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Supreme Court on Unlawful Interference

The Supreme Court of Canada Provides Needed Clarity to the Tort of "Unlawful Interference"

In *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, which was a case originating in Eastern Canada, the Supreme Court was recently asked to provide clarity to the tort of "unlawful interference", which is also known by the pseudonyms "unlawful interference with economic relations", "interference with a trade or business by unlawful means", "intentional interference with economic relations", "causing loss by unlawful means", and finally just "unlawful means". The tort arises in a three-party situation in which party "A" pursues an unlawful course of conduct against party "B" in order to cause intentional economic harm to party "C". The tort is designed to allow party "C" to recover against party "A" notwithstanding that "A's" conduct was perpetrated directly against "B" not "C".

In this case, a group of family members owned an apartment building through a web of interrelated companies. The majority of the family members wanted to sell the building, while one family member did not, and he and his company undertook a series of actions aimed at preventing the sale. Ultimately this family member—through his company—ended up buying the property for approximately $400,000 less than it could have otherwise been sold for. The majority of the family members sued to recover the $400,000 loss and the main question before the trial judge was whether the dissenting family member and his company were liable for the tort of "unlawful interference".

At trial Justice Dionne of the New Brunswick Queen's Bench concluded that the defendant family member was liable for the "unlawful interference" because he had pursued a course of conduct that lacked legal merit, and was therefore "unlawful". The family member then appealed to the New Brunswick Court of Appeal, which took a considerably different view of the tort, but nevertheless dismissed the appeal on the basis that although not unlawful, the defendant-appellants' actions met the criteria for a principled exception and should nevertheless form the basis of liability. The defendant-appellants then appealed to the Supreme Court of Canada, which was faced with the following issues in order to clarify the elements of the tort of unlawful means: (i) what sorts of conduct are considered "unlawful" for the purposes of this tort; (ii) is the tort available only if there is no other cause of action available to the plaintiff against the defendant in relation to the alleged misconduct; and (iii) should the "unlawfulness" requirement be subject to principled exceptions.

Before turning to the treatment of this tort at the various levels of court, and ultimately the Supreme Court's ruling, it is useful to first examine the facts of this case in greater depth. Joyce Avenue Apartments Ltd. owned an apartment building in Moncton New Brunswick. In turn, Joyce was owned by Lillian Schelew and her four sons, Jeffrey, Michael, Bernard and Alan, each through corporate entities. The respondent-plaintiffs Bram Enterprises Ltd. and Jamb Enterprises Ltd. each owned 40% of Joyce. The four Schelew brothers owned equal numbers of shares in both Bram and Jamb, while Lillian held voting preferred shares in Bram. The remaining 20% ownership interest in Joyce was held by the appellant-defendant A.I. Enterprises Ltd, whose owner Alan Schelew was the sole director and was also an appellant-defendant. A.I. (effectively Alan) managed the Joyce owned building for a fee.

Joyce, as the owner of the building, and Bram, Jamb and A.I., as the investors, entered into a syndication agreement that contained a sale mechanism, which gave a majority of investors a right to sell the building subject to a right of first refusal of any dissenting investor to purchase it at a professionally appraised value. Having obtained a professional appraisal, the investors wishing to sell were deemed to have made an irrevocable offer of sale to the dissenting investor, which would remain open for 15 days.

In 2000, all of the family members except Alan and his company A.I. wanted to sell the property. They gave notice to A.I. under the syndication agreement and the building was appraised at $2.2 million. A.I. did not accept the deemed offer within 15 days and the property was listed for sale. Over the course of 16 months the plaintiff-respondents dealt with four potential investors but could not close a sale, which the respondents attributed to the actions of Alan and A.I.

At trial, Justice Dionne focused on four specific acts of the defendants A.I. and Alan, which were to: (i) misuse the arbitration provisions of the syndication agreement as a

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means of stalling the sale of the Joyce property; (ii) advance legally groundless defences for a "Notice of first of refusal" which were filed against the Joyce property; (iii) file an equally baseless certificate of pending litigation against the property; and (iv) deny entry to the Joyce property to prospective buyers. In the view of the trial judge all of A.I. and Alan's conduct had the effect of "complicating, delaying, impeding, and ultimately and for all intents and purposes completely obstructing and preventing" the majority from selling the property to third parties. Justice Dionne concluded that all of this conduct was illegal because it lacked any legal basis or justification, and also that Alan Schelew's conduct breached his fiduciary obligations as a director of Bram and Jamb, while A.I. breached its contractual obligations to Bram and Jamb under the syndication agreement. In finding that A.I. and Alan had committed the tort of "unlawful interference", Justice Dionne found that A.I. and Alan "possessed actual intent to do whatever they could to pursue the interest of A.I. Enteprises and that they were well aware that their actions would cause harm to Jam[b] and Bram". On this basis, damages for the foregone value of the property were awarded to the plaintiffs.

A.I. and Alan Schelew then appealed to the New Brunswick Court of Appeal, which began its analysis by noting that the unlawful means tort has been in a state of flux and has been the subject of two opposing views of the proper scope of the "unlawful means" component following the House of Lords decision in *OBG Ltd. v. Allan*, [2007] UKHL, [2008] 1 A.C. 1. In *OBG,* Lord Hoffman, writing for the majority, adopted a narrow definition of "unlawful means" whereby only breaches of the civil law such as a tort or a breach of a contract would suffice. The unlawful conduct would also need to be actionable by the party against which it was directed in order to give rise to liability. Writing for the minority in *OBG*, Lord Nicholls advocated a broader view, under which "unlawful means" included "common law torts, statutory torts, crimes, breaches of contract, breaches of trust and equitable obligations, breaches of confidence, and so on". The New Brunswick Court of Appeal preferred Lord Hoffman's narrow definition, and found that the conduct of the appellant-defendants, while lacking legal justification, did not amount to a wrong actionable by the prospective purchasers. Notwithstanding this finding, the Court of Appeal allowed for the possibility of principled exceptions mitigating the rigidity of the narrow rule, and crafted an exception to cover this case, which it described in the following terms: "In my view, the intentional erection of self-help legal barriers, some of which are enforceable through statutory processes not subject to prior judicial authorization, in circumstances where those barriers rest on rights fabricated with arguments of sand, warrants redress under the tort of unlawful means (akin to the tort of abuse of legal process)." On this basis the Court of Appeal dismissed the appeal and upheld the liability finding.

A.I. and Alan Schelew then appealed to the Supreme Court of Canada and urged the Court to adopt Lord Hoffman's view on "unlawful", requiring that the conduct be actionable by the third party (or would have been but for the fact that the third party did not suffer a loss). This view is premised on the tort having a limited sphere of operation such that only actionable civil wrongs against the third party provide a basis for allowing the intended victim to sue. A.I. and Alan also urged the Court to hold that the tort is only available to the plaintiff if the defendant's conduct causing the injury does not give rise to another cause of action by the plaintiff against the defendant.

The respondents, on the other hand, argued two alternative positions; the first being that "unlawful means" should be defined by a broad bright line rule that an act is unlawful if there exists a legal proceeding through which its legitimacy can be legally challenged. In the alternative, the respondents would have accepted Lord Hoffman's formulation if the Court held, as the Court of Appeal had, that it was subject to principled exceptions.

In examining which of the positions advanced by the appellants and respondents was to be preferred, the Court engaged in an analysis of the history and rationale of the tort, and determined that it was necessary to give the concept of "unlawful means" a "sound, economically relevant and judicially supported interpretation" in order to keep "economic torts in harmony with contemporary legal values": *No. 1 Collision Repair & Painting (1982) Ltd. v. Insurance Corp. Of British Columbia,* 2000 BCCA 463, 80 B.C.L.R. (3d) 62 leave to appeal refused, [2001] 1 S.C.R. xv. In order to do so, the Court found that the tort must be understood in the context of regulation of economic and competitive activity. The Court has long been loath to develop rules to enforce fair competition, and is concerned not to undermine certainty in commercial affairs, while also traditionally affording less protection to purely economic interests than to physical integrity or property rights. On that point, the Court pointed to its decision in *R.W.D.S.U. , Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156, which states that "the law has never recognized a sweeping right to protection from economic harm", before concluding that the tort of "unlawful means" should not be crafted so as to provide "sweeping relief". This same reluctance was also noted by Lord Nicholls in *OBG*, who stated that: "Competition between business regularly involves taking steps to promote itself at the expense of the other...Far from prohibiting such conduct, the common law seeks to encourage and protect it. The common law recognizes the economic advantages of competition."

Returning to the case at bar, the Court found that the reluctance described by Lord Nicholls was directly relevant to this case. The Court noted that although Justice Dionne found that the appellant-defendants intended to do whatever they could to pursue their interests while being aware of the harm it would cause to Jamb and Bram, that this same conclusion could be applied to a great number of legitimate competitive activities. As expressed by Justice Cromwell speaking for the Court, "that, it seems to me, suggests the need for a limited role for the unlawful means tort." On that basis the Court agreed with Lord Hoffman and held that to be "unlawful" conduct must be conduct that is actionable by a third party, or otherwise would have been had they suffered a loss. The Court also concluded that given the desire to keep the tort narrow, it would be inappropriate to open "unlawful means" to the discretion of the courts, and so declined to allow for a principled exception. Finally, the Court concluded that the tort's availability should not be restricted to instances where no other cause of action is available as this would offend the principle of concurrent liability. Ultimately, the Court found that although the appellants had acted in self interest and had harmed the plaintiffs, their conduct was not actionable by a third party and so not "unlawful". In dismissing the appeal, however, the court upheld the finding of breach of fiduciary duties, and affirmed Justice Dionne's damages award.

A.I. Enterprises Ltd. v. Bram Enterprises Ltd., 2014 SCC 12

Court of Appeal About Face

In the face of widespread consternation about the consequences of one of its decisions on security class actions, the Court of Appeal reverses itself.

In December, 2005 the *Securities Act* of Ontario was amended to make it easier to claim damages for misrepresentations made in respect of shares trading in the secondary market. Section 138.3 of the *Securities Act* now permits an investor to sue for misrepresentation in offering documents or financial statements, without having to prove reliance on those documents. At the same time, certain protections were built in for the defendants in such actions, including a cap on damages, certain statutory defences and a requirement that leave of the Court be obtained before an action can be commenced. The latter provision was introduced to avoid "strike suits" which had become prevalent in the United States and whereby an action was commenced every time a share price fell, in the hope of obtaining a quick settlement. The *Securities Act* amendment also provided that an action must be commenced within three years of the misrepresentation.

It was always contemplated that most actions brought under the new provisions would be class actions since many investors would be affected, and it would frequently be uneconomical for any individual investor to pursue a claim. Section 28 of the Ontario *Class Proceedings Act* ("CPA") provides that any applicable limitation period is suspended in favour of all class members on the commencement of a class proceeding. The section reads as follows

"28. (1) Subject to subsection (2), any limitation period applicable to *a cause of action asserted in a class proceeding* is suspended in favour of a class member on the commencement of the class proceeding and resumes running against the class member when,

(a) the member opts out of the class proceeding;

(b) an amendment that has the effect of excluding the member from the class is made to the certification order;

(c) a decertification order is made under section 10;

(d) the class proceeding is dismissed without an adjudication on the merits;

(e) the class proceeding is abandoned or discontinued with the approval of the court; or

(f) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise. [Emphasis added.]"

In 2009, Mr. Sharma, as representative plaintiff, sued various parties alleging that misrepresentations made by the defendants had affected the value of the shares of Timminco Limited. In early 2011, the plaintiff had not yet brought the motion for leave required by the *Securities Act* and had not brought a motion to certify the class proceeding. As a result, he obtained an order from the class proceedings Judge, declaring that the effect of Section 28 of the *Class Proceedings Act* was to suspend the running of the limitation period in favour of all class members, once the statutory claim was asserted and before leave to commence the action was obtained.

This decision was reversed by the Court of Appeal for Ontario which ruled that a claim could not be said to have been "asserted" within the meaning of Section 28 of the CPA until the necessary leave had been obtained. The Court justified this on the basis, among other grounds, that class members should not be preferred over other categories of plaintiffs by having the limitation period suspended in their favour without leave having been obtained, and on the basis that strict interpretation of the rules would force plaintiffs to proceed with actions in an expeditious manner.

When the Timminco decision was released in February, 2012 it was described as a "thunderbolt" to the securities class action bar. Its effect was to make a number of cases already pending before the Courts statute barred. The consequences were seemingly so potentially cataclysmic, that the Court of Appeal did something that is almost never done. It made a 180 degree change in direction.

Sitting as a five member panel, instead of the usual three, the Court heard three appeals at the same time.

In *Green v. CIBC*, the applications for certification under the *CPA* and for leave to proceed under Part XXIII.1 of the *Securities Act* were heard together. The motions judge would have granted leave and certification but held that there was no relief against the passage of the limitation period in light of the decision in *Timminco*.

In *Silver v. IMAX*, leave had already been granted before *Timminco* was released. Following the release of *Timminco*, the defendants applied to dismiss the action as time-barred. The motion was dismissed and the grant of leave declared to apply *nunc pro tunc* (i.e. retroactively).

In *Trustees of the Millwright Regional Council of Ontario Pension Trust Fund v. Celestica Inc.,* the motions judge applied the doctrine of special circumstances to hold that leave could be granted *nunc pro tunc*.

The issue before the Court was whether *Timminco* was wrongly decided. Even if it was, however, the Court had to get around the doctrine of *stare decisis.* Latin for "to stand by things decided", *stare decisis* is fundamental to the common law. It promotes certainty in the law because courts adhere to their own previous decisions and lower courts are bound by the decisions of higher courts. The Court turned to its own decision in *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.* where the Court said:

"Lord Denning once wrote, 'The doctrine of precedent does not compel your Lordships to follow the wrong path until you fall over the edge of the cliff', to which Justice Brandeis might have replied: 'It is usually more important that a rule of law be settled, than that it be settled right'.... These words, by two great jurists, capture the essence of the debate about *stare decisis*."

The Court of Appeal noted that the Supreme Court of Canada has articulated five factors that would allow it to overrule one of its previous decisions: 1) where a previous decision does not reflect the values of the *Canadian Charter of Rights and Freedoms*; 2) where a previous decision is inconsistent with or "attenuated" by a later decision of the court; 3) where the social, political, or economic assumptions underlying a previous decision are no longer valid in contemporary society; 4) where the previous state of the law was uncertain or where a previous decision caused uncertainty; and, 5) in criminal cases, where the result of overruling is to establish a rule favourable to the accused.

However the Supreme Court also said that "…these five factors were not meant to be a comprehensive list, nor need they all be present to justify overruling a previous decision…they are . . . guidelines to assist this Court in exercising its discretion. But overruling a previous decision based on one or more of these five factors promotes the interests of justice and the court's own sense of

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Court of Appeal About Face (continued)

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justice by bringing judge-made law into line with constitutional, legislative, or social changes, by removing conflicts and uncertainties in the law, or by protecting individual liberty."

The Court of Appeal went on to say:

"Our court has never itemized a similar list of factors to justify overturning one of our decisions. The Supreme Court's factors likely provide a useful, though not exhaustive, checklist for provincial appellate courts in Canada. Certainly, our court has adopted a similar view to that of the Supreme Court. Thus, for example, we have said that we will not overrule one of our previous decisions unless it was 'manifestly wrong'; and we have not felt bound by a judgment of the court 'where the liberty of the subject is in issue if [we are] convinced that the judgment is wrong'. In short, although departure is the exception, we will overrule our precedents in an appropriate case.

Instead of focusing on phrases such as 'manifestly wrong', the approach I prefer is that adopted by this court in R. v. White, It calls on the court to weigh the advantages and disadvantages of correcting the error in a previous decision. This approach focuses on the nature of the error, and the effect and future impact of either correcting it or maintaining it. In doing so, this approach not only takes into account the effect and impact on the parties and future litigants, but also on the integrity and administration of our justice system."

The Court went on to conclude that *Timminco* was wrongly decided. In that case the court had ruled that the representative plaintiff had not "asserted" the statutory misrepresentation cause of action, by issuing his statement of claim without obtaining leave of the court in accordance with s. 138.8(1) of the *Securities Act*. In so deciding, the court referred to two dictionary meanings of "assert", namely, to "make or enforce a claim to" and "to invoke or enforce (a legal right)". The court in *Timminco* focused on the enforcement aspect of the definitions.

However, the Court now states that "…using the same definitions, to assert a claim is also to make a claim or to invoke a legal right... by pleading the statutory claim under s. 138.3, the representative plaintiff is 'making the claim' or 'invoking the legal right'. Although the claim cannot be ultimately enforced unless leave is granted, by pleading the facts necessary to found the claim, the representative plaintiff is 'making the claim' and 'invoking the legal right' given by the statute…Even if one viewed the word 'assert' in s. 28 as ambiguous, because it is contained in a provision that gives the benefit of the suspension of a limitation period to class members, the ambiguity should be resolved in favour of those entitled to that benefit."

The Court went on to give four reasons for overruling *Timminco*:

1) One of the main benefits of the class action, the suspension of the limitation period for all members of the class, has been removed.

2) *Timminco* undercuts the ability of investors to bring a class action within the limitation period because they do not have control of whether they can meet or toll the limitation period.

3) The Manitoba government had already amended its *Securities Act* to provide that once a leave motion has been initiated in a class action, the limitation period is suspended and the Ontario government had indicated an intention to do likewise.

4) The *Timminco* decision is very recent, which is one of the factors that the court considers important in deciding whether to overrule a previous precedent.

The Court therefore set aside the interpretation given to s. 28 of the *CPA* in *Timminco*.

Green v. Canadian Imperial Bank of Commerce, 2014 ONCA 90 (CanLII)

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