KEY BUSINESS AGREEMENTS:
BOILERPLATE CLAUSES (COMMON LAW)

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Review of Boilerplate Clauses in Commercial Agreements: 
Canadian Common Law Perspective

During the negotiation of commercial agreements, it is unfortunately common for the parties and their counsel to pay little attention to provisions in the “General” or “Miscellaneous” section of documents. This paper will review, from a Canadian common law perspective, the following typical boilerplate clauses: (i) “Entire Agreement,” (ii) “Time is of the Essence,” (iii) “Submission to Jurisdiction,” (iv) “Governing Law,” (v) “Assignment and Enurement,” (vi) “Remedies Cumulative,” (vii) “Notice,” and (viii) “Waiver.” The paper will outline the purpose of these clauses, the jurisprudence on them, as well as best practices in drafting them in your commercial agreements.

A. Entire Agreement

An entire agreement clause is intended to provide that the agreement between the parties constitutes the entire agreement and does not include any prior or other agreement, covenant, undertaking, representation, warranty or condition, be it written or oral, in connection with the particular subject matter of the agreement between the parties, except as specifically provided for in the agreement. In essence, the overall purpose of the entire agreement clause is to limit the parties' intentions to written form in order to achieve greater certainty and clarity. While the parol evidence rule restricts the introduction of extrinsic evidence to add, vary or contradict a written contract,1 there are many exceptions to the parol evidence rule and the parties to an agreement often wish to negate as many of these exceptions as possible through the use of an entire agreement clause.

By specifically excluding other possible agreements between the parties, use of the entire agreement provision attempts to provide greater certainty by restricting a party, when claiming for damages, from relying on a breach of a warranty not provided for in the agreement.2 However, an entire agreement clause will generally not prevail against claims arising from false misrepresentations that induced a party to enter into the agreement.3 As noted by the British Columbia Court of Appeal,

A general exclusion clause will not override a specific representation on a point of substance which was intended to induce the making of the agreement unless the intended effect of the exclusion clause can be shown to have been brought home to the party to whom the representation was made by being specifically drawn to the attention of that party, or by being specifically acknowledged by that party, or in some other way.4

2 Ibid at 47.
3 Geoff R. Hall, Canadian Contractual Interpretation Law (Markham: LexisNexis, 2007) at 232; Zippy Print Enterprises Ltd. v. Pawluk, [1995] 3 WWR 324, 20 BLR (2d) 170, 100 BCLR (2d) 5 [Zippy Print].
4 Zippy Print, supra note 2 at 45.
In *Betker v. Williams*, it was held that, in certain circumstances, specific oral representations may prevail despite the insertion of an entire agreement clause in a contract. Specifically, it was held that an entire agreement provision will not protect a vendor who has made a false representation that concerns “a matter of such substance as to go to the purchaser’s basic purpose in entering into the contract and where it has not been shown that the clause in question was actually brought to the purchaser’s attention.” However, the Ontario Supreme Court of Appeal upheld an entire agreement clause in the decision of *Hayward v. Mellick*. In that case, an agreement for purchase and sale of farmland did not include the specific acreage of workable land. The vendor verbally confirmed a false amount of acreage. The court held that this was a negligent misrepresentation as to fitness and quality and should be distinguished from a misrepresentation as to an overriding or collateral matter. In the former situation, the parties should be governed by the terms of the contract, including an entire agreement provision.

Generally, entire agreement provisions will (i) not be enforced over oral agreements if the parties expressed an intention that the written agreement was not to cover the entire transaction, and (ii) will likely apply to past events or communications as opposed to future events. The enforceability of an entire agreement clause will depend on a number of factors, including the sophistication of the parties and the amount of time granted for review of the agreement. The Ontario Court of Appeal failed to uphold an entire agreement provision in a real estate agreement as the provision was in fine print, not brought to the attention of the party challenging it prior to execution, and executed in a hurried manner. As such, there could be no reasonable expectation that the entire agreement clause had been assented to. Accordingly, the Ontario Court of Appeal upheld an entire agreement provision when it was found, amongst other things, that both parties were equally sophisticated and adequate time had been granted to review the agreement prior to execution.

Prior to signing an agreement, both parties should review the entire agreement provision to ensure that any other documents delivered contemporaneously with the agreement are not rendered ineffective by the entire agreement clause, including, for example, any last-minute side letters. Additionally, if the purpose of the entire agreement clause is to exclude all prior agreements regarding the same subject matter as the agreement itself, it is preferable to specifically set out such excluded agreements for greater certainty. Furthermore, it is important to set out which prior or ancillary agreements or representations (if any) will remain effective once the final agreement is executed.

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6 *Ibid* at para 34.
7 (1984), 26 BLR 156, 45 OR (2d) 110.
8 *Ibid* at para 22.
9 Hall, *supra* note 3 at 232.
10 *Ibid* at 237.
11 *Beer v. Townsgate I Ltd.* (1997), OR (3d) 136, 152 DLR (4th) 671 (Ont CA); Hall, I note 3 at 237.
13 Elderkin & Shin Doi, *supra* note 1 at 47.
B. Time is of the Essence

A time is of the essence clause confirms the parties’ intent as to the importance of timeliness. Failure to perform an obligation in accordance with a time is of the essence provision allows the non-defaulting party to terminate the contract. In order to take advantage of this provision, the non-defaulting party is required to be prepared to perform all its obligations pursuant to the agreement. Time will not be of the essence to contractual obligations unless the parties so provide or the circumstances clearly indicate that this is the parties’ intention.

Time being of the essence will not be implied in a contract unless “the express word of the contract, the nature of its subject matter or the surrounding circumstances make it inequitable not to treat the failure of one party to comply exactly with the stipulation as relieving the other party from the duty to perform his obligations under the contract.” Therefore, if the agreement does not expressly provide for a time is of the essence clause, a court will look to interpret the contract to determine whether time is deemed to be of the essence.

Generally, certain types of contracts are often interpreted as time being of the essence. These include (i) options to purchase land or lease renewals, (ii) mercantile contracts not including a time stipulation as it relates to time of payment, (iii) an agreement for income property, and (iv) contracts where the subject of the agreement will likely fluctuate greatly in value. However, it is rare for a court to imply that time is of the essence to contractual obligations where it has not been expressly provided for.

Courts have not enforced a time is of the essence provision, even when expressly provided, if to do so would be inequitable. For example, in an agreement of sale, absent bad faith conduct of the parties, forfeiture will not be granted where to do so would be unreasonable. Waiver of a time is of the essence provision may occur through implied conduct. For example, if a party engages in conduct whereby the party does not insist on the time stipulations, this may be found to constitute a waiver of a time is of the essence provision. The time is of the essence concept is not well known in non-common law jurisdictions, such as the Province of Québec. When dealing with such a jurisdiction, it may be preferable to specify what will occur and on what dates, rather than including a time is of the essence provision.

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17 Elderkin & Shin Doi, *supra* note 1 at 190-191.
18 *Sail Labrador Ltd. v. Challenge One (The)*, [1998] SCR 265 at para 64.
C. Submission to Jurisdiction (Choice of Forum)

There is a difference between the law the parties choose to govern an agreement and the jurisdiction in which the parties choose to resolve any disputes arising from the agreement. Equally, the jurisdiction to which the parties submit need not be the same as the jurisdiction whose laws govern the agreement. The purpose of a submission to jurisdiction provision is to ensure that any future dispute between the parties arising from the agreement is heard in the courts of a particular jurisdiction. If the agreement does not provide for submission to jurisdiction, any court where the action is brought may decline to hear the action if another forum is found more convenient.

There are particular elements to be considered in the enforcement and interpretation of a choice of forum clause where private international law may come into play. These include the following:

(i) in the context of private international law, the enforcement of the choice of forum clause is discretionary, and not mandatory; and

(ii) private international law applies a “strong cause” test to the exercise of judicial discretion as to whether a submission to jurisdiction provision should be enforced. Ontario courts generally uphold submission to jurisdiction clauses unless “strong cause” indicating that the parties should not be bound by the provision is shown.

The parties may specify in the submission to jurisdiction provision whether a particular court is given exclusive (i.e., conferring jurisdiction to only one forum) or non-exclusive (i.e., providing for a particular jurisdiction, but not excluding other forums) jurisdiction. However, notwithstanding any express agreement to the contrary, courts retain inherent jurisdiction to hear or not hear an action. As such, an exclusive jurisdiction clause will be upheld only where the court concludes that the action brought is conveniently heard in the chosen jurisdiction. The jurisprudence is divergent as to whether the word “exclusive” should be included in the choice of forum clause to avoid granting concurrent jurisdiction. Some

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21 Elderkin & Shin Doi, supra note 1 at 80.
22 Ibid at 89.
23 Hall, supra note 3 at 202.
24 Ibid at 205.
26 Elderkin & Shin Doi, supra note 1 at 84; Hall, supra note 3 at 206. The leading Canadian case on the interpretation of choice of forum clauses in the context of private international law is Z.I. Pompey Industrie v. ECU-Line N.V., [2003] 1 SCR 450, 2003 SCC 27. Hall, supra note 3 at 205. In this case, the Supreme Court held, at para 39, that “once a court is satisfied that a validly concluded bill of lading otherwise binds the parties, it must grant the stay [of proceedings] unless the plaintiff can show sufficiently strong reasons to support the conclusion that it would not be reasonable or just in the circumstances to require the plaintiff to adhere to the terms of the [choice of forum] clause. In exercising its discretion, the court should take into account all of the circumstances of the particular case.”
27 Elderkin & Shin Doi, supra note 1 at 85.
28 Ibid.
jurisprudence indicates that a provision containing the word “exclusive” is enforceable unless the party opposing the clause can show that the interests of both the parties and of justice favour litigating in another forum.\textsuperscript{29} Alternatively, other jurisprudence indicates that words other than “exclusive” (i.e., “and no other courts”) may be sufficient to grant exclusive jurisdiction.\textsuperscript{30}

D. **Governing Law (Choice of Law)**

Parties to an agreement are permitted to choose the law that will govern any dispute that may arise between them.\textsuperscript{31} This freedom of choice, however, is subject to certain limitations. As Lord Wright noted in *Vita Food Products Inc. v. Unus Shipping Co.*,\textsuperscript{32} the selection must be *bona fide* and legal and there must be no public policy reason for avoiding the choice of law. For example, where the choice of law has been made to evade the laws of a particular legal system and the transaction is closely connected to that system, the choice will likely be disregarded.\textsuperscript{33}

Additionally, where the choice of law of an agreement is not expressly stated, a court will attempt to ascertain the intention of the parties as implied in the agreement.\textsuperscript{34} If this intention cannot be discovered, then the contract will be governed by the system of law with the closest connection to the contract.\textsuperscript{35} According to the Supreme Court of Canada, “…the problem of determining the proper law of a contract is to be solved by considering the contract as a whole in light of all the circumstances which surround it and applying the law with which it appears to have the closest and most substantial connection.”\textsuperscript{36} The place where the contract is made is not determinative.\textsuperscript{37} In *I.M.P. Group Limited v. Dobbin*,\textsuperscript{38} the Ontario Superior Court held that

The governing law of a contract is the system of law with which the transaction has its closest and most real connection. Factors taken into account to determine the system of law with which a transaction has its closest and most real connection include the domicile and residence of the parties, the principal place where the parties’ businesses are situated, the place where the contract is made and is to be performed, and the nature and situs of the subject matter of the contract. There is a presumption that where a contract is void or invalid under one system of law but not another,

\textsuperscript{29} Ibid.
\textsuperscript{30} Ibid at 88.
\textsuperscript{31} Hall, *supra* note 3 at 202.
\textsuperscript{32} [1939] 1 WWR 433 at para 12, [1939] AC 277, [1939] 1 All ER 513.
\textsuperscript{35} Walker, *supra* note 33.
\textsuperscript{37} Ibid at 447.
\textsuperscript{38} (2008), OJ No. 3572, 2008 CanLII 46328.
the parties must be taken to have intended to contract with reference to the law by which the agreement would be valid.39

A court will give effect to an express choice of law clause if it is satisfied that the choice was made in good faith and if there is no reason to avoid the choice of law due to public policy. As an example, a court may find that the choice of law was not made in good faith if the agreement has no connection with the jurisdiction whose law is chosen to govern the agreement. Furthermore, a court may find that the choice of law was not made in good faith if the parties expressly chose a particular jurisdiction to avoid the consequences of the laws of another, more appropriately connected, jurisdiction.

E. Assignment

An assignment occurs where one party to an agreement assigns its rights and benefits under the agreement to a third party.40 An assignment provision restricts a party’s ability to do this.41 There are a number of reasons why one party would wish to control another party’s rights to assign, the most obvious being that the other party may not want to engage in commercial arrangements with a proposed assignee.

Generally, absent an assignment provision, a party is free to assign the rights and benefits of an agreement except where the agreement is a personal services contract or where an assignment would increase the other party’s obligations under the contract. Furthermore, it must be noted that while rights and benefits may be assigned, contractual obligations and liabilities cannot be assigned.42 The foregoing principles were recently acknowledged by the Ontario Court of Appeal in Rodaro v. Royal Bank.43 The Court stated

Aside from limitations imposed by statute, public policy or the terms of a specific contract, a party to an agreement may assign its rights, but not its obligations under that agreement, to a third party without the consent of the other party to the contract. A party will not, however, be allowed to assign its rights under a contract if that assignment increases the burden on the other party to the agreement or if the agreement is based on confidences, skills or special personal characteristics such as to implicitly limit the agreement to the original parties.44

A party that assigns its rights under a contract is not released from its obligations (whether or not assumed by the assignee) without a specific release either embodied in the

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39 Ibid at para 123.
40 Christou, supra note 14 at 240-241. This can be distinguished from novation, where the original contract is ended and none of the parties to the original contract enters into a new contract with a third party upon identical terms.
41 Elderkin & Shin Doi, supra note 1 at 167.
42 Ibid.
43 (2002), 59 OR (3d) 74, 157 OAC 203 (CA).
44 Ibid at para 33.
agreement itself or by separate contract. If it is intended that the assignor be released from its obligations, a clause to this effect should be included in the agreement. Contrary to this, if the parties intend the assignor to remain obligated, a clause should be included providing that the assumption of the obligations by the assignee will not release the assignor from liability for its obligations under the agreement.

In drafting an assignment provision, the scope of the provision should be carefully considered. The clause may provide that assignment is only available with prior written consent of the other party and it may further add that consent is not to be unreasonably withheld. Factors indicating an unreasonable assignment could include the financial worth, experience or reputation of the proposed assignee. For clarity, the parties may wish to expressly define what constitutes “unreasonable.”

Sometimes the assignment provision will allow assignment without consent to a particular person or corporation. Corporate parties often want the right to transfer their rights and obligations to an affiliate. However, the other party to the agreement may want to restrict assignment to affiliates with a financial worth at least equal to that of the original party.

It may also be useful to explain in the assignment clause whether an amalgamation results in an assignment. In the absence of an express provision, courts have reached different conclusions on this issue. For example, in *Crescent Leaseholds Ltd. v. Gerhard Horn Investments Ltd.*, the court held that an assignment provision in a lease agreement applied to amalgamations, therefore the non-assigning party was required to consent to assignment upon any amalgamation. However, in *Loeb Inc. v. Cooper*, the court held that the tenant’s amalgamation did not constitute an assignment of the lease or, if it did, the amalgamation was not contemplated in the assignment provision. To avoid any unintended results, drafters should take care to include an express provision relating to amalgamations in the assignment clause.

F. Enurement

The enurement clause provides that the agreement continues to the benefit of the parties and their respective successors, permitted assigns, heirs or other designated third parties. The purpose of the clause is to ensure the rights and liabilities contained in the agreement will continue in the event of corporate changes or death. As such, the clause permits the designated third parties to sue on the contract notwithstanding the doctrine of privity.

An enurement clause should be drafted to reflect the nature of the parties involved in the transaction. The terms “successors” and “assigns” may apply to individuals, corporations or other legal entities, whereas “heirs,” “executors” and “administrators” are specific to

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45 Elderkin & Shin Doi, supra note 1 at 175.
46 [1983] 1 WWR 305, 26 RPR 121 (Sask QB).
47 (1991), 5 OR (3d) 259, 3 BLR (2d) OR (On Ct J) at para 75.
48 Elderkin & Shin Doi, supra note 1 at 176.
individuals. In commercial transactions, the term “successor” typically refers to corporations which assume the rights and obligations of the original corporation through legal succession, most commonly amalgamation. The term “assigns” is broader than “successor.” In *National Trust Co. v. Mead*, the Supreme Court of Canada defined an “assign” as “anyone to whom an assignment is made and presumably…would include both individuals and corporations.” An “heir” is “the person to whom the beneficial interest in the property would have gone under the law of Ontario if the testator or the other person died intestate” or the person designated as an heir in the deceased’s will. An “administrator” is defined in Black’s Law Dictionary as “[a] person appointed by the court to manage the assets and liabilities of an intestate.”

It is important to consider whether an enurement clause is consistent with the other provisions of the agreement. For example, the assignment provision may prohibit assignment without prior consent. In this case, the enurement clause should be drafted with the words “permitted assigns.” The courts generally will look to the entire written contract to determine the intention of the parties with respect to a particular provision. For example, in *Air Transit Ltd. v. Innotech Aviation of Nfld. Ltd.*, the court held that the word “assigns” in the enurement clause was not included to permit a party to assign the agreement without the other party’s consent. Rather, the enurement clause was a standard clause that should be read in light of the entire contract that provided for only limited rights of assignment. As well, in *Silver Butte Resources Ltd. v. Esso Resources Canada Ltd.*, the British Columbia Superior Court held that an enurement clause making the contract binding upon the parties’ assigns “means no more than that the contract is binding on assigns if it can be assigned” and does not determine whether a party may assign the contract without consent.

**G. Remedies Cumulative**

A remedies cumulative clause allows for a party who chooses to exercise a remedy as pursuant to an agreement to not be excluded from using any other remedies available to it under general law. In a purchase and sale transaction, a remedies cumulative clause may allow a purchaser to sue for misrepresentation or breach of warranty without having to rely on the indemnity clause in the agreement.

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49 Ibid at 257.
50 Ibid at 256.
52 Ibid at para 28.
55 Christou, *supra* note 14 at 12.
56 Elderkin and Shin Doi, *supra* note 1 at 177 and 257.
59 Ibid.
60 Elderkin and Shin Doi, *supra* note 1 at 107.
The Ontario Court of Appeal decision in *Raymer v. Stratton Woods Holdings Ltd.*⁶¹ provides further guidance to the applicability of a remedies cumulative provision. The remedies cumulative provision in question provided the following:

> It is agreed that in the event of any breach of this Agreement by the Purchaser, or upon default by the Purchaser in any of his several obligations set forth in this Agreement, the Vendor shall have the right to declare this Agreement terminated without further notice and, in addition to and without prejudice to any other remedy available to the Vendor, the deposit paid hereunder shall be forfeited to the Vendor as liquidated damages for expenses, damages, and loss of time incurred by the Vendor in connection with this Agreement.⁶²

The Court of Appeal held that the vendor was not restricted to a retention of the deposit as its sole remedy; it was entitled to sue for all its damages and for breach of the agreement.⁶³

Additionally, should an agreement be governed by provincial arbitration legislation, case law has indicated that a remedies cumulative provision stating that “all remedies afforded under the agreement shall be taken and construed as cumulative and as in addition to every other remedy provided for herein or by law,” may imply that the parties intended to resolve their dispute in more than one way, thereby allowing for two alternative remedies that could exist independently of each other.⁶⁴ However, case law has also indicated that the specific wording of the remedies cumulative clause is imperative in determining its application when an agreement is governed by provincial arbitration.⁶⁵ Actions may be stayed pending the outcome of arbitration orders if the remedies cumulative clause in the agreement giving rise to the dispute was general in nature and applied to all duties, obligations, rights and remedies, rather than only applying to specific remedies.⁶⁶ Consequently, if an agreement contains an arbitration provision, the remedies cumulative provision should be revisited to determine whether it will affect any future arbitration.

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⁶¹ (1988), 65 OR (2d) 16 (CA).
⁶² *Ibid* at para 4; see Elderkin and Shin Doi, *supra* note 1 at 107.
⁶⁵ *Top Notch Construction Ltd. v. Western Irrigation District* (1991), 78 Alta LR (2d) 341, 43 CLR 6 (QB) [*Top Notch*].
⁶⁶ *Ibid* at 20. The Alberta Queen’s Bench in *Top Notch* distinguished this case from *Alta Power* as, in the later decision, the remedies cumulative clause in the agreement specifically provided for an action for damages for breach of the agreement. Contrary to this, the remedies cumulative clause in *Top Notch* did not set out specific recourse to the court for a specific action; rather, it provided a general cumulative remedies clause. See Elderkin and Shin Doi, *supra* note 1 at 109.
H. Notice

The notice provision is often overlooked as relatively unimportant. However, careful attention should be given to the drafting of this clause, as disputes can arise regarding whether effective notice was delivered. The notice provision typically applies to all communication that is required or permitted to be delivered to any party pursuant to the agreement. This may include approvals, demands, directions, consents and designations. The purpose of this provision is to clarify and set out how certain information is to be delivered between parties, in order to eliminate any disagreements as to the evidence of delivery and receipt of notice.

The notice provision should include

(i) the method by which notice should be given;
(ii) when notice is considered to be delivered and received;
(iii) what, if any, is the effect of a disruption in delivery;
(iv) the nature of the notice provision, including whether the notice provision is mandatory or permissive; and
(v) the individual to whom notice must be delivered when notice is required to be delivered to a corporation, partnership or trust.67

(a) Methods of Delivery of Notice

All methods of delivery contemplated by the parties should be addressed in the notice provision. The most common methods of delivery are post, facsimile, personal service and courier. While agreements provide for delivery by facsimile or other means of electronic communication, providing for notice by email has its risks, as there is no reliable way to confirm its receipt.

(b) When Notice is Considered Delivered and Received

The notice provision should specifically provide for when notice is deemed delivered and received (e.g., between regular business hours, and if following, then delivered the next business day). In the absence of an express deeming provision, the parties to the agreement will lose the ability to define these parameters, consequently granting the courts freedom to interpret the notice provision, should litigious issues later arise. Deemed delivery and receipt of notice will vary depending on the method of delivery.68 For example, postal delivery will require a longer period of time to receive than electronic means of delivery. If the notice

67 Elderkin and Shin Doi, supra note 1 at 199.
68 Ibid at 200.
provision fails to provide an express deeming provision, courts may refer to provincial rules of civil procedure to determine the appropriate deemed time of receipt.\textsuperscript{69}

Generally, a facsimile is deemed to be received when sent.\textsuperscript{70} However, problems may arise in that facsimiles sent after business hours may be not be viewed by the receiving party until the next business day. Furthermore, facsimiles may be received, yet incomplete due to technical errors. Consequently, the notice provision should require that the sender obtain and return a confirmation of successful delivery.

(c) Disruptions to Delivery

Similarly, any possible or anticipated disruptions to delivery should be provided for in the notice provision. For example, a postal strike may be a possible disruption to delivery by post, and should therefore be provided for. Failure to do so may result in ineffective notice, as receipt will not occur due to circumstances not contemplated in the agreement.

(d) Nature of the Notice – Mandatory or Permissive

A permissive notice provision allows for methods of delivery of notice other than those specifically provided for in the provision itself. Contrary to this, a mandatory notice provision expressly provides for the effective method(s) of notice. The Ontario Court of Appeal decision in \textit{Ross v. T. Eaton} provides that where a delivery of notice has occurred through a method other than that provided for in a permissive notice provision, notice will be effective as long as the method chosen was not less advantageous to the party in receipt of the notice.\textsuperscript{71}

To determine whether a notice provision is mandatory or permissive, the British Columbia Supreme Court in \textit{Canada Safeway Ltd. v. A. Schiel Construction Ltd.}\textsuperscript{72} provides that a notice provision excluding all other methods of delivery other than those expressly allowed is a mandatory notice provision. To construct a mandatory notice provision, it should be clearly stated that a specific method must be used and that other methods of delivery are explicitly excluded. Caution is suggested if drafting a mandatory notice provision, as a party may be unaware of the dangers of altering the method of notice and therefore mistakenly deliver ineffective notice.

(e) Delivery of Notice to a Corporation, Partnership or Trust

It is imperative that the notice provision be tailored to the client’s specific needs. In particular, the individual holding a particular office entitled to receive notice on behalf of a corporation, partnership or trust, must be correctly identified in the notice provision. However, it is best to avoid identifying an individual by name, since people move around and change positions. It is best to indicate an office, such as President or Chief Executive Officer.

\textsuperscript{69} Ibid.
\textsuperscript{70} Ibid at 206.
\textsuperscript{71} (1992), 96 DLR (4th) 631 at para 26.
\textsuperscript{72} (1993), 34 RPR (2d) 320 at para 14.
I. Waiver Clause

Waiver of a right can be express or inferred from conduct which is inconsistent with the right. Delay or failure to exercise a right may, in certain circumstances, constitute a waiver of that right. It is therefore common for parties to include in their agreement a provision providing that no waiver of any clause in the agreement is binding unless it is made in writing and signed by all the parties entitled, as pursuant to the agreement, to grant the waiver. If an agreement contains conditions precedent, there should be special provisions relating to the waiver of those conditions.

In *British American Oil Co. v. Ferguson*, the Alberta Court of Appeal explained the judicial approach to dealing with waiver clauses as follows: “To establish waiver it must be shown that the person waiving his rights had full knowledge of their existence and their nature. The burden of proving knowledge on the part of the person charged with the waiver is upon the party relying on it.”73 There is always a risk of a court determining that the conduct of a party constituted a waiver in a given case even though the relevant agreement stipulated that no waiver would be effective unless made in writing.74 In *Delilah’s Restaurants Ltd. v. 8-788 Holdings Ltd.*, for example, the court found that the defendant, in accepting rent in full knowledge that breaches of the agreement had occurred, had waived the breaches, notwithstanding that there was a waiver clause in the lease.75

J. Conclusion

Care should be taken in drafting and reviewing boilerplate clauses, otherwise your client may face unintended consequences. Examples of this would be keeping an entire agreement clause in your contract where your client thought that a prior ancillary document would continue to apply, or having a remedies cumulative provision where your client thought the other party’s remedies were limited. The fact that these provisions are usually at the end of the document does not make them any less important.

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73 [1951] 1 WWR (NS) 103 at 26, 2 DLR 37.
74 Elderkin & Shin Doi, *supra* note 1 at 105.