THE COMPLEX COMMERCIAL LITIGATION LAW REVIEW

SECOND EDITION

Editor
Steven M Bierman

THE LAWREVIEWS

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This article was first published in December 2019
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Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC2A 4HL, UK

www.TheLawReviews.co.uk

ISBN 978-1-83862-075-2

Printed in Great Britain by+
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ADVOCATES SMITH TAUBITZ UNSWORTH LTD

ALLEN & GLEDHILL

BAKER & MCKENZIE PARTNERSCHAFT VON RECHTSANWÄLTEN UND STEUERBERATERN MBB

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PREFACE

I am privileged, once again, to be the editor of *The Complex Commercial Litigation Law Review*, now in its second edition. This volume is published at a time when the world grows ever smaller and commercial relationships are the common currency that links countries and cultures across the globe. And, with apologies to the poet Robert Burns, because the best laid plans of commercial counterparties go oft awry, businesses and their legal counsel in every jurisdiction must be familiar not only with the law governing commerce but also must be keenly aware of the legal issues that most frequently arise in commercial disputes.

I have had the good fortune to practise law for many years as a litigation partner of a global law firm, Sidley Austin LLP, in New York City, one of the world's great commercial and financial centers, and a crossroads where many significant and complex disputes are litigated and tried, whether in our US federal or state courts or arbitrated under the auspices of pre-eminent ADR providers. I also have had the pleasure of working alongside, or opposite, some of the most accomplished disputes practitioners anywhere, whether down the street or halfway around the world, in matters both domestic and cross-border in nature. In serving our respective clients, I would like to think that we have learned from each other, and have become better and more effective for the education. I know I have.

It is with that spirit and intention that we have assembled a truly distinguished roster of leading practitioners to contribute to this second edition, which significantly expands the range of jurisdictions from those covered in the inaugural edition. The authors of this publication are from among the most widely respected law firms in their jurisdictions. Their practices run the gamut of complex commercial litigation experience, and the home jurisdictions about which they write span the world's geography. We hope you will find their experience invaluable and enlightening when dealing with issues arising in commercial litigation in your own experience or practice.

These authors practise in disparate legal systems under dissimilar procedural regimes. One of the great strengths and, we hope, utility, of this volume is that, notwithstanding these differences, we have asked the authors to report on core principles and recent developments in the law of their country concerning the same set of fundamentally important legal issues likely to feature in complex commercial disputes, wherever they may arise. These issues include contract formation and modification; contract interpretation; breach of contract; defences to enforcement; fraud, misrepresentation, and other claims impacting contracts; dispute resolution; and remedies. The emphasis is on the law and practice of each jurisdiction, but discussion of emerging or unsettled issues is included where appropriate.

Whether you are a corporate counsel, a business executive, a private practitioner, or a government official, and whether you are facing litigation or arbitration of a commercial

dispute, negotiating a contract with an eye toward minimising litigation risk, or simply interested in learning more about this important area of law as related by seasoned and savvy practitioners, we hope you will find this volume informative, instructive, and enjoyable.

Steven M Bierman
Sidley Austin LLP
New York
November 2019

Chapter 5

CANADA

Alan Mark and Jesse-Ross Cohen[1]

I OVERVIEW

As a forum, Canada is well-suited to the adjudication of complex commercial disputes. Parties are generally free to bring contract claims as they see fit, with frivolous suits discouraged by a costs regime which typically requires the losing party to pay a certain percentage of legal fees to the winning party.

Canadian law is subject to a distribution of legislative powers and responsibilities between the two main levels of government: federal and provincial.[2] Contract law, as a matter of civil rights, is under provincial jurisdiction.[3] There are ten Canadian provinces, each with its own court system and jurisprudential history.[4] Although there are some differences between them, the laws of each province are informed by British common law, and generally the applicable principles align (with the exception of Quebec, a civil law jurisdiction that is not the subject of this chapter).[5] Decisions of the Supreme Court of Canada are binding on all lower courts, further adding to the consistency of the Canadian scheme.

II CONTRACT FORMATION

Contract formation in Canada is governed by the general common law rules of consideration and offer and acceptance, which provide a framework for determining whether the parties have formed a mutual intention to enter into a bargain with each other and on what terms.[6] Canadian courts do not inquire as to the sufficiency of the consideration given, and will merely seek to confirm that some consideration flow from each contracting party.[7] With respect to offer and acceptance, the general principle is this: a valid contract requires the

1 Alan Mark is a partner, and Jesse-Ross Cohen is an associate at Goodmans LLP.

2 Constitution Act, 1867 at 91 and 92.

3 Constitution Act, 1867 at 92(13).

4 The Canadian provinces are, from west to east: British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland. Canada also has three territories, which are not the subject of this paper: Yukon, Nunavut and the Northwest Territories.

5 Certain instances of non-alignment are discussed herein.

6 John D. McCamus, *The Law of Contracts* (2nd ed) (Toronto: Irwin Law, 2012) ('McCamus on Contracts') at p. 31.

7 The old common-law rule is that a 'peppercorn' of value will always be adequate. See, for e.g., *Shaw Production Way Holdings Inc. v. Sunvault Energy, Inc.*, 2018 BCSC 926 (affirmed 2019 BCCA 72) at 136, citing *Sheckter v. Polonuk*, 1992 ABCA 324 (Alta. C.A.). Note that the consideration given by each party need not flow to the counterparty, but can inure to the benefit of third parties.

certainty of an acceptance that is the 'mirror image' of the offer.[8] Also further to the need for certainty, an acceptance must be unequivocal and affirmatively communicated to the offeror in order to be effective.[9] In all respects, contract formation is assessed objectively.[10]

The rules of offer and acceptance are meant to bring certainty and finality to the contracting process. Once a valid agreement is made, however, subsequent negotiations by the contracting parties will not necessarily vitiate that agreement.[11] Indeed, the existence of subsequent negotiations has been held in certain commercial cases to confirm the parties' underlying agreement; especially where the parties have concluded a broad commercial framework (or 'umbrella') agreement under which they will operate and then proceed to negotiate certain ancillary details.[12]

Sometimes, parties to a contract will negotiate 'unilateral' modifications thereto, that is, alterations to the existing agreement where only one party gives fresh consideration. Generally in Canadian law, the 'pre-existing duty' rule provides that such modifications are void for lack of consideration.[13] Canadian commentators have criticised the strict applicability of this rule, however, especially in commercial contexts, and Canadian courts appear to be slowly following suit. In 2008, the New Brunswick Court of Appeal held that a unilateral modification may be enforceable as necessary to give effect to the parties' consensual bargain so long as the variation was not procured under economic duress.[14] In 2018, the British Columbia Court of Appeal agreed and held that, to do justice to the legitimate expectations of parties, unilateral modifications should be enforceable 'in the absence of duress, unconscionability or other proper policy considerations'.[15]

The same practical, fairness-oriented approach governs scenarios where parties make an agreement to engage in further negotiations. While Canadian courts will not deviate from the rules of offer and acceptance and enforce an uncertain bargain, they may recognise a

8 McCamus on Contracts at 31. See also the discussion in *Copperthwaite v. Reed*, 2016 ONSC 1824 (S.C.J.), citing *Harvey v. Perry*, [1953] 1 S.C.R. 233, A.G. Guest, *Chitty on Contracts* (27th ed.) (UK: Sweet & Maxwell Ltd., 1994) at p. 100 and G.H.L. Fridman, *The Law of Contract in Canada* (6th ed.) (Toronto: Carswell, 2011) at p. 46.

9 Angela Swan and Jakub Adamski, *Canadian Contract Law* (3rd ed.) (Toronto: LexisNexis, 2012) ('Swan on Contracts') at 4.45-4.48. Note, however, that the requirement of unequivocal acceptance does not alter the burden of proof; the test of acceptance is always assessed objectively. See: *Marehard v. Ridgway*, 2002 BCCA 405 at 27.

10 'The important question is not what the offeror intended but what the offeree reasonably understood by what the offeror did or said': Swan on Contracts, *supra* note 9 at 4.12. See also, for example, *Saint John Tug Boat Co. v. Irving Refinery Ltd.*, [1964] S.C.R. 614, [1964] S.C.J. No. 38 at 18-20.

11 Swan on Contracts, *supra* note 9 at 4.51.

12 See, for example, *Cana International Distributing Inc. v. Standard Innovation Corporation*, 2018 ONCA 145 at 12, where the Court held that the subsequent 'negotiations concerned relatively minor matters of the kind that would be expected to arise within the framework of a long-term exclusive distributorship agreement.'

13 The leading Ontario law remains the decision of the Court of Appeal in *Gilbert Steel Ltd. v. University Construction Ltd.*, [1976] O.J. No. 2087, 12 O.R. (2d) 19; see *Richcraft Homes Ltd. v. Urbandale Corp.*, 2016 ONCA 622 at 43.

14 *Greater Fredericton Airport Authority Inc. v. NAV Canada*, 2008 NBCA 28 at 31-32.

15 *Rosas v. Toca*, 2018 BCCA 191 at 176. In support of this finding, the Court also cited the decision of the New Zealand Court of Appeal in *Teat v. Willcocks*, [2013] NZCA 162, [2014] 3 N.Z.L.R. 129 at 5. The Ontario Court of Appeal, for its part, recently declined to re-consider the enforceability of unilateral modifications but acknowledged that 'the time might be ripe' to do so: *Richcraft Homes Ltd. v. Urbandale Corp.*, 2016 ONCA 622 at 43.

quasi-contractual relationship (even in the absence of a valid contract) as necessary to protect good faith reliance.[16] Agreements to agree are therefore generally not enforceable, but can create a duty to negotiate in good faith (which can manifest, for example, as an obligation to give the other party a right of first refusal) where the parties are already in a relationship of reliance.[17] Similarly, letters of intent will not bind parties to a particular deal structure but will be binding in respect of establishing the terms on which the buyer's due diligence will be conducted.[18]

As a general matter of law, contracts need not be in writing in order to be valid.[19] Note, however, that provincial legislation requires certain types of contract to be in writing, including agreements that convey interests in land and certain agreements relating to trusts.[20]

Where agreements are in writing, Canadian courts are generally agnostic with respect to the method of communication used by the parties (mail, telex, fax, email, etc.) and take a pragmatic, flexible approach which treats the method of communication as merely a means to the parties' ends and recognises that the intricacies of a given technology should not be allowed to overwhelm the true intent of the parties.[21] Provincial legislation also exists to ensure that the regular rules of contract are adapted as seamlessly as possible to new technological realities.[22]

16 Swan on Contracts, *supra* note 9 at 4.165.

17 Swan on Contracts, *supra* note 9 at 4.156 and 4.162-4.164. For example, in a case where the parties are already in a landlord-lessee relationship and agree to renew such arrangement at 'the market rate prevailing…as mutually agreed': *Empress Towers Ltd. v. Bank of Nova Scotia*, [1990] B.C.W.L.D. 2293, [1990] C.L.D. 1089 (C.A.).

18 Swan on Contracts, *supra* note 9 at 4.148.

19 Obviously, this is not the general commercial practice.

20 See, for example, the legislation in Ontario: Statute of Frauds, R.S.O. 1990, Chapter S.19; in British Columbia: Law and Equity Act, [RSBC 1996] Chapter 253 at 59(1).

21 Guided by Lord Wilberforce of the United Kingdom House of Lords, who noted that '[n]o universal rule can cover all such cases: they must be resolved by reference to the intentions of the parties, by sound business practice and in some cases by a judgment where the risks should lie.' Barry B. Sookman, *Computer, Internet and Electronic Commerce Law*, Chapter 10.7 — Time And Place Of Contract Formation, citing *Brinkibon v Stahag Stahl und Stahlwarenhandels GmbH*, [1983] 2 A.C. 34; [1982] 2 W.K.R. 264 (H.L.). See also, citing *Brinkibon*, Swan on Contracts, *supra* note 9.
For example, the Ontario Court of Appeal recently overturned the finding of a trial judge that the exchange and signing of a term sheet over several weeks via email constituted 'two unique offers' (notwithstanding that the parties ultimately signed the same document, albeit weeks apart); applying good business sense, the Court found that the parties had simply executed the same contract in counterpart. *Cana International Distributing Inc. v. Standard Innovation Corporation*, 2018 ONCA 145 at 8-11, citing *Foley v. R.*, [2000] 4 C.T.C. 2016 (T.C.C. [Informal Procedure]) at 32: 'Agreements signed in counterpart are a part of commercial life.'

22 See, for example, the Electronic Commerce Act, 2000, S.O. 2000, c. 17. This statute codifies, among many other things, that contract is not invalid or unenforceable by reason only of being in electronic form.

III CONTRACT INTERPRETATION

Contractual interpretation in Canada is an exercise in giving effect to the objective intentions of the parties at the time they entered into the contract.[23] To determine the parties' objective intentions, courts look foremost to the plain meaning of the language expressed in the contract,[24] reading the contract as a whole (while giving meaning to every word that is used) and in the context of the circumstances as they existed when the agreement was created.[25] Canadian courts avoid rigid constructions or findings of ambiguity[26] in favour of treating the words as flexible instruments meant to achieve a particular purpose, that is, they will seek to reconcile disputes by adopting an interpretation that accords with the overall business purpose of the provision(s) in question.[27]

In Canada, the circumstances that surround the formation of the contract are referred to as the 'factual matrix'. The factual matrix is relevant in every case, even where the contract is unambiguous on its face,[28] and probative to the extent that considering it deepens the analysis by providing context and does not inform an interpretation which contradicts the express language of the contract. As a further limitation, the factual matrix only comprises that which reasonably ought to have been known by the parties at the time of contract formation.[29]

As the interpretive exercise is objective, the subjective intentions of parties are not relevant.[30] Similarly, extrinsic evidence as to the parties' intentions is barred as a general proposition by the 'parol evidence rule', which precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a

23 Creston *Moly Corp. v Sattva Capital Corp.* 2014 SCC 53 ('Sattva') at 49. The Supreme Court of Canada has mandated a 'practical, common-sense approach not dominated by technical rules of construction'. Sattva at 47.

24 There is a 'cardinal presumption' that parties intended what they said in the contract: *Ventas Inc. v Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205 at 24; *Petty v. Telus Corp*., 2002 BCCA 135 at 14, citing Chitty on Contracts (28th ed) (London: Street & Maxwell 1999); *University Hill Holdings Inc. (Formerly 589918 B.C. Ltd.) v. Canada*, 2017 FCA 232 at 57, affirming lower court's reasoning.

25 Nortel Networks Corp., Re, 2016 ONCA 332 at 58.

26 Pursuant to a 'practical, common-sense' approach mandated by the Supreme Court of Canada: Sattva, *supra* note 23 at 47.

27 The typology of evidence that may be considered in this context is discussed at footnote 46, below. Note that the purpose of a contract is not viewed statically, but can evolve with time; in a recent decision, for example, the Ontario Court of Appeal interpreted the word 'vehicle' in an agreement from 1906 as including automobiles, notwithstanding that automobiles had not yet been invented at the time of contract formation: *Thunder Bay (City) v. Canadian National Railway Company*, 2018 ONCA 919 at 44.

28 See: *Dumbrell v Regional Group of Cos.*, 2007 ONCA 59 at 52-54, citing McCamus, The Law of Contracts (Toronto: Irwin Law, 2005) at 710-11; *IFP Technologies (Canada) Inc. v. EnCana Midstream and Marketing*, 2017 ABCA 157 (leave to appeal refused, [2017] S.C.C.A. No. 303) at 129; *Seven Oaks Inn Partnership v. Directcash Management Inc.*, 2014 SKCA 106; *Langley Lo-Cost Builders Ltd. v. 474835 B.C. Ltd.*, 2000 BCCA 365 at 29.

29 Sattva, *supra* note 23 at 58. This is a question of fact. Subsequent conduct is not part of the factual matrix (and can only be resorted to in cases of ambiguity): *Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912 at 46-50.

30 *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129 at 54-59.

contract that has been wholly reduced to writing.[31] This rule, however, is subject to myriad exceptions.[32] Notably, moreover, the rule does not preclude evidence adduced as part of the factual matrix.[33]

Another relevant principle of interpretation is that Canadian courts will seek to promote commercial efficacy.[34] Interpretations which make 'no commercial sense'[35] or result in a commercial absurdity[36] will be strenuously avoided, while interpretations that 'allow the contract to function and meet the commercial objective in view' will be preferred.[37] Note, however, the following two limits to the doctrine. First, as with the factual matrix, commercial reasonableness is to be assessed objectively, from the perspective of both contracting parties (and not according to one party's subjective intention or desires).[38] Second, the principle of commercial reasonableness will not save a party from a bargain that, while commercially sensible at the time of contract, has proven to be improvident or disadvantageous.[39]

Where commercial reasonableness has conflicted with a plain reading of the words of a contract, courts have taken inconsistent approaches.[40] The correct approach in Ontario appears to be that, in such cases, commercial efficacy will only overwhelm the written words where the words lead to a result that is 'clearly' commercially absurd.[41] In Manitoba, by contrast, the Court of Appeal has ruled that where 'a tension which exists between the literal meaning of a contract and an interpretation based upon its commercial purpose', the latter interpretation may prevail where dictated by 'business common sense'.[42] The Alberta Court of Appeal has phrased the test differently yet again, holding that an interpretation that 'defeats

31 Sattva, *supra* note 23 at 58.

32 Swan on Contracts, *supra* note 9 at 3.1.2. The exceptions include evidence adduced to: (a) show that the contract was invalid due to fraud, misrepresentation, incapacity, lack of consideration or lack of contracting intention; (b) dispel ambiguities in the written text; (c) support a claim for rectification; (d) establish a condition precedent; (e) establish a collateral agreement; (f) support an allegation that the contract does not constitute the entire agreement between the parties; (g) support a claim for an equitable remedy; and (h) support a claim in tort that an oral statement was in breach of the duty of care.

33 Sattva, *supra* note 23 at 59-60.

34 *Salah v Timothy's Coffees of the World Inc.*, 2010 ONCA 673 at 16; *Kentucky Fried Chicken Canada v Scott's Food Services Inc.*, [1998] O.J. No. 4368 (CA) at 27. This is in keeping with the 'practical, common-sense' approach mandated by the Supreme Court in Sattva; see, for example, *Brompton Corp. v. Tuckamore Holdings LP*, 2017 ONCA 594 at 11-13.

35 *Laudervest Developments Ltd. v Rottenberg*, [2004] O.J. No. 140 (S.C.J.) (affirmed, [2004] O.J. No. 4708 (C.A.), leave to appeal to SCC refused, [2005] S.C.C.A. No. 207) at 17.

36 *Kentucky Fried Chicken Canada v Scott's Food Services Inc.*, [1998] O.J. No. 4368 (C.A.) at 27.

37 *Humphries v Lufkin Industries Canada Ltd.*, 2011 ABCA 366 at 15, citing *Consolidated Bathurst Export Ltd. c Mutual Boiler & Machinery Insurance Co.*, [1979] S.C.J. No. 133 at 12-13.

38 *King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80 at 75; *Kentucky Fried Chicken Canada v Scott's Food Services Inc.*, [1998] O.J. No. 4368 (C.A.) at 27; *Hunt River Camps / Air Northland Ltd. v. Canamera Geological Ltd.*, [1998] N.J. No. 325, 168 Nfld. & P.E.I.R. 207 (C.A.) at 28.

39 See, for example, *Northrock Resources v. ExxonMobil Canada Energy*, 2017 SKCA 60 at 22.

40 Geoff Hall, *Canadian Contractual Interpretation Law* (3d) (Toronto: LexisNexis, 2016) ('Hall On Interpretation') at 63-65.

41 As noted by Hall on Interpretation, *supra* note 40 at 65, citing *SimEx Inc. v IMAX Corp.*, [2005] O.J. No.. 5389 (CA) at 20-23. See, more recently, *Thunder Bay (City) v. Canadian National Railway*, 2016 ONSC 469 at 43.

42 As noted by Hall on Interpretation, *supra* note 40 at 65, citing *Nickel Developments Ltd. v. Canada Safeway Ltd.*, 2001 MBCA 79 ('Nickel Developments') at 34-35, citing *Mannai Investment Co. v. Eagle Star Life Assurance Co.*, [1997] 3 All E.R. 352 (Eng. H.L.) ('Mannai') at p. 964.

the intention of the parties and their objective in entering into a commercial transaction in the first place should be discarded in favour of the interpretation which promotes a sensible commercial result'.[43]

Further to the assessment of commercial reasonableness, regardless of which of the approaches described in the preceding paragraph is adopted, the objective evidence that is admissible in the interpretive exercise will include accepted business practice in the field.[44] Note that, in order to be admissible, the evidence in this regard must be reasonably certain and generally known and accepted by those operating in the relevant field.[45] Similarly relevant is objective evidence regarding the context of the transaction,[46] which, together with evidence of trade practices, forms a vital part of the factual matrix as it better permits judges to construe the parties' commercial purpose.[47]

Canadian courts will only imply a term into a contract in limited circumstances: based on custom or usage; if legally incident to the particular class or kind of contract at issue;[48] and based on the presumed intention of the parties where the implied term is necessary 'to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a term which the parties would say, if questioned, that they had obviously assumed'.[49]

Generally, provisions that prescribe a governing law are effective.[50] Where a contract is silent on the law that governs it, the general rule is that substantive disputes will be governed by the local laws of the jurisdiction where the contract was entered into (referred to as the *lex loci contractus*).[51] Procedural disputes, by contrast, are governed by the laws of the local adjudicating forum. In this regard, Canadian courts aim to distinguish between those rules that 'make the machinery of the forum court run smoothly' (e.g., a procedural requirement that a limitations defence be pleaded) and those rules that are 'determinative of the rights of both the parties' (e.g., the specific substantive requirements that must be met for a limitations defence to be successful).[52]

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43 *Bearspaw Petroleum Ltd. v. EnCana Corp.*, 2011 ABCA 7 at 24, citing *Mannai* and *Nickel Developments*.

44 See, for example, *King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80 at 80; *Glaswegian Enterprises Inc. v. BC Tel Mobility Cellular Inc.*, [1997] B.C.J. No. 2946, 101 B.C.A.C. 62 (C.A.) at 18-19.

45 Hall On Interpretation, *supra* note 40 at 122. Generally this will need to be established by expert evidence.

46 This includes consideration of objective evidence regarding the genesis of the transaction, the background and the market in which the parties are operating: Sattva, at 47, citing *Reardon Smith Line Ltd. v. Hansen-Tangen*, [1976] 3 All E.R. 570.

47 Sattva, *supra* note 23 at 47.

48 Which, as with custom and usage, must generally be proven by expert opinion evidence.

49 *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, [1999] 7 W.W.R. 681 at paras. 27 and 29; *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64, 2000 CSC 64 at paras. 30-31. See also, Hall on Interpretation, *supra* note 40 at 180-181. Courts will not imply a term simply because it is reasonable to do so, but only when it is necessary, and will only imply those terms that (a) the contracting parties clearly and objectively intended and (b) do not contradict the written words of the contract. The 'implication of the term must have a certain degree of obviousness to it…if there is evidence of a contrary intention, on the part of either party, an implied term may not be found.' *Double N Earthmovers Ltd. v Edmonton (City)*, 2007 SCC 3 at 31-32.

50 See, for example, *Thyssen Canada Ltd. v. Mariana Maritime S.A.*, [2000] 3 F.C. 398, 254 N.R. 346 (C.A.) at 22-23.

51 *Yugraneft Corp. v. Rexx Management Corp.*, 2010 SCC 19 at 27, citing *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, [1994] S.C.J. No. 110 at 74-89.

52 *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, [1994] S.C.J. No. 110 at 85-86 and 89.

IV DISPUTE RESOLUTION

In Canada, there are typically three levels of court for complex commercial litigation: a provincial court of first instance, a provincial appellate court and the Supreme Court of Canada. Since 1991, Toronto has also housed the 'Commercial List', which acts as a specialised court of first instance for commercial disputes that meet certain criteria or are sufficiently complex (and subject to the Commercial List's ultimate discretion).[53] One other common law province, Alberta, houses its own Commercial List.[54] The expert commercial judges who staff these courts are generally pragmatic and business-oriented and will, where appropriate, facilitate an expedited timetable so that matters can be resolved in 'real time'.

As a general matter, final decisions of Canadian trial courts can be appealed as of right. The standard that applies to the appellate review of judicial findings depends on the question(s) at issue. On a pure question of law, the basic rule is that an appellate court is free to replace the opinion of the trial judge with its own if the trial judge's decision is not correct.[55] On a question of mixed fact and law, such as a question of contractual interpretation, the trial judge's findings will be upheld as long as they are reasonable.[56] A purely factual finding will be upheld absent a 'palpable and overriding error'.[57] Where a principle of natural justice is involved, however, no deference is owed to the judge below.[58]

Notwithstanding the foregoing rubric, in limited cases it is possible to identify an extricable question of law from within what was initially characterised as a question of mixed fact and law; legal errors made in the course of contractual interpretation include 'the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor'.[59]

The jurisdiction of the provincial courts is plenary in respect of all commercial disputes that occur in the province. With respect to assuming jurisdiction over extra-provincial disputes, Canadian courts will generally enforce forum selection clauses in commercial contexts so long as the clause is valid and enforceable, exclusive[60] and there is no 'strong cause' for why it should not be enforced.[61] This approach should continue in light of the recent decision of the Supreme Court of Canada in *Douez v. Facebook*, where three judges

53 The Commercial List has issued a 'Practice Direction' which sets out the type of matters which may be listed on the Commercial List. This provision contains a 'basket clause' which permits for listing any 'such other commercial matters as the judge presiding over the Commercial List may direct to be listed'. Consolidated Practice Direction Concerning the Commercial List, effective July 1, 2014 at Part II(1).

54 There is also the 'Commercial Division' of the Quebec courts.

55 *Housen v. Nikolaisen*, 2002 SCC 33 at 8. This is referred to as the 'correctness' standard.

56 Sattva, *supra* note 23 at 50. That another contractual interpretation might reasonably be available does not provide a basis for appellate intervention: *Atos IT Solutions v. Sapient Canada Inc.*, 2018 ONCA 374 (leave to appeal refused, 2019 CarswellOnt 4343) at 86.

57 *Housen v. Nikolaisen*, 2002 SCC 33 at 10.

58 See, recently, *Union Building Corporation of Canada v. Markham Woodmills Development Inc.*, 2018 ONCA 401, where the application judge was asked to decide a narrow issue but disposed of the application on a basis not advanced by the parties.

59 Sattva at 53, citing *Housen v. Nikolaisen*, 2002 SCC 33 at 31 and 34-35 and *King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80 at 21.

60 That is, a clause that explicitly precludes the applicability of laws of other jurisdictions. See, recently, *Forbes Energy Group Inc. v. Parsian Energy Rad Gas*, 2019 ONCA 372 at 5-7.

61 *Douez v. Facebook, Inc.*, 2017 SCC 33 at 28-29. This requires a court to consider 'all the circumstances… including the convenience of the parties, fairness between the parties and the interests of justice'.

of the Court noted that, in commercial interactions between sophisticated parties, forum selection clauses are generally enforceable 'and to be encouraged' as providing stability and foreseeability to parties that are justifiably deemed to have informed themselves of the risks of agreeing to the clause.[62]

Another 'forum' that parties may select is arbitration, the use of which has significantly increased in popularity in Canada in recent years. Unlike civil litigation generally, arbitration can be private (subject to the parties' agreement); and with the number of sophisticated counsel and former judges in the ranks of Canadian arbitrators,[63] arbitration is far from a 'second-class' method of dispute resolution in Canada.[64] This trend has been encouraged by Canadian courts and legislatures.[65] As noted by the Supreme Court of Canada, arbitration furthers the interests of justice;[66] and in an era of backlog, Canadian courts are (justifiably) eager to have arbitrators act as decision-makers of first instance and undertake the review of voluminous factual evidence.[67]

For these reasons, and animated by some of the same principles discussed above in respect of forum selection clauses, arbitration agreements between sophisticated commercial parties will usually be enforced by Canadian courts. The general rule is that challenges to an arbitrator's jurisdiction must first be resolved by the arbitrator,[68] which is known as the 'competence-competence principle'.[69] Canadian courts will generally not allow parties to circumvent contractual arbitration clauses simply by, for example, pleading in tort,[70] arguing that a certain dispute is not covered by the arbitration agreement because it is not explicitly referred to therein[71] or becoming a party to a parallel claim brought by other parties.[72] To

62 *Douez v. Facebook, Inc.*, 2017 SCC 33 at 31.

63 Including, as of recently, former Chief Justice of the Supreme Court of Canada, Her Honour Justice McLachlin.

64 *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531 at 89-103.

65 'The law favours giving effect to arbitration agreements. This is evident in both legislation and in jurisprudence.' *Haas v. Gunasekaram*, 2016 ONCA 744 at 10.

66 To use the language of the Supreme Court of Canada: *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531 at 89-103.

67 See, for example, *Greer v. Babey*, 2016 SKCA 45 at 30, citing Union des consommateurs c. Dell Computer Corp., 2007 SCC 34, [2007] 2 S.C.R. 801 at 74: 'if the challenge requires the production and review of factual evidence, the court should normally refer the case to arbitration.'

68 Except where the challenge is solely on a question of law or a question of mixed fact of law that requires only a superficial consideration of the documentary evidence in the record.

69 Union des consommateurs c. Dell Computer Corp., 2007 SCC 34, [2007] 2 S.C.R. 801 at 84-86; *Seidel v. Telus Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531 at 29. To be clear, the 'competence-competence principle' is no more than an attempt to properly manifest the parties' intentions, that is, sophisticated parties can contract whatever variation of the principle suits their needs; see, for example, *Enmax Energy Corp. v. TransAlta Generation Partnership*, 2015 ABCA 383 at 23.

70 *Haas v. Gunasekaram*, 2016 ONCA 744 at 32-35.

71 See *Harrison v. UBS Holding Canada Ltd.*, 2014 NBCA 26 at 30; noting also that even claims of fraud and misrepresentation may be determined by arbitration.

72 *TELUS Communications Inc. v. Wellman*, 2019 SCC 19. In this case, the Court enforced the parties' agreement to arbitrate notwithstanding the existence of a parallel class action and general rule prohibiting a multiplicity of proceedings.

facilitate the use of arbitration, each province has enacted domestic and international[73] arbitration legislation that permits defendants in court-initiated litigation to apply for a stay of proceedings on the basis of the parties having previously agreed to an arbitration agreement that addresses some or all of the matters before the court.[74]

The review of arbitral awards by Canadian courts is limited by statute and common law. As a general proposition, parties' selection of arbitration as a forum is said to imply 'both a preference for the outcome arrived at in that forum and a limited role for judicial oversight of the award made in the arbitral forum'.[75] The domestic arbitration acts discussed above do not permit appeals on questions of fact or mixed fact and law, and only permit appeals on questions of law where leave is granted by the appellate court.[76] The international arbitration acts do not permit appeals of arbitral awards on questions of fact or law whatsoever, but only on questions of jurisdiction, procedural fairness and public policy.[77] These grounds are enforced narrowly.[78] A similar deference to the decisions of arbitrators is applied with respect to the recognition and enforcement of arbitral awards.[79]

73 The international statutes are based, in full or in part, on the Model Law on International Commercial Arbitration, as adopted by the United Nations Commission on International Trade Law on 21 June 1985, as amended by the United Nations Commission on International Trade Law on 7 July 2006 ('Model Law'). See *Yugraneft Corp. v. Rexx Management Corp.*, 2010 SCC 19 at 11, noting that the Model Law is a 'codification of best practices' that 'has been adopted, subject to some modifications, by every jurisdiction in Canada.'

74 The domestic Arbitration Act of British Columbia is arguably the most restrictive of these statutes, requiring a stay to be ordered unless the parties' arbitration agreement is 'void, inoperative or incapable of being performed': see *McMillan v. McMillan*, 2016 BCCA 441 at 31, citing R.S.B.C. 1996, c. 55 at 15(2). Other provincial legislation is similar, albeit somewhat less restrictive; see for example the Arbitration Act of Ontario, which permits court proceedings to continue where the matter is a 'proper one for default or summary judgment'): Arbitration Act, 1991, S.O. 1991, c. 17 at 7.
With respect to partial stays, certain of the domestic acts (the Arbitration Act of Ontario, for example), provide explicitly that a court may stay a proceeding with respect to certain matters dealt with in the arbitration agreement and allow it to continue with respect to other matters, provided that the parties thusly agreed and it is not unreasonable to do so: Arbitration Act, 1991, S.O. 1991, c. 17 at 7(5). Other of the domestic acts provide more generally that a stay may be granted in respect of 'a matter agreed to be submitted to arbitration', which has been interpreted as allowing for partial stays; see, for example, *Strata Plan BCS 3165 v. 1100 Georgia Partnership*, 2013 BCSC 1708 at para. 12.

75 See *Popack v. Lipszyc*, 2016 ONCA 135 at 26, citing *Quintette Coal Ltd. v. Nippon Steel Corp*. (1990), [1991] 1 W.W.R. 219 (B.C.C.A.) (leave to appeal refused, [1990] S.C.C.A. No. 431) at p. 229.

76 The parties can preclude the possibility of such appeals in the arbitration agreement, or, by contrast, can explicitly provide for broader appeal rights. See, for example, the Manitoba Arbitration Act, CCSM c. A120 at 44(2).

77 Model Law at Chapter VII, Article 34.

78 Importantly, as recently clarified by the Ontario Court of Appeal in context of the domestic Ontario Arbitration Act, a wrongful interpretation by the arbitrator of the governing agreement does not constitute a jurisdictional error that is subject to curial review: *Alectra Utilities Corporation v. Solar Power Network Inc.*, 2019 ONCA 254 at paras. 42-44.

79 See, recently, in context of an international arbitral award: *Popack v. Lipszyc*, 2018 ONCA 635 at 40, citing *Corporacion Transnacional de Inversiones S.A. de C.V. v. STET International S.p.A.* (1999), 45 O.R. (3d) 183 (Ont. S.C.J. [Commercial List]) (affirmed (2000), 49 O.R. (3d) 414 (C.A.), leave to appeal refused, [2001] 1 S.C.R. xi) at 26.

V BREACH OF CONTRACT CLAIMS

To make out a claim for breach of contract, a party must show evidence of the following that is sufficiently clear, convincing and cogent:

a the existence of a valid contract;

b a breach of that contract; and

c damages flowing as a consequence of that breach.[80]

This test is assessed on a balance of probabilities.[81]

To determine the severity of a breach and the remedies that flow therefrom, Canadian law distinguishes between two types of contractual terms: conditions and warranties. A 'condition' is a term 'of such vital importance that it goes to the root of the transaction';[82] warranties are important but non-fundamental terms.[83] The general rule is that a breach of a warranty entitles the innocent party to sue for damages only, whereas a breach of a condition constitutes a 'repudiation' of the contract that the innocent party may elect to accept (and thereby, to treat its obligations under the contract as at an end) in addition to claiming damages.[84] The lexical distinction between conditions and warranties does not dominate the repudiation analysis, however,[85] which asks holistically whether there has been a breach of a 'sufficiently important term of the contract so that there is a substantial failure of performance',[86] that is, has the innocent party been deprived of something fundamental that it bargained for.

The same framework governs the doctrine of anticipatory breach; an innocent party may accept a repudiation of the contract where the other party, whether by express language or conduct, 'evinces an intention not to be bound by the contract before performance is due'.[87] This question is assessed objectively, querying what a reasonable person would conclude from the breaching party's conduct, and with reference to the overarching question of whether the putative breach would deprive the innocent party of substantially the whole benefit of the contract.[88]

However and whenever an innocent party elects to accept a repudiation, it must promptly, clearly and unequivocally communicate that decision to the breaching party[89] (the general Canadian practice in such cases is for the innocent party to clearly reserve its right

80 Where damages cannot be proven, courts may award nominal damages.

81 As noted by the Supreme Court of Canada, 'there is only one civil standard of proof at common law and that is proof on a balance of probabilities': C. *(R.) v. McDougall*, 2008 SCC 53 at 40 and 46. Note that this same standard of proof applies to the defences to breach of contract discussed in Part VI, below.

82 *Deputy Minister of National Revenue v. Mattel Canada Inc.*, 2001 SCC 36 at 58, citing P.S. Atiyah, *The Sale of Goods*, 8th ed. (London: Pitman Publishing, 1990).

83 Usually in sophisticated commercial contracts, conditions are express; courts may imply additional conditions but the test to do so is high. See Swan on Contracts, *supra* note 9 at 7.3.

84 *Potter v. New Brunswick* (Legal Aid Services Commission), 2015 SCC 10 at 145-149.

85 See Swan on Contracts, *supra* note 9 at 7.5.

86 *Potter v. New Brunswick* (Legal Aid Services Commission), 2015 SCC 10 at 145.

87 Spirent Communications of *Ottawa Ltd. v. Quake Technologies (Canada) Inc.*, 2008 ONCA 92 (leave to appeal refused, [2008] S.C.C.A. No. 151) at 37.

88 *Spirent Communications of Ottawa Ltd. v. Quake Technologies (Canada) Inc.*, 2008 ONCA 92 (leave to appeal refused, [2008] S.C.C.A. No. 151) at 37.

89 *Miller, Canfield, Paddock and Stone, LLP v. BDO Dunwoody LLP*, 2016 ONCA 281 at 6, citing McCamus on Contracts at p. 641. See also: *Gulston v. Aldred*, 2011 BCCA 147 at 50.

to claim damages).[90] Where an innocent party does not wish to terminate the contract, by contrast, it may waive its rights to do so.[91] Two cautions must be noted for commercial parties in respect of such waivers, however. First: they often cannot be effectively retracted, in that, where the breaching party proceeds to act in reliance on a clear and unequivocal waiver, Canadian courts will generally protect that reliance.[92] Second: where a party has a right to invoke a contractual termination provision but chooses not to do so, that party will oftentimes be held liable for the consequences of their non-action.[93]

In limited circumstances, a prospective commercial claimant may seek third party financing to fund its legal costs. The Supreme Court of Canada has yet to provide guidance on this emerging trend[94] but may do so this year.[95]

VI DEFENCES TO ENFORCEMENT

A common defence to contractual claims is that there was never a valid contract to begin with; that is, that there was no valid offer and acceptance[96] or that the contract is void for uncertainty.[97] Canadian courts, however, are highly reluctant to invalidate written agreements made between two sophisticated entities or void provisions of a contract ab initio.[98] Rather,

90 Although technically, there may not be a specific legal requirement to do so. As noted by one judge, 'the right to sue for damages for breach of contract is an implied term of any contract provided…that there is no provision to the contrary': 1394918 *Ontario Ltd. v. 1310210 Ontario Inc.*, [2001] O.J. No. 334, 103 A.C.W.S. (3d) 293 (High Ct.) (affirmed [2002] O.J. No. 18, 110 A.C.W.S. (3d) 1041 (C.A.)).

91 Generally, a party may waive any term that is for its own benefit. See, for example, *Palkovics v. Barta*, 2013 BCCA 181 at 13-14; 1258816 *Ontario Inc. v. Business Depot Inc.*, [2006] O.J. No. 1007, 14 B.L.R. (4th) 21 (C.A.) at 2.

92 Swan on Contracts, *supra* note 9 at 2.239-2.240.

93 See, for example, *Dinicola v. Huang & Danczkay Properties*, 1998, 111 O.A.C. 147, 163 D.L.R. (4th) 286 (C.A.) at 7. In that case, a party elected not to invoke their right to terminate an ongoing construction project, and thereby became liable for losses suffered by the project subsequently.
See, similarly although not directly related to the doctrine of waiver, the recent decision of the British Columbia Court of Appeal in *Cellular Baby Cell Phones Accessories Specialist Ltd. v. Fido Solutions Inc.*, 2017 BCCA 50. In that case, a party was found liable for failing to promptly exercise a right of immediate termination under the contract.

94 See, for example, *Seedling Life Science Ventures LLC v. Pfizer Canada Inc.*, 2017 FC 826. In this case, the plaintiff sought the Federal Court's approval of a litigation funding agreement ('LFA') with a third party funder. The court found that it had no jurisdiction to approve the LFA, but also found that no such approval was necessary.

95 9354-9186 *Québec inc., et al. v. Callidus Capital Corporation, et al.*, 2018 QCCA 632, leave to appeal allowed, 2019 CarswellQue 4889.

96 See Part II, above, for a detailed discussion of the rules of offer and acceptance.

97 See, for example, *Kirchner v. Dielmann Holdings Ltd.*, 2014 MBCA 21 at 8-9; *Vandal v. Cousineau*, 2015 ABCA 408 at 13.

98 *Johnson v. BFI Canada Inc.*, 2010 MBCA 101 at 74, citing Geoff R. Hall, Canadian Contractual Interpretation Law (Markham: LexisNexis Canada Inc., 2007) at 2.6.1. See also: *Sherry v. CIBC Mortgages Inc.*, 2016 BCCA 240 at 62, citing *Marquest Industries Ltd. v. Willows Poultry Farms Ltd.*, [1968] B.C.J. No. 231, 1 D.L.R. (3d) 513 (C.A.) at 12. See, further, Part III – Contractual Interpretation, above.

Canadian courts apply the old English maxim that 'a deed shall never be void where the words may be applied to any extent to make it good'[99] and seek to resolve contractual disputes and apparent ambiguities through the interpretive process.

Another common defence to contractual liability is the expiry of the limitations period. The limitation period in Canada for commercial claims is generally two years as established by statute,[100] subject to the discoverability principle and a 15-year absolute limitation period (i.e., regardless of discoverability). The discoverability principle asks when the plaintiff knew or reasonably ought to have known about their claim and that commencing a legal proceeding would be the appropriate means of obtaining a remedy.[101] A recent decision of the Ontario Court of Appeal highlights the latter aspect of the rule; in that case, the limitation period did not begin to run while the parties were engaged in mediation provided for under their contract.[102] Note, however, that simply engaging in settlement negotiations is insufficient to pause the timer; per statute, parties must actually engage an independent third party (such as a mediator) to assist them in resolving their dispute in order for the limitation period to toll.[103]

Where there is an intervening event that frustrates the parties' contract such that performance becomes impossible, a party may invoke the common-law doctrine of frustration as a defence to excuse itself from performing its outstanding contractual obligations.[104] In certain provinces legislation has codified this rule and the remedies that may be applicable where frustration is made out.[105] Note, however, that frustration of contract is a difficult standard to meet (its contractual cousin is the *force majeure* clause typically advisable in long-term framework agreements) and parties should be wary of invoking the doctrine.

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99 See, for example, *Sherry v. CIBC Mortgages Inc.*, 2016 BCCA 240 at 62, citing *Marquest Industries Ltd. v. Willows Poultry Farms Ltd*. (1968), 1 D.L.R. (3d) 513 (B.C. C.A.); *Vandal v. Cousineau*, 2015 ABCA 408 at 26; *Hunt River Camps / Air Northland Ltd. v. Canamera Geological Ltd.*, [1998] N.J. No. 325, 168 Nfld. & P.E.I.R. 207 (C.A.) at 29.

100 Although Quebec law is not the subject of this article, we note that the limitation period in Quebec is three years.

101 407 ETR Concession Co. v. Day, 2016 ONCA 709, 133 O.R. (3d) 762 (Ont. C.A.) (leave to appeal refused, (2017), [2016] S.C.C.A. No. 509 (S.C.C.)) at 40. For a further discussion of the discoverability principle in Canada, see: *Zapfe v. Barnes*, [2003] O.J. No. 2856 (C.A.), citing *Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 at 224.
Note that the old common-law 'special circumstances' doctrine (which permits parties to escape limitation periods where, for example, their lawyer missed the deadline) has been eroded in recent years, and no longer exists in certain provinces; see, for example, the decision of the Ontario Court of Appeal in *Abrahamovitz v. Berens*, 2018 ONCA 252 at 24-27, citing *Joseph v. Paramount Canada's Wonderland*, 2008 ONCA 469 ('Joseph') at 25-27. See also the decision of the Saskatchewan Court of Appeal in *Global Aerospace Inc. v. Insurance Co. of State of Pennsylvania*, 2010 SKCA 96 at 132-137. The Court in Joseph recognised the harshness of this approach, but held that to construe the law otherwise would be 'contrary to the purpose of the new [Ontario Limitations] Act by removing the certainty of its limitation scheme'.

102 See *PQ Licensing S.A. v. LPQ Central Canada Inc.*, 2018 ONCA 331 at 47-53. It was only when one of the parties formally filed a notice to arbitrate that the limitation period began to run.

103 See, for example, Limitations Act, 2002, S.O. 2022, c.24, Sched. B at section 11(1).

104 The standard of impossibility is elusive, perhaps best defined as an event that makes performance 'radically different' or 'so significantly changes' the nature of the parties' rights and obligations from what could have reasonably been anticipated in the circumstances as known at the time of contract, such that it is now unjust to hold them to the literal text of the contract: Swan on Contracts, *supra* note 9 at 8.303, citing various decisions.

105 See, for example, Frustrated Contracts Act, R.S.O. 1990, Chapter F.34.

With respect to the equitable defences of undue influence and unconscionability, the law is, generally speaking, as set out by the Supreme Court of Canada in its 2017 decision in *Douez v. Facebook, Inc*. ('Douez'), where the Court confirmed that the following two elements are required for such doctrines to apply: inequality of bargaining power (at the time of contract) and meaningful unfairness (at the time of breach).[106]

Notably, Canadian courts have taken to applying the unconscionability standard to contractual defences in respect of which it is not historically linked; namely, limitation of liability clauses and the rule against penalties.[107] Therefore, and as a result of the focus on inequality of bargaining power in the analysis, penalty clauses and limitation of liability clauses agreed to by sophisticated commercial parties are generally enforced in Canada;[108] even where the outcome visits an unfairness on one of the parties.[109] Highlighting this jurisprudential reality is a recent decision of the Ontario Court of Appeal, where a party that failed to act reasonably in terminating a contract (notwithstanding being contractually obligated to do so) was still able to fully rely on the limitation of liability clause contained therein.[110] The equitable jurisdiction that permits courts to decline to enforce limitation of liability and penalty clauses is grounded in public policy, and in Canadian law the promotion of freedom of contract and judicial non-interference is generally a dominant policy concern; especially where sophisticated commercial parties are involved. For similar reasons, equitable defences other than unconscionability are also generally inaccessible to sophisticated commercial parties.[111]

Ultimately, Canadian courts apply the foregoing rules in a practical manner that seeks to protect parties' reasonable reliance. In a recent decision, for example, the Ontario

106 *Douez v. Facebook, Inc.*, 2017 SCC 33 ('Douez') at 115. Provincial appellate courts have similarly held; see, for example, Downer v. Pitcher, 2017 NLCA 13 at 7-54.
It is not clear how to reconcile Douez with the 1976 decision of the Supreme Court of Canada in *H.F. Clarke Ltd. v. Thermidaire Corp.*, where, notwithstanding a relative equality of bargaining power, the Court declined to enforce payment of a sum owing under the contract that was 'extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach': [1976] 1 S.C.R. 319 at 15 and 28.

107 With respect to clauses limiting liability, see: *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4. With respect to penalties, see: *Birch v. Union of Taxation Employees*, Local 70030, 2008 ONCA 809 (leave to appeal refused, [2009] S.C.C.A. No. 29) at 32-40.

108 See *Syncrude Canada Ltd. v. Hunter Engineering Co.*, [1989] 1 S.C.R. 426 at p. 464: 'I have no doubt that unconscionability is not an issue in this case. Both [parties] are large and commercially sophisticated companies. Both knew or should have known what they were doing and what they had bargained for when they entered into the contract.'

109 Notably, however, a party that itself acts unconscionably may not be permitted to rely on a limitation of liability clause. For example, a company knowingly supplying defective product without disclosing such; 'a party to a contract will not be permitted to engage in unconscionable conduct secure in the knowledge that no liability can be imposed upon it because of an exclusionary clause'. *Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd.*, 2004 ABCA 309 (C.A.) (affirmed on this point: *Tercon Contractors Ltd. v. British Columbia* (Minister of Transportation & Highways), 2010 SCC 4 at 119).

110 *Chuang v. Toyota Canada Inc.*, 2016 ONCA 584 (leave to appeal refused, 2017 CarswellOnt 4671) at 22 and 31-34 and 49.

111 An example of this is rectification, which allows courts to correct errors made in the recording of written legal instruments. As noted by the Supreme Court of Canada, a 'relaxed approach to rectification as a substitute for due diligence at the time a document is signed would undermine the confidence of the commercial world in written contracts': *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56 at 13, citing *Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd.*, 2002 SCC 19 at 31.

Court of Appeal upheld a decision of a Toronto Commercial List judge who held that a contractual provision purporting to exclude liability for 'loss of profits' did not, in fact, apply to profits lost as a direct result of the breach, but rather applied only to indirect lost profits (that is, other business opportunities forgone as a result of the breach, sometimes referred to as 'consequential damages').[112] In reaching this conclusion, the court below did not consider the enforceability of the exclusion clause (and the corresponding requirement of unconscionability discussed above) but instead focused on its interpretation, ultimately finding that the clause simply did not apply to profits lost as a direct result of the breach.[113]

VII FRAUD, MISREPRESENTATION AND OTHER CLAIMS

Parties to a contract may sue for negligent or fraudulent misrepresentation.[114] The elements of negligent misrepresentation are:

a a duty of care based on a special relationship;
b a representation that is untrue, inaccurate or misleading;
c that the representor acted negligently in making the misrepresentation;
d that the representee acted reasonably in relying on the misrepresentation; and
e damages caused by the reliance.[115]

The elements of fraudulent misrepresentation are:

a the making of a false representation to the party alleging the wrong;
b the misrepresentation is made either,
- knowing it to be untrue;
- without belief in its truth; or
- reckless as to whether it be true or false; and

c the false representation caused the complaining party to act and to suffer a corresponding loss.[116]

Where misrepresentation is made out, rescission of the contract is often an appropriate remedy (although damages may also be available).[117]

In 2014, the Supreme Court of Canada recognised an 'organising principle of good faith' in contractual performance[118] and the corresponding duty to act honestly

112 *Atos IT Solutions v. Sapient Canada Inc.*, 2018 ONCA 374, leave to appeal refused, 2019 CarswellOnt 4343.

113 *Atos IT Solutions v. Sapient Canada Inc.*, 2018 ONCA 374 at 72, leave to appeal refused, 2019 CarswellOnt 4343. Notably, the court came to this conclusion with explicit reference to the parties' relationship of contractual reliance and the need to compensate the non-breaching party for the total 'loss of bargain' suffered.

114 *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, 31 D.L.R. (4th) 481. Parties may disclaim liability for negligence as an express term of the contract, including by way of an 'entire agreement' clause: see recently, for example, *Manorgate Estates Inc. v. Kirkor Architects and Planners*, 2018 ONCA 617.

115 *Queen v. Cognos Inc.*, [1993] S.C.J. No.3.

116 *Century Services Inc. v. LeRoy*, 2015 BCCA 120 at 19.

117 See, for example, *Ragin v. Ven-Cor Vending Distributors Ltd.*, 2001 CarswellOnt 2511, 106 A.C.W.S. (3d) 642 (S.C.J.) at 23.

118 *Bhasin v. Hrynew*, 2014 SCC 71 at 32-70.

in performance.[119] In doing so, the Court made clear that it was not imposing a duty of fiduciary loyalty or disclosure or establishing a rule requiring parties to forego advantages flowing from the contract[120] out of some '*ad hoc* moralism', but rather 'a simple requirement not to lie or mislead the other party about one's contractual performance.'[121] The parameters of the duty of good faith and the contexts where it might appear are still being developed in the jurisprudence.[122]

VIII REMEDIES

The general remedy for breach of contract is damages. Damages are meant to be compensatory; the basic rule is that the innocent party be placed, so far as money can, in the same situation as if the contract had been performed.[123] This approach (which asks what would have happened 'but for' the breach) is referred to as providing 'expectation' damages. Where expectation damages cannot be ordered, courts will endeavour to at least protect the reliance of the innocent party wherever possible, which generally means repaying out-of-pocket expenses wasted as a result of the breach.[124] Note, however, that the ability of a plaintiff to seek reliance damages is limited by the expectancy principle; a plaintiff will not, for example, recover its expenses when the evidence shows that it would have lost money on a net basis had the contract actually been performed.[125]

Expectation is assessed objectively and governed by the principle of remoteness, which excludes liability for losses that were not reasonably foreseeable when the contract was made.[126] Foreseeability in this regard has two branches: what the breaching party reasonably ought to have known at the time of contract, and what special circumstances (if any) the breaching party was actually told about prior to entering into the contract. As highlighted

119 *Bhasin v. Hrynew*, 2014 SCC 71 at 73.

120 Illustratively, in a recent case the Ontario Court of Appeal declined to sanction a plaintiff that actively deceived the defendant as to their intentions with respect to whether a contract would be terminated. The Court found that this 'failure to act honorably' did not rise 'to the high level required to establish a breach of the duty of honest performance': *CM Callow Inc. v. Zollinger*, 2018 ONCA 896 at 15-16.

121 *Bhasin v. Hrynew*, 2014 SCC 71 at 70, 73 and 86.

122 In 2017, the Supreme Court of Canada refused leave to appeal a decision of the Alberta Court of Appeal, which held that the duty of good faith does not require that discretionary powers granted under a contract be exercised fairly and reasonably (but only that such powers not be exercised in a manner that is 'capricious' or 'arbitrary'): *Styles v. Alberta Investment Management Corp.*, 2017 ABCA 1 (leave to appeal refused, 2017 CarswellAlta 949) at 49-53. More recently, the Supreme Court granted leave to appeal a decision of the British Columbia Court of Appeal, which held that a breach of the duty of good faith requires a finding of subjective dishonesty or improper motive: *Greater Vancouver Sewerage and Drainage District v. Wastech Services Ltd.*, 2019 BCCA 66 (leave to appeal granted, 2019 CarswellAlta 871) at 71 and 74.

123 Swan on Contracts, *supra* note 9 at 6.11.

124 McCamus on Contracts at p. 890.

125 McCamus on Contracts at p. 894.

126 See: *Houweling Nurseries Ltd. v. Fisons Western Corp.*, [1988] B.C.W.L.D. 1254, [1988] C.L.D. 592 (C.A.) (McLachlin, J.A., as she then was) at 27, citing *Hadley v. Baxendale* (1854), 9 Exch. 341, 156 E.R. 145 at 151.

by a recent decision of the British Columbia Court of Appeal, knowledge under the second branch cannot be presumed; there must be an evidentiary basis that the knowledge was 'brought home to the defendant at the time of the contract'.[127]

Expectation damages are also circumscribed by the doctrine of mitigation, which requires that a plaintiff take all reasonable steps to mitigate its losses at its earliest opportunity.[128] The doctrine of mitigation is based on fairness, and applies in all cases; as recently confirmed by the Supreme Court of Canada, claiming a relief in the alternative to damages in litigation (for example specific performance of the contract, which is discussed further below) does not in and of itself relieve a plaintiff of its obligation to mitigate – in all cases the question is what steps the plaintiff ought reasonably to have taken to reduce its damages.[129]

Expectation damages in Canada are further delimited by the 'minimum performance' principle, which provides that, where a defaulting party had alternative modes of performing the contract, damages are calculated on the basis of the mode of performance least burdensome to the defaulting party.[130] A recent decision of the Ontario Court of Appeal highlights this principle, where the Court awarded damages to a party who terminated a contract for cause to rely on the (less onerous) termination for convenience provisions therein (on which the party could have relied, but did not).[131]

As noted above, the general rule is that damages must be proven. Where there has been a clear breach of contract but a strict application of the 'but for' approach to damages would limit or altogether preclude meaningful recovery, however, Canadian courts are to follow the old common-law approach and apply 'sound imagination and the practice of the broad axe' to the damages analysis to ensure, as best as possible, that the innocent party is fully and fairly compensated for the breach.[132]

Where damages cannot be proven in the sense that money is not a complete answer to the plaintiff's claim (namely, where the thing contracted for is unique in that a substitute cannot be readily purchased on the market), specific performance of the contract can be warranted. This arises most often in the real estate context; the test is whether the putative acquirer can show a 'fair, real, and substantial justification' or a 'substantial and legitimate' interest in the land such that damages are insufficient to cure the default.[133] Note that, while the common law of Canada previously presumed uniqueness in land, the Supreme Court of Canada recently overturned this presumption.[134]

127 *Al Boom Wooden Pallets Factory v. Jazz Forest Products (2004) Ltd.*, 2016 BCCA 268 (leave to appeal refused, 2017 CarswellBC 121) at 78-79.

128 *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51 at 24.

129 *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51 at 39-40.

130 *Open Window Bakery*, 2004 SCC 9 at 11 and 20.

131 *Atos IT Solutions v. Sapient Canada Inc.*, 2018 ONCA 374 (leave to appeal refused, 2019 CarswellOnt 4343). This case clarifies that the minimum performance principle does not depend on good faith conduct by the breaching party.

132 *Teva Canada Limited v. Janssen Inc.*, 2018 FCA 33 at 32-36, citing *Watson, Watson, Laidlaw & Co. v. Pott, Cassels & Williamson* (1914), 31 R.P.C. 104 (U.K.H.L.).

133 *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51 at 92, citing *Baud Corp., N.V. v. Brook*, [1978] S.C.J. No. 106, [1979] 1 S.C.R. 633.

134 Which is the natural consequence of the 'advent of condominiums and other forms of interest in land'; see: *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2014 BCCA 388 at 52, citing *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51 at 95.

There is a strong presumption that expectation damages will be assessed as of the date of the breach, with this presumption displaced only in (the rare) circumstances where that result would be fundamentally unfair to the innocent party.[135] The rationale for assessing damages as at the day of breach is related to the doctrine of mitigation discussed above, which requires that a party take steps to crystallise its losses at its earliest opportunity.[136] Thus, the cases where the presumption is displaced are generally only those in which it would be fundamentally unfair to impose a requirement that the innocent party have crystallised its damages (notionally or actually) on or about the date of breach.[137]

Claims for lost opportunity (i.e., loss of chance), although based on the hypothetical value of a future event, are also assessed as of the date of breach. This is done on a probabilistic basis.[138] To secure a remedy for lost opportunity, a plaintiff must show that:

a but for the defendant's wrongful conduct, the plaintiff had a chance to obtain a benefit or avoid a loss;

b the chance lost was sufficiently real and significant to rise above mere speculation;

c whether the plaintiff would have avoided the loss or made the gain depended on someone or something other than the plaintiff himself or herself; and

d the lost chance had some practical value.[139]

135 See *Rougemount Capital Inc. v. Computer Associates International Inc.*, 2016 ONCA 847 at 45 and 50-53, citing *Johnson v. Agnew* (1979), [1980] A.C. 367 (U.K. H.L.), at pp. 400-401.

136 The rationale for early crystallisation is explained by Laskin, J.A. (in dissent) in *Kinbauri Gold Corp. v. IAMGOLD International African Mining Gold Corp.*, [2004] O.J. No. 4568, 135 A.C.W.S. (3d) 70 (C.A.): 'An early crystallisation of the plaintiff's damages promotes efficient behaviour: the litigants become as free as possible to conduct their affairs as they see fit. Early crystallisation also avoids speculation: the plaintiff is precluded from speculating at the defendant's expense by reaping the benefits of an increase in the value of the goods in question without bearing any risk of loss'.

137 For example, in a share transaction where the market for the shares is volatile or non-existent, it would not accord with a commercial party's expectations to sell such shares into the market on the exact day of breach absent some assurance that it would not be more profitable to sell the shares a day, week, month or year later. See, for example: *Kinbauri Gold Corp. v. IAMGOLD International African Mining Gold Corp.*, [2004] O.J. No. 4568, 135 A.C.W.S. (3d) 70 (C.A.) (per Laskin, J.A., concurring) at 126, citing *Johnson v. Agnew* (1979), [1980] A.C. 367 (U.K.H.L.). *Baud Corp., N.V. v. Brook*, [1978] 6 W.W.R. 301, [1978] S.C.J. No. 106, [1979] 1 S.C.R. 633 at 61, citing Atiyah, Sale of Goods, 4th ed. (1971), p. 294: 'In particular it is unrealistic to suppose that a buyer will in practice be able to buy goods on the market on the very day on which the seller fails to deliver.'

138 That is, courts will award damages equal to the probability of securing the lost benefit (or avoiding the loss) multiplied by the value of the lost benefit (or the loss sustained): *Berry v. Pulley*, 2015 ONCA 449 at 72.

139 *Berry v. Pulley*, 2015 ONCA 449 at 70, citing *Folland v. Reardon* (2005), 74 O.R. (3d) 688 (C.A.) at 73.

Liquidated damages awards for breach of contract will generally include pre-judgment interest, assessed from the date of breach at a simple rate prescribed by the Bank of Canada.[140] This presumption can be displaced by the parties' prior agreement.[141] Unless an award (or settlement agreement) provides otherwise, it is deemed to be inclusive of tax.[142]

140 This is provided for variously by provincial legislation. See, for example, the Ontario Courts of Justice Act, RSO 1990, c C.43 at 127; Court Order Interest Act, RSBC c C. 43 at Part 1.

141 This is provided for explicitly in certain provincial legislation; see, for example, Court Order Interest Act, RSBC c C. 43 at 2(c). In other provinces (e.g. Ontario) the legislation is not explicit but courts nevertheless have discretion to award prejudgment interest at a rate and method of calculation (simple or compound) that accords with the expectancy principle and in restitution: *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43.

142 With respect to judicial awards, see: *THD Inc. v. The Queen*, 2018 TCC 147, citing Excise Tax Act, RSC 1985, c E-15. With respect to settlement agreements, see: *Automodular Corporation v. General Motors of Canada Limited*, 2018 ONSC 1640 at paras. 35-40.

Appendix 1

ABOUT THE AUTHORS

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Alan Mark is a partner in the litigation and class actions groups and co-heads the securities and energy law litigation Groups at Goodmans.

Alan has a diversified advocacy practice, specialising in corporate and commercial litigation, class actions and electricity law and regulation. Alan's corporate and commercial litigation practice encompasses all manner of business disputes with a focus on corporate governance, corporate finance, securities, financial services, and restructuring and insolvency. Alan's class action practice includes securities, product liability and environmental claims. Alan also carries on a substantial electricity and regulatory practice, regularly representing clients in the electricity sector before the Ontario Energy Board and the courts.

Alan has appeared at all levels of the Ontario, and other provincial, courts, and the Federal Courts, including the Supreme Court of Canada. Alan has represented many Fortune 500 companies and has been lead counsel on a number of high profile domestic and cross-border cases. Leading businesses and organisations look to Alan for his sound judgment and strategic advice as well as his renowned courtroom skills. Alan has a loyal following of clients who rely on him to handle their most significant legal disputes.

Alan is widely recognised as a leading counsel. He is listed as recommended counsel in numerous leading guides and directories, including *Chambers Global*, *The Lexpert/American Lawyer Guide to the Leading 500 Lawyers in Canada*, the *Lexpert Special Edition on Canada's Leading Lawyers* in the *Globe & Mail's* Report on Business Magazine for energy and litigation, *Best Lawyers in Canada*, *Benchmark Canada* and *Euromoney's Guide to the World's Leading Litigation Lawyers*. In 2013, Alan was recognised as 'Canada's Energy/Resource Litigator of the Year' by *Benchmark Canada*.

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Jesse-Ross Cohen is an associate in the litigation group at Goodmans. He has a broad-based practice with particular focus in the areas of corporate and commercial, technology and environmental and energy litigation.

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ISBN 978-1-83862-075-2