CONTRACT DRAFTING PITFALLS
AND HOW TO AVOID THEM

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Stuart English, Cassels Brock & Blackwell LLP

Julia Shin Doi, Ryerson University
Drafting Tip: Check for unintended clauses caused by commas. When removed, how is sentence affected?

Rogers Comma Case

Subject to the termination provisions of this Agreement, this Agreement shall be effective from the date it is made and shall continue in force for a period of five (5) years from the date it is made, and thereafter for successive five (5) year terms, unless and until terminated by one year prior notice in writing by either party.
Improving contract certainty by clarifying obligations and remedies; specifically, by:
(a) reducing ambiguity,
(b) avoiding agreements-to-agree,
(c) clarifying duty of good faith, and
(d) tightening up indemnity provisions
This presentation borrows liberally from the ideas of various academics who know far more about drafting than I do, particularly Ken Adams (who has presented to our lawyers and at our corporate counsel seminars) and the 2 lawyers who wrote Legal Drafting: Process, Techniques and Exercises – Haggard and Kuney.
Ken Adams, in his book “A Manual of Style for Contract Drafting”, identifies these six sources of uncertainty:

**Ambiguity** is sometimes used interchangeable with uncertainty, but I’m going to use it in the sense Adams does; that is, a contract provision is ambiguous if it is capable of more than one meaning. I’ll focus on this because it’s this uncertainty that is most likely to cause the greatest harm.

**Undue generality** – a provision is unduly general if it encompasses more than the parties intended, such that it cannot be determined what the provision applies to. For example, the property intended to be sold is not described sufficiently to distinguish it from other property.

**Inconsistency**, as opposed to conflict, is the use of one word or phrase to convey two different meanings, or more than one word to convey the same meaning.

**Redundancy** is using more than one word to mean the same thing, from which the reader can infer the words have different meanings. For example, “sell, assign, convey, dispose, pledge, encumber or transfer”.

**Conflict** is where two provisions in a contract contradict each other.

**Vagueness**, unlike the others, has a positive and a negative – it allows for greater breadth where exact parameters are unknown, but it suffers from lack of certainty. Words like “reasonable”, “material”, “promptly”, and “substantially” are examples.
Gaps are missing details or matters not addressed by the contract. A common cause of uncertainty is the failure to include details, such as who, what, where, when and how. Julia will discuss this further.

Agreements-to-agree may take the form of a letter of intent (or sometimes called a “memorandum of understanding”) which merely describes the agreement(s) to be entered into, or a provision within a definitive agreement that refers to matters to be agreed upon by the parties; either of which may be unenforceable.

Most difficult is anticipating changes in circumstances or events, and what to address in the agreement.
There are different ways of categorizing ambiguity; 2 categories used by Adams and Haggard & Kuney are Semantic Ambiguity and Syntactic Ambiguity.

Semantic ambiguity is caused by the choice of words alone; some words have more than one meaning (such as homonyms) or take on different meanings depending on the context.

Syntactic ambiguity results from the order of words and punctuation (or their grammatical relationship).

Note that there are no standard ways of categorizing drafting errors, and there are categories aside from the two I’ve identified here, and many subcategories other than the few I mention in the following slides. However, by categorizing them, and reviewing examples (such as the ones I’ve used), you can become more adept at spotting these potential pitfalls when drafting, or reviewing another’s draft.
A panda walks into a café. He orders a sandwich, eats it, then draws a gun and proceeds to fire it at the other patrons.

‘Why?’ asks the confused, surviving waiter from amidst the carnage, as the panda makes towards the exit.

The panda produces a badly punctuated wildlife manual and tosses it over his shoulder. ‘Well, I’m a panda,’ he says, at the door. ‘Look it up.’

The waiter turns to the relevant entry in the manual and, sure enough, finds an explanation. ‘Panda. Large black-and-white bear-like mammal, native to China. Eats, shoots and leaves.’

This illustrates semantic ambiguity (as a result of homonyms “shoots” and “leaves”) and ambiguity from poor punctuation (which may be classified as syntactic ambiguity).
There are many words in the English language that have more than one meaning. Homonyms are an example, but usually the possible meanings are quite different, so the correct meaning is easily determined by the context.

There are many other words that have more subtle, but very important, differences in meaning – differences that can affect the rights and obligations of parties, and have adverse consequences if given the wrong interpretation (i.e. the one that was not intended). I have identified 3 groups of words that can give rise to semantic ambiguity.

Julia will talk about the uncertainty caused by the use (or overuse) of the word “shall”.

The words above indicating time periods each may be ambiguous. If something must occur “within” a specified period of a date, it is commonly thought of as meaning after the date, but a recent case interpreted it literally to include before, as well as after, the specified date. The ambiguity associated with the other words is that it is not clear whether the date or dates specified are included. For example, if an event must occur “between” two dates, or during a period that runs “from”, “to”, “by” or “until” a specified date, it is ambiguous whether the event may occur on the date(s) specified (absent expressly indicating the date is included within the provision or in a separate interpretation provision).
In Strunk and White’s *Elements of Style* you’ll find the following excerpt:

**And/or.** A device, or shortcut, that damages a sentence and often leads to confusion or ambiguity.¹

Instead of using “and/or”, consider whether your intention can be conveyed by using “and” or “or”, with no loss of meaning.

If not,

where two possibilities are presented,

for inclusivity, use *x or y or both*, and

for exclusivity, use *either x or y* (and add *but not both*, if it is necessary to stress the exclusivity),

where more than two possibilities are presented, from which a combination is to be selected, use *one or more of x, y, and z*.

In the first example, it is not clear whether those entitled to a reduced interest rate are credit cardholders or chequing account holders, as opposed to only those who are holders of both credit cards and chequing accounts.

You’ll note from the second sentence that the problem occurs even if this sentence is reordered.

In the third sentence, I have used “and/or”, which is commonly used in these circumstances, but as I have noted may be ambiguous and has been harshly criticized.

In the fourth sentence, I’ve changed the sentence around to clarify that the entitlement to reduced interest rates applies to holders of either credit cards or chequing accounts, or both. In this instance, it’s probably unnecessary to add “either” and “or both”, but in other circumstances it might be.
Modifiers are a common source of ambiguity. Modifiers are adjectives or clauses that alter the meaning of nouns or clauses. Much of the ambiguity arising from modifiers is syntactic ambiguity. For most of the examples I use, the order in which the words or phrases appear (together with the punctuation) results in the ambiguity.

Pronoun and punctuation are other sources of syntactic ambiguity.

In most, but not all cases, the ambiguity can be rectified by simply reordering the words or phrases (along with some punctuation changes).
This slide contains an example of modifier after 2 verb clauses. Here the modifier is at the end of a sentence and it is not clear whether the time period applies to the payment of the purchase price by the buyer or the designation of the account by the seller (or perhaps both). Note that adding a comma in the second sentence does not address the uncertainty. A better way of clarifying it is set out in the third sentence – I think this is the most clear.
When the text in bold is added to the second sentence, it is not clear that “payments to third parties” is not part of the exclusion.

When the sentence is reordered, as in the third example, the exclusion clearly does not include “payments to third parties” (although if the context were different, it might be ambiguous in that the exclusion might modify that clause – “payments to third parties” – in addition to “other costs incurred in providing the Services”, the ambiguity illustrated by the previous slide).

The last sentence shows how it might be made clear that “payments to third parties” is part of the exclusion (if that was intended).
Modifiers - Tips

- Where a modifier precedes/follows more than one clause, consider whether the modifier applies to all or only the clause it is closer to.
- When inserting a modifier mid-sentence, make sure it is clear where the modifier ends.
- Clarify by: (a) reordering sentence or changing punctuation, (b) enumerating, or (c) tabulating.
- Keep the modifier close to the noun, verb or clause it applies to.
In this example, “it” is intended to refer to the Milestone Payment, but grammatically the pronoun might be interpreted as referring to the Escrow Amount.
Aside from modifiers, another cause of ambiguity is the poor placement of commas and other punctuation errors. The importance of proper punctuation is illustrated in the “Dear John” letters set out on the next slide.

John was very pleased to receive this letter from Jane. However, Jane’s feelings would be misinterpreted by punctuation errors. She had intended to break up with John. You’ll note that the second letter contains exactly the same wording, but the change in punctuation conveys a dramatically different meaning.
Gaps - Agreement-to-Agree

Terms to be Agreed

- Generally unenforceable
- Similar to letters of intent and other “agreements to agree”, except that there is an otherwise binding contract
Letters of Intent

Not unenforceable where:
- no intention to be bound
- too uncertain

Tips:
- For LOI or term sheet, expressly state non-binding obligations
- If letter agreement intended to be binding:
  - indicate binding (despite further agreements to be entered into, if applicable)
  - address uncertainty

To address the uncertainty, see tips on Slide 20.
EdperBrascan Corp. v. 117373 Canada Ltd., 2000 CanLII 22694 (ON S.C.).

The EdperBrascan case is a good example of this pitfall (leaving terms to be agreed upon by the parties). I don’t have time to talk about it in detail, but because I think it’s such a great illustration of the pitfalls of provisions that leave matters “to be agreed” or an “agreement to agree”, I would encourage you to read it.

The rationale for not enforcing these provisions is that they are inherently uncertain and the court will not make the agreement for the parties, at least not without any objective criteria. In EdperBrascan the court reviewed those cases in which terms left to be agreed were held to be enforceable because there was objective criteria upon which the court could make a determination on the term that was left to be agreed upon. The court noted that in one of the leading cases, there was an arbitration provision, although I don’t think this would be determinative.

The court also held that there is no obligation or duty to negotiate in good faith, noting that like agreements to agree, it lacks the necessary certainty. Although the courts have recognized a duty of good faith in the performance of contracts, there is generally no duty to negotiate in good faith.

So, what we’re left with is that, generally, provisions that leave terms to be agreed by the parties (even if it expressly says there is an obligation to negotiate in good faith) are unenforceable, particularly if they lack objective criteria.
Agreements-to-Agree - Tips

- If possible, do not leave matters to be mutually agreed upon.
- If a term is left to be agreed, consider referring to objective criteria, such as fair market value (and determination by third party, such as accountant, expert, arbitrator).
- Consider potential consequences of provision being unenforceable, either entire provision or only a portion of the provision. (Note the consequences in the EdperBrascan case.)
- Describe consequences if parties cannot agree ("If the parties do not agree, then ... ").
Note that, while a positive obligation to negotiate may not be enforceable, restrictions on negotiating with other parties (exclusivity or "no-shop" provisions) are enforceable.

There have been cases where an express duty to negotiate has been held enforceable, but note difficulty in proving damages (given that negotiations may not have lead to an agreement).
Duty of Good Faith – What It Is

- Standard of conduct; applies to the performance of contractual obligations
- Not a fiduciary duty
- Defined: honesty, reasonableness, fairness, regard for other party’s interests, absence of bad faith
McCamus argues that the Canadian common law has not yet recognized a general duty of good faith performance, but notes frequent references to it by Canadian courts and many cases that appear to assume it exists.

An expressed obligation to negotiate or otherwise act in good faith:
- may restrict freedom to walk away from negotiations
- may unintentionally lead to implication that duty does not exist in other provisions where it is not expressly stated

In Labatt *Brewing Company Limited v. NHL Enterprises Canada, L.P.* 2011 ONSC 5652 (CanLII), the court stated that *Canada Trustco Co. v. 1098748 Ontario Ltd.* (1999) 22 R.P.R. (3d) 82 (Ont. S.C.) “stands for the proposition that a party who has expressly agreed to negotiate in good faith may not then negotiate in bad faith, and that the case does not stand for the proposition alleged by Labatt that a party who has agreed to negotiate must affirmatively do so, or be held liable for refusing. The effect of a provision to agree to negotiate in good faith is merely prohibitive; it states what the parties must not do (negotiate in bad faith), not what they must do (negotiate).”
Duty of Good Faith – Cooperation/Effort

- Scope of implied duty is uncertain
- “Further assurances” clause
- “Best Efforts” vs. “Reasonable Efforts”
  - Other alternatives (to avoid):
    - commercially reasonable efforts
    - commercially reasonable best efforts
    - good faith efforts
    - all methods at its disposal
- Tip: clarifying the effort required by specifying:
  - what must be done, or what is specifically included
  - what need not be done, or what is specifically excluded
The case law is not entirely clear whether the exercise of discretion must be reasonable, or the lower standard of not acting in bad faith.

The courts are more likely to intervene if the reasonableness of the particular exercise of discretion is capable of being assessed objectively, as opposed to a decision that is subjective (e.g. based on personal tastes).
Indemnities

Indemnities serve 2 primary functions
- Expand recovery beyond losses resulting from a breach
- Adds certainty as to the losses recoverable
  - types of damages
  - quantum (thresholds, deductibles, caps)
  - time period
  - procedure
Where an indemnity from a company is given in favour of a shareholder who owns less than 100% of the outstanding shares, consider:

(a) whether loss is proportionate to share ownership,

(b) should the payment be grossed-up given that the payment by indemnifying company reduces the value of its shares held by the indemnified shareholder

(c) should the indemnifying party be permitted/required to satisfy the claim by issuing additional shares
Indemnities – Exclusive Remedy

- Exclusive remedy for breach of reps & warranties, but not for all breaches of the agreement
- Exclude tort claims (fraud, negligent misrepresentations)
- Refer specifically to breaches of reps & warranties, or carve out injunctions/specific performance and other dispute resolution procedures (e.g. price adjustment)
Procedure can have a significant effect on ability to enforce an indemnity.

If advising the indemnifying party, the failure to give notice within a specified period should not preclude recovery (unless after survival period) nor should the lack of details (so long as there is enough information to ascertain the nature of the claim).

If advising the indemnifying party, avoid an obligation (as opposed to a right) to defend claims, and a requirement to accept liability as a pre-condition to defending claims.

Third parties may not benefit due to lack of privity; consider adding wording that a party to the contract holds as trustee/agent.

Ensure that indemnifying party will have sufficient assets to satisfy claims.
Where indemnity is limited in time (in asset/share purchase agreements, typically called the survival period) or to dollar amounts (liability caps), exceptions based on wilful or intentional conduct, or negligence or carelessness, may render these limits ineffective (or uncertain as to their application).
Contract Drafting: Pitfalls and Tips
CCCA 2013 National Spring Conference
Julia Shin Doi
April 15, 2013
Overview

- Indemnity
- Limitation of Liability
- Governing Law
- Assignment
- Termination
- Elements of Good Legal Drafting

Indemnity

The Renter shall indemnify and save harmless the Museum from and against any and all claims, damages, suits, and actions whatsoever, including any claims for any personal injury (including death resulting therefrom) or any loss of or damages to property which arise out of or in connection with the entry onto and use of the Museum's facilities on the date(s) specified in this agreement or which arise out of said event. If the Museum is made party to any litigation commenced by or against the Renter, the latter shall promptly indemnify and hold harmless the Museum and shall pay to the Museum all costs and expenses incurred or paid by the Museum in connection with such litigation.

Indemnity – Drafting Tips

• Parties
• Obligation
• Scope of Indemnity
• Nexus
• Subject Matter
• Limitations

Limitation of Liability

In no event is the Corporation liable under any circumstances whatsoever for any loss of profits or revenues, business interruption losses, loss of contract, cost of capital, loss of business opportunity, delay, loss of goodwill, loss of data or for any indirect, special, consequential or incidental damages and including but not limited to punitive or exemplary damages, whether the liability, loss or damages arise in contract or tort or any other theory of liability, even if the Corporation was expressly advised of the possibility of such damages. In no event is the Corporation’s total liability for all damages, losses, and causes of action (whether in contract, tort (including but not limited to negligence) or otherwise) exceed the amount specifically paid to the Corporation hereunder.
Limitation of Liability

Caselaw:


  • Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a Proposal each proponent shall be deemed to have agreed that it has no claim.

Limitation of Liability – Drafting Tips

• “in no event”
• avoid qualifying clauses, use clear language
• specify type of damages limited
• “contract or tort (including but not limited to negligence)”
• use formatting to bring the clause to the attention of the other party

Governing Law

This Agreement is governed by the laws of the Province of Ontario and the laws of Canada applicable therein. The parties attorn to the exclusive jurisdiction of the courts of the Province of Ontario and all courts competent to hear appeals therefrom.

Governing Law – Drafting Tips

- choice of law and choice of forum
- exclusive or non-exclusive Jurisdiction
- “without regard to principles of conflicts of law” “that would impose a law of another jurisdiction”
- other issues: Ontario contract, laws in force, non-jury
Assignment

Neither party may assign this Agreement without the prior written consent of the other party.

Assignment – Drafting Tips

• Cover rights, benefits, obligations
• Written consent
• No Assignment Heading
• Consistency with Enurement Clause
Termination

Either party may terminate this Agreement:
(a) for convenience upon 30 days prior written notice;  
(b) If the other party is in breach or default of any obligation that is not cured within 30 days written notice of such breach; or  
(c) upon the bankruptcy, insolvency, or creditors’ arrangement of the other party.

Termination – Drafting Tips

• Enforceability - Bankruptcy and Insolvency Act  
• Material breach, default  
• Effect of termination  
• Post-Termination rights  
• Survival
Legal Drafting

Elements of Good Legal Drafting

• Clarity
• Consistency
• Concision (Brevity)
• Organization


Clarity

• Who (to whom)
• What
• When
• Where
• Why
• How (how much)

Every sentence in legal drafting that creates an obligation should deal with “who does what (to whom) by when, where, why and how”.

Clarity

Example:
The purchase price shall be paid at closing

Re-Draft:
The Purchaser shall pay the purchase price to the Vendor on the Closing Date at the Vendor’s solicitor’s office.

Consistency

• Use “shall” to create legal obligations

• Example
  – Time shall be of the essence.
  – Time is of the essence.
Dickerson’s Rules

• To create a duty or obligation, choose “shall”
• To create a discretionary authority, choose “may”
• To create a condition precedent, choose “must”
• To create a right, choose “is entitled”


Consistency - Shall

• Example:
Licensee shall provide samples of all artwork showing the Trademark to Licensor. Licensor shall approve all use of the Trademark.

• Re-Draft:
Licensor is entitled to approve all use of the Trademark.
Concision (Brevity)

Express your action by a verb not a noun
These suffixes indicate that you have turned a verb into a noun: “ion”, “ence”, “ness”, “ity”, “ing” and “ment”

Examples
- give consideration to consider
- give payment to pay
- give authority to authorize


Organization

- Typical Organization
- Organization Patterns
- Organization Tools
**Typical Organization**

- Interpretation Provisions
- Term
- Action Clauses
- Money and Payment
- Representations and Warranties
- Other Covenants
- Conditions
- Indemnification
- Insurance, Confidentiality, Intellectual Property, Dispute Resolution
- Termination
- General

**Organization patterns**

- Chronology
- Importance
- Frequency of Occurrence
- Familiar before Unfamiliar
- Rules before Exceptions
- What before How
- Substance before Procedure
- Most complex to Least Complex
- Contingent

Organization Tools

• Headings
• Numbering
• Formatting
• Paragraph Sculpture


Checklists

• Format Organization and Style Checklist
• Contract Review Checklist
Legal drafting tip #1

The attornment clause: exclusive or non-exclusive jurisdiction?

One question you will need to determine when drafting the attornment clause in an agreement is whether to attorn to the exclusive or the non-exclusive jurisdiction of the Ontario courts.

Having decided that Ontario courts are the preferred jurisdiction for resolving dispute, it nevertheless is often not appropriate to indicate that it is the exclusive jurisdiction.

The choice of non-exclusive jurisdiction allows a party to seek remedies in courts other than Ontario, where there are advantages in doing so. For example, if the agreement is breached by persons located in BC, an injunction to restrain that breach will only be easily enforceable against them if made by BC a court. If it is made by an Ontario court, you would have to take further action in BC to have the order enforced there.

In some circumstances the desire to avoid litigation in another jurisdiction may outweigh the benefits of making the choice of jurisdiction non-exclusive. However, an exclusive jurisdiction clause may not be enforceable. Accordingly, clients should be made aware of this limitation, in addition to cautioning them that it may make enforcement impractical in another jurisdictions. Also, you will need to qualify any enforceability opinion about the applicable agreement.
Legal drafting tip #2

Limitation of liability clauses

Contract drafters often seek to limit future damages by using a limitation of liability clause. However, excluding certain kinds of damages, such as “special,” “indirect,” and “consequential,” can be fraught with problems. Because those terms are nebulous, stating that they are excluded does not create any further clarity, thereby increasing the difficulty of valuing those damages and enforcing them in litigation. For example, lost profits may fall into one or more of these categories.

A well-drafted limitation of liability clause can provide certainty and risk allocation that the common law can or does not.

Rather than relying on terms such as “consequential” damages in hopes that it will help exclude certain losses resulting from a breach, it is better practice to identify specific types of damages to be excluded, such as lost profits, loss of business opportunity or goodwill, diminution of market value, or punitive damages.

In addition to being more specific as to what kinds of damages are excluded, you should also consider including a cap on the amounts recoverable in any action relating to the agreement, as well as excluding certain causes of action, proceedings and relief, such as injunctions, rescission and specific performance (if appropriate in the circumstances).

See the long (32 page) article from Business Lawyer magazine at http://www.weil.com/files/Publication/d1704cbb-d7c7-48be-afde-286d92e49258/Presentation/PublicationAttachment/da4a341e-ff72-44fa-9a6e-343fd19583e4/Consequential Damages Article.pdf and Ken Adams’s comments on that article at http://www.adamsdrafting.com/2010/02/15/excluding-consequential-damages-is-a-bad-idea/, and on these issues generally, for a fuller discussion.
Legal drafting tip #3

The Knowledge Qualifier: "Best of our knowledge"

When drafting representations and warranties, it is often necessary to qualify a statement with the phrase “to the best of X's knowledge.” This is generally called a “knowledge qualifier.”

There is often discussion as to whether or not to include the modifier “best”. The Supreme Court interpreted “to the best of my knowledge” as not requiring extra diligence to ascertain the truth of the stated knowledge. The leading case is Confederation Life Assn. v. Miller.

More recently, in John Levy Holdings Inc. v. Cameron & Johnstone Ltd., the court held that the “best of” knowledge qualifier does not warrant the absolute truth of the statement and did not impose a duty to discover whether the knowledge was in fact true. (See also Vokey v. Edwards.)

However, there is a common perception that the “best of” phrase sets a higher standard of diligence than simply stating “to my knowledge.” If you use “to the best of my knowledge,” the other side may infer that you engaged in greater diligence than was the case.

To avoid uncertainty and the risk of litigation, clarify by proper drafting what the phrase means. The agreement should include a provision that defines what level of diligence is required of the party making the statement. For example:

Option #1 – Diligence Required: “Where any representation, warranty, or other statement in this agreement, or in any other agreement or other document delivered in connection with this agreement, is expressed by a party to be “to its knowledge”, or is otherwise expressed to be limited in scope to facts or matters known to the party or of which the party is aware, it means (i) the current, actual knowledge of directors and officers of such party [or Insert individual(s) names for each party, not the name of a legal entity], and (ii) the knowledge that would or should have come to the attention of any such directors or officers [insert individual(s) names for each party, not the name of a legal entity] had such individuals duly investigated the facts related to that statement and made reasonable inquiries of other individuals reasonably likely to have knowledge of facts related to that statement.”

Option #2 – No Diligence Required: “Where any representation, warranty, or statement in this agreement, or in any other agreement or other document delivered in connection with this agreement, is expressed by a party “to its knowledge”, or is otherwise expressed to be limited in scope to facts or matters known to the party or of which the party is aware, it means the current, actual knowledge of the directors...”
and officers of such party [or Insert individual(s) names for each party, not the name of a legal entity], without the requirement to make any other inquiry or investigation."


1887 CarswellOnt 18 (S.C.C.).


1999 CarswellOnt 1440 (S.C.J.).
Legal drafting tip #4

Effective Date

Identifying the date of an agreement with certainty can be very important, but may not be clear. For example, if one party has the right to renew the agreement on notice given “not less than 30 days before the fifth anniversary of the date of this agreement,” determining the actual “date of the agreement” may be critical. The date of the agreement for this purpose may be unclear when a document is executed in counterparts, each signed and dated different days, or when one or more dates above signatures are different or conflict with the date at the top of the agreement.

You should set out the date at the top of the agreement and ask the parties not to add the date with their signatures. However, since they may do so regardless, you should consider including an Effective Date clause to confirm that the date of the agreement is the one identified at the top of the agreement, or some other date that the agreement comes into effect.

Generally, the date of the agreement, or the effective date, should be the date the parties sign or a future date (if the agreement is not intended to come into effect immediately). If you are asked to use an earlier date as the date an agreement (generally by dating it “as of” an earlier date), or specify an effective date earlier than the date the agreement is signed, you must be careful that you are not “papering” something that did not actually happen in the past, in order to inappropriately gain a benefit for the parties, or one of them. This may be appropriate if the parties had in fact earlier come to an understanding on the main points of their deal; however, the efficacy and legality of “back-dating” agreements must be carefully considered in each particular circumstance. Note that American auditors are becoming much less tolerant of documents dated “as of” an earlier date, and we expect this trend to manifest itself in Canada.
Legal drafting tip #5

Terms and Conditions

You will frequently encounter the phrase “terms and conditions” used redundantly or unnecessarily in agreements when cross-referencing other agreement or documents. Generally, this superfluous language may simply be deleted as in the following examples:

The Executive will be entitled to no less than four weeks’ paid vacation per year during the Term, subject to (but not reduced by) the terms and conditions of the Company’s vacation policy in effect from time to time.

The Tenant shall comply with all of the terms and conditions of each insurance policy maintained in accordance with this Lease.

In other circumstances, if a complete deletion of the phrase is not appropriate, you can still simplify a sentence by deleting the reference to “conditions,” since conditions are a subset of contractual terms. Here are some examples:

The Recipient shall refrain from disclosing or communicating the existence or the terms and conditions of this agreement.

None of the terms and conditions of the Lease will be affected by the completion of the Transactions.

You should exercise caution, however, since there may be circumstances where you want specifically to reference conditions (for example, in connection with “conditions of closing”).
Legal drafting tip #6

Recitals

The Recitals section of an agreement is only necessary if it serves a purpose (or may later serve a purpose) in explaining the nature of the deal. Recitals should provide factual background to the transaction or relationship of the parties.

However, since recitals may be used by a court as an aid to interpret the substantive provisions, their drafting should not be taken lightly. In more complex transactions, recitals are particularly useful to people who were not party to the contract negotiations, and who therefore may be unaware of certain subtleties if they subsequently need to review the agreement.

See the blog posting on why the text of the recitals should tell a story at http://www.adamsdrafting.com/using-recitals-to-tell-a-story/. The format of the paragraphs should be “A,” “B,” “C,” etc., so as not to create any confusion with the numbering of the agreement itself.

Avoid using the “WHEREAS” formulation for Recitals, as this is archaic.

See also the blog posting on why it is preferable not to define terms in the recitals at http://www.adamsdrafting.com/using-defined-terms-in-the-recitals/.

You should not include as matter of course in every agreement a blanket statement that the parties represent the truth of the recitals. There may, however, be circumstances where it will be important to have one of the parties make that representation.
Legal drafting tip #7

Time is of the Essence

A clause that provides that “time is of the essence” should be included only when a party wants the timeline of the agreement to be strictly adhered to, with clearly defined consequences resulting from a breach. The clause creates certainty by characterizing time-sensitive obligations in contracts as conditions, the default or breach of which entitles the innocent party to rescind the contract.

The clause attempts to prevent courts from using its equitable jurisdiction to provide the defaulting party with extra time to complete the obligation, or worse, to give them “reasonable” time. Today, courts will rarely invoke their equitable jurisdiction to intervene on time-related issues after Union Eagle Ltd. v. Golden Achievement Ltd. ([http://www.ucc.ie/law/restitution/archive/hkcases/union3.htm](http://www.ucc.ie/law/restitution/archive/hkcases/union3.htm)) was adopted the Ontario in 1473587 Ontario Inc. v. Jackson ([http://www.canlii.org/en/on/onca/doc/2005/2005canlii26121/2005canlii26121.html](http://www.canlii.org/en/on/onca/doc/2005/2005canlii26121/2005canlii26121.html)). These cases held that the question of “how late is too late” is too difficult to decide, and applying different standards of lateness will lead to confusion, litigation, and uncertainty in the law.

If you have determined that your agreement is one where the “time is of the essence” clause should be inserted, consider the following:

- Address the consequences that flow from a failure to comply with the timelines set in the agreement. Though a right of rescission is the traditional remedy, you should expressly include that as well as any other remedies or alternatives you might wish to seek, such as damages or specific performance.
- Describe what behaviour (if any) will constitute a waiver of the clause.
- Alternatively, instead of using a simple “time is of the essence” statement, consider using the following language:
  - If a party wishes to terminate this agreement in accordance with [insert section relating to a “drop dead date” provision], that party will not be required to give the other party any time beyond the [“drop dead date”] to allow that other party to satisfy any condition or perform any obligation under this contract.

Extensions of time may be given without necessarily waiving the time is of the essence clause. However, ensure that time is explicitly stated to be of the essence whenever an extension is given.

Legal drafting tip #8

Assignment

Many agreements place restrictions on assignment, such as the following clause:

This agreement may not be assigned without the prior written consent of each party.

Consent

It is not necessary to add, “which consent may not be unreasonably withheld,” since the parties are, at common law, obliged to deal with each other in a reasonable manner (although it may serve to remind the parties to act reasonably and thereby avoid a dispute). However, if your client wants the ability to veto any assignment, add the language, “which consent may be withheld for any reason.”

Benefits vs. Burdens

At law, only the benefit of a contract can be assigned, but not the burden (i.e. obligations). To shift the burden (such as payment obligations) from the assignor to an assignee, the parties to the agreement must consent. Even if the assignment clause expressly permits assignment without consent, the assignor will generally remain obligated under the agreement unless the other parties release the assignor. (An assignment provision specifically contemplating that, upon the assignment, the assignor is released of any further obligations may have the effect of assigning the burdens, although this type of provision is not common and the law is not entirely clear as to the circumstances in which it would be effective.)

Permitting Assignment

It is common to permit assignments in limited circumstances, such as:

- Allowing the assignment to an affiliate (or a member of a designated list of agreed-upon possible assignees)
- Allowing lender to assign, syndicate, or otherwise deal with its rights without the borrower’s consent

Where assignment is permitted without consent, ensure that you address the issue of notice to the other parties.
Legal drafting tip #9
Survival

When negotiating and “papering” your deal, you should consider the inevitable end of the relationship, and in particular, the clauses that survive termination.

A “survival” clause is necessary if there are any clauses that one of the parties wishes to have remain in effect after the termination of the agreement, either in perpetuity or for a specified period. These clauses include limitations of liability, non-disclosure/confidentiality, non-solicitation, non-competition, indemnities, and insurance provisions.

You should make a complete list of all those clauses in your particular situation (which might serve as the basis of a permanent checklist for yourself).

If the list is short, consider dealing with the issue in the relevant clause. For example, if the only clause to survive termination is an indemnity, consider simply including a provision to that effect in the “Indemnity” clause rather than creating a separate “Survival” clause.

You should also review the case law on the typical period of time courts allow the survival of these clauses, which may be different in various contexts.
Legal drafting tip #10

Including an Arbitration Clause in your Agreement*

Before automatically including an arbitration clause in a commercial agreement, consider whether your client really needs or wants one.

Parties and counsel often assume that arbitration is less costly than litigation and is, therefore, a better way of resolving disputes. It can, however, be as or more expensive than litigation, since the arbitrator, hearing room, and court reporter must all be paid for by the parties. By contrast, the courts are free. The flexibility that arbitration can offer is rarely utilized in practice.

Parties typically require an arbitration clause in one (or more) of the three following situations:

- **A dispute will require specialized knowledge on the part of the decision-maker.** For example, an arbitrator who specializes in complex commercial real estate disputes will not require the same “education” as even an experienced judge might. Time and money can be saved by contracting that any dispute will be resolved by an arbitrator with a high level of relevant experience.

- **One or more parties require confidentiality.** Courts, their proceedings, and the evidence given by the parties are not confidential. However, the contents of and material relating to an arbitration, as well as the final award, can be kept confidential by providing that in the agreement. If your client believes that confidentiality is important, arbitration is preferable to court.

- **Flexibility is required.** Arbitrations are creatures of contract. Accordingly, almost everything relating to an arbitration can be stipulated in the agreement, such as the number of arbitrators, the timing for submission to arbitration, the place of the arbitration, and the manner of conducting the hearing. By contrast, court proceedings are governed by the Rules of Civil Procedure, where less flexibility may be available.

If none of these situations is present, carefully consider whether a mandatory arbitration clause is really the way to go. Once you put it in the agreement, you cannot revert to the court system unless the other party agrees. Remember, even in the absence of a mandatory arbitration clause, parties are still free to elect arbitration by agreement, after the dispute arises.

*Special thanks to Stephen Morrison for his assistance with this tip. You may wish to refer to his and Jennifer Sorge’s paper on alternative forms of dispute resolution, *The ABCs of ADR*. 

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Legal drafting tip #11

Using Plain English

As much as possible, avoid “legalese” when drafting. It is a popular misconception that you must use many “tried and true” legal phrases because they have been sanctioned by case law. (For example, in a release, it is sufficient simply to release a claim. It is unnecessary to “remise and forever quitclaim.”)

For a list of legalistic words to avoid, with suggestions of terms to use in their place, see Joseph Kimble’s Plain Words (Part 1) (http://www.michbar.org/journal/pdf/pdf4article315.pdf) and Plain Words (Part 2) (http://www.michbar.org/journal/pdf/pdf4article323.pdf). Professor Kimble has also set out his guidelines in an article entitled The Elements of Plain Language (http://www.plainlanguage.gov/whatisPL/definitions/Kimble.cfm).
Legal drafting tip #12

Rendering Numbers

When numbers are used in your text, use letters for numbers up to ten and numerals for numbers above ten (in other words, “one” to “ten”, then “11,” “12,” etc.).

For currency amounts, however, the rules are slightly different. For amounts up to $1 million, use figures (for example, $950,000). For figures above $1 million, use “million” or “billion” as appropriate (for example, $7.3 million). If, however, the figure is more “detailed,” you should use figures (for example, $7,350,500). It is not necessary to have currency amounts in words and figures, as for example, “$3,000,000 (three million dollars).”

Where an agreement refers to dollar currencies of two or more countries (such as Canadian and US dollars), ensure that each reference specifies the appropriate currency (for example, Cdn$5 million and US$4 million). (Note that a common currency clause reads: “Unless specified otherwise, all dollar amounts expressed in this agreement refer to the lawful Canadian currency.”)
Legal drafting tip #13

“Best Efforts” Versus “Reasonable Efforts”

Commercial agreements often require a party to perform its obligations to a certain standard. The term “best efforts” and its variants (reasonable efforts, reasonable best efforts, good faith efforts, and commercially reasonable efforts, to name a few) are commonly used in an attempt to convey the different standards of effort required.

Yet, parties frequently use these terms without having a understanding of what is required to satisfy those standards. Although there is one Canadian decision that looks at “reasonable efforts” versus “best efforts”, the court’s reasoning demonstrates that the requirements remain uncertain.²

While the term “reasonable efforts” will more likely reflect the intention of the parties (i.e., the efforts that a reasonable person would expend in the circumstances), if your client’s instructions are to use “best efforts” over “reasonable efforts”, you must manage your client’s expectations. Ensure that your client understands that using this term does not guarantee that a higher standard of effort will be required.

In addition, avoid adding language to the term, such as “all” or “commercially” (a redundancy given that the context of a commercial agreement would necessarily take this into account). This additional language only adds further uncertainty.³ Further, never use two or more different standards within one agreement.

If you, or your client, wish to avoid confusion and eliminate the potential risk of having a court interpret the intention of the parties, we recommend, regardless of which term you use, that you consider agreeing upon the definition of the standard or specifying what requirements are included or excluded in order to satisfy the obligation. For example, rather than simply stating:

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² Jurisprudence regarding the meaning of variants to “reasonable efforts” is even less developed.

³ The leading case in Canada is Atmospheric Diving Systems Inc. v. International Hard Suits Inc. (1994), 89 B.C.L.R. (2d) 356 (S.C.), which ostensibly stands for the proposition that there is a meaningful distinction between “best efforts”, which is a more onerous standard (“leave no stone unturned”), and “reasonable efforts”. Beyond this case, Canadian courts have not articulated what is required of a party in order to satisfy any standard. Causing further uncertainty, Ken Adams notes in this blog posting at http://www.adamsdrafting.com/best-efforts-under-canadian-law-once-more-with-feeling/ that the logic of the court’s reasoning “collapses in upon itself”. He argues that if all the court requires for the “best efforts” standard to be met is for the party to take “reasonable steps in good faith,” then there is fundamentally no difference between the two standards.

Conversely, in the US, it appears that only two courts have suggested that one can distinguish between “best efforts” and “reasonable efforts” but, like in Canada, in neither case does the court provide a coherent rationale for its position. Otherwise, US courts have overwhelmingly rejected the notion that “best efforts” represents a more exacting standard than “reasonable efforts” and yet, among practitioners, that notion still represents the conventional wisdom.
Party A shall use reasonable efforts to obtain the Third Party’s consent.

you could use:

Party A shall use reasonable efforts to obtain the Third Party’s consent by requesting that consent in writing at least 30 days before closing and responding promptly to all reasonable requests from the Third Party. This obligation will not require Party A to take any actions that would disrupt its normal business operations or incur any material expense.

but resist unnecessary embellishments, such as:

Party A shall use reasonable efforts, undertaken diligently and in good faith, to obtain the Third Party’s consent by requesting that consent in writing at least 30 days before closing and responding promptly to all reasonable requests from the Third Party. This obligation will not require Party A to take any actions that would disrupt its normal business operations or incur any material expense.
Legal drafting tip #14
Use of “and/or”

Dust off your copy of Strunk and White’s *Elements of Style* and you’ll find the following excerpt:

**And/or.** A device, or shortcut, that damages a sentence and often leads to confusion or ambiguity.¹

While not every author on the subject is adamantly opposed to its use, if the purpose of an agreement is to create enforceable obligations that reflect with certainty what the parties intend, why take that risk? Instead, we recommend the following:

- Avoid using “and/or” when drafting. Instead, consider whether your intention can be conveyed by using “and” or “or”, with no loss of meaning.
- If not,
  - where two possibilities are presented,
    - for inclusivity, use *x or y or both*, and
    - for exclusivity, use *either x or y* (and add *but not both*, if it is necessary to stress the exclusivity),
  - where more than two possibilities are presented, from which a combination is to be selected, use *one or more of x, y, and z*.

If you wish to read a much more detailed blog posting on the topic, including entertaining commentary illustrating how critical certain courts can be on the matter, see this Slaw article from July 2011 entitled Do Not Use “and/or” in Legal Writing at [http://www.slaw.ca/2011/07/27/grammar-legal-writing/print/](http://www.slaw.ca/2011/07/27/grammar-legal-writing/print/).

Legal drafting tip #15

Agreements to Agree

While often thought of in the context of a letter of intent, parties frequently draft agreements that include provisions left to be agreed upon after the agreement has been executed. These particular provisions within an otherwise binding agreement constitute “agreements to agree” and are generally unenforceable.

As an example of such a provision and the potential consequences, see the summary of an Ontario Superior Court of Justice decision below.¹

¹ In *EdperBrascan Corporation v 117373 Canada Ltd* (2000), 50 OR (3d) 425 (SCJ), EdperBrascan and Labatt entered into an agreement regarding the liquidation of Labatt's investment companies controlled by EdperBrascan. The agreement provided that if the liquidation was not complete by a certain date, EdperBrascan would purchase the remaining investments for cash or securities of "equivalent value" determined in accordance with a formula or at a price mutually agreed upon. The provision in the agreement read as follows:

In the event that not all of the Investments have been sold by March 31, 1998, Brascan will on March 31, 1998 purchase the remaining Investments at their Book Values: either for cash or, at Brascan’s option, for listed common shares or convertible debentures of equivalent value of Brascan Limited, Great Lakes Power Limited, Noranda Inc., or London Insurance Group. To determine equivalent value, the shares chosen by Brascan shall be valued at (a) 95% of their average trading prices on the Toronto Stock Exchange over the 30 days immediately preceding March 31, 1998, or, (b) should Labatt determine that (a) does not represent equivalent value, at a price mutually agreed.

The court determined that the requirement of mutual agreement on the price of the securities was “an agreement to agree,” thus *prima facie* void. EdperBrascan relied on cases that found an obligation to act in good faith in performing “an agreement to agree” in an otherwise enforceable agreement; however, the court distinguished the cases because they each had some objective means of measurement included in them that were *not* present in the agreement at hand. In this case, the court agreed with Labatt who submitted that clause (b) was an integral part of the securities option that could not be severed. The entire option failed and payment had to be made in cash ($135.5 million).
Legal drafting tip #16

Third Party Beneficiaries

The two components of the common law doctrine of privity are that, as a general rule, a party cannot acquire rights or be subjected to liabilities arising under a contract to which they are not a party.\(^1\) While the latter component is widely accepted, the former (or third party beneficiary component) has been the subject of considerable debate among academics and the judiciary alike.

In practice, agreements often include provisions that are intended to benefit third parties. For example, an indemnity provision in favour of a corporation may extend to include that corporation’s directors, officers, employees, etc. Contrary to the intention of the contracting parties, strict application of the doctrine would prevent any third party from bringing an action to enforce its rights under the agreement.

While the courts\(^2\) have avoided strict application of this doctrine, you should consider the following:

1. If practical, have any intended third party beneficiary sign the agreement (if only by way of counterparty endorsement at the end of the agreement).

2. Create a trust and an agency relationship\(^3\) by including language to the effect that a party to the agreement

   a. holds the benefits and rights of certain provisions “as trustee and agent for and on behalf of” each applicable third party, and

   b. may enforce those benefits and rights on behalf of each applicable third party.\(^4\)

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\(^2\) The leading cases are *London Drugs v Kuehne & Nagel Investments* [1992] 3 SCR 299; *Fraser River Pile Dredge v Can-Dive Services Ltd* [1999] 3 SCR 108. In *Fraser River*, the court set out the following test (or “principled exception”) for when a third party could enforce its rights under an agreement:

1. if the parties to the contract intended to benefit the third party, and

2. if the third party was performing the very activities contemplated by the contractual provision.


\(^4\) While it is not certain that including this language will create an agency relationship or a trust that will be upheld by the courts, the courts will look to the agreement for evidence of this intention. Therefore, absent a formal agreement, this approach puts the third party in the best possible position.
3. If you include a “No Third Party Beneficiaries” provision in your agreement, ensure that you carve out any provision that is intended to benefit a third party.\(^5\)

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\(^5\) For example, the following is the “No Third Party Beneficiaries” provision in our firm’s Boilerplate Agreement:

[Aside as otherwise provided in section \(\bullet\) (\(\bullet\)),] This agreement does not confer any rights or remedies upon any Person other than the parties and their respective [heirs, executors, administrators, and other legally appointed representatives,] successors and [permitted] assigns.
Legal drafting tip #17

Exercising Discretion

Contracts often provide that a party has the right to do something at or in “its discretion” (including the use of adjectives such as “sole,” “absolute,” or “unfettered”). On its face, this phrase seems to imply that such party may act as it sees fit. However, despite this seemingly clear language, that party may be required to act reasonably or in good faith.

On one hand, some courts have shown a willingness to impose a duty of good faith to prevent parties from acting in a way that defeats the purpose of the contract.¹ In addition, some courts have held that, absent any explicit language or clear indication to the contrary, when contract performance depends upon the exercise of discretion, discretion must be exercised reasonably.² On the other hand, other courts have held that contracts should be carried out in accordance with the parties’ expectations, as evidenced by the words in the contract.³

Given this uncertainty, we recommend the following:

1. If your client feels that its discretion should not be subject to good faith or reasonableness requirements, state that by expressly permitting unreasonableness. For example, if your client is a landlord entering into a lease and wants to ensure that there is no obligation to allow its tenant to sublease the premises, you could include language to the effect that your client “may unreasonably withhold its consent” to such a sublease.

2. Advise your client that using language permitting their unfettered discretion does not guarantee that their discretion may be exercised in an arbitrary or capricious manner.

¹ *LeMesurier et al v Andrus* (1986), 25 DLR (4th) 424 (Ont CA) is the leading case regarding the duty to perform contractual obligations in good faith.

² *Greenberg v Meffert et al* (1985), 18 DLR (4th) 548 (Ont CA); *Marshall v Bernard Place Corp* (2002), 58 OR (3d) 97 (Ont CA). In *Marshall*, in the context of a residential purchase and sale, the Ontario Court of Appeal provided a useful restatement of the law concerning the exercise of discretion when it held that

1. Sole discretion clauses must be exercised honestly and in good faith. (For example, they cannot be exercised capriciously or arbitrarily.)

2. The opinion that results from the exercise of the discretion must be reasonably formed. The standard of reasonableness that applies depends on the intention of the parties as disclosed in the contract and whether the contract in which the matter to be decided or approved is readily susceptible of objective measurement or not. (For example, matters involving taste, sensibility, personal compatibility, or judgment will generally be determined on a subjective standard of reasonableness, while operative fitness, structural completion, mechanical utility, or marketability will generally be determined on an objective standard of reasonableness).

³ *Mesa Operating Ltd v Amoco Canada Resources Ltd* [1994] AJ no 201 (QL) at para 19 (Alta CA); *Freyberg v Fletcher Challenge Oil and Gas Inc*, 2005 ABCA 46.
You should also keep this uncertainty in mind during the course of negotiation over contract provisions that include this language.

3. If you are providing an opinion on any contract that contains discretionary language, ensure that it is properly qualified.4

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4 See this qualification in our precedent Opinion: “Exercise of unfettered discretion. The right to exercise any unilateral or unfettered discretion in any Transaction Document will not prevent an Ontario court from requiring that discretion to be exercised reasonably and in good faith.”
CONTRACT REVIEW CHECKLIST

- Client’s objectives and concerns – What is the client trying to achieve in the contract? What are the client’s concerns?
- Accuracy – Does the contract reflect the intent of the parties? Work and obligations accurate?
- Parties – Who? Capacity and Authority to contract? Joinder required?
- Terminology - Clarity? Consistency? Framing of obligations, rights, requirements, permission, conditions precedent?

Legislation
- Enforceability - Consideration? Agreement to Agree? Public Policy?
- Term - How Long? Renewable?
- Termination - When and How does the contract end? Are there any post-termination obligations?

Remedies
- Dispute Resolution
- Money - How much? When? To Whom? What is the flow of money?
- Standards - Reasonable? Best Efforts? Commercially Reasonable?

Approval Rights
- Representations and Warranties? Conditions?
- Time - Lengthen or shorten time periods? Cure periods?
- Relationship between the Parties - Exclusivity? Preferential Rights? Non-Competition?
- Indemnity - One way? Mutual?

Insurance
- Limitation of Liability

Confidentiality and Privacy
- Publicity, Publication - Rights? Credits? Acknowledgement?
- Policies - Consistent with internal policies, rules, regulations, guidelines?

Boilerplate Clauses - Governing Law, Time is of Essence, Force Majeure, Notice, Survival, Entire Agreement, Assignment, Enurement

Schedules - Reference? Integral Part? Conflict?

Precedent

LEGAL DRAFTING LANGUAGE & STYLE CHECKLIST

☐ Simple Sentence Structure - subject – verb – (object)
☐ Active Voice instead of passive voice
☐ Present Tense
☐ Five W’s + who, what, when, where, why, how, how much,
☐ Third Person instead of second person or first person
☐ Verbs - change nouns to verbs: ion, ence, ness, ity, ing, ment
☐ shall (create duty/obligation), may (discretionary authority)
☐ must (condition/ precedent), is entitled (create a right)
☐ shall not (prohibit), is not required to (negate existence of a duty),
☐ may not (negate privilege), is not entitled to (negate right)
☐ Such – replace with that, the, those, it, them
☐ Consistent Terminology - capitalized terms defined and used consistently
☐ Concise - delete redundant or unnecessary words
☐ Avoid Legalese - said, aforementioned, herewith, hereinafter, etc.
☐ Avoid Ambiguity - contextual ambiguity, semantic ambiguity, syntactic ambiguity
☐ Vagueness - problematic or advantageous?
☐ Avoid Unusual Punctuation ! ? / ( ) [ ]
☐ Gender Neutral - Replace his/her/its with the noun, the, or reword.
☐ Legal Significance of Terms - statutes, caselaw
☐ Rules of Interpretation

STUART ENGLISH

416 860 5223
senglish@casselsbrock.com

Education: LL.M., (IP), Osgoode Hall Law School, 2009;
M.B.A., Schulich School of Business, York University, 1992;
LL.B., Osgoode Hall Law School, 1992;
B.Sc., Concordia University, 1988
Call to the Bar: Ontario, 1994

Expertise

Stuart is a partner in the Business Law Group whose practice focuses on private equity investments and mergers and acquisitions. He acts for companies and private equity funds in a range of industries, with particular experience in transactions involving life science and emerging technology companies.

Stuart also advises clients on a variety of corporate and commercial matters, including shareholder agreements, partnerships and other joint ventures, stock option and other employee incentive plans, manufacturing, distribution and licensing agreements, and corporate compliance programs and other risk management initiatives.

Stuart is a regular speaker at Cassels Brock’s Corporate Counsel Seminar Series and Canadian Corporate Counsel Association conferences.
Julia Shin Doi is General Counsel and Secretary of the Board of Governors of Ryerson University and a member of Ryerson University’s Executive Group. She is responsible for providing legal and governance advice and has operational responsibility for access to information, privacy, and information security. Julia also serves on the Board of CURIE (Canadian Universities Reciprocal Insurance Exchange) and participates in CURIE’s Risk Management Committee.

Prior to joining Ryerson University, Julia was Counsel in the Office of the Counsel, York University, practising corporate and commercial law, intellectual property law and privacy law, and advising on a broad range of legal matters. She also practised with the law firm, Gowlings and was Associate General Counsel of Imax Corporation.

From 2001 to 2012, Julia was an adjunct professor at Osgoode Hall Law School, where she taught Legal Drafting. Julia is the past director of the Osgoode Business Clinic, past assistant director of the LLM in Business Law and past instructor of Osgoode Professional Development’s Commercial Legal Drafting Workshop. Julia is now affiliated with the Ryerson Law Research Centre.

An active member of her community and the legal profession, Julia is an executive member of the Canadian Corporate Counsel Association, Greater Toronto Area chapter and past executive member of the Ontario Bar Association’s Privacy Section and Entertainment, Media and Communications Section. She is an active member of the Canadian Association of University Solicitors and has served on the Council of Ontario Universities’ Privacy Task Force. Julia is president of the Federation of Asian Canadian Lawyers and a founding member and past director of the Korean Canadian Lawyers Association. She was recognized in 2010 by The Law Society of Upper Canada’s Diversifying the Bar: Lawyers Make History project as an early and exceptional lawyer from a diverse community, and by the Korean Canadian Leadership Development committee as a community leader.

Julia is the co-author of the leading Canadian text on drafting boilerplate contract clauses, Behind and Beyond Boilerplate: Drafting Commercial Agreements. She has also published and presented in the areas of licensing, securing copyright and privacy law and serves on the editorial board of the Intellectual Property Institute of Canada's Canadian Intellectual Property Review.

Julia obtained her BA with distinction from the University of Toronto, her JD and LLM from Osgoode Hall Law School, was admitted to the Bar in Ontario in 1994, and is a registered trademark agent.
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