LAWSON LUNDELL LLP

Contract Law Update

Developments of Note (2025 Edition)

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CONTRACT LAW UPDATE – DEVELOPMENTS OF NOTE (2025)

Lisa A. Peters, K.C. and Catherine Whitehead [1]

As those familiar with this annual update know, each year since 2009, I (Lisa) have undertaken a review of decisions from the previous 12 to 18 months, looking for cases relevant to commercial practice.[2] 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 have written about those cases. But typically, I also highlight cases that remind us of longstanding contract law principles and that illustrate how those apply in practice.

This year there are two important changes. First and foremost, my colleague Catherine Whitehead has co-authored this year's paper and will be the principal author of the 2026 update.

Second, while I generally have steered away from cases on contract interpretation in the past, both because they tend to be fact specific and because the applicable principles have been articulated by the SCC and provincial and territorial Courts of Appeal, this year is different.

This year, we identified a number of cases in which the use of a particular interpretative source was considered in some depth such that the court's analysis may be relevant and persuasive.

This year's topics are:

- ◊ Severance of uncertain contractual terms
- ◊ Statutory signature requirements in the electronic age
- ◊ Clauses requiring a calculation or determination "in accordance with generally accepted accounting principles consistently applied"
- ◊ Distinguishing between guarantees and indemnities
- ◊ Update on the contractual law of good faith

[1] We would like to acknowledge the work of Brooke Briscoe, summer articled student, in carrying out research and identifying topics for this year's update and the editorial input of our colleagues Katie Sykes, Codie Chisholm and Greg Hollingsworth.
[2] From both a transactional and litigation perspective.

Severance of Uncertain Contractual Terms

We have previously written about severance of contractual terms by courts applying either the blue pencil technique or notional severance.[3]

In most of the cases we have discussed in the past, the reason severance was under consideration was because a provision or provisions in the contract suffered from statutory or common law illegality.[4] But severance may also be applied to a contract containing a term that is unenforceable due to uncertainty.

Recent cases from B.C. and Alberta provide guidance on the availability of severance when a contractual term is found to be uncertain.

Khela v. Clarke, 2022 BCCA 71*,* was an appeal from the dismissal of an action for specific performance of a contract for the purchase and sale of residential property. Because the test for severance set out in the trial judgment in this case is cited with approval in two of the other cases discussed here, we will summarize it first.

The substantive ruling on severance was made by the trial judge, Mr. Justice Bernard, with the Court of Appeal finding no extricable error of law in the trial judge's interpretation of the contract and holding that the appellants had not shown that he committed any palpable and overriding errors.

Clarke listed his property "for sale by owner" with an asking price of $4.2 million. He ultimately entered into a contract of purchase and sale with the Khelas for a purchase price of $3.9 million. The closing date agreed to was two years in the future to allow Clarke to remove large amounts of personal property from the land.

The agreement also contained a price adjustment clause (the "PAC"), which read as follows:

> It is agreed that the final purchase price is based on the developable area, any area of the lands that will remain as wetlands, greenspace, ditch, green infrastructure, water courses, or setbacks will not be included in the calculation of the final sale price. If any adjustment is required, the purchase price will be adjusted on a per acre basis from the total 4.3 acres.

Two days prior to the closing date, the Khelas delivered a statement of adjustments to Clarke's solicitor with a $1,362, 416.17 downward adjustment in the purchase price stated to be for "green infrastructure and ditch set back requirements". Clarke was devasted as he owed deferred taxes on the property and was about to complete the purchase of a new home. He sought out legal advice. His new lawyer wrote to the Khelas' lawyer asserting that the PAC was vague and ambiguous, making the contract unenforceable, and indicated that Clarke would be prepared to enter into a mutual release whereby the deposit was returned to the Khelas.

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[3] Lisa last discussed the blue pencil technique or notional severance in the 2023 and 2019 Contract Updates.
From both a transactional and litigation perspective.

[4] Most of the academic commentary also focusses on severance of illegal terms.

On the completion date, the Khelas' solicitor sent a revised statement of adjustments based on the $3.9 million price (*i.e.*, without an adjustment relating to the PAC) and advised that the Khelas were ready, willing and able to close. Clarke refused to complete. The Khelas sued seeking specific performance or damages in the alternative.

In the trial judgment, Mr. Justice Bernard held that there was a true ambiguity as to what the parties meant by "developable" and that the meaning of this word had to be ascertainable in order for there to be certainty as to the purchase price. There were no definitions or terms of reference within the contract that would assist and, he said, the plain and ordinary meaning of the word and the words that followed it did not assist in defining it. Although extrinsic evidence was admissible given the ambiguity, there was no conduct by the parties, either in making the agreement or in fulfilling their obligations under it, that assisted in making an objective determination of the parties' intentions in using the word.

Justice Bernard concluded that the PAC was not severable. Based on commentary and pre-existing case law, he found that severance of uncertain terms was limited to those that are: "(a) meaningless, minor, or subsidiary to an otherwise enforceable agreement; or (b) in a divisible part of an agreement."[5] Vague or uncertain terms that the parties intended to govern a vital aspect of the parties' relationship, he explained, are not severable; rather they vitiate the entire agreement. The price agreed to be paid under a contract for the purchase and sale of land was, obviously, a vital or essential term.

On appeal, the Khelas argued that the judge should have severed the PAC because (1) it was only for their benefit and they did not seek to enforce it at the closing; (2) not severing the PAC granted Clarke a windfall because the value of the property had increased dramatically; and (3) doing so would be consistent with how the parties had operated for over two years.

The Court of Appeal agreed with Clarke that the Khelas were simply rearguing their case and asking the Court to come to a different conclusion. It was, stated Justice Frankel, open to the judge to find that the PAC was not an inconsequential term and that the parties intended it to be the method by which the "final purchase price" was determined. Accordingly, severance was not available.

In a 2025 B.C. case, the Court of Appeal dealt with severance of uncertain terms in its decision on the respondent's cross appeal: *Kim v. Argo Ventures Inc.*, 2025 BCCA 350. The dispute in this case was over additional financing Kim provided to a mixed-use real estate development referred to as the Olympic Village Project (the "Project").

The defendant Argo Ventures, through its sole shareholder and director Hong, identified real estate investment opportunities in Canada and pooled capital from third-party investors. Argo Ventures typically managed the business for investors in exchange for a management fee.

One entity of which Hong was the sole director, and in which Hong and his wife held shares along with other investors ("AMF3"), provided $8.5 million in capital for the Project by way of an equity

[5] At para. 76.

investment and a loan. A second entity ("AMF5") managed by Hong loaned $5.5 million to the Project.

In 2008, the Project was negatively affected by the global financial crisis and Argo Ventures' joint venture partner in the limited partnership that had been formed to develop the Project (in which AMF3 held a 70% interest) withdrew. The AMF3 and AMF5 investors were in danger of losing their investments without an injection of additional funds or capital. Argo Ventures asked the investors in AMF3 to waive their rights in exchange for interest-free promissory notes from Hong personally that were to mature in 50 years. They also agreed that if the AMF3 assets were liquidated, the promissory notes would be destroyed and they would be repaid their initial investment plus a potential bonus if the Project generated additional funds. Argo Ventures subsequently amalgamated with AMF3 and AMF5.

Hong and Argo Venture's next effort to obtain capital for the Project had them approaching investors who were invested in other projects owned or managed by Argo Ventures (the "mutual aid assets"). One of the mutual aid assets was Raven Song Joint Venture ("RSJV"). Hong provided all members of RSJV, including Kim, with a proposal offering incentives in exchange for financial assistance to AMF3 (the "RSJV Financing Proposal"). The proposal became the RSJV Agreement – it was one of three proposals made to different investor audiences approached to provide funds for the Project.

Three incentives were offered to investors in the RSJV Financing Proposal if they agreed to have $2.1 million of RSJV's equity in the RSJV property stand as collateral by AMF3 in the Project:

> a) additional interest on Argo Ventures' loan at 1.1%, annual simple interest to be repaid in a lump sum;
>
> b) a reduction in Argo's management fee rate upon the sale of RSJV's assets from 25% to 20% (the "RSJV Management Fee Incentive"); and
>
> c) a bonus payable to RSJV's members, to be paid from any "liquidation surplus" available following the liquidation of AMF3's assets (the "RSJV Liquidation Incentive").

These Incentives were not offered to all RSJV members. Rather the RSJV Financing Proposal contained the following language (as translated from Korean):

> [I]nvestors of the mutual aid assets related to AMF#3 and AMF#5 are excluded from the beneficiary list for the incentives (the "Incentives Exclusionary Clause").

When the Project ultimately earned a substantial profit, Kim sued as he did not receive the RSJV Management Incentive or the RSJV Liquidation Incentive.

The trial judge held that Kim was entitled to the RSJV Liquidation Incentive and calculated its amount. On appeal, the Court rejected Kim's position that the trial judge erred in his interpretation of the RSJV Agreement and the quantification of the RSJV Liquidation Incentive (if it were owing).

The trial judge did not exclude Kim under the Incentives Exclusionary Clause because he ruled that the Clause was void for uncertainty and could be severed from the RSJV Agreement. Argo Ventures cross-appealed on the severance issue (the finding that the Incentives Exclusionary Clause was void for uncertainty was not appealed).

Justice Butler, in the Court's reasons on the cross-appeal, highlighted the fact that while the RSJV Proposal offered three incentives in exchange for the use of equity from the RSJV project, two of those incentives, including the RSJV Liquidation Incentive, were not offered to investors who fell within the Incentives Exclusionary Clause, *i.e.*, those investors "related to" AMF3 and AMF5. The RSJV Agreement thus contemplated two groups who would receive different incentives. He inferred that no additional incentives were offered to investors related to AMF3 and AMF5 because they already stood to receive the benefit of the possible success of the Project if the equity from RSJV was put towards the Project.

While he found that the trial judge summarized the proper approach to severance set out in *Khela v. Clarke*, Justice Butler concluded that the trial judge erred in applying the principles he outlined by ruling that the identity of the parties entitled to the RSJV Liquidation Incentive was not a vital aspect of the incentive provisions of the RSJV Agreement. Severance of the Incentives Exclusionary Clause would significantly increase the cost of the incentives to Argo Ventures and would provide increased incentives to parties clearly related to AMF3 and AMF5. Severance would therefore alter both the price (cost of the incentives) and the parties (identity of the investors that would receive them). By severing only the Incentives Exclusionary Clause, the trial judge effectively read down the incentive provisions in the RSJV Agreement (*i.e.,* applied notional severance) to affect a new agreement pursuant to which incentives became payable to all the investors, even though the terms of the incentive provisions clearly intended the incentives to be available to only some.

Since the identity of the parties entitled to receive incentives, and the amount of the incentives, were essential terms but were uncertain, the Court of Appeal concluded that the Incentives Exclusionary Clause could not be severed from the incentive provisions of the RSJV Agreement taken as a whole. Thus, the Court allowed the cross-appeal and set aside the paragraph of the order that required Argo Ventures to pay the RSJV Liquidation Incentive to Kim.

In *Hotchkiss v Budding Gardens Inc*, 2021 ABQB 333, the parties entered into a lease for a purported three-year term, commencing on June 1, 2019. While Section 3(a) of the lease set a fixed rent of $7875 for the first year of the term, s. 3(b) required the parties to negotiate and agree on the amount of rent for years two and three. In an earlier decision (2020 ABQB 794), Justice Eamon had concluded that s. 3(b) was uncertain and therefore of no force and effect for years two and three of the term. The landlord took the position that the lease became void as of the end of the first term and that therefore the tenancy was on a month-to-month basis thereafter based on an overholding provision in the lease.

In his earlier reasons, Justice Eamon had declined to rule on whether year one of the lease was severable from years two and three and on whether the tenant was overholding (the judgment was issued on December 17, 2020). He stated that if the parties required determination of those points, they had to do so by written submission unless they persuaded the Court that an oral hearing was necessary.

The tenant abandoned the premises on the date the first judgment came down. The landlord sought directions that the lease was valid for year one but void for years two and three, and costs. The tenant advised it would not participate further in the matter.

In his 2021 decision, Justice Eamon cited *Khela v. Clarke* and said that the test enunciated there is consistent with Alberta authority.[6]

Justice Eamon cited *Ko v. Hillview Homes Ltd*., 2012 ABCA 245,[7] for its discussion of divisible terms. In that case, the Court acknowledged that it may sever divisible terms where the subject matter is separable but refused to sever the uncertain portion on the facts.

After noting that contracts containing uncertain essential terms can be saved by a variety of mechanisms,[8] including implying that an unspecified price be a reasonable price, Justice Eamon declined to adopt that approach on the facts. He concluded that given the surrounding circumstances, the parties must have intended, objectively speaking, that their lease be divisible and that severance of s. 3(b) would respect the parties' "objectively mutual intentions."

The decision of Justice Harris in *Kaup v. Landrex Hunter Ridge Inc,* 2023 ABKB 542, was on an appeal from a decision of Applications Judge Summers on the parties' competing summary judgment applications.

The plaintiffs (Kaup and his professional corporation, MKPC) sued two related corporations, Landrex Hunter Ridge Inc. ("LHR") and Landrex Inc. ("Landrex") for breach of contract. Landrex counter-sued MKPC, also for breach of contract.

The parties had entered into two contracts, an Agreement for Sale by which land owned by MKPC (which was adjacent to a separate parcel owned by Kaup) was to be sold to Landrex and a Master Sales Agreement (the "MSA"). The MSA included a clause requiring LHR to "clean out the ditch" on its lands: Kaup believed that the defendants' failure to manage their land was causing flooding on his adjacent parcel. In addition to this clause, the MSA contained provisions in which Kaup

[6] *Citing Hole v. Hole*, 2016 ABCA 34 at para. 49.

[7] Leave to appeal denied, [2012] S.C.C.A. No. 445.

[8] The list from paragraph 120 of *Ko v. Hillview Homes Ltd.* reads as follows:

1. A specific means of ascertaining them may be given, *e.g.* by reference to a published or to-be-published price or set of standards.

2. Some person, such as an arbitrator or valuator, may be authorized to fix them. Or even one of the parties acting unilaterally.

3. Some well-established custom of the trade is impliedly incorporated into the contract, *e.g.* when and where sales will close, or debts will be paid.

4. (a) They may be so obvious (using as a test the "Oh, of course" reply to the officious bystander) that they must be implied in the contract.

   (b) Or some terms may be implied by law, e.g. use of Canadian currency, or simultaneous tenders of conveyance and price.

agreed to withdraw his appeal from an approval from Alberta Environment and Parks allowing the defendants to operate a storm management system on their land and laying the foundation for the separate Agreement for Sale.

The phrase "clean out the ditch" was not defined or described in the MSA. Kaup understood that it meant that the defendants were required to mechanically remove silt and dirt from the ditch and repeatedly requested that the defendants carry out such work.

Kaup sued the defendants alleging breach of the Agreements. The defendants countersued seeking specific performance of the agreement by MKPC to transfer title of the lands covered by the Agreement for Sale.

The defendants argued that the phrase "clean out the ditch" was void for uncertainty and should be severed from the MSA and that the plaintiff MKPC should be directed to transfer title to the land under the Agreement for Sale to Landrex.

The Applications Judge concluded that the phrase "clean out the ditch" was vague and uncertain. It did not specify what was to be removed, the volume to be removed, and what was to be achieved. He concluded that at the time the parties signed the MSA, they had not determined what exactly needed to be done to clean out the ditch. He held that the phrase could not be saved using the criteria in *Ko v. Hillview Homes Ltd*. The Applications Judge ordered that the clause "clean out the ditch" be severed from the MSA; accordingly, the defendants were not in breach of the MSA.

On appeal, Justice Harris agreed that the phrase was void for uncertainty (it did not define what steps the defendants were to take).

The Applications Judge relied on *Hotchkiss v. Budding Gardens*, 2020 ABQB 794, and its adoption of the B.C. authority for the proposition that severance of uncertain terms is limited to those that are: (1) meaningless, minor, or subsidiary to an otherwise enforceable agreement; or (2) in a divisible part of an agreement.

Justice Harris agreed, but unlike the Applications Judge, held that severance was not available on the facts "the entire point of the MSA was to deal with flooding" and this provision was not a divisible part of the agreement. He cautioned that the Court should not be creating a new agreement and cannot make a bargain for the parties.

As the Agreement for Sale was not dependent on the MSA, however, and the defendants had made the payments under it, the Court declined to interfere with any steps taken by the parties to perform its terms.

Bottom line:

An agreement containing a term that is unenforceable based on uncertainty or vagueness may still be saved where a court is satisfied that severance of the term is appropriate.

Severance will not be available where the uncertain term is an essential term of the contract (a term intended to govern a vital aspect of the contractual relationship). It will only be available where the clause in question is: (a) meaningless, minor, or subsidiary to an otherwise enforceable agreement; or (b) is in a divisible part of an agreement.

This is a different test than the one applied to severance of illegal terms.

A party may also be able to avoid a ruling that the clause is too uncertain to be enforceable if:

1. The contract contains a clause providing a specific means for determining the uncertain item, such as price, *e.g.*, by reference to a published or to-be-published price or set of standards.

2. Some person, such as an arbitrator or valuator, is authorized to set the price or other term.

3. There is a basis for the court implying a term under the law on that topic.

Statutory Signature Requirements in the Electronic Age

While a signature indicating a party's consent to a negotiated contract is not always required (otherwise oral contracts would never be enforceable), there are a surprising number of statutes in Canadian jurisdictions that include a signature requirement.[9]

The Sale of Goods Act ("SOGA") in many Canadian jurisdictions contains a provision requiring that there be some note or memorandum in writing of the contract that is signed by the party to be charged or his agent.

And nearly every jurisdiction has a statute based on the *Statute of Frauds* (or still has the English *Statute of Frauds*[10] or a subsequent version of that statute, as received law), which contains a requirement that certain types of agreements be evidenced by some memorandum or note in writing and signed by the party to be charged, or some other person lawfully authorized by that party.

In our modern technology driven world, then, other than a traditional ink signature, what electronic communication will satisfy these signature requirements?

The cases we will discuss here involve the Saskatchewan *Sale of Goods Act*[11] ("SSOGA") provision

[9] For an example of the variety, see: *Business Corporations Act*, S.B.C. 2002, c. 57, ss. 15(1) and (2); *Employment Pension Plans Act*, S.A. 2012, c. E-8.1, s. 71(6); *The Credit Union Act*, 1998, S.S. 1998, c. C-45.2, s. 194; *Securities Act*, R.S.N.L. 1990, c. S-13, ss. 83, 121; *Partnership Act*, R.S.N.B. 1973, c. P-4, s. 27(2); *Corporations Registration Act*, R.S.N.S. 1989, c. 101, s. 10(3); *Personal Property Security Act*, R.S.O. 1990, c. P-10, s. 11(2); *Co-operative Associations Act*, R.S.P.E.I. 1988, c. C-23, s. 9; *Assignment of Debt Regulations*, R.R.N.W.T. 1990, c. F-1, ss. 2(a) and 2.1(a); *Real Estate Agents Act*, R.S.Y. 2002, c. 188, s. 23; *Land Titles Plans Regulations*, N.W.T. Reg (Nu) 067-93, s. 7(b).

[10] 29 Charles II., c. 3.

[11] R.S.S. 1978, c. S-1.

and the provision in B.C.'s *Law and Equity Act*[12] that reflect principles originating in the *Statute of Frauds.*

We discussed the trial decision in the Saskatchewan case, *South West Terminal Ltd. v. Achter Land and Cattle Ltd.*, 2023 SKKB 116, in our 2023 update.[13] Last year, we alerted participants at our presentations to the late-breaking decision of the Saskatchewan Court of Appeal (*Achter Land & Cattle Ltd. v. South West Terminal Ltd.*, 2024 SKCA 115), which dismissed the appeal of the defendant, and that leave to appeal to the Supreme Court of Canada had been sought.

In July of 2025, the SCC denied leave to appeal.[14]

This case generated significant media attention and legal commentary because one of the issues was whether a "thumbs up" emoji sent by text satisfied the requirements of s. 6(1) of the SSOGA.

Because of the depth and scope of analysis by both the majority and the dissent in the Saskatchewan Court of Appeal, the decision is not suited to a brief blog summary. The majority decision contains a lengthy review of the evidence and decision below, an analysis of all the issues and sub-issues contained therein, and a review of the history of the signature requirement in Saskatchewan.

The dissent, while not reviewing the evidence in any detail, also contains an analysis of the legal issues and sub-issues.

While we will focus here on the sub-issue of the signature requirement under s. 6(1) of the SSOGA, it is worth noting that the majority decision and dissent discuss the following legal principles and concepts:

- Contract formation principles.
- What constitute essential terms in a SOGA contract.
- The requirement in s. 6(1) of the SSOGA that, absent part performance of the contract, there must be some note or memorandum in writing of the contract.
- The interrelationship of electronic transaction statutes (in this case the *Electronic Information and Documents Act, 2000*[15] ("EIDA")) and statutes requiring a signature to validate a contract.

The primary issue on which the majority and dissent parted ways in the Court of Appeal was whether the trial judge erred in finding that a text message containing the thumbs up emoji met the SSOGA requirement that a contract be signed by the party to be bound or his agent.

[12] R.S.B.C. 1996, c. 253.
[13] See the 2023 Contract Law Update.
[14] 2025 CanLII 71474 (S.C.C.).
[15] S.S. 2000, c. E-7.22.

A brief summary of the facts informing that issue is in order.

The plaintiff ("SWT") had purchased grain from the defendant corporation ("Achter Ltd.") for many years. The agreements were all in SWT's standard form contract consisting of two sides of a single sheet of paper. The front page would be completed to contain details such as type of grain, price and delivery date. That page contained a place for a representative of the producer to initial to confirm that they had read and understood the conditions (on the reverse side) and a place for representatives of both parties to affix their respective signatures.

After SWT sent a text message to producers that it had dealt with before, it had conversations with Mr. Achter and his father, which a representative of SWT testified resulted in a verbal agreement that he asked Mr. Achter to confirm via text when SWT sent the standard form to him. The SWT representative signed the filled-out standard form in ink, took a picture of the front on his cellphone and sent the photo via text to Mr. Achter with the message, "Please confirm flax contract." Mr. Achter responded with a thumbs up emoji without any text. Mr. Achter did not sign the contract, digitally or in ink. Subsequently, Mr. Achter advised SWT that Achter Ltd. did not consider itself bound by the contract to deliver flax as he had not signed the contract.

Both the majority and dissent held that a responding text that contained a thumbs up emoji was an action in electronic form under the EIDA and that an objective bystander, aware of the relevant circumstances in this case, would conclude that the emoji signified consent to the contract and that an agreement was thereby reached. They indicated that while a thumbs up emoji is capable of signifying an acceptance of the contract put forward by the counterparty, that will not invariably be the case: it will depend on the context.

In the trial court and the Court of Appeal, SWT relied on the provisions of the EIDA that validated electronic signatures.[16]

Subsection 14(1) provides that a "requirement pursuant to any law for the signature of a person is satisfied by an electronic signature." Section 3(b) of the EIDA defines "electronic signature" as meaning "information in electronic form that a person has created or adopted in order to sign a document and that is in, attached to or associated with the document." The majority in the Court of Appeal concluded that the trial judge found that the signature in this case was the text message comprised of both the emoji and the metadata accompanying it, i.e., Achter's unique cellphone number and related metadata.

The majority broke down the requirements for an electronic communication to qualify as an electronic signature into four elements:

[16] Every province and territory has an *Electronic Transactions Act* or equivalent. They are all based on the Uniform Law Conference of Canada's model statute, but many jurisdictions made modifications when enacting the statute (and many use a different title). Some jurisdictions have enacted related regulations; some have not. It is critical that you consult the relevant statute for the applicable jurisdiction. See *Electronic Transactions Act*, S.B.C. 2001, c. 10; *Electronic Transactions Act*, S.A. 2001, c. E-5.5; *Electronic Transactions Act*, S.N.W.T 2011, c.13; *Electronic Commerce Act, 2000*, S.O. 2000, c. 17; *The Electronic Commerce and Information Act*, C.C.S.M. c. E55; *Electronic Commerce Act*, S.N.S. 2000, c. 26; *Electronic Commerce Act*, R.S.P.E.I. 1988, c. E-4.1; *Electronic Commerce Act*, S.N.L. 2001, c. E-5.2; *Electronic Commerce Act*, R.S.Y. 2002, c. 66; *Electronic Commerce Act*, S. Nu. 2004, c. 7.

1. The presence of some type of “information” on the communication;

2. That such information may be in electronic form;

3. The information must have been created or adopted by the person in order to sign a document; and

4. The information must be attached to or associated with the document

The majority saw “no room for controversy” in relation to the first, second and fourth elements.

When considering the third element, Chief Justice Leurer noted that the law has long demanded (prior to the electronic age) that any form of signature occur with the intent to agree to or authenticate the document and indicate the person’s intention to be bound. The trial judge had considered and rejected Mr. Achter’s argument that he had used the thumbs up emoji simply to confirm receipt of the first page of the contract as a photo in a text message.

He concluded in part:

> [137] To be clear, the metadata that went with Mr. Achter’s text message existed only in electronic form, and was only readable by electronic, magnetic, optical or similar means. However, it and the emoji served precisely the same purpose – and, importantly, would have been known by Mr. Achter to serve that purpose – [case references omitted]– that is it authenticated him and his assent to the contract. It does not matter whether Mr. Achter knew precisely what metadata accompanied his text message reply to Mr. Mickleborough as it is not disputed that there was sufficient information for Mr. Achter to be identified to Mr. Mickleborough and that Mr. Achter knew and intended that his text message would be identified to Mr. Mickleborough as coming from himself.
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> [138] Mr. Achter may also not have known that, at law, his text message reply amounted to him having “signed” the contract, but that does not invalidate the legal consequences attached to his actions. What is material is that Mr. Achter intentionally communicated his agreement to Mr. Mickleborough and did so in a way that knowingly verified the communication as his own.

Justice Barrington-Foote dissented on this issue. In his dissenting judgment, he stressed the distinction between the question of whether the person’s name or mark was written or otherwise placed on the document and the question of whether it was so affixed with the intention of authenticating the document as binding. In his opinion, to characterize the metadata that identifies the source of a text message – in substance, the text message address – as a *signature*, would:

- improperly stretch the signature requirement beyond recognition;

- ignore the language chosen by the Legislature to advance the purpose of the legislation;[17] and

- be tantamount to the repeal of s. 6(1) of the SSOGA.

This takes us to the B.C. Supreme Court decision in *Ross v. Garvey*, 2025 BCSC 705. At issue in that case was the signature requirement in s. 59(3)(a) the Law and Equity Act, B.C.'s successor statute to the *Statute of Frauds*.

Pursuant to s. 59(3), a contract respecting land or a disposition of land is not enforceable unless it satisfies one of three conditions:

> (a) there is, in a writing signed by the party to be charged or by that party's agent, both an indication that it has been made and a reasonable indication of the subject matter,
>
> (b) the party to be charged has done an act, or acquiesced in an act of the party alleging the contract or disposition, that indicates that a contract or disposition not inconsistent with that alleged has been made, or
>
> (c) the person alleging the contract or disposition has, in reasonable reliance on it, so changed the person's position that an inequitable result, having regard to both parties' interests, can be avoided only by enforcing the contract or disposition.

The Garvey brothers owned a property in Saanich, B.C. (Kyle held a 99% share and Matthew a 1% share). They created a listing without the assistance of a realtor. Ross, who was himself a licensed realtor, sent them an offer at the Gmail address that Kyle provided to him (the "Owners' Gmail Account"). Ross used the standard form contract of purchase and sale used in B.C. and signed the documentation using his electronic signature and electronic initials.

In an email, Kyle indicated that the brothers were not prepared to accept the offer. Ross suggested they send a counteroffer.

On September 24, 2025, Ross received an email from the Owners' Gmail Account setting out the property address as the subject line and containing a summary of the changes to Ross's offer made in an attached counteroffer. The counteroffer changed the price, the deposit amount, the condition removal date, and the completion, possession and adjustment dates. It set an offer expiry date and time of 9 p.m. on September 25, 2025. The email also indicated that the Garvey brothers would like to decrease the Buyer's Brokerage fee from 2% to 1.5%. Kyle alerted Ross by text message that a counteroffer had been sent.

However, neither Matthew nor Kyle signed the counteroffer document, electronically or otherwise. Ross sent a reply email to Kyle indicating that he was accepting the counteroffer on September 24th. He attached the counteroffer pdf sent by the brothers but added a notation that the contract acceptance date was September 24th and that the buyer's deadline for

[17] The section has both cautionary and evidentiary purposes and benefits. The act of creating a memorandum and signing it warns the parties of the seriousness and finality of their transaction, while the memorandum itself acts as the best evidence of the terms to which the parties have agreed.

exercising his rescission right was September 27, 2024. He also attached a document reflecting the reduction in the Buyer's brokerage fee.

Ross emphasized in his email that a counteroffer normally would have been signed and initialled in the appropriate places. He asked the brothers to sign and initial everything as soon as possible. In a subsequent email, Ross stated again that he had sent an accepted counteroffer and asked if Kyle had any questions.

Kyle responded with a thumbs up emoji.

When Ross again asked that the brothers sign and initial everything and offered to send them the materials through Docusign.

Kyle responded that he would not be able to accomplish that that night given his and his brother's schedules and said he would have the lawyer look things over and discuss it with his brother and get back to Ross.

Ross's next email made it clear that from his perspective there was a binding accepted offer that "should have all signatures attached".

The next email Ross received from the brothers was not from the Owners' Gmail Account, but from Matthew on his Gmail account. He indicated that Kyle was dealing with a medical emergency and that all future communications should be directed to him.

Ross ultimately heard from the lawyer for the brothers that their position was that they did not enter into a binding agreement to sell the property to him.

In his judgment on the summary trial of Ross's action against the Garveys, Justice Brongers found that at the date of the counteroffer, Kyle had apparent authority to act for Matthew. He found that a contract of purchase and sale was formed between the parties when Ross accepted the counteroffer sent by Kyle.

However, he found that the contract was not enforceable because it did not satisfy any of the three alternative routes to enforceability in s. 59(3) of the *Law and Equity Act*. In particular, he concluded that the contract was not signed by the Garveys.

After reviewing cases dealing with whether signature requirements were satisfied from B.C. and four other provinces and a Law Reform Commission of British Columbia Report on the *Statute of Frauds* from 1977, and emphasizing principles of statutory interpretation, Justice Brongers agreed with and adopted the reasoning in Justice Barrington-Foote's dissent in *Achter Land & Cattle Ltd. v. South West Terminal Ltd*. He concluded that while a signature need not be a traditional handwritten signature, the contract "must bear at least some sort of a formal inscription, made manually or electronically, that reflects the identity of the party who made it. In so doing, there is some assurance that the signatory not only wishes to be bound, but also appreciates the significance of the act they have agreed to."[18] Simply sending a document from a particular e-mail

[18] At para. 123.

address is not enough for the document to be considered "signed." Nor does sending a separate text with a thumbs-up emoji constitute a signature on a contract for the purposes of s. 59(3)(a) of the LEA.

Bottom line:

Many statutes contain signature requirements for specific types of contracts, some of which were originally in place long before there was any ability to sign a document other than in wet ink.

These provisions necessarily interact with a given jurisdiction's electronic transactions statutes, which are permissive as opposed to mandatory in nature.

When transacting parties adopt electronic signature software to affix their signature to a contract governed by a mandatory statutory signature requirement in a way that mirrors what would have been a wet ink signature in the past, disputes as to whether the contract has been signed do not arise.

But where the agreement is formed by way of online communications (such as emails or texts) and one or more parties does not sign the agreement in ink or via electronic signature software, an opening is created for a party having second thoughts about the contract to argue that the contract is unenforceable as it did not comply with the statutory signature requirement.

The question then arises as to what other content in a text or email exchange in which the parties reach consensus *ad idem* on the terms of a contract can constitute a signature for the purposes of the mandatory statutory signature requirement.

We now have examples of courts taking very different views of how far they can go to "construct" a signature out of content in an email or text. There is a majority decision in the Saskatchewan Court of Appeal concluding that metadata and a thumbs up emoji in a text message constituted a signature, and the minority decision in that same case, along with a B.C. Supreme Court decision concluding that the contract must at least bear some sort of formal inscription, made manually or electronically, that reflects the identity of the party who made it.

Clauses Referencing GAAP

A decision on a leave application in the B.C. Court of Appeal in December of 2024 prompted us to consider how effective (or ineffective) a reference to generally accepted accounting principles ("GAAP") is as a formula for some sort of calculation in an agreement and how often it leads to litigation.

In *EverGen Infrastructure Corp. v. Net Zero Waste Inc.*, 2024 BCCA 430, EverGen sought leave to appeal the award of an arbitrator relating to post-closing adjustments under a share purchase agreement ("SPA").

Under the SPA, EverGen was purchasing the shares of Sea to Sky Soils and Composting Inc. ("Sea to Sky") from the respondents; the transaction completed on December 31, 2020. Post-closing adjustments included the current liabilities of Sea to Sky, defined as:

… "liabilities of the Corporation which, in accordance with GAAP, are shown on the balance sheet of the Corporation as "current liabilities" including, without limitation, accounts payable and accrued liabilities in respect of any goods purchased by, or services performed for the Corporation prior to the Closing Date, deferred revenue, rent and other amounts payable under property leases, GST/HST payable, capital taxes, other Taxes payable and accruals for any and all obligations in respect of employees, deferred revenue in connection with the carbon credits…

(emphasis added).

The primary asset of Sea to Sky was a composting facility. The Ministry of Environment ("MOE") issued a non-compliance advisory letter to Sea to Sky in November of 2020 that identified specific areas of non-compliance with the *Organic Matter Recycling Regulation* ("OMRR").[19]

In the post-closing adjustments, EverGen recorded the amount of $550,750 as a current liability, drawing the amount from an estimate it had received for the construction of a pond from a contractor (the "MOE Accrual"). The arbitrator indicated that constructing the pond would have resolved two of the three non-compliance matters identified in the MOE advisory letter.

The respondents took the position that EverGen had failed to provide a fair and accurate statement of the calculation of the closing working capital and pursued arbitration. The only sub-issue on which EverGen sought leave to appeal was the arbitrator's finding that the MOE Accrual was not a current liability under GAAP (and therefore could not be included in the determination of current liabilities under the SPA).

Before the arbitrator, both experts relied on the three-part definition of liability found in the CPA Handbook and the three elements that must be met for an amount to constitute a liability.[20] He found that these three elements were not made out by EverGen. The arbitrator concluded that the MOE Accrual was not a liability under GAAP and therefore not a liability on closing.

Appeals from an arbitral award under s. 59 of the *Arbitration Act*[21] are limited to questions of law arising out of the award. EverGen framed three alleged intertwined errors of law on the leave application, asserting that the arbitrator erred in:

(1) incorrectly interpreting GAAP to require an expenditure of money in the fiscal year 2020 or prior to the closing date;

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[19] B.C. Reg. 18/2002.

[20] These are:

a) They embody a duty or responsibility to others that entails settlement by future transfer or use of assets, provision of services or other yielding of economic benefits, at a specified or determinable date, on occurrence of a specified event, or on demand;

b) The duty or responsibility obligates the entity leaving it little or no discretion to avoid it; and

c) The transaction or event obligating the entity has already occurred.

[21] S.B.C. 2020, c. 2.

(2) incorrectly determining that compliance with the OMRR was discretionary; and

(3) failing to consider a relevant element of the "legal test" under GAAP, that being whether the MOE Accrual constituted a "constructive liability" and as set out in the CPA Handbook.

The obstacle to EverGen obtaining leave was the body of law, including two decisions of the SCC and one from the BCCA,[22] standing for the propositions that GAAP is not law and that determinations made under GAAP are findings of fact. EverGen could not produce any contrary authority and conceded that GAAP, along with the CPA Handbook, provided the only framework for the three asserted errors of law.

EverGen contended, however, that by including a reference to GAAP in the SPA, the principles of GAAP effectively became the parties' own private law or that such principles were elevated to legal principles or a legal test.

Madam Justice Fleming rejected this contention. The jurisprudence recognized GAAP as a non-legal tool and findings based on GAAP as findings of fact. The parties did not, merely by agreeing contractually to use a tool or set of non-legal principles, give that tool the status of law.

Before discussing two other relatively recent cases, we pause here to point out that the cases on this issue typically refer to GAAP. As those familiar with accounting principles know, prior to 2011, a single set of standardized rules, principles and guidelines governing financial accounting and reporting was referred to as GAAP in Canada.

In 2011, Canada made a strategic decision to align with global accounting practices by adopting International Financial Reporting Standards ("IFRS"), which are mandatory for publicly accountable enterprises. Private corporations can elect to follow IFRS but more often choose Accounting Standards for Private Enterprises ("ASPE").

Further, there are two other standards dealt with in the CPA Handbook: Accounting Standards for Not-for-Profit Organizations ("ASNPO") and Accounting Standards for Pension Plans ("ASPP").

As we understand it, there are multiple differences among the standards. In modern parlance, then, GAAP is now the umbrella term that refers to all of these standards as a collectivity in Canada. Notwithstanding, in the cases we reviewed, parties appear to have chosen to refer to GAAP[23] in their agreement rather than one of the individual standards and did not necessarily make it clear whether they were incorporating U.S. GAAP or one of the Canadian standards under the umbrella concept of GAAP in this country[24].

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[22] *Symes v. Canada*, [1993] 4 S.C.R. 695 at 720-21; *Canderal v. Canada*, [1998] 1 S.C.R. 147; *Close v. Weigh West Marine Resort Incorporated*, 2009 BCCA 216.

[23] We understand that commercial solicitors may include a comprehensive definition of "GAAP" in an agreement, which may refer to a specific one of the standards described above include language such as "generally accepted accounting principles in Canada from time to time applying, for the avoidance of doubt, the standards prescribed in (naming a specific part of the CPA Canada Handbook dealing with a given standard), applied in a manner consistent with the prior periods (of the purchased corporation)."

[24] In one recent B.C. case, *H.R.S. Resources Corp. v. Thompson Metals Company Inc*., 2024 BCSC 1847, the Royalty Agreement at issue provided that starting in the third year of commercial production, HRS was to receive a 2% royalty on all "net smelter returns"

Such usage could lead to some unintended consequences, including debate about which principles of GAAP apply, but perhaps this issue does not arise where it is clear which set of standards the corporation in question has consistently adopted for its financial reporting.

Leeder Automotive Inc. v. Warwick, 2023 ONCA 726, is a case we discussed in 2023's paper, under the heading "Shotgun Clauses". We will revisit the case here for its treatment of a contractual clause in a Unanimous Shareholders' Agreement ("USA") dealing with valuation of shares which referenced GAAP.

Pursuant to the USA, Warwick indicated his intention to sell his shares to Leeder and Leeder indicated its agreement to buy the shares. When the relationship between Warwick and Leeder's CEO broke down, Warwick refused to sell his shares. Leeder brought an application seeking to compel Warwick to complete the transaction. The two issues before the application judge were whether the share-purchase transaction was a separate, standalone contract capable of being repudiated and whether Leeder had repudiated that contract. The application judge found that even though the share-purchase transaction did not constitute a separate contract, it was nonetheless repudiated by Leeder such that Warwick remained a shareholder.

The appeal considered both issues. The issue relevant to us in this paper is the question of repudiation, specifically whether one of the actions of Leeder that Warwick alleged constituted repudiation was indeed repudiation.

The valuation clause (Article 12) in the USA required that the Corporation's auditors or accountants "use generally accepted accounting principles applied on a basis consistent with those used in the preceding fiscal year."

When Leeder's accountants sent draft financial statements to Leeder's CEO, they cautioned that:

> "Paragraph 12.1 requires GAAP financial statements, being a Review or Audit Engagement. The draft financials are a Notice to Reader engagement only and <u>are not GAAP</u>" (emphasis added).

Further, while the draft sent by the accountants included an approximately $5 million settlement Leeder had received in relation to the Volkswagen TDI emissions scandal, this amount was excluded in subsequent versions (which the application judge attributed to instructions from the CEO).

On appeal, Leeder argued that Article 12.1 did not require formal compliance with GAAP. It submitted that something short of GAAP was permitted, based on the language "applied on a basis consistent with those used in the preceding fiscal year".

The Ontario Court of Appeal rejected this argument:[25]

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attributable to "ores and mineral products" from the mine. Section 1 of Schedule B of the Royalty Agreement provided that "Net smelter returns shall apply to the sale or deemed sale of all ores produced from the Property or concentrates derived therefrom determined in accordance with generally accepted accounting principles consistently applied", *i.e.*, there was no explicit reference to U.S. or Canadian GAAP. Expert evidence was led on U.S. GAAP, which was the set of principles applied by the defendant mine operator, a U.S. company, in its financial statements. Expert evidence was also led on IFRS, as Thomson Metals was acquired by Centerra Gold Inc., a publicly traded Canadian company, in the relevant time frame and it applied IFRS principles to its financial statements.

[25] At para. 66.

> This amounts to the proposition that, in 2003,[26] the shareholders intended that, down the road, the exchange of potentially millions of dollars' worth of shares would
>
> proceed on a 'GAAP-lite' basis: without properly audited statements that were instead based on the advice of management. This is an untenable interpretation of Article 12. The provision could not be any clearer. This is undoubtedly why BDO was cautious to alert readers of the statements that they were not prepared according to GAAP. This was a sufficient basis for the application judge to find that Article 12.1 had been infringed.

In *Amtim Capital Inc. v. Appliance Recycling Centers of America*, 2022 ONSC 6877,[27] the parties had expressly referenced U.S. GAAP in a contractual term, which led to a negative outcome for the plaintiff in relation to a claim for annual compensation.

The defendant ARCA was a publicly traded U.S. corporation. Its two main businesses were appliance recycling across North America and retail sales of appliances in the U.S. It carried out the appliance recycling business in Canada through its Canadian subsidiary, ARCA Canada Inc. ("ARCA Canada").

Amtim was a personal services corporation; Joe Berta was its sole principal. Amtim entered into a contractual arrangement with ARCA made up of two 2007 agreements whereby Berta, through Amtim, assumed responsibility for all sales by, and day-to-day management of, ARCA Canada in exchange for compensation. Each of the agreements had its own specific formula for calculating the compensation but each was based on the net profit on services delivered in Canada through ARCA Canada. Net profit of ARCA Canada was to be determined by subtracting total expenses from total revenue before taxes "calculated in accordance with generally accepted accounting principles of the USA, consistently applied."

ARCA was required to produce an income statement for the operations of ARCA Canada in accordance with U.S. GAAP within 90 days of the end of each fiscal year. The agreements conferred on Amtim the right to review all ARCA records pertaining to the Canadian operations.

In 2009, Berta wrote to ARCA expressing concern about the calculation of fees owing under one of the agreements and, in particular, the allocation of ARCA corporate overhead costs to ARCA Canada. Ultimately, litigation ensued in both the U.S. and Canada. The focus of the claim in Ontario was whether ARCA, in preparing the annual income statements for ARCA Canada, allocated ARCA corporate overhead costs to ARCA Canada in a manner that was not in accordance with U.S. GAAP, consistently applied, thereby reducing the annual net profit of ARCA Canada and correspondingly the compensation payable to Amtim.

The parties both led expert evidence on the requirements, directions or guidance of U.S. GAAP concerning the allocation of corporate overhead costs by a parent to a subsidiary or subsidiaries (and in particular, by ARCA to ARCA Canada). Interestingly, Berta acknowledged at trial that he had no specific knowledge of what U.S. GAAP provided respecting the calculation of net profit but was content that net profit be calculated according to whatever U.S. GAAP did provide.

[26] The year the USA was executed.

[27] Aff'd 2024 ONCA 225.

After summarizing the expert reports in detail, Justice Broad summarized the principles to be applied in interpreting a commercial contract.[28] He held that the parties had agreed on the application of external principles which would guide the calculation of "net profit" which are recognized and shared on a societal level by many business enterprises," and not on a set of "detailed and prescriptive rules." Those principles permitted allocation of corporate overhead costs to subsidiaries. The agreements between the parties "delegated to ARCA the task of determining ARCA Canada's 'net profit' for the purpose of calculating AMTIM's annual compensation and provided only that the calculation be done in a way that accords with (or 'agrees with or follows') U.S. GAAP."

He found that "consistently applied" referred to the application of U.S. GAAP and not necessarily particular methodologies chosen by ARCA management for the allocation of corporate overhead costs to ARCA Canada.

Ultimately, Justice Broad concluded that the experts agreed that the allocation of corporate overhead costs by a parent to a subsidiary was not governed by a strict set of rules which would provide a bright line separating allocations that would be deemed to have been made in accordance with U.S. GAAP from allocations deemed not to have been. This led him to the conclusion that there may be a range of available allocation methodologies that might be considered rational and reasonable. Therefore, it was open to corporate financial management to exercise its own discretion in selecting the allocation methodology to be employed. An assessor or adjudicator charged with determining whether the allocation of corporate overhead costs was "in accordance" with U.S. GAAP, he concluded, is required to be deferential to the exercise of management's discretion, so long as it is rational, reasonable and consistent.

Antim had the onus of proving that ARCA breached the Agreements by allocating overhead costs to ARCA Canada in a manner that was not "in accordance with U.S. GAAP, consistently applied". It failed to meet that onus.

<u>Bottom line:</u>

Parties appear to frequently choose to reference GAAP in commercial agreements by stipulating that a calculation or adjustment be made in accordance with GAAP, consistently applied. There are, of course, variations on this formulation.

Parties choosing such a formulation should consider a number of factors:

- GAAP is not law and it does not articulate a legal test. There are several corollaries to this proposition:
    - Findings by a lower court or arbitrator based on GAAP are findings of fact. Where the test for leave to appeal requires that there be an issue of law, errors in applying or interpreting GAAP will not give rise to an appealable issue.
    - A reference to GAAP cannot trump other parts of the contract nor can it be read in a way that ignores or renders meaningless other parts of the written agreement. The court is still tasked with interpreting the contract according to the well-

[28] Beginning at para. 53.

established principles of contract interpretation.

While a contract can explicitly task accountants with determining an issue, a reference to GAAP in a formula in a contract does not accomplish this.

If there is a dispute rooted in the calculation referencing GAAP, expert accounting evidence will be required.

In Canada, GAAP is now an umbrella term for multiple accounting principles and standards, including without limitation International Financial Reporting Standards (IFRS); Accounting Standards for Private Enterprises (ASPE); Accounting Standards for Not-for-Profit Organizations (ASNPO) and Accounting Standards for Pension Plans (ASPP).

If there is a reason to choose U.S. GAAP, which is not identical to Canadian GAAP (for example, if the target company in a SPA is an American company), the client needs to be aware of the differences.

The phrase "in accordance with GAAP, consistently applied" is not a term of art.

The formulation "in compliance with GAAP, consistently applied" could have a more prescriptive meaning, *i.e.*, in a way that is required by GAAP as consistently applied in prior periods.

Creating a detailed formula for calculating the entitlement, payment or adjustment may be more challenging than inserting a reference to GAAP as an objective standard, but a more detailed formula may be less likely to lead to litigation. What the words "in accordance with GAAP, consistently applied" can mean in relation to a particular calculation is something that experts can, and likely will, have different views on.

Distinguishing between Contractual Guarantees and Indemnities and Why it Matters

Commercial agreements often include what are described as "indemnities". Guarantees, as leading writers on the topic tell us, are a particular type of indemnity obligation. Whether or not a particular agreement or clause is one of indemnity or guarantee is a question of contract interpretation.

The case law explains some of the reasons why placing a contractual obligation[29] in one or the other category matters.

In *WBI Home Warranty Ltd. v. Patel*, 2025 ABKB 307, the question of whether an indemnity agreement was a guarantee mattered because of the existence of Alberta's *Guarantees Acknowledgment Act*[30] (the "GAA"). Those of you familiar with the GAA will know that it contains requirements for guarantees entered into by a person who is not a corporation, specifically appearance before a lawyer by the person, who must acknowledge that they executed the guarantee, and sign a form of certificate.

The plaintiff WBI was an agent for Royal & Sun Alliance Insurance Company of Canada ("RSA"). It sold home warranty insurance underwritten by RSA, as agent for RSA, to home builders in Alberta

[29] Obligations to indemnify may arise under statute or be implied or imposed by the law of restitution. We are focusing on contractual obligations in this paper.

[30] R.S.A. 2000, c. G-11.

in compliance with the *New Home Buyer Protection Act*.[31] WBI sold insurance to a homebuilding company, Optimistix (the "Builder"), under an agreement referred to as the "Builder Agreement," and at the same time entered into an agreement described as an "Indemnity Agreement" with Optimistix and three others who signed in their personal capacities, one of whom was a director of Optimistix. Under that agreement, the defendants agreed to indemnify RSA from any loss it might suffer if any of them failed to meet their obligations under the respective agreements.

RSA suffered a loss and sought indemnity for it from the Builder and individual defendants. The defendants moved for summary judgment, arguing that the Indemnity Agreement was a guarantee and was unenforceable because the parties had not complied with the requirements of the GAA.

At first instance, the Alberta Court of Justice held that the Indemnity Agreement was unenforceable on the basis it was a guarantee and was not compliant with the GAA.

RSA appealed to the Court of King's Bench. Justice Kuntz, in her Reasons on appeal, noted that whether an agreement falls within the definition of "guarantee" in the GAA is a question of contract interpretation.[32]

She reproduced passages from the McGuinness text[33] on the law of guarantees, noting that the distinction between the two is conceptually clear: indemnities relate to protection against loss or liability, while guarantees relate to protection against the default in performance of another person. In particular cases, the distinction may not be sharp. If one party induces another to enter into a transaction by a promise to indemnify against liabilities that may arise from the transaction, that promise is not a guarantee.

Justice Kuntz also considered a 1983 decision of the Alberta Court of Queen's Bench (*Kamitomo v. Pasula,* [1983] A.J. No. 703 (Q.B.)), where the issue of whether an oral promise to pay was an indemnity or a guarantee mattered because if it was a guarantee, it did not comply with the *Statute of Frauds*. In *Kamitomo*, Justice Kryczka adopted passages from the English cases[34] that set out three tests for when the *Statute of Frauds* applied (because the obligation was a guarantee).

The first test is based on three propositions:

1. A promise made to a person who is a creditor or is about to become a creditor to pay the debt due or to become due from another to the creditor is a guarantee, whether the promise to pay is conditional or unconditional.

2. A promise made to one who is not a creditor that if he will incur liability, the promissor will indemnify him against it, is an indemnity which does not fall within the statute.

3. If the object of an agreement between the plaintiff and the defendant is to induce the plaintiff to assume a liability which does not then exist and is being assumed as a consequence of the agreement, then a promise of the defendant made incidentally

[31] S.A. 2012, c. N-3.2.

[32] Citing, *inter alia,* the SCC decision in *Communities Economic Development Fund v. Canadian Pickles Corporation*, [1991] 3 S.C.R. 388.

[33] Kevin P. McGuinness, *The Law of Guarantee*, 3rd ed. (Markham, Ont.: LexisNexis Canada, 2013).

[34] Primarily *Sutton & Co. v. Grey*, [1894] 1 Q.B. 285.

> thereto to pay the debt of a third person is an indemnity which does not fall within the statute.

The second test is described as the "interest test." It assesses "…whether the defendant is interested in the transaction, either by being the person who is to negotiate it or in some other way, or whether he is totally unconnected with it. If he is totally unconnected with it, except by means of his promise to pay the loss, the contract is a guarantee; if he is not totally unconnected with the transaction, but is to derive some benefit from it, the contract is one of indemnity, not a guarantee…".

The third test is the object test. If the object of the agreement between the defendant and the plaintiff is to accrue a benefit to the defendant, then the incidental promise of the defendant made for the purpose of attaining that object to pay the debt of a third person is an indemnity which does not fall within the *Statute of Frauds*.

Justice Kuntz outlined the surrounding circumstances that informed the interpretation of the Indemnity Contract, which included:

- One of the individual signatories of the Indemnity Agreement was a director of the Builder. He signed the Indemnity Agreement on behalf of the Builder and in his personal capacity.

- While there was no evidence as to whether the other two individuals were directors, officers or shareholders of the Builder, the Builder Agreement stated that RSA may require such persons to sign the Indemnity Agreement. The Court drew an inference that the other two individual defendants were directors, officers or shareholders of the Builder.

Justice Kunz concluded:

> [61] The object of the transaction was the Builder Agreement. The Builder and the Respondents needed RSA to enter into the Builder Agreement so that the Builder could build and sell new homes in compliance with the NHBPA. The Respondents stood to gain from the Builder Agreement because it was necessary to keep their company, the Builder, in business. The Respondents induced RSA to enter into the Builder Agreement and assume a potential liability to Owners by promising to indemnify RSA under the Indemnity Agreement. In accordance with the principles of law and case law I have reviewed, these facts describe an indemnity.
>
> [62] I also find that the obligations under the Builder Agreement are separate and distinct from those under the Indemnity Agreement.
>
> [63] The Builder Agreement requires the Builder to remedy or repair Defects that are subject to a valid Claim by an Owner under a Warranty Policy. The Warranty Policy is between the Owner and RSA. If the Builder fails to make a required repair under the Builder Agreement, the Builder is in default and RSA steps in to facilitate the repair. RSA answers for the Builder's default because it owes an obligation to the

Owner under the Warranty Policy. RSA takes on the risk that the NHBPA was meant to address, namely, Owners being left without recourse against a builder.

[64] In my view, this structure is inconsistent with the idea that the Indemnity Agreement is a guarantee. The Builder Agreement creates it own set of obligations between the Builder and RSA in response to legislation that requires Owners to be protected. The Respondents did not agree to answer for the Builder's default in that context and could not because it would mean the Owner was not insured as required by the NHBPA.

[65] What the Respondents agreed to was a separate and distinct obligation, and that was to indemnify RSA for costs it might incur as a result of taking on the risk under the Warranty Policy, namely the costs of repairing a defect. I appreciate that RSA would not incur costs but for the Builder's default, however, in the overall context of the Builder Agreement that is not enough for me to find that the Respondents guaranteed the Builder's performance under the Builder Agreement. The failure to repair is the default, and the costs arising from that is a separate event in respect of which the Respondents agreed to indemnify RSA.

She referenced various clauses in both the Builder Agreement and Indemnity Agreement that supported her conclusion:

- A clause that had the defendants hold RSA harmless in respect of any obligation of the Builder under the Builder Agreement.
- A clause providing that RSA's remedies were cumulative and could be exercised together or independently of other rights and remedies available to RSA (i.e., it did not need to exhaust its rights against the Builder prior to seeking recovery from the defendants).
- A clause that mandated joint and several liability of the Builder and the individual signatories.
- A clause that made it clear that RSA was not obliged to pursue the Builder for costs prior to pursuing the individual defendants.

She construed the reference in the Indemnity Agreement to the Builder's default under the Builder's Agreement (which the Respondents pointed to as the reason the Indemnity Agreement was a guarantee) as simply background to the obligation to indemnify.

Evidenced by this case, the *Statute of Frauds* (or its progeny) in an important consideration in nearly every Canadian jurisdiction[35] because it requires "certain classes of contract to be evidenced in writing."[36] In some provinces and territories, a version of the English statute is still part of provincial

[35] Manitoba (*Repeal The Statute of Frauds Act*, C.C.S.M., c. F158) and New Brunswick (*An Act to Repeal the Statute of Frauds*, S.N.B. 2014, c. 47) have both repealed the *Statute of Frauds*. Note that the Manitoba Act contains a provision stating that "[i]n any action based in whole or in part upon acts done, contracts or agreements made or other claims which arose prior to October 1, 1983 the *Statute of Frauds* and the *Statute of Frauds Amendment Act* may be pleaded" (s. 2).

[36] McGuinness at §5.3: "It is almost beyond question that the most widely considered statutory graft of formality onto the

law as received English law,[37] while other provinces have either re-enacted it in more modern language or have added a domestic statutory overlay.[38] B.C. has repealed the *Statute of Frauds*, but retains an element of it in s. 59 of the *Law and Equity Act*[39] as it relates to contracts respecting land or a disposition of land (subject to certain exceptions) and as it relates to guarantees and indemnities.[40]

McGuinness says that the case law applying the statute is "both confused and complex" because "[t]he judiciary throughout the common law world has often expressed its hostility towards the *Statute of Frauds*, and they have, for the most part, almost since its enactment consistently striven to find ingenious ways of circumventing its effect".[41]

The Alberta GAA and the requirements of provincial versions of the *Statute of Frauds* are not the only reason the distinction between guarantees and indemnities may matter. Other reasons include:

- An indemnifier is liable even if the principal debt is void or otherwise unenforceable, which is not the case with a guarantee.[42]

- While the normal defences arising under the law of contract apply to both categories, the law of guarantee affords sureties what McGuinness describes as a "staggering array of defences that may be raised by a surety in answer to any claim by a creditor for payment or performance under the guarantee."[43]

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common law of contract was introduced by the enactment of the *Statute of Frauds* in 1677."

[37] Alberta, Saskatchewan, Newfoundland and Labrador, Yukon, N.W.T. and Nunavut.

[38] Ontario (*Statute of Frauds*, R.S.O. 1990, c. S.19), Nova Scotia (*Statute of Frauds*, R.S.N.S. 1989, c. 442) and P.E.I. (*Statute of Frauds*, R.S.P.E.I. 1988, c. S-6).

[39] R.S.B.C. 1996, c. 253.

[40] B.C.'s *Law and Equity Act* provides under s. 56 that a guarantee or indemnity is not enforceable unless (a) it is evidenced by writing signed by, or by the agent of, the guarantor or indemnitor, or (b) the alleged guarantor or indemnitor has done an act indicating that a guarantee or indemnity consistent with that alleged has been made. As explained by the B.C. Supreme Court in *Lindstrom Construction Ltd. v. Capozzi Enterprises Ltd*., 1992 CarswellBC 840, 1992 CanLII 825 (B.C.S.C.):

> 141 In England and in other common law jurisdictions under the wording of s. 4 of the *Statute of Frauds* or its equivalent the courts held that the writing requirement applied only to guarantees but not to indemnities. To decide whether a particular set of facts amounted to a guarantee or an indemnity involved a difficult problem of interpretation. The need to make the subtle distinction between indemnity and guarantee on which the result in many cases falling to be decided under s. 4 statutes, has been done away with in British Columbia and is irrelevant for the purposes of the governing provision of the *Statute of Frauds*. For some years the writing formality has been a requirement of the statute of this province in respect of indemnities as well as guarantees…

McGuinness at §5.44 notes that "[d]espite these statutory requirements, the British Columbia courts have held that there are circumstances where an oral promise to pay or make good the deficient performance of another person is as binding as a written guarantee":

> Under the so-called "wider interest exception", where a purported surety stands to gain personally by inducing the creditor to accept his or her undertaking to pay, the surety is bound to honour the oral guarantee. In order for the exception to apply, the surety must have been engaged in "the pursuit of an objective beyond that of simply guaranteeing the debt". In other words the guarantee must be "incidental to a larger purpose sought to be accomplished by the promisor".

[41] McGuinness at §5.2, fn 4.

[42] See Communities *Economic Development Fund v. Canadian Pickles Corp., supra, and MacNeill v. Fero Waste and Recycling Inc*., 2003 NSCA 34.

[43] McGuinness at §11.200.

- Different limitation periods and triggering events may apply to the two categories.

Bottom line:

While it may be difficult to distinguish a contractual indemnity from a guarantee, there are important reasons to do so, including: applicability of the *Statute of Frauds* (and its equivalent in various jurisdictions); applicability of Alberta's GAA; some defences available to guarantors are not available to indemnitors; differences in applicable limitation periods.

The use of a label will not be determinative, nor will the fact that the obligation assumed is secondary in nature.

The resolution in a given case will turn on the correct interpretation of the contract and the intentions of the parties. The interpretative exercise may be informed by tests articulated in older English cases dealing with the application of the *Statute of Frauds*.

Update on Good Faith Duties in Contract Law

Every year, we review decisions on the contractual duties of good faith and report on anything new or noteworthy since the three key decisions of the SCC in 2014 (*Bhasin v. Hrynew*, 2014 SCC 71), 2020 (*C.M. Callow Inc. v. Zollinger*, 2020 SCC 45) and 2021 (*Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District,* 2021 SCC 7) (collectively, the "Trilogy"). These decisions have been discussed in depth in prior papers.[44]

Case law this year offers clarity on the following questions that the Trilogy did not answer:

- Can pre-contractual dishonesty give rise to a claim of breach of the duty of honest performance?
- What constitutes a contractual discretion that gives rise to the good faith duty described in *Wastech*?
- Can a breach of a good faith duty occur in the context of a letter of intent ("LOI")?

Pre-contractual dishonesty and good faith

The SCC has not definitively stated whether or not there is a "manifestation of good faith which could apply to pre-contractual negotiations".[45] In *Ocean Pacific Hotels Ltd. v. Lee*, 2025 BCCA 57, the B.C. Court of Appeal considered whether pre-contractual negotiations may form the basis for a claim based on a breach of a common law duty of good faith. Mr. Justice Butler specifically considered whether dishonest conduct that is "intended to induce the formation of a contract" may underpin a claim for breach of the duty of honest performance and ultimately endorsed the "developing consensus … that a claim for breach of the duty of honest performance cannot be

[44] See "The New(ish) Doctrines of Good Faith in Contract Law – The Recent Teachings of the Supreme Court of Canada" (2021) and "Tell Me No Lies – The New Duty of Honesty in Contractual Performance" (2014).

[45] 2025 BCCA 57 at para. 65 ("*Ocean Pacific* CA").

based on dishonest conduct connected to contract negotiations."[46]

The appellant ("Ocean Pacific") operated the Pan Pacific Hotel in Vancouver. The respondents were former employees who had agreed in 2020 to change their employment status to "casual" after Ocean Pacific was unable to offer regular shifts to many employees due to the COVID-19 pandemic. Employees who changed their status and signed agreements for casual employment (the "Casual Agreements") stayed eligible for extended health benefits, "subject to and in accordance with the terms and conditions of the applicable plans and policies and the continued approval of [Ocean Pacific's] carrier", even though casual employees were not normally eligible for those benefits.[47] Ocean Pacific was able to extend coverage during a 120-day grace period under its terms with the insurance provider, Manulife.

In July 2020, the grace period was expiring. Ocean Pacific still did not have sufficient work for most of its regular hourly employees. In response to employee questions regarding the Casual Agreements, Ocean Pacific stated that, "Current Benefits, which are subject to the rules, regulations and policies of the Provider will remain the same." While Ocean Pacific obtained a second extension from Manulife, it expired on January 2, 2021.

The employees commenced a class action against Ocean Pacific. They alleged that Ocean Pacific promised them when they signed the Casual Agreements that their extended health benefits would be extended indefinitely.

The chambers judge initially declined to certify the class action, finding that "both the original notice of civil claim … and the proposed amended notice of civil claim, failed to plead the material facts necessary to support the elements of the causes of action pleaded", but gave the employees "the opportunity to amend their pleadings to produce a potentially viable claim."[48]

The employees advanced a new theory of their case: that there was an implied term in new employment agreements for casual employment that Ocean Pacific would take reasonable steps to obtain the insurer's continued approval to provide extended health benefits to the employees. They revised the legal basis for their claim for breach of the duty of good faith contractual performance. They pleaded that Ocean Pacific made dishonest statements about the terms of the new agreements and failed to inform them that it had only arranged for benefits covering for a temporary grace period and did not intend to take reasonable steps to seek an extension for as long as it could obtain Manulife's agreement to do so.

The chambers judge held that the claim was novel on the ground that it suggested that the existing employment agreement and the new agreement for casual employment had to be taken together collectively, and therefore Ocean Pacific had been dishonest within an existing contractual relationship. She concluded that there was some prospect the claim might succeed at trial.

The common issues certified included the following:

Breach of the duty of honest performance

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[46] *Ocean Pacific* CA at paras. 36, 65 (emphasis added).

[47] *Lee v. Ocean Pacific Hotels Ltd.*, 2023 BCSC 1650 at para. 17 (*Ocean Pacific* SC), rev'd in part *Ocean Pacific* CA.

[48] *Ocean Pacific* SC at para. 5

1. Did the defendant intentionally mislead the Class members about the limited continuation of their benefits?

2. If so, did that conduct amount to a breach of the defendant's duty of honest performance of its contractual obligations toward Class members?

3. If so, what remedies are the Class members entitled to?[49]

On appeal, Mr. Justice Butler set aside the order certifying the above three common issues.[50] The claim as pleaded alleged that Ocean Pacific had been dishonest during the negotiation of the casual employment agreements, which induced them to enter into those agreements. Those facts could not support a claim for breach of the duty of honest performance—but leave was granted to amend the pleadings to plead a breach in relation to the employees' existing employment contracts. Butler J.A. concluded that while the SCC has not definitively denied the existence of a good faith duty that could apply to pre-contractual negotiations, it did not intend to create such a duty when it recognized the existence of a contractual duty of honest performance[51]. Rather, in his view, the torts of negligent and fraudulent misrepresentation provided "an adequate remedy".[52] The employees "could have advanced a claim in fraudulent misrepresentation based on the same material facts pled in the ANOCC in support of the claim for breach of the duty of honest performance"[53], but did not do so.

The good faith duty of honest performance does not require that a defendant meant for a representation to be relied on by the plaintiff. Mr. Justice Butler accordingly noted that allowing this duty to extend to contractual negotiations would mean that claims could potentially include situations where a defendant did not intend to induce the other party to enter into the agreement.

<u>What Constitutes a Contractual Discretion</u>

The SCC in *Wastech* did not define a "contractual discretion" when it established the contours of the duty to exercise contractual discretion in good faith. In a prior update on the *Wastech* decision, we noted that it remained uncertain what types of contractual obligations or powers should be properly characterized as "discretionary" and therefore subject to this particular good faith duty, since almost any power under a contract could be described, in a general way, as discretionary *(i.e.*, a party can choose to exercise it or not).

In *Crotty v. Aviva General Insurance Company*, 2025 NLCA 39, the Court of Appeal of Newfoundland and Labrador helped to resolve this uncertainty by considering what constitutes a contractual discretion in the context of assessing whether the terms of a standard automobile insurance policy (the "Standard Automobile Policy") gave the insurer ("Aviva General") the discretion to decide whether claimed travel expenses were reasonable.

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[49] *Ocean Pacific* SC at paras. 137-141.

[50] However, the claim for breach of the duty of honest performance was not struck. The respondents were given leave to amend their pleadings and the matter was referred back to the chambers judge: *Ocean Pacific* CA at paras. 98-99.

[51] *Ocean Pacific* CA at para. 65.

[52] *Ocean Pacific* CA at para. 66.

[53] *Ocean Pacific* CA at para. 67.

The appellants had been injured in motor vehicle accidents and claimed that Aviva General had wrongly denied them reimbursement for expenses they incurred for travel to treatments. They claimed breach of contract (among other things), arguing that the terms of the Standard Automobile Policy required Aviva General to reimburse them for reasonable travel expenses, but that it did not do so because it had adopted a practice not to cover transportation expenses for round trips less than 25 kilometers.

The lower Court characterized the contractual obligation for Aviva General to pay reasonable expenses as a discretionary term and held that because the appellants had not alleged that Aviva General had exercised that discretion in an arbitrary or capricious manner or in bad faith, as established in *Wastech*, the amended Statement of Claim did not set out a viable claim for breach of contract.

The Court of Appeal disagreed with the lower Court that the contractual obligation to pay reasonable expenses was a discretionary term. The Court of Appeal characterized a contractual discretion as follows:

> [71] A contractual discretion does not therefore arise because a party has a choice how to execute the contract. It arises when a party has the power not only to choose but to bind the other party to that choice.

Applying this reasoning to the Standard Automobile Policy, the Court concluded:

> [73] The terms of Section B impose on Aviva General an obligation, not a discretion, to pay reasonable expenses. Aviva General can choose whether it considers an expense reasonable but so can insured persons when they submit their claim. Neither party has the discretionary power to decide whether an expense is reasonable and bind the other party to that choice.

Because Aviva General was not exercising a discretionary power, the appellants did not need to allege that it had exercised that power "contrary to the requirements of good faith", as required by *Wastech*. The allegation that Aviva General had breached the policy by not paying the travel claims was therefore sufficient as a cause of action.

<u>Good Faith in the Context of a Letter of Intent</u>

Dr. Michael Emon Dentistry Professional Corporation v. Alexander Sevo Dentistry Professional Corporation, 2025 ONSC 4961, considered good faith duties in the context of a letter of intent (the "LOI") concerning the sale of an endodontic practice (the "Practice") between two dentists, Dr. Emon and Dr. Sevo. Dr. Emon was transitioning into retirement and Dr. Sevo wanted to purchase his Practice.

The LOI set out a series of steps and conditions precedent that were required to be completed and met prior to the purchase of the Practice proceeding.

The LOI expressly stated it "[was] not contractual in nature or binding (except as specifically set out herein) … and reflect[ed] only the intention to proceed toward the negotiation of the Purchase

Agreement."[54]

Key provisions of the LOI included:

- No material adverse change in the Practice, and the Practice having been carried on in the ordinary course since the date of the most recent financial statements;

- Dr. Sevo's having entered into a lease agreement with the landlord and the practice that shared the premises on terms satisfactory to him;

- Dr. Sevo's being satisfied with his due diligence investigations "in his sole and absolute discretion;"

- Dr. Sevo's having obtained financing on terms satisfactory to him, in his discretion.

It is unclear from the reasons whether a Purchase Agreement, which was intended to be signed no later than April 3, 2017, was ever executed. The reasons seem to refer to the LOI at times as if it were the Purchase Agreement: this may be because the contents of the ultimate Purchase Agreement were set out in the LOI. However, the question arises as to whether the trial judge was applying contractual duties of good faith to a non-binding LOI.

The closing date was extended twice, but "numerous items" remained "in draft or outstanding", including the lease agreement, which was a condition precedent to closing.[55] During this time, Dr. Sevo also learned that the Practice's office manager intended to resign, and that another employee with bookkeeping-related responsibilities would be retiring when the deal closed.

Dr. Sevo decided to terminate the purchase. Dr. Emon argued that Dr. Sevo's conduct constituted a breach of the duty of honest performance and the duty to exercise contractual discretion in good faith. Specifically, Dr. Emon argued that "(i) Sevo's failure to finalize and sign the lease agreement with the Landlord, (ii) the manner in which Sevo exercised his contractual discretion under the LOI, and (iii) his ultimate termination of the LOI and transaction, each amount to a breach of the duty of good faith and honest performance."[56]

Justice Horvat found no breach of "contractual discretion and good faith performance" in relation to Dr. Sevo's refusal to enter into a lease agreement with the Landlord: "The LOI explicitly granted Sevo the right to enter into a lease agreement on terms satisfactory to him. It is not, in my view, a breach of the duty of good faith performance for Sevo to enter into a lease agreement on his own terms, and not adopt the one negotiated by prior tenants."[57]

In other words, Dr. Sevo did not act in bad faith in "protect[ing] his own interests."[58] Nor was his decision to hire a leasing consultant an indicator of a breach of a good faith duty. Rather, it showed

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[54] At para. 8.

[55] At para. 61.

[56] At para. 51. Dr. Emon's allegations as to Dr. Sevo delaying or avoiding his contractual obligations appear to invoke another good faith duty that the Trilogy identified: the duty not to evade contractual obligations in bad faith. The Reasons do not deal with this duty.

[57] At para. 63.

[58] At para. 65.

that he “had every intention of closing the transaction.”[59]

The Court found that Dr. Sevo has “used all reasonable efforts” to finalize the lease agreement. The landlord had not responded to his draft lease substantively and had not provided an update when Dr. Sevo asked. It was neither unreasonable nor an act of bad faith for Dr. Sevo to terminate the LOI and the lease agreement negotiations in the circumstances. There was also no evidence that Dr. Sevo had lied or otherwise knowingly misled Dr. Emon in deciding to terminate, as “[t]he ball was in the Landlord’s court at the time of termination, and based on the evidence, no acceptance of the draft lease agreement was forthcoming.”[60]

Dr. Sevo’s obligation to enter into a lease agreement was to be a condition of the Purchase Agreement; if there was no Purchase Agreement executed, it is difficult to see how his failure to enter into a lease with the Landlord could be a breach of the contractual duty of good faith performance.

What is not set out in the Reasons is how the duty of good faith performance could apply to terms of the LOI that were expressly non-binding. Based on the trial judge’s decision, the binding provisions included provisions as to due diligence and access for due diligence, provisions concerning confidentiality, public announcements and each party’s bearing of expenses incurred. Was the framing of certain due diligence rights and obligations as binding the basis for the plaintiff raising good faith performance and the Court considering it?

Bottom Line

The BCCA in *Ocean Pacific Hotels v. Lee* confirmed that the good faith duty of honest performance does not apply where one party claims that it was dishonestly induced to enter into a contract. Otherwise, there would be an “exponential” expansion of remedies for breach of this duty, as well as a problematic overlap with the remedies available in tort.

The BCCA declined to rule definitively on whether other scenarios involving pre-contractual dishonesty could potentially form the basis for a claim for breach of the duty of honest performance. The BCCA did not suggest what those scenarios might look like. If misrepresentations in negotiations cannot ground this type of claim, it is difficult to imagine what other pre-contractual conduct could potentially do so. The decision in *Crotty v. Aviva General Insurance Company* affirms what we have previously opined about Wastech: the SCC did not intend to label every contractual power as a discretion. Instead, this particular good faith doctrine applies to contractual terms that permit one party to make discretionary choices that bind the other party (*i.e.*, determine that party’s contractual rights).

The decision in *Dr. Michael Emon Dentistry Professional Corporation v. Alexander Sevo Dentistry Professional Corporation* seems to suggest that the contractual duties of good faith performance and good faith exercise of discretion could apply to a non-binding letter of intent (although no such breaches were found on the facts). This would be a startling conclusion; it may be that the case can be explained on the basis that the LOI did contain some binding provisions and that counsel was relying on those provisions when raising the good faith duties.

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[59] At para. 64.

[60] At para. 72.

CONTRACT LAW DEVELOPMENTS OF NOTE SUMMARY OF TOPICS

HEADINGS	2024	2023	2022	2021	2020	2019	2018	2017	2016
Links to Contract Law Paper by Year	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									
Best Efforts Clauses			X						
Binding Effect and Enurement Clauses									
Buy/Sell Clauses									
Conditions Precedent									
Confidentiality Clauses									
Consideration in the Context of Contract Variations							X		
Constitutions/bylaws of voluntary associations as contracts			X						
Continuing Breach of Contract									X
Contract Interpretation						X			X
Contract Termination									

CONTRACT LAW DEVELOPMENTS OF NOTE SUMMARY OF TOPICS

HEADINGS	2024	2023	2022	2021	2020	2019	2018	2017	2016
Links to Contract Law Paper by Year	Link	Link	Link	Link	Link	Link	Link	Link	Link
Contracting with First Nations under the *Indian Act*									
Contracts with government			X						
Contractual References to Legislative Provisions							X		
Discretionary Powers									
Duties of Good Faith (see supplements)	X	X	X	X	X				X
Efficient breach									
Economic Duress									
Electronic Transactions									
Entire Agreement Clauses						X			
Equitable Mistake									
Exculpatory Clauses and Limitation of	X						X		
Forum Selection Clauses	X				X		X	X	

CONTRACT LAW DEVELOPMENTS OF NOTE SUMMARY OF TOPICS

HEADINGS	2024	2023	2022	2021	2020	2019	2018	2017	2016
Links to Contract Law Paper by Year	Link	Link	Link	Link	Link	Link	Link	Link	Link
Frustration and Force Majeure							X		
Fundamental Breach									
Illegal Contracts	X								
Implied Terms and Implied Contracts						X			
Inconsistent Terms									
Indemnity Clauses					X				
Liquidated Damages						X			
Mistake					X				
Mitigation									
No Suit Clauses								X	
“No Waiver” Clauses				X					
Nominal Consideration						X			
Non est Factum				X					
Offer and Acceptance			X						
Options									X
Ordinary course of business covenants			X						
Penalty Clauses	X								X
Perpetual Contracts				X					
Pre-Incorporation Contracts				X					

CONTRACT LAW DEVELOPMENTS OF NOTE SUMMARY OF TOPICS

HEADINGS	2024	2023	2022	2021	2020	2019	2018	2017	2016
Links to Contract Law Paper by Year	Link	Link	Link	Link	Link	Link	Link	Link	Link
Privity of Contract	X	X							
Rectification			X		X			X	
Releases				X					
Rescission			X						
Rights of First Refusal									X
Restrictive covenants									
Severability		X				X			
Shotgun (buy-sell) Clauses		X							
Smart Contracts							X	X	
Specific Performance									
Standard of Review on Contract Interpretation Issues									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			

LAWSON LUNDELL LLP

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 or Catherine Whitehead if you have any questions or require further information.

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