned materials and participating in class:

1. You will be able to describe the current state of the law of contract in selected areas. This includes articulating legal principles; placing these in their social, economic, political and historical context and identifying the purposes and values that are served by those rules.
2. You will be able to display traditional lawyering skills including the ability to read cases and critically analyze legal materials.
3. You will be able to apply the law by translating the facts of a human problem into recognizable legal categories; communicating arguments that are relevant and persuasive to the resolution of legal problems and evaluating those arguments by reference to social goals and values.
4. You will be able critically to appraise the law in selected areas. This includes an ability to identify the overt and covert functions of the law; to evaluate those functions against defensible standards; to identify areas in which the law is uncertain or inadequate to achieve its intended purpose; to articulate the alternate values and purposes that could and should be served by the law; and to suggest and support avenues of reform.
5. You will be able to articulate and anticipate the problems that may arise between persons in relationships of planning and exchange and explain methods of avoiding or resolving these problems.

TASKS AND SKILLS

In order to achieve these objectives you will need to do the following things:

1. Read and prepare notes on all of the cases and materials. (It is not necessary that you prepare a formal brief of all cases, your notes should address the facts, decision and reasons.)
2. Critically analyze and evaluate the cases. This means you should be prepared to discuss them or write about them in terms of:
 - (a) What did the judge think was the problem? What do you think?
 - (b) What did the judge think the relevant facts were? What do you think?
 - (c) What interests of the parties are at stake and are there any other interests that are relevant?
 - (d) What legal principle(s) were applied and what, if any, rule emerges from the decision?
 - (e) What are the broader social consequences of the decision? What values does it express and what purposes does it promote? Are these appropriate?

3. Synthesize the materials. Explain how each new case fits with those you have read before; how it adds to, contradicts or conforms to your previous understanding. Consider whether it is possible to articulate more general principles or theories that provide a coherent account of the variety of materials you have read.
4. Apply the law to cases you have read earlier and to new fact situations. Articulate the arguments that are likely to be drawn from the law to solve a problem and predict what the likely outcome is going to be. In solving new problems you will need to recognize the appropriate general principles, and also to make arguments that extend or confine particular rules and reasons (by drawing analogies, distinguishing, etc.)
5. Evaluate the law by identifying the purposes that it could/should serve and the values that it could/should express. Be prepared to state and defend standards by which the law can be measured, supported or criticized; explain the consequences of legal decisions and legal rules; identify alternate approaches; and suggest and defend desirable reforms.

CLASSROOM METHODOLOGY

Methodology will include lectures, classroom and group discussion and problem solving.

EVALUATION

1. Course Evaluation

December Examination..... 30%
(if higher than final exam)

- Currently Scheduled for **Wednesday, 9 December 2009.**

April Examination70-100%
(depending on December exam mark)

- Currently Scheduled for **Monday, 12 April 2010.**
- This examination will concentrate on material covered in the Spring Term, though may incidentally touch on topics and issues covered in the Fall, and such coverage will be graded.

December and April examinations will be *open book*. Students may bring in the course text, supplemental materials and notes, instructor handouts, course outlines and any student prepared notes, *but nothing else*. No library books or other texts are permitted. Laptop computers or other electronic devices may not be used.

2. December Exam

The December examination is open book and is potentially worth 30% towards your final grade. However, it will *only* count if it raises that grade. That is, if the December grade is lower than your final examination grade, your grade in the course will be based solely upon the final examination grade.

(a) A Mandatory Requirement – Penalty for Failure to Write December Examination

The December examination in this course is compulsory. In the absence of a documented medical or other acceptable reason, failure to write the examination in December will mean that *a penalty of one grade point* will be deducted from your grade in the final examination in April. For example, if this penalty were to be applied, a final grade of B+ would become a B.

(b) Establishing Acceptable Reasons for Failure to Write December Examination

An acceptable reason for not writing a December examination is a reason that would normally justify a Special Examination in a course (i.e. illness, family affliction or other pressing special circumstances) and the procedures to be followed to establish that an acceptable reason exists are the same as those that apply to Special Examinations. Among other things, these procedures require that you contact the Associate Dean as soon as possible, and no later than five days after the scheduled date of the examination, to inform her of the problem and provide the documentation necessary to substantiate your grounds for missing the examination.

All students should ensure that they are familiar with the Faculty's regulations regarding Special Examinations that are set out in the Calendar and posted on the main notice board.

(c) Writing the December Examination on a Deferred Basis

A student who establishes an acceptable reason for failing to write the December examination on the scheduled date may be granted special permission to write the examination on a deferred basis, provided that he or she is capable of doing so within the regular examination period in December. In such a case, the December examination grade will count in the calculation of the final grade for the course in the usual way. Arrangements to write an examination on a deferred basis must be made through the Associate Dean's office and an undertaking regarding non-discovery of the contents of the examination will be required.

A student who has an acceptable reason for failing to write a December examination on the scheduled date and who cannot write the examination within the regular examination period, will not be allowed to write the examination at a later date and have it count in the calculation of his/her final grade for the course. In such a case, the penalty for failure to write the examination will not apply and calculation of the final grade will be made on the basis of the final exam alone.

(d) Relevance of December Examination in Other Contexts

Students should also be aware that, although writing the December examination in this course cannot adversely affect your final grade in the course, December grades for first year students have recently become relevant in other contexts. For example, you may be asked or required to provide your unofficial December grades to prospective employers. The law school will refer to these grades if you apply for a summer research position. And, the Director of Co-op may refer to them if a First Year student is not performing well in the Co-op preparation course, to help her determine whether that student should be allowed to apply for a summer work term. In addition, in January, the faculty will meet to review the December grades in order to identify students who are experiencing academic difficulties and thus be in a better position to assist students. A grade of less than C in the December examination in this course may result in remedial work of some kind being required.

3. Grading

The table below shows the official grading system used by instructors in arriving at final assessments of student performance.

Passing Grades	Grade Point Value	Percentage Value	Description	Comments
A+	9	90-100%	Exceptional	Grades in this range are normally achieved by a minority of students. These grades indicate a student who is self-initiating, exceeds expectation, and has an insightful grasp of subject matter.
A	8	85-89%	Outstanding	
A-	7	80-84%	Excellent	
B+	6	75-79%	Very good	Grades in this range are normally achieved by the largest number of students. These grades indicate a good grasp of subject matter or excellent grasp in one area balanced with satisfactory grasp in the other area.
B	5	70-74%	Good	
B-	4	65-69%	Solid	
C+	3	60-64%	Satisfactory	These grades indicate a satisfactory performance and knowledge of subject matter.
C	2	55-59%	Minimally satisfactory	
D	1	50-54%	Marginal	A student receiving this grade demonstrates a superficial grasp of subject matter.
F	0	49% and below	Unsatisfactory	

STUDENT CONDUCT, POLICIES AND REGULATIONS

Students should obtain and review all regulations and policies contained in the University of Victoria Calendar, 2009-2010 available online at web.uvic.ca/calendar2009 (the Calendar) both generally and specifically for the Faculty of Law. The Calendar's Undergraduate Academic Regulations set out the University's expectations about attendance and assignments. The Faculty of Law's Academic Regulations can also be found in the Calendar. Students must comply with all applicable university and Faculty policies and regulations.

1. Classroom Climate

An inclusive, respectful and diverse classroom environment is crucial to our work in this course. To ensure that all class members feel welcomed and equally able to contribute to class discussions, both I as instructor and you as students must endeavor to be respectful in our language, our examples, and the manner in which we conduct our discussions and group work. We have both an ethical and legal obligation to support this kind of environment. For your reference, you may wish to consult the University's Policy on Human Rights, Equity and Fairness (<http://web.uvic.ca/uvic-policies/pol-1000/1105.html>) and Policy on Discrimination and Harassment Policy (<http://web.uvic.ca/uvic-policies/pol-1000/1150HPP.html>). In particular, Section 5.1 of the Policy on Human Rights, Equity and Fairness provides that: **“All members of the university community are responsible for promoting a supportive and inclusive learning and working environment and for dealing respectfully and fairly with each other.”** I expect all aspects of this class to be conducted with this commitment firmly in mind. If you have any concerns about the climate of the class, please feel free to contact me or the Associate Dean.

2. Students with a Disability

If you have any type of disability, there are support systems, resources, and accommodation actions available to you. If you wish to access any of these supports, resources or accommodations, I encourage you to contact the Associate Dean or the Resource Centre for Students with a Disability (<http://rcsd.uvic.ca/home.ihtml>) and I would be more than happy to work with you to ensure your success in this course.

3. Accommodation of Religious Observances

The University of Victoria and the Faculty of Law have policies guaranteeing accommodation for those students who are unable to participate in a class or an aspect of the course owing to a religious holiday (see <http://web.uvic.ca/uvic-policies/pol-2000/2350SRO.html>). If you will be missing a class, know that you will be unable to complete an assignment or exam, or otherwise require accommodation on account of a religious holiday, please speak with me (or the Associate Dean) and I will be pleased to work out some satisfactory form of accommodation.

4. Double-sided Printing Encouraged

In recognition that members of the university community have a personal responsibility for the way their conduct impacts the local and global environment, students are encouraged that all reports and other documents, whenever possible, be printed on both sides of the paper (University of Victoria Operational Policy 6485, Waste Management, section 2.8.1).

5. Academic Dishonesty

It is a serious academic offence to engage in plagiarism or other forms of academic dishonesty or to assist others in doing so. Please refer to the statement set out below that is excerpted from the University of Victoria calendar for a detailed explanation of what constitutes plagiarism and for reference to other prohibited forms of academic dishonesty and the possible penalties that may be imposed for such infractions.

Note that **“multiple submissions” of your own work is an academic offence** unless you have obtained the prior permission of the instructor. This means that you are not allowed to submit the same work for academic credit in more than one course, regardless of whether or not the other course is one at this university or at another academic institution. Note that similar issues may arise regarding the use of research and writing that has been undertaken or completed in an employment or other non-academic context. Students should consult their instructor for permission in such cases.

Plagiarism and other forms of academic dishonesty may lead to disciplinary proceedings and, depending on the circumstances, may result in the imposition of academic penalties ranging from a reprimand, loss of credit for a course, an “F” grade, or temporary or permanent suspension from the Faculty or the University.

The following are the Academic Regulations of the University of Victoria regarding academic integrity (*Source: University of Victoria 2090-2010 Calendar*)

Policy on Academic Integrity

Academic integrity requires commitment to the values of honesty, trust, fairness, respect, and responsibility. It is expected that students, faculty members and staff at the University of Victoria, as members of an intellectual community, will adhere to these ethical values in all activities related to learning, teaching, research and service. Any action that contravenes this standard, including misrepresentation, falsification or deception, undermines the intention and worth of scholarly work and violates the fundamental academic rights of members of our community. The following policies and procedures are designed to ensure that the University’s standards are upheld in a fair and transparent fashion.

In this regulation, “work” is defined as including the following: written material, laboratory and computer work, musical or art works, oral reports, audiovisual or taped presentations, lesson plans and material in any medium submitted to an instructor for grading purposes.

Violations of academic integrity covered by this policy can take a number of forms, including the following:

Plagiarism

A student commits plagiarism when he or she:

- *submits the work of another person as original work*
- *gives inadequate attribution to an author or creator whose work is incorporated into the student's work, including failing to indicate clearly (through accepted practices within the discipline, such as footnotes, internal references and the crediting of all verbatim passages through indentations of longer passages or the use of quotation marks) the inclusion of another individual's work*
- *paraphrases material from a source without sufficient acknowledgement as described above*

Students who are in doubt as to what constitutes plagiarism in a particular instance should consult their course instructor.

The University reserves the right to use plagiarism detection software programs to detect plagiarism in essays, term papers and other assignments.

Multiple Submission

Multiple submission is the resubmission of work by a student that has been used in identical or similar form to fulfill any academic requirement at UVic or another institution. Students who do so without prior permission from their instructor are subject to penalty.

Falsifying Materials Subject to Academic Evaluation

Falsifying materials subject to academic evaluation includes, but is not limited to:

- *fraudulently manipulating laboratory processes, electronic data or research data in order to achieve desired results*
- *using work prepared by someone else (e.g., commercially prepared essays) and submitting it as one's own*
- *citing a source from which material was not obtained*
- *using a quoted reference from a non-original source while implying reference to the original source*
- *submitting false records, information or data, in writing or orally*

Cheating on Assignments, Tests and Examinations

Cheating includes, but is not limited to:

- *copying the answers or other work of another person*
- *sharing information or answers when doing take-home assignments, tests and examinations except where the instructor has authorized collaborative work*
- *having in an examination or test any materials or equipment other than those authorized by the examiners*
- *impersonating a candidate on an examination or test, or being assigned the results of such impersonation*

Candidates found communicating with one another in any way or having unauthorized books, papers, or communication devices such as cell phones and PDA's in their possession, will be considered to be in violation of the University Policy on Academic Integrity.

Aiding Others to Cheat

It is an offence to help others or attempt to help others to engage in any of the conduct described above.