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Résumé de l'article

Cet article examine la mesure dans laquelle les clauses d'intégralité du contrat (CICs) sont exécutoires selon la common law canadienne des contrats et l'étendue de leur efficacité dans la promotion de la certitude contractuelle. On retrouve généralement les CICs au sein d'ententes commerciales entre des parties juridiquement sophistiquées ainsi que dans des contrats d'adhésion où une inégalité de pouvoir de négociation entre les parties est présente. L'objectif des CICs est de promouvoir la certitude contractuelle en établissant que les termes complets du contrat sont dans le document contenant cette clause. Bien que le but des CICs soit de promouvoir la certitude contractuelle, leur portée juridique et leur efficacité sont sujettes à plusieurs limites. À certaines occasions, les tribunaux ont donné effet à des CICs afin d'empêcher des déclarations précontractuelles d'être juridiquement opérantes; à d'autres, ils les ont ignorées et ont reconnu la validité de réclamations basées sur des déclarations externes au contrat. Cet article a pour objectif d'examiner la jurisprudence pertinente en ce qui a trait à l'exécution des CICs et d'établir leur efficacité en tant qu'outil servant à promouvoir la certitude contractuelle. Il est suggéré que les tribunaux puissent progressivement améliorer la certitude contractuelle en distinguant d'une façon plus marquée le traitement juridique des CICs trouvées dans des contrats pleinement négociés entre des parties sophistiquées et celles au sein de contrats d'adhésion.

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Unpacking Entire Agreement Clauses: On the (Elusive) Search for Contractually Induced Formalism in Contractual Adjudication

Daniele Bertolini[*]

This article examines the extent to which entire agreement clauses (EACs) are enforceable under the Canadian common law of contracts and the extent to which these contractual provisions are effective in promoting contractual certainty. EACs are generally found in commercial agreements between legally sophisticated parties and in contracts of adhesion with inequality of bargaining power between parties. Their purpose is to promote contractual certainty by establishing that the full terms of the contracts are to be found in the document containing the clause. Although the goal of EACs is to promote contractual certainty, their legal significance is far from definitive and their effectiveness is subject to several limitations. On some occasions, courts have given effect to EACs to prevent pre-contractual statements from being legally operative; in others, they have disregarded them and recognized the validity of claims based on statements external to the contract. This paper aims to examine the relevant case law relating to the enforcement of EACs and to assess the overall effectiveness of such clauses as a contractual device for promoting contractual certainty. It is suggested that courts could incrementally improve legal certainty, by more markedly differentiating the legal treatment of EACs found in fully negotiated contracts between sophisticated parties and contracts of adhesion.

Cet article examine la mesure dans laquelle les clauses d'intégralité du contrat (CICs) sont exécutoires selon la common law canadienne des contrats et l'étendue de leur efficacité dans la promotion de la certitude contractuelle. On retrouve généralement les CICs au sein d'ententes commerciales entre des parties juridiquement sophistiquées ainsi que dans des contrats d'adhésion où une inégalité de pouvoir de négociation entre les parties est présente. L'objectif des CICs est de promouvoir la certitude contractuelle en établissant que les termes complets du contrat sont dans le document contenant cette clause. Bien que le but des CICs soit de promouvoir la certitude contractuelle, leur portée juridique et leur efficacité sont sujettes à plusieurs limites. À certaines occasions, les tribunaux ont donné effet à des CICs afin d'empêcher des déclarations précontractuelles d'être juridiquement opérantes; à d'autres, ils les ont ignorées et ont reconnu la validité de réclamations basées sur des déclarations externes au contrat. Cet article a pour objectif d'examiner la jurisprudence pertinente en ce qui a trait à l'exécution des CICs et d'établir leur efficacité en tant qu'outil servant à promouvoir la certitude contractuelle. Il est suggéré que les tribunaux puissent progressivement améliorer la certitude contractuelle en distinguant d'une façon plus marquée le traitement juridique des CICs trouvées dans des contrats pleinement négociés entre des parties sophistiquées et celles au sein de contrats d'adhésion.

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Introduction

This article examines the extent to which entire agreement clauses (EACs) are enforceable under the Canadian common law of contracts and the extent to which these contractual provisions are effective in promoting contractual certainty. EACs are generally found in commercial agreements between legally sophisticated parties[1] and in contracts of adhesion between parties with unequal bargaining power.[2] Their purpose is to promote contractual certainty by establishing that the full terms of the contracts are to be found in the document containing the clause. By stating that the entire agreement is confined within the "four corners" of the written document, parties aim to identify the exclusive source of contractual obligations, thereby excluding any liability for claims arising from statements that are external to the written contract. Although the EACs' purpose is to promote contractual certainty, their legal significance is far from definitive and their effectiveness is subject to several limitations.

EACs operate within a complex matrix of legal issues involving both contract and tort doctrines. It is useful to distinguish between two broad types of EACs that often appear in commercial contracts. The first is the "EAC proper,"[3] which typically reads 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, or conditions of any kind, oral or written, expressed or implied, which are not merged into this contract or superseded by it.

The main function of an EAC proper is to prevent parties from asserting a claim in contract that goes beyond the four walls of the written contract. The second type is the non-reliance clause (NRC), whose function is to preclude claims in tort for misrepresentation. In practice, a comprehensive EAC contains both an EAC proper and an NRC, and the case law often uses the term EAC to refer to clauses containing both an EAC proper and a NRC. The legal issues associated with the EAC proper and the NRC are analytically distinct and largely independent of each other. In this article, I focus solely on the EAC proper and its impact on contractual adjudication. Specifically, I examine the interplay between the EAC proper and the doctrines of contractual interpretation, collateral contract, and

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1 See Uri Benoliel, "The Interpretation of Commercial Contracts: An Empirical Study" (2017) 69:2 Ala L Rev 469.

2 See Cynthia L Elderkin & Julia S Shin Doi, *Behind and Beyond Boilerplate: Drafting Commercial Agreements*, 4th ed (Toronto: Carswell, 2018) at 45.

3 See Catherine Mitchell, "Entire Agreement Clauses: Contracting Out of Contextualism" (2006) 22:3 Austl J Contract L 222 at 225.

implication of terms.[4] These doctrines are often employed in contractual adjudication to explain why statements external to the written contract may have legal consequences; the inclusion of an EAC in a written contract is meant to exclude or limit their scope of operation.

Canadian courts have adopted different approaches to the enforcement of EACs. On some occasions, they have given effect to EACs to prevent pre-contractual statements from being legally operative;[5] on other occasions, they have disregarded them and recognized the validity of claims based on statements external to the contract.[6] These conflicting approaches have created considerable legal uncertainty surrounding the enforceability of EACs. Contract scholars have emphasized the lack of a coherent theory underlying the nature and scope of operation of EACs. Perell (writing before his elevation to the bench) described the law relating to EACs as a "riddle inside an enigma"[7] to emphasize the difficulty of providing a coherent explanation of the law. Hall states that EACs "are one of the most confusing areas of the law of contractual interpretation in Canada"[8] and that "[t]here appears to be no overarching theory of how the courts should or do approach such provisions."[9] Elderkin and Shin Doi emphasize that caution should be exercised in drafting an EAC, as "the enforceability of these clauses is evolving," which often makes it difficult for parties to anticipate whether courts will give effect to them.[10]

Furthermore, several recent developments in the Canadian common law of contracts have exacerbated the uncertainty surrounding EACs by

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4 I will not discuss the case law concerning the unconscionability of EACs and their qualification as exculpatory clauses, as these two important legal issues are generally addressed in the case law regarding NRCs. See e.g. *Singh v Trump*, 2016 ONCA 747 at paras 94, 129 (holding an NRC unconscionable); *Manorgate Estates Inc v Kirkor Architects and Planners*, 2018 ONCA 617 at para 18 (finding an NRC not unconscionable). In the remaining discussion, I will use the expression EAC to refer exclusively to the EAC proper.

5 See e.g. *Power Consolidated (China) Pulp Inc v British Columbia Resources Investment Corp*, [1989] BCJ No 114, 14 ACWS (3d) 11 [*Power Consolidated* cited to BCJ]; *Gutierrez v Tropic International Ltd*, [2002] 63 OR (3d) 63, OJ No 3079 [*Gutierrez* cited to OR]; *MacMillan v Kaiser Equipment Ltd,* 2004 BCCA 270 [*MacMillan*].

6 See e.g. *Zippy Print Enterprises Ltd v Pawliuk,* [1994] BCJ No 2778, 52 ACWS (3d) 51 [*Zippy* cited to BCJ]; *Turner v Visscher Holdings Inc,* [1996] BCJ No 998, 63 ACWS (3d) 50 [*Turner* cited to BCJ].

7 Paul M Perell, "A Riddle Inside an Enigma: The Entire Agreement Clause" (1998) 20:3 Adv Q 287. For a criticism of Perell's view, see MH Ogilvie, "Entire Agreement Clauses: Neither Riddle nor Enigma" (2008) 87:3 Can Bar Rev 625 at 645.

8 Geoff R Hall, *Canadian Contractual Interpretation Law*, 3rd ed (Toronto: LexisNexis Canada, 2016) at 318.

9 *Ibid*.

10 Elderkin & Shin Doi, *supra* note 2 at 51.

directly or indirectly expanding the legal significance of the circumstances surrounding the written agreement. In *Sattva Capital Corp. v. Creston Moly Corp.* ("*Sattva*"), the Supreme Court of Canada formally recognized the importance to contractual interpretation of evidence of the surrounding circumstances in which a contract is formed.[11] This holding raises the question of whether an EAC may succeed in limiting the use of extrinsic evidence in ascertaining the parties' contractual intent. In *Bhasin v. Hrynew* ("*Bhasin*"), the Supreme Court established the duty of honesty in contractual performance and stated that such a duty cannot be fully displaced by an EAC.[12] This holding has been recently confirmed in *C.M. Callow Inc. v. Zollinger* ("*Callow*").[13] Furthermore, in *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District* ("*Wastech*") the Supreme Court has clarified that parties to a contract cannot exclude the duty to exercise discretion in good faith by drafting EACs.[14] Taken together, these decisions have made clear that parties will often be able to point outside the four corners of the written contract document. For that reason, they cast further doubt on the possibility of EACs being fully effective.

This paper aims to examine the relevant case law relating to the enforcement of EACs and to assess the overall effectiveness of such clauses as a device for promoting contractual certainty. This article's central thesis is twofold. First, it is argued that *inherent* limitations impede the effectiveness of EACs in promoting legal certainty, and these limitations ultimately originate from the underlying tension between such clauses and the principles of contextualism in contractual interpretation. Second, it is suggested that courts could incrementally improve legal certainty by more markedly differentiating between EACs found in contracts between sophisticated parties and those found in contracts of adhesion, as well as between specifically and generically worded EACs. Although these distinctions are present in the relevant case law, marginal improvements in EACs' effectiveness could be obtained through sharper differentiation of the legal *effects* associated with these distinctions. More specifically, it is suggested that in fully negotiated contracts between sophisticated parties, courts should regard the existence of a specifically worded EAC as establishing a *conclusive* presumption that the written document represents the final and exclusive record of the parties' agreement. This pre-

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11 2014 SCC 53 [*Sattva*].

12 2014 SCC 71 at para 75 [*Bhasin*].

13 2020 SCC 45 [*Callow*] (confirming that the duty of honesty "should not be thought of as an implied term, but a general doctrine of contract law," which "operates irrespective of the intentions of the parties" at para 48, citing *Bhasin*, *supra* note 12 at para 74).

14 2021 SCC 7 [*Wastech*] at paras 94–95.

sumption would preclude: 1) the admission of evidence that the written document does not represent the final and exclusive record of the parties' agreement, 2) claims for breach of collateral contracts, and 3) claims based on implied terms that are not already part of the agreement. On the other hand, in standard form contracts, courts could improve legal certainty by applying the following two rules: 1) the existence of a generically worded EAC does not preclude the establishment of a collateral contract that is grounded in a specific statement external to the contract that is inconsistent with a general clause found in the written agreement; and 2) the existence of an EAC does not preclude the ability of a court to imply terms in a contract that do not conflict with its express language.

The proposed improvements to the legal regime governing the enforcement of EACs are rooted in the recognition that the normative needs underlying the enforcement of such clauses change when clauses are found in fully negotiated contracts between sophisticated parties and in contracts of adhesion. In fully negotiated contracts between sophisticated parties, the main objective of contractual adjudication is to promote the parties' common goals. By contrast, in standard from contracts, the focus of contractual adjudication shifts to the protection of the weaker party. Moreover, the proposed differentiation in the legal treatment of EACs is consistent with the recent trend that has emerged in the Supreme Court's case law, which has explored whether different principles should apply to specifically negotiated contracts and standard form contracts. The Supreme Court's decisions in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.* ("*Ledcor*"),[15] *Douez v. Facebook, Inc.* ("*Facebook*"),[16] and *Uber Technologies Inc. v. Heller* ("*Uber*")[17] emphasize that different principles—albeit not directly relating to the enforcement of EACs—should apply to specifically negotiated and standard form contracts. Finally, a growing strand of contract law scholarship emphasizes the distinctive issues involved in standard-form agreements as compared to specifically negotiated contracts.[18]

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15 2016 SCC 37 [*Ledcor*].

16 2017 SCC 33 [*Facebook*].

17 2020 SCC 16 [*Uber*].

18 See Peter Benson "Radin on Consent and Fairness in Consumer Boilerplate: A Brief Comment" (2013) 54:2 Can Bus LJ 282; Omri Ben-Shahar, "Regulation Through Boilerplate: An Apologia" (2014) 112:6 Mich L Rev 883; Yannis Bakos, Florencia Marotta-Wurgler & David R Trossen "Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts" (2014) 43:1 J Leg Stud 1; James Gibson, "Boilerplate's False Dichotomy" (2018) 106:2 Geo LJ 249; Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton: Princeton University Press, 2013); Jason MacLean, "The Death of Contract, Redux: Boilerplate and the End of In-

The remaining discussion is organized as follows. Part I analyzes the impact of EACs on the identification and interpretation of contract terms in light of the relevant context. Part II examines the issue of whether an EAC is binding and conclusive at common law, so as to preclude a claim for breach of a collateral contract. Part III examines the interplay between EACs and implied terms. Part IV examines the normative dimension underlying the enforceability of EACs and identifies incremental improvements that could be made in the legal regime concerning such clauses.

I. Contract Interpretation

The first major limitation to EACs' effectiveness lies in the tension between the rationale underlying the creation and use of the EAC and the principles informing the process of contractual interpretation. EACs aim to preclude legal effects flowing from any documentation, representation, or other extrinsic evidence that has not been incorporated by the parties into the final written document. However, in assessing EACs' enforceability and legal significance, courts are considering the very evidence that such clauses serve to exclude. This fundamental tension is the key source of uncertainty in case law, which makes it difficult for parties to confidently anticipate such clauses' enforceability.

This section identifies three limitations to the effectiveness of EACs in promoting contractual certainty: A) the relationship with the parol evidence rule; B) the relationship with contextualism in contractual interpretation; and C) their retrospective application by courts.

A. Identifying Contractual Terms

An EAC states that *only* statements found in the written contractual document constitute contract terms. This component of an EAC aims to influence the judge's determination of which statements made by the parties during contractual negotiations should be regarded as part of the actual contract. Many legal commentators[19] as well as several courts' decisions[20] have emphasized that this component of an EAC performs a func-

terpretation" (2016) 58:3 Can Bus LJ 289; John Enman-Beech, "When Is a Contract Not a Contract? *Douez v Facebook Inc.* and Boilerplate" (2018) 60:3 Can Bus LJ 428.

19 See Perell, *supra* note 7 at 291; Elderkin & Shin Doi, *supra* note 2 at 50; Angela Swan, Jakub Adamski & Annie Na, *Canadian Contract Law*, 4th ed (Toronto: LexisNexis Canada, 2018) at 752. See also John D McCamus, *The Law of Contracts*, 2nd ed (Toronto: Irwin Law, 2012) at 798–99.

20 See e.g. *Hayward v Mellick* (1984), 45 OR (2d) 110 at 120, 5 DLR (4d) 740*; Zippy*, *supra* note 6 at paras 36, 41; *Turner*, *supra* note 6 at para 15; *One West Holdings Ltd v*

tion similar to that of the parol evidence rule. Both EACs and the parol evidence rule attempt to delimit the scope of contractual interpretation by excluding statements external to a contract from the judge's consideration.

This is not to say that EACs merely replicate the parol evidence rule. The presence of an integration clause in the written contract reduces the uncertainty that may come with the sole operation of the parol evidence rule.[21] Greater contractual certainty may be attained as a result of the *evidential* effect an EAC may generate. Mitchell has explained this point by observing that while "[t]he parol evidence rule [is] based on an inference about the parties' intentions based on the *appearance* of the documents," an EAC provides "ostensibly a clearer indication of the parties' intentions" about the conclusiveness of the written document.[22] By drafting an EAC, parties expressly state their intention to consider the written agreement as the sole and exclusive source of contractual obligations.

That EACs perform an evidential function is confirmed by decisions of Canadian courts that consider the existence of an EAC to be evidence of the parties' intention to have the written contract represent their entire agreement. For example, in *McNeely v. Herbal Magic Inc.* ("*McNeely*"), the Ontario Superior Court of Justice found that the existence in the contract of an EAC "demonstrate[d] that the parties intended that the written agreements represented their entire agreement notwithstanding any prior oral representations or discussions regarding the subject matter of the agreements."[23] The court precluded the plaintiff's claim for damages for breach of a collateral agreement. The principle was subsequently confirmed by the same court in *National Logistics Services (2006) Inc. v. American Eagle Outfitters Canada Corp.*[24]

It must be emphasized, however, that the existence of an EAC does not constitute *conclusive* evidence of the parties' intention to integrate their agreement. In *Rossman v. Canadian Solar Inc.*,[25] an employee commenced a claim, seeking payment of commissions he argued were owed to him by the defendant employer. The claim was based on alleged oral rep-

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Greata Ranch Holdings Corp, 2013 BCSC 1570 at para 28; *Soboczynski v Beauchamp*, 2015 ONCA 282 at paras 45–46 [*Soboczynski*].

21 See Bruce MacDougall, *Misrepresentation* (Toronto: LexisNexis Canada, 2016) at 35.

22 Mitchell, *supra* note 3 at 232. See also Elisabeth Peden & JW Carter, "Entire Agreement – and Similar – Clauses" (2006) 22 Austl J Contract L 1 at 4.

23 2011 ONSC 4237 at para 19 [*McNeely*].

24 2012 ONSC 384 at para 39.

25 2018 ONSC 7172 [*Rossman* SC]. See also *Rossman v Canadian Solar Inc*, 2019 ONCA [*Rossman* CA].

resentations and discussions prior to the signing of the employment agreement. The defendant argued that the plaintiff's claim should be dismissed by virtue of an EAC included in the employment agreement. The Ontario Superior Court of Justice found that the EAC was "not demonstrative of an intention to oust any prior oral representations or discussions regarding outstanding commissions" and, therefore, it could not conclude that the employment agreement's intention was to preclude an entitlement to commissions.[26] This finding was subsequently confirmed by the Ontario Court of Appeal.[27]

These examples suggest that a first source of uncertainty surrounding the enforcement of EACs may be the courts' apparently conflicting attitudes toward the evidentiary relevance of EACs to the issue of integration. However, a deeper appreciation of the way in which an EAC interacts with the application of the parol evidence rule reveals that this uncertainty is not generated by courts' conflicting decisions, but rather is rooted in EACs' *inherently* limited effectiveness in delimiting the scope of contractual interpretation. The parol evidence rule establishes that when the written document represents the final and exclusive record of the parties' agreement, extrinsic statements and promises that add to, subtract from, vary, or contradict the written contract are not admissible.[28] It is useful to distinguish the *conditions* for the applicability of the parol evidence rule from the *effects* of its application. To determine the applicability of the rule, the judge must decide whether a written document is to be regarded as the final and exclusive record of the parties' agreement.[29] To determine whether the agreement is fully integrated, the judge must gather evidence of the communications that occurred between the parties and ascertain whether the writing was intended by the parties to constitute the completed record of their agreement. As to the effects of its application, several commentators have emphasized the distinction between two different versions of the parol evidence rule.[30] According to the "traditional" approach, when the written agreement ostensibly appears to be integrated, parties are not permitted to provide evidence of contractual

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26 See *Rossman* SC, *supra* note 25 at para 40.

27 See *Rossman* CA, *supra* note 25 at para 15.

28 For textbook definitions of the parol evidence rule, see McCamus, *supra* note 19 at 215–28; Hall, *supra* note 8 at 73–87; Swan, Adamski & Na, *supra* note 19 at 751–69. The Supreme Court of Canada affirmed the parol evidence rule in *Hawrish v Bank of Montreal*, [1969] SCR 515 at 518, 2 DLR (3d) 600 [*Hawrish*] and *Bauer v The Bank of Montreal* [1980] 2 SCR 102 at 112–14, 110 DLR (3d) 424 [*Bauer*].

29 See Swan, Adamski & Na, *supra* note 19 at 753.

30 See SM Waddams, "Two Contrasting Approaches to the Parol Evidence Rule", Comment, (1986) 12:2 Can Bus LJ 207 [Waddams, "Two Contrasting Approaches"]; McCamus, *supra* note 19 at 215–20, 224–27.

terms that are oral and have not been rendered in writing. According to the "modern" approach, the presence of a written agreement that is ostensibly integrated gives rise to a rebuttable presumption that the written document represents the final and exclusive record of the parties' agreement. Parties are permitted to provide (oral or written) evidence of the parties' intent to not regard the written document as the final and exclusive record of their agreement. There is evidence that, in the last few decades, Canadian courts have (at least to some extent) moved toward the adoption of the modern rule.[31]

In drafting an EAC, parties aim to influence the judicial determination of the *conditions* for the applicability of the parol evidence rule, by providing evidence of the parties' intentions to regard the written document as the exclusive and complete record of their agreement. However, the fact that a written document contains an express statement that it is intended to be the fully integrated contract does not conclusively prove that the document itself was ever so assented to. The question of integration is itself an *interpretive* question;[32] therefore, despite the existence of an EAC in the written contract, the judge must still rely on both the parol evidence and consideration of the surrounding circumstances to determine whether the agreement is fully integrated.[33] In short, the parol evidence rule does not preclude the use of parol evidence to determine integration. If the rule were otherwise interpreted, the existence of an EAC would hamper the judge's ability to use evidence outside the words of the written contract, even in the case of a contract that was incomplete or ambiguous on its face. This difficulty suggests that, despite the presence of an EAC in a written contract, the judge must still weigh all available evidence against the EAC to determine the parties' intention as to the issue of integration. This does not render EACs wholly insignificant, as their existence often strongly indicates that the written document represents the final and exclusive record of the parties' agreement.[34] Thus, an EAC enhances contractual certainty compared to mere reliance on the parol evidence rule, but this increased certainty is achieved only *indirectly*

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31 See e.g. *Gallen v Butterley,* [1984] BCJ No 1621, 9 DLR (4th) 496; *Nevin v British Columbia Hazardous Waste Management Corp* [1995] BCJ No 2301, 129 DLR (4th) 569.

32 See Steven J Burton, *Elements of Contract Interpretation* (Oxford, UK: Oxford University Press, 2009) at 77–88; Daniele Bertolini, "Unmixing the Mixed Questions: A Framework for Distinguishing Between Questions of Fact and Questions of Law in Contractual Interpretation" (2019) 52:2 UBC L Rev 345 at 404–08.

33 See Waddams, "Two Contrasting Approaches", *supra* note 30 at 208; SM Waddams "Do We Need a Parol Evidence Rule?" (1991) 19 Can Bus LJ 385 at 395; Swan, Adamski & Na, *supra* note 19 at 757.

34 See David W McLauchlan, "The Inconsistent Collateral Contract" (1976) 3:1 Dal LJ 136 at 174.

by facilitating the application of the parol evidence rule rather than conclusively proving that the contract is fully integrated.[35]

B. Interpreting Contractual Terms

Several scholars have argued that by including an EAC in the contract, parties attempt to limit the evidence available to the judge who must *interpret* the words of the written contract.[36] This evidential function is distinct from that analyzed earlier: the EAC is not used to circumscribe the scope of the contractual agreement but rather to limit the set of extrinsic evidence that the judge may use to ascribe meaning to the contract's terms.

A conceptual tension exists between this aspect of EACs' evidential function and the contextual approach to contractual interpretation formally recognized in *Sattva*. The contextualist approach mandates courts to consider the circumstances surrounding the formation of the contract when determining the verbal meaning of the written document; by contrast, the EAC is designed to exclude the surrounding circumstances from the scope of the judge's consideration.[37] The move toward contextualism in contractual interpretation raises the issue of whether parties can successfully use an EAC to opt for an interpretive regime that excludes the evidentiary relevance of the context.

From a theoretical perspective, there is no reason why the judge should be precluded from adopting a contextualist approach to contractual interpretation in the presence of an EAC.[38] First, the selection of the most appropriate method of contractual interpretation resides with the judge and not with the private parties, as the interpretation of the contract is an institutional function of the judge. Contracting parties cannot, by mutual agreement, prescribe new evidentiary rules and procedures to

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35 But see *McNeely*, *supra* note 23 (stating that the existence in the contract of an EAC demonstrates the parties' intention to consider the contract as fully integrated, despite the existence of prior oral discussions concerning the object of the contract).

36 See Alan Schwartz & Robert E Scott, "Contract Theory and the Limits of Contract Law" (2003) 113 Yale LJ 541 at 589–90; Avery Wiener Katz, "The Economics of Form and Substance in Contract Interpretation" (2004) 104:2 Colum L Rev 496 at 508; Mitchell, *supra* note 3.

37 See Mitchell, *supra* note 3.

38 See Richard Calnan, "Controlling Contractual Interpretation" in Paul S Davies & Magda Raczynska, eds, *Contents of Commercial Contracts: Terms Affecting Freedoms* (Oxford, UK: Hart Publishing, 2020) 51 ("[o]nce the parties have established what terms of the contract are, it is then up to the court to interpret the meaning of those terms. An entire agreement clause has nothing to say about that" at 53–54). For a different perspective in the context of English law, see Mitchell, *supra* note 3.

limit the ability of the judge to resolve the questions of fact and questions of law that interpretation raises.[39] Second, Canadian courts' adoption of a contextualist approach to contractual interpretation implies that EACs themselves should be interpreted in light of the factual matrix, in the same way as all other contractual provisions. From this perspective, whether and to what extent parties intended EACs to exclude the evidentiary relevance of statements external to the contract depends on the consideration of the factual matrix. Third, in *Sattva*, the Court emphasized that "the parol evidence rule does not apply to preclude evidence of surrounding circumstances when interpreting the words of a written contract."[40] If the parol evidence rule—a common law doctrine—does not prevent the judge from considering the factual matrix, it is difficult to imagine how the *contractual* invocation of the same rule might impede the judge's ability to consider the context. Both the parol evidence rule and EACs concern the *identification* of contractual terms, while the factual matrix is considered for *ascribing meaning* to contractual terms. Finally, the relevance of the context in contractual interpretation cannot be suppressed for practical reasons: it is virtually impossible for parties to write an "entire contract." It is widely recognized in contract scholarship that written contracts are generally incomplete. These considerations suggest that the presence of an EAC in a written contract cannot preclude the central relevance of the factual matrix in interpreting the contract.

This conclusion is confirmed by the Alberta Court of Appeal's decision in *IFP Technologies (Canada) Inc. v. EnCana Midstream and Marketing* ("*IFP Technologies*").[41] In that decision, the court held that in interpreting a commercial contract, a court must consider the factual matrix involved in the contract and that this duty is not excluded by an EAC. The divergent approaches of the trial judge and the appellate court illustrate the practical and theoretical relevance of the issue.[42] IFP Technologies Canada Inc. (IFP) and Pan Canadian Resources (PCR) entered into an asset exchange agreement with respect to various leases in the Eyehill Creek area. PCR later sold its interest to a third party who intended to reactivate existing wells and drill new ones. A central issue concerned the nature and extent of the working interest held by IFP pursuant to the agreement. One interpretation was that IFP held an undivided working

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39 See *Sattva*, *supra* note 11 at paras 50, 53 (establishing that contractual interpretation generally involves questions of mixed fact and law unless an extricable error of law is identified). For a detailed discussion of the distinction between questions of fact and question of law in contractual interpretation, see Bertolini, *supra* note 32.

40 *Supra* note 11 at para 61.

41 2017 ABCA 157 at para 124 [*IFP Technologies* CA].

42 See *IFP Technologies (Canada) v Encana Midstream and Marketing*, 2014 ABQB 470 at paras 83–84. [*IFP Technologies* QB].

interest in all primary and enhanced oil and gas leases. Alternatively, IFP's interest might only have been in oil and gas produced through thermal and other enhanced recovery methods. This second interpretation would have excluded oil and gas produced through primary production. The agreement contained an EAC, stating that

> [the asset exchange agreement] supersedes all other agreements, documents, writings, and verbal understandings among the Parties relating to the subject matter hereof and expresses the entire understanding of the Parties with respect to the subject matter hereof.

Based on this contractual provision, the trial judge dismissed important pre-contractual documents (e.g., a memorandum of understanding) and other surrounding circumstances as irrelevant to the interpretive exercise. He determined that the agreement was at odds with what he considered to be IFP's unilateral expectations with respect to the nature of its working interest. For that reason, he dismissed IFP's claim.[43]

The Court of Appeal reversed the trial judge's decision, holding that the judge erred in law in failing to consider the surrounding circumstances. The court undertook a detailed analysis of the circumstances surrounding the agreement in an effort to determine the parties' mutual and objective intentions with respect to the interest held by IFP. To do so, the court considered the evidence of negotiations leading up to the execution of the agreement and a memorandum of understanding agreed to by the parties prior to the contract's execution. The court concluded that, had the surrounding circumstances been taken into account, it would have been apparent that the contract was not intended to—and did not—limit IFP's working interest in Eyehill Creek. The court ruled in favour of IFP.

Two steps in the court's reasoning are relevant to our discussion. First, the court clarified the theoretical reasons suggesting that the parol evidence rule does not interfere with the central relevance of the factual matrix:

> Considering the surrounding circumstances of a contract does not offend the parol evidence rule. That rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract. However, evidence of surrounding circumstances is not used for this purpose but rather as an objective interpretive aid to determine the meaning of the words the parties used ... Therefore, while the factual matrix cannot be used to craft a new agreement, a trial judge must consider it to ensure the written words of the contract are not looked at in isolation or divorced from the background context against which the words were chosen. The goal is to deepen the trial judge's under-

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[43] See *ibid* at para 407.

> standing of the mutual and objective intentions of the parties as expressed in the words of the contract.[44]

This passage clarifies that while the parol evidence rule concerns the identification of contract terms, the relevance of the factual matrix is limited to these terms' interpretation. The court then applied this conceptual distinction to the issue of whether an EAC may limit the interpretive relevance of the factual matrix. The court clarified that the EAC in the agreement did not excuse the trial judge from considering the surrounding circumstances in determining the meaning of "working interest." The court stated,

> The mere existence of an "entire agreement" provision does not mean that the words chosen beyond that entire agreement provision admit of one interpretation only. The purpose of considering the surrounding circumstances is not to add to, contradict or vary the terms of the agreement but rather use them as an interpretive aid to determine the meaning of the words in dispute. Where parties have concluded an agreement and a court is left to sort out the parties' objective intentions, it cannot be prevented from considering the surrounding circumstances by a provision that is itself based on the assumption that the agreement is clear – when it is not.[45]

The preceding considerations suggest that the interpretation of EACs as preventing judges from reading contracts in light of the surrounding circumstances may significantly undermine the accuracy of the contractual interpretation process. Ostensibly, EACs indicate the parties' intentions to limit their obligations to the written contractual terms—that is, they are concerned with the identification of contract terms and not their interpretation. Therefore, to plausibly interpret an EAC as signalling the parties' intention to contract out of a contextual approach to contract interpretation, the court must be able to venture beyond the terms expressed by the parties and read the EAC in light of the overall circumstances surrounding the formation of the contract.

Furthermore, even when the existence of an EAC is found to reflect the genuine intent of the parties to integrate their agreement, interpretive accuracy may still require judges to read the written terms in light of the surrounding circumstances bearing on the parties' objective intention. It is a well-established principle in current Canadian common law that courts must consider the background facts of the contract regardless of any finding of ambiguity on a plain reading of the language of the con-

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[44] *IFP Technologies* CA, *supra* note 41 at para 81 (quoting *Sattva*, *supra* note 11 at paras 59–61).

[45] *Ibid* at para 124.

tract.[46] The source of contractual ambiguity is to be found in the context of the agreement. Therefore, in the case of a contract that is not ambiguous on its face, interpreting an EAC as setting aside the context would impede a judge's ability to *identify* a contractual ambiguity. On the other hand, in the case of a contract that is incomplete or ambiguous, interpreting an EAC as barring consideration of the context would hamper the judge's ability to *resolve* contractual ambiguity or to accurately interpret the lack of precision in the contract. For these reasons, interpreting EACs as impeding the judge's ability to use evidence beyond the wording of the written contract can yield arbitrary results at odds with the parties' objective intentions, as reflected in the contract's written terms.

C. Subsequent Conduct

A major limitation to the effectiveness of EACs stems from the principle, generally recognized by courts, that EACs only apply to events that have already occurred at the time of contract formation. The most detailed judicial statement concerning the retrospective effect of EACs is found in *Shelanu Inc. v. Print Three Franchising Corp.* ("*Shelanu*").[47] The Ontario Court of Appeal found that an EAC in a written agreement does not render a subsequent oral agreement between the parties unenforceable.[48] The retrospective nature of EACs has two important implications. First, parties to a contract cannot rely on an EAC to shield them from liability arising from representations made *after* a contract has been signed. Second, courts may consider the parties' post-contractual conduct to determine what they intended the words enshrined in the EAC to mean.

A good example of how these two principles can be applied by courts is the Ontario Court of Appeal's decision in *Soboczynski v. Beauchamp* ("*Soboczynski*").[49] The dispute involved an agreement of purchase and sale of a house, and the agreement contained the following EAC:

> [The agreement of purchase and sale], including any Schedule attached hereto, shall constitute the entire Agreement between Buyer

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46 See e.g. *Eco-Zone Engineering Ltd v Grand Falls-Windsor (Town of)*, 2000 NFCA 21 at para 10; *King v Operating Engineers Training Institute of Manitoba Inc*, 2011 MBCA 80 at paras 69–70; *Sattva*, *supra* note 11 at para 46; *Fontaine v Canada (AG)*, 2014 MBCA 93 at para 43; *Directcash Management Inc v Seven Oaks Inn Partnership*, 2014 SKCA 106 at para 13; *Shewchuk v Blackmont Capital Inc*, 2016 ONCA 912 at para 39; *IFP Technologies* CA, *supra* note 41 at para 82. *Sattva*, *supra* note 11 marked a shift where examining background facts in the absence of ambiguity began to be more clearly expressed as obligatory.

47 [2003] OJ No 1919, 64 OR (3d) 533 (CA) [*Shelanu* cited to OJ].

48 See *ibid* at para 52.

49 See *Soboczynski*, *supra* note 20.

> and Seller. There is no representation, warranty, collateral agreement or condition, which affects [the agreement] other than as expressed herein.[50]

Following the execution of the agreement but before the transaction closed, the purchaser requested that the seller complete and sign a Seller Property Information Statement (SPIS) to the effect that the property was not subject to flooding. After delivery of the SPIS, the basement of the house flooded, causing minor damage. The appellants repaired the damage but did not disclose the incident to the respondents. After the transaction closed, the basement flooded again. Upon learning of the undisclosed pre-closure flood, the purchaser sued the seller for damages based on negligent misrepresentation, arguing that the SPIS compelled the seller to disclose the pre-closing flood to them. One issue that arose at trial was whether the EAC contained in the agreement precluded the purchaser's action in tort based on non-contractual representations made subsequent to entering into the agreement. Although the dispute centred on a tort issue, the sweeping language of the decision was applicable to both tort and contract claims grounded in representations made after the conclusion of the contract.

The trial judge dismissed the plaintiff's claim, holding that the EAC in the agreement acted as a bar to the respondents' action. The Divisional Court disagreed with the trial judge and held that the SPIS required the seller to advise of the pre-closing flood regardless of the EAC in the agreement.[51] The Ontario Court of Appeal agreed with the Divisional Court that the representations the appellants made in the SPIS were actionable notwithstanding the EAC in the agreement. The court found that the EAC in the agreement operated retrospectively, not prospectively. Its application was "restricted to limit representations, warranties, collateral agreements, and conditions made *prior to or during* the negotiations leading up to the signing of the agreement."[52] The SPIS was completed *after* the agreement had been signed by all parties; therefore, when the seller made representations in the SPIS, "the entire agreement clause was spent."[53] Thus, "any consequences flowing from representations made in the SPIS were outside the reach of the entire agreement clause."[54]

To justify its conclusion, the court relied on four points. First, the general purpose of an EAC is "to lift and distill the parties' bargain from the

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50 *Ibid* at para 10.

51 See *Soboczynski v Beauchamp*, 2011 ONSC 679 (Div Ct).

52 *Soboczynski*, *supra* note 20 at para 41 [emphasis in original].

53 *Ibid*.

54 *Ibid*.

muck of [*pre-contractual*] negotiations."[55] Second, the court relied on *Shelanu* to support the proposition that "[EACs] do not apply prospectively, unless the wording expressly so provides."[56] Third, the court considered the wording of the EAC contained in the agreement and emphasized that the use of the present tense ("[t]here *is* no representation") referred to representations made at the time the agreement was signed.[57] Finally, the court relied on the parties' post-contractual conduct to clarify their intended meaning: "The fact that [the parties] completed the SPIS, after consulting their lawyer, provides insight into their intentions in relation to the entire agreement clause. It reveals that the [parties] considered the SPIS seriously."[58] The parties intended the sellers' obligations under the SPIS to apply and not be rendered unenforceable by the EAC.

The generally accepted interpretation by courts that EACs do not apply prospectively is supported by both sound legal theory and sensible policy considerations. From a theoretical standpoint, while the basis for the enforcement of EACs (as with any other contract term) is the principle of freedom of contract,[59] the forward-looking interpretation of such clauses precludes parties from freely entering a contract at a later date. This would raise the question of whether the principle of freedom of contract could coherently support the application of EACs to events subsequent to the time of contracting. Indeed, it may rightly be argued that rather than supporting the prevalence of an EAC over a subsequent agreement, the principle of freedom of contract enables parties to freely "unmake" the earlier contract (which was aimed at precluding the subsequent agreement). Furthermore, contract law scholarship generally recognizes that contracting parties are largely unable to predict all future contingencies. The limited foresight of parties makes it even more difficult to ground the forward-looking interpretation of EACs on the principle of party autonomy.[60]

From a policy perspective, the prospective application of EACs may be justified by the desire to preclude fabricated claims that a party has made an oral agreement. However, the prospective application of wide-ranging EACs is not what is needed to reflect this valid policy goal. The need to protect contracting parties from fabricated claims invoking subsequent

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55 *Ibid* at para 43 [emphasis added].

56 *Ibid* at para 51.

57 See *ibid* at para 56 [emphasis in original].

58 *Ibid* at para 62.

59 More specifically, the legal basis for the enforcement of EACs is found in the doctrine of estoppel by convention or estoppel by representation: see MacDougall, *supra* note 21 at 41–42.

60 See Hall, *supra* note 8 at 321.

oral variations can be effectively dealt with by the existing principles of contract law concerning contract formation. To prove the existence of a subsequent oral agreement, the claimant must establish on the balance of probabilities all the requirements of contract formation, including offer and acceptance, intention to enter into a legal relationship, and exchange of sufficient consideration. Furthermore, at common law, contract variations are subject to the pre-existing duty rule, which requires fresh consideration for a contract variation to become binding.[61] There is nothing to suggest that a forward-looking interpretation of EACs would enhance the effectiveness of these principles of contract formation in the context of subsequent oral agreements.[62] Sophisticated contracting parties seeking to improve commercial certainty and prevent abusive litigation on alleged subsequent oral variations could perhaps use a more targeted no-oral-modification clause (NOM). Finally, it is plausible that a generalized prospective application of EACs would have to be counterbalanced in some instances by the creation of specific exceptions aimed at avoiding unfair outcomes. These exceptions—which would likely be based on equitable doctrines, such as estoppel and detrimental reliance—would likely result in increased uncertainty surrounding the application of EACs. In light of these considerations, it is plausible that the law is rendered significantly more certain through the interpretation of EAC clauses as only retrospectively applicable.

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61 See *Gilbert Steel Ltd v University Construction Ltd*, (1976) 67 DLR (3d) 606, 12 OR (2d) 19 (Ont CA).

62 A number of lower court decisions in Canada hold that a no-oral-modification clause is enforceable: see *Toronto Dominion Bank v Turk* [1997] OJ No 2669, 1997 CarswellOnt 2054 at 15–16; *Becker v Jane Doe No 1,* 2015 ABQB 144 at paras 23–28, 33, 37–38; *Sportsco International, LP v Rogers Blue Jays Baseball Partnership,* [2003] OJ No 189, 119 ACWS (3d) 568. However, in *Shelanu*, *supra* note 47 at para 50, the Ontario Court of Appeal argued that "an express provision in a written contract forbidding oral variation of the terms of a contract or its discharge is generally unsuccessful with respect to subsequent agreements." There is increasing scholarly debate on the enforceability of no-oral-modification clauses in common law jurisdictions: see e.g. Jonathan Morgan, "Contracting for Self-Denial: On Enforcing 'No Oral Modification' Clauses" (2017) 76:3 Cambridge LJ 589 (arguing that no-oral-modification clauses should be enforced in English law); Joshua Tayar, "No Certainty and No Justice: The Counterintuitive Effects of Enforcing 'No Oral Modification Clauses'" (2019) 19:2 Global Jurist 1 (arguing that no-oral-modification clauses should generally not be enforced); Andrew Burrows, "Anti-Oral Variation Clauses: Rock-Solid or Rocky?" in Paul S Davies & Magda Raczynska, eds, *Contents of Commercial Contracts: Terms Affecting Freedoms* (Oxford, UK: Hart Publishing, 2020) 35 at 35–50 (examining alternative jurisprudential approaches).

II. The Collateral Contract

One of the effects that parties aim to achieve when drafting an EAC is to preclude claims of breach of collateral contracts. The theory of collateral contract is used in contractual adjudication to justify an exception to the application of the parol evidence rule; that is, the parol evidence is admitted to prove the existence of a collateral contract. A pre-contractual statement can be qualified as a collateral contract when it is made by one party (the promisor in the principal contract) in exchange for the other party (the promisee in the principal contract) entering into the main contract. To be enforceable, the collateral agreement must itself be a complete and enforceable contract,[63] and it must not contradict, nor be inconsistent with, the main written agreement.[64]

The effectiveness of EACs in precluding claims based on collateral contracts is diminished by the very same limitations inherent in the evidentiary function of EACs. In deciding whether an EAC precludes claims for breach of a collateral contract, the judge must ascertain the parties' objective intention in light of the circumstances surrounding the formation of the contract. The existence of an EAC is, therefore, not conclusive with respect to whether the collateral agreement is enforceable: whether an EAC precludes a collateral agreement is ultimately a matter of contextual interpretation.

A. Decisions Disregarding EACs to Give Effect to Collateral Contracts

A first line of decisions by British Columbia's lower courts has recognized and enforced a collateral agreement between the parties notwithstanding the presence of an EAC in the main contract. The British Columbia Court of Appeal's decision in *Turner v. Visscher Holdings Inc.* ("*Turner*") constitutes the precedential basis for several of these decisions.[65] The parties entered into a written contract pursuant to which the defendant would purchase the plaintiff's interest in a company. The contract contained an EAC that expressly excluded collateral agreements from the contract's scope. The plaintiff alleged that the parties had entered into two subsequent collateral oral contracts—employment and bo-

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63 See *Heilbut Symons & Co v Buckleton* [1913] AC 30 (HL (Eng)) at 33–34.

64 See *Hawrish*, *supra* note 28; *Bauer*, *supra* note 28. However, some cases suggest that this principle applies only when it is clear that the contract sued upon is wholly in writing. If a party can establish that there was a pre-contractual stipulation that was not intended to be excluded, then it may be relied on even though it is arguably inconsistent with certain terms of the written contract (see *Toronto-Dominion Bank v Griffiths,* [1987] BCJ No 1876 at 11–12, 18 BCLR. (2d) 117 (CA)).

65 See *Turner*, *supra* note 6.

nus agreements—and sought to enforce the latter. In assessing the enforceability of the EAC, the court stated, it "all comes down to a question of intention."[66] The judge must determine whether "it [is] reasonable to infer [the parties'] mutual intention ... that the entire agreement clause of the written contract should apply to the oral bonus agreement."[67] The court found that, notwithstanding the existence of an EAC, the parties had acted in accordance with the terms of the collateral employment agreement, thereby evidencing a clear intention not to have the written contract encompass all their contractual relations. Under these circumstances, the judge could not infer the parties' mutual intention that the EAC in the written contract should apply to the oral bonus agreement.

A similar line of reasoning was followed by the British Columbia Court of Appeal in *Zippy Print Enterprises Ltd. v. Pawliuk*, the most vigorous and articulated judicial statement of an EAC's non-enforceability in the face of claims for breach of collateral contracts.[68] 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 into the contract, the licensee learned that many of the representations were untrue and the franchise ultimately failed. The agreement contained an EAC that expressly excluded promises "whether direct, indirect, or collateral, oral or otherwise" that were not embodied in the written contract.[69] The franchisor sued the franchisee for unpaid royalties and to enforce a non-competition clause. The franchisee counterclaimed damages for breach of collateral agreement and for negligent misrepresentation. She said that the numerous specific representations made by the franchisor created a collateral contract to the licence agreement in which the consideration was the entry into the licence agreement. The trial judge ruled in favour of the franchisee, and the appellate court affirmed the judgment by declining to enforce the EAC that precluded the franchisee's claim.

In rejecting the enforcement of the EAC, Justice Lambert, writing for the majority, examined the theoretical basis for justifying the enforcement of the collateral contract in the face of an EAC. He referred to the principle established by Lord Denning in *Mendelssohn v. Normand Ltd.* ("*Mendelssohn*"),[70] according to which:

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66 *Ibid* at para 11.

67 *Ibid*.

68 See *Zippy*, *supra* note 6.

69 *Ibid* at para 30.

70 [1970] 1 QB 177 (CA (Eng)) [*Mendelssohn*].

> when a man has made, by word of mouth, a promise or a representation of fact, on which the other party acts by entering into the contract. In all such cases the man is not allowed to repudiate his representation by reference to a printed condition.[71]

The practical implication of this principle is that a commercial actor cannot make an oral representation designed to persuade the counterparty to enter into a contract of adhesion and subsequently evade liability for misrepresentation by invoking the parol evidence rule. The inducing precontractual statement must be treated as part of the contractual relationship on one of the following two grounds:

> either on the basis that the written contract document was not intended to form the entire agreement between the parties (the one contract theory), or, alternatively, on the basis that the oral representation, when it was acted upon by the person to whom it was made entering into the written contract, became a separate or collateral contract on which liability may be founded (the two contract theory).[72]

Justice Lambert recognized that "on either theory, liability for the damages flowing from the falsity of the representation can be excluded by a properly framed exclusion clause which both parties have considered and which both parties intend should limit liability flowing from the representation."[73] However, Justice Lambert stated:

> 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.[74]

The *Zippy* decision clarifies that an EAC can be defeated by submitting parol evidence that the parties' mutual objective intention was not to consider the written contract their whole agreement. EACs will be enforced if brought to the attention of the contracting party. In short, EACs are more likely to preclude collateral contracts if they are *both* specific in content and specifically acknowledged by the party.

B. Decisions Enforcing EACs to Exclude Collateral Contracts

A second line of cases represents the proposition that a collateral agreement cannot be enforced if it is precluded by an EAC. These deci-

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71 *Zippy*, *supra* note 6 at para 37 (quoting *Mendelssohn*, *supra* note 70).

72 *Ibid* at para 41.

73 *Ibid* at para 42.

74 *Ibid*.

sions rest on the same conceptual assumption as *Turner* and *Zippy* that the decision as to whether an EAC precludes a collateral contract requires the judge to ascertain the objective intention of the parties. Unlike *Turner* and *Zippy*, however, these cases involve contracts negotiated between experienced commercial parties.

The most frequently cited precedential basis for these decisions is the holding in *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* ("*Power Consolidated*").[75] The dispute arose out of the defendants' sale of a pulp mill to the plaintiffs. The contract contained the following EAC:

> This Agreement (including the Schedules), together with the agreements, certificates and other documents to be delivered pursuant to this Agreement, constitute the entire agreement between the parties pertaining to the subject matter hereof...[76]

During the negotiations, a key issue was the quantification of the funds the vendor should transfer to the buyer to pay the pension benefits of salaried employees. The agreed value of pension assets to be transferred was considerably lower than the true value that should have been transferred. The plaintiffs accepted the lower amount as they relied on written representations provided to them by one of the vendor's employees. At trial, the plaintiff sued for breach of contract and negligent misrepresentation, claiming that by misrepresenting the values of pension assets the vendor breached a contractual warranty. The defendant argued that no breach of contract had occurred because the contract expressly excluded liability for all pre-contractual representations not included in the written contract. The court had to decide whether the EAC precluded the argument that the misrepresentation constituted a collateral contract. The court dismissed the plaintiffs' claim of breach of collateral contract on the basis that the parties had intended their written contracts to constitute the whole of their agreement, thereby precluding the plaintiffs from relying on an alleged collateral contract. The court stated:

> [T]he question is whether the intention of the parties in the case at bar was that the written contract together with the specified appendices would constitute the whole of the contract. That intention, as in all matters relating to contractual construction, must be determined objectively. Here the parties expressly agreed that the contract documents constituted the whole of their agreement. While in most cases such an agreement is only a presumption based on the parol evidence rule, in this case it has been made an express term of

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75 *Power Consolidated*, *supra* note 5 at 6.

76 *Ibid* at 2, 5.

> the contract. A presumption can be rebutted; an express term of the contract, barring mistake or fraud, cannot.[77]

This passage has become a reference point for subsequent decisions to enforce EACs to preclude claims grounded either in alleged collateral contracts or, as will be seen in the next subsection, in implied terms.

In *Gutierrez v. Tropic International Ltd.* ("*Gutierrez*"), the plaintiff sued to enforce a guarantee related to a redemption agreement.[78] The agreement contained an EAC providing that the terms of both the agreement and the guarantee "[superseded] any and all prior negotiations, understandings and agreements, written or oral."[79] The two defendants alleged that prior to their execution of the agreement, they had reached an oral agreement relating to various matters according to which the plaintiff was not entitled to receive payment. Quoting *Power Consolidated*, the Ontario Court of Appeal emphasized the importance of ascertaining the parties' intentions and found that the existence of an EAC demonstrated the parties' intentions to render their contract wholly in writing.[80] The court concluded that the alleged collateral contract could not survive the EAC in the redemption agreement. The evidence submitted by the parties indicated that the collateral agreement was made prior to the execution dates of both the redemption agreement and the guarantee. Assuming that the pre-contractual statements alleged by the defendants constituted a collateral contract, they would still be excluded by virtue of the fact that, after entering into the collateral agreement, the parties agreed to an overriding contractual integration clause.[81]

A similar presumption in favour of the enforcement of an EAC over a collateral contract is found in *MacMillan v. Kaiser Equipment Ltd.* ("*MacMillan*").[82] Mr. MacMillan, an inventor of tools for use in the drywall industry, sold his company to Kaiser Equipment and was concurrently employed as a consultant by Kaiser under a separate contract. Within one year of the execution of the employment agreement, he was dismissed for cause by Kaiser Equipment. He alleged that he had been promised an equitable interest in the defendant company, which never materialized but had induced him to enter the various contracts. He sued for negligent misrepresentation and breach of contract. The employment contract contained an EAC, which read as follows:

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77 *Ibid* at 2–4.

78 *Gutierrez*, *supra* note 5 at para 9.

79 *Ibid* at para 5.

80 See *ibid* at paras 9, 24, citing in part *Power Consolidated*, *supra* note 5 at 6.

81 See *ibid*.

82 *MacMillan*, *supra* note 5 at para 36.

> This contract constitutes the entire agreement between the parties with respect to the employment and appointment of [Mr. MacMillan] and any and all previous agreements, written or oral, express or implied, between the parties or on their behalf relating to the employment and appointment of [Mr. MacMillan] by the Employer, are terminated and cancelled and each of the parties releases and forever discharges the other of and from all manner of actions, causes of action, claims and demands whatsoever, under or in respect of any agreement.[83]

At trial, Mr. MacMillan invoked *Turner* and *Zippy* to argue that the EAC's presence merely reinforced the presumption that the employment agreement is the whole agreement between the parties. The trial judge relied on the *Gutierrez* principle that an action on a written agreement containing an EAC could not be defended on the basis of an alleged oral collateral agreement.[84] She concluded that the EAC in the employment agreement was not rebutted or modified by a collateral promise of shares and dismissed the plaintiff's action for both negligent misrepresentation and breach of contract.

MacMillan appealed, arguing that evidence relating to the defendant's collateral promises must be considered to determine whether the EAC in the employment agreement was truly intended to exclude those promises. The British Columbia Court of Appeal rejected this argument, stating that in determining the intention of contracting parties, courts adopt an objective standard.[85] From this perspective, MacMillan failed to establish that the alleged collateral agreement survived the EAC in the written agreement. In this respect, the court emphasized that both parties were "sophisticated businesspersons" who negotiated the agreement with legal advice.[86] In particular, "MacMillan received independent legal advice by counsel who certified that he voluntarily agreed to be bound by the entire contents of the [employment agreement] after having received legal advice with respect to those contents."[87] The court stated that "an agreement that is negotiated between sophisticated businesspersons ought to be enforced in accordance with the terms they select in all but the most exceptional circumstances."[88] The court confirmed the trial judge's decision and concluded that the alleged collateral contract was excluded by the EAC. It

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83 *Ibid* at para 14.

84 See *MacMillan v Kaiser Equipment Ltd*, 2003 BCSC 672 at para 106.

85 See *MacMillan*, *supra* note 5 at paras 43–44.

86 See *ibid* at paras 43–45.

87 *Ibid* at para 14.

88 *Ibid* at para 45.

is worth noting that in *MacMillan,* the court expressly distinguished *Turner* and *Zippy* as cases involving a clear expression of the parties' intention to rely on promises or representations external to the written contract. In *Turner*, the parties clearly indicated that the written agreement containing the EAC did not actually constitute the entire agreement.[89] Similarly, in *Zippy*, it was clear that oral representations were deliberately made to induce the defendants to enter into the contract and that the defendants relied on those representations.[90]

Overall, case law analysis supports the proposition that the effectiveness of an EAC in barring claims based on collateral contracts ultimately depends on a variety of elements to be contextually examined by courts, including the drafting of the EAC, the level of sophistication of contracting parties, and whether the clause has been specifically acknowledged by the party.

III. Implied Terms

In addition to establishing a collateral contract, another means of asserting a claim that goes beyond the four walls of the written contract is to persuade the judge that a term (not expressly stated in the written document) should be *implied* in the contract because it reflects the intentions of the contracting parties. Courts have adopted conflicting approaches to the relationship between EACs and implied terms. A first line of decisions adopts a contextualist approach, according to which an EAC does not operate to exclude terms implied in the contract *when the court finds that the implied term is part of the existing agreement.* A second line of authorities takes a more formalistic approach, according to which the presence of a generically worded EAC is sufficient to exclude an implied term. Finally, the landmark decision by Supreme Court in *Bhasin* has clarified that the obligation of good faith performance is not an implied term and, as such, it falls outside the relationship between an EAC and implied terms.

A. Decisions Enforcing Implied Terms Found to Be Part of the Agreement

The leading case stating that a court may infer a term in a contract despite the existence of an EAC is the Ontario Court of Appeal's decision in *CivicLife.com Inc. v. Canada (A.G.)* ("*CivicLife*").[91] Industry Canada contracted with CivicLife.com Inc. ("CivicLife") to develop a portal making

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89 See *ibid* at para 37.

90 See *ibid* at para 39.

91 [2006] OJ No 2474, 215 OAC 43 [*CivicLife* cited to OJ].

all federal services and information accessible online. The contract contained an EAC that did not expressly preclude implied terms. The portal was not developed as planned, and a dispute arose mainly due to Industry Canada's lack of cooperation. The trial judge read into the contract an implied term of good faith owed by Industry Canada to CivicLife and held that Industry Canada had breached that duty. On appeal, the Crown submitted that the EAC precluded the trial judge from implying a duty of good faith. In rejecting this argument, the Ontario Court of Appeal stated that "an entire agreement clause will not preclude the implication of a term of the contract, such as a duty of good faith performance or the duty not to abuse a discretion, because such a term is already part of the existing agreement."[92] According to the court, "The trial judge was not adding a term to the agreement that was not part of the parties' bargain; he was enforcing the reasonable expectations of the parties under the agreement."[93] The court also noted that the EAC's wording did not preclude the implication of a term.[94]

The principle established in *CivicLife* requires courts to determine whether, according to the parties' intentions, implied terms 1) are *separate* from the contract and must, therefore, be excluded under an EAC, or 2) constitute *part of* the contract and cannot, therefore, be excluded. The highly contextual nature of this inquiry has resulted in apparently divergent outcomes in similar cases. One example of divergent outcomes is the Ontario Superior Court of Justice's decisions in *Allarco Entertainment 2008 Inc. v. Rogers Communications Inc.* ("*Allarco*")[95] and *Rio Algom Ltd. v. Canada (A.G.)* ("*Rio Algom*").[96] In *Allarco*, Allarco Entertainment Inc. ("Allarco Entertainment") brought a motion for a partial summary judgment against Rogers Communications Inc., claiming two breaches of implied terms in a broadcasting contract between them. The contract contained an EAC that specifically precluded implied terms.[97] Invoking *Civ-*

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92 *Ibid* at para 52.

93 *Ibid*.

94 See *ibid*.

95 2011 ONSC 5623 [*Allarco*].

96 2012 ONSC 550 [*Rio Algom*].

97 See *Allarco*, *supra* note 95 at para 62 [emphasis added]:

> This Agreement, including the schedules hereto and any agreements or documents to be delivered pursuant to the terms of this Agreement, constitutes the entire agreement of the parties relating to the subject matter hereof and supersedes all prior agreements, understandings, negotiations, representations and proposals, whether written or oral, relating to the subject matter hereof. There are no conditions, covenants, representations or warranties, express or *implied*, statutory or otherwise relating to the subject matter hereof, except as herein expressly provided.

icLife, Allarco Entertainment submitted that the EAC did not operate to exclude implied terms because such terms were already part of the existing agreement.[98] The court rejected Allarco Entertainment's argument by carefully distinguishing *CivicLife* on three bases. First, unlike in *CivicLife,* the EAC did not specifically exclude implied terms.[99] Second, unlike in *CivicLife,* the contract did not confer a wide discretionary power which might have allowed the judge to "say ... that the connected implied contractual good faith duty not to abuse the discretion was already part of the existing agreement."[100] Third, in *CivicLife,* the "implication of implied terms was used by the trial judge as part of an exercise to determine the overall intentions and objectives of the parties in entering into the contract."[101] The terms implied in *CivicLife* "were consistent with and indeed built upon the existing terms of the contract";[102] therefore, the judge could correctly conclude "that the implied terms were already terms of the agreement notwithstanding the entire agreement clause."[103] For these reasons, Allarco Entertainment's action against Rogers was dismissed. Justice Perell's analysis usefully clarifies the precedential significance of *CivicLif*e, which "stands only for the proposition that an implied term of good faith built upon existing terms of the contract is also an existing term of the contract that is not precluded by an entire agreement clause."[104] This is particularly the case when the EAC "does not expressly exclude implied terms."[105] Furthermore, Justice Perell emphasized that, independent of the operation of an EAC, a term cannot be implied in an agreement when the proposed term would conflict with the contract's express language.[106]

Justice Perell subsequently revisited his *Allarco* decision in *Rio Algom*.[107] The dispute arose out of a contract for the supply of uranium oxide between Eldorado Nuclear Mining and Refining Ltd. (a federal Crown corporation) and Rio Algom Canada. After the federal government enacted environmental regulations to remediate environmental harm, Rio Algom spent significant amounts to comply with the regulatory regime and

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98 See *ibid* at para 143.

99 See *ibid* at para 144.

100 *Ibid* at para 145.

101 *Ibid* at para 146, citing *CivicLife*, *supra* note 91.

102 *Supra* note 91.

103 *Allarco*, *supra* note 95 at para 146.

104 *Ibid* at para 147.

105 *Ibid*.

106 See *ibid* at para 148.

107 *Rio Algom*, *supra* note 96.

asked the federal government (as Eldorado's principal) to reimburse it. The Canadian government refused, and Rio Algom sued. Rio Algom argued that it was an implied term of the contract that, if Canada took any unilateral action increasing Rio Algom's cost of having produced and sold uranium, Canada would indemnify Rio Algom for the increased costs.[108] Justice Perell dismissed Rio Algom's claim on the grounds that the proposed implied term was not necessary to give business efficacy to the contract. In his reasoning, Justice Perell addressed the argument that an EAC precluded the court from inferring any term in the contracts. He compared the EAC he had interpreted in *Allarco* to the one in the contract between Rio Algom and Eldorado. The Rio Algom EAC did not contain the same explicit language as in the *Allarco* contract; the agreement was simply expressed as the "one agreement between Eldorado and Rio Algom containing a full and complete statement of the rights between the parties all as hereinafter fully set forth."[109] Justice Perell stated that this clause was "not strong or clear enough to preclude implied terms being part of the contract."[110] To support its conclusion, he invoked the *CivicLife* principle "that an entire agreement clause does not operate to exclude terms implied into the contract—when the court finds that the implied term is part of the existing agreement."[111] Furthermore, he emphasized that "[a]n entire agreement clause that does not expressly bar an implied term does not preclude the implication of a term in a contract."[112]

Recently, the Ontario Court of Appeal validated the approach set out in *CivicLife* in *Packall Packaging Inc. v. Ciszewski* ("*Packall*").[113] The decision in *Packall* provides an example of a term implied in the contract, despite the presence of an EAC, on the grounds that the implied term is required to give contractual efficacy to the contract. The dispute arose from a separation agreement between Henry Ciszewski and Anita Ciszewski. The agreement provided for Ms. Ciszewski's support through the receipt of dividends from Packall Packaging Inc. (PPI), a company operated by Mr. Ciszewski, whose ownership was split between the former spouses. Ms. Ciszewski threatened to sell her shares in the company and began to solicit interest from third parties, including PPI's competitors. Mr. Ciszewski subsequently moved to restrain Ms. Ciszewski from selling her shares without his consent. The motion judge inferred a term in the separation agreement that prevented Mr. or Ms. Ciszewski from dispos-

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108 See *ibid* at para 12.

109 *Ibid* at para 90.

110 *Ibid* at para 161.

111 *Ibid*, citing *CivicLife*, *supra* note 91.

112 *Rio Algom*, *supra* note 96 at para 161.

113 2016 ONCA 6 [*Packall*].

ing of their shares without one another's consent. The appellate court found that the implied term was necessary to give business efficacy to the separation agreement. Ms. Ciszewski's continued ownership gave effect to the parties' bargain that support payments to Ms. Ciszewski would be funded by PPI. That bargain necessitated that Ms. Ciszewski remain a shareholder of the companies through which the dividends flowed. This required the implication of the term that prevented Ms. Ciszewski from selling her shares in PPI without Mr. Ciszewski's consent. In the absence of such an implied term, Ms. Ciszewski would have been free to sell her shares, which would result in her no longer being able to receive dividends, which were the primary means of her ongoing support. Such action clearly defeats the main purpose of the separation agreement. The Court of Appeal held that the EAC did not preclude the finding of the implied term. It argued that "finding an implied term does not add a term to the agreement that was not part of the parties' bargain but enforces the parties' reasonable expectations."[114] To support its conclusion, the court relied on the *CivicLife* principle that "the presence of an entire agreement clause will not preclude the implication of a term of the contract because the term is already part of the existing agreement."[115]

B. Decisions Precluding Implied Terms Not Expressly Stated in the Contract

Another line of reasoning holds that EACs operate as a bar to implied terms in contracts. Such cases assume that the contractual statement that the written document constitutes the whole agreement between the parties is itself sufficient to exclude implied terms. To do otherwise would produce an effect that is inconsistent with the parties' intention. The conceptual underpinning of these decisions is the purported logical incompatibility of the incorporation of an EAC into a contract and an implied term. While the implication of a term is based on *adding* to the contract terms that parties have intended, by including an EAC in the contract (even without explicitly excluding implied terms), parties indicate their intent to *preclude the addition* of any term that is not rendered in writing.

The leading example of this line of reasoning is the Alberta Court of Appeal's decision in *Gainers Inc. v. Pocklington Financial Corp.* ("*Gainers*").[116] The dispute arose out of management services agreements between the plaintiff, Gainers Inc., and a group of its former parent corporations. The agreements contained an EAC stating that the written contract "constitutes the entire agreement between the Parties hereto with respect

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[114] *Ibid* at para 22.

[115] *Ibid*.

[116] 2000 ABCA 151 [*Gainers*].

to the subject matter hereof and supersedes [sic] all prior negotiations, proposals and agreements, whether oral or written, with respect to the subject matter hereof."[117] The trial judge admitted parol evidence concerning the parties' understanding, intent, and knowledge, and on this evidential basis it identified implied terms in the contracts. By contrast, the appellate court stated that the EAC would suffice to prevent the trial judge from amending the management services agreements through the implication of terms.[118] The court emphasized the principle that "[t]he intent of the parties is to be determined from the words which they put into their written contract; their subjective intent is irrelevant."[119] Therefore, "[t]he power to imply terms is to be used cautiously, and no implied term can be inconsistent with or contrary to the express terms of the contract."[120] On these premises, the court found that implied terms were ruled out by the EAC. The chief concern underlying the court's approach was to ensure contractual certainty, as the court vividly emphasized in this passage:

> If hindsight, *implication*, unspoken thoughts, and unwritten statements could have so pivotal a role as they appear to have had here, then written contracts would become a mere trap for the credulous. Almost all commercial certainty would evaporate, and commercial litigation become a swearing contest. A suit on a commercial contract, no matter how carefully drafted, would become a long historical investigation of an insoluble mystery.[121]

The incompatibility of an EAC and an implied term was made explicit by the Alberta Court of Queen's Bench in *921250 Alberta Ltd. v. 762910 Alberta Inc.*[122] A land vendor presented three offers to sell, each offer dealing with a separate piece of property. The purchaser, who intended to proceed with the purchase of only one parcel, purported to have accepted the offers conditionally but then removed the conditions on only one property. The vendor took the position that there was an ("all or none") implied term in each of the offers under which the purchaser would either accept all or none of the offers. The court, relying on the *Gainers* decision, declined to find an implied term, ruling that implied terms were precluded by the EAC. The court argued as follows:

> The underlying theory that terms can be implied in a contract is based on adding missing terms that the parties intended. Where

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117 *Ibid* at para 11.

118 See *ibid* at paras 14, 16.

119 *Ibid* at para 20.

120 *Ibid* at para 18.

121 *Ibid* at para 24 [emphasis added].

122 2003 ABQB 81 [*921250 Alberta*].

> parties expressly disavow the existence of any other terms in an "entire agreement" clause, it cannot be consistent with their intention to act to the opposite and purport to add some.[123]

In British Columbia, lower courts have often adopted a similar approach, arguing that an EAC operates as a bar to implying a term in a contract and that holding otherwise would produce an effect inconsistent with the agreement as a whole.[124]

C. EACs Cannot Exclude the Duty of Honesty in Contractual Performance

The Supreme Court's decision in *Bhasin* has specifically addressed the issue of the relationship between EACs and the obligation of good faith performance.

In *Bhasin*, the plaintiff, Harish Bhasin, brought an action for breach of contract against Canadian American Financial Corporation ("Can-Am"). Mr. Bhasin and Can-Am had a commercial dealership agreement, which contained an EAC that specifically precluded the implication of any terms other than the express terms of the contract. The trial judge held that Can-Am breached its duty to act in good faith in performing its contractual obligations.[125] The Alberta Court of Appeal found that any implication of a duty of good faith was precluded by the EAC and reversed.[126] The Supreme Court recognized that, given the EAC's clear terms, "it would ... be difficult to say that a duty of good faith should be implied in this case on the basis of the intentions of the parties."[127] Thus, it rejected the plaintiff's argument that the defendant had breached an implied term imposing a duty of good faith in the exercise of contractual discretion. However, in order to protect Mr. Bhasin's legitimate interests under the contract, the Court created a new duty of honesty in contractual performance that operates as a legal doctrine (rather than a contract term), independently of the parties' intention. The duty of honesty emanates directly from the general organizing principle of good faith in contractual performance that *Bhasin* formally recognizes. Justice Cromwell, writing for a unanimous court, clarified that the duty of honesty "should not be

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[123] *Ibid* at para 16. The same line of reasoning was adopted more recently by the same court in *Creeburn Lake Lodge Limited Partnership v Fluor Canada Ltd*, 2013 ABQB 721.

[124] See *Water's Edge Resort Ltd v Canada (AG) Ltd*, 2014 BCSC 873 at para 72; *Maxam Opportunities Fund Limited Partnership v 729171 Alberta Inc*, 2015 BCSC 271 at para 122.

[125] See *Bhasin v Hrynew*, 2011 ABQB 637.

[126] See *Bhasin v Hrynew*, 2013 ABCA 98.

[127] *Bhasin*, *supra* note 12 at para 72.

thought of as an implied term, but a general doctrine of contract law"[128] and, as such, parties cannot exclude it by an EAC.[129]

Justice Cromwell admitted the possibility that parties might partially disclaim the newly recognized duty of honest performance. He stated, "any modification of the duty of honest performance would need to be in express terms."[130] However, he also emphasized that "[b]ecause the duty of honesty in contractual performance is a general doctrine of contract law that applies to all contracts ... the parties are not free to exclude it."[131] Crucially, he noted, "[a] generically worded entire agreement clause ... does not indicate any intention of the parties to depart from the basic tenets of honest performance."[132] Therefore, it is clear after *Bhasin* that the overarching principle of good faith in contractual performance is not an implied term, and neither the general principle of good faith nor its more specific manifestations can be contractually disclaimed. Two recent Supreme Court decisions have confirmed this approach. In *Callow*, the Supreme Court emphasized that the duty of honesty "applies to all contracts"[133] and that such duty "operates irrespective of the intentions of the parties."[134] In *Wastech*, the Court established that the duty to exercise discretion in good faith is a general doctrine of contract law[135] and parties to a contract cannot exclude that duty by drafting entire agreement clauses.[136]

Although the Supreme Court has clarified that the duty of good faith cannot be excluded by an EAC, it is likely that some degree of uncertainty will continue to characterize the relationship between EACs and implied terms. Courts will continue to oscillate between more contextualist (relying on *CivicLife*) and more formalist approaches (relying on *Gainers*). Divergent decisions by the Ontario Court of Appeal following *Bhasin* seem to corroborate this conjecture. In *High Tower Homes Corp. v. Stevens*, the court found that an EAC precluded implied conditions.[137] The court stated: "Seen in the light of *Bhasin*, *CivicLife* is about the importance of acting in good faith in contractual dealings, and not about the general ability

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[128] *Ibid* at para 74.

[129] See *ibid*.

[130] *Ibid* at para 78.

[131] *Ibid* at para 75.

[132] *Ibid* at para 78.

[133] *Callow*, *supra* note 13 at para 42.

[134] *Ibid* at para 48, citing *Bhasin*, *supra* note 12 at para 74.

[135] See *Wastech*, *supra* note 14 at paras 91, 94.

[136] See *Ibid* at para 95.

[137] 2014 ONCA 911 [*High Tower*].

to imply terms ... notwithstanding an entire agreement clause."[138] In *Balmoral Custom Homes Ltd. v. Biggar*, the court found that an EAC did not "exclude the parties' duty of honesty not to lie or otherwise knowingly mislead one another about matters directly linked to the performance of the contract."[139] Relying on *Bhasin*, the court emphasized that this duty operates as a general doctrine of contract law that the parties are not authorized to exclude.[140]

D. The Institutional Dimension of the Interplay Between EACs and Implied Terms

The interplay between EACs and implied terms raises deep issues concerning the tension between the principle of freedom of contract and the courts' jurisdiction in matters of contract interpretation. The previously examined case law reflects the courts' attempt to strike a balance between these competing features of contract law. The *CivicLife* distinction between terms that are found to be part of the contract and terms that are separate from the contract can be usefully understood as an attempt to demarcate the outer limits of freedom of contract with respect to the courts' jurisdiction in contractual interpretation. When terms are found to be part of the contract, they are attributed to the parties' actual intention. As such, they reside outside the relationship between EACs and implied terms. They should be regarded as falling within the contract's four corners. In other instances, however, terms are implied in the contract in the *absence* of the parties' actual intention, on the basis of a deliberate judicial reallocation of the contractual risks informed by policy considerations external to the contract.[141] In this latter scenario, the presence of an EAC specifically excluding the implication of terms raises a tension between implication of terms and freedom of contract. This tension can be resolved by examining the nature and characteristics of the specific contractual relationship at hand. In fully negotiated contracts between sophisticated parties, the principle of freedom of contract should be

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[138] *Ibid* at para 37.

[139] 2016 ONCA 967 at para 8 [*Balmoral*].

[140] See *ibid* at para 8.

[141] For discussion on how courts apply the doctrine of implied terms to supplement the agreement between the parties, see Todd D Rakoff, "The Implied Terms of Contracts: Of 'Default Rules' and 'Situation-Sense'" in Jack Beatson & Daniel Friedmann, eds, *Good Faith and Fault in Contract Law* (Oxford, UK: Clarendon Press, 1995) 191 at 191–228; Elisabeth Peden, "Policy Concerns Behind Implication of Terms in Law" (2001) 117 Law Q Rev 459; Stephen A Smith, *Contract Theory* (Oxford, UK: Oxford University Press, 2004) at 306–12; McCamus, *supra* note 19 at 832–53; Hugh Collins, "Implied Terms: The Foundation in Good Faith and Fair Dealing" (2014) 67 Current Leg Probs 297.

the overriding concern of contract adjudication; hence, terms that are separate from the contract should be excluded by the presence of a specifically worded EAC. By contrast, in contracts of adhesion with inequality of bargaining power, courts should always be permitted to afford protection to the unsophisticated party by implying terms that accord with the fundamental notions of reasonableness and fair dealing.[142]

It is worth noting that the *CivicLife* distinction largely corresponds to the division between "intrinsic" and "non-intrinsic" implied terms found in English contract law.[143] English courts qualify terms as "intrinsic" to the written agreement when they are required to give efficacy to existing terms by making the contract operational and more coherent. By contrast, terms are considered "non-intrinsic" when they do not form part of the written agreement itself but rather require external facts to be proved, such as terms arising as a result of a particular trade usage or custom. As a matter of English law, intrinsic implied terms cannot be excluded by an EAC, even though the clause specifically seeks to exclude implied terms. By contrast, non-intrinsic implied terms can be excluded by EACs provided the clause is clearly written so as to specifically exclude non-intrinsic terms.[144]

Legal certainty over the relationship between EACs and implied terms could be attained by Canadian courts through further clarification

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[142] In contracts between sophisticated parties with marked inequality of bargaining power, the tension between implication of terms and freedom of contract would be more difficult to solve. Arguably, the imbalance of bargaining power between the parties undermines the weaker party's freedom of contract; therefore, the overriding concern of contract adjudication is the protection of the weaker party, not freedom of contract. This consideration may suggest that, in contracts between sophisticated parties with marked power inequality, judges should afford protection to the weaker party by implying terms that reflect the notions of reasonableness and fair dealing.

[143] See e.g. *Axa Sun Life Services plc v Campbell Martin Ltd*, [2011] EWCA Civ 133; *J N Hipwell & Son v Szurek*, [2018] EWCA Civ 674.

[144] The Canadian common law of contracts distinguishes three categories under which courts may imply terms: terms implied in fact; terms implied in law; and terms implied by custom and usage (see *Canadian Pacific Hotels Ltd v Bank of Montreal*, [1987] 1 SCR 711, 40 DLR (4th) 385; *Machtinger v HOJ Industries Ltd*, [1992] 1 SCR 986, 91 DLR (4th) 491). It is tempting to argue that, for the purposes of assessing their enforceability in the face of an EAC, terms implied in fact should generally be regarded as terms found in the contract. This argument would be based on the widely purported assumption in case law that terms implied in fact are designed to give effect to the will of the parties. However, contract scholarship has clarified that in some instances the rationale for terms implied in fact may be grounded on "notions of reasonableness and fair dealing" rather than the parties' intention (McCamus, *supra* note 19 at 834–35). Arguably, therefore, the *CivicLife* distinction between terms found to be part of the contract and terms separate to the contract cuts across the various instances in which courts may imply terms in Canadian common law contracts (see *CivicLife*, *supra* note 91 at para 52).

of the distinction between intrinsic and non-intrinsic contract terms. Greater clarity over this distinction would help contracting parties to better predict when courts are likely to enforce an EAC to exclude implied terms or disregard EACs to imply terms into the contract. By virtue of this clarified distinction, parties would be able to know in advance that they could not preclude intrinsic implied terms by drafting an EAC, while they could exclude extrinsic implied terms by drafting a specifically worded EAC.

IV. Assessing the Law on EACs

This section examines the normative underpinnings of the law on EACs. It emphasizes the current case law regime's strengths and limitations and identifies possible improvements that courts might adopt.

A. The Structure of the Normative Dilemma

In assessing an EAC's enforceability, courts attempt to strike a balance between the desire to protect the representee's reasonable reliance on the representor's pre-contractual statements and the competing desire to shield the representor from opportunistic post-contract allegations by the representee. The desire to protect the representee demands a contextual assessment of the understandings and expectations of the parties at the time of contract formation, as these are reflected in oral or written statements or representations found outside the written contract. By contrast, the desire to protect the representor's expectations that the source of contract obligations is confined to the four corners of the agreement (as stated in EACs) requires courts to adopt a more formalistic approach to contractual adjudication, insulating the written contract from the surrounding circumstances. Crucially, the balancing point between these competing normative needs shifts depending on various factors. Case law analysis has shown that, in enforcing EACs, Canadian courts consider the precise language of the EAC together with the specific characteristics of the transactional setting within which the clause operates. The relevant transactional features considered by courts include inequality of bargaining power between parties, their level of legal sophistication, and whether the contract containing the EAC is fully negotiated or is rather a contract of adhesion.

These considerations suggest that the degree of uncertainty surrounding the enforcement of EACs is not necessarily attributable to a lack of a coherent approach by courts but rather to the variance of the balancing point between competing normative needs in different transactional con-

texts.[145] Assessment of an EAC's enforceability requires a context-specific inquiry into whether the intention of the parties at the time of contract formation is to have the written contract constitute the whole of the contract. This assessment requires the judge to take into consideration the various factors mentioned above (wording, bargaining power and sophistication level, contractual type) to appropriately consider the legitimate interests of the parties involved. This approach to assessing EACs is consistent with the contextual method of contractual interpretation adopted by Canadian courts, according to which judges must ascertain the parties' objective intention at the time of contract formation by considering all the relevant circumstances surrounding the formation of the contract. It is, therefore, an *inherent* limitation to the effectiveness of EACs that their evidential significance varies depending on various circumstances against which they are weighed in determining the parties' intentions.

Furthermore, recent case law of the Supreme Court highlights the legal significance of the differentiation between fully negotiated contracts between sophisticated parties and contracts of adhesion. Three recent decisions—not specifically concerning EACs—have emphasized the distinct nature of issues raised by mass-market boilerplates as compared to fully negotiated contracts. First, in *Ledcor*[146] the Supreme Court established a different, less deferential, standard of appellate review for issues of contractual interpretation in standard form agreements, as compared to the general deferential standard of review developed in *Sattva*.[147] As MacLean has usefully emphasized, by mandating appellate courts to review standard form contracts on a less deferential standard of review, the Supreme Court has empowered appellate courts to "exercise sorely needed judicial oversight over these potentially harmful products."[148] Second, in *Facebook* the Supreme Court set aside the forum selection clause in Facebook's terms of service agreement, thereby allowing a class action brought by British Columbia residents against Facebook to proceed.[149] In *Facebook* the lead judgment regarded several distinctive features of contracts of

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145 See Ogilvie, *supra* note 7 at 645.

146 See *Ledcor*, *supra* note 15 at para 24 (the SCC established that the interpretation of a standard form contract is "better characterized as a question of law subject to correctness review," rather than a question of mixed fact and law subject to palpable and overriding error).

147 See *Sattva, supra* note 11. For a discussion on how the interpretation of standard form contracts evolved through *Sattva* and *Ledcor*, see Sandra Corbett & Ryan P Krushelnitzky, "Through the Scratched Looking Glass: *Sattva*, *Ledcor*, *Teal* and Developments in the Law of Contract" [2017] Annual Rev Civ Litigation 379 at 402–404; Bertolini, *supra* note 32 at 346.

148 MacLean, *supra* note 18 at 309.

149 See *Facebook*, *supra* note 16 at paras 2, 4.

adhesion—such as inequality of bargaining power,[150] and lack of opportunity to negotiate[151]—as strong enough public policy factors to deprive the forum selection clause of effect.[152] Finally, in *Uber*, the Supreme Court found that an arbitration clause within an online standard form services agreement was invalid because it was unconscionable.[153] The majority opinion examined the doctrine of unconscionability in the context of a standard form contract. It emphasized that, although standard form contracts are in many instances both necessary and useful, there are "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."[154] In examining the arbitration clause in the case at hand, the Court found an inequality of bargaining power between the parties to the contract, and emphasized that the standard form contract in which the arbitration clause was contained was non-negotiable.

The above considerations suggest that any effort to improve the law concerning EACs must focus on differentiating between 1) contracts between sophisticated parties and contracts of adhesion and 2) specifically negotiated EACs and generically worded EACs found in standard form contracts. As the analysis in previous sections has demonstrated, these distinctions are already present in the relevant case law. However, marginal improvements in EAC effectiveness could be obtained through sharper differentiation of the legal *effects* associated with these distinctions. To illustrate this point, in the next subsection, two hypothetical legal regimes concerning EACs will be examined. This discussion will help to define with greater precision the normative trade-offs associated with alternative legal regimes depending on the level of legal sophistication of the parties involved and their ability to mutually negotiate the contract's terms. Based on these insights, I will subsequently suggest that courts adopt two separate and clearly distinct legal regimes for contracts between sophisticated parties and contracts of adhesion. Adopting these regimes may, I will argue, improve EACs' effectiveness.

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150 See *ibid* at para 54.

151 See *ibid* at para 55.

152 See *ibid* at para 38. See also Enman-Beech, *supra* note 18 at 436–43.

153 See *Uber*, *supra* note 17.

154 *Ibid* at para 89.

B. Two Hypothetical Rules

1. Unenforceability Rule

Consider first a hypothetical legal regime in which courts deny the enforcement of EACs, holding constant all other elements of the current legal regime. The representee would be permitted to allege extrinsic evidence of breach of collateral contracts, regardless of the presence of an EAC in the written contract. Under Canadian case law, as noted earlier, judges may regard the presence of an EAC as constituting a strong indication of the parties' mutual intention to have the written document represent the exclusive record of their agreement (e.g., *Power Consolidated*, *Gutierrez*, *MacMillan*). This approach to an EAC is most likely to be taken by courts in contracts between sophisticated parties, while courts tend to be more reluctant to give effect to EACs to bar claims based on collateral contracts in contracts of adhesion (e.g., *Turner*, *Zippy*). Against this jurisprudential background, the generalized unenforceability of EACs would likely strengthen the protection of the sophisticated representee (which is not precluded from engaging in post-contractual allegations of collateral contracts in the presence of an EAC), without significantly improving the protection of the unsophisticated, inexperienced representee entering into contracts of adhesion. Furthermore, the generalized unenforceability of EACs would weaken the position of the sophisticated representor, who would be unable to negotiate the inclusion into the contract of an EAC either when dealing with a sophisticated commercial partner or unsophisticated counterparties.

This solution would likely be legally and economically inefficient. Sophisticated commercial actors tend to "factor the [legal] remedial options available to their counterparties into the purchase price of their transactions."[155] The inability to clearly and decisively contract away the counterparty's reliance on statements external to the contract will likely result in an increased price, incorporating an insurance premium against the risk of future claims in contract. In turn, the sophisticated representee would face a higher price for legal protection that they would prefer not to purchase. Generally, sophisticated representees have the cognitive, legal, and economic resources (e.g., sophisticated lawyers, accountants, and consultants) to effectively engage in pre-contractual inspections aimed at verifying the representor's pre-contractual statements. They 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

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[155] 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 Bus Lawyer 999 at 1001.

to prove the existence of a collateral contract in post-contractual litigation.[156] The preceding considerations suggest that a regime of generalized unenforceability of EACs would be inefficiently over-inclusive in its protection. It would prevent sophisticated parties from achieving their preferred bargaining equilibrium (trading the inclusion of an EAC against a lower price) without significantly improving the protection of the unsophisticated representee.

2. Default Penalty Rule

The problem of over-inclusiveness associated with the generalized unenforceability of EACs can be addressed, in principle, through the establishment of a default legal regime. Default rules govern the contractual relationship unless parties contract around them. Penalty default rules, in particular, are applied by courts to penalize certain parties ex post to encourage them to reveal more information ex ante to the parties with whom they are contracting.[157] Now, consider a hypothetical legal regime in which courts deny the enforcement of an EAC unless the representee has deliberately and specifically accepted it as a separate provision in the contract. This regime would introduce a default rule that penalizes the representor who has failed to bring the EAC specifically to the attention of the representee. The court would treat the EAC that has not been specifically negotiated and deliberately accepted by the representee as a gap in the contract and fill it with a default rule according to which the representee is not precluded from submitting a claim for breach of a collateral contract despite the presence of an EAC. This penalty default would afford protection to the representee by providing the representor with incentives to draw the EAC to the representee's attention. In assessing the enforceability of an EAC, the judge would assess the genuineness of the representee's consent by considering all the available evidence concerning the circumstances surrounding the formation of the contract.

Unlike the generalized unenforceability of EACs, this rule would enable sophisticated contracting parties to include, to their mutual advantage, an enforceable EAC in the written contract. Under this default regime, the sophisticated representor would agree to reduce the price in

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[156] See JM Levin, "A Proposed Penalty Default Rule Governing a Seller's Ability to Disclaim Liability for Precontractual Misrepresentations" [1997] 2/3 Colum Bus L Rev 399 at 410–12 (arguing that sophisticated contracting parties prefer to rely on their own experts' evaluation of the seller's pre-contractual representations and buy at the lower price that came as a result of the warranty disclaimers rather than paying a higher price as a result of an express contractual warranty).

[157] See Ian Ayres & Robert Gertner, "Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules" (1989) 99:1 Yale LJ 87 at 87, 96–97.

exchange for enhanced contractual certainty (induced by a properly drafted EAC), while the sophisticated representee would be willing to accept the EAC and rely on its own pre-contractual inspection. In this way, the default penalty rule would address the problem of over-inclusiveness associated with the generalized unenforceability rule: sophisticated parties would be permitted to attain a better bargaining equilibrium than that attainable under a regime of generalized unenforceability of EACs.

However, this solution would be hindered by two limitations. First, since the presence of an EAC alone would not offer conclusive proof of the genuineness of the representee's consent, parties would face uncertainty as to what contractual language and what type of evidentiary submission would succeed in contracting away reliance on statements external to the written contract. This is a major drawback, as an EAC's value for the parties lies wholly in its effectiveness in improving contractual certainty. It is important for parties to predict with enough confidence what wording is adequate to ensure that an EAC will be enforced by the court. Second, a default penalty rule would likely provide weak protection to the unsophisticated representee. The rule provides that when the representor is dealing with an unsophisticated representee, an EAC can be enforced by a court if the representor can establish that the representee has freely and knowingly accepted it. This assumes that the protection of the party who is in the weaker position in the bargaining process can be disclaimed by the same weak party *within* the bargaining process. However, in many situations, parties who are in a weak bargaining position are willing to relinquish their legal protection to conclude the deal. Thus, for example, a party in a weak bargaining position may be willing to sign a separate EAC in the contract, thereby cooperating with the representor to produce evidence that the clause has been freely and knowingly agreed to. This suggests that the requirement of having a contract clause specifically and deliberately bargained for by the parties for that clause to be enforced is unlikely to be effective in addressing asymmetrical bargaining power between negotiating parties. The penalty default rule would provide incentives to the sophisticated representor to ensure that the weaker, inexperienced representee understood the implications of the EAC; however, this provides no protection for the representee's reliance on the representor's utterances. It merely ensures that the weaker party provides formal express consent to release reliance on the representor's pre-contractual statements.

C. Proposed Incremental Improvements

The above discussion suggests that an optimal legal EAC regime will afford effective protection to the unsophisticated representee while simultaneously permitting sophisticated parties to include an EAC in their written contract and predict with enough confidence that the clause will

be enforced by courts to preclude claims based on collateral contracts and implied terms. In this subsection, I suggest that these goals could be achieved through clearer differentiation of the legal treatment of EACs found in fully negotiated contracts between sophisticated parties and contracts of adhesion.

1. EACs in Contracts Between Sophisticated Parties

In contracts between sophisticated parties, the representor and representee share a common incentive to agree on a specifically drafted EAC in exchange for a lower price. Parties have a common interest in promoting contractual certainty and insulating the written contract against external statements as much as possible. I argue that in fully negotiated contracts between sophisticated parties, courts should regard the existence of a specifically worded EAC as establishing:

> a conclusive presumption that the written document represents the final and exclusive record of the parties' agreement, thereby precluding:
>
> 1) the admission of evidence that the written document does not represent the final and exclusive record of the parties' agreement;
>
> 2) claims for breach of collateral contracts; and
>
> 3) claims based on implied terms that are not already part of the agreement.

This proposed legal regime would differ from the current prevailing case law in three respects. First, it would preclude sophisticated contracting parties from submitting evidence showing that the contract is not fully integrated. Under the current legal regime, as noted earlier, one possible way to circumvent the presence of an EAC is to provide oral or written evidence of the parties' intent to not regard the written document as the final and exclusive record of their agreement. The rule suggested here would restore the traditional approach to the parol evidence rule in the case of contracts between sophisticated parties including an EAC, thereby precluding the possibility of submitting parol evidence to challenge the fully integrated nature of the contract.

Second, unlike the current legal regime, the proposed conclusive presumption of full contractual integration would preclude claims based on collateral contracts. The collateral contract exception to the parol evidence rule was introduced by courts to correct the excessive formalism of the traditional version of the rule in contracts when inexperienced parties were involved. The rule suggested here would extend the traditional approach to the parol evidence rule to fully negotiated contracts between sophisticated parties that include an EAC. Under these restrictive conditions, the gain in contractual certainty generated by the conclusive presumption of a fully integrated contract would be achieved without un-

dermining the protection of the unsophisticated representee's reliance on extra-contractual statements. The proposed rule would essentially generalize the application of the *Power Consolidated*, *Gutierrez*, and *MacMillan* regime in contracts between sophisticated parties.

Third, unlike the current legal regime, the proposed conclusive presumption of fully integrated written contracts would preclude courts from implying contract terms that are not already part of the agreement. This rule would achieve the practical effect of generalizing the application of *CivicLife* to contracts between sophisticated parties. In the presence of an EAC, courts would be permitted to imply terms necessary to give business efficacy to the agreement, while they would be precluded from implying terms that are separate from the agreement.

Overall, these principles would enhance EACs' value in contexts in which sophisticated commercial parties factor into their transaction price their ability to clearly shield the written contract against claims based on collateral promises or implied terms. This legal regime would not rule out the interpretive relevance of the factual matrix, nor of subsequent conduct. Therefore, parties would still be permitted to submit extrinsic evidence for the purposes of aiding contractual interpretation. In line with current case law, judges would be allowed to adopt a contextual approach to the interpretation of the written contract despite the presence of an EAC.

2. EACs in Contracts of Adhesion

In contracts of adhesion, the current case law could be incrementally improved through courts' application of the following two rules:

> 1) The existence of a generically worded EAC does not preclude the establishment of a collateral contract that is grounded in a specific statement external to the contract that contradicts or is inconsistent with a general clause found in the written agreement.
>
> 2) The existence of an EAC does not preclude the ability of a court to infer terms in a contract that do not conflict with the express language of the contract.

The adoption of the first rule would generalize the application of the *Turner* and *Zippy* principle to contracts of adhesion. The practical effect of this rule would be that a generically worded EAC would not suffice to exclude collateral contracts arising from specific statements that induced the representee to enter the contract. The unsophisticated representee would be permitted to present evidence of reliance on specific pre-contractual representations, regardless of the existence of a generic EAC in the contract. Should a contradiction arise between a specific pre-contractual oral representation and a general clause found in the written contract, the oral representation would prevail.

This rule would provide the sophisticated representor with the incentive to be careful and forthright during negotiations. They would have every incentive to seek enhanced contractual certainty by specifying the content of pre-contractual representations in the written document, as this would likely be the most effective means of defeating the legal relevance of an external statement. Furthermore, this rule would be legally and economically efficient, as it would penalize the more knowledgeable party for not having revealed more information ex ante to the parties with whom they were contracting. This would essentially prevent sophisticated representors from using EACs as a trap for inexperienced representees.

The adoption of the second rule would have the effect of permitting courts to afford protection to the unsophisticated representee by implying terms that are not inconsistent with the express contractual provision. This proposed legal regime would further differ from the current prevailing case law in one important respect: according to current case law, an EAC that specifically and clearly excludes implied terms precludes a court from inferring terms in the contract. By contrast, under the proposed rule, a court would always be allowed to infer a term in a contract, with the sole limitation that the term must not be inconsistent with the express contract term.

Finally, under this legal regime, the presence of an EAC in a contract of adhesion would not preclude parties from submitting evidence demonstrating that the contract is fully integrated. Parties would also be permitted to submit extrinsic evidence to aid contractual interpretation and to allege evidence of post-contractual conduct to shed light on the EAC's significance under the contract. Judges would be allowed to adopt a contextual approach to the process of interpreting the written contract in line with current case law.

Conclusion

EACs' effectiveness have *inherent* limitations, which derive from the tension between such clauses and the principles of contextualism in contractual interpretation. Although EACs points toward a textual method of contractual interpretation, the meaning and legal effect of an EAC (as with any contractual provision) is itself a matter of interpretation. Since Canadian courts adopt a contextual approach to contractual interpretation, the legal significance of EACs must itself be determined by ascertaining the parties' mutual intention in light of the surrounding circumstances. Case law analysis has shown that inherent tension between contextualism and EACs is reflected in all elements of the EACs' legal significance. First, although an EAC may constitute a strong indication of the parties' intention to integrate their agreement, it cannot constitute con-

clusive evidence of integration. Second, although an EAC may preclude claims for breach of collateral contract, the judge's contextual inquiry may still determine that the parties' mutual intention was not for the written contract to constitute the entire agreement. Third, although an EAC may preclude the implication of terms in the contract, the judge may still infer the terms necessary to give the contract business efficacy without contradicting its express terms. Furthermore, notwithstanding the presence of an EAC, judges may always consider the factual matrix and the parties' subsequent conduct as an aid to determining the meaning of the contract's terms.

This paper has suggested that courts' current approach to EACs is coherent with the changing normative needs underlying the enforcement of such clauses in fully negotiated contracts between sophisticated parties and contracts of adhesion, and with the emerging trend in contract law that emphasizes the legal significance of this distinction. It has proposed that marginal improvements in EACs' enhanced effectiveness could be obtained by more sharply differentiating the legal treatment of EACs in fully negotiated contracts between sophisticated parties and contracts of adhesion.