

## Foreword

The chapters in this volume are the product of a symposium titled 'Exploring Contract Law' held at the University of Western Ontario Faculty of Law in January 2008. The sessions featured good intellectual punch-ups between those participants who see law as an adjectival study focused on the work of the courts and commerce, and others who dedicate their careers to more philosophical musings about legal concepts. Both approaches are helpful. Problem solving without a sound philosophical basis risks palm tree justice. Theory without a nod to practice risks irrelevance. Those in the first group would likely agree with Karl Llewellyn's definition of law as what legal people do:

This doing of something about disputes, this doing of it reasonably, is the business of law. And the people who have the doing in charge, whether they be judges or sheriffs or clerks or jailers or lawyers, are officials of the law. *What these officials do about disputes is, to my mind the law itself.*<sup>1</sup>

However, chapters in this volume by those in the second group show them to be in determined pursuit of what might be called a pure theory of contract law. At the symposium, one of the participants conjured up (in support of the argument that contracts are not necessarily promises) an electrical repairman who includes in his wiring contract a rather unlikely clause:

The commitments expressed herein are exclusively contractual. We intend hereby to bind ourselves contractually to make the payments and to perform the acts specified, *but we do not intend to bind ourselves morally to do so: these are contractual undertakings, not promises* (emphasis added).

I do not expect to see such contractual provisions anytime soon and the theoreticians probably have no expectation that we will, or even much interest in whether we do. Such writings constitute 'an exercise in logic, not in life,'<sup>2</sup> and derive their nourishment from the writings of other academics rather than judges, even the sort of peripatetic judges who turn up at symposia like this to listen, learn and inwardly digest.

What is intensely enjoyable about these sorts of confrontations is the enthusiasm with which the participants attack one another. For example, John Swan observed at the symposium:

<sup>1</sup> K Llewellyn, *The Bramble Bush: Some Lectures on Law and its Study* (1930) 3 (emphasis in original), recently reprinted as K Llewellyn, *The Bramble Bush: The Classic Lectures on the Law and Law School* (New York, Oxford University Press, 2008).

<sup>2</sup> HJ Laski, *A Grammar of Politics*, 4th edn (London, Allen & Unwin Ltd, 1963) vi.

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From my point of view, I can't see what could possibly be gained by the acceptance of Stephen [Smith's] argument that, for example, the law of damages for breach of contract is not part of the law of contract but should instead be dealt with in a discussion of both contract and tort damages, with tort damages seeming to run from cases of personal injury through negligent misrepresentation to trespass, defamation and beyond.

The 'what's your point' rejoinder was much favoured by most of the participants in both camps most of the time. While the chapters published here are generally more restrained in tone than the symposium itself, together they represent significant and closely-argued contributions to our collective understanding of contract law. We are fortunate to have the work of both the theoreticians and the Llewellynites gathered together here in permanent form.

Justice Ian Binnie  
Supreme Court of Canada  
28 May 2008

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