

## WAIVERS IN CONTRACTS AND THEIR RISKS AND CONSEQUENCES TO PARTIES

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### INTRODUCTION

It is a common understanding that parties to a contract are bound by the provisions of that contract. However, there may come a time when one or more parties wish to waive a provision in the contract, or when one party breaches a contract, but the other party is prepared to overlook the breach. These situations raise many important questions: if you expressly waive an obligation does this waiver last indefinitely? If you do not explicitly waive an obligation, but take no action in response to the breach, has that obligation been waived?

This article gives readers an overview of the law on waivers, the difficulties surrounding waiver, and the ways parties often try to protect themselves from the uncertainty of waivers.

### HOW DO YOU WAIVE A TERM IN A CONTRACT?

The Court of Appeal for Ontario summarized the law of waiver in paragraph 43 of *High Tower Homes Corporation v Stevens*,<sup>1</sup> citing, among other cases, the

Supreme Court of Canada decision *Saskatchewan River Bungalows Ltd v Maritime Life Assurance Co.*<sup>2</sup>

Waiver occurs when one party to a contract... takes steps that amount to foregoing reliance on some known right or defect in the performance of the other party. It will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of the deficiency that might be relied on and (2) an unequivocal and conscious intention to abandon the right to rely on it. The intention to relinquish the right must be communicated. Communication can be formal or informal and it may be inferred from conduct. The overriding consideration in each case is whether one party communicated a clear intention to waive a right to the other party.

Accordingly, there must be evidence that the party waiving knew what was being waived, intended to waive and communicated its waiver. However, it is important to note that communication can be formal or informal, and can be inferred from conduct. This means that a party might, only by its conduct, waive a right or excuse a defect in performance. As such, parties to a contract

should be careful in its interactions and communications between one another.

### **Silence or Inaction**

If a party chooses not to communicate their waiver of another's obligation, can it be said that that party waived the other's obligation?

Such an issue was discussed briefly in *First Majestic Silver Corp v Davila Santos*,<sup>3</sup> which was later referenced approvingly in *Suzuki v Polygon Homes Ltd.*<sup>4</sup> In both cases, the court held that "silence or inaction *alone* is insufficient to support an inference of waiver,"<sup>5</sup> but inaction coupled with "positive actions" could amount to an intention to waive. In *Suzuki v Polygon Homes*, the inaction was the "failure to take issue with the late delivery of an executed counteroffer"<sup>6</sup> and the positive actions were "the positive steps [taken] to coordinate the delivery of the executed counteroffer."<sup>7</sup>

Therefore, a party to a contract that wishes to stay silent on the other's breach but does not wish to waive such breach should be aware of the risk that such silence, coupled with its own subsequent conduct, may constitute a waiver. Such a party may wish to consider seeking legal advice to better understand when waiver may occur.

Parties should also be reminded their duty to act honestly in performance of a contract (including all contracting obligations and rights).<sup>8</sup> In other words, "parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract." Where a party acts dishonestly or misleadingly in respect of performance, the party may open itself up to liability. In the context of waivers, a party should not automatically presume that they can stay silent in respect of the other's breach in the hopes of later claiming that such breach was never waived.

In many situations, parties may wish to bring certainty to

one's waiver of the other's breach through methods such as by providing written notice. This could ensure that parties understand what is being waived and that the waiver of one breach is not misconstrued as a waiver of subsequent breaches.

### **RETRACTION OF WAIVER**

Where a waiver has been given, parties should note that "[w]aiver can be retracted if reasonable notice is given to the party in whose favour it operates,"<sup>9</sup> such as the "communication of a party's intention to insist on strict compliance with the terms of a contract". Therefore, where it is possible that one party's action may be interpreted as a waiver of another's breach, that party may be able to take steps to ensure that such action does not amount to a waiver.

### **CHALLENGES WITH APPLYING THE LAW OF WAIVERS**

As noted above, there can be some uncertainty as to whether an obligation has been waived depending on, for example, whether a party has, in addition to silence, done something that can be construed as a positive action, which together amount to an intention to waive. Other uncertainties include how waiver may differentially apply depending on whether the breach is a singular, discrete breach or a continuous breach.

To avoid such uncertainty, parties often include one or more provisions regarding waiver in their contracts.

### **HOW PARTIES OFTEN PROTECT THEMSELVES**

Contracts often include "No Waiver" or "Entire Agreement" clauses such as the following:

No consent or waiver, express or implied, by any party to or of any breach or default by any other party in the performance by the other party of its

obligations hereunder shall be deemed or construed to be a consent or waiver to or of any other breach or default in the performance of obligations by such party hereunder. Failure on the part of any party to complain of any act or failure to act of any other party or to declare any other party in default, notwithstanding how long the failure continues, shall not constitute a waiver by such party of its rights hereunder.<sup>10</sup>

These provisions can stand alone or be subsumed within another clause such as an “entire agreement” clause.

Regardless, these provisions can be an effective way of ensuring that a provision in or breach of a contract is not inadvertently waived simply because a party was silent or forgiving in response to a breach.

However, care must be taken as to how such clauses are drafted. The clause above was quoted in *Nault v Four C's Holdings Ltd*, and the court had interpreted it as meaning that “there can be a consent or waiver by any party, to a breach or default by any other party and that that consent or waiver can be expressed or implied”,<sup>11</sup> but that “one breach cannot be deemed or interpreted to be a consent or waiver to any other breach”.<sup>12</sup>

In *DirectCash Management Inc v Mac Convenience Stores Inc*,<sup>13</sup> the plaintiff and defendant had an agreement for providing ATM-related services that automatically renewed unless one party gave notice to the other. To that end, the defendant gave notice to the plaintiff, which the plaintiff later argued was non-compliant, alleging that the notice was directed to the wrong recipient, it was sent by the incorrect party, and that it introduced a new condition or amendment to the existing agreement. Following a review of the plaintiff's conduct, the court stated that “[it] would have found [the plaintiff] DirectCash to have waived its rights to object to the non-renewal notice *but for the operation of the “no waiver” clause in the Agreement*”.<sup>14</sup>

The court also noted that while the no waiver clause in the contract was similar to a typical non-waiver clause (such as the clause quoted above), slight differences in wording meant that, instead of a waiver not applying to subsequent breaches, the contract “completely [precluded] the application of the doctrine of waiver to the conduct of the parties to the contract”.<sup>15</sup>

## OTHER CONSIDERATIONS

Waiver is only one of many considerations for a party that is not insisting on strict compliance with the terms of a contract. Other considerations include the doctrine of estoppel, the policy roots of which are “very closely allied”<sup>16</sup> to that of waiver—“the principal underlying both... is that a party should not be allowed to go back on a choice when it would be unfair to the other party to do so.”<sup>17</sup> Promissory estoppel, for example, prevents a party from going back on a promise or assurance that the other party relied and acted upon,<sup>18</sup> and may be argued alongside waiver where a term of a contract is not enforced. Therefore, when a party chooses to waive a breach of a contract or retract such waiver, that party should be aware of the other legal implications that could arise from the waiver.

Furthermore, certain types of clauses can have their own requirements for and limits of waiver. An example of this is the “time of the essence” clause (where parties are required to strictly comply with the dates in an agreement)<sup>19</sup>—“a party who is not prepared to perform an agreement cannot rely on a ‘time of the essence’ clause to terminate the contract for the other party's failure to comply strictly with the time provisions in the contract”.<sup>20</sup> Conditions precedent, as well, may only be waived in specific circumstances, one of which is set out statutorily in the *Law and Equity Act*.<sup>21</sup>

## CONCLUSION

Ultimately, all parties to a contract should ensure that they follow the terms of that contract and be careful when one chooses to waive the other's breach. Where one party acts in contravention of a contract, the other party may, through subsequent communication, find that they have unequivocally and intentionally waived that party's contravention, though there are generally opportunities to retract such waiver.

Furthermore, adding a waiver provision to a contract (e.g. the parties agree that waiver is only effective if in writing and signed by the waiving party) is generally effective in preventing waiver; however, while such a provision may appear to be boilerplate, parties should consider the effect and potential use of a waiver provision when carrying out the terms of a contract to ensure that the scope of such a provision is appropriate.

Lastly, when deciding to waive a breach or retract such waiver, that party should keep in mind other legal implications that may arise in doing so to prevent surprises down the line.

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### Footnotes:

1. 2014 ONCA 911.
2. [1994] 2 SCR 490, 1994 CanLII 100 (SCC) [Saskatchewan River].
3. 2012 BCCA 5 at para 32.
4. 2013 BCSC 1709 at paras 38-39.
5. *Ibid* at para 39 (emphasis added).
6. *BNSF Railway Company v Teck Metals Ltd*, 2020 BCSC 1133 at para 488.
7. *Ibid*.
8. See *CM Callow Inc v Zollinger*, 2020 SCC 45 (CanLII), at para 48.
9. *Saskatchewan River*, *supra* note 2.
10. See *Nault v Four C's Holdings Ltd*, 2012 ABQB 13, [2012] AJ No. 32 (QB) at para 5.
11. *Ibid* at para 38.
12. *Ibid*.
13. 2018 ABQB 231 (CanLII).
14. *Ibid* at para 42 (emphasis added).
15. *Ibid* at para 63.
16. *Dunn v Vicars*, 2009 BCCA 477 (CanLII) at para 43.
17. *Saskatchewan River*, *supra* note 2.
18. See *Maracle v Travellers Indemnity Co of Canada*, [1991] 2 SCR 50, 1991 CanLII 58 (SCC).
19. See *Toor v Dhillon*, 2020 BCCA 137 at para 54.
20. *Ibid* at para 50.
21. See RSBC 1996, c 253, s 54.



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Kai is an associate lawyer of the firm and maintains a general municipal law practice with a focus on real estate development. In particular, he regularly drafts section 219 covenants, statutory rights of ways and other legal agreements for real estate projects, and he has provided assistance during various stages of the development process, from rezoning and development permit issuance to air space parcel subdivision and occupancy permit issuance. He has also assisted with other local government matters, ranging from procurement to regulatory issues.

Kai obtained his Juris Doctor from the Peter A. Allard School of Law at The University of British Columbia, articulated with a provincial organization, and was called to the Bar of British Columbia in May 2022. He was heavily involved in law school through activities such as presenting legal topics to high school students through Legal Education Outreach; singing and dancing in the school's annual comedy sketch show; working as the Centre for Business Law's Operations Officer; participating in the Corporate Counsel Externship; competing in the 2021 Adam F. Fanaki Competition Law Moot where he and his moot partner were awarded "Best Factum – Appellant"; volunteering as a clinician with the Law Students' Legal Advice Program; and volunteering with A2JBC through Pro Bono Students Canada where Kai had the opportunity to discuss access to justice issues with advocates throughout the province and was co-recipient of the 2021 Honourable Donna J. Martinson Access to Justice Award.

Prior to law school, Kai obtained his Bachelor of Applied Science in Mechanical Engineering with Distinction from The University of British Columbia. Upon graduating, he was employed as a Process Improvement Specialist at an architectural glass fabrication company for several years, where he designed and implemented a new laminated glass line as well as numerous mechanical and organizational process improvements.

Outside of the office, Kai has participated in the CBABC Law Student Mentorship Program as a mentor, and you can find him rehearsing for and performing in shows as part of a local community musical theatre group.

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