

## Consideration is Dead! Long Live Consideration! *Richcraft Homes Ltd. v Urbandale Corporation* and the Zombie-Theory of Contract Law

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### A Personal Preface: Contracts, Consideration, and Zombies

Teaching contracts is sometimes a thankless task. I speak not of students' complete lack of familiarity with - let alone their total lack of interest in - titillating topics such as the mailbox rule, whether promissory estoppel may be used both as a sword and a shield, or the vagaries of the parol evidence rule. I speak, of course, of the doctrine of consideration. The doctrine of consideration is fascinating for a number of reasons but perhaps none more so than the fact that it is a zombie theory - it died long ago, and yet it keeps shambling along.

So that there is no confusion, let me state my position at the outset: consideration is not a thing. It is so nebulous, so shape-shifting, and ultimately so arbitrarily defined and deployed by courts that it cannot be said to be a meaningful or predictable element of contract law doctrine. It belongs more to the canon of Palm Tree Justice than the Rule of Law.

I only wish I had come up with this insight myself! Perhaps the most famous formulation of the idea belongs to the legendary Grant Gilmore of Yale Law School, who in his brilliant book *The Death of Contract*<sup>1</sup> noted that the American Law Institute's *Restatement (Second)* of contract law conceded that "[t]he word 'consideration' ... is often used merely to express the legal conclusion that a promise is enforceable."<sup>2</sup> Even the great Charles Fried, a legend in his own right at Harvard Law School, author of the luminous *Contract as Promise*,<sup>3</sup> and a true believer - unlike Professor Gilmore - in a coherent, internally-consistent law of contract, argues that consideration "offers no coherent alternative basis for the force of contracts".<sup>4</sup>

And yet consideration continues to consume the brains of first-year law students. Surely consideration is a thing, they say, year after year, almost zombie-like themselves. And not just any thing, but a most important thing! After all, long before beginning law school students learn that a legally-binding contract consists of an offer, acceptance, and consideration. They learn this from watching TV shows like *The Good Wife*, *Damages*, and perhaps the worst-ever show about the practice of law, *Suits*.

But it is not only students who resist the wisdom of the likes of Professors Gilmore and Fried, to say nothing of what they ought to see with their very own eyes simply by reading any random

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<sup>1</sup> Grant Gilmore, *The Death of Contract* (Columbus, OH: Ohio State University Press, 1974).

<sup>2</sup> *Ibid* at 77 [emphasis added].

<sup>3</sup> Charles Fried, *Contract as Promise: A Theory of Contractual Obligation*, 2<sup>nd</sup> ed (New York: Oxford University Press, 2015).

<sup>4</sup> *Ibid* at 38.

sample of contract law judgments in which consideration is supposedly at issue. Making matters more difficult still for those contract law professors with a realist bent, who like the great Karl Llewellyn before them attend not only to what the courts say but also to what the courts do, are the confounding comments of well-meaning colleagues and members of the practicing bar, many of whom have been victimized by the zombie of consideration.

So it was with considerable excitement that I and other realist professors of contract law awaited the Ontario Court of Appeal's decision in *Richcraft Homes Ltd. v. Urbandale Corporation*.<sup>5</sup> In *Richcraft*, the Ontario Court of Appeal peered fearlessly into consideration's empty, lifeless eyes, but just as it was poised to finally banish consideration forever, the Court blinked, allowing consideration to live another day. Bad as this is, it gets worse. For not only did the Court miss an important opportunity to rid contract law of the scourge of consideration. In allowing consideration to remain among the walking dead, the Court may have invented the least convincing, most farcical rationalization yet for the continued existence of consideration.

### Background Facts

It began innocently enough. A property developer and its related homebuilder (collectively, "Urbandale") entered into a Limited Partnership Agreement ("LPA") with another developer and builder, Richcraft. The purpose of their LPA was to develop 3,000 acres of land in the south of Ottawa.

In 2005 the parties signed a document related to the LPA (the "2005 Document"). The 2005 Document is brief:

#### The above parties agree as follows:

- The above parties have entered into joint agreements, October 23, 2001 for Riverside South and September 6, 2000 for the Kanata Lakes lands.
- Richcraft and Urbandale will have first right to purchase available lots in the above projects and will be divided equally at the same price.
- In the event that the lots in the above two projects are sold to other builders and in return Urbandale and/or Richcraft have the right to purchase lots in other projects belonging to the other builders then any lot(s) acquired by either Urbandale or Richcraft will be shared equally between them if agreeable by both parties.

The practical issue is whether the LPA and the 2005 Document, when read together, permit Richcraft to take up half the lots as the project proceeds. Urbandale disagreed, asserting that the LPA - which gives Urbandale control of two-thirds of the partnership - did not support Richcraft's position, and to the extent that the 2005 Document did so (which is unclear on its face), Urbandale argued that the 2005 Document is nevertheless unenforceable because it lacks

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<sup>5</sup> *Richcraft Homes Ltd. v. Urbandale Corporation*, 2016 ONCA 622 [*Richcraft*].

consideration.<sup>6</sup> Urbandale further argued that the terms of the 2005 Document “are fatally uncertain.”<sup>7</sup>

In order to clear up the interpretation of the LPA in conjunction with the 2005 Document, the parties brought an application “on a cooperative basis.”<sup>8</sup> The significance of this fact cannot be overestimated - not only did the parties dispute the enforceability of the 2005 Document, they also did not know what it actually meant.

### The Court Stalks the Zombie of Consideration

The Court begins its analysis by reconsidering its earlier decision in *Gilbert Steel Ltd. v. University Construction Ltd.*<sup>9</sup> In *Gilbert Steel*, a steel mill continually raised the price of unfabricated steel it was supplying to a construction company for a series of projects in the context of an ongoing commercial relationship, and while the construction company orally agreed to the higher prices, it ultimately only paid rounded amounts that left an amount owing equal to the difference between the price agreed to in the original, written, and executed contract, and the raised prices agreed to orally. The Court of Appeal refused to enforce the orally-agreed-upon price, concluding that it failed as a contract modification for want of consideration.

The Court in *Richcraft* proceeds to survey the evolution of the common law of consideration since *Gilbert Steel*, beginning with *Williams v. Roffey Bros. & Nicholls (Contractors) Ltd.*, in which Russell L.J. stated that where “a party undertakes to make a payment because by so doing it will gain an advantage arising out of the continuing relationship with the promisee”, the modified agreement “will not fail for want of consideration.”<sup>10</sup>

Next the Court of Appeal quotes from a 2003 decision of New Zealand’s Court of Appeal, in which that Court sensibly explained that

The importance of consideration is as a valuable signal that the parties intend to be bound by their agreement, rather than an end in itself. Where the parties have already made such intention clear by entering legal relations have acted upon an agreement to a variation, in the absence of policy reasons to the contrary they should be bound by their agreement.<sup>11</sup>

This reasoning was further developed in the New Brunswick Court of Appeal’s important and influential decision in *Greater Fredericton Airport Authority v. NAV Canada*, where Robertson

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<sup>6</sup> Urbandale also argued that the 2005 Document did not meet the legal requirements for an enforceable option: *Richcraft*, *supra* note 5 at para 13.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid* at para 3.

<sup>9</sup> *Gilbert Steel Ltd. v. University Construction Ltd.* (1976), 12 O.R. (2d) 19 (C.A.) [*Gilbert Steel*].

<sup>10</sup> *Williams v. Roffey Bros. & Nicholls (Contractors) Ltd.*, [1990] 1 All E.R. 512 (C.A.), quoted in *Richcraft*, *supra* note 5 at para 33. See also *MWB Business Exchange Centres Ltd. v. Rock Advertising Ltd.*, [2016] EWCA Civ 553.

<sup>11</sup> *Antons Trawling Co. Ltd. v. Smith*, [2003] 2 N.Z.L.R. 23 (C.A.) at para 93, quoted in *Richcraft*, *supra* note 5 at para 34. See also *Teat v. Willcocks*, [2013] NZCA 162, [2014] 3 N.Z.L.R. 129 at para 54.

J.A. explained that “a post-contractual modification, unsupported by consideration, may be enforceable so long as it is established that the variation was not procured under economic duress.”<sup>12</sup> Fearless in the face of zombie theories of contract law, Robertson J.A. concluded that “[t]he doctrine of consideration and the concept of bargain and exchange should not be frozen in time so as to reflect only the commercial realities of another era.”<sup>13</sup>

Just how long has the doctrine of consideration been frozen in time, a member of the walking dead? Consider the case of *Foakes and Beer*, a canonical case standing for the proposition that a partial accord and satisfaction of a debt fails for want of consideration. Bound by precedent, Lord Blackburn lamented that “...all men of business, whether merchants or tradesman, do everyday recognise and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment as a whole.”<sup>14</sup> The House of Lords decided *Foakes v. Beer* in 1884. The precedent to which it felt inescapably bound was *Pinnel’s Case*, authored by Lord Coke in 1602. Not for another 100 years was an English court (in *Williams v. Roffey Bros.*) willing to accept the House of Lords’ notion of a presumed benefit in voluntary agreements.

And yet, in 2016, the Ontario Court of Appeal in *Richcraft* refused to deliver the long-awaited *coup de grâce*. Writing for a unanimous Court, Lauwers J.A. demurred that “[w]hile the developing case law outside Ontario suggests that the time might be ripe for this court to reconsider the role that consideration plays in the enforceability of contractual variations, in my view, *Gilbert Steel* was a fundamentally different case on the facts and its holding has no application to this case.”<sup>15</sup>

This is an unfortunate missed opportunity, and serves only to delay - for how long it is impossible to predict - the inevitable. But the Court’s application of the zombie doctrine of consideration on the merits is worse still.

### Consideration as Clarification, Clear as Mud

The Court in *Richcraft* not only demurred from finally putting consideration to rest as, at best, merely an indicator of the intention to be legally bound, or, more accurately still, a legal fiction variously deployed by courts either to enforce or to refuse to enforce promises. Rather, the Court proceeded to find that the 2005 Document was supported by consideration after all, in the form of the *clarification* it provided to the parties. According to the Court:

The 2005 document clarified the issue of quantum: Richcraft was entitled to share equally in the available lots with Urbandale Construction. Clarifying an unclear term in a long-term contract, *in order to create certainty and to avoid future costly disputes*, enures to the parties’ mutual benefit, and is something of value that flows from

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<sup>12</sup> *Greater Fredericton Airport Authority v. NAV Canada*, 2008 NBCA 28, 229 N.B.R. (2d) 238 at para 31, quoted in *Richcraft*, *supra* note 5 at para 36.

<sup>13</sup> *Ibid* at para 30, quoted in *Richcraft*, *supra* note 5 at para 36.

<sup>14</sup> *Foakes v. Beer*, [1884] UKHL 1 (H.L.).

<sup>15</sup> *Richcraft*, *supra* note 5 at para 43.

and to each contracting party. *It thus serves as a functional form of consideration.*<sup>16</sup>

To be clear, the Court is saying that the 2005 Document created certainty and helped the parties avoid future costly disputes, notwithstanding the fact that the parties cooperatively pursued an application before not one but two courts *in order to clarify the uncertain meaning and legal status of the 2005 Document*. The most that can be said of the 2005 Document is that the parties signed it with the intention of clarifying and thereby affirming their LPA - that, and that alone, ought to have been sufficient for the Court to enforce the 2005 Document. But the 2005 Document clearly failed to adequately clarify the parties' entitlements under the LPA - hence the parties' decision to cooperatively seek out judicial clarification of the meaning of the 2005 Document itself. It was the courts, not the 2005 Document, that clarified the meaning of the 2005 Document and, by implication, the LPA.

The Court's reasoning in *Richcraft* is reminiscent of Justice Cardozo's famous finding of consideration in the case (among many others) of *Allegheny College v. National Chautauqua Bank*, where he explained that a woman's pledge to make a donation to a college - which she later sought to revoke - was enforceable because the college implicitly obligated itself to memorialize the donor's name in return.<sup>17</sup> In Cardozo's poetic prose: "The longing for posthumous remembrance is an emotion not so weak as to justify us in saying that its gratification is a negligible good."<sup>18</sup> This prompted Professor Gilmore to conclude - astutely - that "a judge who could find 'consideration' in the ... *Allegheny College* case could, when he was so inclined, find consideration anywhere: the term had been so broadened as to have become meaningless."<sup>19</sup> Although rendered in prose somewhat less poetic, the Ontario Court of Appeal's finding in *Richcraft* that a document about which its signatories cooperatively sought the courts' clarification was enforceable because it served to clarify the parties' legal obligations is a worthy successor to Justice Cardozo's "gossamer spider webs of consideration."<sup>20</sup>

### Conclusion: Back to Class

Regrettable as *Richcraft* is, I expect that it will nonetheless prove to be an excellent teaching tool. It reveals - unwittingly - several lessons about the common law of contracts. Such lessons include, notably, the incredible inertia of the common law, which makes it a welcome home to zombies such as the doctrine of consideration. Then again, changing the law is difficult, and in many cases - present company excluded - it ought to be difficult. Moreover, *Richcraft* reveals the gap between what the courts say the law is, and how the courts actually use the law to settle disputes. While this gap is a source of endless frustration to beginning students, it eventually reveals itself as the space where the law is made and remade - eventually - by the most creative lawyers.

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<sup>16</sup> *Ibid* at para 47 [emphasis added].

<sup>17</sup> *Allegheny College v. National Chautauqua Bank*, 246 N.Y. 369, 159 N.E. 173 (1927).

<sup>18</sup> *Ibid* at 377.

<sup>19</sup> Gilmore, *supra* note 1 at 69.

<sup>20</sup> *Ibid*.