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Contracting Out Liability for Negligent Pre-Contractual Misrepresentation

This article examines the extent to which entire agreement clauses (EACs) and non-reliance clauses (NRCs) are enforceable to preclude actions for negligent pre-contractual misrepresentations. It is argued that courts could improve legal certainty and contractual fairness by adopting two distinct legal rules to be applied, respectively, to contracts between sophisticated parties and in adhesion contracts. First, it is suggested that in contracts between sophisticated parties only specific contractual barriers to actions should provide a complete defence against negligent misrepresentation claims. Under this rule, the exclusionary effect of EACs and NRCs would be achieved only if an express term of the contract is inconsistent with the pre-contractual statement on which the plaintiff bases their tort claim. Second, it is proposed that in contracts of adhesion EACs and NRCs should be regarded as presumptively unconscionable, thereby precluding sophisticated parties from using such clauses as a shield against tort claims for negligence misrepresentations.

Dans cet article, nous examinons dans quelle mesure les clauses d'accord global (CAG) et les clauses de non-recours (CNR) sont exécutoires pour exclure les actions pour fausses déclarations précontractuelles négligentes. Nous soutenons que les tribunaux pourraient améliorer la certitude juridique et l'équité contractuelle en adoptant deux règles juridiques distinctes à appliquer, respectivement, aux contrats entre parties averties et aux contrats d'adhésion. Premièrement, il est suggéré que dans les contrats entre parties averties, seules des barrières contractuelles spécifiques aux actions devraient fournir une défense complète contre les réclamations pour fausse déclaration négligente. En vertu de cette règle, l'effet d'exclusion des CAG et des CNR ne serait obtenu que si une clause expresse du contrat est incompatible avec la déclaration précontractuelle sur laquelle le demandeur fonde son action en réparation. Deuxièmement, il est proposé que, dans les contrats d'adhésion, les CAG et les CNR soient considérées comme présumées inadmissibles, empêchant ainsi les parties averties d'utiliser de telles clauses comme rempart contre les actions en réparation pour fausses déclarations négligentes.

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Introduction

This article concerns the extent to which contract barriers to actions for negligent pre-contractual misrepresentations are enforceable under the Canadian common law of contract. Despite their widespread use in commercial contracts between legally sophisticated parties and boilerplate clauses in adhesion contracts, the legal significance of such clauses is far from definitive, and their effectiveness in shielding contracting parties against claims in tort for negligent misrepresentations is subject to several limitations. On several occasions, Canadian courts have given effect to contract barriers to tort actions and prevented pre-contractual statements

from being legally operative;[1] in other instances, they have disregarded these barriers and recognized the validity of tort claims based on statements external to the contract.[2] These competing approaches have created uncertainty over the extent to which parties to a commercial agreement may effectively exclude tort claims for negligent misrepresentation based on statements made during contractual negotiations.

Contracting parties may draft two broad types of contract clauses to preclude actions for negligent pre-contractual misrepresentations. The first is the entire agreement clause (EAC) proper or the integration clause, which is usually phrased along the following lines: "This writing constitutes the final and entire agreement between the parties with respect to all the matters therein referred to and there are no other agreements, understandings, promises, representations, warranties, or conditions of any kind, oral or written, expressed or implied, which are not merged into this contract and superseded by it." By stating that the contracts' full terms may be found in the written document containing the clause, parties aim to identify the exclusive source of contractual obligations, thereby excluding any liability for claims arising from statements external to the written contract.

The second type is the non-reliance clause (NRC), or the disclaimer clause, which is usually phrased along the following lines: "No reliance is placed by any party on any warranty, representation, opinion, advice or assertion of fact made by any party, its directors, officers, employees or agents, to any other party, its directors, officers, employees or agents, except to the extent that it has been reduced to writing and included in this agreement." By stating that the parties have not relied on any representations other than those set out in the contract, the NRC specifically aims to prevent parties from successfully establishing the constituent elements of negligent misrepresentation, such as reasonable reliance on pre-contractual statements or duty of care. Although the distinction between EACs and NRCs is articulated in the relevant case law,[3] contracts often contain elements of integration clauses and disclaimer clauses within the same

1. E.g., *Bow Valley Husky Bermuda Ltd v Saint John Shipping Ltd*, [1997] 3 SCR 1210 [*Bow Valley*]; *No 2002 Taurus Ventures Ltd v Intrawest Corp*, [2007] BCJ No. 812 [*Taurus BCCA*]; *Houle v Knelsen Sand and Gravel Ltd*, 2016 ABCA 247 [*Knelsen ABCA*], leave to appeal refused *Knelsen Sand and Gravel Ltd v Houle*, 2017 CarswellAlta 381, 2017 CarswellAlta 382.

2. E.g., *Betker v Williams* (1992), 63 BCLR (2d) 14 (BCCA); *Zippy Print Enterprises Ltd. v Pawliuk*, [1994] BCJ No. 2778 [*Zippy*]; *Feldstein v 364 Northern Development Corp*, 2017 BCCA 174 [*Feldstein BCCA*].

3. E.g., *Carman Construction Ltd v Canadian Pacific Railway Co*, [1982] 1 SCR 958 [*Carman*]; *BG Checo International Ltd v British Columbia Hydro and Power Authority*, [1993] 1 SCR 12 [*BG Checo*].

broadly worded EAC. Consequently, several decisions by lower courts use the term EAC loosely to denote clauses comprising *both* an integration clause and a disclaimer clause. Throughout the discussion, I refer to both types of contract barrier to tort action for negligent misrepresentation as EACs proper and NRCs.

Contract scholars in the common law tradition have long debated the implications of EACs and NRCs on tort claims.[4] In the specific context of the Canadian common law of contract, academic commentaries have examined the impact of EACs on negligence misrepresentation claims mostly in conjunction with the impact on claims in contract.[5] Commentators have often emphasized the lack of a coherent, unified rationale underlying the operation of EACs and the resulting legal uncertainty.[6] However, it is worth emphasizing that the impact of an EAC on contractual adjudication is distinct and largely independent of its impact on tort claims. Therefore, the two aspects warrant separate analyses. In this article, I focus solely on the impact of EACs and NRCs on tort claims for negligence misrepresentation and refrain from discussing the effects of such clauses on tort claims for fraudulent misrepresentation or claims in contract.[7] Specifically, I examine

4. Elizabeth Cumming, "Balancing the Buyer's Right to Recover for Pre-contractual Misstatements and the Seller's Ability to Disclaim Express Warranties" (1992) 76:5 Minn L Rev 1189; Jared M Levin, "A Proposed Penalty Default Rule Governing a Seller's Ability to Disclaim Liability for Pre-contractual Misrepresentations" (1997) 2 Colum Bus L Rev 399; Kevin Davis, "Licensing Lies: Merger Clauses, the Parol Evidence Rule and Pre-contractual Misrepresentations" (1999) 33:2 Val U L Rev 485; Catherine Mitchell, "Entire agreement clauses: Contracting out of contextualism" (2006) 22 JCL 222 at 225; Glenn D West & W Benton Lewis Jr, "Contracting to Avoid Extra-Contractual Liability—Can Your Contractual Deal Ever Really Be the "Entire" Deal?" (2009) 64:4 The Business Lawyer 999; Kabir Masson, "Paradox of Presumptions: Seller Warranties and Reliance Waivers in Commercial Contracts" (2009) 109:3 Colum L Rev 503; Russell Korobkin, "The Borat Problem in Negotiation: Fraud, Assent, and the Behavioral Law and Economics of Standard Form Contracts" (2013) 101 Cal L Rev 51; Jonathan Morgan, "Opting for 'Documentary Fundamentalism': Respecting Party Choice for Entire Agreement and Non-Reliance Clauses," in Paul S Davies & Magda Raczynska, eds, *Contents of Commercial Contracts: Terms Affecting Freedoms* (London: Bloomsbury Publishing Plc, 2020) at 239–266.

5. Francis Dawson, "Parol Evidence, Misrepresentation and Collateral Contracts" (1982) 27:3 McGill LJ 403; Perell, "A Riddle Inside an Enigma: The Entire Agreement Clause" (1998) The Advocates' Q. 287; MH Ogilvie, "Entire Agreement Clauses: Neither Riddle nor Enigma," (2008) 87 Can. B. Rev. 626 at 645; Geoff R Hall, *Canadian Contractual Interpretation Law* (Toronto: Lexis Nexis, 2016) at 318; Angela Swan, Jakub Adamski & Annie Na, *Canadian Contract Law*, 4th ed (Markham: Lexis Nexis Canada, 2018) at 752; John D McCamus, *The Law of Contracts*, 3d ed (Toronto: Irwin Law Inc., 2020) at 790.

6. Perell, *ibid;* Hall, *ibid*; Cynthia L Elderkin & Julia Shin Doi, *Behind and Beyond Boilerplate: Drafting Commercial Agreements*, 4th ed. (Toronto: Thomson Canada Limited, 2018) at 45. See, however, Ogilvie, *supra* note 5.

7. EACs impacts on contractual adjudication by interplaying with the doctrines of contractual interpretation, collateral contract and implication of terms. For comments on the relationship between EACs and contractual adjudication, see Perell, *supra* note 5; Ogilvie, *ibid;* Hall, *supra* note 5; Swan, Adamski & Na, *supra* note 5 at 752; McCamus, *supra* note 5 at 790; Morgan, *supra* note 4 at 239–266; Bertolini, "Unpacking entire agreement clauses: On the (elusive) search for contractually induced

the interplay between these EACs and NRCs on the principle of concurrent actionability of actions in tort and contract, the legal regime of exculpatory clauses and the doctrine of unconscionability.

In assessing the enforceability of EACs and NRCs, courts must strike a balance between the buyer's right to recover for pre-contractual misstatements and the seller's ability to negotiate contractual barriers to misrepresentation actions. This paper argues that the appropriate balance between these competing goals varies depending on whether such clauses are found in fully negotiated contracts between sophisticated parties or in adhesion contracts. In fully negotiated contracts, the parties' relatively more balanced bargaining power and greater homogeneity in the parties' legal sophistication emphasize the need for promoting the parties' common goals and intentions. By contrast, in standardized form contracts, the contractual relationship is systematically skewed to the disadvantage of one party: unsophisticated purchasers are particularly vulnerable to exploitation by terms that serve only the sophisticated seller's interests. In this context, the main objective of contractual adjudication is to protect the vulnerable party who cannot meaningfully participate in contract design. Contracts of adhesion entail a shift in the normative focus of contract law from the enforcement of the common purpose of the parties to the protection of the party at a disadvantage.

That EAC and NRC legal regimes should reflect the changing normative needs underlying different contractual settings is partially reflected in current Canadian case law. As discussed in this paper, in assessing the enforceability of EACs and NRCs, Canadian courts consider the characteristics of the transactional setting within which these clauses operate, including the inequality of bargaining power between parties, their level of legal sophistication, and whether the contract containing such clauses is fully negotiated or a contract of adhesion. Moreover, commentators have highlighted—albeit not with specific respect to the enforcement of EACs and NRCs—the distinctive nature of the issues involved in standard form agreements compared to specifically negotiated contracts.[8] However, both scholarly and jurisprudential debates have seldom inquired into whether courts could incrementally improve the

formalism in contractual adjudication" (2021) 66 McGill L J (forthcoming).

8. Peter Benson "Radin on Consent and Fairness in Consumer Boilerplate: A Brief Comment" (2013) 54 Can. Bus. LJ 282; Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton: Princeton University Press, 2014); Jason MacLean, "The Death of Contract, Redux: Boilerplate and the End of Interpretation" (2016) 58:3 Can Bus LJ 289; John Enman-Beech, "When Is a Contract Not a Contract?: *Douez v Facebook Inc*. and Boilerplate" (2017) 60:3 Can Bus LJ 428.

current case law of EACs and NRCs in terms of greater legal certainty, efficiency, and fairness.

This article's central thesis is that courts may improve legal certainty and contractual fairness by more markedly differentiating the legal treatment of EACs and NRCs in fully negotiated contracts between sophisticated parties and in adhesion contracts. More specifically, it is suggested that courts adopt two distinct legal rules. First, it is suggested that in contracts between sophisticated parties only *specific* contractual barriers to actions should provide a complete defence against negligent misrepresentation claims. Under this rule, the exclusionary effect of contractual barriers to tort actions would be achieved *only* if an express term of the contract contradicts or is inconsistent with the pre-contractual statement on which the plaintiff bases their tort claim. The adoption of this rule would have two legal implications. On the one hand, in force of the proposed legal change, generically worded EACs would not be given effect to preclude claims in tort for negligent misrepresentation that are grounded on specific statements external to the contract. This would improve legal certainty, since current case law fails to provide clear indications over the degree of specificity required for the enforceability of EACs and NRCs. On the other hand, the proposed rule would add a restrictive qualification to the principle—long-established in Canadian case law—that pre-contractual negligent misrepresentations are actionable as both a breach of contract and negligent misrepresentation.[9] The proposed legal change would generalize the application of the rule identified in Iacobucci's dissenting opinion in *BG Checo*,[10] which states that when the express terms of a contract provides a contractual obligation that is *coextensive* with the common law duty of care the plaintiff cannot bring a concurrent action in tort for negligent misrepresentation and is confined to whatever remedies are available under the law of contract.

Second, it is argued that in contracts of adhesion courts could improve legal certainty and contractual fairness by regarding EACs and NRCs as *presumptively* unconscionable and therefore not enforceable by courts to preclude tort claims for negligent misrepresentation. This presumption would preclude sophisticated parties from using EACs and NRCs as a shield against tort claims for negligence misrepresentations, thereby incentivising them to enhance the clarity of pre-contractual communications. This rule would improve the protection of unsophisticated representees. Canadian case law tends to treat EACs and NRCs in adhesion contracts as

9. *Queen v. Cognos Inc.*, [1993] 1 SCR 87 [*Cognos*]; *BG Checo, supra* note 3.
10. *BG Checo, supra* note 3.

exclusionary clauses and assesses their enforceability based on a *Tercon* unconscionability analysis.[11] The proposed presumptive unconscionability would release the unsophisticated, inexperienced representee from the burden of persuading the court that the elements of a *Tercon* analysis have been met, allowing them to bring action against the careless representor in tort.

The proposed differentiation in the legal treatment of EACs and NRCs is consistent with the recent emerging trend in the Supreme Court of Canada (SCC) case law. The decisions in *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*,[12] *Douez v Facebook, Inc*,[13] and *Uber Technologies Inc v Heller*[14] were based on the recognition that specifically negotiated contracts and standard-form agreements raise different issues with respect to interpretation and application, such that it is insufficient to have only one set of legal principles that is uniformly applied to both types of contracts.

The discussion is organized as follows. Section I examines the issue of concurrence of tort and contract actions and identifies the factors considered by courts in determining the enforceability of EACs as a barrier to tort actions for negligent misrepresentations. Section II discusses the two strategies most commonly employed by litigants to defeat the enforceability of EACs: narrow construction and unconscionability. Finally, Section III investigates the normative dimension underlying the enforceability of contract barriers to tort actions and attempts to identify incremental improvements in the legal regime concerning such clauses.

I. *Enforcing EACs and NRCs*

1. *Concurrence of tort and contract*

Actions in tort for negligent misrepresentations committed through pre-contractual statements raise the preliminary issue of whether a plaintiff who is in a contractual relationship with the defendant can sue the defendant in tort, when the duty relied upon by the plaintiff in tort is also an expressly defined contractual duty. This issue is of preliminary importance to our discussion, as any limitation to the concurrent actionability of tort and contract actions may have the effect of precluding a claim for negligent misrepresentation, regardless of the existence of any contractually defined limitations to tort actions. If concurrent actionability is limited or excluded,

11. *Tercon Contractors Ltd v British Columbia (Transportation and Highways)*, 2010 SCC 4 [*Tercon*].
12. 2016 SCC 37 [*Ledcor*].
13. 2017 SCC 33 [*Facebook*].
14. 2020 SCC 16 [*Uber*].

a tort claim may be precluded *independent of the existence in the contract of an EAC or an NRC.*

In *Central Trust Co v Rafuse*, the SCC recognized the general rule of concurrency between claims in contract and in tort.[15] Le Dain J., writing for a unanimous Court, adopted the position that both the duty of care and liability may be concurrent in contract and tort. It falls to the plaintiff to select the most advantageous cause of action. Subsequently, the SCC addressed the issue of concurrency of tort and contract in the specific context of negligent misrepresentation in *Queen v Cognos Inc*[16] and *BG Checo International Ltd. v British Columbia Hydro and Power Authority.*[17] In both *Cognos and BG Checo*, the SCC established that an action in tort for negligent misrepresentations is not precluded by the facts that the alleged misrepresentations are made in a pre-contractual setting and that a contract is subsequently entered into by the representee and representor. It is thus a well-established, general principle in Canadian case law that pre-contractual misrepresentations are actionable as *both* a breach of contract and negligent misrepresentation. Put otherwise, an action in tort is not precluded by the mere existence of a contractual relationship between the plaintiff and defendant.

One issue that tends to arise is whether *specific* contract terms can nonetheless limit or exclude liability for negligent misrepresentation. In *BG Checo*, the SCC established that parties may contractually allocate their rights and duties in a way that differs from how it would be done in accordance with tort law.[18] La Forest and McLachlin JJ., writing for the majority, identified three different ways in which contractual duties may relate to tort duties. First, the contract may stipulate a *higher* duty than that imposed by the law of tort.[19] Under this scenario, which typifies the vast majority of commercial transactions, parties are unlikely to sue in tort, since they cannot recover through a tort action the higher contractual duty. Second, the contract may stipulate a *lower* duty than that which would be established by the law of tort in similar circumstances. The majority of EACs and NRCs fall within the second class of cases, as parties seek to limit their exposure to tort liability by contractually defining a duty or liability that is lower than that which would be established by the law of tort. Third, the duty in contract and in tort may be *co-extensive* when the

15. *Central Trust Co v Rafuse*, [1986] 2 SCR 147 at para 51 [*Trust*].
16. *Supra* note 9.
17. *Supra* note 3.
18. *BG Checo, ibid* at para 15.
19. *BG Checo, ibid* at para 17.

contract expressly provides for a duty that is the same as that imposed by the common law.

The SCC ruled that in *all* these scenarios, the plaintiff is permitted to sue concurrently in tort and in contract. The majority concluded that the plaintiff was entitled to claim against the defendant in tort. In his dissenting opinion Iacobucci J. adopted the position that where a duty arising in tort is *co-extensive* with a duty created by an express term of the contract, the plaintiff should be limited to whatever remedies are available under the contract.[20] He therefore articulated a bifurcated rule of law: if the pre-contractual representation relied on by the plaintiff becomes an express term of the subsequent contract, the plaintiff is precluded from suing in tort and is limited to the remedies available in contract; if the pre-contractual representation is not incorporated in an express term of the contract, the plaintiff will be able to use whatever remedies are available in the law of tort. Since, in the case at bar, the common law duty of care was co-extensive with a duty imposed by an express contract term, he concluded that the plaintiff was barred from exercising a concurrent action in tort.[21]

Iacobucci's line of reasoning provides a useful reference point when discussing possible incremental improvements in the current legal treatment of EACs and NRCs. Under the bifurcated rule identified by Iacobucci, if the pre-contractual representation relied on by the plaintiff is incorporated into an express contract term, the plaintiff's claim in tort is barred *independently of the operation of an EAC or NRC*—the tort claim is precluded not in virtue of a contract barrier to action but because of an exception to the general rule of concurrency of tort and contract.

In *Cognos*, Iacobucci J., writing in this case for the majority, further emphasized that the admissibility of a representee's claim in tort depends on whether a specific contractual duty is created by an express term of the contract that is co-extensive with the common law duty of care that the representee alleges the representor to have breached.[22] He also emphasized that in cases in which concurrency of tort and contract is admitted, the contract can still play an important role in determining whether or not a claim for negligent misrepresentation will succeed.[23] More specifically, an express contract term can bar an action in tort by excluding or limiting either the *liability* or the *duty.*[24] Clauses that negate the existence of a duty

20. *BG Checo, ibid* at para 132.
21. *BG Checo, ibid* at para 135.
22. *Ibid* para 37.
23. *Ibid* at para 38.
24. *Ibid* at para 132.

of care are often referred to as "disclaimers" or "non-reliance provisions."[25] In both cases, "the plaintiff may not allege a wider liability in tort in order to circumvent the terms of the contract."[26] Since, in the case at bar, the exclusion clauses included in the contract were not sufficiently broad to limit the defendant's liability for the breach of duty of care, Iacobucci concluded that the plaintiff's action in misrepresentation was not precluded by the contract.

To summarize, the foregoing discussion has identified the following important points: An action in tort for negligent misrepresentation is not precluded by the existence *per se* of a contractual relationship between plaintiff and defendant. However, parties to a contract can nonetheless limit or exclude liability for negligent misrepresentation through express contractual provisions. When a specific contractual duty created by an express term of the contract is co-extensive with the common law duty of care, the plaintiff is still entitled to claim against the defendant in tort. In Iacobucci's important dissenting opinion, in this latter scenario the plaintiff is barred from exercising a concurrent action in tort and is limited to the remedies available in contract.

Having examined the general availability, as between the parties to a contract, of claims in tort that parallel those available in contract, the discussion will now examine the *conditions* under which courts may enforce specific contract terms that limit or exclude actions for negligent misrepresentations.

2. *Conditions favouring enforceability*

a. *Specifically worded EACs and NRCs*

Courts have routinely given effect to EACs or NRCs in situations involving commercial contracts between sophisticated businesspeople. A key example of NRCs' effectiveness is *Carman Construction Ltd. v Canadian Pacific Railway Co.*[27] Carman Construction Limited (Carman) was contracted to construct a railway siding for the defendant, Canadian Pacific Railway Company (CPR), who wished to have a railway siding widened and sought tenders to carry out rock excavations. The bidding documents did not disclose the quantity of rock to be removed. Carman sought information from a CPR employee authorized to provide that information. Mid-project, Carman learned that the requisite excavations

25. *Ibid* at para 114.
26. *Ibid* at para 132.
27. See *Carman, supra* note 3. See, for comments, Emil J Hayek, "Collateral Contracts and the Supreme Court of Canada: Carman Construction Ltd. v. Canadian Pacific Railway Co." (1983) 7:3 Can Community LJ 328

were substantially more extensive than were first estimated based on the CPR employee's representation. When CPR refused Carman's demand for an additional payment, Carman sought damages from CPR and sued both in contract for breach of collateral warranty and in tort for negligent misrepresentation. The construction contract included the following NRC, specifically excluding reliance on pre-contractual representations:

> It is hereby declared and agreed by the Contractor that this Agreement has been entered into by him on his own knowledge respecting the nature and conformation of the ground upon which the work is to be done, the location, character, quality and quantities of the material to be removed, the character of the equipment and facilities needed, the general and local conditions and all other matters which can in any way affect the work under this Agreement, and *the Contractor does not rely upon any information given or statement made to him in relation to the work by the Company*.[28] [Emphasis added.]

The trial judge found that a negligent misrepresentation had been proven but that the existence of the NRC saved the defendants from liability. The Ontario Court of Appeal upheld this finding. The SCC held that the respondent was not liable for negligent misrepresentation, as the contractual disclaimer clause limited the duty of care owed by the CPR to Carman.

b. *Generically worded EACs*

The SCC case law does not address the issue of whether a *generically* worded EAC, which does not expressly exclude liability for negligent misrepresentation, may preclude a claim in tort. Lacking clear guidance by the SCC, lower courts have assessed the enforceability of contract barriers to tort action by considering the degree of specificity of the contract language *together* with other factors, such as 1) the level of sophistication of the parties, 2) the inequality of bargaining power between the parties, and 3) whether the EAC or NRC has been brought to the attention of the party sought to be bound.

The British Columbia Court of Appeal in *No. 2002 Taurus Ventures Ltd. v Intrawest Corp.* provides the most clear and articulate application of these principles to a generically worded EAC.[29] Intrawest operated a ski resort and planned new ski runs in an area that it planned to develop, which was located outside the current ski area's boundary. Its marketing materials described the area as a ski-in, ski-out hideaway and indicated

28. *Carman, ibid* at 961.
29. See *Taurus BCCA*, *supra* note 1.

that it would have access to lots from three proposed ski runs. The contract made no express provision as to who would build the ski runs and trails or when they would be built. Taurus agreed to purchase a vacant lot. The contract included an EAC, which stated:

> This Contract is the entire agreement between the parties and there are no other terms, conditions, representations, warranties or collateral agreements, express or implied, whether made by the Vendor, any agent, employee or representative of the Vendor or any other person. […][30]

At the time of the hearing, the ski runs still had not been completed. Taurus sued for breach of collateral contract, rescission of the contract, and damages for misrepresentation by Intrawest. It alleged that the purchase of the building lot had been induced by Intrawest's assurance that ski access to the lot would be built by vendors. At trial, the central issue was whether pre-contractual representations could give rise to damages and whether the EAC was enforceable to preclude liability for negligent misrepresentation.

The trial judge relied on Iacobucci's minority position in *Cognos* in support of his conclusion that Taurus was not precluded from bringing an action for negligent misrepresentation despite having entered into a contract. He concluded that because no express provision was made in the contract of sale dealing with ski access to the lot, Taurus was entitled to maintain an action for negligent misrepresentation. He also found that "a limitation written into a contract does not, in the absence of express language, exclude representations made during pre-contractual negotiations."[31]

The BC Court of Appeal reversed the trial judge's decision and found that negligence need not be expressly referred to in an exclusion clause to exclude an action in negligence.[32] The appellate court relied on *Bow Valley Husky (Bermuda) Ltd. v Saint John Shipbuilding Ltd.,*[33] in which the SCC held that the exclusion clauses in the contract, none of which referred expressly to negligence, nonetheless excluded liability for negligent failure to warn. The court also emphasized that both parties were sophisticated commercial entities.[34] The purchaser had extensive experience in real estate development and had dealt extensively with the vendor in the past. Therefore, the contract was not a "standard adhesion contract." The contract contained a detailed description of the lot and

30. *Ibid* at para 22.
31. *Intrawest Corp. v No. 2002 Taurus Ventures Ltd.*, [2006] B.C.J. No. 365 [*Taurus BCJ*] at para 83.
32. *Taurus BCCA*, *supra* note 1 at para 59.
33. *Bow Valley*, *supra* note 1.
34. *Ibid* at para 59.

the responsibilities and obligations of the various parties involved in the development. Moreover, the purchaser had several opportunities to address any concerns they may have had about the details of the development. In these circumstances, the contract was clearly intended to govern the relationship between the parties, and it would not accord with commercial reality to give no effect to the EAC in determining whether Taurus could claim a tort remedy. The court concluded that the EAC excluded the plaintiff from claiming in tort for negligent misrepresentation. This decision has become the precedential basis for several subsequent decisions enforcing EACs to exclude negligent misrepresentations.[35]

The same favorable approach toward the enforcement of EACs has been followed by the Alberta Court of Appeal in *Houle v Knelsen Sand and Gravel Ltd.*[36] Charles and Ernie Houle (Houles) discovered a parcel of land that they believed to contain valuable deposits of gravel. They pursued development of the gravel deposits with a company that had obtained an exploration permit for the property and that engaged Silvatech Resource Solutions to assess the deposit. They contacted Knelsen Sand and Gravel Ltd. about the gravel deposit and provided them with the Silvatech data. A formal contract was prepared by counsel and signed by the parties for the price of $800,000 payable by a deposit, followed by an initial payment and then a final payment the following year. The contract included the following EAC:

> The Purchaser acknowledges that he has inspected the property and that he is purchasing the property as is and that there is no representation, warranty, collateral agreement or condition affecting the property or this offer other than as expressed herein in writing.[37]

When Knelsen began excavations, it quickly became apparent that the lands contained far less gravel than estimated. Knelsen failed to make the final contract payment, and the Houles sued. Knelsen counterclaimed in tort for misrepresentation, alleging that the Silvatech data constituted a misrepresentation on which it had relied to its detriment.

The Court of Appeal found that the EAC precluded liability for misrepresentations made during negotiations. The court noted that "in this case the EAC was inserted after an express request by the Houles, and in direct response to the negotiations about the sale of the rights to extract the

35. E.g., *0715257 B.C. Ltd v Longiaru*, [2008] BCJ No 1808; *Cordova Housing Holdings Inc v Wheeldon*, [2015] BCJ No 2709.
36. *Knelsen ABCA, supra* note 1.
37. *Ibid* at para 4.

gravel."[38] Thus, the EAC was a means of allocating the risk concerning the actual quantity of gravel, which was well known to the parties.[39]

In Ontario, lower courts have adopted a similar approach by implementing EACs in commercial contracts between sophisticated parties.[40] A significant recent example is provided by the decision of the Ontario Court of Appeal in *Manorgate Estates Inc. v Kirkor Architects & Planners*.[41] The plaintiff, a real estate developer, had enlisted the defendant to provide architectural consulting services for a construction project. The plaintiff alleged that prior to entering into the consulting agreement, the defendant falsely represented the costs of the construction project and that they had entered into the construction project in reliance on the alleged negligent misrepresentation. The agreements contained an EAC that explicitly excluded claims based on any pre-contractual representations. The court upheld the lower judge's decision that the EAC operated as a complete defence to the appellants' claim of alleged negligent misrepresentation.[42] In arriving at this conclusion, both decisions considered the two parties' levels of industry experience. Finally, contracting parties can increase the likelihood that the judge will enforce an EAC by explicitly stating in the contract that the agreement has been fully negotiated between sophisticated parties.[43] Analysis of the case law shows that Canadian courts are generally willing to enforce EACs and NRCs to preclude claims for negligent misrepresentation in contracts that have been fully negotiated between sophisticated parties and that have been professionally drafted and when the EAC specifically excludes pre-contractual statements.

II. *Defeating EACs and NRCs*

Two strategies are frequently employed to defeat EACs. The first relies on the qualification of EACs as exclusion clauses to be narrowly construed against the party seeking to invoke them. The second relies on the relatively more recent doctrine of unconscionable terms. Both strategies have been successfully employed to defeat EACs in adhesion contracts, particularly in the context of transactions conducted on a take-it-or-leave-it basis.

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38. *Ibid.*
39. *Ibid* at para 23.
40. *Hammer v. Cleeves*, 2015 ONSC 2547.
41. *Manorgate Estates Inc v Kirkor Architects & Planners*, [2018] O.J. No. 3596 [*Manorgate ONCA*]. See, also, *Haliburton Forest & Wildlife Reserve Ltd v Toromont Industries Ltd*, [2016] O.J. No. 2960 (enforced-Tercon applied and EAC found not unconscionable).
42. *Manorgate Estates Inc v Kirkor Architects & Planners,* [2017] O.J. No. 6243 [*Manorgate OSCJ*].
43. *Curtis Chandler v Karl Hollett*, 2017 ONSC 2969.

1. *Narrow construction*

Canadian courts have often regarded EACs as a special type of exclusion clause whose purpose is to limit the mutual obligations of contracting parties to what has been committed to writing and, consequently, to exclude liability for any statement external to the contract.[44] A corollary of the qualification of EACs as exclusion clauses is that they must be narrowly constructed against the party seeking to invoke them. Courts have adopted a strict approach to interpreting EACs in contracts induced by negligent misrepresentation where an unsophisticated party is involved. As previously noted, in these circumstances, courts have found generically worded EACs to be unenforceable unless notice of the clause has been brought home to the unsophisticated party during the negotiation.

The most coherent and detailed application of this approach is found in *Zippy Print Enterprises Ltd. v Pawliuk*, [1994] BCJ No. 2778.[45] A franchisor made pre-contractual statements about estimated gross sales, expenses, and profits to induce prospective franchisees to enter a licence agreement for the operation of the franchise. After entering the contract, the licensee learned that many of the representations were false. The franchise eventually failed. The license agreement contained the following two clauses:

> *It is expressly understood and agreed that the Company has made no representations, inducements, warranties or promises whether direct, indirect, or collateral, oral or otherwise, concerning this Agreement, the matters herein, the business licensed hereunder or concerning any other matter, which are not embodied herein.*
>
> *The Licensee acknowledges that he has conducted an independent investigation of the business licensed…The Company expressly disclaims the making of and the Licensee acknowledges that he has not received, any representation, warranty or guarantee, express or implied, as to the potential volume, profits or success of the business venture contemplated by this Agreement.*[46]

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44. See, e.g., *Shelanu Inc v Print Three Franchising Corp* (*Shelanu*), [2003] OJ No 1919 at para 31-32: the Ontario Court of Appeal unanimously held that EACs should be construed using the construction principles normally applied to exclusionary clauses set out by the SCC in *Hunter Engineering Co v. Syncrude Canada Ltd*, [1989] 1 SCR 426 [*Hunter*].

45. *Zippy, supra* note 2. See also *Beer v Townsgate 1 Ltd* (1997), 152 DLR (4th) 671 (ONCA), emphasizing that since the EAC was in fine print, it was not drawn to the attention of these respondents, the contract was signed in haste, in a frenzied atmosphere, with no opportunity for the unsophisticated purchasers to read it, there can be no reasonable expectation [the purchasers] were assenting to the clause.

46. *Zippy, ibid* para 30 (emphasis added).

The franchisor sued the franchisee for unpaid royalties and to enforce a non-competition clause. The franchisee counterclaimed damages for both breach of collateral agreement and for negligent misrepresentation. On appeal, the main issue was whether the plaintiff could rely on an EAC to avoid liability. After characterizing the misrepresentations by the franchisor as negligent, the court declined to enforce the EAC on the grounds that an EAC is an "exclusion clause" and that, as such, it must be narrowly interpreted. The Court stated, "If the clause does not specifically state that liability for negligence is excluded, then liability for negligence is not excluded."[47] On this basis, the court ruled in the franchisee's favour by awarding damages on the counterclaim.

The rationale underlying the strict approach in *Zippy* is the *Mendelssohn* principle, which holds that when a party is induced to enter into a contract by a misrepresentation, any clause excluding responsibility for the misrepresentation is not enforceable.[48] The court applied this principle in the context of a contract of adhesion and emphasized the importance of the clause being specifically drawn to the representee's attention. In a widely cited passage from the decision, Lambert stated:

> 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.[49]

In light of *Zippy*, parties that intend to exclude claims in tort for negligent misrepresentation should indicate specifically which prior statements are superseded by the written document and bring the EAC specifically to the attention of the counterparty. *Zippy* has become the precedential basis of several subsequent decisions in which EACs have been disregarded by courts to permit claims for negligent misrepresentations based on pre-contractual statements.[50]

The British Columbia Court of Appeal has recently confirmed this approach in *Feldstein v 364 Northern Development Corp.*[51] Mr. Feldstein had been offered a position as a software engineer by 364. Prior to accepting the offer of employment, Feldstein disclosed that he had cystic fibrosis and

47. *Ibid* at 34.
48. *Mendelssohn v Normand Ltd*, [1970] 1 QB 177 (CA).
49. *Ibid* at para 45.
50. See, e.g., *Taggart v No 236 Seabright Holdings Ltd*, [2008] BCJ No 2004.
51. *Feldstein BCCA, supra* note 2.

inquired about the eligibility requirements for long-term disability (LTD) coverage under the company's benefits plan. The Chief Information Officer of 364 advised Feldstein that he would qualify for LTD upon proof of good health after three months of continuous employment. He understood this to mean that his pre-existing cystic fibrosis would not prevent him from receiving coverage in the likely event that he would need it if he worked for 364 for three months without illness. The employment contract included the following EAC:

> This Agreement constitutes the entire agreement between the parties and supersedes all prior communications, representations, understandings and agreements whether verbal or written between the parties with respect to the subject-matter hereof. No amendment, variation, representations or communications shall affect this Agreement or the Employee's employment with the Company unless it is made in writing, signed by the parties hereto, and states expressly that it is intended to modify this Agreement.[52]

After working for 364 for one year, when Feldstein applied for LTD, he was advised that he did not qualify for full benefits. Feldstein sued 364 for negligent misrepresentation.

364 argued that the EAC in the employment contract meant that Feldstein could not sue for negligent misrepresentation. The trial judge rejected this argument based on two arguments. First, Power J. applied the rule invoked by Iacobucci in *Cognos*.[53] She found no specific contractual duty that was co-extensive with the common law duty of care: the subject matter of the impugned statement (how "proof of good health" was related to the eligibility requirements for full LTD coverage) did not become an express term of the contract (the contract merely confirmed that Mr. Feldstein would be entitled to participate in any benefits plan that was available to employees). Second, the court applied the principle set out in *Zippy*.[54] Power J. noted that the contract included no express term that expressly excluded liability for negligence and which would prevail over the explicit, specific pre-contractual representation made by 364's Chief Information Officer. Therefore, the contract does not preclude the plaintiff's right to pursue his claim in tort. The trial judge concluded that 364 was liable for negligent misrepresentation and awarded Feldstein damages for loss of benefits.

52. *Ibid* at para 18.
53. *Feldstein v 364 Northern Development Corp*, 2016 BCSC 108 at para 110.
54. *Ibid* at para 111.

On appeal, 364 relied on *Taurus* to argue that negligence need not be expressly referred to in an EAC to exclude an action in negligence.[55] Further, Mr. Feldstein was not an unsophisticated party: he had negotiated beneficial terms and obtained legal advice prior to signing the contract. The British Columbia Court of Appeal rejected this ground of appeal based on two arguments. First, the court relied on *Bow Valley,* stating that exclusion clauses should generally be strictly construed against the party seeking to invoke them. Second, the court distinguished *Taurus,* in which the parties to a contract were commercially sophisticated actors and it was therefore appropriate to give broader effect to an exclusion clause. In the case at hand, although Mr. Feldstein obtained legal advice, he was not a commercially sophisticated actor.[56] Therefore, unlike in *Taurus,* the EAC could not be broadly construed to exclude liability for the pre-contractual misrepresentation.

Both *Zippy* and *Feldstein* show that the line of reasoning in *Taurus* can be reversed in contracts in which one of the parties is unsophisticated or has less bargaining power. Under these circumstances, the more specific pre-contractual statement is deemed by courts to prevail over a generically worded EAC. The prevailing force of the more specific pre-contractual representation can be grounded conceptually either on the narrow construction principle stated in *Bow Valley* or on the co-extensivity rule invoked by Iacobucci in *Cognos*.

2. *Unconscionability*

A second corollary of the qualification of EACs as exclusion clauses is the application of the SCC's construction approach, as stated in *Tercon Contractors Ltd v British Columbia (Transportation and Highways)*.[57] In *Tercon*, the SCC developed a three-part test to determine when an exclusionary clause is enforceable. First, the court must determine whether, as a matter of interpretation, the exclusion clause applies to the case. Second, if the exclusion clause applies, the judge must determine whether the exclusion clause was unconscionable at the time the contract was made, as might arise from situations wherein the bargaining power between the parties is unequal. Third, if the exclusion clause is held to be valid and applicable, the Court may nevertheless refuse to enforce the valid exclusion clause owing to the existence of an overriding public policy.

In several cases, courts have struck down an EAC based on the second component of the *Tercon* test. An example of this is the decision

55. *Feldstein BCCA, supra* note 2 at para 54.
56. *Ibid* at para 60.
57. *Supra* note 11.

of the Ontario Court of Appeal's decision in *Singh v Trump.*[58] The case involved a dispute between two individuals, Mr. Singh and Mrs. Lee, who purchased units in the Toronto Trump International Hotel. Both individuals were unsophisticated investors. They were enticed into purchasing units by alleged misrepresentations made by marketing material projecting impressive profit margins that never materialized. Mr. Singh and Mrs. Lee sued for rescission and damages, claiming that they had been misled by marketing materials. The agreement for purchase and sale and other contractual documents contained various EACs that could limit the ability to sue unless they were found to be invalid or unenforceable. The motion judge held that the plaintiffs' negligent misrepresentation claim was defeated by the EACs of the purchase agreement and related contracts.[59] In assessing the enforceability of the EACs, he relied on the *Tercon* test and concluded that it was not unconscionable to enforce such provisions.

The Ontario Court of Appeal held that the motions judge erred in enforcing the EACs to bar the plaintiffs' actions.[60] In light of the context in which the clauses were entered into, it would be unconscionable to enforce those clauses.[61] In applying the second component of the *Tercon* test (unconscionability), the court relied on the SCC's proposition in *ABB Inc. v Domtar Inc.,* according to which an exculpatory clause is unconscionable "where one party to the contract has abused its negotiating power to undue advantage of the other."[62] The court also relied on the *Zippy* principle, according to which a general exclusion clause cannot override a specific representation on a point of substance unless it has been drawn to the attention of that party to whom the representation was made.[63] The court found that the EAC functioned "as a trap to these unsurprisingly unwary purchasers."[64] The court emphasized that given the plaintiffs' "minimal investing experience"[65] and that the EAC "was well hidden within the agreement," such a clause "would mean nothing" to the plaintiffs.[66] They "could not have reasonably been expected to have understood that this [clause] meant that the [sellers] were exempting themselves from any

58. 2016 ONCA 747 [*Trump ONCA*], leave to appeal refused Trump v Singh, [2016] SCCA No 548. See also *2190322 Ontario Ltd v Ajilon Consulting, a division of Ajilon Canada Inc*, [2014] OJ No. 536.
59. *Singh v Trump*, [2015] OJ No 3660 at para 235.
60. *Trump ONCA, supra* note 59 at para 94.
61. *Ibid.*
62. *Ibid* at para 114 (quoting *ABB Inc v Domtar Inc* 2007 SCC 50, [2007] 3 SCR 461, at para 82).
63. *Ibid* at para 115 (quoting *Zippy* at para 45).
64. *Ibid* at para 116.
65. *Ibid.*
66. *Ibid* at para 118.

liability flowing from their misrepresentations that induced [them] to sign the contract in the first place."[67] The EAC contained in one of the contractual documents was "on even more unstable ground [as] it was not provided to either the [plaintiffs] until after they had signed the agreements of purchase and sale."[68] The court set aside the motions judge's decision and ordered the agreement of purchase and sale to be rescinded for one plaintiff and awarded damages for negligent misrepresentation to the other.

In situations involving relatively sophisticated parties who have been given the opportunity to fully consider the agreements at issue, courts are more likely to give effect to EACs and find no unconscionability. An example of an unsuccessful attempt by the plaintiff to defeat an EAC on the grounds of unconscionability is provided by the previously mentioned decisions in *Manorgate Estates Inc. v Kirkor Architects & Planners*, in which the Ontario Court of Appeal[69] upheld the motion judge's decision[70] that the EAC in the relevant agreement regarding architectural consulting for a construction project operated as a complete defence to the appellants' claim of alleged negligent misrepresentation. The motion judge distinguished *Singh v Trump*, arguing that the case before her did not present the same disparities in bargaining power or sophistication as *Singh v Trump* did. She found that the plaintiff was an experienced builder and there was no basis for finding that the defendant abused their bargaining power to take undue advantage of him. Unlike *Singh v Trump*, in the present case, the "differences in experience between the parties are a matter of degree, and not dramatically divergent, such as a sophisticated developer taking advantage of inexperienced investors through a complex marketing scheme."[71] The alleged misrepresentations "can hardly be characterized as designed to entrap or improperly induce" the plaintiff to enter into the agreement with the defendant.[72] The judge also noted that the "construction cost is not information that was uniquely in the defendant's possession or that it was seeking to hide from the plaintiff.[73] She concluded that the EAC was not unconscionable, and the appellate court confirmed.[74]

This cursory overview of case law with respect to the unconscionability of EACs suggests that courts consider EACs in light of the features of

67. *Ibid.*
68. *Ibid* at para 119 (emphasis in original).
69. *Manorgate ONCA*, *supra* note 42.
70. *Manorgate OSCJ*, *supra* note 43.
71. *Ibid* at para 50.
72. *Ibid.*
73. *Ibid.*
74. *Supra* note 42 at para 18.

the transactional settings within which the contract has been formed. The recent decision of the SCC in *Uber Technologies Inc. v Heller*[75] confirms that the doctrine of unconscionability will continue to play a central role in courts' assessments of the enforceability of EACs in standard form contracts. Although the dispute in *Uber* focuses on the enforceability of an arbitration clause in the context of an employment agreement, the broadly sweeping language of the decision is likely to influence how lower courts treat all types of boilerplate clauses in standard form contracts characterized by inequality of bargaining power between individuals.[76]

III. *Assessing the law of EACs and NRCs*

This section examines the normative dimensions informing the law of EACs and NRCs and identifies possible incremental improvements that courts might adopt. The discussion is organized in three steps. First, I identify the competing normative concerns underlying the enforceability of EACs and NRCs. Second, I demonstrate that legal rules governing EACs and NRCs, while failing to differentiate contracts between sophisticated parties and contracts of adhesion, fail also to satisfy autonomy and efficiency concerns underlying contract law. I illustrate this point by examining two hypothetical legal rules: general unenforceability and penalty default. Third, I suggest two specific legal changes that Canadian courts could adopt to improve legal certainty and contractual fairness with respect to contractual barriers to actions for negligent misrepresentation: penalty default unenforceability in contract between sophisticated parties and general unenforceability in adhesion contracts.

1. *Two competing normative needs*

In determining whether an EAC or an NRC should be given effect to preclude a claim for negligent misrepresentation, courts must strike a balance between two competing needs: 1) protecting the representee from pre-contractual negligent misrepresentations upon which they have placed reasonable reliance and 2) shielding the representor from having the representee—dissatisfied *ex post* for what turned out to be a bad bargain—"threshing through the underground"[77] to find a pre-contractual remark or a statement that turned out to be false and seeking to rescind the

75. *Supra* note 15: SCC finding that an arbitration clause within an online standard-form "contractor" agreement was invalid because it was unconscionable.

76. *Ibid* at para 89: The SCC states "unconscionability has a meaningful role to play in examining the conditions behind consent to contracts of adhesion, as it does with any contract. The many ways in which standard form contracts can impair a party's ability to protect their interests in the contracting process and make them more vulnerable, are well-documented."

77. *Inntrepreneur Pub Co v East Crown Ltd*, [2000] 2 Lloyd's Rep 611 at para 7.

contract on that basis. The desire to protect the representee induced into the contract through negligent communications calls for courts not upholding contractual barriers to tort actions to allow the representee to recover for pre-contractual misstatements through tort actions. By contrast, the desire to protect the representor requires courts to uphold the principle of freedom of contract by giving effect to EACs and NRCs, thereby avoiding the uncertainty of the litigation based on allegations of oral statements at pre-contractual meetings.

The balancing point between these competing needs varies depending on several considerations. From an efficiency perspective, enforcing EACs and NRCs may arguably incentivize the representee (i.e., buyers and customers) to bear the costs of insuring themselves against the risk of inadequate pre-contractual information. This argument may hold in the context of contracts wherein parties have relatively *equal* bargaining power, have the chance to individually negotiate the contract terms, have ready access to legal advice, or have the chance to conduct private pre-contractual inspections. By contrast, in contracts characterized by severe power or information *asymmetry* in favour of the representor, the enforcement of contractual barriers to recovery for pre-contractual misstatements may exacerbate the risk of moral hazard on the part of firms, who may lack proper incentives to clearly inform buyers about products' and services' characteristics. In such a context, the enforcement of EACs and NRCs may ultimately involve an unwelcome step toward the philosophy of "caveat emptor."[78]

From an autonomy perspective, the argument in support of enforcing EACs and NRCs may simply be based on freedom of contract: A party should be bound by such clauses insofar as they have agreed that no representations at all have been made, or that there has been no reliance on any such representations in entering into the contract. However, a distinction should be made between clauses in commercial contracts wherein parties have deliberately negotiated the allocation of risk and boilerplate clauses found in contracts of adhesion. Only in the former case can it be said that EACs or NRCs constitute a genuine manifestation of freedom of contract, while in the latter case, these clauses are most often a function of power and information asymmetry between the parties.

The foregoing considerations suggest that, regardless of the normative assumptions concerning the nature of contract law, any effort invested toward improving the law concerning EACs must focus on differentiating

78. Cumming, *supra* note 4 at 1211; Shelby D Green, "Contesting Disclaimer-of-Reliance Clauses of Efficiency, Free Will, and Conscience: Staving off Caveat Emptor" (2014) 2:1 Texas A&M L Rev 1.

1) between contracts between sophisticated parties and contracts of adhesions, and 2) between specifically negotiated EACs and NRCs and generically worded EACs and NRCs in standard form contracts. From an efficiency perspective, the relevance of these distinctions lies in the fact that in contracts between sophisticated parties, the efficient bearer of risk of harm from defective pre-contractual information is the representee, while in adhesion contracts, the representor more often bears the risk of harm. From an autonomy perspective, only in fully negotiated contracts between sophisticated parties can the representee be said to have given their full consent, while in contracts of adhesion, the representee's consent to contractual barriers to tort actions is significantly more problematic.[79]

Analysis of the relevant case law has demonstrated that courts already apply these distinctions. Canadian lower courts consider the specific language of EACs or NRCs together with the specific characteristics of the transactional setting within which these clauses operate. The relevant transactional features include the inequality of bargaining power between parties, their level of legal sophistication and whether the contract containing the EAC or NRC is fully negotiated or a contract of adhesion. Furthermore, these distinctions are explored in the recent evolution of the SCC's case law, albeit not with specific respect to the enforcement of EACs and NRCs. First, in *Ledcor,*[80] the SCC has empowered appellate courts to exercise a more intense judicial oversight over contracts of adhesion by establishing a less deferential standard of appellate review for issues of contractual interpretation in standard form agreements as compared to the general deferential standard developed in *Sattva.*[81] Second, in *Facebook*[82] the SCC examined several distinctive features of adhesion contracts, such as inequality of bargaining power[83] and lack of opportunity to negotiate,[84] to conclude that public policy was sufficiently strong as to deprive the

79. The issue of the quality of consent to boilerplate terms has been the subject of considerable scholarly debate: see Randy E Barnett, "Consenting to Form Contracts" (2002) 71 Fordham L Rev 627; Benson, *supra* note 8; Omri Ben-Shahar "Contracts without consent: Exploring a new basis for contractual liability" (2004) 6:152 U Penn L Rev 1829; Omri Ben-Shahar, "The Myth of the 'Opportunity to Read' in Contract law" (2009) 5:1 European Review of Contract Law 1; Ian Ayres & Alan Schwartz "The No-Reading Problem in Consumer Contract Law" (2014) 66 Stanford L Rev 545; Radin, *supra* note 8 at 82-98.

80. *Ledcor*, *supra* note 12.

81. *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53. See, for discussion, Sandra Corbett & Ryan P Krushelnitzky, "Through the Scratched Looking Glass: *Sattva*, *Ledcor*, *Teal* and Developments in the Law of Contract" (2017) 1 Ann. Rev. Civ. Lit. 379 at 404.

82. *Facebook, supra* note 14.

83. *Ibid* at para 54.

84. *Ibid* at para 55.

forum selection clause in Facebook's terms of service agreement of effect.[85] Finally, in *Uber,*[86] the SCC emphasized the "many ways in which standard form contracts can impair a party's ability to protect their interests in the contracting process and make them more vulnerable."[87] In examining an arbitration clause within an online standard form services agreement, the Court emphasized that the parties to the contract were unequal with respect to bargaining power and that the contract in which the arbitration clause was contained was non-negotiable and on this basis held the clause to be unconscionable.

The foregoing considerations emphasize a growing tension in the relevant case law between the desire to preserve the principles of freedom of contract and primacy of private ordering and the perceived need for extra-contractual policing of contract formation by courts to protect weaker parties. It is argued in the remaining discussion that sharper differentiation between the legal regime for contracts between sophisticated parties and adhesion contracts could secure marginal improvements to current case law. To illustrate this point, I examine two hypothetical legal regimes that solve in opposite, specular ways, the normative dilemma underlying EACs and NRCs: general unenforceability and penalty default. These hypothetical rules exemplify the two possible approaches courts could adopt in assessing EAC and NRC enforceability without differentiating between contracts between sophisticated parties and contracts of adhesion. I show that while general unenforceability prioritizes the protection of the unsophisticated representee, the penalty default rule enhances the interests of the sophisticated representor. This analysis demonstrates the impossibility of satisfactorily balancing the normative tension underlying EACs and NRCs without differentiating the contracts between sophisticated commercial parties and contracts of adhesion. Considering these issues, I advocate for courts to differentiate more clearly the legal treatment of EACs and NRCs in contracts between sophisticated commercial parties from adhesion contracts.

2. *General unenforceability*

The discussion will now briefly examine the different impacts of EACs' and NRCs' generalized unenforceability in alternative transactional settings. Consider a hypothetical legal regime in which—maintaining all other elements of the current legal regime constant—courts deny the enforcement of EACs and NRCs. The representee would be allowed to recover for

85. *Ibid* at para 38. See, on this point, John Enman-Beech, *supra* note 8 at 436-443.
86. *Uber, supra* note 15.
87. *Ibid* at para 89.

pre-contractual negligent misstatements by bringing an action in tort, regardless of the presence of EACs and NRCs in the written contract. The generalized unenforceability of contractual barriers to misrepresentation actions would fail to distinguish between specifically negotiated contracts between sophisticated parties who have equal bargaining power and contracts of adhesion. Consequently, the institutional response of contract law would not be adjusted to the changing balancing point between the two competing needs to protect the representee's reasonable reliance and to shield the representor from fabricated claims.

a. *Sophisticated parties*

Sophisticated contracting parties may wish to include an EAC or an NRC clause in a contract for several reasons. A representor—typically the seller—may wish to include such clauses to protect against the risk of costly legal defense against fabricated claims of negligent misrepresentation raised by opportunistic or manipulative buyers. Such clauses may also protect the corporate seller against the risk of misrepresentation by selling agents or other corporate representatives, who orally represent the organization during negotiations.[88] In short, contractual barriers to misrepresentation actions may be regarded as transaction-cost-saving mechanisms that sophisticated sellers might wish to include in the written contract in exchange for reducing the sale price.

By accepting such clauses, the sophisticated representee—typically the buyer—gives up the opportunity to recover pecuniary losses that are proximately caused by negligent misrepresentations. The buyer also gives up the possibility to eventually use the claim of negligent misrepresentation as a post-contractual bargaining chip. However, the representee may benefit from such clauses, as the seller may reduce the sale price in exchange for having these clauses included in the written agreement. Generally, sophisticated representees have the cognitive, legal, and economic resources (e.g., sophisticated lawyers, accountants, and consultants) to engage effectively in pre-contractual inspections aimed at verifying the representor's pre-contractual statements. They may prefer to rely on their own ex-ante private assessment of the representor's pre-contractual representations instead of paying a higher price for the right to prove the existence of a negligent misrepresentation in post-contractual litigation.

These considerations suggest that the *enforceability* of contractual barriers to negligent misrepresentation actions may allow sophisticated

88. Davis, *supra* note 4.

parties to create mutually beneficial, value maximizing agreements by modulating the remedies available at the post-contractual stage and factoring them into the purchase price of their transactions. By contrast, a regime of generalized *unenforceability* would not permit sophisticated parties to engage in cognizant risk allocation, and it would prevent them from creating contracts that are mutually beneficial. The representor's inability to clearly and decisively contract away the counterparty's reliance on statements external to the contract would result in the incorporation of an insurance premium against the risk of future tort claims into the transaction price. In turn, the sophisticated representee would face a higher price for a contractual protection that he or she would prefer not to buy. In sum, the generalized unenforceability would weaken the sophisticated representor's position only to provide unwanted additional protection to the sophisticated representee.

b. *Contracts of adhesion*

Contracts of adhesion contain boilerplate clauses that are presented by the seller and accepted by the inexperienced buyer on a take-it-or-leave-it basis. Under Canadian case law, when assessing EACs and NRCs in contracts of adhesion, courts apply the *Tercon* unconscionability analysis. If evidence indicates that one party to the contract has abused its negotiating power to take undue advantage of the other, courts will decline to enforce an EAC. Against this jurisprudential background, a regime of generalized unenforceability of such clauses would dispense the unsophisticated representee from the burden proving the elements of the *Tercon* test. This would make it easier for the unsophisticated representee to bring actions in tort for negligent misrepresentation.

Since courts' invalidation of EACs would prevent sophisticated parties in fully negotiated contracts from creating value-maximizing contracts, as noted above, it is unclear whether this regime would constitute an overall improvement on current case law. It is particularly questionable whether interference with sophisticated parties' contractual freedom in fully negotiated contracts would be justifiable on the sole basis of releasing the unsophisticated representee from the burden of proving the elements of the *Tercon* test. Indeed, under this hypothetical rule, the sophisticated representor would move from a situation with contractual protection to a situation with no contractual protection, while the unsophisticated representee would simply move to stronger protection. In short, a regime of generalized unenforceability would undermine sophisticated parties' position to only partially improve the unsophisticated representee's protection.

3. *Penalty default*

Courts could adopt a default rule stating that EACs and NRCs are invalid *unless* the representee freely, deliberately, and specifically accepts them as a separate provision in the contract. This approach would function as a penalty default rule—that is, a rule that "penalizes" the sophisticated representor who fails to specifically contract around the default regime.[89] Such a rule would not be too dissimilar from current Canadian case law, wherein courts are generally reluctant to give effect to EACs and NRCs in contracts of adhesion, while they are willing to enforce them in contracts between sophisticated parties that have specifically disclaimed reliance on pre-contractual representations. It is useful to briefly examine the relative advantages and disadvantages of such a default regime.

a. *Sophisticated parties*

A penalty default rule would permit sophisticated parties to attain a better bargaining equilibrium than that attainable under a regime of generalized unenforceability. As noted previously, the sophisticated representee in a commercial context often prefers to rely on their own private pre-contractual inspections while accepting contractual preclusions to future misrepresentation claims, rather than paying a higher price for the right to allege pre-contractual misrepresentations in ex-post litigation. For their part, the sophisticated representor would likely be willing to reduce the transaction price in exchange for the enhanced contractual certainty offered by a properly drafted EAC or NRC. Ultimately, sophisticated parties face incentives to contract away liability for pre-contractual misrepresentation while factoring this element into the transaction price.

This solution would involve a major limitation: it is reasonable to expect that litigation would occur over whether the clause has been sufficiently negotiated to meet the enforceability threshold. According to the contextualist approach to contractual interpretation adopted by Canadian courts, the judge must assess the genuineness of the representee's consent by considering all the circumstances surrounding the formation of the contract. If the representor fails to meet the burden of proving that the EAC or NRC has been freely, knowingly, and specifically accepted by the representee, the court will not give effect to the EAC or NRC. In this latter scenario, the representee is not permitted to claim misrepresentations on the grounds of pre-contractual misstatements.[90]. This is a major drawback

89. Ian Ayres & Robert Gertner, "Filling gaps in incomplete contracts: An economic theory of default rules" (1989) 99:1 Yale LJ 87.

90. This would be consistent with the contextualist approach to interpretation adopted by Canadian courts.

to the rule, as the value to the parties of an EAC or an NRC is largely a function of the degree of confidence with which parties can predict what wording will be adequate to ensure courts' enforcement of such clauses.

b. *Contracts of adhesion*

In contracts of adhesion, a penalty default rule would provide only weak protection to the unsophisticated representee. The reason for this limited protection lies in the very nature of default rules. Ayres and Gertner have long demonstrated that the adoption of penalty default rules by courts may prove to be effective in solving information asymmetries between contracting parties.[91] If appropriately designed, penalty default rules may provide a contract's more informed party with strong incentives to share information with the less informed counterparty, knowing that without it the contract will not be enforced.

However, the problem underlying the enforceability of EACs and NRCs in contracts with unsophisticated or inexperienced parties is not merely one of asymmetry of information; rather, it is one of asymmetry of bargaining *power* between parties. In such transactional settings, a default rule as described above would provide the sophisticated representor with an incentive to ensure that the weaker, unexperienced representee provides formal, express consent to the EAC or NRC, thereby affording only a weak protection to the unsophisticated party in a contract with *unequal* bargaining power. Formal acceptance of reliance-disclaimer provisions would provide no assurance of the representee's genuine consent to release reliance on the representor's pre-contractual statements and representations. In many situations, the party who is in a weaker bargaining position may be willing to relinquish protection to conclude the deal: this could hardly be deemed to constitute genuine consent to contract terms that may deprive the representee of important legal rights that they might not even know they have or might not consciously believe they will ever need to exercise in the future. The idea that the protection of the weaker party can be grounded on the expression of formal consent to reliance-disclaimer provisions by the same weaker party within the same bargaining process is, at best, an uneasy assumption.

4. *Preferable solution*

The above discussion suggests that neither a regime of general unenforceability nor the penalty default rule as described would enable courts to attain an appropriate balance between the buyer's right to recover

91. Ayres & Gertner, *supra* note 90 at 106: providing the example of the common law's refusal to enforce vague or indefinite contracts.

from pre-contractual misstatements and the seller's ability to negotiate contractual barriers to misrepresentation actions. In this subsection, I argue that the preferable solution to the normative dilemma underlying the enforcement of EACs and NRCs is to more clearly differentiate the legal regime of fully negotiated contracts between sophisticated parties from that of adhesion contracts. Specifically, the current case law could be incrementally improved through court application of the following two rules.

(1) In contracts between sophisticated parties, general EACs and NRCs should not be given effect to preclude claims in tort for negligent misrepresentation that are grounded on specific statements external to the contract that do not contradict or that are not inconsistent with the express terms of the written contract.
(2) In contracts of adhesion, EACs and NRCs are presumptively unconscionable and therefore not enforceable to preclude claims in tort for negligent misrepresentation based on pre-contractual statements.

a. *Penalty default unenforceability in contracts between sophisticated parties*

The proposed rule for contracts between sophisticated parties would establish that only *specific* contractual barriers to actions provide a complete defence against negligent misrepresentation claims. This rule would essentially generalize the rule identified in Iacobucci's dissenting opinion in *BG Checo*, which conditioned the exclusionary effect of contractual barriers to negligence actions to the requirement of co-extensivity of tort duties and contract duties. This legal regime would mark a significant improvement to current case law. As previously noted, the lack of clear indications by courts over the degree of specificity required for such clauses to be enforced is a source of uncertainty around the enforceability of EACs and NRCs. Against this jurisprudential background, the proposed rule would clarify that sophisticated parties may attain the exclusionary effect (with respect to claims in tort for negligence misrepresentation) *only* to the extent that an express term of the contract contradicts or is inconsistent with the pre-contractual statement on which the plaintiff bases their tort claim. Claims based on pre-contractual statements that do not contradict or that are not inconsistent with the express terms of the contract would not be precluded by general EACs and NRCs.

This rule would provide an incentive to the representor to carefully conduct a forthright negotiation and to incorporate all the relevant representations in the express contract terms. The more specific and

detailed the warranties and representations codified in the contract, the wider the scope of the exclusionary effect will be. The exclusionary effect would not undermine the representee's legal protection. This will be a sophisticated party and therefore arguably capable of bargaining over specific representations and fully appreciating their implications. One may object that conditioning the exclusionary effect of an EAC or an NRC to its degree of specificity would increase the costs of ex-ante specification of contract terms incurred by parties. However, it is reasonable to assume that sophisticated parties would be willing to incur this additional cost exchange of increased contractual certainty. Without certainty, the transaction costs associated with the arrangement would probably increase even more drastically.

Finally, from a theoretical perspective, it is reasonable to assume that legally sophisticated parties have reached genuine consent on matters that are the subject of express contract terms. This would justify the presumption that by including an EAC or NRC in their written contract, parties have knowingly and willingly given up their right to sue in tort on matters expressly and specifically regulated by the mutually drafted contract terms. If a contractual term specifically defines the duty owed by one party to the other with respect to a subject matter, the latter party to the contract may not use an action in tort to either impose a wider liability on the first party than would be available under the contract. Finally, it is worth emphasizing that this rule would be consistent with the principle established by the SCC in *Central Trust* that when a pre-contractual representation relied on by the plaintiff becomes an express term of the subsequent contract, the plaintiff cannot bring a concurrent action in tort for negligent misrepresentation and is restricted to whatever remedies are available under contract law.

b. *General unenforceability in contracts of adhesion*

In contracts of adhesion, courts could incrementally improve the case law by regarding EACs and NRCs as presumptively unconscionable. A regime of presumptive unconscionability for EACs and NRCs in contracts of adhesion would enhance both contractual certainty and fairness. As previously noted, Canadian case law tends to treat EACs and NRCs in adhesion contracts as exclusionary clauses and assesses their enforceability based on *Tercon* unconscionability analysis. However, this legal regime places the burden of persuading the court of the unconscionability of EACs and NRCs on the *weaker* contracting party. This arrangement raises concerns in terms of fairness, especially considering the difficulties that inexperienced, unsophisticated buyers encounter with respect to accessing

contractual adjudication and given the costs and uncertainties associated with litigation. Furthermore, from the sophisticated seller or representor's perspective, this legal regime generates contractual uncertainty, as the seller is faced with doubt as to what contractual language may succeed in clearly and definitively disclaiming the representee's reliance on extra-contractual statements. In short, the indeterminacy of the unconscionability doctrine frustrates both the representor's need for contractual certainty and the goal of protecting the inexperienced, unsophisticated representee.

The practical effect of this rule would be to release the unsophisticated, inexperienced representee from the burden of persuading the court that the elements of a *Tercon* analysis have been met, allowing them to bring action against the careless representor in tort. In turn, the sophisticated representor would be prevented from using contractual barriers to negligent misrepresentation actions as "traps for the unwary." That is, this proposed rule would create valuable deterrence by ensuring that sophisticated representors appropriately account for losses to others in deciding how much care to take in communicating the pre-contractual statements. To enhance contractual certainty, the sophisticated representor should implement alternative strategies to enhance clarity in their pre-contractual communications.

Theoretically, a presumption of the unconscionability of EACs and NRCs would be justified by virtue of the characteristics of the transactional setting in which these contracts are formed. Information and bargaining power asymmetry between contracting parties justify a shift in the normative focus of contract law from the enforcement of the common intention of the parties to the protection of the disadvantaged party. Under such circumstances, the policy goal of protecting individuals who are unable to protect themselves from the unscrupulous actions of the more sophisticated counterparty is paramount. Reasons that may justify sophisticated parties allocating contractual risk in a manner that differs from tort law do not hold in adhesion contracts. While in the former scenario, the enforcement of contractual barriers to tort actions may be justified based on the primacy of private ordering, in the latter context, an express contract term's exclusion of the duty of care in tort may likelier result in a wrong without a remedy to the plaintiff's disadvantage. Unsophisticated parties may be incapable of protecting their interests at the negotiation stage. They also may be unable to neither appreciate the implications of the legal jargon employed in boilerplate contracts or afford the costs of accessing justice. Therefore, they should not be barred from submitting allegations of negligent misrepresentation. Both efficiency and fairness suggest that it is appropriate to place the duty of careful

and comprehensible pre-contractual communication on the sophisticated representor and leave open the door to judicial policing of contract formation through the doctrine of negligent misrepresentation.

One major concern with permitting parties to sue in tort despite the existence of an EAC or an NRC is that it deprives the representor of a tool to shield against opportunistic claims by representees who are dissatisfied ex post with what transpires to be a bad bargain. However, this argument is unconvincing when applied to adhesion contracts. A legally sophisticated representor has the economic and cognitive resources to prevent ex post allegations of negligent misrepresentations by ensuring that all pre-contractual statements are scrutinized, accurate, comprehensible and properly justified. The unenforceability of EACs and NRCs would not deprive the representor of all protection against the risk of opportunistic tort actions; rather, it would encourage them, as the more knowledgeable, informed and experienced party, to reveal ex ante more information to the contracting counterpart. The sophisticated representor is the efficient bearer of the risk of harm associated with negligent pre-contractual communications.

Finally, it may be objected that the proposed presumption of the unconscionability of EACs and NRCs would constitute an unnecessary, unjustified interference with the representor's freedom of contract. Under current Canadian case law, the objection would argue that such clauses are enforceable only to the extent that they are specifically brought to the attention of the party to whom the representation was made. This rule already provides sufficient incentives to induce the representor to ensure that the representee understands the implications of such clauses, while concurrently avoiding interference with the representor's freedom of contract through presumptive unconscionability. However, it could be easily counter-objected that, in the context of take-it-or-leave-it transactions, the special notice requirement provides only weak protection to the representee. As previously emphasized, in the context of power imbalance between contracting parties, the weaker party's formal acknowledgment of EACs or NRCs provides no real protection of the representee's reasonable reliance on the representor's utterances.

Conclusion

Underlying the enforcement of EACs and NRCs is an inherent tension between the representee's right to recover for negligent pre-contractual misstatements and the representor's ability to negotiate contractual barriers to misrepresentation actions to shield themselves against tort claims in negligence. Since EACs and NRCs are widely used both in commercial

contracts between legally sophisticated parties and in contracts of adhesion in which parties have unequal bargaining power, courts are often confronted with the challenge that the appropriate balance between these competing goals varies across different transactional contexts. In a contract between legally sophisticated parties, the normative focus of contractual adjudication is to enjoin the parties' common goals and intentions, which call for courts to refrain from interfering with the parties' desire to exclude representations and liability arising from representations. By contrast, in contracts of adhesion, the focus is on protecting the vulnerable party who cannot meaningfully participate in the contract's design. In this context, it may often seem more appropriate to give legal effect to specific representations intended to induce the making of the contract despite the presence of written exclusion clauses.

Case law analysis has shown that the normative shift from contractual freedom to the protection of the weaker party is, at least to some extent, reflected in courts' decisions assessing the enforceability of contractual barriers to tort actions. It has been suggested that marginal improvements to the current case law of EACs or NRCs—in terms of enhanced contractual certainty and contractual fairness—could be obtained by more sharply differentiating the legal treatment of such clauses in fully negotiated contracts between sophisticated parties and contracts of adhesion. In contracts between sophisticated parties, general EACs and NRCs should not be given effect to preclude claims in tort for negligent misrepresentation that are grounded on specific statements external to the contract that do not contradict or are not inconsistent with the express terms of the written contract. In contracts of adhesion, EACs and NRCs should be treated as presumptively unconscionable and therefore not enforceable to preclude claims in tort for negligent misrepresentation based on pre-contractual statements.