

# Commercial Litigation and Arbitration Review

VOLUME 10, NUMBER 4

Cited as 10 C.L.A.R.

NOVEMBER 2021

## • STRIKE TWO... THE COMMISSIONER LOSES SECOND INJUNCTION TO BLOCK MERGER •

James B. Musgrove, Partner and Joshua Krane, Partner, McMillan  
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**James B. Musgrove**



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Unlike in some jurisdictions, Canadian merger review has not given rise to significant excitement of late. The recent *Secure/Tervita* case may have changed that. On June 30, 2021, the Commissioner of Competition brought an 11<sup>th</sup> hour application for an “interim interim” injunction to prevent Secure Energy Services Inc. from closing its acquisition of Tervita Corporation. That application failed, and a late night emergency appeal to the Federal Court of Appeal also failed. Minutes later, just after midnight on July 2<sup>nd</sup>, the transaction closed.

Once bitten but not twice shy, the Commissioner returned to the fray on August 4, 2021, seeking an order from the Competition Tribunal under section 104 of the *Competition Act* to prevent Secure from integrating the Tervita assets, and requiring that they be held and operated separately pending a decision by the Tribunal on the Commissioner’s section 92 application as to whether the merger was

## COMMERCIAL LITIGATION AND ARBITRATION REVIEW

**Commercial Litigation and Arbitration Review** is published four times per year by LexisNexis Canada Inc., 111 Gordon Baker Road, Suite 900, Toronto ON M2H 3R1 by subscription only.

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**ISBN 0-433-47142-5 (print)**

**ISBN 0-433-47144-1 (PDF)**

**ISBN 0-433-47146-8 (print & PDF)**

Subscription rates: \$400.00 per year (print or PDF)  
\$615.00 per year (print & PDF)

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likely to prevent or lessen competition substantially. This second kick at the cat was also unsuccessful. But in only its second contested Section 104 injunction decision, released August 16, 2021, the Tribunal has provided useful guidance with respect to merger injunctions.

The Tribunal's clear instruction to the Competition Bureau is that, if it seeks to enjoin a merger before it closes, it needs to either:

- a. Bring a section 104 injunction application along with its merger challenge application early so there is a reasonable amount of time for such application to be heard (the Tribunal suggested at least one week) before the statutory no-close waiting period expires (or any agreement to extend closing expires);
- or
- b. Bring an interim section 100 injunction application without a merger challenge application in order to gain additional time to complete the review.

The parties agreed that the basic injunction test which the Tribunal was to apply is the three-part test established in the *RJR MacDonald* case: serious issue to be tried/strong *prima facie* case; irreparable harm; and balance of convenience. The decision provides guidance for both the Commissioner and merging parties in applying that test.

### 1. SERIOUS ISSUE TO BE TRIED V STRONG *PRIMA FACIE* CASE

Consistent with Supreme Court guidance on injunctions generally, the Tribunal determined that, when the relief sought by the Commissioner is primarily in the nature of a mandatory order, the higher "strong *prima facie* case" test will ordinarily apply. In the merger context, injunctive relief will likely be "mandatory" if sought after the merging parties have closed, but only "restraining" if sought pre-closing. The Tribunal agreed with Secure that, given that the merger had closed and could no longer be restrained, the relief sought by the Commissioner amounted to a mandatory order.

However, in the “very particular circumstances of the [Secure/Tervita] case” the Tribunal found that the test to be used was the more relaxed “serious issue to be tried” test. That was because the Tribunal found that Secure’s conduct was “high handed” by closing in the face of a Section 104 application. In describing Secure as having attempted to “steal a march” on the Commissioner the Tribunal distinguished this case from situations where parties close in the face of a mere objection or “at your own risk” letter from the Commissioner.

Applying the serious issue to be tried test, the Tribunal had no difficulty concluding that the Commissioner had met his burden.

## 2. PROOF OF STRONG *PRIMA FACIE* CASE

Had the Tribunal concluded that the Commissioner was required to show a strong *prima facie* case – which the Tribunal indicated is the test that will ordinarily apply if a mandatory order is sought – it was clear that the Commissioner would have failed. He would have been required to demonstrate a strong likelihood of showing both that the merger was likely to substantially lessen competition in the interim period before the section 92 application was determined, and that these effects would not be offset by efficiencies such that it would be “saved” by the section 96 efficiencies defence. Since the Commissioner did not attempt to address the section 96 defence, or provide evidence of price elasticity of demand or deadweight loss, the Commissioner could not have satisfied this requirement.

## 3. WHAT IRREPARABLE HARM NEED BE SHOWN?

The second significant question for the Tribunal to determine in a section 104 application is whether there would be irreparable harm if injunction were not granted. This has to be shown, or inferred, on ‘clear and not speculative’ evidence. Secure argued, based on the *Superior Propane* case, that the harm to be considered should be whether or not, if the Tribunal ultimately found that the merger should be unwound or its effects mitigated, such unwinding

could be achieved – that is, whether the eggs could be “unscrambled” – also referred to as “remedy impairment”.

The Commissioner argued that, in addition to remedy impairment (which can be an issue in some cases, but was not in the *Secure* case), irreparable harm can also flow from the interim (between closing and the final determination) effects of the merger – increased prices and non-price effects on customers, and interim deadweight loss to the economy. The Tribunal accepted this argument – which flows from the decision in the *Parkland* case – and is different from the injunction test under Section 100 which is focused only on the issue of remedy impairment. The Tribunal also noted that the onus of demonstrating irreparable harm to the public interest is lower where the moving party is a public authority acting within its mandate, such as the Commissioner.

In the result, the Tribunal accepted the Commissioner’s evidence respecting interim competitive effects related to Secure’s ability to exercise increased market power, and held that the Commissioner had satisfied the “irreparable harm” portion of the injunction test.

## 4. MERGING PARTY’S EVIDENCE OF ITS INTENT/INCENTIVES

With respect to the issue of interim harm, the Tribunal rejected Secure’s evidence that it would not raise prices. The Tribunal will not rely on a merged entity to benevolently refrain from exercising increased market power. Secure’s argument that it would not have an incentive to raise prices – because that would assist the Commissioner’s pending section 92 case against it – was not persuasive, and that evidence of such an incentive will not typically be determinative. Rather, the Tribunal accepted the Commissioner’s argument that the focus should generally be on the merged firm’s *ability* to exercise market power.

## 5. BALANCE OF CONVENIENCE ANALYSIS

Finally, in determining whether to grant the injunction, the Tribunal considered the balance of

convenience between the parties. This is where most interlocutory injunctions are won or lost, and here the Commissioner lost. While Secure had provided significant evidence of the damage it would suffer – including particularly lost efficiencies – if the injunction were granted, the Tribunal noted that “the Commissioner has made no effort to provide the Tribunal with even a very preliminary or rough sense of how all of [the evidence he had supplied] comes together, so that the Tribunal can have a least some appreciation of how the interim harm he alleges compares with the harm Secure has identified”. The Tribunal indicated that particularly, where the merging parties have signalled that they will rely on an efficiencies defence in pre-litigation discussions, the Commissioner should be expected to provide at least rough estimates of the range of anticipated price effects and elasticities of demand; a ballpark estimate of the deadweight loss to the economy; and some sense of anticipated non-price effects. Customer complaints or examples of price increases may be evidence of lessening of competition, but will not satisfy a failure by the Commissioner to address efficiencies, because the Tribunal requires some measure of how the total anti-competitive effects compare to the total alleged efficiencies. Such estimates should be qualified, at least roughly, where possible. This will be a tall order in many cases – but is the Tribunal’s clear guidance.

## CONCLUSION

The Commissioner’s two attempts to obtain an injunction in the Secure/Tervita case have provided significant guidance as to what the Commissioner must demonstrate to obtain an injunction to prevent a merger or to require that the assets be held separate. It similarly provides merging parties with a roadmap of what to anticipate.

As a practical matter the decisions suggest that, in matters where the Bureau has serious concerns respecting the need for a remedy, it will turn its mind to preparing for litigation much earlier in the process than has been the case to date. Realistically, the Commissioner cannot fully analyze competitive

effects (or efficiencies) until the parties have responded to a Supplementary Information Request (SIR). But, when the parties certify compliance with a SIR they are entitled to close 30 days later (absent an injunction). Accordingly, the Commissioner is very likely to shift efforts to preparing for injunctive litigation (under section 100, or section 104, or both) immediately upon – and presumably in some cases before – certification of compliance with the SIR, unless the parties are willing to provide an undertaking not to close without providing notice to the Commissioner. This will have implications for deal timing as well as, potentially, for standard deal terms.

Another question raised by this decision, coupled with the earlier decision holding that the Tribunal cannot order interim interim injunctions, is whether it may have the practical effect of preventing the Commissioner from enjoining a significant body of mergers at all. While an extension of time is available for an interim injunction under section 100, such an injunction is only available where there is a concern about remedy impairment. Where, as in the Secure case, and potentially in many other cases, the concern is about competitive effects during the interim period, rather than remedy impairment, a section 100 interim injunction, and therefore the extension of time which it can provide, appears not to be available.

Things may be getting a little more interesting, even in Canada.

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## • UBER CLASS ACTION CERTIFIED: ONTARIO COURT RULING LAYS FOUNDATION FOR COMMON ISSUES TRIAL IN INDEPENDENT CONTRACTOR CLASSIFICATION DISPUTE •

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**In *Heller v. Uber Technologies Inc.*, the Ontario Superior Court of Justice certified a class action lawsuit brought by Uber drivers who claim they have been misclassified as independent contractors and denied employment benefits.**

### BACKGROUND

In 2017, the representative plaintiffs, an UberEats driver and an Uber driver (the "Plaintiffs"),

commenced a proposed class action in Ontario against Uber Technologies Inc. and related entities (together, "Uber") on behalf of persons who have entered into Service Agreements with Uber to use software applications ("Uber Apps") developed and operated by Uber to provide transportation and food delivery services (the "Class Members").

The Service Agreements label the Uber drivers or delivery people as "independent contractors". This

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legal categorization was disputed by the Plaintiffs, who alleged that they should be classified as employees, and therefore, entitled to the benefits of Ontario's *Employment Standards Act, 2000* ("ESA") and other federal employment-related legislation such as the *Canada Pension Plan* and the *Employment Insurance Act*.

Uber initially asserted that the Plaintiffs' class action was precluded by an arbitration clause in its Services Agreements that required all disputes to be resolved through arbitration in the Netherlands. As we noted in 2020, the Supreme Court of Canada ruled that the mandatory arbitration clause in Uber's service agreement was unconscionable, and therefore invalid, with the consequence that the proposed class action could proceed to court.

Following the Supreme Court's ruling, the Plaintiffs moved to certify the proceeding as a class action.

## OVERVIEW OF THE PARTIES' POSITIONS

The Plaintiffs submitted that Uber had misclassified the proposed Class Members as independent contractors rather than employees, and that there was some basis in fact for the commonality of all the proposed common issues that would determine and classify the employment relationship. For instance, they all used the Uber App, were bound by the standard form service agreements, and shared rules of contract performance imposed on them by Uber.

In their Statement of Claim, the Plaintiffs advanced four causes of action: (i) breach of the ESA; (ii) breach of contract; (iii) negligence; and (iv) unjust enrichment. The Plaintiffs claimed that their proposed class action is similar to other employment status misclassification cases that have been certified and that it too should be certified.

Uber, on the other hand, argued that the Class Members were independent contractors as this was a status expressly attributed to them in the Service Agreements. Uber also argued that the Class Members made the choice to provide services to riders using the Uber App, with Uber's role being to develop, license,

and market the app, as well as to facilitate payment for services (among other things). Uber claimed that the matter of employee or independent contractor status could not be determined at a common issues trial because, regardless of the common Uber Apps, common Service Agreement, and common rules and regulations, employment status is ultimately an idiosyncratic analysis that varies from driver to driver.

## THE CERTIFICATION DECISION

The Court certified the class proceeding, finding that the five criteria set out in section 5 of Ontario's *Class Proceedings Act, 1992* (the "CPA") were met, namely that:

- the pleadings disclose a **cause of action**;
- there is an **identifiable class** of two or more persons;
- the claims of the class members raise **common issues**;
- a class proceeding would be the **preferable procedure** for the resolution of the common issues; and
- there is a **representative plaintiff** who would fairly and adequately represent the interests of the class in accordance with a workable plan and who does not have a conflict of interest with other class members on the common **issues** to be raised.

## CAUSE OF ACTION

While the Court concluded that the Plaintiffs satisfied the cause of action criterion for breach of the ESA and breach of contract, the Court agreed with Uber that the Plaintiffs did not satisfy the cause of action criteria or the preferable procedure criteria for their claims of unjust enrichment and negligence.

The Court held that the Plaintiffs' claims for ESA entitlements and other unpaid statutory payment and out-of-pocket expenses were all breach of contract claims, and that the equitable relief of unjust enrichment was not available where the plaintiff possesses a right to contractual relief. Relying on the Supreme Court in *Atlantic Lottery v. Babstock*,

the Court held that disgorgement is generally not available for breach of contract and is only available in extraordinary circumstances, which did not exist in this case.

With respect to the negligence claim, the Court held that the putative Class Members' pure economic loss claims did not fall within any of the recognized categories where recovery for pure economic loss is permitted in negligence and that the claims were more than adequately addressed by the ESA and the alleged contracts of employment. The Court further held that this was not an occasion for concurrent liability in contract and tort. Moreover, the Court held that any claim in negligence would be redundant and cumbersome and would not satisfy the preferable procedure criterion.

#### IDENTIFIABLE CLASS

The Court held that the Plaintiffs satisfied the identifiable class criterion, but that the class definition needed a modest revision. Specifically, the Plaintiffs' proposed class definition referred to "any person who, since January 1, 2012, worked or continues to work ... pursuant to a Service Agreement". Finding that this definition obscured the key issue in the case as to whether the Class Members, all of whom are Uber App users, are "working for" Uber, the Court revised the definition to identify the putative Class Members simply as any person who "used" the Uber App to transport passengers and/or to provide delivery services.

#### COMMON ISSUES

The commonality or idiosyncrasy of the proposed common issues questions was a "major factual and legal battleground" of the proposed class action.

After reviewing the extensive evidentiary record, the Court held (notwithstanding Uber's arguments to the contrary) that there was some basis in fact for a number of proposed common issues, including whether the Uber App users were employees or independent contractors, and the Class Members'

related breach of contract and statutory claims. Moreover, the Court held that all proposed Class Members had in common that they invariably used Uber Apps and were bound by the Service Agreements. In light of the foregoing, the Court held that there were sufficient common issues to bind all Class Members. The ultimate determination of whether an employment relationship exists will be decided by a common issues trial judge at a later date (pending the outcome of any appeals, to the extent made).

Significantly, the Court held that, in this case, the question of aggregate damages was **not** certifiable as a common issue. The CPA provides that a court can determine damages on an aggregate (i.e. class-wide basis) when "no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability" and "the aggregate of the defendant's liability can reasonably be determined without proof by individual class members". In this case, however, the Court held that individual questions of fact relating to the determination of each Class Member's damages remained to be determined on an individual basis, with Class Members required to provide proof in support of their damages claims at individual issues trials.

In the event that the Class Members are successful in proving they are Uber employees at the common issues trial, individual issues trials will follow to determine the Class Members' individual damages. While the number of individual issues trials in this circumstance could be quite large (there are 366,259 Class Members), the Court noted in its decision that the take up of individual claims may be small due to Class Member attrition (individuals may decide that they do not have provable claims or that they would not benefit from a "employee" finding).

#### PREFERABLE PROCEDURE

The Court held that the Plaintiffs satisfied the preferable procedure criterion and rejected Uber's arguments that the individual issues in this case stemming from

employment classification and limitations issues will overwhelm the common issues and make the class action unmanageable.

The Court held that there are viable common issues and a class action would be a meaningful route to access to justice for both parties. According to the Court, the proceeding would be manageable, and a common issues trial would provide “considerable momentum for individual issues trials”. The Court noted that waiting for legislative reform would be of no use to Class members who have present day claims and that the court could eventually rely on section 25 of the CPA to develop protocols for the resolution of the individual issues trials.

The fifth certification test requirement (an adequate representative plaintiff with a workable litigation plan) was not contested.

#### KEY TAKE-AWAYS

Businesses in which independent contractors form part of the workplace fabric will want to keep an eye on this case, which – as a result of this ruling – could now proceed to a common issues trial. There is of course the possibility of an appeal of the certification order, and it will be interesting to see if that is pursued and what the result is. In any event, it should be remembered that this decision is not a decision on the merits: there is still a long way to go before any determination will be made as to the classification of Uber drivers as independent contractors or employees.

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## • EXTREME FAMILY DISFUNCTION: UNINTENDED CONSEQUENCES IN A WINDING-UP CASE •

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**Kenneth Prehogan**

**Some** cases are noteworthy for the precedent they set. Others for the story they tell. *Libfeld v. Libfeld* 2020 ONSC 4670 has both.

The Court has broad jurisdiction to intervene in the breakdown of partnerships and corporations where it is just and equitable to do so, and a broad discretion to determine the methodology of the dissolution. It is common to appoint an independent receiver to sell the business.<sup>1</sup> While there is nothing ground-breaking in that the Court ordered the business in this case to be sold, it is unusual that the Court granted this relief even though it was not the preferred outcome of any of the parties.

Theodore Libfeld, a Holocaust survivor, immigrated to Canada from Poland in 1951. He founded and carried on a real estate development and building business known as the Conservatory Group (the “Group”). He was joined by his four sons who continued the business as equal owners after Theodore died in 2000.

The Group’s business structure consists of over 350 single purpose entities and joint venture interests. Its holdings include income-producing residential and commercial properties, and a significant mortgage portfolio. The Court found that the likely value was in the range of \$2.5 to \$4 billion, including \$250 to \$500 million in cash. There was no shareholder or partnership agreement to govern the relationship between the brothers. Justice McEwen described the

group as a “huge financial success”. All the brothers wished to continue to carry on the business, albeit not in partnership with each other.

Beginning in 2005, the brothers made efforts to bring some semblance of order to their business relationship with respect to cash distributions, estate planning, life insurance and the payment of tax. They engaged capable professionals to assist them but were not able to come to any agreement on any of the issues. The relationship devolved from disagreement to acrimony, morphing into significant dysfunction and confrontations between the brothers.

One of the brothers, Mark Libfeld, brought an application to wind up the business against his three brothers. By the time the case got to trial, Mark was joined by Corey, with Sheldon and Jay on the other side. Remarkably, at trial, there was no dispute that the overall business relationship between the brothers had completely broken down and that the damage done was irreparable, such that an order to wind up the Group was inevitable. During the 21-day trial, there was much evidence led in support of competing allegations of oppression, but the Court made no finding of oppressive conduct by any of the parties. Justice McEwen stated that many of the disputes between the brothers were petty in nature and solidified his conclusion that they could not carry on working together. The main issue to be determined was the methodology of the dissolution.

Sheldon and Jay’s primary submission was that the Court order a buy-sell remedy, or alternatively a strategic buy out, both of which would have resulted in Sheldon and Jay owning 100% of the Group, with the power to divest classes of assets as part of the transaction. Mark and Corey proposed that the Group be divided into four portions, with each brother being allocated one portion. Alternatively, they proposed

a total liquidation, wind-up and sale of the Group, on condition that none of the brothers be permitted to purchase any of the assets. In the result, Justice McEwen ordered that the Group be wound up and sold under the supervision of a Court-appointed sales officer, with the Libfeld brothers being permitted to participate in the sales process as potential purchasers.

In his analysis, Justice McEwen reviewed each remedy proposed by the parties, and rejected them all. For example, he found that the buy-sell was not within the reasonable expectation of the parties. It would be unfair in that it would have forced Mark and Corey to act together as buyers, which they did not want to do, and was really a buy opportunity for Sheldon and Jay only, who proposed it and did want to work together. This proposed remedy had tight timelines, an information divide and, due to the sheer volume and value of the assets, a need for financing which led to execution risk. The Court found that all these factors favoured Sheldon and Jay, and prejudiced Mark and Corey, having regard to the specific roles historically played by each. The judge found that the Modified Restructuring Protocol proposed by Mark and Corey, whereby a Court appointed restructuring monitor would divide the Group into four equal interests, was “doomed to fail”. The ongoing projects are high-rise and low-rise developments and plans of subdivision cannot be divided so that the brothers could receive lots in the same project. The build out of these projects would require cooperation between the brothers, which was proven to be impossible to achieve, and would lead to ongoing litigation.

In coming to his conclusion as to the appropriate remedy, Justice McEwen was influenced by the extreme nature of the disfunction in this case. He stated at paras. 452-454:

This case, however, goes far beyond what has been described in the aforementioned case law as being necessary to wind-up a business. None of the factual patterns in the case law provided by the parties came close to matching the dysfunction that exists here. The unfortunate reality is that the Libfeld brothers’ relationships with each other have been totally and likely irretrievably destroyed.

The acrimony has grown to the point where, to summarize, the last 6 years have seen the following:

- The Libfeld brothers have been unable to enter into written agreements which would allow them to collectively operate the Group. There is no reasonable prospect that they be able to do so given this historical failure and the current situation.
- There has been a significant, ongoing and likely permanent breakdown in communication between Sheldon and Jay on the one hand and Mark and Corey on the other.
- There have been physical altercations, accusations and cruel insults.
- The Libfeld brothers have engaged in secretive dealings.
- The Group failed to pay hundreds of millions of dollars in tax, while the Libfeld brothers have received significant financial benefits over the last 16 years alone.
- Employees have been, at times, unfairly dragged into the middle of the dispute.
- Relationships with their business partners have been adversely affected.
- Family relationships have been significantly, perhaps irreparably damaged.
- The Libfeld brothers have dragged their mother into this litigation and are unable to agree upon the amount of money she is owed. This has damaged her relationship with some of her sons.
- There is no succession plan.
- The Group has not been able to enter into any new transactions since 2017, which best demonstrates the devastating effect of the aforementioned dysfunction.

All of this has occurred notwithstanding the fact that the Libfeld brothers are owners of the Group which has been an enormous financial success.

## KEY TAKEAWAYS

What lesson is to be learned from this decision? Businesspeople themselves are best equipped to

determine the way forward when relationships break down. Aided by capable counsel and experts, as the parties were here, they can structure a settlement in a tax advantageous manner, avoiding the costs of litigation, and of the Court appointed sales officer and his or her counsel. They lose control once they enter the courtroom, and the outcome might be very different from what they anticipated. On a positive note, once the sale process is complete, the parties can have an opportunity to take advantage of a fresh start.

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<sup>1</sup> Ontario *Business Corporations Act*, s. 207(1)(b)(iv); *Partnership Act*, s. 35(1)(f).

## • HOW A PLAINTIFF PROVES BREACH OF GOOD FAITH IN A COMMERCIAL CONTRACT •

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**Marco P. Falco**

In 2020, the Supreme Court of Canada in *CM Callow Inc. v. Zollinger*, 2020 sec 45 reinvigorated the duty of honest contractual performance, i.e. the obligation that parties to an agreement must not “lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract.”

But in order for a plaintiff to successfully sue a defendant for breach of honest contractual performance, do they have to show that the defendant lied or misled to their own personal advantage? Moreover, will an exclusion of liability clause render the defendant immune from an action for breach of good faith?

A recent decision of the Alberta Court of Appeal, *Canlanka Ventures Ltd. v. Capital Direct Lending Corp.*, 2021 ABCA 115, provides answers to both of these questions.

### MISREPRESENTATIONS AND GOOD FAITH

Canlanka involved a contract between the appellant mortgage broker and the respondent who had purchased second mortgages from the appellant as an investment. The appellant was retained to administer the respondent's mortgages.

The contract included an exclusion of liability clause which purported to limit the appellant's liability for any errors or omissions in the administration of the mortgages:

Due to the nature of the mortgage business and the surrounding environment of notices and information from a variety of sources, the [appellant] will strive to attend to all aspects of the [respondent's] mortgage interests, but cannot therefore be held liable for any oversight, errors or omissions related to the mortgage interests included under this agreement.

According to the trial judge, the appellant made two intentional misrepresentations to the respondent in the performance of the agreement:

- The appellant told the respondent that one of its mortgages had been placed into foreclosure. When the appellant learned that foreclosure was in relation to another mortgage, owned by a third

party, the appellant did nothing to correct this representation; and

- The appellant told the respondent that another party intended to buy out a second mortgage - this information was incorrect. The buyout did not take place.

As a result of these representations, the respondent was unable to make an informed decision about whether to foreclose on one of its mortgages, to obtain its own appraisals and to offer to buy out another mortgagee. The respondent commenced an action for its losses.

The trial judge dismissed three of the respondent's four claims, but awarded judgment in favour of the respondent for damages of \$25,000 in relation to one of the mortgages.

The trial judge held that the appellant's misrepresentations were intentional, deliberate and amounted to a breach of the duty of honest contractual performance and good faith.

The Alberta Court of Appeal affirmed this decision.

#### NO NEED TO PROVE DEFENDANT'S PERSONAL GAIN

On appeal, the appellant argued that the trial judge erred in finding that it had breached its duty of good faith under the contract because, although the representations it made to the respondent were intentional, they were not made for personal gain.

The appellant argued that it had previously concluded that no action should be taken on the mortgages because of the respondent's limited equity in the secured property and because of the high costs of foreclosure. The court characterized the appellant's conduct toward the respondent as "paternalistic."

The court, however, held that a breach of the duty of good faith nonetheless occurred, despite the fact that the appellant was not motivated by personal gain in making its misrepresentations.

Citing *Bhasin v. Hrynew*, 2014 sec 71 and the *Callow* decision, *supra*, the court noted that the duty of honest contractual performance did not require proof of the defendant's personal gain under the contract:

... The trial judge found, and the appellant does not argue otherwise, that the misrepresentations were intentional. They actively misled the respondent, regarding the proceedings in relation to the ... mortgage, and therefore amounted to a breach of the duty of honesty in contractual performance. Nothing in *Bhasin* makes a finding of a breach of the duty of honesty in contractual performance turn on the fact [that] the underlying misrepresentation was made for personal gain. The misrepresentations in this case were active, intentional and went well beyond innocent non-disclosure.

#### NO CONTRACTING OUT OF DUTY OF GOOD FAITH

The Alberta Court of Appeal further rejected the appellant's position that it was immune from liability for breach of the duty of good faith under the exclusion clause. The exclusion clause did not apply as it was limited to negligent conduct. Here, the appellant's misrepresentations were deliberate and therefore the conduct was not covered by the clause.

The Court of Appeal went further, however. It noted that, as a general contract doctrine, the duty of honest contractual performance cannot be excluded by the parties. The doctrine applies, regardless of the parties' intentions:

We note that at para 75 of *Bhasin*, the Supreme Court declared that the duty of honesty in contractual performance is a doctrine that the parties are not free to exclude. It was therefore not, in any event, open for the trial judge to interpret the exclusion clause in a way that would excuse the breach of the appellant's duty of honesty toward the respondent.

#### BREACH OF GOOD FAITH NOT NARROW DOCTRINE IT ONCE WAS

*Canlanka* affirms that the duty of good faith and honest contractual performance is a robust doctrine. It is not as narrow as once was assumed. Both its scope and application have arguably been broadened in the post-*Callow* jurisprudence.

*Canlanka* establishes that the defendant's liability under the doctrine does not turn on whether the

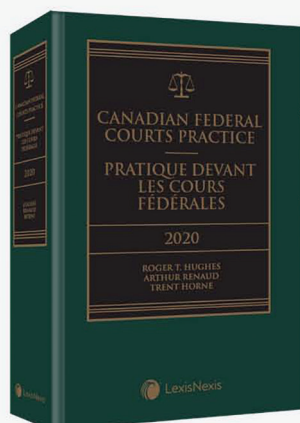


defendant stood to gain by its misrepresentations. A benefit to the defendant is irrelevant to whether the duty of good faith has been breached. What matters instead is whether there was a misrepresentation to the plaintiff - be it in the form of an active deception or even an omission.

*Canlanka* also affirms that parties are not free to contract out of the duty of honest contractual performance. The doctrine applies to all Canadian contracts as a matter of common law. Clever contractual turns of phrase that try to exclude the doctrine's application will be rejected. Like other contractual doctrines, the parties are bound by a basic level of honesty and good faith in the performance of their agreement. This is a matter of common law, not express contractual rights.

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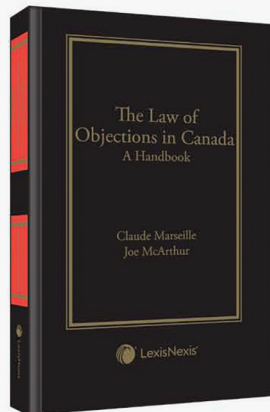
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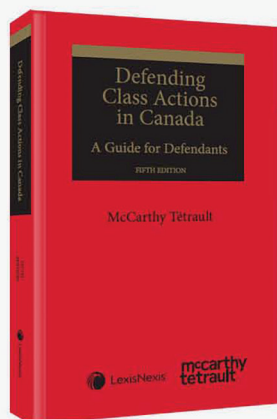
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