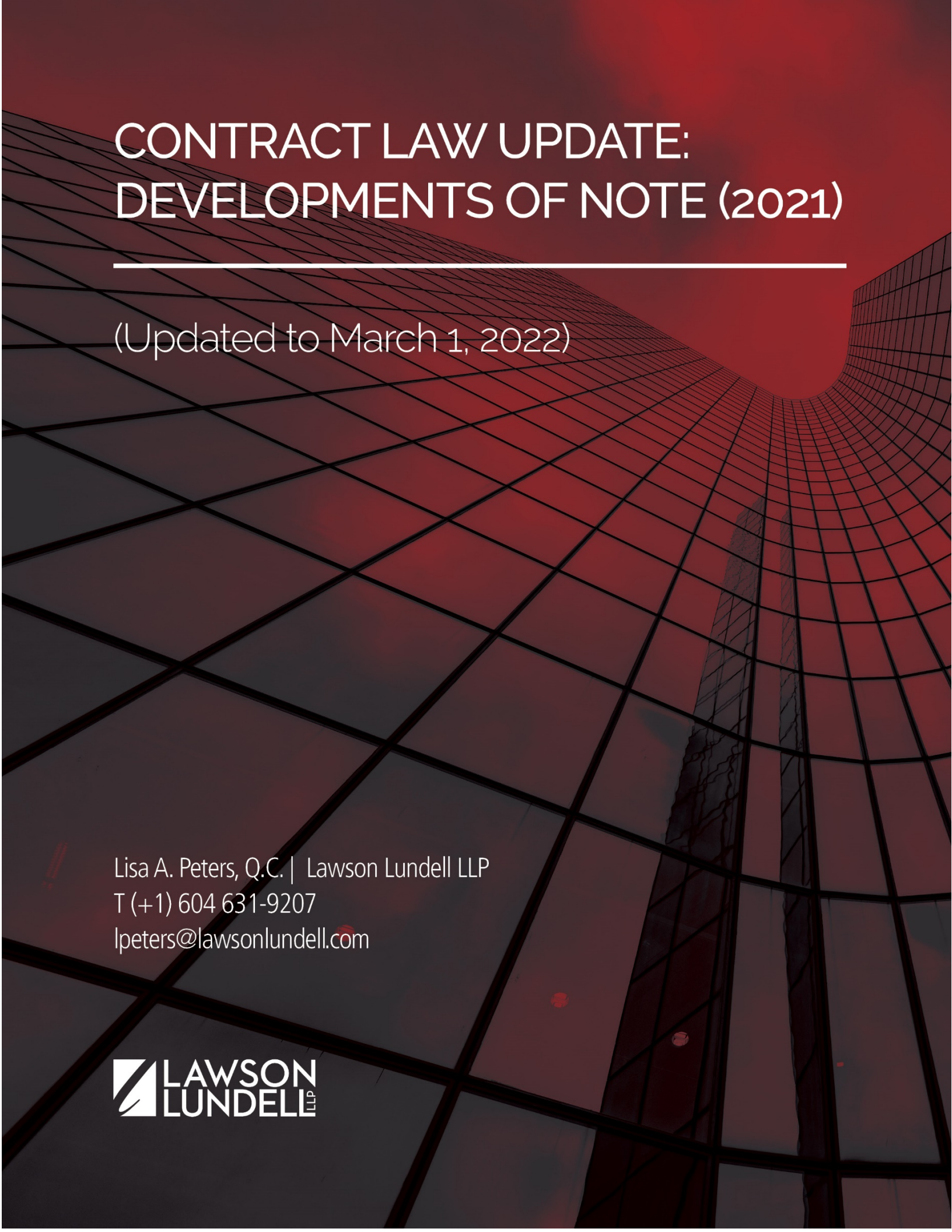

CONTRACT LAW UPDATE: DEVELOPMENTS OF NOTE (2021)

(Updated to March 1, 2022)

Lisa A. Peters, Q.C. | Lawson Lundell LLP
T (+1) 604 631-9207
lpeters@lawsonlundell.com

LAWSON LUNDELL LLP

CONTRACT LAW UPDATE: DEVELOPMENTS OF NOTE (2021)

Updated to March 1, 2022

Lisa A. Peters, Q.C.

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 (and this year is no different), I will also highlight cases that remind us of longstanding contract law principles and that illustrate how those principles apply in practice.

At the end of this paper is a chart that tracks the topics I have covered over the past decade.

This year's topics are:

- Pre-incorporation contracts outside the remedial provisions of business corporations statutes;
- Interpreting releases – the SCC puts the final stake through the *Blackmore* rule;
- Perpetual contracts vs. contracts for an indefinite term terminable on reasonable notice;
- Unconscionability post-*Uber Technologies Inc. v. Heller*;
- *Non est factum* – a reminder of its limitations as a defence;
- This year's boilerplate – "no waiver" clauses;
- Good faith duties in contract law – what's new in 2021?; and
- Update on implied contracts.

[1] I would like to acknowledge the work of Jillian Epp, a University of Ottawa law student, who did her summer articles at Lawson Lundell in 2021, and who diligently reviewed cases and articles to assist me in mapping out this year's topics.

Pre-incorporation Contracts not Governed by Statute

Way back in 2010, I wrote about pre-incorporation contracts in the context of express remedial provisions found in business corporations statutes.

Virtually every common law jurisdiction in Canada has included provisions governing pre-incorporation contracts in its *Business Corporations Act* (or equivalent).

Generally, Canadian company legislation provides that a business corporation may adopt a pre-incorporation contract by any act or conduct signifying its intention to be bound. This is to be contrasted with the common law approach, where a corporation is not bound by a pre-incorporation contract and must enter into a distinct post-incorporation contract on the same terms.

But of course, not all companies or corporations are governed by a jurisdiction's *Business Corporations Act*. Some are established under standalone Acts and the *Business Corporations Act* is expressly stated not to apply to them. And there are entities such as societies (not-for profit corporations) and cooperatives that are governed by different legislation.

The starting place when assessing the enforceability of pre-incorporation contracts, therefore, is to consult the relevant statute to see if the issue is expressly dealt with there. If not, you will have to revert to common law principles.

The SCC clarified the principles applying to the treatment of pre-incorporation contracts at common law in *Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corporation*, 2020 SCC 29. There are no provisions dealing with pre-incorporation contracts in B.C.'s *Strata Property Act,*[2] and the *Business Corporations Act*[3] does not apply to a strata corporation,[4] so the common law applied to the question of whether the plaintiff strata corporation was bound by such a contract.

In this case, an air space parcel agreement ("ASP Agreement") was entered into by a developer and the City of Burnaby. The developer was developing a large multi-use development with various air space parcels; one such parcel was to contain an office tower and another a parking facility.

[2] S.B.C. 1998, c. 43.
[3] S.B.C. 2002, c. 57.
[4] Per s. 291(1) of the *Strata Property Act,* provisions of the *Business Corporations Act* do not apply to strata corporations unless the *Strata Property Act* specifically so provides.

The ASP Agreement contained the following relevant terms:

- The owner of the parking facility was obligated to provide the owners of the other air space parcels with parking and access rights in exchange for an annual fee, payable monthly (the "Fees"). The ASP Agreement allocated 78 parking spaces to the owner(s) of the office tower parcel.

- Upon subdivision of any of the air space parcels by a strata plan, the strata corporation created would be entitled to give all permissions and consents permitted to be given by the owners of the subdivided parcel (strata lot owners).

- The strata corporation would be responsible for payment of the Fees as well as administering the parking rights of the strata lot owners.

- Once the owner of the parking facility had recouped the capital costs of construction of the facility, the Fees would be significantly reduced.

- Also upon subdivision of an air space parcel by a strata plan, the strata corporation was to enter into an assumption agreement with the owners of the other air space parcels so as to assume obligations under the ASP Agreement.

The ASP Agreement was registered on title to the air space parcels as an easement prior to the incorporation of the plaintiff strata corporation ("Strata Co.").

The strata plan that created Strata Co. in May 1999 created 68 lots in the office tower in one of the air space parcels. Strata Co. never entered into an assumption agreement under which it assumed the relevant obligations under the ASP Agreement.

While the developer was the original owner of the air space parcel on which the parking facility was located, it sold that parcel to the defendant ("CSPC") and CSPC took an assignment of the developer's rights under the ASP Agreement.

Until 2012 when the dispute arose, the Strata Co.'s members parked in the parking facility and it paid the Fees contemplated by the ASP Agreement. When the dispute arose, CSPC revoked the parking privileges of Strata Co.'s members.

By way of a claim by Strata Co. and a counterclaim by CSPC, the issue of the status of the ASP Agreement (as binding on Strata Co. or not) and of whether the Strata Co.

assented to a subsequent (post-incorporation) agreement on the same terms was raised.[5]

The trial judge found that Strata Co.'s conduct did not evince an intention to enter into a post-incorporation agreement on the same terms as the ASP Agreement: while the members of Strata Co. had parked in the facility and Strata Co. paid the Fees, they did so under the mistaken belief that they were already bound by the ASP Agreement. That outcome was reversed on appeal. The British Columbia Court of Appeal ("BCCA") held that Strata Co.'s subjective misunderstanding that it was bound by the pre-incorporation contract was irrelevant to the determination of whether the parties had objectively manifested an intention to be bound by a post-incorporation contract on the same terms.

The SCC confirmed that a corporation, at common law, is not bound by a pre-incorporation contract: it is incapable of ratifying or adopting a pre-incorporation contract, because a person cannot ratify or adopt a contract if they were not in a condition to be bound by it at the time it was made. However, a corporation may, after coming into existence, enter into a new contract on the same terms as those of the pre-incorporation contract.

There was some divergence in the law on the analytical approach to be taken in determining when a corporation has entered into a post-incorporation contract, including the role of the intention of the parties. The SCC endorsed an objective approach, under which the conduct of the parties and the surrounding circumstances must be considered in order to determine whether the parties manifested, from an objective perspective, an intention to enter into a post-incorporation contract on the same terms as the pre-incorporation contract. It tracked the common law's long adherence to an objective theory of contract formation and stated that the offer, acceptance, consideration and terms of the contract may be inferred from the parties' conduct and from the surrounding circumstances.

The SCC rejected a line of authorities under which courts considered whether the corporation's post-incorporation conduct was animated by an erroneous opinion that the corporation was bound by the pre-incorporation contract (and if it was,

[5] The SCC also considered, and rejected, an argument by Strata Co. that because courts will not enforce the burden of a positive covenant as if it ran with the land, it should not enforce a post-incorporation agreement in these circumstances. It concluded that the enforcement of a contractual right against a party to the contract is not to be equated with the enforcement of a real covenant against a subsequent purchaser and that an otherwise valid and effective post-incorporation contract is not unenforceable simply because its terms affect interests in land. The Court noted that privity of contract has always served as a means by which landowners may bypass the operation of the general rule that positive covenants do not run with the land.

there was no valid post-incorporation contract). The Court noted that misunderstandings, errors and other irregularities arising during the contract formation process would generally be addressed through the doctrines of mistake, misrepresentation, *non est factum* and unconscionability, as well as through the remedies of rescission and rectification. It indicated that the objective intentions of the original parties to the pre-incorporation contract may be relevant insofar as the pre-incorporation contract prescribes certain benefits and burdens for a soon-to-be-incorporated entity, as that will assist the court in interpreting how a reasonable person would have perceived the parties' post-incorporation conduct.

After outlining the principles applicable to pre-incorporation contracts at common law, the SCC first considered whether those principles were ousted by the *Strata Property Act*. It held that they were not, noting the following:

- Strata corporations were given the power and capacity of a natural person and a natural person is capable of entering into a contract by way of objective conduct that signifies their intention to be bound.

- The Legislature is presumed not to have intended to alter or extinguish common law rules.

The SCC rejected, in turn, various arguments made by Strata Co. as to why allowing a strata corporation to be bound to a contract by conduct would be inconsistent with the governance scheme of the *Strata Property Act* and would lead to self-serving and unscrupulous conduct by developers.

The SCC concluded that Strata Co. manifested an intention, by way of objective conduct, to be bound by a post-incorporation contract after CSPC purchased the parking facility. CSPC manifested an intention to offer Strata Co. a contract on the terms of the ASP Agreement by making valid parking passes available to Strata Co.'s members and maintaining the facility. Strata Co. objectively manifested an intention to accept CSPC's offer by paying the fees, after which the members exercised the rights corresponding to those payments.

Bottom line: When assessing whether a corporation (or similar entity) is bound by a pre-incorporation contract, the starting place is the statute under which the corporation was formed. While most *Business Corporations Acts* contain provisions under which the corporation can adopt a pre-incorporation contract once formed, other types of statutes providing for the formation of legal entities may not contain an equivalent regime. Absent a statutory regime on the topic, common law principles apply (unless the statute under which the corporation was formed

explicitly ousts the common law on this issue). At common law, a corporation cannot be bound by a pre-incorporation contract but may, on the application of an objective test for contract formation, be found to have manifested its intention to enter into a post-incorporation contract on the same terms.

SCC Weighs in on the Interpretation of Releases

In my 2017 update, I noted what I saw as a shift away from what has been called the *Blackmore* rule,[6] an interpretative principle applying specifically to releases, whereby releases are to be construed narrowly so that they are limited to that thing or things that were specifically in the contemplation of the parties at the time the release was given.

As applied, this principle put an onus on a party seeking to cover an unknown or not-yet- arising claim at the time of the release's execution to use very explicit language to achieve that result.

In light of the SCC's decision in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 ("*Sattva*"), it was unclear whether the *Blackmore* rule was still relevant.

The SCC addressed this issue head on in *Corner Brook (City) v. Bailey*, 2021 SCC 29.

In 2009, while driving her husband's car, Mrs. Bailey hit a City employee who was performing roadwork ("Temple"). Temple sued Mrs. Bailey. Mr. and Mrs. Bailey sued the City in a separate action for property damage to the car and injury suffered by Mrs. Bailey.

The Baileys settled their action against the City in 2011, and executed a release containing the following language:

> . . . the [Baileys], on behalf of themselves and their heirs, dependents, executors, administrators, successors, assigns, and legal and personal representatives, hereby release and forever discharge the [City, its] servants, agents, officers, directors, managers, employees, their associated, affiliated and subsidiary legal entities and their legal successors and assigns, both jointly and severally, from all actions, suits, causes of action, debts, dues, accounts, benefits, bonds, covenants, contracts, costs, claims and demands whatsoever, including all claims for compensation, loss of use, loss of time, loss of wages, expenses, disability, past, present or future, and any

[6] Referring to the decision in *London and South Western Railway v. Blackmore* (1870), L.R. 4 H.L. 610.

> aggravation, foreseen or unforeseen, as well as for injuries presently undisclosed and all demands and claims of any kind or nature whatsoever arising out of or relating to the accident which occurred on or about March 3, 2009, and without limiting the generality of the foregoing from all claims raised or which could have been raised in the [Bailey Action] . . . [Emphasis added by SCC]

Temple's lawsuit continued and in 2016, Mrs. Bailey commenced a third party claim against the City in that action, seeking contribution and indemnity. The City brought a summary trial application, taking the position that the release executed by the Baileys barred the third party claim. Mrs. Bailey's position, based on the *Blackmore* rule, was that because the third party claim was not specifically contemplated by the City and the Baileys when they signed the release in 2011, the release did not apply to bar the third party claim.

The application judge, while considering himself bound by the *Blackmore* rule, concluded that the parties had contemplated a third party claim and therefore intended to cover such a claim by the release.

The Newfoundland and Labrador Court of Appeal allowed the appeal and reinstated the third party notice. It concluded that the *Blackmore* rule has been subsumed into the principles of contract interpretation set out in *Sattva* and *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37. Applying those principles, the Court concluded that when the release was interpreted in the context of the factual matrix, the parties only released the claims of the Baileys in their own action.

In the SCC, Mrs. Bailey agreed that the *Blackmore* rule had been subsumed into the normal rules of contract interpretation, but argued that whether applying the *Blackmore* rule or those rules, the result would be the same – the release was not intended to allocate to the Baileys the City's responsibility for Temple's injuries.

Justice Rowe's reasons for judgment review the history and content of the *Blackmore* rule. He held that the *Blackmore* rule has been overtaken by the general principles of contract law in *Sattva*, has outlived its usefulness and should no longer be referred to.[7]

[7] He concurred with a statement of Lord Nicholls in *Bank of Credit and Commerce International S.A. v. Ali*, [2001] UKHL 8, at para. 26, where his Lordship stated that "there is no room today for the application of any special 'rules' of interpretation in the case of general releases. There is no room for any special rules because there is now no occasion for them. A general release is a term in a contract. The meaning to be given to the words used in a contract is the meaning which ought reasonably to be ascribed to those words having due regard to the

However, he went on to discuss why releases may be subject to a narrower interpretation than other types of contracts, not because of the *Blackmore* rule, but because of the nature of releases as contracts.

First, they are often expressed in the broadest possible words. Second, parties to a release are often trying to account for risks unknown at the time of contracting.

Justice Rowe concluded that:

> [38] For these reasons, releases may tend to lead to dissonance between the words of the agreement on their face and what the parties seem to have objectively intended based on the surrounding circumstances, with greater regularity than other types of contracts: see Cass, at p. 89. In resolving this tension, courts can be persuaded to interpret releases narrowly more so than other types of contracts, not because there is any special rule of interpretation that applies to releases, but simply because the broad wording of releases can conflict with the circumstances, especially for claims not in contemplation at the time of the release. The broader the wording of the release, the more likely this is to be so.

Justice Rowe also explained, drawing from a House of Lords decision[8] and an Ontario Court of Appeal decision,[9] that it is possible for a release to include claims of which the parties were not aware at the time they signed the release (unknown claims), but that clear language to that effect should be used to achieve that result. He suggests that drafters address in express language whether the release covers unknown claims and whether the claims covered by the release must be related to a particular time frame or subject matter.[10]

After pointing out that the standard of review on an issue of contract interpretation, absent an extricable error of law, is palpable and overriding error, Justice Rowe concluded that the application judge made no reviewable error in interpreting the release. Accordingly, the release covered Mrs. Bailey's third party claim against the City. That claim fell within the plain meaning of the words of the release, the surrounding circumstances confirmed that the parties had objective knowledge of

---

purpose of the contract and the circumstances in which the contract was made. This general principle is as much applicable to a general release as to any other contractual term. Why ever should it not be?"

[8] *Bank of Credit and Commerce International S.A. v. Ali*, *supra.*

[9] *Biancaniello v. DMCT LLP*, 2017 ONCA 386, discussed in my 2017 update.

[10] He points to the decision of the Ontario Court of Appeal in *Biancaniello* as an example of how one can draft to capture unknown claims while limiting them to a specific subject matter.

all the facts underlying the third party claim when they executed the release, and the parties limited the scope of the release to claims arising out of a particular event.

Corner Brook (City) v. Bailey was applied in *Rai v Sechelt (District),* 2021 BCCA 349. Property owners in Sechelt sued the District for negligent approval of the subdivision in which their properties are located. The subdivision was carried out on land that they said the District knew or ought to have known was subject to the risk of subsidence. Subsidence indeed occurred and the owners had to evacuate their properties.

Pursuant to s. 219 of the *Land Title Act*,[11] a covenant was registered against title to all the lots in the subdivision (the "Covenant"). The original covenantor was the developer of the lands. The Covenant, as a charge, burdened and ran with the land on each lot.

Section 7 of the Covenant provided as follows:

> The Covenantor, for himself and his successors and assigns, hereby releases, saves harmless and indemnifies the Municipality for any damage, loss claim, demand, cost (including legal cost), whether as a result of injury or death to any person, or damage to property of any kind, including any claims by third parties, arising from or in connection with the construction of any structures on the Lands or use of the Lands, whether or not construction is in accordance with the geotechnical assessments referred to herein, including without limitation any subsidence, settling of any structure including any utility or road infrastructure, loss of slope stability, or any similar matter.
>
> [Emphasis of the trial judge.]

The District took the position that the Covenant therefore barred the claims of the property owners. It brought a summary trial application.

The application judge held that the *Land Title Act* did not authorize the inclusion of a release in a s. 219 covenant. He went on to hold that in any event, properly interpreted, the release did not capture the property owners' claims.

[11] R.S.B.C. 1996, c. 250.

On appeal, that result was overturned. The BCCA held that by its choice of broad language in s. 219, the Legislature contemplated the inclusion of a release in a covenant as a provision "in respect of the use of land".

The Court went on to interpret the release language in the Covenant, citing *Corner Brook (City) v. Bailey,* and reiterating that *Sattva* required the interpreter to look to the surrounding circumstances known to the parties at the time the contract was entered into.

In a key passage, Mr. Justice Harris summarized the ruling in *Corner Brook (City) v. Bailey* and its application to the facts of the case before the Court:

> [58] There exists no special dictate requiring releases to be interpreted more narrowly than other forms of contractual agreements, so long as the plain words of the agreement are in basic harmony with the parties' intentions, as shown by the circumstances surrounding the contract's execution: *Corner Brook* at paras. 3, 36–38. Broad wording in a release can conflict with the circumstances if the claims were not in contemplation at the time the release was executed: *Corner Brook* at para. 38. But that is not the case here. The requirement of the Section 219 Covenant arose out of the District's approval of the subdivision of the property and was aimed, in part, at addressing the District's potential liability arising from the Development generally. The evidence establishes that geotechnical risks associated with the Development, in particular, were known to the contracting parties at the time the release was drafted and, indeed, are expressly referred to in clause 7.

The Court held that all of the property owners' claims as pleaded arose from or were in connection with the construction of structures in the development or the use of development lands generally. The evidence, it said, demonstrated that these issues were in the contemplation of the parties at the time the Covenant was drafted and entered into and were the precise types of damage, loss, claims and demands contemplated by the release language in the Covenant. The Court issued a declaration that the property owners had released the District from all claims alleged and damages sought.

Bottom line: Releases are subject to the same principles of interpretation as other contracts. There is no special interpretative rule for releases. However, a clash between the words of the release and the objective intention of the parties derived from the surrounding circumstances is, perhaps, more likely in the context of a

broadly worded, general release. As a result, courts may interpret a broad release narrowly. If parties are intending to include unknown claims within the terms of the release, they should use explicit language and consider whether it is appropriate to limit the scope of such language by stipulating a specific subject matter or time frame.

Perpetual Contracts vs. Indefinite Term Contracts Terminable on Reasonable Notice

Where parties do not include a stipulation as to the duration of a contract and also do not include express rights of termination on reasonable notice in their contract, a dispute can arise as to whether they intended a contract of perpetual duration or whether the agreement is properly construed as an indefinite term contract terminable on reasonable notice.

This is what occurred in *Conseil Scolaire Catholique Franco-Nord v. Nipissing*, 2021 ONCA 544.

On one level, this decision is simply another example of the application of the *Sattva* principles of contract interpretation. However, the Ontario Court of Appeal ("ONCA") outlined the principles that guide the interpretation of contracts that are silent on the issue of termination. As a result, while fact specific (as interpretation cases invariably must be), the decision provides guidance to contract drafters seeking either to create a perpetual contract or to ensure that a contract is terminable on reasonable notice.

Justice Rouleau explained that at one time, the presumption was that an indefinite contract was intended to be perpetual, but that a countervailing presumption also developed in the context of commercial contracts (*i.e.,* that parties are presumed to have intended the contract to be terminable on reasonable notice). He went on to cite Professor McCamus to the effect that these presumptions have fallen away to be replaced by the ordinary principles of contract interpretation.

But even without the presumptions operating, there are some principles particular to these type of cases. Justice Rouleau points out that the case law puts some emphasis on the nature of the relationship created by the contract. Agreements characterized as personal service contracts, *e.g.,* employment, partnership and other similar contracts, all of which depend upon a level of trust and continuous performance, typically are found to be terminable on reasonable notice, as a corollary to the courts' general unwillingness to order specific performance of such contracts.

And yet, even this characterization is not determinative – you still have to examine the agreement in its entire context. The existence of a special or trust relationship is a strong factor and can be decisive in a given case, but is not categorically determinative.

The contract in this case was for the Township of Caldwell to provide snow and garbage removal services to schools located in the Township, in consideration for the transfer of a particular school property by the school board to the Township. In light of surrounding circumstances, the ONCA held that the contract was perpetual. Indicia leading to that conclusion included: the contract was between two public institutions offering services to the same community; the arrangement reached was mutually beneficial; the Township, which was relatively small, acquired property it needed but was unable to pay for; and, in exchange for the property, the Township made a commitment that was neither onerous nor unusual for a municipality.[12]

Bottom line: If the parties intend a contract to be perpetual, it is best to say so expressly. Similarly, it is advisable to include a right to terminate on reasonable notice if that is what is intended. A commercial contract that is silent on both counts is more likely to be interpreted as terminable on reasonable notice, particularly if it is a personal services contract of some description, meaning that the parties have a relationship that depends on a level of trust and continuous performance. But at the end of the day, each case will be decided based on interpretation of the contract as a whole and the surrounding circumstances.

Unconscionability after *Uber Technologies Inc. v. Heller* ("*Uber*")

As I outlined in my 2020 update, the majority decision in *Uber* applied the doctrine of unconscionability to invalidate an arbitration clause in a contract of adhesion between Mr. Heller (an Uber driver) and Uber on finding both an inequality of bargaining power and a resulting improvident bargain.

Questions that remained following the issuance of the SCC reasons for judgment in June of 2020 included:

- The extent to which the doctrine would be relied upon in more obviously commercial contract relationships;

- What other types of clauses, aside from arbitration clauses, would be subject to scrutiny under the doctrine; and

[12] The Township was succeeded by the Municipality of West Nipissing, the defendant in the action.

- What type of "improvident bargain" had to be made out – in *Uber* it was the fact that the arbitration clause required US$14,500 in up-front administrative fees, thereby denying access to justice.

Uber has been cited in over 80 cases since it was handed down. Not surprisingly, a large number of them involved arbitration clauses and many of them involved an individual plaintiff or plaintiffs, as opposed to a corporation or other business organization as plaintiff.

While those may be the contexts in which the case is most often cited, there are numerous examples of parties pleading unconscionability in a commercial relationship and seeking to invalidate other types of clauses[13] or contracts more generally[14] (although few of them were successful).

I will review a few of the more notable decisions here.

Unconscionability and class action waivers

The appellants in *Pearce v. 4 Pillars Consulting Group Inc.*, 2021 BCCA 198,[15] were corporations and individuals who offered debt advisory (restructuring) services for a fee to individuals who were on the brink of insolvency. The appellants were not licensed, and therefore their fees were not regulated, and they charged more than professionals (debt repayment agents under the *Business Practices and Consumer Protection Act*[16] ("BPCPA") and licenced insolvency trustees under the *Bankruptcy and Insolvency Act*[17] ("BIA")) who were licensed to provide these services. The appellants claimed to occupy a "lawful niche" distinct from the regulated professionals.

A class action was commenced and certified, in which customers of the appellants alleged that the appellants' services fell within those reserved to licensed professionals under the two statutes and that, therefore, the services were provided in breach of those statutes. The representative plaintiff pleaded statutory causes of action under the BPCPA, including that the fees charged were an unconscionable act or practice, and common law causes of action in unjust enrichment and civil conspiracy.

[13] Including forum selection clauses, class action waivers, exclusion clauses, and irrevocability clauses.
[14] Including releases, contingency fee agreements, settlement agreements, mortgage and loan agreements, and asset purchase agreements.
[15] Leave to appeal to the S.C.C. was sought but discontinued.
[16] S.B.C. 2004, c. 2.
[17] R.S.C. 1985, c. B-3.

At the certification hearing, the appellants sought to strike the claims on the ground that it was plain and obvious that the appellant's activities did not fall within the BPCPA or BIA. They also sought to stay the claims of all class members who entered into a contract with them that contained a class action waiver clause.

The class action waiver clause found in the appellants' standard form contract from June 15, 2017 read as follows:

> To the extent permitted under applicable law, you may only resolve disputes with us on an individual basis, and may not bring a claim as a plaintiff or class member in a class, consolidated, or representative action. Class arbitrations, class actions, general actions and consolidation with other arbitrations are not allowed.

The appellants' applications were dismissed by the judge who certified the class proceeding.

On appeal, the appellants alleged three errors. It is the third alleged error that is relevant to this discussion: that the judge erred in failing to enforce the class action waiver clause against those members of the class who entered into agreements containing that clause.

The application judge found that the class action waiver was unenforceable for two reasons:

- First, it purported to override the mandatory language of the *Class Proceedings Act*.
- Second, there was strong cause not to enforce the waiver on public policy grounds on the basis that the administration of justice would be frustrated.

The SCC decision in *Uber* had not been issued at the time of the lower court decision in *Pearce v. 4 Pillars Consulting Group Inc.* But it had been issued by the time the appeal was heard. The BCCA stated that on applying the analytical framework from the majority and concurring judgments in *Uber*, it agreed with the Court below that the class action waiver was unenforceable.

The BCCA found the waiver to be unenforceable both on applying the doctrine of unconscionability and on the basis of public policy (describing them as doctrinal cousins).

What follows is a summary of the Court's finding on how each of the two prongs[18] of unconscionability were made out.

Inequality of bargaining power: The contract was a contract of adhesion, imposed on the proposed class members without the opportunity to negotiate it. The proposed class members entered into the agreement as persons in financial distress, as contrasted with the appellants, who were sophisticated business persons using a standard form contract across a national chain of franchises. The agreement did not explain the unusual and onerous effects of the waiver, which rendered it practically impossible for the proposed class action members to pursue claims against the appellants. The fact that the contract was in plain English and was reviewed with each client before they signed did not overcome the gulf in sophistication between the parties.

Improvident bargain: The waiver essentially modified all the substantive rights of the proposed class members. If they wished to enforce any of their rights, they would be denied a critical tool for access to justice, namely a class or representative action. The Court said that no reasonable person who understood the implications of the class action waiver would have agreed to be denied one of the single most important tools available to allow them to vindicate their rights.

In concluding that the class action waiver was contrary to public policy, the BCCA reviewed the policy underpinnings of class actions and representative proceedings identified in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46: preserving judicial resources; improving access to justice; and ensuring wrongdoers do not ignore their obligations. It went on to find that the waiver sought to defeat all three of these benefits. It concluded that "the class action waiver at issue in this appeal so functionally interferes with access to the courts that it is contrary to public policy and unenforceable."[19] The BCCA noted that unlike a forum selection clause, where an argument might be made that the foreign forum is more convenient to the stronger party and has a connection with the dispute, thereby providing a commercial reason for the clause, the only possible reason for a class action waiver in this case was to impede the customers' rights to access justice.[20]

[18] The BCCA reiterates that unconscionability is not available where an unfair bargain is the result of a fair bargaining process; both prongs must be made out.
[19] At para. 279.
[20] At para. 231.

Commentators have noted that the public policy doctrine may be available to more sophisticated plaintiffs as a means to attack class action waivers, since it does not require inequality of bargaining power (unlike unconscionability).

Threshold for establishing inequality of bargaining power

A Saskatchewan case confirms that the threshold for inequality of bargaining power remains high – it must be shown that a party was not able to engage in autonomous, self-interested bargaining.

In *Input Capital Corp. v. Gustafson*, 2021 SKCA 56,[21] Gustafson and related farming corporations agreed to ten contracts spanning a number of years for the sale of canola to Input. When Gustafson defaulted on delivery obligations, Input sued. The trial judge held that the contracts were unconscionable because Gustafson was under financial distress at the time of contract formation.[22] An appeal was heard and a decision issued in 2019,[23] overturning the trial ruling. Leave to appeal to the SCC was sought; that Court remanded the case back to the SKCA for disposition in accordance with its decision in *Uber*.[24]

The SKCA held that while the reasoning of the majority in *Uber* altered the language used to describe unconscionability, it did not lead to a different result from its 2019 ruling on the facts.

Both parties before the Court agreed that the majority reasons in *Uber* "lowered the bar" for a finding of unconscionability. But the SKCA found that even with this perceived relaxing of the standard, unconscionability was not made out. The key passages from the decision read as follows:

> [33] Upon reconsideration under *Heller*, we confirm that the *Trial Decision* does not explain how the evidence of Gustafson Farms' financial circumstances could have displaced the law's normal assumptions about free bargaining. Considering the general bargaining context at issue, there is nothing special or significant about a farmer experiencing financial difficulty while, at the same time, entering a grain delivery contract. Moreover, the *Trial Decision* did not identify any evidence to suggest that financial circumstances had impaired Gustafson Farms' "ability to freely enter or negotiate a contract" or had compromised its "ability to understand or appreciate the meaning and

[21] Leave to appeal refused, CarswellSask 721 (S.C.C.).
[22] 2018 SKQB 154.
[23] 2019 SKCA 78.
[24] 2020 CanLII 76220 (S.C.C.).

> significance of the contractual terms". As we observed in the *Decision*, some of the trial judge's findings of fact are pointedly inconsistent with those conclusions. In the result, we confirm that Gustafson Farms failed to establish that the required degree of inequality of bargaining power existed between it and ICC in the circumstances of this case. […]
>
> [41] In the *Decision*, we found the evidence did not support a finding of inequality of bargaining power and we further found the bargain struck under the Contracts was not improvident. Having reconsidered the case in the light of *Heller*, we find the evidence did not establish the presence of a bargaining context where the law's normal assumptions about free bargaining either no longer held substantially true or were incapable of being fairly applied. Although not strictly necessary, we further find there is no undue advantage or disadvantage in the contractual arrangement between ICC and Gustafson Farms. Moreover, given the bargaining context and the terms of the Contracts, the evidence strongly supports the conclusion that, in the words of *Heller*, Gustafson Farms had invoked the doctrine of unconscionability in an attempt to "escape from a contract when their circumstances are such that the agreement *now* works a hardship upon them" (at para 74; emphasis in original).[25]

Bottom line: Unconscionability remains most relevant in the consumer-transactions context, but is also relevant in the context of contracts of adhesion imposed by a larger entity on an individual or small entity, particularly where the contract contains a provision that prevents access to justice (like the arbitration clause in *Uber* and the class action waiver in *Pearce*). Because inequality of bargaining power (one of the two prongs of an unconscionability claim) is difficult to make out in a commercial context, as illustrated by the decision in *Input Capital Corp.*, plaintiffs will want to consider whether there is any scope for arguing that a contract term should be invalidated as contrary to public policy (although such an argument will also be challenging in a commercial context).

Limitations of *Non est Factum* as a Defence

The defence of *non est factum* (literally, "it is not her deed") is rarely available to commercial contracting parties. In a recent case, the BCCA reminded us of the

[25] A determination of damages ensued (2021 SKQB 250). That determination was unsuccessfully appealed (2022 SKCA 22) and leave to appeal to the SCC denied (2021 CanLII 129763).

burden of the party relying on that defence and of a party seeking to rely on unilateral mistake.

Channelling Captain Obvious, the reasons for judgment in *1001790 BC Ltd. v. 0996530 BC Ltd.* 2021 BCCA 321, open with the statement:

> Parties to contracts should read those contracts before signing them.

The defendants borrowed money from the plaintiff lender, secured by a mortgage. When they defaulted on the loan, the lender foreclosed. In the course of the foreclosure proceedings, the parties agreed to release the mortgage against certain parcels so the borrowers could sell them, with $515,000 being then held in trust pending further court order or written agreement. The parties subsequently agreed to the release of $250,000 to the lender, as representing an undisputed amount of principal still owing. No agreement was reached at that point on interest.

The parties continued to negotiate and thought they had reached an agreement. The borrowers' lawyer drafted a settlement agreement, which required the borrowers to pay the lender $75,721 in addition to the $250,000 previously paid. No one on the lender's side read the settlement agreement. When the borrowers tendered the $75,721, the lender objected; it took the view that the borrowers had agreed to pay $325,721 as new money (*i.e.*, without deduction of the $250,000 previously paid).

The lender applied for rectification while the borrower sought an order enforcing the agreement as written. The chambers judge dismissed both applications, concluding that no valid, binding agreement had been reached as the parties never reached a meeting of the minds about the contract's essential terms. The borrowers appealed, focussing primarily on the finding of no *consensus ad idem*.

The BCCA held that the chambers judge erred in misapplying the principle of *consensus ad idem* by referring to subjective views of the parties and in looking beyond the four corners of the unambiguous signed agreement to determine the parties' intentions. It held that from a common law perspective, there was a valid and enforceable agreement, notwithstanding that the lender and her advisors did not read it and subjectively misunderstood its contents.

But the Court then noted that there are circumstances where equitable considerations may give rise to a reason not to enforce such an agreement against the mistaken party.

It was the BCCA that asked the parties to address *non est factum*, on the grounds that the doctrine essentially encompassed the position of the lender. Apparently also on its own motion, the Court also dealt with unilateral mistake as it might apply to the facts. Neither defence was raised below.

The Court outlined the elements of a plea of *non est factum* that a party seeking to rely on it has the burden of demonstrating:

- That the document they signed was fundamentally different in nature from what they believed it to be;
- That they signed it as a result of a misrepresentation; and
- That they were not careless in doing so.

The Court also summarized the law of unilateral mistake as follows:

- Unilateral mistake will justify the rescission of an otherwise binding contract where it would be unconscionable to enforce the bargain;
- This will be the case where a party is found to have been mistaken as to a material term, and this error was actually or constructively known by the non-mistaken party, leading to an unconscionable result; and
- Lack of due diligence by the mistaken party in failing to read the document may weigh against a finding of unconscionability.[26]

There was no evidence that the borrowers knew or ought to have known that the lender was mistaken in any way. For this reason, rescission for unilateral mistake was not available.

The chambers judge found that the written agreement signed by the lender was fundamentally different from what its principal believed it to be (in content as opposed to nature – it was clearly a settlement agreement). The question, then, was whether there was a misrepresentation that would found *non est factum*. The lender claimed that it was misled in that the borrowers represented in the recitals and in emails that the documents reflected the oral agreement reached by the parties.

[26] The use of the word "unconscionable" is confusing in this context. The cases cited by the BCCA are not referring to the doctrine of unconscionability, but rather a scenario where one party is seeking to take sharp advantage of the other's mistake and it would be unjust to allow them to do so.

The BCCA rejected this argument. It held that there was no misapprehension on the lender's part as to the nature of the document as a settlement agreement. In proffering it, the borrowers made no specific representation at all about the terms of settlement, other than what was expressly contained in the document. If those terms did not represent the lender's understanding of what they had agreed, it had only to refuse to sign the document.

The lender sought to have its lack of due diligence excused on the basis that no third party relied on the document, citing cases holding that in those circumstances, the signing party clearly had to bear the burden of its carelessness, not the innocent third party.[27] The Court concluded that the principles from that body of law did not justify relieving the lender from its lack of due diligence where there was no finding of fault on the part of the borrowers – there was no evidence or finding that the borrowers knew or ought to have known that the lender was mistaken in any way. The Court allowed the appeal, and ordered that the written agreement was valid and enforceable.

Bottom line: Parties who carelessly or mistakenly sign agreements that do not reflect what they understand to be the deal nonetheless will be bound unless they can fit within the doctrines of rectification, *non est factum* or unilateral mistake. Where the counterparty did not make a relevant misrepresentation and did not seek to take advantage of the other party's mistake that it knew or ought to have known about, the mistaken party will have no recourse under *non est factum* or unilateral mistake.

"No Waiver" Clauses

The purpose of "no waiver" clauses (sometimes called waiver clauses) is to clarify what constitutes an intentional relinquishment of a contractual right by a party.[28] Such a clause is meant to give rise to more certainty for commercial parties by expressly excluding the possibility of a party being found to have waived a right by

[27] In particular, *Marvco Colour Research Ltd. v. Harris*, [1982] 2 S.C.R. 774. In that case, the SCC stated in part (at para. 27):

> The magnitude and extent of the carelessness, the circumstances which may have contributed to such carelessness, and all other circumstances must be taken into account in each case before a court may determine whether estoppel shall arise in the defendant so as to prevent the raising of this defence.

[28] Cynthia L. Elderkin & Julia S. Shin Do, *Behind and Beyond Boilerplate: Drafting Commercial Agreements*, 4th ed. (Toronto: Thomson Reuters, 2018) at 112. See p. 111 of that text for sample "no waiver" clauses.

silence, inaction or conduct (*e.g.,* by requiring any waiver to be in writing, signed by the party to be effective).[29]

In general terms, such clauses will be enforced when contained in commercial agreements.[30]

However, "no waiver" clauses may not be effective to preclude relief from forfeiture where the innocent party has evinced an intention to waive a contractual right (arising on breach) by their conduct. See, for example, *Delilah's Restaurants Ltd. v. 8-788 Holdings Ltd.* (1994), 92 B.C.L.R. (2d) 342 (C.A.) and *Fitkid (York) Inc. v. 1277633 Ontario Ltd.*, [2002] O.J. No. 3959 (S.C.J.), and other cases decided in the leasing context.

And a recent Ontario case illustrates how a court may find that a party, by their conduct, has waived a right despite not strictly complying with the technical requirements of a waiver clause (such as a requirement that a waiver be executed by the parties).

In *Jack Ganz Consulting Ltd. v. Recipe Unlimited Corporation*, 2020 ONSC 3319, the plaintiff was retained by the defendant under a consulting agreement with an initial term of three years. The consulting agreement contained an automatic renewal clause, pursuant to which the agreement was renewed for further terms of three years unless terminated in accordance with the agreement.

The agreement also contained the following clause:

> 6.06 Amendments and Waivers. No amendment to this Consulting Agreement shall be valid or binding unless set forth in writing and duly executed by the parties. No waiver of any breach of any term or provision of this Consulting Agreement shall be effective or binding unless in writing and signed by the parties, nor shall any such waiver be deemed a waiver of similar or dissimilar provisions or conditions at the same or at any prior to subsequent time.

In 2008, after a meeting between the parties, the plaintiff sent an email to the defendant, stating in part, "Let this email serve to remove the auto renewal from my contract." The defendant's representative responded, "I look forward to discussing

[29] While the SCC held in *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.,* [1994] 2 S.C.R. 490, that waiver could only be found where evidence demonstrates that the party waiving had: (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them, it cited other cases for the proposition that waiver can be inferred from conduct or expressed in some informal fashion.
[30] See, for example, *KL Solar Projects LP v. Independent Electricity System Operator*, 2019 ONSC 6501, aff'd 2020 ONCA 499, leave to appeal refused, 2021 CanLII 10741 (S.C.C.).

with you the terms of our new arrangement that will take effect after your current agreement comes to an end."

On the evidence, the parties had an ongoing relationship after March 9, 2009, the date on which the original term of the agreement would have ended absent an automatic renewal. However, the defendant's position was that this continuing relationship was not based on any right of renewal, but on it having extended the agreement for 12 months (an express right it had) and then the parties agreeing to operate on a month-to-month basis. When disagreements arose between the parties in 2014, the defendant terminated the services of the plaintiff.

The plaintiff sued, alleging breach of contract (on the basis that it had continued to automatically renew) and a right to reasonable notice of termination on the basis that it was a dependent contractor. The defendant brought a motion for summary judgment, which was granted.

The plaintiff argued that to the extent there was a waiver by it of the right of renewal in 2008, it did not comply with clause 6.06, as it was not executed by the parties in writing. Justice Nishikawa held as follows: [31]

> [87] In my view, the parties, by their conduct, demonstrated that they did not intend to be strictly bound to the amendment provision. JGC sent an email unequivocally removing the Renewal Clause, as requested by Mr. Smith, who then accepted the change. The email waiving the Renewal Clause was in writing and both parties clearly intended to be bound. In *L'Ouvrier Inc. v. Leung*, 2016 ONSC 6993, at para. 55, notice by text message was found to be effective, as the parties acted in a manner consistent with effective notice having been delivered. In this case as well, the parties' conduct after the waiver of the Renewal Clause, including their negotiations of a new agreement and Mr. Ganz's acquiescence with email messages referring to the Consulting Agreement as terminated, was consistent with an intent to be bound by the waiver.
>
> [88] The evidentiary record belies Mr. Ganz's submission that he insisted on strict compliance with the formal requirements of the Consulting Agreement. The parties' relationship continued despite an absence of clarity as to the terms governing their relationship.

[31] Justice Nishikawa drew from cases dealing with "no oral amendment" clauses, which I discussed in my 2016 Update. Contract drafters often combine the two types of clauses, as was the case here.

> [89] Indeed, it would be unduly formalistic to find that, after such a clear indication that the parties did not intend to be bound to the Renewal Clause, a party could rely upon a purely formal contractual requirement to relieve itself from its promise. As stated by the Supreme Court in *Saskatchewan River*, at para. 18, "the principle underlying both doctrines [waiver and promissory estoppel] is that a party should not be allowed to go back on a choice when it would be unfair to the other party to do so."

After the original version of this paper was published in early December of 2021, the ONCA issued reasons for judgment on appeal. That Court allowed the appeal, set aside the summary judgment, and remitted the matter for trial (2021 ONCA 907).

While the ONCA weighed in on the issue of whether the plaintiff had waived the automatic renewal provision in the consulting agreement, it did not discuss the no waiver clause at all. Rather, it held that the motion judge erred in law by concluding that the plaintiff had unilaterally waived the automatic renewal provision for no consideration. It was not clear from the record, the ONCA stated, that Ganz had full knowledge of his rights or an unequivocal and conscious intention to abandon those rights and thus the stringent criteria from *Saskatchewan Bungalow* had not been made out. I will watch for the reasons from the ONSC at trial.

Bottom line: While "no waiver" clauses continue to be a desirable inclusion in the boilerplate section of a commercial contract, contracting parties should be aware that their conduct in relation to a non-compliant waiver may be found to demonstrate that they do not intend to be bound by the formalities of such a clause and to trump requirements for a valid waiver set out in such a clause.

Good Faith Duties in Contract Law – What's New since February of 2021?

As everyone knows, the SCC has published three decisions dealing with good faith duties in contract: *Bhasin v. Hrynew*, 2014 SCC 71 ("*Bhasin*"); *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45 ("*C.M. Callow*") and *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 ("*Wastech*") (collectively, the "Trilogy"). I wrote about each of these decisions in depth in prior papers.[32]

[32] https://www.lawsonlundell.com/newsroom-news-1509
https://www.lawsonlundell.com/the-business-law-blog/tell-me-no-lies-the-new-duty

What I will do here is comment on some of the decisions applying the teachings of the SCC in the Trilogy and the extent to which they illustrate or expand upon the principles enunciated by the SCC.

Inability to contractually exclude the good faith doctrines

Canlanka Ventures Ltd. v. Capital Direct Lending Corp., 2021 ABCA 115, involved an allegation of breach of the duty of honest performance. This case confirms that exculpatory clauses will not be effective to relieve a party of liability for a breach of that duty and that indemnity clauses, if interpreted to apply to first party rather than third party claims, likely will not be either.

Calanka was in the business of investing in mortgages. It bought a number of second mortgages from Capital Direct and ultimately sued Capital Direct in relation to losses suffered from four of those mortgages. There was an administration agreement between the parties in which Capital Direct agreed to perform certain services in relation to the mortgages that Canlanka bought, for a fee. The trial judge dismissed three of the four claims, but awarded damages in relation to the claim on the fourth (the "Bastien Mortgage").

The two principal issues on appeal were whether the trial judge erred in finding that Capital Direct breached its duty of honesty in contractual performance and in finding that the indemnity clause in the contract did not insulate Capital Direct from liability.

The administration agreement expressly provided that Capital Direct agreed to act in good faith and to the best of its ability in the best interests of Canlanka. But it also included an exclusion clause stating that Capital Direct "cannot therefore be held liable for any oversight, errors or omissions related to the mortgage interests included under this agreement."

And, the agreement included an indemnity clause:

> The Mortgage Holder shall indemnify and hold this Administrator harmless from any and all loss, injury, damage and/or liability resulting or claimed to have resulted by any person or entity from any breach of the Administrator's promises, representations or warranties under this Agreement or otherwise arising from or relating to any acts or omissions, whether willful, negligent or otherwise, of Administrator or its employees or agents in connection with any loan under this Agreement.

The trial judge found that after Canlanka advised Capital Direct it had stopped receiving payments on the Bastien mortgage, Capital Direct deliberately misrepresented to Canlanka that it was the Bastien mortgage that was in foreclosure (not the first mortgage ahead of it on title) and advised Canlanka that the mortgagors intended to buy out the Bastien mortgage, which was not true and did not occur. The trial judge concluded that as a result of the misrepresentations, Canlanka was precluded from making an informed decision on whether to foreclose on the Bastien mortgage, whether to seek to obtain its own appraisals, and whether to offer to buy out the first mortgagee.

After noting that the duty of good faith performance did not depend upon the express good faith clause in the parties' agreement, the Alberta Court of Appeal upheld the finding of the trial judge that the duty was breached. It noted that nothing in *Bhasin* makes a finding of a breach of the duty turn on the fact that the underlying misrepresentation was made for personal gain (rejecting an argument of Capital Direct to that effect). It held that the misrepresentations in this case were active, intentional and went well beyond innocent non-disclosure. The Court also agreed with the trial judge that the exclusion clause could not exclude the duty.

The Court of Appeal then went on to consider the indemnity clause and the trial judge's finding that it did not protect Capital Direct because it indemnified it against claims made by third parties only.

First, the Court held that an interpretation under which the indemnity clause would apply to the claim would deprive Canlanka of an ability to enforce the agreement, even if Capital Direct failed to make any attempt to administer the mortgages as promised, and would arguably be absurd because it would not reflect the reasonable assumptions of the parties in contracting. It agreed with the trial judge that it could not be interpreted to apply to first party, rather than just third party, claims.

Capital Direct argued that the indemnity clause protected it from liability because it would survive the *Tercon*[33] test for assessing the enforceability of such clauses. The Court of Appeal held that it was unnecessary to consider this argument. *Bhasin*, decided post-*Tercon*, it held, expressly prohibits contracting out of the duty of honest performance. The Court also refused to interfere with the trial judge's award of $25,000 damages for loss of opportunity.

[33] *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways),* 2010 SCC 4. I have discussed this case and the test articulated in it as applied subsequently in multiple versions of my update (see the chart).

When does a duty to correct a misapprehension of a counterparty arise?

While the duty of honest performance does not impose a positive obligation of disclosure, parties can breach the duty through silence, omission or failing to correct a misapprehension. Two recent decisions of the ONCA help illustrate where a failure to "speak up" will not be actionable.

In *Subway Franchise Restaurants of Canada Ltd. v. BMO Life Assurance Company,* 2021 ONCA 349*,* Subway erroneously recorded the date for renewal of a lease with its commercial landlord, BMO. Subway recorded the lease expiry date in its database as May 31, 2018, but also had a document that stated August 23, 2018. Subway sent a letter to BMO requesting confirmation of the correct date. BMO did not respond or confirm the correct date. Subway then purported to exercise its option to renew based on the incorrect date of May 31, 2018. Since the attempt was outside of the notice period,[34] Subway's attempt to renew the lease was not successful.

The ONCA upheld the application judge's finding that BMO did not breach the duty of honest performance by remaining silent when Subway asked for confirmation of the correct date. The duty of good faith did not require BMO to ensure Subway fulfilled its own obligations. The ONCA distinguished the case from *C.M. Callow* because there was no deception directly linked to the contract. Although in *C.M. Callow*, Kasirer J. referred to a duty to correct a misapprehension, the ONCA took the view that this duty only arises when the defendant makes false representations. There was no evidence that "BMO lied or knowingly misled Subway, created a false impression through its own actions, or actively contributed to Subway's misapprehension."[35] A defendant's failure to disclose a material fact is not contrary to the duty of honest performance when there is no false representation on behalf of the defendant.

In *Hutchingame Growth Capital Corporation v. Independent Electricity System Operator*, 2020 ONCA 430, leave to appeal refused, 2021 CanLII 2823 (S.C.C.), the ONCA held that the duty of honest performance does not impose an obligation to inform the other party of a consequence outlined in the contract. In *Hutchingame,* the defendant IESO operated a renewable energy program where it entered into contracts to purchase energy from small renewable energy projects. Greenview Power was one such project that entered into a contract with IESO. A provision of the contract was that the agreement would terminate in the event of bankruptcy.

[34] The renewal option had to be exercised at least 9 months and not more than 12 months prior to the expiration of the term.
[35] At para. 15.

When Greenview could not meet the deadlines in the contract, the appellant Hutchingame purchased some of Greenview's secured debt and assumed effective control. A couple of years later, Greenview went bankrupt and the contract terminated. Hutchingame claimed IESO breached the duty of good faith by not informing it of the "termination upon bankruptcy" provision.

Applying similar reasoning to that in *Subway Franchise,* the ONCA agreed with the trial judge's decision that IESO did not have a duty to disclose because it did not lie to or knowingly mislead Hutchingame. The ONCA adopted the trial judge's conclusion that the duty of honest performance "does not impose a duty of loyalty or of disclosure or require a party to forgo advantages flowing from the contract."[36]

Duty of honest in contractual performance does not apply if contract has lapsed

Stoni Consolidated Holdings Inc. v. Maple Reinders Capital Corp., 2021 BCSC 1018, is interesting because it involved an allegation of a breach of duties of good faith after a contract had lapsed.

Stoni contracted to purchase industrial property in Kelowna from Maple. The contract was subject to conditions that were neither waived nor fulfilled and the transaction did not complete. Maple sold to a third party. Stoni sued, alleging misrepresentation and that Maple breached a duty of good faith performance owed to Stoni in negotiating removal of the conditions.

The negotiations in question took place after the contract had lapsed due to failure to satisfy a condition. The purchase agreement expressly provided that upon expiration of the contractual timetable for satisfying the conditions without them being satisfied, "this Agreement shall immediately become null and void".

Justice Gomery found that Maple could not owe a duty of good faith performance to Stoni once the contract had terminated, even though they were both negotiating with a view to extending closing. He also found that Maple did not act in bad faith in any event in ending the negotiations. It was entitled to decline to renegotiate price.[37]

Breach of good faith doctrines may preclude equitable remedies

SHH Management Limited v. Philip, 2020 BCSC 1411, is interesting because Justice Basran held that breach of the duty of honest performance by the plaintiffs disentitled them to the equitable remedies they sought, namely specific

[36] A quote from *Bhasin* at para. 73.
[37] See also *Correct Building Corporation v. Lehman,* 2022 ONSC 527, where the Court held that the duty of honest performance did not apply to pre-contractual negotiations.

performance and restitution based on unjust enrichment.[38] The reasons on this issue state in part:

> 257 Although characterized by Justice Cromwell in *Bhasin v. Hrynew*, 2014 SCC 71 (S.C.C.) at para. 33, as an "organizing principle of the common law of contract", the doctrine of good faith and the common law duty to act honestly in the performance of contractual obligations established in *Bhasin* are closely tied to equitable concepts…
>
> 258 The court may refuse to grant an equitable remedy if the plaintiff committed fraudulent misrepresentations that were directly related to the subject matter of the claim…
>
> 259 In my view, the plaintiffs' considerable misconduct and bad faith in respect of its non-performance of the SPA, Settlement, and Addendum, over the past six years establishes a clear basis for a finding that they failed to act honestly or in good faith in their contractual performance. Specifically, the evidence shows that Holdings and its principals never intended to perform their fundamental obligations under these agreements and they knowingly misled the Philips into believing that they would. […]
>
> 267 In my view, the extensive record of lies and fraudulent misrepresentations deployed by Mr. Durkin and Mr. Gregory throughout the history of their dealings with the Philips illustrates considerable bad-faith that is more than sufficient to preclude Holdings from obtaining an equitable remedy.

Application of *Wastech*

The Riverside Professional Centre Inc. v. The Ottawa Hospital, 2021 ONSC 1705, is one of the first cases applying the *Wastech* principles on good faith exercise of discretion.[39]

A group of doctors (which became the plaintiff RPC) entered into two agreements with the defendant hospital: a lease and a related memorandum of agreement. Under the agreements, the doctors agreed to build a medical office building

[38] He also denied the plaintiffs' claim in damages and awarded the defendants damages on their counterclaim.
[39] See also *Stericycle ULC v. HealthPRO Procurement Services Inc.*, 2021 ONCA 878, where the duty was alleged but not made out on the facts.

adjacent to the hospital and expand the existing parking lot to 325 parking spaces. The hospital agreed to construct a shared access road.

The agreed-upon construction took place in 1991. The hospital administered the expanded parking lot and the parties shared the access road and parking lot for many years without issues. However, in 2015, RPC complained about the number of parking spaces made available to them and ultimately brought an action, alleging that the hospital breached its obligations under the lease and had failed to exercise its discretion thereunder in good faith. RPC brought a motion for summary judgment, seeking a determination that the hospital had breached the lease and for damages and injunctive relief.

When the decision in *Wastech* was handed down (prior to reasons being issued by the Ontario Superior Court of Justice in this case), the parties were given an opportunity to make further submissions on the duty to exercise discretion in good faith.

Justice R. Smith held that the hospital had not breached the duty in question when administering the parking lot spaces:

> 75 … The Hospital has always been and continues to be in complete control of the management of the parking in lot B and exercises a contractual discretion on the number of parking passes it will issue. I find that the Hospital has a duty to exercise its contractual discretion concerning parking in good faith and in a reasonable manner in accordance with the purposes of the lease and the reasonable expectations of the parties.
>
> 76 The Hospital is not restricted from issuing parking passes for lot B, provided that the number of passes issued does not prevent the Professional Centre from reasonably accessing up to 250 parking spaces in lot B. For example, if the Hospital was to issue 2000 parking passes to Hospital staff for lot B, the Professional Centre would only be able to access very few parking spots. This would not be reasonable or in accordance with the expectations or objective intentions of the parties.
>
> 77 I conclude that the parties intended that the parking spaces in lot B would be shared to meet the reasonable parking requirements of both parties and to comply with the zoning bylaw, and that the Hospital could issue monthly parking passes for lot B, provided the number of

> parking passes issued would not unduly interfere with Professional Centre's ability to access up to 250 parking spaces in lot B.
>
> 78 The Hospital has the unilateral authority to increase or decrease the number of parking passes that it issues for lot B, which allows it to decrease or increase the number of parking spaces available to the Professional Centre. I find that the Hospital has met its good faith obligations to manage the parking in lot B by hiring a parking attendant in Feb. of 2018 to jockey the vehicles when necessary, by segregating 250 parking spaces for the Professional Centre in lot B on August 1, 2019, and by preventing the hospital staff monthly pass holders from parking in the segregated area on October 31, 2019.

Bottom line: Exculpatory clauses, which typically survive the *Tercon* test in a commercial contracting context, are ineffective to exclude liability for one of the doctrines of good faith articulated by the SCC. While the SCC has said that both the duty of good faith performance and the duty to exercise discretion in good faith are doctrines, and therefore operate irrespective of the intentions of the parties (and cannot be excluded), a comment made by the majority in *Wastech*,[40] and the importance of the factual matrix in assessing the content of the duties and whether they have been breached in a given case, underpin some discussion of whether parties can nonetheless modify these duties by way of express terms. We will have to wait for some jurisprudence considering a clause that seeks to modify, limit or shape the duties of good faith, rather than excluding them outright.

The duty of good faith performance is only relevant while the contract is in force (not pre- or post-contract).

Defendants to a breach of contract claim may be able to use the good faith doctrines as a sword in the sense of using conduct of a plaintiff in breach of those doctrines as a means of precluding equitable remedies.

As I have noted in prior papers, we will have to wait and see what appellate courts, and ultimately the SCC, have to say about the other good faith doctrines listed in *Bhasin* (including the duty to cooperate in order to achieve the objects of the contract and the duty not to evade contractual duties). Further, as the SCC has recognized, additional doctrines might be recognized under the organizing principle articulated in *Bhasin*.

[40] At para. 95, Justice Kasirer stated: "The entire agreement clause in this Contract (s. 32.17) does not exclude the duty, although, in any particular case, the contract as a whole will guide the analysis of what the duty requires."

Update on 2019 Decision on Implied Contracts and Other Snippets

In my 2019 update, I commented on the decision of Justice Braid in *G.E.X.R. v. Shantz Station Terminal*, 2019 ONSC 1914, in which she discussed the concept of implied contracts, *i.e.,* contracts inferred by law, as a matter of reason and justice from the conduct of the parties and the circumstances surrounding a transaction. Justice Braid declined to find an express or implied contract on the facts and also rejected the claim in unjust enrichment.

The case went to the ONCA and that Court issued reasons on September 9, 2020 (2020 ONCA 560).

The Ontario Court of Appeal confirmed two rulings of interest to transportation lawyers:

- A contract is required to impose an obligation on a shipper to pay freight charges, including demurrage.

- The *Canada Transportation Act* does not authorize charging demurrage to non-contracting parties.

On the issue important to contract law more generally, the Court of Appeal held that the trial judge did not err in finding no implied contract on the facts. Justice Zarnett notes that where a shipper deals directly and solely with a railway, engaging it to carry or deliver goods to a particular location on the railway's own line, it is clear that a contract between the shipper and the railway under which the shipper is to pay freight charges, including demurrage, can be readily implied.

These were not, however, the facts underlying GEXR's claim. Instead, there existed two express contracts: the shipper contracted with CN to carry freight on CN lines and beyond to Shantz Station. CN had a contract with GEXR and was able to have freight carried by GEXR from CN lines to Shantz. It was not necessary, therefore, to imply a third contract. GEXR, as held by the trial judge, did not prove a custom of paying demurrage by shippers in these circumstances.

On the test for implied contracts, the Court of Appeal concluded:

> [80] As a general matter, for a contract to be implied, the conduct of the parties must objectively manifest that an offer of one party has been accepted by the other resulting in a meeting of the minds. Where the terms upon which services made available by one party are made known to the other, who uses the services while remaining silent about

> the terms, acceptance of the terms may be implied: *Saint John Tug Boat Co. Ltd. v. Irving Refinery Ltd.*, [1964] S.C.R. 614 at pp. 622-23.

Effect of online and video hearings on *forum non conveniens*

There was a fair amount of buzz about the comments of Justice Morgan of the Ontario Superior Court in *Kore Meals LLC v. Freshii Development LLC*, 2021 ONSC 2896, where he posited that in a world where hearings could be on line or by videoconference, arguments based on *forum non conveniens* (in a court proceeding) and arguments that a forum or venue identified in an arbitration agreement is unfair or impractical, were effectively obsolete. He concluded:

> 31 It is by now an obvious point, but it bears repeating that a digital-based adjudicative system with a videoconference hearing is as distant and as nearby as the World Wide Web. With this in mind, the considerable legal learning that has gone into contests of competing forums over the years is now all but obsolete. Judges cannot say *forum non conveniens* we hardly knew you, but they can now say farewell to what was until recently a familiar doctrinal presence in the courthouse.
>
> 32 And what is true for *forum non conveniens* is equally true for the access to justice approach to the arbitration question. Chicago and Toronto are all on the same cyber street. They are accessed in the identical way with a voice command or the click of a finger. No one venue is more or less unfair or impractical than another.

Subsequently, in *Li v. Li*, 2021 ONCA 669, Justice Coroza had this to say (in a footnote to the reasons of the Court):[41]

> I note that in a recent Superior Court decision, *Kore Meals LLC v. Freshii Development LLC,* 2021 ONSC 2896, 156 O.R. (3d) 311, E.M. Morgan J. observed that the world of videoconference hearings may have implications for the relevance of *forum non conveniens.* I leave that issue for another day. In the present case, where the competing forums involve different languages and different time zones, the choice of forum remains relevant.

We will have to wait and see how this line of authority develops.

[41] Leave to appeal filed, 2021 CarswellOnt 20309 (S.C.C.).

CONTRACT LAW
DEVELOPMENTS OF NOTE SUMMARY OF TOPICS

HEADINGS	2020	2019	2018	2017	2016	2015	2014	2013	2012
Links to Contract Law Paper by Year	https://www.lawsonlundell.com/assets/htmldocuments/Contract%20Law%20Update%20-%20Developments%20to%20Note%202020.pdf	https://www.lawsonlundell.com/assets/htmldocuments/Contract%20Law%20Update%20-%20Developments%20of%20Note%202019.pdf	https://www.lawsonlundell.com/assets/htmldocuments/Contract%20Law%20Update%20May%2024%202019.pdf	https://www.lawsonlundell.com/assets/htmldocuments/2017%20Contract%20Law%20Update.pdf	http://www.lawsonlundell.com/media/news/550_Lisa%20Peters%20Contract%20Law%20Update%20November%2015%202016%20Final.pdf	http://www.lawsonlundell.com/media/news/502_Contract%20Law%20Update%202015%20_final_.pdf	https://www.lawsonlundell.com/assets/htmldocuments/461_Contract%20Law%20Update%202014%20_LP_.pdf https://www.lawsonlundell.com/assets/htmldocuments/464_Formatted_Tell%20Me%20No%20Lies%20_The%20New%20Duty%20of%20Honesty%20in%20Contractual%20Performance-final2.pdf	http://www.lawsonlundell.com/media/news/396_2013%20developments%20in%20contract%20law%20paper%20_in%20house%20and%20website%20version%20as%20at%20October%2031_.pdf	http://www.lawsonlundell.com/media/news/323_ContractLawUpdate2012.pdf
Acceptance by Conduct									X
Anti-oral Amendment Clauses					X				
Arbitration Clauses			X	X			X	X	
Automatic Renewal Clauses						X			
Best Efforts Clauses									
Binding Effect and Enurement Clauses								X	
Buy/Sell Clauses									
Conditions Precedent								X	
Confidentiality Clauses						X			
Consideration in the Context of Contract Variations			X						
Continuing Breach of Contract					X	X			
Contract Interpretation		X			X		X		
Contract Termination									

HEADINGS	2020	2019	2018	2017	2016	2015	2014	2013	2012
Links to Contract Law Paper by Year	https://www.lawsonlundell.com/assets/htmldocuments/Contract%20Law%20Update%20-%20Developments%20to%20Note%202020.pdf	https://www.lawsonlundell.com/assets/htmldocuments/Contract%20Law%20Update%20-%20Developments%20of%20Note%202019.pdf	https://www.lawsonlundell.com/assets/htmldocuments/Contract%20Law%20Update%20May%2024%202019.pdf	https://www.lawsonlundell.com/assets/htmldocuments/2017%20Contract%20Law%20Update.pdf	http://www.lawsonlundell.com/media/news/550_Lisa%20Peters%20Contract%20Law%20Update%20November%2015%20201 6%20Final.pdf	http://www.lawsonlundell.com/media/news/502_Contract%20Law%20Update%202015%20_final_.pdf	https://www.lawsonlundell.com/assets/htmldocuments/461_Contract%20Law%20Update%202014%20_LP_.pdf https://www.lawsonlundell.com/assets/htmldocuments/464_Formatted_Tell%20Me%20No%20Lies%20_The%20New%20Duty%20of%20Honesty%20in%20Contractual%20Performance-final2.pdf	http://www.lawsonlundell.com/media/news/396_2013%20developments%20in%20contract%20law%20paper%20_in%20house%20and%20website%20version%20as%20at%20October%2031_.pdf	http://www.lawsonlundell.com/media/news/323_ContractLawUpdate2012.pdf
Contracting with First Nations under the *Indian Act*								X	
Contractual References to Legislative Provisions			X						
Discretionary Powers					X				
Duties of Good Faith (see supplements)	X				X	X	X	X	
Duty of Honesty in Contractual						X	X		
Efficient breach							X		
Economic Duress									
Electronic Transactions									X
Entire Agreement Clauses		X					X		
Equitable Mistake									
Exculpatory Clauses and Limitation of Liability Clauses			X			X	X	X	X
Forum Selection Clauses	X		X	X			X		

HEADINGS	2020	2019	2018	2017	2016	2015	2014	2013	2012
Links to Contract Law Paper by Year	https://www.lawsonlundell.com/assets/htmldocuments/Contract%20Law%20Update%20-%20Developments%20to%20Note%202020.pdf	https://www.lawsonlundell.com/assets/htmldocuments/Contract%20Law%20Update%20-%20Developments%20of%20Note%202019.pdf	https://www.lawsonlundell.com/assets/htmldocuments/Contract%20Law%20Update%20May%202024%202019.pdf	https://www.lawsonlundell.com/assets/htmldocuments/2017%20Contract%20Law%20Update.pdf	http://www.lawsonlundell.com/media/news/550_Lisa%20Peters%20Contract%20Law%20Update%20November%2015%20201 6%20Final.pdf	http://www.lawsonlundell.com/media/news/502_Contract%20Law%20Update%202015%20_final_.pdf	https://www.lawsonlundell.com/assets/htmldocuments/461_Contract%20Law%20Update%202014%20_LP_.pdf https://www.lawsonlundell.com/assets/htmldocuments/464_Formatted_Tell%20Me%20No%20Lies%20_The%20New%20Duty%20of%20Honesty%20in%20Contractual%20Performance-final2.pdf	http://www.lawsonlundell.com/media/news/396_2013%20developments%20in%20contract%20law%20paper%20_in%20house%20and%20website%20version%20as%20at%20October%2031_.pdf	http://www.lawsonlundell.com/media/news/323_ContractLawUpdate2012.pdf
Frustration and *Force Majeure*			X						
Fundamental Breach									
Illegal Contracts									
Implied Terms and Implied Contracts		X				X			X
Inconsistent Terms	X								
Indemnity Clauses		X							
Liquidated Damages									X
Mistake	X								
Mitigation								X	
No Suit Clauses				X					
Nominal Consideration		X							
Options					X				
Penalty Clauses					X				
Pre-Incorporation Contracts									
Privity of Contract									X

HEADINGS	2020	2019	2018	2017	2016	2015	2014	2013	2012
Links to Contract Law Paper by Year	https://www.lawsonlundell.com/assets/htmldocuments/Contract%20Law%20Update%20-%20Developments%20to%20Note%202020.pdf	https://www.lawsonlundell.com/assets/htmldocuments/Contract%20Law%20Update%20-%20Developments%20of%20Note%202019.pdf	https://www.lawsonlundell.com/assets/htmldocuments/Contract%20Law%20Update%20May%2024%202019.pdf	https://www.lawsonlundell.com/assets/htmldocuments/2017%20Contract%20Law%20Update.pdf	http://www.lawsonlundell.com/media/news/550_Lisa%20Peters%20Contract%20Law%20Update%20November%2015%20201 6%20Final.pdf	http://www.lawsonlundell.com/media/news/502_Contract%20Law%20Update%202015%20_final_.pdf	https://www.lawsonlundell.com/assets/htmldocuments/461_Contract%20Law%20Update%202014%20_LP_.pdf https://www.lawsonlundell.com/assets/htmldocuments/464_Formatted_Tell%20Me%20No%20Lies%20_The%20New%20Duty%20of%20Honesty%20in%20Contractual%20Performance-final2.pdf	http://www.lawsonlundell.com/media/news/396_2013%20developments%20in%20contract%20law%20paper%20_in%20house%20and%20website%20version%20as%20at%20October%2031_.pdf	http://www.lawsonlundell.com/media/news/323_ContractLawUpdate2012.pdf
Rectification	X			X					
Releases				X					
Rights of First Refusal					X				
Restrictive covenants							X		
Severability		X							
Smart Contracts			X	X		X	X		
Specific Performance								X	
Standard of Review on Contract Interpretation Issues					X		X		
Statutory Illegality									X
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	X

66 Lawson Lundell Lawyers Recognized Across **36** Practice Areas in ***The Best Lawyers™ in Canada*** 2022

VANCOUVER
Suite 1600 Cathedral Place
925 West Georgia Street
Vancouver, British Columbia
V6C 3L2
t 604.685.3456
f 604.669.1620

CALGARY
Suite 1100, 225-6th Avenue S.W.
Brookfield Place
Calgary, Alberta
T2P 1N2
t 403.269.6900
f 403.269.9494

KELOWNA
Suite 403 - 460 Doyle Avenue
Kelowna, British Columbia
V1Y 0C2
t 778.738.2610

YELLOWKNIFE
Suite 200 - 4915 - 48th Street
Yellowknife, Northwest Territories
X1A 2N6
t 867.669.5500
f 867.920.2206

LAWSON LUNDELL LLP

Leading full service business law firm in Western and Northern Canada

lawsonlundell.com @LawsonLundell