

## Contract Law (Part 2)

In Part 1 of the Contract Law materials we looked at part of the mating dance necessary for the courts to recognize an agreement as a contract.

First there must be offer and acceptance. And, it should be noted that the acceptance must be to the offer. If Harry offers Bob a horse for \$500.00 and Bob replies, 'Sure I'll buy that horse, but for \$400.00 - there is no contract. What there is, is a counteroffer, which Harry could now accept by saying 'OK. We have a deal'. What if Harry says, 'Well let me think about that!' Bob says sure. But when he gets home, and before he has heard from Harry, Bob's wife calls him an idiot and says there is no way they should be buying a horse. So Bob phones Harry up and says to him, "Um Hi Harry!". Harry has a sixth sense of what is to come, and having decided that \$400.00 is about as good as things will get, says " Bob, I accept your offer of \$400.00 for my horse." Bob says, 'But Harry I was phoning you to withdraw my offer. I don't want the horse.'

"Too late !", says Harry, "But, I tell you what; I'll buy the horse back for \$200.00". Now Bob has to calculate whether he should cut his losses at \$200.00 or whether he should acquire the horse and face his wife with it. This is an example of why the courts are, and should be very reticent about remaking bad bargains. Domestic peace - what will bring it, what will lose it - may be among the things that Bob is factoring in to what this deal is worth or not worth to him. Why should the court interfere? And if, later, Bob's wife said 'Go to court and get that contract set aside - the horse was worth twice that much!', the court, if it was persuaded to interfere, would be missing an important part of what had happened.

Second, there must be an intention to contract. Even if an offer was accepted - there must also be a mutual intention to be bound. Social or domestic agreements may often meet the condition of offer and acceptance, but the court presumes there was no intention by the husband to make an agreement that would permit him to enforce the agreement against his wife in a court of law. If that presumption is wrong, it may be displaced by calling evidence to show that, contrary to the ordinary case, there was an intention to be bound. Of course if the spouses have reduced their contract to writing and if the written agreement makes clear that indeed they intend the agreement to be binding, then it will meet the

'intention to contract' condition. The presumption that agreements borne of personal relationships are not intended to be binding is sensible. Making contracts is supposed to be an 'eyes wide open' activity. People should not be bound unless it is reasonable to conclude (objective, not subjective, remember!) that they intended it so.

Third, there must be 'consideration'. 'Consideration', was one of the issues that was argued back and forth in *Carbolic Smoke Ball*. Consideration is some right, benefit or interest accruing to one party or some forbearance, loss of right, benefit or interest suffered by the other party. Each party must give and get in some sense; there must be a form of exchange. Save under unusual circumstances, a promise to give a gift is not enforceable because the person who was promised the gift has not given or given up anything. No give and get, no contract

### Sowing the seeds of trouble: Misrepresentation

You are having discussions with somebody with a view to entering into a contract. In the course of those discussions many things are said, many claims are made, each party is putting his or her best foot forward. At the end of the day you agree to enter into a contract which is written up and signed by yourself and the other party ( let's say his name is Jake). Some of the statements made by you and Jake end up as part of the contract; but some do not. Nevertheless, things said, matters claimed, before the contract was agreed upon may yet prove important if those 'representations' induced you to enter the contract. Or as lawyers put it, there was 'reliance'. Now suppose that one or more of the representations that you relied upon, turns out to be false. If you can prove to the satisfaction of the court that:-

- a) The representation was made;
- b) That it was false;
- c) That you relied upon it and as a result entered the contract to your detriment (else why would you be suing):

then the court will grant you a remedy. But notice that we are about to leave the 'objective world' of the contract, where what matters is what

reasonable observers would think is going on, and return to a subjective world where mind-watching matters. I say that because the law recognizes three kinds of misrepresentation, and the difference between each of them is what is going on in the mind of the misrepresenter.

The three kinds of misrepresentation are:

- A) Innocent Misrepresentation. *The misrepresenter didn't mean to get it wrong. In fact he meant to get it right. He made a mistake.*
  
- B) Negligent Misrepresentation *The misrepresenter was negligent, careless, and for that reason, claimed, urged something that wasn't true. But for his negligence, the misrepresentation would not have been made.*
  
- C) Fraudulent Misrepresentation *The misrepresenter knew it wasn't true and, intending you to rely upon his mistruth and enter the contract, he said it anyway.*

### Remedies

In court there may be a fierce battle to determine which of these three forms misrepresentation occurred, because the remedies are different.

- A) For Innocent Misrepresentation the party alleging it may be restricted to a remedy called 'rescission'. *If a contract is ordered to be rescinded it means that the contract is set aside and each party must return what has been given to the other. If you say, "I just want my money back and you can have the car back!", you are asking for rescission. What the court will not give you is damages to compensate you for the consequences of that innocent misrepresentation. (Rescission is an equitable remedy. I'll tell you what that means shortly)*
  
- B) and C) In the case of both negligent and fraudulent misrepresentation the party aggrieved may sue for damages. In the case of fraudulent misrepresentation, it will be no defence for the fraudster to prove that the other party was negligent and should have detected the fraud with

reasonable care. If you lie to people, it is no defence to say, "Sensible people would not have believed me!" In the case of negligent and fraudulent misrepresentation the aggrieved party may also seek rescission as a remedy. In the case of fraudulent misrepresentation, distinctively, if you are the victim of the fraud and the fraudster is suing you for non-performance of the contract then, having successfully raised fraud as a defence, not only are you relieved from further performance of the contract, in addition you do not have to give back what you have been given. Thus, Bob forgets on purpose to tell you, Sally, that he has had two heart attacks when he applies for a policy of disability insurance with your company, Mutual of Sally. When he has a third heart attack and makes a claim, which you refuse to pay, the court not only sustains your refusal to pay, but also agrees that you need not return the premiums that Bob has paid your company.

Contract law could not work to facilitate freedom of peaceful exchange if its aim was to remake bad bargains into something that the court, in its necessarily imperfect wisdom, thought was a 'better' deal. A court's pledge is to interpret and enforce the contract that the parties made and, if it were otherwise, no-one would have confidence that his/her contract would be enforced as written. Then our ability to plan for an uncertain future would be damaged.

However the court will not enforce contracts that are a product of 'Duress' or 'Undue Influence'.

### 1. Duress

The court will not enforce your contract if it was induced by violence or threats of violence. We will cite for example the case of *Byle v. Byle*, a BC Court of Appeal case. I have attached the case and you should look at it as an example of how convoluted case reports can become. Most of it, in its particulars, need not concern us. It's hard to read the case without feeling for sorry for Mr. and Mrs. Byle, who probably could not have imagined that their modest dream of a family empire would bring them to this. On the other hand, you might well reflect that Christmas dinner with *your* family wasn't so bad after all. One of the sons, Jim makes a threat of physical violence which is transmitted by one of the other sons to their parents. As a result, the court finds, their aging parents enter into an agreement that, but

for the threat, they would not have made. There are not a lot of duress cases reported, though the principle is firm and well recognized.

A gentler cousin of duress that finds broader application is 'undue influence' but because undue influence is an 'equitable doctrine', I must now walk you down a road of legal history that I was kind of hoping to avoid, in a spirit of deep-seated indolence.

### Equity and the Law

I have said, in the context of Contract Law, that the Common Law is traditionally tough minded. It will not compensate for life's innumerable disappointments, expects you to be resilient, requires you to make the best of things and will not listen to moralizing that 'does not answer' in damages.

The great Common Law Courts of England (The Court of Common Pleas and the Court of Kings Bench) became, after their trip across the Atlantic, the Superior Courts of each province - thus, the BC Supreme Court and the Alberta Court of Queens Bench (which will instantly become the Alberta Court of *Kings* Bench when and if Charles becomes King). These two English Courts historically evolved from the King's Council - it was the King doing justice through his closest and highest officials, who, in an era of human history when book learning was scarce, were generally church officials. The common law (hereinafter CL) proceeding on a case by case basis and conscious of the need to decide cases on an observably principled basis (else why bother with the Royal courts at all - might as well take one's chances with the Lord in his Manor and his local court), gradually came to give heavy weight to case precedent. Indeed the very sense of the 'rule of law' meant in large measure that a judge would decide your case according to the principles that emerged from previous cases even if it meant ignoring your claim for fairness in the particular circumstances of your case. It is easy to over emphasize this; new fact patterns constantly drove and drive evolution in the law. But not every claim of unfairness will generate a new rule and the promise of law is that it will lay down rules for all of us and not that it will deliver perfect fairness to each of us.

In any event, the case driven CL rules proved so tough that litigants took to pleading with the King's Chancellor to impose a remedy on top of the CL judgment - and so it was done, in fact done so often that the Chancellor's

power (or jurisdiction) to do this generated new courts, called Courts of Equity, whose job was to mitigate the harshness of the CL rule. An example from land law might suit:- A CL analysis would focus on who had title to the land, according to the impartial rules that the cases had generated. So you go to Court and say, my Uncle Harry may have 'title', having produced a deed of title to that effect, but Uncle Harry has obligations respecting that land to me. He promised to do so and such and the circumstances in which that promise between us was generated are this and thus. The CL Court would say, "It is title that we are concerned with and, as against the world, it is title that Harry may claim as the basis of his possession and ownership of that land. Go away!" But a Court of Equity would say 'Come here Harry. Is it true that you made promises to your niece respecting this land? Yes? Well then, as against the world you shall continue to hold title to the land, but you will keep your promise to your niece. You promised, that in exchange for raising and tutoring your children, for all those years after your wife died, that your niece would have use of the guest cottage rent free for as long as she lived. I order you to keep that promise Harry. Harry says, "Or what?" and the Chancellor (or, as matters developed, his judge in a Court of Equity) would say, " If you disobey the Court's order, the Court will find you 'in contempt' and you will be ordered to prison to reflect on your disobedience for a while and then, when you are ready to apologize to the Court and obey its order, you will be released". So Harry decides that his niece must have the cottage after all and the new tutor, 'Trixie', who is not big on reading, but stands to teach Harry a thing or two, will have to continue living at the inn in town. What if Harry sold the land and didn't tell the purchaser about his promise to his niece. The purchaser could not be bound by a promise that he was unaware of, but you, his niece, would have a claim for damages against Harry in a Court of Equity for failing to see that the new title holder subscribed to the promise.

Note that Equity did not seek to disturb 'title', or undo what had been decided in the CL court. Instead it added its requirement on top. The legal phrase is 'Equity follows the law'. There was a time in England when a litigant would have to sue in a CL court and then, armed with that judgment, proceed to a Court of Equity to obtain the equitable remedy that would sit on top of the CL judgment - an exhausting, expensive business that grew more so as both bodies of law and procedure became more complex over time. Then from 1873 to the end of the century, in a quarter century of reform, the separate court systems of common law and equity were fused

such that a judge of the new 'high' court had both common law and equitable jurisdiction. But the two bodies of law were not fused. It remained and, to a degree, remains important that lawyers and judges remain conscious of whether the legal remedy sought was one provided by the CL or Equity. There are two reasons, that I suggest, why that is so. First, Equity is an add on. Equitable remedies bolt onto the existing common law. So one needs to reach the CL conclusion (at least analytically) before bolting on Equity's addition. Second, considering the common law and then Equity provides a sequence of analysis which helps the lawyer make sense of it all.

### Fusion of (Common) Law and Equity in Canada

Some provinces (to be) got the job done well before Confederation and well before England; others maintained separate Court systems until the English reforms took effect. Most everyone had gotten the job done by the end of the nineteenth century. Remarkably, fusion did not occur in Prince Edward Island until 1974!

In summary, Equity evolved as a body of law, supplemental to the common law. Our superior courts possess both CL and Equitable jurisdiction, separate courts having been abolished (save for PEI) by the end of the nineteenth century.

### *Back to Contract Law*

#### Undue Influence

Originally, the common law doctrine of duress required a threat of violence. But the equitable doctrine of undue influence required and requires less. 'Improper pressure' is sufficient. Thus in the 1866 House of Lords case of Williams v. Bayley a son gave the bank promissory notes appearing to be endorsed by his father (a coal mine owner), when in fact the son had forged his father's signature. The bank threatened prosecution, mentioning 'transportation for life' as the penalty unless father came through for his errant son by mortgaging the coal mine to the bank. The court set aside the mortgage agreement as having been induced by improper pressure.

Today, the word that our courts often reach for when they are resisting the demand to enforce what strikes the court as being 'unfair' is

'Unconscionability'. What do we mean by that? In truth, the courts are not entirely sure. That a contract is unconscionable is, as much as anything, a declaration that the circumstances of the contract caused the court to react by saying, 'That's unconscionable!'. At the heart of matter is a sense of a profound inequality of bargaining power such that the aggrieved party was forced or persuaded to enter into a contract so unreasonable that the court will not live with it. Needless to say, at the margin, it is very hard to say where the courts duty not to interfere where a party later thinks he or she has made a bad bargain ends and the court's duty to intervene begins.

I have attached some of the leading cases on Duress, Undue Influence and Unconscionability. They are

Stewart v. Canada Life

Campbell v. Campbell (1989)

Campbell v. Campbell (1990)

Morrison v. Coast Finance, and

Miller v. Lavoie

I have also attached Byle v. Byle and Ororio v. Cardona

This week I will be sending you a further supplement on Contract Law that covers some topics that will not be part of the Unit Test due on January 25, 2011. They are:

1. An examination of two special kinds of contract; the employment contract and the life insurance contract.
2. An examination a regime of agricultural supply management where contract law and the marketplace have been substantially replaced by alternative framework.
3. The Human Rights Act and Freedom of Contract

4. An Introduction to Messrs Smoot and Hawley who asked and answered, 'Should foreigners be permitted to enjoy freedom of contract with us?'  
Well, should they?

**SDMW**