THE COUNTY OF CARLETON LAW ASSOCIATION

2008 EAST REGION SOLICITORS CONFERENCE

BACK TO

BOILERPLATE

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I. Introduction

Boilerplate provisions are for the most part ignored, much less negotiated, but we do so at our peril. Boilerplate clauses have developed from historical common law and equitable principles. Each clause confirms or negates a legal principle and has a very specific purpose. As such, it is imperative that we understand the purpose and meaning of each clause, its interpretation by the courts, and its ultimate effect on the rights of our clients. This article will provide a comprehensive discussion on entire agreement provisions and also briefly address the following boilerplate provisions: recitals, headings, capitalized terms, business day, schedules and appendices.

II. Recitals

WHEREAS:

A. the Vendor carries on the business of managing the recreational facilities; and
B. the Vendor desires to sell the to the Purchaser and the Purchaser wishes to purchase from the vendor all of the property, rights, and assets of that business;

The purpose of the recitals is to explain how the agreement fits into the overall business relationship between the parties. It has been stated that "no contracts are made in a vacuum: there is always a setting in which they have to be placed"[1] It is important to give careful consideration to the wording in the recitals as they may be used by the courts when interpreting the construction of the contract. According to Lord Esher:

> Now there are three rules applicable to the construction of such an instrument. If the recitals are clear and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous, and the operative part is clear, the operative part must prevail. If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred.[2]

It is prudent to include a boilerplate provision indicating that the recitals are true and correct in substance and in fact. Doing so provides greater certainty and can prevent the parties from later denying the truth of the facts recited.[3]

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[1] *Reardon Smith Line Ltd. v. Hansen-Tangen*, [1976] 3 All E.R. 570 at 574-5 (H.L.).
[2] *Ex parte Dawes, In re Moon*, (1886) 17 Q.B.D. 275(C.A.) at 286.
[3] Cynthia L. Elderkin & Julia S. Shin Doi, *Behind and Beyond the Boilerplate: Drafting Commercial Agreements*, 2nd ed. (Toronto: Carswell, 2005) at 29 ["Elderkin, *Boilerplate*"].

III. Headings

1. The captions, section numbers, article numbers and table of contents appearing in this Agreement are inserted only as a matter of convenience and in no way affect the substance, or interpretation of this Agreement.

2. The division of this Agreement into sections, the insertion of headings and the provisions of a table of contents are for convenience of reference only and are not to affect the construction or interpretation of the this Agreement.

Headings are used in agreements to enhance readability and serve as a quick reference guide to locate a specific provision. Unfortunately, during the course of negotiating the contract, we often fail to amend the headings to reflect the final meaning of the provisions located thereunder. This can be a dangerous practice in the absence of a boilerplate provision to the effect that the headings are not to affect the interpretation of the agreement. Under the common law, the courts may use the headings to interpret the clauses grouped beneath them unless the agreement explicitly provides otherwise.[4]

A headings provision should clearly indicate that headings are for convenience of reference only and are not to affect the construction or interpretation of the agreement. If the agreement includes a clause to this effect, the courts have respected the intention of the parties and have interpreted the contract in a manner that does not give effect to a misleading heading.[5]

IV. Capitalized Terms

1. Each capitalized term not otherwise defined in this Agreement has the meaning given to it in the offer to purchase dated November 30, 2008.

2. For the purposes of this Agreement, all capitalized terms shall have the meaning attributed to each such term in the *Personal Property Security Act,* R.S.O. 1990, c. P.10.

3. Each capitalized term has the meaning given to it in this Agreement.

Apart from words that are normally capitalized, the use of capitalized terms in a commercial agreement indicates that the term has been defined by the parties and should be interpreted in that manner. It is common practice to define all capitalized terms in a definition section at the beginning or end of a lengthy agreement. Alternatively, the capitalized term can be defined in the substantive provision in which it first arises in the agreement. This is normally done by bolding the capitalized term and placing it within quotation marks and parenthesis.

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[4] *Toronto Corp. v. Toronto Railway*, [1907] A.C. 315 (P.C.), var'g (1906)
[5] *KKBL No. 29 Ventures Ltd. v. IKON Office Solutions Inc.,* 2003 BCSC 1598 at para 24.

If a capitalized term is not defined in the agreement itself (but rather in another agreement or in legislation), a boilerplate provision should be included in the agreement that directs the reader to the document in which the term was originally defined. For example, if it is intended that the term "substantially performed" is to have the meaning as ascribed to this term in the *Construction Lien Act*, the first use of this term in the agreement should be followed by "as defined in the *Construction Lien Act*".

V. Business Day Definition

1. "Business Day" means every day except Saturdays, Sundays and statutory holidays in the Province of Ontario.

2. "Business Day" means a day on which banks are open for business in the City of Ottawa, Ontario but does not include a Saturday, Sunday, or a statutory holiday in the Province of Ontario.

Defining the term "business day" in a commercial agreement provides certainty with respect to determining when obligations are due, when notice periods expire and how time periods are to be calculated. In the absence of a definition for the term "business day", it is difficult to know with certainty whether Saturday, Sunday or statutory holidays are to be included or excluded. Complicating matters further, it can be particularly difficult to determine if a particular day is a statutory holiday if the parties carry on business in different jurisdictions. As such, it is useful to specify the jurisdiction in which a statutory holiday arises, as for example, "excluding statutory holidays in the Province of Ontario". It is also prudent to specify the hours of the business day within the definition. If the agreement does not specify the time when the business day ends, the Ontario Court of Appeal has held that the business day runs from midnight from one day to the next.[6]

VI. Schedules and Appendices

1. The following schedules are attached to form part of this Agreement:

Schedule	Description
Schedule "A"	Collateral
Schedule "B"	Permitted Encumbrances

2. The schedules and appendices constitute an integral part of this Agreement.

3. Schedules "A" and "B" which are attached to this Agreement are incorporated into this Agreement by reference and are deemed to be part hereof.

[6] *Goldstein v. Grant*, (1978), 82 D.L.R. (3d) 326 (Ont. C.A.).

4. In the event of a conflict between any of the terms of this Agreement, including its schedules and appendices, the conflict shall be resolved according to the following order of priority: the clause of the Agreement, Schedule "A", Schedule "B", Schedule "C", Appendix "1", Appendix "2" and Appendix "3".

Schedules and appendices are attachments to an agreement. Schedules are used to place detailed information at the end of the agreement that would otherwise disrupt the flow of the substantive provisions. A court will interpret a schedule as an integral part of the agreement if the agreement contains a boilerplate provision indicating same.[7]

Appendices do not necessarily form part of the agreement and are often used to attach materials to an agreement for ease of reference. For example, the form of a promissory note that will be executed by the borrower may be attached to a loan agreement as an appendix for information purposes.[8]

If it is intended that the schedule or appendix form part of the agreement it is imperative to include a provision stipulating this. Otherwise, a party wishing to rely on the schedule or appendix, may be compelled to take its chances that the court will make a finding in its favour based on principles of reliance and equity.

Finally, the agreement should also address inconsistencies between the agreement, schedules, appendices and other documents. The boilerplate provision should address which is to govern in the event of conflicting provisions.

VII. Entire Agreement

This Lease and the Schedules and Riders, if any, attached hereto, and the Landlord's construction manual, set forth the entire agreement between the Landlord and Tenant concerning the Premises and there are no agreements or understandings between them other than as are herein set forth.

An entire agreement provision is designed to clarify the relationship between the parties. A large volume of information is often exchanged between the parties during the course of contract negotiations. For example, the negotiation process for a commercial lease typically involves the exchange of marketing materials, letters of intent, measurement certificates, financial statements and site terms and oral representations. The entire agreement provision is designed to exclude liability based on pre-contractual representations and to restrict the relationship between the parties to the specific wording in the agreement.

The entire agreement provision reinforces the parol evidence rule, which provides that once a written agreement is in place, "verbal evidence is not allowed to be given of what

[7] *Agosta v. Whitby Landmark Developments Inc.*, [1996] O.J. No. 3733 (Gen. Div.).
[8] Elderkin, *Boilerplate, supra* note 3 at 98.

passed between the parties, either before the written agreement was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract".[9] Due to the multitude of exceptions to the parol evidence rule, it will be prudent to include an entire agreement provision in most commercial agreements.

There are competing lines of authority regarding whether a court will uphold an entire agreement provision and allow a party to avoid liability for misrepresentations. The general rule is that, absent equitable circumstances, a broadly worded entire agreement provision will exclude liability for innocent and negligent misrepresentations made prior to the agreement. An entire agreement provision will not, however, shelter a party from fraudulent misrepresentations.[10] Upholding entire agreement provisions supports the doctrines of freedom to contract and party autonomy. On the other hand, a number of authorities have disregarded the presence of an entire agreement provision on the basis of equitable grounds.[11] This often occurs in contracts of adhesion in which there is an inequality of bargaining power.

Hayward v. Mellick[12] is an illustrative example in which the Ontario Court of Appeal upheld an entire agreement clause thereby excluding liability for a negligent misrepresentation made in the during the sale of farm land. The facts of *Hayward* are as follows. During the course of negotiations for the purchase and sale of farm land, the vendor orally advised the purchaser that the land contained 65 workable acres. The agreement entered into between the parties contained the following provision, "there is no representation, warranty, collateral agreement or other than as expressed herein in writing". It turned out that the farm land contained only 51.7 workable acres. The purchaser then sued the vendor for negligent misrepresentation.

The Ontario Court of Appeal in *Hayward* held that the representation regarding the workable acres of farm land was within the subject matter of the contract and should be interpreted according to the terms of the contract. The entire agreement clause was held to exclude the liability of the vendor for negligent misrepresentations. The Court noted that negligent misrepresentations for collateral matters outside the scope of the contract would not be sheltered by an entire agreement provision. The Court also noted that entire agreement provisions should only exclude liability for representations (excluding fraudulent) that go to the quality of fitness of the subject matter of the contract.

A narrowly worded entire agreement provision will often not be adequate to exclude liability for misrepresentations. *Somerville v. MacRae Heating and Air Conditioning Ltd.*[13] involved a contract for the purchase of a Lenox propane furnace. The agreement stipulated that, "Conditions and Guarantees of this Agreement are set forth in full above". The court found that the defendant had made negligent misrepresentations regarding the

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[9] *Goss v. Lord Nugent*, (1833), 110 E.R. 713 at 716.
[10] *Hasham v. Kingston*, (1991), 4 O.R. (3d) 514 (Div. Ct.) ["*Hasham*"].
[11] Elderkin, *Boilerplate, supra* note 3 at 52.
[12] (1984) D.L.R. (4th) 740 (Ont. C.A.).
[13] [1996] O.J. No. 3496 (Gen Div.).

cost of heating with propane. According to Justice Cavarzan, "[i]n my opinion that clause is not sufficiently broad to exclude liability for negligent misrepresentation inducing entry into the contract."[14] Based on *Summerville*, drafters are advised to include a broadly worded entire agreement provision in order to protect their client's rights.

As noted above, an entire agreement clause does not preclude liability for fraudulent misrepresentation. *Hasham v. Kingston*[15], involved the purchase and sale of a rental property. The agreement of purchase and sale did not contain a provision regarding the amount of rent produced by the property. There were, however, representations regarding the rental income generated by the property. After the sale of the property, the purchaser discovered that that the vendor had not received approval by the Residential Tenancy Commission prior to increasing the rent and therefore, the rent increases were illegal. While the agreement contained an entire agreement provision, the purchaser was successful in his claim against the vendor. The court held that the defendant knew the rents were illegal and therefore, the representations were fraudulent.

Shelanu Inc. v. Print Three Franchising Corp.[16] is illustrative of the court giving consideration to equitable circumstances in its decision to set aside an entire agreement provision. The facts are as follows. The plaintiff Shelanu Inc. ("Shelanu"), entered into a written franchise agreement with the defendant Print Three Franchising Corp. ("Print Three"). Subsequent to the entering into the franchise agreement, Print Three orally agreed to an increase in the royalty rebate to which Shelanu was entitled under the franchise agreement. Print Three later tried to argue that they should not be bound by this oral agreement since the franchise agreement contained both an entire agreement provision and a provision stipulating that all waivers and amendments to the agreement must be made in writing.

Despite the existence of a broadly worded entire agreement provision in franchise agreement, Justice Weiler, albeit in obiter, indicated that:

> I would also note that the agreement that we are dealing with is a franchise agreement. A franchise agreement is a type of contract of adhesion, that is, a type of contract whose main provisions are presented on a "take it or leave it basis". In such situations, the case for holding that an exclusion clause represents the intention of the signer and that the signer should be bound by it is weaker because there is usually an inherent inequality of bargaining power between the parties.[17]

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[14] *Ibid*. at para. 20.
[15] *Hasham, supra* note 10.
[16] (2003), 64 O.R. (3d) 533 (C.A.).
[17] *Ibid*. at para. 58. See also *Beer v. Townsgate I*, *supra*, *Solway v. Davis Moving & Storage Inc. (c.o.b. Kennedy Moving Systems)*, [2002] O.J. No. 4760 (C.A.) at para. 21; *Zurich Insurance Company v. 686234* O*ntario Ltd.*, [2002] O.J. No. 4496 (C.A.); *Mellco Developments Ltd*. v. *Portage la Prairie (City)*, [2002] M.J. No. 381 (C.A.).

Justice Weiler's reasoning is in line with an earlier-decided case by the British Columbia Court of Appeal in *Zippy Print Enterprises Ltd. v. Pawliuk*[18]. In a similar franchise dispute involving the interplay between misleading representations and an entire agreement provision, the Court stated that:

> … if the exclusion clause is part of a standard form contract of adhesion it will not operate to exclude liability in contract in the face of an explicit representation which induced the making of the contract. In those circumstances the more specific term, namely the explicit representation, will prevail.[19]

It appears that inequality of bargaining power, contracts of adhesion, and the failure to bring an entire agreement clause to the attention of the other party are all equitable circumstances which a court will be sympathetic to in considering whether to set aside an entire agreement provision. According to one author, "judges are enforcing entire agreement clauses if they think the evidence of the extrinsic evidence is weak. Rather than rejecting the evidence for lack of probity, it is easier to say the entire agreement clause means they don't have to even weigh the evidence. On the other hand, if they think the evidence is strong, then they use one of the methods for avoiding this clause."[20] It is important to appreciate that there are competing authorities that will allow the court to uphold or set aside the entire agreement provision. The presence of equitable grounds and inequality of bargaining power can tip the scale in favour of the entire agreement provision being set aside.

VIII. Conclusion

It is important to understand the purpose behind the respective boilerplate provisions and the impact they have on our clients' rights. These clauses should not be ignored and we need to ensure that we are proactive in negotiating these provisions to suit our clients' individual circumstances.

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[18] [1995] 3 W.W.R. 324 (B.C.C.A.).
[19] *Ibid*. at para 42.
[20] Jan Weir, "Commercial Litigation, Entire Agreement Clauses, Disclaimers", The Lawyer's Weekly, Vol. 19, No. 47, April 21, 2000.