



2022 Client and In-House Counsel Update

Welcome

June 8, 2022




Contract Fundamentals

Jurisdiction Clauses

The information and comments herein are for general information and are not intended as advice or opinion to be relied upon in relation to any circumstances. For application of the law to specific situations, you are encouraged to seek legal advice.

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How many of you have seen and/or used jurisdiction clauses in a contract?



Choice of forum ≠ Choice of Law

- Choice of Forum – indicates the **jurisdiction(s)** where the parties will have their dispute heard
- Choice of Law – indicates the **law** which governs their potential dispute



Sample Clauses

This Agreement is governed by the laws of the Province of Ontario

The Corporation and each Participant irrevocably submits to the exclusive jurisdiction of the courts of competent jurisdiction in the Province of British Columbia in respect of any action or proceeding



Importance of Forum Selection Clause

- Failure to include = risk of challenge to jurisdiction
- Certainty...or is there?



Enforceability of Forum Selection Clauses

- Test: *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27
- Commercial v. Consumer context
- Sophisticated parties
- Awareness
- The Covid effect on the rise of tech



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Settlement Privilege

Disclosure obligations in multi-party litigation

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*If a plaintiff settles with one defendant,
when / what does it have to tell the other
defendant(s)?*



Refresher

- *Mary Carter* and *Pierringer* agreements

Tallman Truck Centre Limited v KSP Holdings Inc, 2022 ONCA 66

- Tallman entered into a *Pierringer*-type agreement with one defendant
- Tallman disclosed the agreement to the other defendant (KSP) three weeks later (after an inquiry from KSP's counsel)
- KSP brought a motion to permanently stay the action on the grounds that Tallman failed to *immediately* disclose the settlement
- Motion granted - decision upheld by the Court of Appeal



To disclose or not to disclose?

- Does the agreement “change the landscape of the litigation”?
- Does the agreement “change the adversarial position of the parties set out in the pleadings into a cooperative one”?



What are your disclosure obligations?

- Entire agreement or key terms?
- Settlement amount?
- Should you wait for a request for disclosure?
- Timing of disclosure?



Key takeaways

- Do not wait for a request for disclosure from defendant's counsel
- Obligation is on the plaintiff to disclose immediately
- Cannot hide behind settlement privilege and only disclose "key terms"
- Settlement amount can be redacted



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Bankruptcy and Insolvency

What You Should Know

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Bankruptcy Proceedings: 101

- Bankruptcy (*trustee in bankruptcy*)
- Receivership (*secured creditor*)
- Restructuring (*debtor in possession*)



Creditor Considerations

- Give it back!
- Two wrongs make a right
- Prove it!
- Getting a promotion



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Q & A

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