CONTRACT DRAFTING AND NEGOTIATING:

PITFALLS AND STRATEGIES

CCCA NATIONAL SPRING CONFERENCE
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CONTRACT DRAFTING AND NEGOTIATING

PITFALLS AND STRATEGIES

CCCA NATIONAL SPRING CONFERENCE, MONTREAL
APRIL 16, 2012
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.

Purpose of Contracts

- To create obligations that reflect what you intended and are enforceable
- 2 Key Requirements
  - Certainty
  - Enforceability
CONTRACT DRAFTING

AVOIDING AMBIGUITY AND OTHER UNCERTAINTY

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APRIL 16, 2012
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 be focusing 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.
More difficult is anticipating changes in circumstances or events.
Lastly, provisions that refer to matters to be agreed upon by the parties may be unenforceable because they lack certainty.
There are different ways of categorizing ambiguity; 2 categories used by Adams and Haggard and 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, and their subcategories. However, by categorizing them, along with the examples I’ll give, you can more readily spot 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).
“Shall” is a word that’s rarely used in common speech, but overused in contracts. Using it in all of these 3 senses, or misusing it in 2 of the 3, creates ambiguity.

It is correctly used to describe a duty or obligation. Some proponents of plain language in drafting might say using “must” is preferable, but I don’t see any harm in retaining “shall” for this purpose (and can add certainty to the extent it is only used for this purpose).

It is sometimes used to mean a person has a right or discretion. This can create ambiguity. “May” is correct, but “is entitled to” is perhaps more clear.

Using “shall” in a descriptive sense, where it’s not associated with an obligation or duty, is also ambiguous, as illustrated by my next slide. It’s preferable to use “is” or “will” (depending on the tense).
The first sentence on this slide illustrates the overuse of “shall”. The first “shall” reads as if it’s an obligation; although the intention might have been to create an entitlement, in which case, using “may” would be more clear.

More problematic is the second “shall”. It’s unclear whether the second “shall” means the subcontractors designated must have been authorized by the Developer or that those designated by the Contractor are authorized (that is, they become authorized by virtue of being designated by the Contractor).

These alternate possible meanings are illustrated in the second and third sentences where I’ve replaced “shall”, except where it is intended to create an obligation.
Dates, Time Periods

- “Within” means before or after
- Between, from/to, by, until
- Counting periods – day, week, month, year
- Gaps – before/after closing date
“Within” is commonly used to mean after a specified date, but a recent Ontario case held that “within” means before or after.

Note that, in the example above, the financial statements delivered might not cover the period until closing (what was intended), but instead might be for a fiscal year ending prior to closing.
In each of these examples, it is unclear whether the date specified is inclusive, the start date or the end date.

A common mistake is to describe periods ending before or after a particular day (such as a closing date), but failing to include the particular day. This creates a gap of one day, and it's not clear whether that day should fall within the prior or subsequent period.
The Interpretation Act illustrates the potential ambiguity in determining time periods. Sections 27 and 28 of the Interpretation Act (Canada) provide:

**Clear days**

27. (1) Where there is a reference to a number of clear days or "at least" a number of days between two events, in calculating that number of days the days on which the events happen are excluded.

**Not clear days**

(2) Where there is a reference to a number of days, not expressed to be clear days, between two events, in calculating that number of days the day on which the first event happens is excluded and the day on which the second event happens is included.

**Beginning and ending of prescribed periods**

(3) Where a time is expressed to begin or end at, on or with a specified day, or to continue to or until a specified day, the time includes that day.

**After specified day**

(4) Where a time is expressed to begin after or to be from a specified day, the time does not include that day.

**Within a time**

(5) Where anything is to be done within a time after, from, of or before a specified day, the time does not include that day.

**Calculation of a period of months after or before a specified day**

28. Where there is a reference to a period of time consisting of a number of months after or before a specified day, the period is calculated by:

(a) counting forward or backward from the specified day the number of months, without including the month in which that day falls;

(b) excluding the specified day; and

(c) including in the last month counted under paragraph (a) the day that has the same calendar number as the specified day or, if that month has no day with that number, the last day of that month.
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

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* (http://www.slaw.ca/2011/07/27/grammar-legal-writing/print/).

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’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.

Note that I have not used “and/or”, which is commonly used in these circumstances, but as I have noted may be ambiguous and has been harshly criticized.
You’ll note from the first example in the slide that it is not clear whether qualified individuals must be 18 years of age and either a student or living with their parents (i.e. 2 conditions must be satisfied), or that they qualify if they meet either of the following two eligibility requirements: (1) 18 years of age and a student, or (2) living with their parents.

This uncertainty is easily solved by enumeration, grouping two of the criteria into one, as I have done in the second and third sentences, which illustrate the two possible interpretations of the first sentence.
Modifiers are a common source of ambiguity. Modifiers are adjectives or clauses that alter the meaning of nouns or verb clauses. Much of the ambiguity arising from modifiers is syntactic ambiguity. As I mentioned, syntactic ambiguity (as opposed to semantic ambiguity) is that which arises out of the order of words and phrases and their grammatical relationship (and punctuation). For most of the examples I use, the order in which the words or phrases appear results in the ambiguity.

In most, but not all cases, the ambiguity can be rectified by simply reordering the words or phrases (along with some punctuation changes).
Where an adjective precedes a series of nouns, it is not always clear whether it modifies only the first or all of the nouns. This is illustrated by the first sentence on the slide. It is not clear whether “Acer” or “Window-based” apply only to each noun in the string – desktops, notebooks, tablets and smart phones – or only the first: desktops.

In many circumstances, the adjective at the beginning will only make sense with the first noun, or the subsequent nouns will not make sense without the adjective, particularly when taking into account the context. However, its plain meaning is ambiguous, and might be interpreted contrary to your expectations with a particular set of words and circumstances.

Note that putting the modifier at the end is also ambiguous.

The ambiguity is avoided in the third sentence.
Another type of modifier that can give rise to ambiguity is where a clause modifies more than one term before or after the modifier.

You’ll note from the first example that it is not clear whether the modifier (which is in bold, and actually contains 2 modifiers) applies only to the immediately preceding “payments to third parties”, or also to “overhead charges”.

I’ve restructured the sentence several ways illustrating the different possible meanings, as well as ways of clarifying the intended meaning. In the first alternate, I’ve simply added commas, which should work because the words between the commas separate a clause that can be removed, such that the modifier also applies to the words preceding the clause, although this is not my preferred approach since it’s not as clear as it could be (I’ll say more about the use of commas in this respect a bit later).

Using enumeration in the third example works if the modifier only applies to the words right before it (payments to third parties).
In the next example, I’ve used tabulation to make it clear that the modifier applies to both items. However, tabulation is intended – and most useful – to separate long clauses to make the agreement easier to read. Using it in this fashion wastes a lot of space and is not as easy to read as it could be.

The last example is my preferred approach.

The order in which I have placed by suggested solutions is intentional. For short clauses, I think tabulation should be a last resort. You’ll note in the drafting tips included in the materials reordering the sentence is my suggested first choice, before considering enumeration and, lastly, tabulation. Tabulation should be reserved for lengthy and complex provisions, which can be made easier to read by breaking them out. I’m not a big fan of enumeration either, if the ambiguity can be resolved simply by reordering or changing the punctuation; however, that’s somewhat a question of style. Also, a potential pitfall of enumeration is that you need to be careful not to use numbers or letters otherwise also used for sections, which can lead to incorrect cross-references.
Buyer shall **pay** the purchase price to Seller by wire transfer to an account **designated** by Seller **no later than 5 business days after delivery of the goods.**

Buyer shall pay the purchase price to Seller, by wire transfer to an account designated by Seller, no later than 5 business days after delivery of the goods.

Buyer shall pay the purchase price to Seller, no later than 5 business days after delivery of the goods, by wire transfer to an account designated by Seller.

The next 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.

Note that adding a comma in the second sentence doesn’t address the uncertainty.

A better way of clarifying it is set out in the third sentence – I think this is the most clear. Note that simply moving the modifier closer to the verb will in many cases resolve the ambiguity.
The next type of drafting error is referred to as “squinting modifiers”. Although easy to spot and fix, it occurs quite often - when a modifier is in the middle of sentence and it is not clear whether it applies to the first half or second half of the sentence.

You’ll note that the 30-day time period in the middle of the sentence might apply to either the time period in which the Company may dispute the cost reconciliation, or the time period in which the Service Provider must provide supporting documentation or revised cost reconciliation.

Simply inserting a comma before or after “within 30 days” goes a long way to resolving the ambiguity. Of course, adding a comma both before and after does not help at all. This may seem obvious, but I’ve seen this a number of times – more often than omitting the commas entirely. The reason being is that some drafters seem to arbitrarily insert commas where they feel a pause is appropriate, without much regard to the ambiguity that can cause. I’ll mention this a bit more in a few minutes.

Moving the modifier, as I have done in the third sentence, is more clear than relying on the placement of a comma.
Most common mistake is using “which” instead of “that”.

A restrictive clause limits or restricts a noun.

A non-restrictive clause describes a noun without adding a restriction.

Restrictive clauses can be introduced with “that” or “which”; although grammar purists insist on using “that” and following that rule can avoid ambiguity.

Non-restrictive clause must begin with “which” (“that” indicates a restrictive clause).
In the first sentence it is not clear whether the clause beginning with “which” restricts, or limits, the interest charges that will be waived (i.e. only interest not in excess of $100 is waived), as opposed to describing the interest charges that are waived (non-restrictive). If the latter (the non-restrictive sense) is intended, then the interest would be waived even if exceeded $100.

Note that the clause in the second sentence beginning with “that” can only be a restrictive clause, avoiding any ambiguity.

If the clause was intended to be non-restrictive, use “which” but separate the clause by commas.
In this slide I have copied an earlier example where the modifier in bold begins with “that”. Clearly the clause is restrictive.

Note how it reads if I replace “that” with “which”, and add a common before (following the common grammatical rule of adding a comma before which). This could be interpreted as a non-restrictive clause, stating that the costs not in the schedule and over $50,000 are considered overhead or third party payments (rather than adding a further limitation to the applicable costs).
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.
On the next slide I have repeated a previous example, with a few changes. You’ll note the ambiguity as to whether the modifier, beginning with “not set out”, applies to overhead changes or third-party payments. This sentence is particularly confusing because there are two modifiers at the end, as you’ll notice from the next two sentences where I’ve put a comma in a different place. This illustrates the same point that caused the confusion in the Rogers case – that commas may indicate the beginning and end of a clause.

In this example (and in some of the previous) inserting a comma can clarify the intent. However, may drafters forget that commas may indicate the beginning and end of a clause that, when removed, changes the meaning of the sentence considerably.

My experience is that many lawyers simply put commas where a pause seems natural, without enough thought to the impact on the interpretation. Another school of drafting omits commas (and other punctuation) for fear that they can cause uncertainty. However, commas can be essential to getting the proper meaning across free from ambiguity. Also, even if the meaning might be without a doubt grammatically in the absence of a comma, reading long sentences without commas can be arduous.

Rather than rely on the placement of commas, I would suggest reordering the sentence (perhaps adding enumeration) as in the earlier example.
Asking the 5W’s, or “W5”, can help avoid unintended gaps or details that are required to ensure certainty as to the nature of obligations.
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, 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 have included it in the materials.

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.
DRAFTING LIMITATION OF LIABILITY, INDEMNITY AND PENALTY CLAUSES

A LITIGATOR’S PERSPECTIVE ON ENFORCEABILITY

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APRIL 16, 2012
OVERVIEW

1. Limitation of Liability Clauses
   ● A working definition and general principles of interpretation
   ● The historical approach to enforceability
   ● The “new frontier” to attacking enforceability
   ● Sample Clauses and Cases
   ● Traps and tips from the case law

2. Indemnity Clauses
   ● A working definition and general principles of interpretation
   ● Sample Clauses and Cases
   ● Traps and tips from the case law
OVERVIEW

3. Penalty Clauses
   ● A working definition
   ● Sample Clauses and Cases
   ● Distinguished from “Exit Fees”
   ● Traps and tips from the case law

LIMITATION OF LIABILITY CLAUSES

Working Definition

● A working definition is set out in the Supreme Court of Canada decision of Bauer v. Bank of Montreal (1980), 10 B.L.R. 209 at 217, as follows:

   "... exemption clauses ... generally have the effect of excluding or limiting the liability of one party to a contract and ... generally, but not always, appear in standard form contracts widely used in commercial matters. While they have been variously described, I find that the categorization in Chitty on Contracts (24th ed., 1977), vol. 1, p. 362, particularly helpful where it is said:
LIMITATION OF LIABILITY CLAUSES cont’d

Working Definition

Exemption clauses may broadly be divided into three categories. First, there are clauses which purport to exempt one party from a substantive obligation to which he would otherwise be subject under the contract, for example, by excluding express or implied terms, by limiting liability to cases of wilful neglect or default, or by binding a buyer of land or goods to accept the property sold subject to “faults”, “defects” or “errors of description”. Secondly, there are clauses which purport to relieve a party in default from the sanctions which would otherwise attach to his breach of contract, such as the liability to be sued for breach or to be liable in damages, or which take away from the other party the right to repudiate or rescind the agreement. Thirdly, there are clauses which purport to qualify the duty of the party in default to indemnify the other party, for example, by limiting the amount of damages recoverable against him, or by providing a time-limit within which claims must be made.

LIMITATION OF LIABILITY CLAUSES cont’d

Rules of Interpretation

- In Bauer v. Bank of Montreal, supra, at p. 218, the Supreme Court of Canada set out the basic rules of interpreting limitation of liability clauses as follows:
  
  “Contracts falling within these categories are said to be subject to special rules of construction. In construing such a clause, the Court will see that the clause is expressed clearly and that it is limited in its effect to the narrow meaning of the words employed and it must clearly cover the exact circumstances which have arisen in order to afford protection to the party claiming benefit. It is generally to be construed against the party benefiting from the exemption and this is particularly true where the clause is found in a standard printed form of contract, frequently termed a contract of adhesion, which is presented by one party to the other as the basis of their transaction.” (emphasis added)
LIMITATION OF LIABILITY CLAUSES cont’d  
Historical Attacks on Enforceability

- Historically and in addition to attacking limitation of liability clauses on imprecise or ambiguous drafting, the litigator could also attack the enforceability of such a clause on the doctrine of “fundamental breach” (if the breach went to the “root of the contract”).
- The “fundamental breach” doctrine dates back to the English Court of Appeal case of *Karsales (Harrow) Ltd. v. Wallis*, [1956] 2 All E.R. 866 and was followed in Canada for the next several decades.

- The issue then became: What breaches were so “fundamental” or went to “the root of the contract” so as to prevent a defaulting party from being able to rely upon it?
LIMITATION OF LIABILITY CLAUSES cont’d

Historical Attacks on Enforceability


- Facts: Defendant supplied unsuitable gear boxes to defendant with an agreement that, upon breach, the defendant’s liability would be limited to the amount of the purchase price.

Held: “A fundamental breach occurs where the event resulting from the failure of one party to perform a primary obligation has the effect of depriving the other party of *substantially the whole benefit* that the parties intended to be obtained from the contract.”

Held: The inferior performance of gears supplied by the defendant did not deprive the plaintiff of substantially the whole benefit of the contract. The gears, while not reasonably fit, worked for a period of time and were repairable. Serious but repairable defects in machinery may not amount to a fundamental breach.
The “New Frontier”


Facts: Plaintiff submitted a compliant bid in a tendering process established by the British Columbia government for the design and construction of a highway, which tendering process had an exclusion of liability clause that stated:

“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.”

The British Columbia government awarded the contract to a bidder with a non-compliant bid, and the plaintiff sued.

Held: The 5-4 majority of the Supreme Court of Canada overturned the British Columbia Court of Appeal and found that the British Columbia government could not rely upon the exclusion of liability clause.
LIMITATION OF LIABILITY CLAUSES cont’d
The “New Frontier”

● Held: The precise language of the exclusion clause only applied to the consideration and acceptance of compliant bids (“in this request for proposals”) and therefore did not exempt the British Columbia government from liability if it accepted non-compliant bids.

● In Tercon Contractors Ltd., the majority of the Supreme Court of Canada held that, in terms of the appropriate framework of analysis, “the doctrine of fundamental breach should be laid to rest”.

● The majority imposed a new analysis to be applied when a plaintiff seeks to escape the effects of an exclusion clause (or any other contractual terms to which it had previously agreed), as follows:
  1. As a matter of interpretation, does the exclusion clause even apply to the circumstances established in the evidence?
2. If the exclusion clause applies, is the exclusion clause unconscionable and thus invalid at the time it was made?
3. If the exclusion clause is held to be valid at the time of contract formation and applicable to the facts of the case, should the court refuse to enforce the exclusion clause because of an overriding public policy?

In terms of onus, the majority in *Tercon Contractors Ltd.* made it clear that the burden of persuasion lies on the party seeking to avoid enforcement of the clause to demonstrate an abuse of the freedom of contract that outweighs the very strong public interest in the enforcement of the clause.

With the decision in *Tercon Contractors Ltd.*, it is clear that precisely drafted limitation of liability clauses that are either negotiated between sophisticated parties or are otherwise clearly brought to the attention of the other party (in advance of signing) are *prima facie* enforceable and will, generally speaking, be strictly enforced in accordance with their precise terms.
LIMITATION OF LIABILITY CLAUSES cont’d
Sample Clauses and Cases


- “Shipping Company shall not be liable in any capacity whatsoever for any loss of the goods occurring before loading”
- The Supreme Court of Canada held that the shipping company was exempted from liability after shipping company was negligent in failing to guard goods during temporary storage before shipment.

(ii) *Plax-Tex Canada Ltd. v. Dow Chemical of Canada Ltd.* (2004), 357 AR 139

- “Plas-Tex accepts all liability for loss or damage resulting from the use of the resin” supplied by Dow Chemical
- The Alberta Court of Appeal refused to exempt Dow Chemical from liability as it was found that Dow Chemical knew that the resin was defective and could pose a life-threatening danger to Plas-Tex’s employees and customers; it was therefore unconscionable and against public policy to permit an exemption clause to prevail under these circumstances.
LIMITATION OF LIABILITY CLAUSES cont’d
Sample Clauses and Cases

(iii) Pro-clean International Ltd. v. Pattisserie Monaco Inc., 2011 ONSC 1498

- “The Service Provider will have no liability to the Customer or any other party for any loss or damage (whether direct, indirect or consequential) which may arise from the provision of the Services”
- The Ontario Superior Court held that the cleaning company was exempted from liability after it damaged the defendant’s cake slicer while providing cleaning services.

(iv) Timminco Ltd. v. ABB Industrial Design Systems Inc., 2010 ONSC 6971

- “Seller’s liability for any claim whether in contract, warranty, negligence, tort, strict liability or otherwise for any loss or damage arising out of, connected with, or resulting from this contract or the performance or breach thereof, or from the design, manufacture, sale, delivery, resale, repair, replacement, installation, technical direction of installation, inspection, operation or use of any equipment covered by or furnished under this contract, or from any services rendered in connection therewith, shall in no case … exceed the purchase price allocable to the Equipment or Services.”
LIMITATION OF LIABILITY CLAUSES cont’d
Sample Clauses and Cases

- The Ontario Superior Court held that ABB’s liability was limited to the purchase price of the blast furnaces (there being no evidence of bad faith or unconscionable conduct on the part of ABB).

LIMITATION OF LIABILITY CLAUSES cont’d
Traps and Tips

1. Avoid ambiguous drafting
2. Consider all possible triggering events
3. Ensure limitation of liability clause has at least the following essential components:
   - identify parties receiving the benefit of the limitation
   - identify the parties agreeing to limit their rights
   - specify which types of liabilities are being excluded (breach of contract, negligence, breach of warranty, or any liability of any kind whatsoever, whether in law or in equity)
LIMITATION OF LIABILITY CLAUSES cont’d

Traps and Tips

● specify what kinds of damages are being excluded (“direct or consequential damages” may be too vague so specify if damages are limited to specific amount or exclude a specific type of damage, such as loss of profits, loss of business value, loss of business opportunity etc.)

4. Ensure limitation of liability clause is clearly brought to attention of other party in advance (if standard form contract, have other party initial language and/or consider larger font or bold print with title “Limitation of Liability”)

INDEMNITY CLAUSES

Working Definition

● The British Columbia Court of Appeal in *Arklie v. Haskell* (1986), 25 C.C.L.I. 277 at 284 explained the concept of an indemnity as follows:

  “The concept of indemnity has central to it the idea of compensation, of making good, of paying monies to a person, to reimburse them for losses sustained. It cannot … be said that a loan which may be required to be repaid constitutes reimbursement or restoration, or making good of the loss in whole or part of the person to whom it is made.” (emphasis added)

● Indemnities are often considered in the context of liability to reimburse a contracting party from liabilities asserted by third parties (non-contracting parties)
In terms of general principles of interpretation, it should be noted that indemnity clauses are not limited to third party liabilities, nor are they always subject to the strict interpretation principles applicable to limitation of liability clauses. As explained in the Alberta Court of Appeal decision of *Herron v. Hunting Chase Inc.*, 2003 ABCA 219 at para. 34:

“The question whether a particular contract gives rise to a right of indemnity is one of interpretation: Kevin P. McGuiness, The Law of Guarantee, 2nd ed. (Toronto: Carswell, 1996) at 616. Subsequent Alberta decisions have not treated *Mobil Oil*, supra as authority for limiting the application of indemnification clauses to third parties. Most recently, this court stated that *Mobil Oil* is “of little help” because it was a decision based on the interpretation of a specific contractual provision and “precedents are of limited value when interpreting contracts” … Rather than relying on *Mobil Oil*, the plain and ordinary meaning of each contract must be assessed in its own context with a focus on the intention of the parties ...”
In the Alberta Queen’s Bench decision of *Sinclaire v. South Trail Shell* (1987), 2002 ABQB 378, the court stated at para. 43:

“… *Mobil Oil* remains, in my view, authority for the proposition that indemnity clauses should be read in the overall context of the agreement, and also should be read, where the total is unclear, in light of the principle of *contra proferentum*.”

As well, numerous cases have held, as a general proposition, that a clause will not be construed so as to indemnify a party against his own negligence without express words or necessary implication to that effect (See *Canada Steamship Lines Ltd. v. The King*, [1952] 2 D.L.R. 786 (P.C.) and *Gersten v. Municipality of Metropolitan Toronto (No. 2)*, [1974] 2 O.R. (2d) 560)
INDEMNITY CLAUSES cont’d
Sample Clauses and Cases

(i)  *Harris v. Memorial Boys’ and Girls’ Club Inc.*, 2008 Can LII 34360

- “The applicant (the Club) agrees to and with the Corporation of the City of London that the applicant will indemnify and save harmless the Corporation of the City of London against all losses, costs, claims, damages, actions, suits of any nature and kind whatsoever which may arise as a result of the use of the facility or area granted under this agreement”
- The Ontario Superior Court of Justice held that the City was entitled to indemnity from the Club for financial contribution to a settlement made by the City to the plaintiff when the plaintiff was hurt on a ride operated by the Club on the City’s lands.

(ii) *Smith v. Global Plastics Ltd.*, 2001 BCSC 1336

- “Vendor agrees to indemnify Purchaser for any incorrectness in or breach of any representation of warranty of the Vendor contained in this Agreement or under any other agreement, certificate or instrument executed and delivered pursuant to this Agreement”
- Held: The Purchaser was unable to obtain indemnification from the Vendor for a wrongful dismissal lawsuit commenced by an employee terminated by the Purchaser on the oral representation of the Vendor that the employee was an independent contractor as the court found that there was “no agreement” in which a representation was made about the status of the employee in question, nor was there any express rights of indemnity for wrongful dismissal causes of action commenced by third parties.
INDEMNITY CLAUSES cont’d
Sample Clauses and Cases

(iii) Griffiths v. New Westminster (City of), 2001 BCSC 1482

● The City sought to enforce a broad and onerous indemnity clause in a standard form rental agreement against an individual (Jover) who rented the hockey arena from the City for a pick-up game at which Griffiths was injured.
● Held: The indemnity clause was unenforceable because:
  (a) the “acts or omissions” referenced in the rental agreement to trigger rights of indemnity were interpreted to reference only the “acts or omissions” of Jover (such that Jover did not agree to indemnify for “acts or omissions” of the City);

(b) it would be “inappropriate” for the City to attempt to have Jover act as insurer for a rental fee of $154 per hour;
(c) the City “knew or ought to have known” that Jover’s signature on the standard form rental agreement “did not represent his true intention and that he would be unaware of the onerous provisions contained within the standard form contract”. The City “cannot rely on this indemnity provision unless it takes reasonable measures to draw this term to the attention of Mr. Jover: Tilden Rent-A-Car Co. v. Clendenning”;
INDEMNITY CLAUSES cont’d
Sample Clauses and Cases

(d) it is “so unreasonable and such a clear abuse of freedom of contract that it ought not to be enforced by the court”, it being “unconscionable to bind the parties to their form of bargain”.

INDEMNITY CLAUSES cont’d
Sample Clauses and Cases

(iv) *Edmonton (City) Library Board v. Morrill* (1989), 96 A.R. 128 (QB)

- The City’s library sought to enforce a library agreement wherein a mother agreed to accept responsibility for the issuance of a library card to her son and to indemnify the library for “any fines, loss or damage by use of the Library Card”.
- Held: The mother was liable to indemnify on the general language of the indemnity upon the son losing the library card and a rogue then using the card to steal 30 library books; the indemnity language was not restricted to the use of the library card by the son himself.
INDEMNITY CLAUSES cont’d
Traps and Tips

1. Avoid ambiguous drafting.
2. Consider all possible triggering events, and if a party’s own negligence is a triggering event, then this should be specified.
3. Make the indemnity reasonable (given the context).
4. If the indemnity is in a lengthy standard form and is onerous, take reasonable steps to bring it to the attention of the other party (require party to initial the specific clause and/or use large, bold font for the clause).
5. Consider insertion of pre-conditions to indemnity rights (notice of potential claim, restriction on settlement without consent of indemnifier, monetary limits etc.).

PENALTY CLAUSES
Working Definition

- A broad definition of “penalty” (in the context of contractual penalty clauses) is found in the Supreme Court of Canada decision of Canadian General Electric Co. v. Canadian Rubber Co. (1915), 27 D.L.R. 294 at 295. In that decision, the court stated:

  “A penalty is the payment of a stipulated sum on breach of the contract, irrespective of the damage sustained.”
PENALTY CLAUSES cont’d

Working Definition

● The Alberta Court of Appeal, in *Ellis v. Frughtman* (1912), 8 D.L.R. 353 at 356 defined a contractual penalty clause this way:
  “The word “penalty” as applied to an agreement means, I think, a punishment for committing a breach of it.”

● And in *Bank of Nova Scotia v. Dunphy Leasing Enterprises Ltd.* (1987), 38 D.L.R. (4th) 575 at 578, the Alberta Court of Appeal stated:
  “A penalty can be defined as a sum of money the purpose of which is not to compensate, but to discourage certain conduct.”

PENALTY CLAUSES cont’d

Sample Clauses and Cases


● The Respondents acquired the Applicant’s shares in a diagnostic imaging business pursuant to Section 21 of the Shareholders Agreement, which enabled shareholders holding a majority of the outstanding shares to at any time require a minority shareholder to sell all of his shares.

● Section 21(1)(d) of the Shareholders Agreement further required that, on the closing date, the selling shareholder was required to resign from his position as a radiologist, failing which the price to be paid for his shares would be reduced by 25%.
PENALTY CLAUSES cont’d
Sample Clauses and Cases

● The Applicant, who refused to resign, sought a declaration that section 21(1)(d) of the Shareholders Agreement was tantamount to a “penalty clause” and was therefore not enforceable.
● The applications judge held it would be unconscionable or seriously unfair to enforce the price reduction section.

THE DIVISIONAL COURT HELD:

● The onus of proving that a clause is a penalty lies with the party alleging the clause is a penalty.
● If the clause is a penalty, the party must prove that the penalty is "extravagant and exorbitant in comparison with the greatest loss which could conceivably have flowed from the breach".
● The section did not prohibit the radiologist from continuing to work. It simply imposed a reasonable economic consequence for doing so by offsetting a loss of income that the respondent would suffer as a result of the radiologist continuing to practice in direct competition.
PENALTY CLAUSES cont’d
Sample Clauses and Cases

- The Divisional Court overturned the applications judge and held that the clause was enforceable.

- The defendant received a $450 loan from the plaintiff, Loans Till Payday.
- A promissory note was signed by the defendant, as follows:
  “Upon failure to make full payment by the specified date, and should this note be turned over for collection or legal action, I understand and hereby agree to pay an additional $500.00 in costs as liquidated damages and not as penalty.”
When the defendant defaulted, the plaintiff claimed in Small Claims Court for the amount of the note, prejudgment interest at 59%, and liquidated damages of $500, for a total of $1,114.32.

The trial judge did not allow the claim of $500 on the note because he was not satisfied that it was a genuine pre-estimate of loss or reasonable in the circumstances.

ON APPEAL, THE COURT HELD:

"The fact that the promissory note indicates that the amount is liquidated damages and not a penalty is not conclusive."

"The essence of liquidated damages is that it is, indeed, a genuine pre-estimate of damages... ...Where, however, the agreement is not an agreement to estimate loss in advance but rather a penalty intended to secure performance of the contract, then it is not liquidated damages but rather a penalty and as such is not recoverable."

"Given the lack of evidence in support of the claim, the judge did not err when he concluded that Loans Till Payday did not establish that the amount claimed was, indeed, a genuine pre-estimate or was reasonable."
PENALTY CLAUSES cont’d
Sample Clauses and Cases

(iii) Peachtree II Associates v. 857486 Ontario Ltd., 2005 Can LII 23216 (ON CA)

- Parties entered into agreements to purchase and operate two rental properties.
- Passive investors provided a service company with promissory notes (“C-Notes”) to secure their obligation to reimburse the service company for certain “soft costs” to be paid by the service company to set up the investment and for advances ultimately payable to the service company.

PENALTY CLAUSES cont’d
Sample Clauses and Cases

- The agreements provided that, upon the service company failing to cure defaults within a reasonable time after being given notice on two separate occasions, the promissory notes (the amount of which could vary but could be several millions of dollars) were deemed to be paid.
PENALTY CLAUSES cont’d
Sample Clauses and Cases

- The service company failed to provide a promised line of credit and failed to refund $432,000 in tax overpayments to the passive investors.
- The passive investors commenced arbitration to seek a declaration that the promissory notes were deemed to be paid in full in accordance with the stipulated term of the contract. The service company defended the arbitration on the basis that the clause deeming the promissory notes to be paid in full upon breach of services by the service company was a “penalty” and therefore unenforceable.

THE ARBITRATOR HELD:
- That there was no attempt to relate the amount outstanding under the promissory notes to an estimate of the amount of damages and the deemed payment of the promissory notes could therefore be regarded as a “penalty”.
- The arbitrator proceeded to apply “equitable principles” to determine whether or not the “stipulated remedy clause” should be enforced.
PENALTY CLAUSES cont’d
Sample Clauses and Cases

● The arbitrator then found that because the service company had not established a disparity between the value of the promissory notes and the damage caused by the serious breach by the service company, the “stipulated remedy clause” was enforceable, and it was inappropriate to grant relief from forfeiture in favour of the service company.

● The service company appealed….

PENALTY CLAUSES cont’d
Sample Clauses and Cases

● A single judge of the Ontario Superior Court upheld the arbitrator’s ruling and found that the stipulated remedy clause was not a penalty, as follows:

“Given the nature of the transactions, the roles of the parties, the “double notice” provision with its attendant opportunity for remedying the breaches, the large potential for serious damage to the interests and property of the investors, the sophistication of the parties or their representatives and the Arbitrator’s finding (that) it was uncertain that there was a disparity between the value of the C-Notes and the damage caused by the breaches, it had not been established that the clause in question was extravagant, extortionate, unconscionable or unreasonable….”
On further appeal to the Ontario Court of Appeal, the decision of the arbitrator and the single judge of the Ontario Superior Court was upheld. In so finding, the Ontario Court of Appeal noted:

“First, it seems more apt to describe deeming the notes paid as being a forfeiture rather than the payment of a penalty. A penalty is the payment of a sum as a consequence of a breach. By the terms of the clause at issue here, the appellant (the service company) pays nothing on account of its breach. Rather, the appellant forfeits the right to enforce the notes. Admittedly, in the case at bar, we are to some extent looking at two sides of the same coin, but as I shall explain, there is good authority to the effect that courts should, if at all possible, avoid classifying contractual clauses as penalties and, when faced with a choice between considering stipulated remedies as penalties or forfeitures, favour the latter.”

Contractual provisions that provide for a lump sum payment to terminate a contractual relationship prematurely without there being a breach by the other party are not considered “penalties” and are therefore not subject to attack on a “genuine pre-estimate of damages” approach as they are considered to be negotiated “exit fees” (see Pike v. Bel-Tronics Co., 2000 Can LII 22489 ON SC).

Commonly found in pre-payment of mortgages or break fees in corporate merger and acquisition transactions.

If early termination remedy and lump sum payment is based upon non-performance, however, the court may still consider whether the clause is substantively a “penalty clause” (see Hurley Corporation v. Canadian IPG Corporation, 2010 ON SC 681).
If you want a liquidated damages clause to be enforceable:
1. expressly indicate that the clause is indeed a “pre-estimate of damages”;
2. prepare calculations to reflect how the amount was selected (for evidentiary purposes);
3. select an amount that reflects the damages that could reasonably occasioned by the breach in question;

4. provide opportunities to cure the default upon reasonable notice;
5. consider whether the “stipulated remedy clause” can be drafted as a forfeiture of rights (which may then trigger “relief from forfeiture” principles); and
6. consider whether the “stipulated remedy clause” can be structured as an “exit fee”.
Negotiation Styles

Know Yourself and Get the Deal Done
Negotiating Styles

What kind of negotiator are you?
- Competitor
- Avoider
- Collaborator
- Compromiser
- Accommodator

Know yourself to be more effective!

The Competitor

- Most aggressive style of negotiation
- Competitors enjoy the prospect of “winning” through negotiation
- Competitors have strong instincts for all aspects of the negotiation process, and are often highly strategic in their approach
- This dominating style can taint the bargaining process, and can often neglect the importance of relationship building
The Avoider

- Most passive style of negotiation
- Avoiders are those who do not enjoy negotiation, and will only engage in negotiation where absolutely necessary
- Avoiders tend to defer and dodge the confrontational aspects of negotiation
- Avoiders are often perceived as tactful and diplomatic in their approach, though their unwillingness or inability to deal with some more contentious issues may result in delays highly damaging to the negotiation at hand

The Collaborator

- Collaborators are often effective at navigating impasses in negotiation through creative problem solving
- Collaborators aim to understand the concerns and interests of other parties
- However, Collaborators can be prone to transforming relatively simple situations into more complex and time consuming ones which may threaten to derail negotiations
The Compromiser

- Compromisers are eager to close a deal by doing what is fair and equal for all parties involved in the negotiation

- Compromisers can be useful where there are time constraints surrounding deal completion

- Where time is not an issue, Compromisers may unnecessarily rush the negotiation process and make concessions too hastily, which may in turn ultimately limit their success in achieving their mandate

The Accommodator

- Accommodators aim to solve the other party’s problems, and to preserve personal and business relationships for future dealings

- While some may find the Accommodator’s concern for the other side to be a strength, this focus may result in the Accommodator sacrificing more than necessary to finalize the deal at hand
Understand the Other Side

- What are their interests and concerns?
- What arguments are they likely to use to advance their position?
- Anticipate their ideal target outcome
- Anticipate their Best Alternative to Negotiated Agreement (BATNA)
- While more difficult than forecasting the other side’s target outcome and BATNA, try to anticipate a rough estimate of their Reservation Price (RP), in doing so, you can estimate the overlapping Zone of Possible Agreement (ZOPA) between the parties
- What negotiation style(s) might they adopt to achieve their end goals?

Adapt when Necessary

Certain scenarios call for different approaches. The negotiator should consider adjusting tactics when:

- cultural differences exist between the parties;
- participating in an auction which prescribes a particular process;
- buying a company out of receivership;
- dealing with a trusted business partner.
Drafting Tips for Avoiding Uncertainty

Shall — Must, May, Will
1. Use “shall” only for duties or obligations (“may” for rights or discretion; “is” or “will” for descriptions).

Date/Time Periods
2. “Within”, “before”, “after”, “between”, “from”, “to”, “by”, “until”, and the manner of counting periods, may be ambiguous. Clarify where used, or add interpretation section (and ensure interpretation rules are followed).

And/Or
3. “Or” can have inclusive or exclusive meaning. Clarify to avoid uncertainty (preferably not by using “and/or”).

“And” Between 2 Adjectives
4. If a noun is modified by 2 adjectives, clarify whether 2 separate categories are intended or 1 category with 2 criteria.

And & Or in String
5. When “and” and “or” are both used in a string of nouns or clauses, clarify grouping by enumeration.

Modifiers
6. Where a modifier is before/after more than one noun or clause clarify whether the modifier applies to all or only some of the nouns or clauses.

7. Clarify by: (a) reordering sentence or changing punctuation, (b) enumerating, or (c) tabulating.

8. Keep the modifier close to the noun, verb or clause it applies to.

9. Watch for squinting modifiers.

That/Which
10. Use “that” for restrictive clauses; use “which” for non-restrictive clauses (preceded by a comma).

For more information, please contact Stuart English at senglish@casselsbrock.com or 416 860 5223.
Drafting Tips for Avoiding Uncertainty

Pronouns
11. A pronoun may refer to more than one preceding noun; clarify by reordering sentence or simply repeating the applicable noun.

Commas
12. Check for unintended clauses between commas. When removed, how is sentence affected?
13. Don’t simply add commas for a pause or to arbitrarily break up a sentence (or omit commas and other punctuation); follow grammatical rules.

Agreements to Agree
14. If possible, do not leave matters to be mutually agreed upon.
15. 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).
16. Consider potential consequences of provision being unenforceable, either entire provision or only a portion of the provision. (Note the consequences in the EdperBrascan case.)
17. Describe consequences if parties cannot agree (“If the parties do not agree, then…”).
Ontario Supreme Court  
EdperBrascan Corp. v. 117373 Canada Ltd.  
Date: 2000-10-27

EdperBrascan Corporation  
and  
117373 Canada Ltd.  
Labatt Brewing Company Limited  
and  
EdperBrascan Corporation et al.

Superior Court of Justice, Lane J. October 27, 2000

Neil Finkelstein, Sandra Forbes and Brian Smith, for moving parties, 117373 Canada Ltd. and Labatt Brewing Company Limited.

Paul Steep, Geoffrey Hall and Sarah M. Chesworth, for respondent, EdperBrascan Corporation.

Bernard McGarva and H. Lindsay Burry, for respondents, Epsim Investments Limited and Mico Investments Limited.

[1] LANE J.:—This is a motion for summary judgment brought by the defendant and the plaintiff by counterclaim (collectively “Labatt”) seeking a dismissal of EdperBrascan’s claim that it has complied with all of its obligations to Labatt under para. 4 of the March 9, 1993 letter agreement executed by EdperBrascan and Labatt (“the letter agreement”) and that the letter agreement is at an end. Labatt also seeks partial summary judgment in the counterclaim in the form of an order requiring EdperBrascan to pay it $135.5 million, plus amounts owing for unpaid dividends and interest from March 31, 1998, in fulfillment of EdperBrascan’s obligations under para. 4 of the letter agreement.

[2] The corporate entities involved in this litigation have undergone various reorganizations and name changes in the period of interest. None of these affect the merits of the case and, for convenience, I will refer to them by their present names throughout.

[3] The dispute arises out of a corporate divorce. Between 1980 and March 8, 1993, EdperBrascan owned some 38 per cent of the common shares of Labatt, the remainder being publicly held. EdperBrascan was in effective control of Labatt. During that period some $300
million of Labatt’s money was invested in two EdperBrascan controlled companies: Epsim Investments Limited ("Epsim") and Mico Investments Ltd. ("Mico"). Epsim and Mico in turn invested in the shares of other companies, largely those also controlled by EdperBrascan. Labatt was thus deeply involved in the financing of other parts of the EdperBrascan corporate group.

[4] In early 1993, EdperBrascan agreed with certain underwriters to sell its stake in Labatt to the public. The parties evidently thought it desirable to remove Labatt from its financing role and negotiated the letter agreement.

[5] So far as relevant, the letter agreement reads as follows:

As part of John Labatt Limited’s ("JLL") 1993 business plan objective to focus on fewer businesses... we have determined that our investment portfolios in [Epsim] and [Mico] aggregating Cdn. $300 million at book values reflected in our April 30, 1992 financial statements ("Book Values")... should be liquidated over a period of time.

In consideration of JLL’s covenants, agreements and undertakings given in connection with the sale by Brascan Limited ("Brascan") of its shares in JLL and other good and valuable consideration, Brascan will assist JLL in liquidating JLL’s shares in Mico and either JLL’s shares in Epsim or the investments held by Epsim (collectively the "Investments") on the following schedule:

1. On or before April 30, 1993, Brascan will arrange for the orderly liquidation of $50 million of the Investments at the Book Values.

2. Commencing immediately thereafter, Brascan will assist Labatt in the orderly liquidation of the remaining $250 million of Investments at the Book Values with the objective of completion by February 15, 1996.

3. If any of the Investments remain unsold on February 15, 1996, Brascan will continue to assist Labatt in the orderly liquidation of the remaining Investments on the same basis as in 2 above with the objective of completion by March 31, 1998.

4. 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. Any shares or debentures transferred to Labatt will be market traded and will be either freely resalable or, at Labatt’s request, a prospectus will be promptly prepared and issued at Brascan’s cost by the entity whose shares are being transferred to Labatt to permit the public distribution of such shares.
Between the signing of the letter agreement in March 1993 and early 1998, EdperBrascan and Labatt had disposed of $165 million of the Labatt investments in Mico and Epsim, leaving remaining investments having a book value of $135 million. In accordance with para. 4 of the letter agreement, if these investments had not been sold by March 31, 1998, EdperBrascan would be obliged to purchase them on the terms set out in that paragraph. On March 23, EdperBrascan wrote to Labatt as follows:

... the following is notice that EdperBrascan will satisfy the arrangements contemplated in [the Letter Agreement] as described below.

EdperBrascan shall deliver 6,658,477 common shares of Great Lakes Power Inc. (“GLPI”) in exchange for the investments as defined in the [Letter Agreement]... The common shares of GLPI have been valued at $20.35, being 95% of their average market price over the past thirty days of $21.42 per share.

This letter indicates that EdperBrascan intends to exercise its option to pay for the remaining investments, not in cash, but in shares “of equivalent value”. It proceeds to rely upon part (a) of

the two-part formula for determining equivalency of value, by citing the average 30-day GLPI share price and offering the shares at 95 per cent thereof.

On March 26, 1998, Labatt replied, rejecting the proposal as not in accordance with the terms of the letter agreement. It noted that the GLPI shares proposed were not among the list of four permitted shares set out in the letter agreement, that the limited float in such shares would not provide the necessary liquidity, that EdperBrascan knew Labatt did not want an ongoing investment in GLPI, an EdperBrascan company, and that, in effect, there was no market for the GLPI shares. Labatt also made some alternative proposals in an effort to resolve the dispute.

On March 27, 1998, EdperBrascan rejected the alternative proposals put forward by Labatt and reasserted its intention to pay for the remaining investments by tendering the GLPI shares. As to the fact that the GLPI shares were not included in the list of acceptable shares in the letter agreement, EdperBrascan said that GLPI, as the only publicly traded power generating affiliate in the EdperBrascan group, was the company contemplated by the parties, although another EdperBrascan company, Great Lakes Power Limited, had been named.
[10] By letter of March 30, 1998, the solicitors for Labatt responded on its behalf. They again took the point that the letter agreement did not list GLPI as an acceptable share. They went on:

Even if GLPI was listed in the Agreement, which it is not, the shares which you are offering do not represent equivalent value to cash and are not freely resaleable. The formula referred to in your letter is clearly inappropriate for shares of GLPI, which has such a small public float relative to the Book Value of the Investments. The intention underlying the Agreement was that the Investments would be sold to Brascan for cash or securities which could immediately be turned into cash at a value equivalent to the Book Value of the Investments. Consistent with this, Labatt intends to immediately convert to cash the instruments which you deliver pursuant to the Agreement. As you know, GLPI shares are very thinly traded. In fact, over the past year, less than 100,000 shares of GLPI have traded in total. Accordingly, it is quite obvious that the 6.6 million shares Brascan intends to deliver tomorrow are not freely resaleable, have no market liquidity and do not meet any definition of tradeability. Moreover, even if any sale was possible (which it isn’t), the GLPI shares will not yield a value equivalent to $136 million upon disposition. Labatt will not accept the GLPI shares as satisfaction of Brascan’s obligations under the Agreement, and grant it a release of these obligations upon delivery of those shares.

... Labatt remains ready, willing and able to tender its shares of Epsim and Mico in accordance with the Agreement.

[11] In response to this letter, EdperBrascan wrote on March 31, 1998, noting that Labatt had advised that it would not be accepting the GLPI shares and asserting that Labatt had made no effort to discuss an alternative basis for EdperBrascan to deliver those shares. Instead, Labatt had taken the technical position that the shares were not listed in the agreement. Therefore, said EdperBrascan, Labatt had repudiated the letter agreement; EdperBrascan accepted that repudiation and the letter agreement was at an end. On the same day, EdperBrascan issued its statement of claim seeking judgment that it had complied with its obligations under the letter agreement, properly construed, and that that agreement was at an end.

[12] On April 30, 1998, Labatt delivered its defence and counterclaim asserting that EdperBrascan was in breach of the letter agreement, asking that such agreement be declared in full force and effect and, inter alia, asking for an order that EdperBrascan carry out the letter agreement by delivering either cash or securities of EdperBrascan or Noranda Inc. (these are the two remaining companies in the list in para. 4 of the letter agreement since the
London Insurance Group was no longer associated with EdperBrascan), of equivalent value, market traded, freely ressaleable and immediately convertible to cash.

[13] The present motion seeks to resolve, by summary judgment, those issues which are determined by the construction of the letter agreement.

[14] Labatt, the moving party, submitted that the letter agreement was unambiguous and required the shares to be purchased for cash or shares that could immediately be turned into cash. That was the meaning required by the factual context and by the phrases “equivalent value”, “freely ressaleable” and “market traded” as seen in that context. The fundamental basis of the letter agreement was that Labatt was to get its money out either in cash or in shares that could readily be converted into cash. The securities option had a basic flaw: it lacked a determination of the price at which the shares were to be exchanged in the event that Labatt determined under clause (b) that the 95 per cent formula did not achieve equivalent value. There was only an agreement to agree which was not enforceable. Since (b) was an integral part of the option, it could not be severed and the whole option must fail, leaving EdperBrascan to pay cash. There was no evidence that Labatt was wrong or acting in bad faith in its determination that the proffered shares could not yield an equivalent cash return. Mr. Cockwell, of EdperBrascan, who was examined on the subject, could not even guess at how long it would take Labatt to sell them into the market at the average price and admitted he did not even consider the question at the time. There was thus no material fact in dispute as to the value issue. Evidence as to the subjective intentions of the parties was not admissible and accordingly differences between the parties raised by such evidence could neither create an ambiguity nor be the basis of a genuine issue for trial. There was no genuine issue for trial and summary judgment should issue.

[15] EdperBrascan, responding, submitted that the letter agreement did not require EdperBrascan to proffer shares that could be readily converted into cash, but only shares of one of the four companies at the 95 per cent formula. The phrase “equivalent to cash” does not appear anywhere in the letter agreement, although used frequently in Labatt’s material. Importance was placed upon the contrast between Labatt’s pleaded request for an order that the letter agreement is still binding and enforceable and that EdperBrascan be required to pay in cash or in shares of Noranda or EdperBrascan itself, on the one hand, and the assertion on this motion that the securities option was unenforceable. It was submitted that Labatt’s
position in the correspondence was to reject the choice of GLPI shares and was not based upon the price and Labatt had no right to take that position. Labatt thus repudiated the contract before the parties ever got to the point of discussing the price at which the shares would represent equivalent value in Labatt’s opinion. Labatt could not simply reject the formula price without addressing whether there had been unusual fluctuations in the share prices during the previous 30 days which made the formula inappropriate. In particular, the appropriateness of the formula price could not be judged with reference to the liquidity of the shares. The intention of the parties was that “equivalent value” was not an independent concept, but was defined by the 95 per cent formula. If there was no agreement under clause (b), there was a basis in the letter agreement and in the evidence upon which the court could fix the price which was fair. The object of the letter agreement could not be that EdperBrascan guaranteed the return of Labatt’s capital: that capital was in the market and therefore inherently at risk and for tax reasons, Labatt had to keep it at risk.

[16] Much of the argument made on behalf of EdperBrascan referred to evidence which it alleged demonstrated the subjective intentions of the parties as expressed in pre-contractual negotiations and earlier drafts of the letter agreement. For example, EdperBrascan referred to evidence that it rejected a term proposed by Labatt during negotiations which would have required it to pay cash for the investments in all circumstances, and that a term was struck from an earlier draft of the letter agreement which would have required shares offered pursuant to the securities option to trade “in sufficient volumes” to be equivalent to cash.

[17] In my view the position of Labatt that this evidence is inadmissible, and irrelevant, by virtue of the parol evidence rule, is correct. The Supreme Court of Canada recently discussed that rule in Eli Lilly & Co. v. Novopharm Ltd., [1998] 2 S.C.R. 129 at pp. 166-67, 161 D.L.R. (4th) 1 at pp. 27-28, as follows:

> The contractual intent of the parties is to be determined by reference to the words they used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time. Evidence of one party’s subjective intention has no independent place in this determination.

Indeed, it is unnecessary to consider any extrinsic evidence at all when the document is clear and unambiguous on its face. In the words of Lord Atkinson in Lampson v. City of Quebec (1920), 54 D.L.R. 344 (P.C.):
... the intention by which the deed is to be construed is that of the parties as revealed by the language they have chosen to use in the deed itself... [I]f the meaning of the deed, reading its words in their ordinary sense, be plain and unambiguous it is not permissible for the parties to it, while it stands unreformed, to come into a Court of justice and say: “Our intention was wholly different from that which the language of our deed expresses…”

... Admittedly, it would be absurd to adopt an interpretation which is clearly inconsistent with the commercial interests of the parties, if the goal is to ascertain their true contractual intent. However, to interpret a plainly worded document in accordance with the true contractual intent of the parties is not difficult, if it is presumed that the parties intended the legal consequences of their words...

... Leaving aside the question of circumventing the legislation, which has no bearing on the interpretation of the contract, the parties’ intentions are clear on the face of the agreement. Accordingly, it cannot properly be said, in my view, that the supply agreement contains any ambiguity that cannot be resolved by reference to its text. No further interpretive aids are necessary.

More specifically, there is no need to resort to any of the evidence tendered by either Apotex or Novopharm as to the subjective intentions of their principals at the time of drafting. Consequently, I find this evidence to be inadmissible by virtue of the parol evidence rule: see Indian Molybdenum Ltd. v. The King, [1951] 3 D.L.R. 497 (S.C.C.) at pp. 502-503.

[18] In Glimmer Resources Inc. v. Exall Resources Ltd. (1999), 119 O.A.C. 78 at pp. 83-85, the Ontario Court of Appeal addressed the process of interpreting an agreement in writing, cited Novopharm, supra, and continued, at p. 84:

That is not to say that each word in an agreement must be placed under the interpretative microscope in isolation and given a meaning without regard to the entire document and the nature of the relationship created by the agreement. Context can elucidate and assist in revealing the plain meaning of words used in a contract. One part of an agreement may enlighten as to the meaning to be given to words used in another part of the agreement.

Similarly, the relationship created by the agreement and its overall purpose as indicated in the agreement may assist in giving meaning to particular words or phrases within the agreement. Context in this sense does not, however, refer to extrinsic evidence of the conduct of the parties or expert evidence as to the meaning of words used in the agreement.

[20] The proffered evidence as to subjective intention is not admissible whether or not the letter agreement is ambiguous. If, as EdperBrascan actually pleads, there is no ambiguity, no extrinsic evidence is admissible. If there is ambiguity, evidence of subjective intention of a party is not admissible although other relevant evidence may be resorted to. The mere presence of earlier drafts of the letter agreement in the Labatt materials for this motion cannot affect that situation. There is an issue in the action which could make the earlier drafts and the other proffered evidence of subjective intention admissible: the rectification of the reference to Great Lakes Power Limited to Great Lakes Power Inc., but for the purposes of this motion, Labatt has taken the position that even if that change was made, the shares are still not “equivalent value” within the correct meaning of the letter agreement. That aspect of the case is therefore irrelevant on this motion and the evidence remains inadmissible. Finally, even if admitted on that issue, the evidence would not be admissible on the issue of the interpretation of the existing words. The same rule applies to the evidence proffered by Labatt as to the subjective views of Mr. Myhal (of EdperBrascan) as to the purpose of the letter agreement.

[21] EdperBrascan submitted that Labatt’s defence and counterclaim opened the door to extrinsic evidence by pleading the reasonable expectations of the parties, as well as Labatt’s state of mind regarding the dispute over GLP Inc. and GLP Ltd. shares. There are two points to be made in this connection. Farley J. recognized, in refusing EdperBrascan’s motion in this proceeding for production of certain documents, that “…the relevance of the [evidence sought to be produced] must be measured against the summary judgment motion in question and not the lawsuit (i.e., the general pleadings)”: endorsement of Farley J., dated April 6, 2000, para. 2. Labatt has not put the expectations of the parties, nor its own state of mind, at issue in this summary judgment motion. It relies upon the interpretation of the letter agreement, a process which does not involve evidence as to the subjective intention of the parties.

[22] The second point is that, while the “reasonable expectations of the parties” as to a contract are entitled to protection, they are not derived from extrinsic evidence as to subjective intention, but from the contract itself. In Waddams, The Law of Contracts, 4th ed. (Toronto: Canada Law Book, 1999) the discussion of this concept is found under the heading “The Objective Principle of Contract Formation” and the point is made at para. 141:
Every definition of contract, whether based on agreement or on promise, includes a consensual element. But the test of whether a promise is made, or of whether assent is manifested to a bargain, does not and should not depend on an enquiry into the actual state of mind of the promisor, but on how the promisor’s conduct would strike a reasonable person in the position of the promisee.

In this connection, the author referred to *Brooklin Heights Homes Ltd. v Major Holdings & Developments Ltd.* (1977), 80 D.L.R. (3d) 563 (Ont. H.C.J.) where, at pp. 569-70, Grange J. noted that the test for the validity of a contract was an objective one.

[23] For these reasons, I do not think that Labatt’s pleading opens the door to the proffered evidence as to subjective intention. The meaning of the letter agreement must be derived from the words themselves in the context of the factual matrix of March 1993.

[24] Against this background, I turn to the interpretation of the letter agreement. The overall context of the letter agreement is the corporate divorce referred to earlier. EdperBrascan was selling its 38 per cent stake in Labatt. Labatt was no longer to be a part of the EdperBrascan group of companies and it was no longer appropriate for a large amount of its assets to be invested in EdperBrascan group investments. The context therefore is one of the separation over time of the EdperBrascan interests from Labatt. The scale of time intended is shown by the time frame set out in the letter agreement: the five years from March 1993 to March 1998. The agreement is clear that the intent was not only to separate their respective interests, but that Labatt was to get its investments out of the EdperBrascan group intact at book value.

[25] The letter agreement uses the verb “liquidate” and the noun “liquidation” to describe what is intended to happen during that five-year period: “liquidated over a period of time” (opening paragraph); “orderly liquidation” (paras. 1, 2 and 3). It is appropriate to consider the meaning of that word to assist in understanding the objectives of the parties as expressed in their agreement. The *New Shorter Oxford English Dictionary* (1993 ed.), includes definitions related to determining and apportioning, ascertaining and setting out clearly and the paying off of a debt. These aspects of the definition do not relate to any problem the parties had; there was no lack of certainty as to the amounts involved and there was no debt as such involved. Other aspects of the definition come closer to the relevant context: “…convert to liquid assets” (“liquidate”) and “the selling of certain assets in order to achieve greater liquidity” (“liquidation”). “Liquidity” in turn is defined as including “the interchangeability of assets and money”. There is thus a strong flavour of turning the investments into cash involved in the choice of these words “liquidate” and “liquidation”. That flavour is enhanced by
the phrase in para. 3: “If any of the investments remain unsold…”, and the reference in para.
4 to investments that have not been sold, since sale normally involves the exchange of goods
for money.

[26] Paragraph 4 of the letter agreement opens with a requirement that EdperBrascan
purchase the remaining investments at their book values either for cash or an option to
EdperBrascan to pay with certain securities of the listed companies “of equivalent value”. It is
fundamental to the submissions of EdperBrascan that this phrase refers simply to an
equivalency of Book Value to trade price without regard to whether the securities can be
turned into cash of a like amount in a reasonable time. The submissions of Labatt are that the
true meaning is that the securities, to be of equivalent value, must be exchangeable into cash
within a reasonable time. (Initially the submission was immediately.) In ordinary
circumstances, the Labatt definition is commonplace; value is tested by what can be obtained
in the marketplace in a sale between a willing buyer and a willing seller, neither being under
any compulsion to deal. No formulation of value can avoid addressing the question of how
many shares are to be put into the market and over what period of time, and consequential
effects on price. Does the language of para. 4 direct us to a different meaning?

[27] In my view the language of para. 4 is not ambiguous when approached as the Supreme
Court has directed. It would be entirely inconsistent with the purpose of the letter agreement,
as evidenced by the context referred to and by the language of liquidity used consistently
elsewhere in the document, to interpret the option without regard to the convertibility of the
offered securities into cash: i.e., their liquidation. It is also contrary to the ordinary meaning of
value as discussed above. In particular it should be noted that the reference to “liquidated” in
the opening paragraph refers to the entire process and not just to the steps outlined in paras.
1, 2 and 3. The purpose of the letter agreement was to disengage EdperBrascan and Labatt;
the interpretation offered by EdperBrascan locks Labatt and the EdperBrascan group into a
continued relationship for possibly years or condemns Labatt to take a substantial loss,
thereby undermining the intent of the parties to separate their interests with Labatt getting its
money out intact. The parties contracted that the shares to be tendered would be of
equivalent value. Equivalent value is to be determined in one of two sequential ways: the 95
per cent formula or a price to be agreed if Labatt rejects that formula as not representing
equivalent value. I reject the notion that the 95 per cent formula overrides this dual concept;
the court must give meaning to the whole of the language the parties have chosen.
Accordingly, to exercise its option, EdperBrascan was obliged to offer to Labatt, in lieu of cash, that number of shares in one or more of the listed companies which the parties could reasonably anticipate could be liquidated, i.e., turned into cash, in an amount equivalent to the book value of the remaining investments, within a reasonable time, or face the prospect that Labatt would determine the offer did not represent equivalent value and throw the matter into negotiations.

[28] There is really no factual dispute about the illiquidity of the proffered shares. The evidence conclusively demonstrates that EdperBrascan did not fulfill its obligation. The shares offered were so thinly traded that it would have taken years to dispose of them at an aggregate cash return equivalent to the book value of the investments which they were purchasing. If sold in more or less the quantities normally traded, a necessary step to avoid depressing the price, it would take some 55 years to complete the disposition. No doubt some additional shares could be fed into the market without adversely affecting the price, but that a full recovery could be obtained in a reasonable time, judging what is reasonable by the order of magnitude of the five-year term the parties aimed for as the length of the total disengagement process, is not a rational conclusion, and no one suggested otherwise. Mr. Steep’s position was that actual conversion into cash was purely Labatt’s problem and irrelevant to this motion. It was argued that because the GLPI shares were listed among the four, and were known in 1993 to be relatively illiquid, there could be no complaint about them. But the parties in 1993 did not know how many shares would be offered and in which companies, and it does not follow that they intended that an unlimited quantity of illiquid shares would be the “equivalent value” for which they contracted. Indeed, the possibility of such a proposal may be why Labatt obtained the right under clause (b) to opt out of the 95 per cent formula.

[29] The option given to EdperBrascan under para. 4 provides that if Labatt determines that the formula of 95 per cent of average trading price does not represent equivalent value, the price of the proffered shares is to be mutually agreed. It was submitted that Labatt did not make such a determination, but rejected the shares outright on the “technicality” that they were not shares in one of the four permitted companies. It is true that this point was taken by Labatt in the letters, but it is too narrow a reading of the correspondence as a whole to say that no determination of lack of equivalent value was made. In my view, the letter of March 31, 1998, quoted above, is such a determination, Indeed, there is no issue about this, it was
admitted by Mr. Myhal (QQ. 1526-1529) that he drew the conclusion from it that Labatt considered the formula inappropriate. In the light of my interpretation of the true meaning of the letter agreement, the statement that the 6.6 million shares “do not represent equivalent value to cash” is not a repudiation of the letter agreement, but a summary of its meaning.

[30] There has, of course, been no mutual agreement on the price. EdperBrascan submits that, absent such an agreement, Labatt must accept the shares at the 95 per cent figure. Mr. Steep went so far as to contend that the 95 per cent figure was equivalent value by definition. I agree with the concept that equivalent value is defined, in effect, by the (a), then (b), option, but counsel’s position devalues (b) altogether and, as already noted, the court must strive to find meaning for all the words the parties chose. The definition of equivalent value must encompass both ways of determining it. If the parties intended the transaction to take place at the 30-day average trading price in any event, they need not have imported the idea of “equivalent value” at all. By referring to “value” and by including (b), the parties intended to look beyond the trading price to the value Labatt could obtain for the proffered shares. The letter agreement defines equivalent value in two sequential ways, first the 95 per cent formula and then, if 95 per cent is rejected, what the parties agree to. Labatt has rejected the 95 per cent formula, as the letter agreement expressly contemplates it might, and the result is that there is only mutual agreement left if the option is to be exercised. As there is no mutual agreement, the entire option fails because it is not enforceable at law, and there must be payment in cash.

[31] Alternatively, counsel for EdperBrascan contended that if Labatt made the determination that the 95 per cent calculation did not produce equivalent value, and there was no mutual agreement, this court should set the price, although at a trial and not on this motion. In *Didymi Corp. v. Atlantic Lines and Navigation Co.*, [1987] 2 Lloyd’s Rep. 166 (Q.B., Comm. Ct.), the charter party provided that if the vessel did not meet certain representations as to speed and fuel consumption, “…the hire shall be equitably decreased by an amount to be mutually agreed between owners and charterers.” There was an arbitration clause. Hobhouse J. held that the concept of an equitable reduction was sufficiently certain to enable the appropriate adjustment to be determined. He said:

The words of this paragraph do not disclose an intention merely to require an agreement. The words “to be mutually agreed” are directory or mechanical and do not
represent the substance of the provision. The substantive provision is that there shall be an equitable decrease in the hire.

Later he continued:

The relevant consideration in deciding whether the Court can and should give effect to a clause such as this depends upon whether or not the clause provides a sufficient criterion to enable the appropriate reduction or increase in hire to be determined. If there is, then the clause can be given effect to. If there is not, then it cannot.

[32] Dealing with the first point, unlike the charter party in *Didymyi*, the requirement for agreement in the letter agreement is not merely directory and mechanical; it is at the heart of the agreement. Unlike *Didymyi*, there is no arbitration clause.

[33] There is also no formula or other criterion given in the letter agreement which the court can apply to reach the result the parties ought reasonably to reach. “Equivalent value” would ordinarily be such a formula and with the aid of expert evidence, courts make such decisions. But, as discussed above, the parties did not leave the matter at “equivalent value” *per se*. In the letter agreement, “equivalent value” is not used in the ordinary sense. It is a defined term and one-half of the definition is a price to be mutually agreed. Looking at it another way, the parties have expressly declared how it is to be determined: 95 per cent or mutual agreement. Either way, there is no contemplation in the letter agreement of the intervention of any third party to make the determination that the parties have expressly reserved for themselves.

[34] A similar dual requirement was considered by the British Columbia Court of Appeal in *Empress Towers Ltd. v. Bank of Nova Scotia* (1990), 73 D.L.R. (4th) 400, 50 B.C.L.R. (2d) 126, where there was a right to renew a lease [at p. 402 D.L.R.]:

… the market rental prevailing at the commencement of that renewal term as mutually agreed between the Landlord and the Tenant.

[35] The majority of the court held (at p. 404) that if the parties had said only that the tenant could renew at the market rate prevailing at the beginning of the renewal term, the question would have been an objective one which the court could have determined upon valuations. But the clause added the further requirement that the renewal rate must not only be the prevailing rate, but the prevailing rate as mutually agreed. That meant that the landlord could not be compelled to accept a renewal rent which it had not accepted as the market rental. That is like our case: the court cannot make a contract which the parties themselves have expressly reserved for their own future negotiation.
The *Empress Towers* court went on to find that there was an obligation to negotiate in good faith, but was careful to point out, at pp. 404-05, that the key to that requirement was the agreement that the renewal should be at the prevailing market rate and that it was not necessary to decide what would be the case if there were a bare right to renew at a rate to be agreed. I will refer to this aspect of the decision again later.

EdperBrascan submitted that the court could supply whatever was necessary to imply so that the agreement would have commercial efficacy, referring to *Dot Developments Ltd. v. Fowler* (1980), 118 D.L.R. (3d) 371 (B.C.S.C.) and cases cited therein. That was a case where there was to be a vendor take-back mortgage. The agreement set out the amount, interest rate, payment terms and maturity date. The court rejected the argument that it was void for uncertainty because the form of the mortgage and therefore the remaining terms were not settled. It was only the absence of essential terms that prevented the enforcement of the agreement and all the essential terms were clearly expressed. That is not this case. An essential term is missing: the price.

EdperBrascan also referred to *Foley v. Classique Coaches Ltd.*, [1934] 2 K.B. 1 (C.A.) and *Brown v. Gould*, [1972] 1 Ch. 53. In *Foley* an agreement for the sale of land was to be accompanied by a second agreement requiring the purchaser to buy from the vendor all of the petrol needed for the business the purchaser was to operate on the lands. The lands were conveyed and some years later the purchaser sought to repudiate the second agreement as having no binding force because the price was to be “agreed by the parties in writing and from time to time.” There had never been such a price agreement in writing. The Court of Appeal held that it must be implied that the price would be a reasonable one and that any dispute could be resolved under the arbitration clause in the second agreement. In *Brown*, the option to renew a lease was at a rent “to be fixed having regard to the market value of the premises...”. Megarry J. held that where there was a workable formula, but no agreed machinery such as an arbitration clause, the court could supply the deficiency and set the rent having due regard to the formula.

Neither *Foley* nor *Brown* assists EdperBrascan. There is no arbitration clause to resolve disputes as in the former case, and there is no agreed formula as in the latter. Indeed, in *Brown*, at p. 58, Megarry J. notes that in the case of an option to renew simply “at a rent to be agreed” without any formula, the option would be *prima facie* void as a mere agreement to
agree. That is this case. There is no agreed basis upon which the court could decide for the parties a “mutually agreed” price once Labatt has determined the 95 per cent formula to be inappropriate. Mr. Steep’s submission that the 30-day market for these publicly traded shares provided the formula amounts to writing (b) out of the letter agreement. Under (b) Labatt had not only the right to determine that the market price in (a) did not represent equivalent value, but also the right to require resort to negotiations rather than any other possible solution.

[40] It was further submitted that there was no right in Labatt to dispute the 95 per cent figure except in the case of unusual volatility during the preceding 30 days. There is nothing in the letter agreement about this; the point depends upon the admission of extrinsic evidence as to subjective intention which, for reasons already noted, is not admissible.

[41] Finally, it was submitted that if (b) was a mere agreement to agree and so unenforceable, it could be disregarded as not one of the essential terms, leaving EdperBrascan with its option intact. In my view, the option is not divisible in this fashion; it is all one concept. The letter agreement provides that the shares are to be valued at either (a) or, in a certain case, (b), and the latter is an integral part of the scheme to protect Labatt from the very thing that occurred: a situation where the 95 per cent formula is not an accurate reflection of what Labatt will be able to obtain in the market over a reasonable time. This interpretation fits the overall scheme of the letter agreement: the liquidation of the investments at their book value in order to disengage the parties since Labatt will no longer be part of the EdperBrascan group. In the absence of a mutual agreement on the price to be assigned to the proffered shares, the entire option fails and payment must be in cash.

[42] Counsel for EdperBrascan proposed two genuine issues for trial that prevented the granting of summary judgment. One was whether Labatt had any right to depart from the 95 per cent formula in the light of the absence of unusual volatility in the stock price during the 30 days prior to March 31, 1998. I have already noted that the letter agreement says nothing about this point; it depends upon inadmissible evidence of subjective intention. It is a question of law as to the proper interpretation of the letter agreement, not one of fact at all.

[43] The second issue put forward as requiring a trial for its resolution was whether Labatt ever attempted in good faith to agree on a price for the GLPI shares. EdperBrascan submitted that Labatt simply rejected those shares outright without attempting to reach an agreement on
a price that was appropriate, i.e., that did represent equivalent value. That was not acting in good faith. A trial was necessary to determine this issue.

[44] In response, Labatt submitted that whether there was an obligation to negotiate in good faith was a legal issue and not a factual one, that if there was such an obligation, EdperBrascan had the onus of proving bad faith and there is no such evidence before this court and that Labatt did not break off the discussions, but EdperBrascan did, despite Labatt’s expressed willingness to talk. I agree with all three of these submissions, although I do not rest my decision on the third as it may involve some degree of weighing the evidence.

[45] Counsel for EdperBrascan did not rest his case on any general principle that parties at arm’s length had an obligation to negotiate in good faith. However, he drew a distinction between negotiations to achieve a contract in the first place and negotiations within an existing contract. In the latter case, he submitted, a party to a contract had to act in good faith in performing that part of the contract calling for mutual agreement. Counsel for Labatt submitted that the difficulties with an obligation to negotiate in good faith were no less problematic in the context of an existing contract with a portion left to be negotiated than in initial contract talks. In neither case was such an obligation workable. Parties to negotiations are always entitled to act in their own best interests as they see them.

[46] Counsel for EdperBrascan referred me to the decision of Lowry J. in Westcom TV Group Ltd. v. CanWest Global Broadcasting Inc. (1996), 27 B.C.L.R. (3d) 291, [1997] 1 W.W.R. 761 (S.C.) where the issue was whether CanWest owed to Westcom a duty to bargain in good faith in negotiating towards a long-term purchase of TV programming. The action was summarily dismissed upon the ground that the common law had not recognized a duty to bargain in good faith in normal commercial transactions between parties acting at arm’s length. However, counsel stressed that Lowry J. noted that there had been but one class of case where an exception had been made: cases where parties have agreed, in the context of an otherwise binding contract, to negotiate a specified term outside the contract, such as rent for the renewal of a lease. Lowry J. cited Empress Towers, supra, as constituting this exception, which he found had no application to the case before him.

[47] It was urged upon me that I should follow Empress Towers, where there was, as noted above, a finding by the majority that there was an obligation to negotiate in good faith to reach agreement on what was the prevailing market rental in order to enable an option to renew to
have efficacy. But, as that court itself said at pp. 404-05, cited supra, the key to that finding was the presence of the objective standard of the prevailing market. There was thus some standard against which to measure good faith. The Empress Towers court was careful to note that it was not deciding a case of a bare right to renew at a rate to be agreed. In our case, there is no such objective standard set up by the parties since equivalent value is a defined term. Further, the case before me is not a case where the matter to be negotiated was outside the contract, but rather is at the heart of the existing contract.

[48] A problematic aspect of Empress Towers is the passage at p. 405 (letter b), in which the majority supports the decision by referring to the analogous case of an implied obligation to “use best efforts” where a contract is subject to the obtaining of financing or a similar provision. That analogy was expressly rejected by Lord Ackner in Walford v. Miles, [1992] 2 A.C. 128 (H.L.) at p. 138, where he discussed a decision of the United States Court of Appeal, Third Circuit, referred to by the appellants in Walford as the clearest example of the American cases in their favour:

That case raised the issue of whether an agreement to negotiate in good faith, if supported by consideration, is an enforceable contract. I do not find the decision of any assistance. While accepting that an agreement to agree is not an enforceable contract, the Court of Appeal appears to have proceeded on the basis that an agreement to negotiate in good faith is synonymous with an agreement to use best endeavours and as the latter is enforceable, so is the former. This appears to me, with respect, to be an unsustainable proposition. The reason why an agreement to negotiate, like an agreement to agree, is unenforceable, is simply because it lacks the necessary certainty. The same does not apply to an agreement to use best endeavours.

[49] In the light of these cases, perhaps Empress Towers should be regarded as confined to its very narrow set of facts, and not as authority for a general proposition that the duty to bargain in good faith exists whenever a negotiation takes place within an existing contract. To some extent this seems to have happened. In Mannpar Enterprises Ltd. v. Canada (1999), 173 D.L.R. (4th) 243 at p. 264, para. 47, 67 B.C.L.R. (3d) 64, the British Columbia Court of Appeal dealt with a case where the lessors refused to negotiate a renewal of a licence to remove aggregates from an Indian reserve. There was no reference in the licence to any objective standard for the renewal rate. The court noted the importance in Empress Towers of the existence of the “...benchmark that could have been capable of objective assessment, namely ‘market rental’.” At para. 52, the court reverted to the point, observing that without “…a benchmark or a standard by which to measure such a duty, the negotiation concept is
unworkable." The point was also referred to by Helper J.A. for the Manitoba Court of Appeal in *P.P. (Portage) Holdings Ltd. v. 346 Portage Avenue Inc.* (1999), 27 R.P.R. (3d) 47 at p. 56, para. 35, 138 Man. R. (2d) 217. More fundamentally, *Empress Towers*, even confined to its facts, seems out of step with the high authority in the House of Lords, the Ontario Court of Appeal and elsewhere that a duty to bargain in good faith is not a workable concept from the point of view of enforcement through the courts. For these reasons, I do not think that *Empress Towers* is helpful to EdperBrascan on the issue of a duty to bargain in good faith. In any event, given the Ontario decisions, by which I am bound, I am not free to follow it even if I thought that it was right.

[50] There are certainly obligations upon contracting parties to act in good faith in some circumstances. Examples include the exercise of a discretion, *Greenberg v. Meffert* (1985), 50 O.R. (2d) 755, 18 D.L.R. (4th) 548 (C.A.), and the duty to use best efforts, *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, [1978] 2 S.C.R. 1072, 85 D.L.R. (3d) 19. But these sorts of cases differ from our own because in them the parties did not expressly agree to a future negotiation. Nor is the obligation universal: in *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 at p. 735 ff., 742, 152 D.L.R. (4th) 1, Iacobucci J., for the majority of the Supreme Court, rejected the imposition of a requirement of “good faith” reasons for the discharge of an employee, whether in contract or in tort, describing the proposed tort as a “radical shift in the law”. However, because of the peculiarly vulnerable position of the employee at the time of discharge, there was an obligation of good faith and fair dealing in the manner of dismissal, breach of which could be compensated for by an extension of the period of notice.

[51] The common law rule is that contracts to negotiate are inherently uncertain and therefore incapable of creating binding and enforceable obligations. In *Courtney & Fairbairn Ltd. v. Tolaini Bros. (Hotels) Ltd.*, [1975] 1 All E.R. 716 at p. 720 (C.A.), Lord Denning M.R., with whom Lord Diplock and Lawton L.J. expressly agreed, stated:

There is very little guidance in the book about a contract to negotiate. It was touched on by Lord Wright in *Hillas & Co. Ltd. v. Arcos Ltd.* [(1932) 147 L.T. 503 at p. 515 (H.L.)] where he said: “There is then no bargain except to negotiate, and negotiations may be fruitless and end without any contract ensuing.” Then he went on:

… yet even then, in strict theory, there is a contract (if there is good consideration) to negotiate, though in the event of repudiation by one party the damages may be nominal, unless a jury think that the opportunity to negotiate was of some appreciable value to the injured party.
That tentative opinion by Lord Wright does not seem to me to be well founded. If the law does not recognise a contract to enter into a contract (when there is a fundamental term yet to be agreed) it seems to me it cannot recognise a contract to negotiate. The reason is because it is too uncertain to have any binding force. No court could estimate the damages because no one can tell whether the negotiations would be successful or would fall through; or if successful, what the result would be. It seems to me that a contract to negotiate, like a contract to enter into a contract, is not a contract known to the law... I think we must apply the general principle that where there is a fundamental matter left undecided and to be the subject of negotiation, there is no contract.


The general rule is that the law does not recognize a contract to enter into a contract, nor a contract to negotiate. The matter was dealt with by Lord Denning in *Courtney & Fairbairn Ltd. v. Tolaini Brothers (Hotels) Ltd.*, [1975] 1 All E.R. 716, 720.

[53] More recently, in *Walford v. Miles*, [1992] 2 A.C. 128 (H.L.), the House of Lords was invited to declare that *Courtney, supra,* was wrongly decided. In rejecting that invitation, Lord Ackner said at p. 138:

The reason why an agreement to negotiate, like an agreement to agree, is unenforceable, is simply because it lacks the necessary certainty. The same does not apply to an agreement to use best endeavours. This uncertainty is demonstrated in the instant case by the provision which it is said has to be implied in the agreement for the determination of the negotiations. How can a court be expected to decide whether, subjectively, a proper reason existed for the termination of negotiations? The answer suggested depends upon whether the negotiations have been determined "in good faith." However the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. ...A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies. In my judgment, while negotiations are in existence either party is entitled to withdraw from those negotiations, at any time and for any reason. There can be thus no obligation to continue to negotiate until there is a "proper reason" to withdraw. Accordingly a bare agreement to negotiate has no legal content.

[54] This view of the law was recently confirmed for Ontario in *Cedar Group Inc. v. Stelco Inc.*, [1995] O.J. No. 3998 at paras. 3-6 (Gen. Div.), affirmed [1996] O.J. No. 3974 (C.A.) in which the trial judge found that an agreement to "negotiate in good faith to complete the definitive agreements" was unenforceable. O'Leary J., the trial judge, had based his reasoning on
Courtney, Walford and L.C.D.H., supra, and, in a brief endorsement, the Court of Appeal held that there was no reason to doubt his conclusions.

[55] My attention was drawn to the decision of Cumming J. of this court in Canada Trustco Mortgage Co. v. 1098748 Ontario Ltd. (1999), 23 R.P.R. (3d) 82 (Ont. Gen. Div.), where the issue was the enforceability of an option to renew a lease in which the renewal terms, conditions and minimum rent were to “be as is mutually agreed upon”. There was further language as to the minimum rent which referred to fair market value for premises of comparable age, etc., which Cumming J. said made it arguable that there was an objective standard set out. However, there was no such guidance as to the other terms and conditions and he held that the renewal clause amounted to no more than an agreement to negotiate and was not enforceable. It was submitted that there was an enforceable duty to negotiate in good faith. Cumming J. said he did not have to decide whether there was such a duty as “an underlying tenet of contract law”. Instead, he found in the context of the agreement a basis for an implied duty to do so. There was however, no evidence before him of any lack of good faith and the tenant’s claim to enforce the renewal failed.

[56] In the light of the decision of O’Leary J., affirmed by the Court of Appeal, in Cedar Group, supra, where the language of the unenforceable agreement to negotiate included an express requirement of good faith, it is not clear how the implication of such a term could alter the result. As is noted in the cases cited above, the obligation to negotiate in good faith is “unworkable in practice” and “inherently inconsistent with the position of a negotiating party” and such a clause “lacks legal content”. Those factors do not change simply because there is an existing contract within which the negotiation is to be conducted. At first glance, the result seems inconsistent with the modern view that contracts ought to be performed if at all possible, and one’s innate feeling that people ought to act in good faith in all their dealings.

But the parties before me contracted that they would negotiate the share price in the future and they must be taken to have known what the legal result of that language would be. In requiring them to resolve the price themselves, if at all, and making the order which necessarily flows from the absence of such a resolution, the court is, in effect, enforcing the very contract that they made.

[57] Since our law does not recognize a duty to negotiate in good faith in the circumstances of this case, allegations of failure to do so cannot raise a genuine issue for trial.
[58] It is, strictly speaking, unnecessary to deal with the alternative argument, but, out of deference to the effort involved on the part of counsel, I will do so briefly. If there was a duty to negotiate in good faith, the burden would be upon EdperBrascan to adduce evidence on this motion to raise a genuine issue for trial as to Labatt’s good faith. In negotiations, as the cases cited show, each party is entitled to act in accordance with its own interests. As Cumming J. put it in Canada Trustco, supra [at p. 89]:

It is true that the position the landlord put forward was in its own interest, but it was fully entitled to do so. There is nothing to show that the landlord acted with malice or fraud in putting forward its position.

[59] There is similarly no such evidence before me. Labatt rejected the offer of 6.6 million shares and indicated in the same letter a willingness to receive another offer in accordance with the agreement. The response was this action. The witness, Mr. Cockwell, for EdperBrascan indicated he had never even considered whether the shares he was offering could be disposed of in the market in a reasonable period. He was not in a position to give evidence to suggest that Labatt was acting mala fides in taking the position that the offer was unsatisfactory for that reason.

[60] There are no genuine issues for trial. Judgment will go dismissing EdperBrascan’s claim that it has complied with all of its obligations under para. 4 of the letter agreement and dismissing EdperBrascan’s claim that the letter agreement is at an end. Partial judgment will go on the counterclaim requiring EdperBrascan to pay Labatt in cash the sum of $135.5 million for the remaining investments plus accrued dividends thereon and prejudgment interest from March 31, 1998. The rate of interest and questions of costs may be spoken to, or if the parties agree, addressed by written submissions.

Motion granted.
Letters of Intent and Arbitration Clauses

Letter of Intent #1 – *Wallace v. Allen* 2009 ONCA 36

The Background

- The defendant decided to sell his businesses and retire.
- After weeks of negotiation, the parties executed a letter of intent for the share purchase and sale of four companies.
- A draft share purchase agreement was prepared and various issues that were intended to be inserted in the share purchase agreement were resolved verbally in a meeting.
- At the closing, the plaintiff did not attend, and the defendant refused to close at a later date.
- The plaintiff sued for specific performance based on the letter of intent as the share purchase agreement was never signed.

The Clauses

- “It is also agreed by the parties that there will be much legal work to be done upon acceptance by both sides and that the wording of this agreement may alter somewhat”; and
- “This letter of intent must be reduced into a binding agreement of purchase and sale by the parties within the next 40 days.”

The Court Held

- The Letter of Intent was binding in that the parties used “the language of contract”
  - “It is agreed”
  - “Upon acceptance”
  - “This agreement”
- “The language of the document itself speaks to an intention to be bound upon signing.”
- The defendant’s refusal to sign previous drafts of the letter because they “left too much in the air” indicated an intention to be bound by this version.


The Background

- The defendant operated a gas station that depended on a “pump support” rebate paid by the plaintiff.
- The business relationship was set out in various written contracts, which did not mention pump support.
Letters of Intent and Arbitration Clauses

• Years later, the plaintiff made a loan to the defendant to make improvements to the gas station.
• Prior to finalizing the loan contracts, the plaintiff sent a letter of intent stating that pump support would be provided to the defendant’s gas station.
• The plaintiff sued over the loan, and the defendant counterclaimed for the unpaid pump support.

The Clauses

• “Although this letter contains points agreed to, this is not intended to be a binding agreement.”
• “A binding agreement would be entered into only upon our delivering to you fully signed copies of all the contracts.”

The Court Held

• The Letter of Intent was expressly not binding on the parties.
• The Petroleum Contract (one of the loan documents that followed) governed the arrangements for the supply of gasoline, and contained an “entire agreement” clause to preclude the defendant from arguing a collateral contract for pump support based upon the letter of intent.

Lessons Learned with Letters of Intent

• If you want the Letter of Intent to be binding, make sure that:
  a) You have incorporated fundamental terms;
  b) You choose language which reflects that the Letter of Intent is “binding”; and
  c) You have obtained the signature of the other party to acknowledge that the terms of the Letter of Intent are binding, even if the parties anticipate executing more definitive agreements at a later stage.
• If you don’t want the Letter of Intent to be binding, use clear language that the letter of intent is meant to be “non-binding” until and unless more formal agreements have been executed by the parties.
Enforcement of Contractual Provisions (Arbitration Clauses)

- Enforcement of arbitration clauses
  - Consideration of Triggering Language
  - Remedy is to Stay Court Proceedings
    - Example 1 – Narrow Scope and Permissive
      - “Any question with respect to the interpretation of this Agreement may be submitted to arbitration.”
    - Example 2 – Broad Scope and Mandatory
      - “Any controversy, question, claim or other dispute arising out of or relating to this Agreement or the rights and obligations of the parties in connection therewith shall be referred to a single arbitrator. The award of the arbitrator shall be final and binding and not subject to appeal.”

Case Scenario 1:
- A and B enter into a basic unanimous shareholders agreement which contains the following arbitration clause:
  - “Any question with respect to the interpretation of this Agreement may be submitted to arbitration.”
- A is believed to be misappropriating corporate funds or has diverted corporate opportunities to a separate business owned by a spouse.
- B brings an action to the Ontario Superior Court to seek injunctive and monetary relief.
- A will be unsuccessful in his attempt to stay (freeze) the Ontario Superior Court action in trying to enforce the arbitration clause as the arbitration clause is not mandatory and has a narrow scope; it therefore does not preclude court process.

Case Scenario 2:
- A and B enter into a basic unanimous shareholders agreement which contains the following arbitration clause:
  - “Any controversy, question, claim or other dispute arising out of or relating to this Agreement or the rights and obligations of the parties in connection therewith shall be referred to a single arbitrator.”
- A is believed to be misappropriating corporate funds or has diverted corporate opportunities to a separate business owned by a spouse.
- B brings an action to the Ontario Superior Court to seek injunctive and monetary relief.
- A will be successful in obtaining a court order to stay (freeze) the Ontario Superior Court action as the arbitration clause, by its terms, is broad and enforceable to preclude court process.
Letters of Intent and Arbitration Clauses

Consequences associated with enforcement of arbitration clauses

- Significant distinctions between arbitration process and typical court process.
- Enforcement of arbitration clause may have significant impact on:
  - Qualifications or expertise of adjudicator
  - Speed to engage the process and to access an adjudicator
  - Costs of retaining adjudicator
  - Confidentiality of process
  - Rights of appeal / delay in enforcing award

Court’s powers to refuse to enforce arbitration clause

- Subsequent 7(2) of Arbitration Act, 1991.
- The court may refuse to stay a proceeding commenced in the Ontario Superior Court of Justice in respect of an issue that is otherwise required to be submitted to arbitration in any of the following cases:
  - A party entered into the arbitration agreement while under a legal incapacity.
  - The arbitration agreement is invalid.
  - The subject matter of the dispute is not capable of being the subject of arbitration under Ontario law.
  - The motion to stay is brought with undue delay.
  - The matter is a proper one for default or summary judgment.

Lessons Learned in Terms of Enforcement of Arbitration Clauses

- If you want the parties to be subject to mandatory arbitration, you should:
  - Indicate that the parties “shall” arbitrate;
  - Consider the scope of the disputes that will trigger the arbitration;
  - Consider whether to take away rights of appeal; and
  - Consider whether to include a basic process, or reference appropriate legislation for process, such as the Arbitrations Act, 1991 (Ontario), or the International Commercial Arbitration Act (Ontario), which incorporates the United Nations Commission on International Trade (UNCITRAL).
**Negotiation Tactics**

**Auction**: Set sellers or buyers against one another.

**Bad publicity**: Indicate bad publicity of not agreeing.

**Bait-and-Switch**: Great offer that never happens.

**Better offer**: indicate a better offer from the competition.

**Better than that**: Just say 'You'll have to do better than that...'

**Biased choice**: Offering choices that already include your biases.

**Big fish**: Show you're the big fish and they could get eaten.

**Bluff**: Assert things that are not true.

**Breaking it off**: Walking away from the negotiation.

**Brooklyn optician**: price or negotiate each item.

**Call girl**: Ask to be paid up front.

**Cards on the table**: State your case, clearly and completely.

**Change the negotiator**: New person can reset the rules.

**Changing standards**: Change the benchmarks of good and bad.

**Check the facts**: Bring up new information you have found.

**Control the agenda**: And hence what is discussed.

**Credentials**: Show how clever you are.

**Deadlines**: Push them up against the wall of time.

**Delays**: Buying time and building tension.

**Disrupt-Then-Reframe (DTR)**: Break the pattern, then rebuild differently.

**Divide and conquer**: Get them arguing with one another.

**Doomsday**: paint an overly black picture.

**Door In The Face (DITF)**: Cause rejection, then make real offer.

**Double agent**: Get one of their people on your side.
Negotiation Tactics

**Dry well**: Show you've nothing left to exchange.

**Dump and Chase (DAC)**: Provoke objections, then negotiate on them.

**Empty pockets**: Say you can't afford it, don't have it, etc.

**Empty promises**: Make promises that you know you will not keep.

**Escalating demand**: The more you get the more you require.

**Expanding the Pie**: Ensuring there's more for everyone.

**Fair criteria**: Set decisions criteria such that is is perceived as fair.

**False deadline**: Time limitation on their action.

**Faking**: Letting them believe something about you that is not true.

**Fame**: Appeal to their need for esteem from others.

**Fear-Then-Relief (FTR)**: Scare them, then rescue them.

**Flattery**: Make them look good, then ask for concession.

**Foot In The Door (FITD)**: Make small offer, then increase.

** Forced choice**: Subtly nudging them toward your choice.

**Funny money**: Financial games, percentages, increments, etc.

**Fragmentation**: Breaking big things into lots of little things.

**Go For A Walk**: Take time out to change.

**Good guy/bad guy**: Hurt and rescue by people.

**Heart, Head, Hands**: Emotion first, then rationale and action.

**Highball**: Sellers — start high; you can always go down.

**Hire an expert**: Get an expert negotiator or subject expert on your team.

**Hook and Sinker**: Easy agreement, then commitment requirement.

**Incremental conversion**: Persuade one person at a time. Then use them as allies.
**Negotiation Tactics**

**Interim trade**: Make an exchange during negotiation that will not get into the final contract.

**Invoke Rules**: Bring up standards they should follow.

**Lawyer**: Use survey results, facts, logic, leading question.

**Leaking**: Let them find out 'secret' information.

**Linking**: Connect benefit and cost, strong and weak.

**Log-rolling**: Concede on low-priority items.

**Lowball**: Buyers — start low; you can always go up.

**New issue**: Introduce a new key issue during the negotiation.

**New player**: Another person who wants what you have appears on the scene.

**Nibbling**: Constant adding of small requirements.

**No authority**: Refuse to agree because you are not allowed to.

**Non-negotiable**: Things that cannot be negotiated.

**Overwhelm**: Cover them in requests or information.

**Padding**: Make unimportant things 'essential', then concede them.

**Phasing**: Offer to phase in/out the unpleasant bits.

**Plant**: A 'neutral' person who is really working for you.

**Quivering quill**: Ask for concession just before signing.

**Red herring**: Leave a false trail.

**Russian Front**: Two alternatives, one intimidating.

**Reducing choice**: Offering a limited set of options.

**See you in court**: Threatening to go to a higher or public forum.

**Selling the Top Of The Line (TOTL)**: First promote an expensive product, then show them a cheaper product.

**Shotgun**: Refusal to continue until a concession is gained.
Negotiation Tactics

**Side Payments**: Add a cash balance.

**Slicing**: Break one deal down into multiple smaller deals.

**Split the difference**: Offer to agree on a half-way position.

**Take it or leave it**: give only one option.

**That's not all (TNA)**: Add a string of benefits.

**Trial balloon**: Suggest a final solution and see if they bite.

**Undiscussable**: Things that cannot even be discussed.

**War**: Threaten extreme action.

**Widows and orphans**: Show the effect on the weak and innocent.

**Wince**: Repeat price loudly, then silence.
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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 renewable energy, life science and emerging technology companies.

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Bob practises in the field of commercial litigation and litigates cases in various areas of law, including oppression remedies and other shareholder disputes for public and private companies, securities regulation, partnership disputes, injunctions, defamation, banking disputes, employment law, real estate litigation, investor fraud, receiverships, contract disputes and professional malpractice. He acts for a broad spectrum of clients, ranging from individuals and entrepreneurs in small and large businesses as well as boards of public companies.

Bob has had a number of favourable arbitration, trial and Court of Appeal decisions, many of which have been reported in various legal reporting services. In addition to appearing in the Ontario Securities Commission as successful counsel (InterRent REIT), he has also appeared as successful counsel before the Ontario Court of Appeal in seminal decisions on banking law (Valentine v. TD Bank) and contract and disclaimer interpretation (Solway v. Kennedy). Bob also appeared as successful counsel in the Supreme Court of Canada decision determining presumptions of law as they pertain to joint bank accounts in the context of estate disputes (Saylor and Madsen v. Brooks).

Bob has considerable negotiation skills which have led to efficient and large settlements for his clients, including dozens of large settlements in multi-million dollar investment fraud cases. He is well-versed and has acted as counsel in alternative dispute resolution methods, including mediation and arbitration.

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Bob joined Cassels Brock in 1992 and has been a partner at the firm since 1999. He taught Civil Procedure at Osgoode Hall Law School for many years and is now a mentor in the firm's associate training program.
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Robert A. Balcom is Senior Vice President, General Counsel – Canada and Secretary of George Weston Limited, and Senior Vice President and Secretary of Loblaw Companies Limited in Toronto, Ontario. Prior to joining the Weston/Loblaw Group, Mr. Balcom practiced corporate/commercial law as an associate at Borden Ladner Gervais LLP. Mr. Balcom’s practice encompasses business acquisitions and divestitures, corporate finance transactions, competition law, and general commercial matters. Mr. Balcom is also involved in a variety of corporate governance and corporate secretarial matters. Mr. Balcom graduated from Acadia University in 1983 (Bus. Admin. (Hons.)), from Dalhousie University with an LLB and MBA in 1987 and from Osgoode Hall Law School with an LLM, specializing in International Trade and Competition Law, in 1998. He was admitted to the Ontario Bar in 1989. He is a member of both the Canadian Bar Association and the American Bar Association.

George Weston Limited is a large North American food processing and distribution company and one of the largest corporations in Canada. Weston has two operating segments: Weston Foods and Loblaw. The Weston Foods segment is engaged in the baking industry within North America. Loblaw Companies Limited is Canada’s largest food distributor and a leading provider of general merchandise, drugstore and financial products and services.