Risk Management Considerations for Why You Should Use a Lawyer for Contracts

Contracts direct almost every aspect of the operations we conduct. Agreements are negotiated between parties for the provision of services, construction of buildings and infrastructure, funding projects and leasing premises.

Risk Management Services at Intact Public Entities will review your agreements with specific attention to the indemnification and insurance clauses in order to ensure that liability is placed on the appropriate party and to verify that you are not agreeing to something that your insurance policy does not cover and/or is unable to provide or to assist you in getting the coverage you have agreed to carry. For example, many contracts include a clause where the insured is required to agree that the other party would still be covered as an additional insured if the named insured was in breach of the policy. Most insurance policies do not provide for this, so the insured should not agree to it.

While our Risk Management Services include contract reviews, this is a tool that should be utilized in addition to legal advice. Contracts are legally binding documents that are enforceable in Court and therefore, we always advise insureds to have contracts reviewed by their legal representative before they are signed to avoid the following pitfalls:

1. Exclusions – A contract may contain exclusionary clauses that restrict your rights. Alternatively, you may want to include an exclusionary clause in a contract and it may not be enforceable if it is not drafted properly or brought to the attention of the other party. Many provinces have insurance and sale of goods legislation which restricts or regulates the use of exclusion clauses.
2. Misunderstandings – You could agree to something you had not intended if you gloss over terms you do not understand. Alternatively, your understanding of the obligations of the other party may be incorrect. A lack of understanding of the agreement terms is not a valid reason to have the agreement voided.
3. Contra proferentum – If you have drafted your own agreement and a term is unclear or unfair, a Judge can interpret the contract against you.
4. Mistakes – If the names of parties or the object of the agreement are not described correctly, your agreement might not be worth the paper it is written on.

5. Omissions – A party may wish it had included a provision or even think that it did but unless it is included in the written agreement, it will not be enforceable. A lawyer will determine what you are attempting to accomplish with the agreement and ensure that all necessary terms are included.
6. Legal precedent – Canada's legal system is based on following legal precedent of which you may not be aware. A lawyer will be up-to-date on current case law and can help you draft an agreement that will stand up to challenges.
7. Laws and regulations – an agreement that does not follow the law is not enforceable. A lawyer will be aware of the relevant legislation and ensure that your agreement is in compliance.
8. When renting commercial property, signing an Agreement to Lease can have the same legal effect as signing the actual lease. Don't get trapped in a bad lease by signing an Agreement to Lease.
9. Unfair contract terms – If a term of the contract unreasonably attempts to limit a party's liability, it can void the contract.
10. Dispute resolution – What will happen if the unexpected or undesirable occurs?
11. Parole Evidence Rule – If you sign an agreement that does not clearly state your understanding of it because you think that everyone knows what was actually intended, you may not be allowed to introduce contradictory evidence in Court. Verbal evidence is inadmissible to vary or contradict the terms of a written agreement.
12. Ambiguities – Eliminate the need for interpretation and guesswork.
13. Uncertainty of Court – If ambiguities in your agreement lead to a dispute that requires the contract to be interpreted by a Court, the Judge could interpret your contract differently than you had intended.

In the Nova Scotia case; *Canadian National Railway v. Halifax (Regional Municipality)*, the Municipality had an agreement with the Railway for repair and maintenance of railway bridges. When the parties attempted to execute the contract, it quickly became apparent that they had very different interpretations of their agreement. The Railway made an application to the Court for interpretation of the agreement.

The Municipality had not intended and did not believe the agreement obligated them to relocate utilities, construct temporary structures to accommodate vehicular or pedestrian traffic or bear responsibility for the layer of general fill required.

The interpretation of the contract came down to the difference between the words "on" and "to". The agreement stated that Halifax was responsible for the subsurface layers "to the surface of the arch".

The position of the Railway was that Halifax was responsible for both the base fill and the general fill. Halifax's position was that they were only responsible for the fill to the apex of the arch which meant they were only required to provide the base fill. With 12 bridges to be repaired, this amounted to a significant cost difference.

The result was that the Municipality was responsible for relocation of utilities and the layer of general fill. In addition, it was ordered to pay the costs of the Railway.

There is a common perception that you can save money by not paying legal fees to draft or review your agreements but, in the long run, you could be paying much more if you are sued because you did not fulfill an obligation you did not intend to agree to or there is a disagreement as to the terms of the agreement that has to be decided in Court.

Litigation is very expensive so it is best to be sure the terms of the agreement are as clear as possible to avoid misunderstandings later that could lead to expensive litigation.

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