Contract Law Update

Developments of Note 2024

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As those familiar with this annual update know, each fall I undertake a review of decisions from the previous 12 to 18 months, looking for cases relevant to commercial practice.[1] If there are cases bringing about significant changes to the law of contract or if the Supreme Court of Canada ("SCC") weighs in on a contract law issue, I will write about those cases. But typically, I will also highlight cases that remind us of longstanding contract law principles and that illustrate how those apply in practice.

Because they are typically fact dependent, I generally do not deal with cases in which the issue was interpretation of contractual provisions or whether an enforceable contract had been made (unless they articulate more broadly applicable principles).

This year's topics are:

- Exclusion clauses in contracts for the sale of goods
- Illegal contracts at common law
- Penalty clauses, relief from forfeiture and unconscionability
- Survival clauses
- Forum selection clauses
- Update on good faith jurisprudence
- Privity of contract and arbitration clauses

Interpreting Exclusion Clauses in Contracts for the Sale of Goods

All the provinces and territories in Canada (except Québec) have enacted a *Sale of Goods Act* ("*SGA*"). Embedded within those statutes are provisions that provide for implied conditions in relation to the characteristics or properties of the goods sold, namely or fitness for purpose, merchantability and correspondence with description.

Each statutorily implied condition has its own set of internal requirements before the seller is affixed with that particular legal responsibility, meaning that the legislature did not choose to imply conditions concerning the state of the goods into every contract of sale.

The status of these statutorily implied terms as conditions is important from the perspective of the innocent purchaser: the breach of a "condition" is so serious that the innocent party has the option either to treat the contract as repudiated, or to treat the breach of the condition as a breach of warranty and claim damages.

Also embedded in these statutes is a provision that authorizes parties to negative or vary any right, duty or liability that would arise under a contract of sale by implication in stipulated ways.

For example, s. 53 of the Ontario *SGA*[2] reads as follows:

> Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage is such as to bind both parties to the contract.

[1] From both a transactional and litigation perspective.
[2] R.S.O. 1990, c. S.1.

In *Earthco Soil Mixtures Inc. v. Pine Valley Enterprises Inc*., 2024 SCC 20 ("*Earthco v. Pine Valley*"), the SCC took on the task of determining what qualifies as an express agreement under s. 53 of the Ontario *SGA*, as informed by recent cases on contract interpretation and the legal operation of exclusion clauses.

The Court took the opportunity to revisit the foundational interpretative principles it laid down in *Sattva Capital Corp. v. Creston Moly Corp*.[3] and its decision in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*,[4] in which it set out the test to be applied to exclusion clauses. So while on a narrow view, this was a decision about the interpretation of *SGA* provisions, it is more broadly of relevance to contract law since the Court had to deal with the interaction among *SGA* provisions, principles of contract interpretation and principles applicable to exclusion clauses.[5]

The statutorily implied condition at issue in this case arose under s. 14 of the Ontario *SGA*:

> Where there is a contract for the sale of goods by description, there is an implied condition that the goods will correspond with the description, and, if the sale is by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

Pine Valley Enterprises Inc. ("Pine Valley") was contracted by the City of Toronto (the "City") to remove and replace topsoil at the site of basement flooding in a residential area. The City required that the topsoil have a specific composition that was conducive to proper drainage.

The contract required Pine Valley substantially perform its contractual obligations by August 19, 2011. If Pine Valley was late, it would have to pay liquidated damages of $500 per working day until the project was complete. The completion date was extended multiple times, ultimately to October 3, 2011. Despite Pine Valley's efforts to secure a suitable topsoil from various suppliers, the City's consultant did not approve any of the samples it obtained. The substantial performance date of October 3, 2011 also passed without any topsoil having been purchased, delivered, spread or graded on the project site. The City made one further and final concession and gave notice that as of October 15, 2011, it would enforce the liquidated damages clause.

On October 3, 2011, Pine Valley reached out to Earthco Soil Mixtures Inc. ("Earthco"), a large custom topsoil provider, seeking to obtain topsoil of the required composition. Earthco provided Pine Valley with lab reports from three different topsoil mixes taken about six weeks earlier and the City's consultant indicated that two of the proposed mixes would be acceptable with certain modifications. Pine Valley and Earthco discussed, on numerous occasions, the need to further test the soil before delivery to accurately ascertain its properties at the time of sale, a step that was a standard part of Earthco's process.

Because Pine Valley was running late on the performance of its obligations to the City, the parties urgently negotiated a purchase order without help from counsel. Earthco advised Pine Valley that it needed time to test the topsoil to confirm it met the agreed-upon specifications and warned against buying topsoil without an updated test before delivery. However, Pine Valley chose to

[3] 2014 SCC 53.
[4] 2010 SCC 4.
[5] The Court also comments negatively on efforts by the plaintiff to elevate the standard of review by taking a generous view of what constitutes an extricable error of law.

rely on older lab reports because it wanted to meet the City's final timeline and avoid payment of liquidated damages.

Due to Pine Valley's refusal to wait for testing, Earthco added two clauses to its standard purchase order (the "Exclusionary Clauses"):

> 6) [Pine Valley] has the right to test and approve the material at its own expense at our facility before it is shipped and placed. Please contact Richard Outred to arrange.
>
> 7) If [Pine Valley] waives its right to test and approve the material before it is shipped, Earthco Soils Inc. will not be responsible for the quality of the material once it leaves our facility.[6]

After the topsoil was delivered, pooling at the flooding site revealed that the topsoil contained significantly more clay than the older test results had indicated. The City claimed liquidated damages.

Pine Valley sued Earthco for breach of contract, arguing that the Exclusionary Clauses did not displace the statutory requirements under section 14 of the Ontario *SGA* (applying to a sale of goods by description).

The trial judge found that there was a sale of goods by description and that the statutorily implied condition under s. 14 had, *prima facie*, been breached. However, he went on to find that the Exclusionary Clauses were clear and unambiguous and served to negative Earthco's liability under s. 14.

The Ontario Court of Appeal allowed the appeal. It held that the standard for ousting the statutorily implied condition in s. 14 required the parties to "explicitly, clearly and directly" agree to its exclusion. The Court of Appeal held that to rely on s. 53, parties must expressly exclude statutory ***conditions*** and that the Exclusionary Clauses only disclaimed liability for the quality of the soil rather than the identity of the soil.

The majority of the SCC disagreed, rejecting what it describes as a requirement for particular "magic words" to be used to bring a contractual exclusionary clause within s. 53, stating in part (at para. 98):

> … Section 53 requires an "express *agreement*", not "express *language*", and is far removed from setting a legal standard that insists on explicit, clear and direct language which speaks to the legal characterization of the terms at issue. There is no requirement for "magic words". While the words of the agreement itself are undoubtedly important, *Sattva* allows a court to read these words with the surrounding circumstances in mind and does not mandate that words be strictly attributed with a singular, prescriptive meaning. It simply requires that any intention of the parties to exclude the *SGA* be grounded in the text, if the contract is a written one. To have an effective express agreement that satisfies s. 53, the parties' joint intention must be declared and the exclusion clause must unambiguously vary or negative the statutorily implied obligation, based not only from the words of the contract itself, but also from an analysis of the surrounding circumstances…

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[6] *Earthco v. Pine Valley* (SCC), at para 9.

The SCC commented on the legislative intention underlying the inclusion of both the statutorily implied conditions and s. 53 in the *SGA*:

> [41] The co-existence of implied conditions and s. 53 demonstrates that in enacting the *SGA*, the legislature did not have a singular purpose in mind — but rather, dual purposes of both protecting buyers and safeguarding freedom of contract. If the parties are silent on the issue, a statutory condition like s. 14 will be implied into their dealings, but if the parties wish, they may allocate their risk accordingly and contract out of whichever presumptive provisions they so choose. These dual purposes are to be balanced and should be approached more like a rebuttable presumption than a general rule with a limited exception. In the final analysis, if any primacy is to be given, the legislature has privileged private ordering over statutory prescription.

The Court noted that while a sale of goods is subject to a host of provisions in the relevant *SGA*, it is also an agreement that sits within the common law of contracts and should be interpreted in accordance with contract interpretation principles (pointing out that s. 57(1) of the Ontario *SGA* specifically refers to the application of the rules of common law applying where not inconsistent with the express provisions of the Act). It also noted that *SGA*s are not exhaustive or comprehensive codes. The paramount consideration under both *Sattva* and the first prong of the *Tercon* test is the objective intention of the parties. The surrounding circumstances, including the commercial buying experience of Pine Valley and both parties' awareness of the changing nature of topsoil and the dated nature of the prior tests, informed the interpretation of the agreement.

The objective meaning of the parties' express agreement in this case was that the buyer accepted the risk that the topsoil would not meet the earlier test results/specifications concerning its composition.

The Court endorses clear drafting techniques but at the same time propounds a forgiving approach to clauses where the drafting is suboptimal:

> [75] Language that explicitly, clearly and directly ousts a protection that the legislature has presumptively bestowed on a party to a contract is an optimal way to ensure the parties' mutual objectives are being carried out. As a drafting technique, it is the gold standard for contractual certainty and its presence is to be encouraged. However, with respect, this approach should not be elevated into a binding prerequisite, the absence of which would not only create a stand-alone error of law, but would lead to the inapplicability of an express exclusion clause at the first step of the *Tercon* test. In the case at bar, this binding prerequisite would lead to the non-enforceability of the exclusion clauses because the parties did not expressly refer to conditions or to identity to demonstrate their intention to contract out of s. 14 of the *SGA*.

The SCC did not have to address the operation of provisions like s. 53 where the "negativing or variation" of a statutorily implied term is said to have arisen from the course of dealing between the parties or by usage (as opposed to by express agreement).

Don't lose sight of the fact that each jurisdiction in Canada (including Québec) has a statute implementing the *United Nations Convention on Contracts for the International Sale of Goods*.[7] Provincial and territorial *International Sale of Goods Acts* are significantly different from the

[7] 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988).

provincial and territorial *SGA*s. See my 2018 paper[8] for a discussion of contracting out of the statutory conditions or warranties in these statutes.

Bottom line: Canadian *Sale of Goods Acts* contain statutorily implied conditions and warranties, but also contain a provision that permits parties to exclude or vary such implied terms. The SCC in *Earthco v. Pine Valley* explained that in pairing these two categories of provisions, the legislature had the dual purpose of protecting buyers while at the same time safeguarding freedom of contract.

While the exclusion or variation of terms implied by law may arise from the course of dealing between the parties or by usage, vendors under commercial contracts for sale of goods would be well-advised to insert express language if the intention is to exclude any given implied condition or warranty.

Sale of goods contracts, while subject to the provisions of the *Sale of Goods Acts*, are also subject to the overarching principles of contract interpretation and exclusion clauses contained in them are subject to the *Tercon* test for assessing their enforceability.

Illegal Contracts at Common Law

The SCC decision in *Scott v. Golden Oaks Enterprises Inc*., 2024 SCC 32, which arose in the context of a trustee advancing statutory claims under the *Bankruptcy and Insolvency Act* ("*BIA*"),[9] deals with a number of common law and equitable concepts, including unjust enrichment, limitation of actions, equitable set-off and the corporate attribution doctrine.

I am including the case in this year's paper because it also deals with the question of when a contract is illegal at common law.[10]

Golden Oaks Enterprises Inc. ("Golden Oaks") was ostensibly a legitimate rent-to-own residential property business operated by its sole officer, shareholder, and directing mind, Joseph Gilles Jean Claude Lacasse ("Lacasse"). In reality, it was a Ponzi scheme: the company continuously needed new loans to repay existing loans. It paid short-term investors interest at criminal interest rates to raise funds to pay its existing investors. The investors received promissory notes.

Some investors also helped perpetuate the Ponzi scheme by entering into referral agreements with Golden Oaks to refer new investors to the company in exchange for commissions based on a percentage of the amounts invested by the new investors. When the Ponzi scheme eventually collapsed, Golden Oaks and Lacasse went into receivership and made assignments in bankruptcy.

The trustee in bankruptcy brought multiple actions aimed at recovering amounts that Golden Oaks had paid the appellant investors in interest under the usurious loans and in commissions under the referral agreements, relying primarily on the law of unjust enrichment. The defendants/appellants were all victims of the Ponzi scheme who lost their invested principal when Golden Oaks went bankrupt, but who managed to recoup some of their early investments through interest and who received commission payments under referral agreements before its bankruptcy.

[8] https://www.lawsonlundell.com/assets/htmldocuments/Contract%20Law%20Update%20May%2024%202019.pdf
[9] R.S.C. 1985, c. B-3.
[10] I last discussed illegal contracts in my 2009 and 2010 papers.

At trial, the appellants raised four main defences:

- The actions were statute-barred under the Ontario *Limitations Act, 2002*,[11] on the basis that the two-year limitation period began when Golden Oaks knew or ought to have known about the impugned payments. The appellants asserted that because Lacasse knew of the impugned payments, his knowledge should be attributed to the company under the common law doctrine of corporate attribution.
- They were not unjustly enriched, invoking the doctrine of notional severance to argue that the court should reduce the criminal rate of interest to the maximum legal rate of interest and order them to return only the interest above that rate.[12]
- They were entitled to equitable set-off of amounts they owed the estate as against the principal of the loans still owed to them, relying on s. 97(3) of the *BIA*.
- The referral agreements were lawful, and thus provided a juristic reason for them to keep the commissions they had received under those agreements.

I will not discuss the limitations defence and the Court's consideration of the corporate attribution doctrine,[13] and will deal instead with the illegality arguments made and ruled upon in relation to both the commission claims and the interest claims.

At trial,[14] Justice Gomery focused on whether the referral agreements were contrary to s. 25(3) of the Ontario *Securities Act*,[15] ruling that the *Securities Act* provisions, which constituted a complete code for a particular sphere of activities, did not render the agreements unenforceable. Thus, she found that the referral agreements were a juristic reason for denying the trustee's claims to the commissions paid based on unjust enrichment.

The Court of Appeal[16] found that the trial judge erred in failing to consider whether the referral agreements were illegal agreements ***at common law***:

> [80] The trial judge did not address the Trustee's argument that the referral agreements were illegal contracts at common law (as opposed to breaching the *Securities Act*). Contracts will be considered illegal where they are either criminal on their face or, while facially legitimate, are entered into for the purpose of perpetrating a criminal act: *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd*., 2020 BCCA 130, 35 B.C.L.R. (6th) 326, at paras. 47-48.[17] The Trustee alleged the referral agreements were illegal in this latter sense.
> [...]

[11] S.O. 2002, c. 24, Sch. B.
[12] The trial judge applied the principles from *Transport North American Express Inc. v. New Solutions Financial Corp*., and declined to apply notional severance in favour of the appellants so as to reduce the interest rate to 60%. This issue was not before the SCC.
[13] On the corporate attribution issue, the majority outlined the guiding principles for applying the doctrine of corporate attribution and held that there was no principled basis for applying different guiding principles to a fact pattern involving a one-person corporation. However, the Court then approved the ruling of the Court of Appeal that the trial judge should have exercised her discretion not to attribute Lacasse's knowledge to the company on public policy grounds (*i.e*., attribution in this case would undermine the purpose of the discoverability rules in the applicable limitation statute and the purposes of the *BIA*).
[14] 2019 ONSC 5108.
[15] R.S.O. 1990, c. S.5.
[16] 2022 ONCA 509.
[17] At paragraph 48 of this decision, Mr. Justice Hunter stated as follows:

> [48] The second type of illegality is more nuanced. A contract may be unenforceable in circumstances where it is not *per se* illegal, but was entered into at least in part, with the object of committing an illegal act. Enforcement of such a contract may be so tainted with illegality that a court is entitled to refuse to enforce it. These cases must be considered on a case-by-case basis, unless there is controlling authority, as I conclude there is for the present appeal. But in examining the facts of each case, the application of the illegality defence should be approached on the basis of principle, namely the impact of enforcement on the integrity of the judicial process, rather than as a rules-based exercise.

> [83] I agree with the Trustee (as cross-appellant) that the trial judge erred in considering only one basis on which the referral agreements could be treated as unlawful for the purposes of unjust enrichment and that, based on her other findings regarding the conduct of the defendants, the referral contracts were illegal contracts at common law and could not be the basis of a juristic reason for payments enriching the defendants.

Writing for the majority at the SCC, Justice Jamal agreed with the Ontario Court of Appeal that the referral agreements were illegal contracts at common law.[18] He rejected the proposition that the appellants' lack of subjective knowledge of illegality (that the referral agreements were for the purpose of furthering a Ponzi scheme) should defeat the trustee's illegality argument, explaining that the question of whether a contract was entered into at least in part for the purpose of committing an illegal act is examined from the objective standpoint of a reasonable person.

Justice Jamal noted that each appellant that earned referral commissions *also* lent money to Golden Oaks under one or more promissory notes and received illegal interest as part of the Ponzi scheme. The trial judge found as a fact that the appellants, as lenders to Golden Oaks, "all knew, or should have known, that they were entering into illegal agreements". Although this finding related specifically to the payment of illegal interest, Justice Jamal found it also bore on the appellants' referral agreements, under which they agreed to recruit new investors to lend money to Golden Oaks at a criminal rate of interest in order to perpetuate the Ponzi scheme. The purpose of the referral agreements was, at least in part, to induce others to enter into the illegal loan agreements, a purpose that is contrary to public policy at common law.[19]

At paragraphs 108-111, Justice Jamal helpfully reviews the common law of contract illegality, citing leading texts and cases. Key points from that summary include:

- A contract may be unenforceable because of illegality if it is contrary to statute (statutory illegality) or void at common law on grounds of public policy (common law illegality).
- A contract may be found illegal in one of two ways:
    - First, a contract may be illegal *per se* if the "performance of the contract violates a statutory or common law prohibition." For example, a contract may be illegal *per se* if it contains an agreement to do an act or for a consideration that is illegal, immoral, or contrary to public policy.
    - Second, even if a contract is not illegal *per se*, it may still be unenforceable if it "was entered into, at least in part, with the object of committing an illegal act". Enforcement of such a contract may be so tainted with illegality that a court is entitled to refuse to enforce it. Whether a contract was entered into with the object of committing an illegal act is a question of contractual interpretation that is evaluated objectively from the perspective of a reasonable person.

Illegality was also relevant to the appellants' equitable set-off claim under s. 97(3) of the *BIA*. Justice Jamal reviewed the body of law recognizing that courts have a judicial discretion to disallow a defence of equitable set-off when the party invoking the defence does not have "clean hands" or is tainted by some other form of inequity.

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[18] Justice Côté, who dissented on some issues, agreed with the majority on this issue.
[19] The Reasons also contain a discussion of the Latin maxim *in pari delicto, potior est conditio defendentis*, which addresses the allocation of fault between parties and provides that, in a case of equal fault, the defendant's position is stronger. Justice Jamal found that the doctrine did not assist the appellants on the facts.

As noted by the SCC, the trial judge accepted that the appellants were not aware that they were involved with a fraudulent Ponzi scheme, but concluded that they "all knew, or should have known, that they were entering into illegal agreements". She found that evidence of the parties' interactions showed that they did not conduct themselves in a manner consistent with above-board commercial dealings – they failed to undertake basic due diligence and ignored several red flags. Thus, confirmed the SCC, the appellants did not come to the court with clean hands because their wrongful conduct was at the heart of their set-off claim.

Bottom line: Contracts may be regarded as illegal in two distinct ways: (1) a contract may be illegal *per se* if it violates a statutory or common law prohibition; (2) even though it is not illegal *per se*, a contract that was entered into, at least in part, for the purpose of committing an illegal act may be so tainted with illegality that a court is entitled to refuse to enforce it.

Under the second category, the court must consider whether the contract was entered into with the object of committing an illegal act from the perspective of a reasonable person. Accordingly, an argument by the contracting party that they did not have subjective knowledge of illegality will not succeed if a reasonable person would have known that the purpose of the contract was illegal.

A plea that a contract is illegal in either of the two senses may be raised as a defence to a claim for breach of contract, but as we see in the SCC decision in *Scott v. Golden Oaks Enterprises Inc.*, it may also be raised as a juristic reason to deny relief in unjust enrichment and as a basis for finding a party is disentitled to equitable relief because of their "unclean hands."

Penalty Clauses, Relief from Forfeiture and Unconscionability

Each of the following bodies of law articulates a distinct limit on freedom of contract: the body of law finding penalty clauses unenforceable; the body of law on relief from forfeiture; and the body of law in which contracts are found to be unenforceable because they are unconscionable.[20] However, the jurisprudence sometimes blurs the distinctions among these three concepts and some cases advocate for them being combined.

The term "unconscionable" features in one of the articulations of when a clause is properly characterized as a penalty clause, as opposed to a liquidated damages clause. Canadian courts[21] frequently cited the decision of the House of Lords in *Dunlop Pneumatic Tyre Co. Ltd. v. New Garage & Motor Co. Ltd*., [1915] A.C. 79, in which Lord Dunedin stated that:

- The essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damages.[22]
- A clause will be held to be a penalty if the sum stipulated for it is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach.[23]

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[20] In a recent article, the author tracks the history of what he describes as the three doctrines in both English and Canadian law, and posits that each of the doctrines continues to suffer from issues of clarity, coherence, or a combination of both: see Eric Andrews, "The Penalty Doctrine, Relief against Forfeiture, and Unconscionability in Anglo-Canadian Law", (2023) 86 Sask. L. Rev. 197 ("Andrews article").
[21] For an in-depth discussion of how the Canadian law has developed since *Dunlop* was cited with approval by the SCC in 1915, see the Andrews article.
[22] At 86.
[23] At 87.

Unconscionability is also a term used when courts are considering whether relief from forfeiture should be granted, framing the question as whether allowing a party to retain sums that the other party had agreed to pay would be unconscionable in all the circumstances.[24]

The independent doctrine of unconscionability, explained at some length in *Uber v. Heller*, 2020 SCC 16, is an equitable doctrine that is used to set aside unfair agreements that result from an inequality of bargaining power. The doctrine requires both an inequality of bargaining power and a resulting improvident bargain.

When I wrote about the law on characterizing clauses as liquidated damages clauses or penalty clauses in 2016, I noted a decision of the Ontario Court of Appeal that rejected the proposition that all stipulated remedy clauses having penal consequences were unenforceable.[25]

In *Peachtree II Associates – Dallas, L.P. v. 857486 Ontario Limited* (2005), 76 O.R. (3d) 362 (C.A.),[26] Justice Sharpe explained that the common law's approach to penalty clauses is based on a finding that, at the time of contracting, the penalty clause was not a genuine pre-estimate of the innocent party's anticipated damages from a breach of contract, whereas equity's approach to forfeiture or penalty clauses is based on a finding of unconscionability at the time of enforcement of the forfeiture or penalty clause. He stated that there was much to be said for assimilating both penalty clauses and forfeitures under unconscionability: I will admit to not entirely grasping what that means. But in any event, the Court found the clause in question to be a forfeiture, and therefore subject to the body of law on relief from forfeiture as opposed to the law on penalty clauses.

A decision of the Ontario Court of Appeal in 2024 illustrates how an impugned clause has to first fit the characterization of a penalty clause for there to be a prospect of relief from forfeiture, *i.e.,* it must be an extravagant stipulated remedy ***payable upon breach*** and also explains the difference between the independent doctrine of unconscionability and unconscionability in the context of relief from forfeiture.

In *660 Sunningdale GP Inc. v. First Source Mortgage Corporation*, 2024 ONCA 252, a borrower ("660") agreed in a commitment letter (the "Loan Agreement") to pay a fee (the "Lender Fee") to the lender ("First Source") as part of the consideration for a multi-million dollar loan. The loan amount was to be the lesser of $15,500,000 or 62% of the value of a property that 660 was developing. The Lender Fee of 2.75% was deemed under the Loan Agreement to be earned upon the acceptance and execution of the Loan Agreement. The Lender Fee was payable in two tranches: $100,000 at the time the Loan Agreement was executed and accepted and the remaining payment of $326,500 (the "Balance") to follow.

660 paid the $100,000 but then decided not to proceed with the loan and did not pay the Balance. Litigation ensued.

[24] Such as in *Coal Harbour Properties Partnership v. Liu*, 2006 BCCA 385.
[25] It is fair to say that in 2016, I did not fully understand the distinction the Court was making and was more interested in its commentary as to assimilation of the law on penalties and on forfeitures.
[26] Leave to appeal refused, 2006 CarswellOnt 316 (S.C.C.).

The motion judge[27] found that while the $100,000 was a "pre-estimate of damages", and thus not a penalty clause, the clause requiring payment of the Balance was an unenforceable penalty clause and that relief from forfeiture in relation to the Balance should be granted.[28]

On appeal, the Court of Appeal held that it was an error to apply the law relating to penalty clauses to funds that are payable under a contract in the absence of a breach. Citing, *inter alia*, 1915 SCC authority,[29] the Court stated that a penalty is the payment of a stipulated sum on breach of the contract, irrespective of the damage sustained. Thus, unless a term of a contract stipulates a purported remedy for a breach it cannot be a penalty clause. The Lender Fee, held the Court of Appeal, was not payable as a stipulated remedy for breach of the contract, but rather as consideration for the lender obtaining the loan commitment.

The Court considered whether the ruling of the motion judge granting relief from forfeiture fit within the case law wherein such relief was granted:[30]

- in relation to breaches of contractual clauses inserted to secure performance;
- to prevent the loss of proprietary or possessory rights;
- where there has been fraud, accident, mistake or surprise;
- where a party faces the loss of an option to renew a lease or extend a contractual right;

and found that this case law also did not apply.

The Court stated that the application by the motion judge of the doctrine of relief from forfeiture was unsupported by authority and wrong in principle. The Court found that by granting relief from forfeiture to relieve 660 from a contractual payment obligation that did not arise from any non-observance of the Loan Agreement by 660, the motion judge, in effect, applied the "independent doctrine of unconscionability" in circumstances where there was no inequality of bargaining power.[31]

Justice Paciocco concluded that the motion judge did not relieve 660 from any specific conduct that it engaged in that triggered its obligation to pay the Balance. Rather than relieving 660 from the consequences of its conduct relating to the contact, she purported to relieve it from a contractual term that she found to be excessive and unconscionable in amount.

Leaving aside academic literature,[32] this is the first time post-*Uber v. Heller* that I have seen a court draw a clear line between unconscionability writ large as a basis for invalidating a contract provision and unconscionability as it more narrowly applies to relief from forfeiture.

What I understand the Court of Appeal to be saying on this latter point is this:

- The independent doctrine of unconscionability applies to unfair agreements that have resulted from inequality of bargaining power. In order for this doctrine to relieve a party from a contract or contractual term they have agreed to, they must meet the two-part test

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[27] 2023 ONSC 2129.
[28] She also found in the alternative that the Balance was not earned because the loan had not been advanced, a conclusion rejected by the Court of Appeal.
[29] *Canadian General Electric Co. v. Canadian Rubber Co*. (1915), 52 S.C.R. 349.
[30] Justice Paciocco made it clear that the list of circumstances in which relief from forfeiture is available in this part of the Reasons is not meant to be exhaustive (at para. 46).
[31] For other examples of a defendant failing to establish that the clause in question stipulated a remedy for breach (and could therefore qualify as a penalty clause), see *Do v. Nichols*, 2016 BCCA 128, which I discussed in my 2016 paper.
[32] See the Andrews article, *supra,* which the Court of Appeal cites.

from the case law by establishing inequality of bargaining position and an improvident bargain.

- Per the majority of the SCC in *Uber v. Heller,* this independent doctrine allows courts to fill in gaps between existing "islands of intervention".
- Unconscionability as applied in the context of relief from forfeiture is one such existing island of intervention. In this context, relief from forfeiture may be available to relieve a party from the loss of a right, or property or money as the result of conduct on their part consisting of the non-observance of, or non-compliance with, a contract or covenant. While the Ontario Court of Appeal did not expressly deal with what "unconscionable" meant in this context, it appears to be used to describe situations where the other party would receive a windfall if allowed to retain the right, property or money.
- Subsets of scenarios where relief from forfeiture may be available where a party has breached a contractual clause include:
    - Cases involving forfeiture of non-refundable deposits;
    - Cases involving forfeiture of insurance coverage for imperfect compliance with policy terms;
    - Cases involving forfeiture upon repudiation by a purchaser of instalments or part or full payment of purchase monies that have been advanced;
    - Cases involving forfeitures provided for in stipulated remedy clauses.

In citing the concurring Reasons of Justice Brown in *Uber v. Heller*, the Ontario Court of Appeal seems to be suggesting that we only use the term "unconscionability" to refer to the independent doctrine (which is a shift from the prior appellate decisions of this Court and the B.C. Court of Appeal). In my view, that approach would clear up some of the confusion as to the use of the term in cases involving penalty clauses and relief from forfeiture.

Bottom line: Unconscionability, I have learned, is a term that is used to mean a number of things in the Canadian law of contracts.

A 2024 decision of the Ontario Court of Appeal explains that when that term is used in the context of relief from forfeiture (in that case in relation to an alleged penalty clause), it is not a reference to the independent doctrine of unconscionability, discussed at length in the SCC decision in *Uber v. Heller*, which requires proof of both inequality of bargaining power and an improvident bargain.

That decision also explains that the law as to unenforceability of penalty clauses does not apply to a clause stipulating that funds are payable under a contract in the absence of a breach of contract.

Survival Clauses

Parties include survival clauses to make plain their intention that the doctrine of merger **is not** to operate and, therefore, their intention that representations and warranties of the parties **not** merge on closing.

The SCC clarified, back in 1979, that merger does not occur automatically by operation of law, but rather depends in each case on the parties' intentions: *Fraser-Reid v. Droumtsekas*, [1980] 1 S.C.R. 720.

A survival clause is the obvious way of making the parties' intentions manifest. A survival clause may include the following elements:

- Particularization of which representations and warranties survive closing, for how long and for what purposes.
- Particularization as to whether certificates, statements, declarations or other writings delivered on closing survive closing.
- A stipulation that the representations and warranties will survive despite any investigation carried out by the counterparty.

Classic survival clauses

The decision in *2250898 Ontario Inc. v. Mukelova*, 2022 ONSC 3075, underscores the importance of specificity in drafting such clauses.

In that case, the survival clause in a Share Purchase Agreement ("SPA") read as follows:

> 6.3 Representations and Warranties Surviving Closing – The representations, warranties and covenants of the Purchaser and the Vendors in Articles 6.1 and 6.2 hereof shall survive Closing and, notwithstanding the closing of the transaction herein provided for, shall continue in full force and effect for a period of two (2) years following Closing, except that those covenants, representations and warranties of the Vendors relating to the tax or source deduction liability of the Corporation… In addition, notwithstanding the limitations set out above, any claim which is based on title to the Purchased Shares, ownership of the Business at the Closing Date pursuant to section 6.15 above or fraud may be brought at any time.

The plaintiff sought to amend its statement of claim to allege misrepresentations by the defendant as to its annual revenues. One of the arguments made by the defendant was that s. 6.3 of the SPA barred the claim in that the plaintiff had not brought the claim within two years of the closing.

The Court seized on a position that was apparently not argued by the plaintiff. Associate Justice Frank concluded that there were two possible interpretations of the survival clause: that a claim must have been made and notice must have been given within two years of closing or that a claim should have arisen during the two year period. He noted that the clause did not contain any requirement for the plaintiff to provide notice or commence an action within the stipulated two-year survival period. Accordingly, he held that the second interpretation applied.

Clauses addressing survival of contract provisions on termination

While classic survival clauses deal with representations, warranties and covenants surviving closing, there can be issues arising as to survival of particular rights or obligations post-termination of the contract and clauses sometimes styled as survival clauses may deal with the status of certain rights or obligations after termination, not just post-closing. Survival clauses may expressly provide for indemnification provisions surviving termination, for example.

I will leave it to transactional lawyers to weigh in on whether such clauses are properly described as survival clauses and whether it is better to state the effect of termination on a particular right or obligation within the clause articulating the right or obligation or in a termination provision. Instead, I will canvass some recent case law in which the interaction between contract termination and a survival clause was at issue.

The question that has arisen in some cases is whether provisions not expressly dealt with in the agreement's survival clause survive termination of the agreement.

Parties including arbitration clauses in their agreement typically state expressly that the arbitration agreement therein contained survives termination. Even absent such an express term, there is authority for the proposition that an arbitration agreement contained in another agreement survives termination of the latter, and modern arbitration statutes typically contain a provision to that effect.

A 2024 Ontario decision considered whether a forum selection clause survived termination of the agreement in which it was included, and found that it did.

In *JLPM v. Ferrovial Services Canada Limited*, 2024 ONSC 6404, the subcontract in question was for the provision of vegetation and maintenance work for picnic sites and rest areas along a highway in Ontario for the party [Ferrovial] that had contracted with the Province to provide highway maintenance.

The subcontract contained a termination provision that gave Ferrovial the option to terminate or suspend the contract due, among other things, to its convenience or when it was deemed in the best interest of Ferrovial to do so. The term of the subcontract was seven years, but Ferrovial terminated it less than two years in.

JLPM commenced an action seeking damages for breach of contract, negligence, negligent misrepresentation and unjust enrichment. Ferrovial applied for a stay of proceedings based on a forum selection clause selecting the courts of Travis County, Texas.

The subcontract also contained a “Surviving Clauses” provision that stated that the provisions of the subcontract related to warranty, indemnity, audit and confidentiality would survive termination. JLPM took the position that once Ferrovial terminated the subcontract, the only terms that survived were those expressly referenced in the Surviving Clauses term and given that the forum selection clause was not expressly referenced, it did not survive.

Ferrovial submitted that it would be illogical for JLPM to argue both that the subcontract was terminated causing actionable damages, but that the forum selection clause was inapplicable due to the termination.

Not surprisingly, the Court found that the forum selection clause survived termination of the subcontract.

Ghali v Jordahl USA Inc., 2022 ABQB 248, is another case in which a party argued that because an obligation or right was not expressly listed in the contract’s survival clause, it fell away on termination.

The plaintiff, Ghali, obtained summary judgment against the defendants (“Jordahl”). The Master hearing the application found that Ghali was entitled to ongoing royalty payments from Jordahl on the sale of Studrail 1 products, which were based on a mechanically anchored reinforcement system for concrete slabs invented by Ghali and a former colleague of his. Jordahl appealed.

At the core of the dispute were an original agreement and an amended agreement. Jordahl’s position was that it was no longer required to make royalty payments because of the expiration of the amended agreement or, in the alternative, because Jordahl exercised its right to terminate its payment obligation by providing a year’s notice under the original agreement.

Much of the decision on appeal is about the interaction among specific provisions in the original agreement and amended agreement. Justice Labrenz agreed with the Master that the payment obligation was not captured by the express termination clause in the original agreement.

It was uncontested that the amended agreement had expired. Jordahl pointed to the Survival Clause in that agreement and argued that only the Indemnity Clause in Article 2 survived termination of the amended agreement because it was the only provision referenced in the Survival Clause.

At paragraph 60, Justice Labrenz dealt with that submission as follows:

> In my view, it is not illogical that the Survival Clause does not reference the payment obligation. This is because the payment obligation was expressly drafted to outlast the Amended Agreement – whether expired or terminated. There was no need to address it in the Survival Clause.

The decision in *Peoples Trust Company v PSP Services Inc*., 2024 ONSC 2616 deals with competing applications for interlocutory mandatory injunctions by the parties.

As described by the chambers judge, Peoples Trust Company ("PTC") stands above PSP Services Inc. ("PSP") in the chain of commerce by which credit card companies, like Visa and Mastercard, allow retailers to access their credit granting services and payment settlement services. This structure is needed for customers of retailers to pay for goods and services with their credit cards. PTC is a bank that has the right to provide access to and settlement services on the Visa system and is said to be an "acquirer". Acquirers contract with "operators" who bring in and manage relations with retailers who want to be able to offer their customers the ability to pay for goods and services with a Visa brand credit card. PSP is an operator.

PTC was seeking an injunction requiring PSP to allow it to conduct an audit of PSP pursuant to the agreement between them. PSP contested PTC's right to audit because PSP had terminated the agreement and engaged a process described in the contract as "De-Conversion." The De-Conversion process was designed to bring about a controlled separation of the two businesses rather than a hard and potentially catastrophic shut down of PSP's customers' access to Visa.

In addressing the strong *prima facie* case element of the injunction test, PSP took the position that the audit right terminated when PSP terminated the contract. It pointed to a detailed survival clause in the contract and submitted that the parties had turned their minds to which parts of the contract survived termination and which did not. The audit right was not expressly referred to in the survival clause.

On interpreting the contract as a whole, Justice Myers rejected this argument:

> [30] This is not a valid legal argument, however. Article 10.6 of the agreement provides expressly that, "the terms and conditions of this Agreement shall apply during such De-Conversion period."
>
> [31] De-Conversion is only available after the agreement has been terminated. De-Conversion allows for a controlled separation of the businesses rather than a hard and potentially catastrophic shut down of PSP's customers' access to Visa.
>
> [32] By definition De-Conversion keeps the terms of the agreement alive despite termination. The provisions of the agreement allowing for ongoing credit granting

and settlement operations are not listed in the survival clause. Article 10.6 prevents the survival clause from kicking in immediately and shutting down ongoing credit granting and settlement services for PSP's retailers and their customers.

[33] The survival clause keeps some clauses alive after the parties are no longer carrying on active business together when the agreement is terminated without a De-Conversion. Where, as here, when PSP invokes a De-Conversion process, the survival clause is effective after the De-Conversion wind down period ends and article 10.6 no longer keeps all agreement terms operative.

[34] PSP invoked De-Conversion for good reason. It preserves [sic] going concern business operations and minimizes disruption to the parties, retailers, and the consuming retail public despite the termination [sic] fo the agreement between PTC and PSP.

[35] It is perfectly clear that the survival clause applies only after De-Conversion no longer keeps the terms of the whole agreement operative. This is not an implied term argument. This is not a contra preferentum or a fancy interpretive exercise. The plain words of the agreement are clear and precise. The full agreement remains applicable during De-Conversion.

Bottom line: The traditional use of the term "survival clause" is to describe a clause that expresses the intention of contracting parties that representations, warranties and covenants of the parties **not** merge on closing due to operation of the doctrine of merger.

While such clauses are often boilerplate, drafters should consider addressing explicitly:[33]

- ✓ Which representations, warranties and covenants are not to merge and are to continue in full force and effect;
- ✓ Whether to stipulate that all certificates, statements, declarations and documents delivered on closing also survive closing to preserve the parties' rights to rely on those items post-closing;
- ✓ The period of time post-closing the terms in question are intended to survive for and particulars of whether a claim in relation to the terms need only arise in the survival period or whether the party claiming must give notice or start a proceeding within the survival period; and
- ✓ Whether the given terms are intended to survive and be relied upon by a party notwithstanding investigations carried out by them.

Recent jurisprudence demonstrates that there can be confusion about the relationship of traditional survival clauses to the rights and obligations of contracting parties post-termination.

Parties may stipulate that certain rights and obligations survive termination in the clause in which such rights or obligations are described, in a termination clause, or within a traditional survival clause. Surviving termination is obviously a different outcome than surviving closing.

[33] See Cynthia L. Elderkin & Julia S. Shin Doi, *Behind and Beyond Boilerplate: Drafting Commercial Agreements*, 5th ed. (Toronto: Thomson Reuters, 2024) at §§9.22-9.24 for sample clauses and more discussion of desirable components for survival clauses.

Once again, careful and explicit drafting, keeping in mind that the contract will be interpreted as a whole, may avoid litigation in which a party alleges that because a specific right or obligation was not included in a "survival clause", the parties did not intend it to survive termination.

Update on Good Faith Duties in Contract Law

Each year I look for significant cases that expand upon the good faith duties articulated in the SCC trilogy.[34] This year, as in some prior years, the vast majority of lower court cases apply the principles from the trilogy to a given set of facts and the good faith duties alleged are either the duty of good faith performance or the duty to exercise contractual discretion in good faith.

As I have noted in prior updates, in *Bhasin v. Hrynew,* Justice Cromwell cited with approval a type of good faith duty identified by Professor McCamus, namely the duty to cooperate in order to achieve the objects of the contract. There have been very few cases in the past five years in which such a good faith duty has been asserted and considered by a court.[35]

But in 2024, there were two Ontario decisions that deal with the duty to cooperate in good faith.

Jones v. Quinn, 2024 ONCA 315, dealt with an agreement of private purchase and sale that contained a buyback provision. Ms. Jones transferred a 100-acre property to Mr. Quinn as a means of obtaining relief for her financial difficulties.

The buyback provision stated that "[w]ithin eight years of the date of purchase, Linda Jones may purchase the property back from Elwood Quinn" for an amount based on the specified formula provided in the provision. The agreement did not expressly set out the precise mechanism to trigger the buyback provision. The agreement also provided that Ms. Jones "may live on the property, having full use of it, for a period of eight years" at a specified rent which was not due to be paid unless she exercised the buyback provision.

While there was initial cooperation between the parties with regards to financing, maintaining and improving the property, the relationship deteriorated and Mr. Quinn's agent ("Franklin") took steps to remove Ms. Jones and her son from the property.

Throughout 2020 and 2021, Ms. Jones and her son made attempts to initiate a buyback process, which included them delivering an unconditional offer to purchase the property in the form of an Agreement of Purchase. The application judge found that Franklin thwarted this process in multiple ways. She found that Mr. Quinn had breached the buyback provision and that, in the alternative, Ms. Jones and her son had established a constructive trust. She ordered that Mr. Quinn permit Ms. Jones or an authorized party to repurchase the property in accordance with the buyback provision.

Mr. Quinn appealed, with his primary argument being that the buyback provision, properly characterized, was a unilateral option, not an agreement to agree as found by the application judge, and that once the respondents had invoked the provision, they were required to strictly comply with its terms, which they failed to do.

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[34] *Bhasin v. Hrynew*, 2014 SCC 71; *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45; *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7.
[35] Given my lack of expertise in civil law, I will not comment on the multiple SCC decisions dealing with good faith obligations of contracting parties under the *Civil Code of Québec*.

The Court of Appeal found that the buyback provision was indeed an option, but found that parties to an option are subject to the same good faith obligations as parties to other contracts.

The application judge found that the respondents did everything that could have been expected of them in the circumstances and that Franklin acted in a highly obstructionist manner. The Court of Appeal stated that Franklin failed to cooperate with the respondents to achieve the objects of the contract and sought to evade Mr. Quinn's contractual duties.

This finding then feeds the result that Mr. Quinn was not entitled to rescind the contract on the basis of the respondents' failure to make tender of the purchase price on the stipulated date. In this case, the plaintiffs were not seeking damages for breach of the duty to cooperate in good faith, but rather sought and obtained an order for specific performance, which the Court of Appeal confirmed.

In *Block Developments Inc. v. Brewers Retail Inc*., 2024 ONSC 1401, Block Developments Inc. ("Block") made an offer to purchase three Toronto properties that was accepted by Brewers Retail Inc. ("Brewers"). Two of the properties were "sale and lease back", which meant that interim and long-term leases had to be negotiated following entry into the Agreement of Purchase and Sale ("APS") for those properties. A condition in the APS reflected the requirement of such leases being finalized by a set date (the "Mutual Lease Condition"). The obligation of both parties to complete the transaction was condition upon satisfaction or waiver of the Mutual Lease Condition on or before a stipulated date.

On November 5, 2015, following negotiations for interim and long-term leases, and six days after the Mutual Lease Condition Date (October 29, 2015) had expired, Brewers unilaterally terminated the APS and sold the properties to another purchaser.

Block sued, seeking damages for breach of contract, breach of the obligation of good faith performance, misrepresentation and promissory estoppel.

The trial judge found that Brewers had made representations to Block on the Mutual Lease Condition Date that it would not rely upon its strict legal rights and the parties continued to negotiate the final lease agreements after that date, with their lawyers working over the weekend to attempt to finalize the leases. Unbeknownst to Block, behind the scenes, the Brewers Board had approved the sale of the properties to a third-party connected to one of the principals of Brewers. The judgment details the tactics engaged in by representatives of Brewers in the critical time frame of October 19 to November 5, 2015, which caused Block to believe that Brewers would not insist on its strict legal rights.

At times, the trial judge appears to situate a duty to cooperate in good faith within the duty of honest performance; at other times she treats them as distinct duties. At paragraph 143, she lists "breach of the duty of cooperation to fulfill the Mutual Lease Condition", as a distinct breach of the APS alleged by Block. At paragraph 226, she states that a party to a contract has a good faith duty of honest performance where the parties must cooperate to achieve the objects of the contract, which may include taking all reasonable steps to fulfil the contract. At paragraph 227, she frames a "duty to cooperate in fulfilling conditions", citing ***Dynamic Transport Ltd. v. OK Detailing Ltd*., [1978] 2 S.C.R. 1072,** which is the pre-trilogy case sometimes cited for a good faith duty of cooperation. At paragraph 238, she finds that Brewers failed to take reasonable steps to finalize the leases so that the Mutual Lease Condition could be satisfied, thus breaching its duty of cooperation to achieve the objects of the contract and that Brewers "also breached its obligation of honest performance."

In any event, she found at para. 231:

> I find these misrepresentations and Lucas' overall conduct to constitute bad faith business dealings as regards Block. I find that Brewers generally did not fulfil its duties to act honestly and in good faith, to cooperate to achieve the objects of the agreements, and to fulfil conditions in its dealings with Block.

She found Brewers liable for breach of its contractual obligations of good faith and for misrepresentation. She held that Brewers was estopped from relying on its strict legal rights in the APS on the basis of promissory estoppel. She awarded Block damages in the amount of $15.5 million.

A third decision out of Ontario, *1401380 Ontario Ltd. (c.o.b. Wilderness North Air) v. Wasaya Airways LP*, 2024 ONSC 4701, serves as an illustration of how a party with contractual discretion may be found to have breached the duty to exercise that discretion in good faith[36] despite the fact that the rationale behind the exercise of discretion was not self-serving, but arguably well intentioned.

Hydro One Remote Communities Inc. ("Remotes"), a subsidiary of Hydro One Inc., is required to provide electricity to isolated communities in Northern Ontario that are not connected to the grid. Most of those communities are First Nations communities. Remotes needed diesel fuel to operate diesel generating stations in these communities.

The plaintiff ("Wilderness"), was the successful proponent under an RFP issued by Remotes for the supply and delivery of diesel fuel by air to five remote First Nations communities (the "Primary Communities"). Wilderness was also the successful proponent as a secondary supplier of fuel to seven other communities (the "Secondary Communities") if the primary supplier was unable to deliver the fuel from time to time.

The defendant Wasya Airways LP ("Wasaya") bid on the RFP but was unsuccessful.

Wasaya is a limited partnership owned by twelve First Nations. As a result of Wasaya's failed bid, Band Councils passed resolutions confirming that the First Nations communities would not permit anyone other than Wasaya on their land for diesel fuel delivery purposes.

Subsequently, Remotes notified Wilderness that it would no longer be utilizing its services for four of the Primary Communities. Wasaya was awarded the contract for one of those communities and another entity in which some of the Nations held an interest, Cargo North, assumed responsibility for the other three communities. Cargo North was the original successful proponent to be the primary vendor for the Secondary Communities. After the Band Council Resolutions were passed, Cargo North released Remotes from any contractual obligation with respect to fuel delivery for those communities. When this happened, rather than issue Purchase Orders to Wilderness as secondary supplier, Remotes contracted with Wasaya, granting it exclusive delivery rights.

Wilderness sued Remotes, alleging breach of contract and Wasaya, alleging inducing breach of contract and unlawful interference with economic interests.

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[36] There is also a 2024 decision of the Ontario Court of Appeal on good faith exercise of discretion in a class action context: *Spina v. Shoppers Drug Mart Inc.*, 2024 ONCA 642. I do not have the space to review it here, but it is another useful illustration of how courts will determine the purpose of a clause granting discretion and whether the defendant exercised their discretion for that purpose.

In her reasons for judgment, Madam Justice Nieckarz considers both the duty of honest performance and the duty to exercise discretion in good faith.

She held that she could not find a breach of the duty of honest performance because there was no evidence that Remotes lied to or misled Wilderness.

She then considered a specific clause in the contract (s. 27) between Wilderness and Remotes that gave Remotes discretion to cancel purchase orders in certain circumstances (which Remotes relied upon, asserting that the Band Council Resolutions caused a change in circumstances requiring invocation of the clause). That clause stated in part:

> (a) The Purchaser shall have the right, which may be exercised at any time, and from time to time, to cancel any undelivered portion of the Work, without any costs, interest, or penalties to the Purchaser. Except to the extent any such cancellation arises in respect of any event of default by the Company, the Purchaser will pay the Company the amounts set out below, supported by any audit requested by the Purchaser (including an audit performed by the members of the Purchaser's internal audit staff): [list of items to be reimbursed].

Remotes also relied on another clause in the RFP stating that it was not precluded from soliciting or accepting bids, *etc*., from other companies.

Justice Nieckarz found that the purpose of s. 27 was to give Remotes sufficient operational flexibility to cancel purchase orders to deal with such things as changing fuel requirements and delivery mechanisms (winter road vs. air delivery) and that the purpose of the clause in the RFP was to allow Remotes to procure and transport fuel to the communities if there was an issue with the Primary and Secondary vendor such that they could not deliver the fuel. This allowed Remotes to meet its statutory obligation to ensure the communities had power.

She concluded (at para. 181):

> While Remotes' motives and conduct *vis-à-vis* the First Nations were honourable in wanting to respect the [Band Council Resolutions], Remotes exercised its contractual discretion under these provisions with a manner inconsistent with the purpose for which the discretion was granted. For reasons already set out in this decision, it was not reasonable contractual performance, in that the discretion referred to in paragraphs (a)-(c) was not exercised in a manner consistent with the purpose for which it was granted to substitute Wasaya and Cargo North as the primary vendors for the Primary Communities when Wilderness was capable of satisfying its contractual obligations.

Justice Nieckarz also detailed how the exercise of discretion constituted unreasonable conduct, noting in part:

> Remotes argues its actions were reasonable because of its statutory obligation under the *Electricity Act* to provide electricity. I have found that Wilderness was capable of delivering in accordance with the requirements of the Contract. Furthermore, while Remotes has a clear statutory duty, it also had a contractual obligation to Wilderness and a contractual duty of good faith.

Bottom line: Recent cases referencing the good faith duty to cooperate to achieve the objects of a contract illustrate the type of conduct that will be found to be a breach of that duty, including thwarting a buyback process initiated by a vendor under an agreement of purchase and sale and deliberate stalling in finalizing leases so that mutual conditions requiring such leases in place by a set date could be fulfilled.

An interesting case out of Ontario tells us that honourable motives for exercising a contractual discretion, in that case to respect the wishes of impacted third parties, will not be a good faith exercise of discretion when it is not consistent with the purpose for which the discretion was granted.

Forum Selection Clauses

I wrote on this topic at some length in my 2020 paper. In light of the jurisprudence in which courts were required to interpret a contract to determine whether the wording of a given clause was intended by the parties to select a named forum as exclusive or not, I urged readers to use the terms "exclusive" or "non-exclusive" as a means of avoiding litigation on the issue.[37]

A recent decision of the B.C. Court of Appeal corrects a puzzling distinction made by a B.C. Supreme Court Justice between the words "attorn" and "submit" in a forum selection clause.

In *Yegre EB Ltd. v. Seguin*, 2024 BCCA 365, the forum selection clause at issue read as follows:

> This Agreement shall be construed and enforced in accordance with the laws of the Province of Alberta and the laws of Canada applicable thereto and shall be treated in all respects as an Alberta contract. <u>The parties hereto hereby submit to the jurisdiction of the Alberta courts for all purposes arising in connection with this Agreement</u>.
>
> [Emphasis added.]

In a 1998 decision,[38] the Court of Appeal had determined that an analogous clause, which substituted the word "attorn" for "submit," was not an exclusive forum selection clause.

The chambers judge in *Yegre EB Ltd. v. Seguin*[39] distinguished the 1998 appeal decision based on the fact the clause in that case used the term "attorn" rather than "submit". After reviewing its 1998 decision and other relevant cases, the Court of Appeal held that the chambers judge committed an extricable error in law in interpreting the case law as recognizing a relevant distinction between the terms "attorn" and "submit" so as to lend weight to the respondent's submission that the forum selection clause granted exclusive jurisdiction to the Alberta courts.

The decision in *Savanta v. Hilditch*, 2022 ONCA 890, illustrates how despite agreeing to use the term "non-exclusive" in a forum selection clause, a party may subsequently regret that choice, and argue for a novel interpretation of that term.

The relevant portion of the forum selection clause in that case provided that any dispute contemplated by the agreement:

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[37] Note that the strong cause test, which usually results in the forum selection clause selecting a foreign jurisdiction being enforced by Canadian courts, only applies to exclusive forum selection clauses: *Hydro Aluminium Rolled Products GmbH v. MFC Bancorp Ltd.*, 2020 BCCA 295.
[38] *Old North State Brewing Co. Inc. v. Newlands Services Inc*. (1999), 58 B.C.L.R. (3d) 144 (C.A.).
[39] 2023 BCSC 1481.

> … must be brought in any state or federal court of competent jurisdiction in the Commonwealth of Massachusetts, and each Party irrevocably submits and agrees to attorn to the <u>non-exclusive</u> jurisdiction of <u>such court</u>. [Emphasis added.]

The plaintiff argued that the clause conferred ***exclusive*** jurisdiction on Massachusetts because the phrase "non-exclusive jurisdiction of such court" meant non-exclusive as between state and federal courts in Massachusetts. The chambers judge rejected this argument and the Court of Appeal concurred with that ruling.

Another issue that can arise in complex agreements is the interaction between a clause mandating arbitration for particularized categories of disputes and an exclusive forum selection clause.

The interaction between such clauses is important: the drafting should make it abundantly clear which categories of disputes are to be arbitrated and therefore carved out of the forum selection clause.

A second issue that can arise is the effect of an exclusive forum selection clause on applications to set aside (or appeal) arbitration awards made under arbitration clauses in the same agreement.

In *Tehama Group Inc. v. Pythian Services Inc*., 2024 ONSC 1819, the asset purchase agreement in question contained an exclusive forum selection clause under which the parties agreed to the exclusive jurisdiction of the courts of New York for the purposes of any suit, action or other proceeding arising out of the agreement (s. 7.08). The agreement contained a choice of law provision that made New York law applicable.

The agreement also contained arbitration clauses to deal with particular accounting matters (ss. 1.07 and 1.08).

Section 1.07 dealt with disputes over certain purchase price closing adjustments. Section 1.08 dealt with disputes over a $10 million earnout payment to Tehama Group Inc. ("Tehama") if the business generated a certain amount of earnings in 2021. Section 1.08 provided that the dispute resolution procedures set out in s. 1.07 applied "*mutatis mutandis*" to the earnout dispute. The arbitrator stipulated by the parties in s. 1.07 was "the Toronto office of PricewaterhouseCoopers LLP."

Section 7.08 contained an express carve-out of disputes <u>under s. 1.07</u> that were required to be decided by the accounting firm.

When the parties could not agree if the relevant threshold had been met in relation to the earnout, the matter was referred to arbitration. The 2023 award of PricewaterhouseCoopers LLP ("PwC") denied Tehama's claim for the earnout payment. Tehama brought an application in the Ontario Superior Court pursuant to Article 34 of the *Model Law on International Commercial Arbitration* (the "*Model Law*"), set out in Sched. 2 to the *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Sched. 5, to set aside the arbitral award, primarily on procedural fairness grounds. Pythian Services Inc. ("Pythian") brought an application for a stay in this Ontario proceeding.

Pythian then commenced an anti-suit injunction application in New York while Tehama brought a motion in the New York proceeding for a stay of Pythian's application and any enforcement proceedings pending the outcome of the Ontario application.

Pythian's argument on the stay application in the Ontario court was threefold:[40]

- On a motion for a stay of proceedings based on an exclusive forum selection clause, the parties ought to be held to their bargain, particularly in the context of international commercial contracts where certainty and security are of paramount importance. Strong cause or exceptional circumstances must be shown in order for a forum selection clause not to be enforced.
- While acknowledging the carve-out from the forum selection clause of any dispute under s. 1.07 required to be decided by PwC, Pythian argued that this dispute was not under the purchase price adjustment provisions of s. 1.07, but was rather a contingent payment dispute under s. 1.08.
- In the alternative, Pythian argued that the *International Commercial Arbitration Act* and the *Model Law* could only apply to oust the forum selection clause if Toronto, Ontario, was the place of arbitration, which it was not.

The Court rejected the proposition that disputes under s. 1.08 were not captured by the carve-out in s. 7.08 (the forum selection clause), noting that this argument ignored the incorporation by reference in s. 1.08 of the dispute resolution procedures in s. 1.07, and described Pythian's argument on this point as "formalistic in the extreme."

The Court gave more in-depth consideration to the argument based on the provisions of the *International Commercial Arbitration Act* and the *Model Law*.

Article 1(2) of the *Model Law* provides (with certain exceptions not relevant here) that the provisions of the *Model Law* apply only if the "place of arbitration is in the territory of" the given State adopting the *Model Law* (in this case, Ontario).

Under Article 20, where the parties do not agree on the place (seat) of arbitration, it shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

Justice Penny reminds us that:

- The choice of "place" of an arbitration is not a geographical choice as much as a legal choice.
- The choice of place determines the arbitral law applicable to the arbitration.
- The law of the arbitration is separate and distinct from the substantive law of the contract. The former includes the setting aside of the award and court intervention in the arbitration process generally.

Recourse to a court under Article 34 of the *Model Law* may only be made by an application to set aside.

The agreement did not expressly select a place of arbitration and the issue was not addressed during the arbitration hearing.

It was conceded that the award was made in Toronto. The submissions in the arbitration were directed to an accountant at PwC's Toronto office and the award was rendered on PwC Toronto letterhead. The retainer letter of PwC, signed by both parties, contained a choice of law clause,

[40] Pythian also invoked the doctrine of *forum non conveniens*, which I will not deal with here.

selecting the law of Ontario. Given these factors, the Court found that the place of arbitration was Ontario.

Justice Penny concluded as follows:

> [44] Pythian relies heavily on the commercial goals of certainty and security in international contracting. It submits that the parties agreed to New York as the forum and law governing all suits, actions and other proceedings arising out of the APA. Tehama, it says, should be held to its bargain and be required to litigate its concerns with the Award in New York, not in Ontario.
>
> [45] Certainty and security are indeed important goals in international commercial contract-making. But it was a purpose of the *Model Law* to advance and enhance these purposes. As the Explanatory Notes of the UNCITRAL secretariat (at p. 26) state:
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>> The territorial criterion governing most of the Model Law was adopted for the sake of certainty…In addition to the law governing the arbitral procedure, the territorial criterion is of considerable practical importance in respect of articles 11, 13, 14, 16, 27 and 34, which entrust State courts at the place of arbitration with functions of supervision and assistance to arbitration.
>
> [46] The parties chose Toronto as the place of arbitration for all disputes arising out of purchase price adjustments (under s. 1.07) and the contingent payment (s. 1.08). These disputes are specifically excepted from the choice of forum provisions of s. 7.08. Having chosen Toronto as the place of the arbitration, the *Model Law* applies. Any application to set aside the Award must be made to the Ontario Superior Court of Justice.
>
> [47] Tehama is not seeking to avoid the consequences of its bargain by bringing its challenge to the Award in Ontario. It is required to do so. This is what the parties agreed to. It is Pythian which is seeking to avoid the consequences of that bargain.[41]

Bottom line: Contract drafters need to ensure that their clients understand the differences between exclusive and non-exclusive forum selection clauses, and the advantages and disadvantages of each, before inserting a boilerplate forum selection clause.

Language from U.S. precedents seems to have migrated into some Canadian agreements. Such precedents characterize the parties as "submitting" or "attorning" to the jurisdiction of a particular court or courts. When paired with other language such as "for all purposes" a clause adopting this language will likely be interpreted as exclusive but why leave any doubt?

The best way to indicate the client's choice is by using the words "exclusive" or "non-exclusive".

Recent appellate authority in B.C. has confirmed that "submitting" and "attorning" are synonyms when used in a forum selection clause (and overruled trial level authority to the contrary).

[41] For a discussion of this case by arbitration counsel, see W. Brad Hanna, "Potentially Conflicting Arbitration and Forum Selection Clauses in Commercial Agreements" (2024) 13 C.L.A.R. 29.

Where a commercial contract contains an exclusive forum selection clause and choice of law clause, but also carve-outs for particular issues to be resolved by arbitration, the drafter needs to be alive to disputes about how those clauses interact when there is an application to set aside an arbitration award made under one of the carve-outs. Ideally, the seat or place of arbitration should be explicit because it determines the law that applies to the arbitration, including the process for setting aside arbitral awards. This, of course, may be a different jurisdiction than the one set out in the exclusive forum selection clause and choice of law clause.

Privity of Contract and Arbitration Clauses

An issue that arises quite frequently in the jurisprudence is whether third parties are bound by arbitration clauses contained in a contract to which they are not a signatory.

In 2024, the Alberta Court of Appeal had the opportunity to review the existing case law on this issue.

Husky Oil Operations Limited v. Technip Stone & Webster Process Technology Inc., 2024 ABCA 369, involved breach of warranty and negligent manufacture claims by Husky Oil Operations Limited ("Husky") against two related entities that are equipment suppliers ("Technip"). The contract contained a dispute resolution clause that culminated in mandatory arbitration between Technip and a contractor ("Saipem") which Husky had retained for the engineering, procurement and construction of a steam-assisted gravity drainage oil sands project northeast of Fort McMurray. Husky was not party to that contract.

The contract between Technip and Saipem provided expressly (in Clause PC9) that all warranties given by Technip were for both the benefit of Saipem and Husky and that the warranties could be enforced by Saipem or by Husky through Saipem.

Technip manufactured and supplied the steam generator modules for the project. In October 2015, Husky discovered what it alleged were defects in the modules, rendering them unsafe and unfit for their intended use. In December 2015, Husky provided details of the alleged warranty issues and, in April 2016, sent a letter in which it submitted a "formal warranty claim."

In December 2017, when Husky served an amended statement of claim on Technip (it never served the original), it indicated that it did not require a formal response at that time. The parties held discussions. In October 2020, Husky required Technip to file a defence. Technip then raised, for the first time, the dispute resolution provisions in the contract and took the position that the dispute had to be resolved by arbitration. Technip asserted that Husky could not take the benefit of the contractual warranty without taking the corresponding obligations and burdens, including the requirement to arbitrate. It also asserted that Husky was out of time to invoke arbitration and was therefore without a remedy.

Since the language used in the two clauses that mandated arbitration was important to the Court's analysis, I will reproduce them here:

> PC 13.7: GENERAL TERMS AND CONDITIONS FOR PURCHASE ORDER DOCUMENTS - HIGH COMPLEXITY - GTC-COR-MATE-001-E Rev 05 shall be referred to and finally resolved by arbitration under the rules of the International Chamber of Commerce in accordance with the Arbitration Act of Alberta (the "Act").

PC 13.8: All disputes arising out of or in connection with the present PURCHASE ORDER shall be finally settled under the Rules or Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

The governing law shall be the laws of the Province of Alberta and the federal laws of Canada applicable therein, and the location of the arbitration shall be Calgary, Alberta, Canada.

The matter was first heard by an application judge, who held that Husky was not bound to arbitrate under PC 13 of the contract. He noted that the contract did not expressly state that Husky was required to pursue its warranty claims by arbitration and that Husky was not a party to the contract. He concluded PC 13.8 could not be used to impose mandatory arbitration on Husky in the circumstances.

Technip appealed to a chambers judge. The chambers judge interpreted the dispute resolution provisions differently. In his view, the debate between the parties distilled to the nature of the rights conferred by the contract on Technip – were the warranty rights free standing, not subject to limitations and conditions; or were they qualified or limited, such that they could only be enforced by arbitration? He came down in favour of the latter interpretation: while some of the dispute resolution provisions applied only to "disputes between the PARTIES", the parties departed from this formulation for the final clause in PC 13.2 and in PC 13.8, referring broadly to "all disputes". He reasoned that the wider scope of "all disputes" was intended to capture disputes arising from the appellant enforcing its rights. Husky appealed to the Court of Appeal.

The two issues that the Court of Appeal focused on as determinative of the appeal were whether the chambers judge erred in finding that the arbitration provision in the contract applied to Husky and in determining that it agreed to arbitrate its warranty claims.

The Court of Appeal reviewed circumstances in which a non-party to a contract may become bound by an arbitration agreement contained therein:[42]

- An entity connected with a signatory to a contract containing an arbitration agreement may become bound as a "party" by operation of law. However, the SCC ruling *in Peace River Hydro Partners v. Petrowest Corp*., 2022 SCC 41, confirmed that all non-signatories, whether they are agents, trustees in bankruptcy, receivers, or assignees may claim only through or under a signatory, upon stepping into its contractual shoes.
- The doctrine of privity may be relaxed where non-parties seek to rely on contractual provisions made for their benefit (the so-called "principled exception" to privity). For a court to relax the doctrine on given facts, the two-part analysis from *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd*., [1999] 3 S.C.R. 108, has to be undertaken.[43]

[42] Some other circumstances where a non-signatory may be subject to an arbitration agreement are listed in J. Kenneth McEwan and Ludmila B. Herbst, *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations*, looseleaf (Scarborough: Carswell, 2004--) at §2.31 as including:
the contractual agreement between a party and the non-party incorporates the arbitration clause by reference; the corporate relationship between a parent and its subsidiary may be sufficiently close as to justify piercing the corporate veil and holding one corporation legally accountable for the actions of the other; and a non-party is bound by estoppel. As the authors of this text note, the wording of the applicable arbitration statute must be considered.
[43] At para. 32 of that case: (a) Did the parties to the contract intend to extend the benefit in question to the third party seeking to rely on the contractual provision? and (b) Are the activities performed by the third party seeking to rely on the contractual provision the very activities contemplated as coming within the scope of the contract in general, or the provision in particular, again as determined by reference to the intentions of the parties?

In the case before it, Husky was not making the warranty claim on the basis it was stepping into the contractual shoes of Saipem.

The Alberta Court of Appeal dealt with Technip's position on the principled exception to privity as follows:

> [29] Here, the respondents do not argue the principled exception to privity imposes a free-standing obligation on the appellant. Instead, they argue the warranty conferred on the appellant under the contract by virtue of the principled exception to privity was intended by the contracting parties to be subject to the requirement to arbitrate. This is a nuanced distinction that calls for significant caution.
>
> [30] As the parties have pointed out, there is no authority directly determining whether or not contracting parties can contractually bind a true non-party to arbitration. The decision of the Federal Court of Appeal in *T Co Metals* comes closest. It considered whether the benefit conferred by the contracting parties in that case was "a qualified benefit in the sense that [it] could only be invoked through arbitration proceedings". However, it held that on a proper construction the contract did not require that. For the purposes of this appeal, we need not decide whether imposing an obligation to arbitrate, absent the advance consent of the affected party, is possible.
>
> [31] If it is possible to do so, the requirement to arbitrate must be manifest. It must be expressed in clear and explicit language. Relying only on the principles of contract interpretation to find the obligation is not enough. That is because contract interpretation considers in part "circumstances known to the parties at the time of formation of the contract" and determines "the intent of the parties and the scope of their understanding" (*Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at para 47), whereas non-parties will not be aware of those circumstances, intentions and understandings.
>
> [32] If the obligation to arbitrate is not clear and explicit, the non-party may choose litigation to enforce the benefit they have been conferred without realizing the contracting parties intended mandatory arbitration. By the time the contracting party raises the obligation to arbitrate, it may be too late for the non-party to change tracks.
>
> [33] That is what the appellant says happened here. There is no evidence before us to suggest the appellant was involved with the negotiations leading to the formation of the contract, or that it had any knowledge of the intentions of the contracting parties or their understanding.
>
> [34] The chambers judge failed to consider the importance of mutual consent and the unique difficulties that arise when contracting parties attempt to impose an obligation on a non-party. In this case, the effect would be to restrict a non-party's access to the courts. His conclusion that the appellant was required to arbitrate turned on his determination of the "correct interpretation" of the contract (*Chambers Decision* at paras 13, 26), but was not supported by clear and explicit wording. Although he stated the "requirement for clearly-expressed benefit-limiting or benefit-availability terms" was met (*Chambers Decision* at para 49), he was referring to a different requirement expressed in *Fraser River* in the context of

contracts of insurance. He did not apply the required threshold for assessing the asserted arbitration obligation in this case. Therefore, even if it is possible for arbitration to be imposed on a non-party beneficiary as argued by the respondents, the trial judge erred in his approach.

> [35] The requirement to arbitrate in this case was not manifest. It was not expressed in clear and explicit language. As this litigation has shown, competing interpretations were reasonably available on the face of the contract. Under one interpretation, the appellant was bound to arbitrate. Under the other, it would not be able to compel arbitration even if it had wanted to. The appellant proceeded on the basis of the latter interpretation and the respondents responded with the former. Their positions could easily have been reversed. Had the appellant proceeded by way of referral to arbitration, the respondents could have argued it was required to litigate and that it was out of time to do so. Ultimately, we agree with the applications judge that the contract did not contain "express clear provisions directly on point". It did "not expressly state that Husky must pursue the warranty claim by arbitration". That is the type of clear language that was, at minimum, required before the appellant could be deprived of its ability to access the courts.

I will not attempt here to discuss and rationalize the case law in which various theories have been adopted by courts to justify a third party being bound by or being able to invoke an arbitration agreement. As noted in footnote 43, texts on arbitration outline the various theories arising from the case law. In a compendious 2021 article, [44] Gerald Ghikas, KC states the following:[45]

> Mutual consent is the foundation of an enforceable arbitration agreement…
>
> Various theories have, however, been invoked in relation to both international and non-international arbitration agreements to allow enforcement by and against non-signatories. Some theories are consistent with the requirement for mutual consent, but others are not. Some theories are founded on principles recognizable under Canadian laws—theories of contract law, such as assignment and assumption or incorporation by reference, or theories of agency law. Some, such as alter ego, estoppel, and third-party beneficiary theories, sound familiar to a Canadian ear, but their applicability in an arbitral context requires careful consideration. Other theories, however, seem untethered to the law. They appear designed to avoid a multiplicity of proceedings or to promote notions of "fairness".

As the author points out,[46] there are three scenarios in which non-signatory issues arise in an arbitration: (1) a claimant who is a signatory to an arbitration agreement wishes to enforce the arbitration agreement against an unwilling non-signatory respondent; (2) a defendant who is a non-signatory wishes to enforce an arbitration agreement against an unwilling signatory plaintiff; or (3) a claimant who is a non-signatory to an arbitration agreement wishes to enforce the arbitration agreement against an unwilling signatory respondent.

[44] Gerald W. Ghikas, KC, "Consent to Arbitration, Party Autonomy, and Non-Signatories, A Review of Procedural, Analytical and Substantive Approaches under Canadian Laws", 2021 CanLIIDocs 13816.
[45] At pp. 1-2.
[46] At p. 3.

Different principles may apply to each scenario.[47] Courts may be more inclined to permit a non-party to enforce a provision to pursue rights under a contract under the principled exception than to find that a non-party is bound by obligations.

Bottom line: The question of when and how third parties (non-signatories) may either be bound by or be entitled to enforce an arbitration agreement is a burgeoning and developing area of jurisprudence and commentary. In 2024, the Alberta Court of Appeal considered whether the fact that warranties in a contract were stated to be for the benefit of both a contracting party and a non-contracting party meant that the latter was bound by the arbitration clause contained in the agreement. The Court held that even if it was possible to contractual bind a true non-party to a contract (which it did not decide), such a requirement would have to be manifest, and expressed in clear and explicit language.

[47] For a recent case considering scenario #2, see *Porter Airlines Inc. v. Nieuport Aviation Infrastructure Partners GP*, 2022 ONSC 5922. I discussed that case, and the principled exception to privity more generally, in my 2023 paper.

Contract Law Developments of Note Summary of Topics

Headings	2023	2022	2021	2020	2019	2018	2017	2016	2015	2014
Links to Contract Law Paper by Year	Link	Link	Link	Link	Link	Link	Link	Link	Link	Link
Acceptance by Conduct										
Anti-oral Amendment Clauses								X		
Arbitration Clauses		X				X	X			X
Automatic Renew Clauses									X	
Best Efforts Clauses		X								
Binding Effect and Enurement Clauses										
Buy/Sell Clauses										
Conditions Precedent										
Confidentiality Clauses								X		
Consideration in the Context of Contract Variations						X				
Constitutions/bylaws of voluntary associations as contracts		X								
Continuing Breach of Contract								X	X	
Continuing Interpretation					X			X		X
Contract Termination										

Contract Law Developments of Note Summary of Topics

Headings	2023	2022	2021	2020	2019	2018	2017	2016	2015	2014
Contracting with First Nations under the *Indian Act*										
Contracts with government		X								
Contractual References to Legislative Provisions						X				
Discretionary Powers								X		
Duties of Good Faith (see supplements)	X	X	X	X				X	X	X
Efficient breach										X
Economic Duress										
Electronic Transactions										
Entire Agreement Clauses					X					X
Equitable Mistake										
Exculpatory Clauses and Limitation of						X			X	X
Forum Selection Clauses				X		X	X			X
Frustration and *Force*						X				
Fundamental Breach										
Illegal Contracts										

Contract Law Developments of Note Summary of Topics

Headings	2023	2022	2021	2020	2019	2018	2017	2016	2015	2014
Implied Terms and Implied Contracts					X			X		
Inconsistent Terms				X						
Indemnity Clauses					X					
Liquidated Damages										
Mistake				X						
Mitigation										
No Suit Clauses							X			
"No Waiver" Clauses			X							
Nomincal Consideration					X					
Non est Factum			X							
Offer and Acceptance	X									
Options								X		
Ordinary course of business covenants		X								
Penalty Clauses								X		
Perpetual Contracts			X							
Pre-Incorporation Contracts			X							

Contract Law Developments of Note Summary of Topics

Headings	2023	2022	2021	2020	2019	2018	2017	2016	2015	2014
Privity of Contract	X									
Rectification		X		X			X			
Releases			X				X			
Rescission		X								
Rights of First Refusal								X		
Restrictive covenants										X
Severability	X				X					
Shotgun (buy-sell) Clauses	X									
Smart Contracts						X	X		X	X
Specific Performance										
Standard of Review on Contract Interpretation Issues								X		X
Statutory Illegality										
Statutory Warranties Under the *International Sale of Goods Act*					X					
Stipulated-Consequence-on-Insolvency Clauses				X						
Time of the Essence Clauses										
Unconscionability			X	X	X				X	X

We hope that the information in this Contract Law update is helpful and we look forward to speaking with you.

Please reach out to Lisa A. Peters, KC if you have any questions or require further information.

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