In Dispute:
A Compendium of Key Cases

The year 2020 was "unprecedented" for many reasons, as courts and counsel were forced to conduct civil litigation and appeals in a virtual world due to the COVID-19 pandemic. As that unfolded, our highest court continued to hear new cases and render decisions on matters heard before and during the pandemic.

Decisions from the bench became the talk of Twitter, but 2020 will perhaps be best remembered by lawyers as a year in which the Supreme Court of Canada was a sharply divided court: highly anticipated decisions on a variety of key issues reflected very different approaches and perspectives on the part of the top court's justices. How lower courts will interpret and apply these decisions makes for great suspense for litigators, as the law is shaped and developed in the coming months and years.

In an effort to reflect on the Court's decisions in the past year, and forecast their implications into 2021 and beyond, the Lerners Commercial Litigation Group presents *In Dispute*, our inaugural annual review of key cases. This edition focuses on key cases from 2020 that we think will have the greatest impact upon commercial litigation and arbitration going forward, as well as the "ones to watch" in 2021.

A divided court and multiple decisions makes for longer summaries. So, settle in to read these on a cold winter's night with a hot drink in hand!

Looking back on 2020

Nevsun Resources Ltd. v. Araya, 2020 SCC 5: Canadian corporate liability in Canada under Canadian law for human rights violations abroad

The plaintiffs were three Eritrean workers who claimed that they were conscripted through Eritrea's military service into working at a mine in Eritrea owned by the defendant Canadian corporation, Nevsun. The plaintiffs claimed they were subjected

to forced labour, slavery, cruel, inhuman and degrading treatment, and crimes against humanity. Nevsun brought a motion to strike the claim based on two legal theories:

- the "act of state" doctrine, which precludes domestic courts from assessing the sovereign acts of a foreign government; and
- that the claims based on breach of customary international law had no reasonable prospect of success.

While the Supreme Court of Canada allowed the claim to proceed, the Court was deeply divided (5-2-2), reflecting very different views of the courts' role in developing the law in the area of liability by Canadian private actors for human rights violations taking place abroad, and in adjudicating on issues that might appropriately be dealt with through diplomatic channels.

Abella J., for the five-justice majority, found that the "act of state" doctrine does not form part of Canadian law and therefore could not bar the claim at its early stage. However, she noted that the principles underlying the doctrine are found in Canadian law relating to conflict of laws and judicial restraint: Canadian courts have the discretion to decline to enforce foreign laws where they are contrary to public policy, including respect for public international law.

Abella J. further found that it was not plain and obvious that the plaintiffs' claims based on breaches of customary international law had no reasonable likelihood of success. Modern international law has developed from maintaining peace between states to protecting individuals from violations of obligatory, definable, and universal norms of international law. Private actors such as corporations, and not just states, may be held accountable.

Further, a distinction must be made between domestic torts and claims such as those advanced by the plaintiffs to ensure that courts can adequately address the heinous nature of the harm caused by such conduct. Canada has automatically adopted customary international law into domestic common law without any need for legislative action. Since Nevsun was bound by Canadian law, the claims were allowed to proceed.

Brown and Rowe JJ., dissenting in part, agreed with the majority's determination that the claim should survive the motion to strike based upon the principles underlying the foreign "act of state" doctrine, but disagreed with the majority's view of the status of customary international law in Canada. Canada does not recognize a cause of action that would hold a corporation civilly liable for breach of a customary international law norm, and courts develop the law only incrementally. Any change in the law in this respect would be outside the competence of the courts and would require legislative enactment.

Further, Canadian law does not recognize new nominate torts inspired by breaches of customary international law. Some of the proposed new causes of action were already

covered by recognized torts. Where there is a breach of rights that is more grave or that needs to be deterred, increased damages are available under existing tort law. To the extent that international norms require Canada to prohibit and prevent the wrongful conduct alleged, this can only be given effect through the criminal law, which does not allow for private causes of action. In any event, tortious conduct abroad will not be governed generally by Canadian law, even where the wrong is litigated in the Canadian courts. To do otherwise would constitute judicial intrusion into the executive branch of government's dominion over foreign relations.

Côté and Moldaver JJ., dissenting, would have struck the claim. It was plain and obvious that the plaintiffs' claims concerning breaches of customary international law would fail. The extension of customary international law to corporations would represent a significant departure from existing law.

Further, the "act of state" doctrine applied, and claims based upon it are not justiciable within Canada. Instead, they fall within the plane of international affairs for resolution in accordance with the principles of public international law and diplomacy. The doctrine of justiciability is rooted in a commitment to the constitutional separation of powers. A court must show deference for the roles of the executive and the legislature. The claims were private claims impugning the lawfulness of a foreign state's conduct under international law, as the plaintiffs alleged that Nevsun was liable for its complicity in the Eritrean authorities' alleged wrongful acts under international law. Such claims exceed the limits of the courts' proper role.

It is important that this decision be assessed in context. This decision was made on a pleadings motion, where the question was whether the claims should be struck on the ground that, on their face, it was plain and obvious that they would fail. The threshold to maintain the claim was, consequently, low. No determination was made as to whether these claims could succeed on their merits and, if so, what evidence would be required to support them.

Unfortunately, no merits determination will be forthcoming, because the case has now settled. However, the decision has broader implications. For the first time, the Court acknowledged that customary international law forms part of the common law in Canada, and that Canadian corporations operating abroad in jurisdictions where there are known human rights violations may face civil liability in Canada.

In a world in which state economies, including Canada's, depend in large part upon corporations having global operations, this case is significant. It is expected that corporations will be concerned about this expansion of potential liability and lobby for legislative protection. In the meantime, the extent to which the Court was divided on these issues suggests that this could continue to be a developing area of the law as more litigation is brought to test the boundaries of the principles expounded.

9354-9186 Quebec Inc. v. Callidus Capital Corp, 2020 SCC 10: Third party litigation funding agreements are not illegal *per se*

The debtor companies filed a petition for and obtained an initial order under the *Companies' Creditors Arrangement Act* ("*CCAA*"). Thereafter, most of the debtor companies' assets were liquidated, save for claims for damages against the companies' only secured creditor, Callidus. The debtor companies sought interim financing in the form of a proposed third party funding agreement, which would permit them to pursue the litigation.

Over the objections of Callidus, the supervising judge authorized the debtor companies to enter into the third party funding agreement. The Quebec Court of Appeal set aside that order. The Supreme Court of Canada, in a unanimous decision, reinstated it on the basis that a supervising judge has the power under the *CCAA* to exercise broad discretion, to which a high degree of deference is owed, and can approve third party litigation funding as interim financing pursuant to s. 11.2 of the *CCAA*.

Third party litigation funding generally involves "a third party, otherwise unconnected to the litigation, agree[ing] to pay some or all of a party's litigation costs, in exchange for a portion of that party's recovery in damages or costs". Third party funding can take various forms. A common model involves the litigation funder agreeing to pay a plaintiff's disbursements and to indemnify the plaintiff in the event of an adverse cost award, in exchange for a share of the proceeds of any successful judgment or settlement.

Whether third party funding should be approved as interim financing under the *CCAA* is a case-specific inquiry that should have regard to the text of s. 11.2 and the remedial objectives of the *CCAA*. These objectives include:

- providing for timely, efficient, and impartial resolution of a debtor's insolvency;
- preserving and maximizing the value of a debtor's assets;
- ensuring fair and equitable treatment of claims against a debtor;
- protecting the public interest; and, in the context of a commercial insolvency; and
- balancing the costs and benefits of restructuring or liquidating the company.

The architecture of the *CCAA* leaves the case-specific balancing of these objectives to the supervising judge.

Interim financing is a flexible tool that may take on a range of forms with a variety of terms, as is apparent from the broad language of s. 11.2(1). It is not defined in the *CCAA*, but at its core, interim financing enables the preservation and realization of the value of a debtor's assets. It provides that the financing must be in an amount that is "appropriate" and "required by the company, having regard to its cash-flow statement".

Under s. 11.2(2), the court may grant the lender a "super-priority charge" in exchange, failing which the corporation might not be able to obtain financing at all.

Therefore, third party financing agreements may be approved as interim financing in *CCAA* proceedings when the supervising judge determines that doing so would be fair and appropriate, having regard to all the circumstances and the objects of the *CCAA*. This requires a consideration of specific factors listed in s. 11.2(4), which are not to be applied mechanically and are not exhaustive. The agreement must not contain terms that essentially convert it into a plan of arrangement.

In this case, it was clear that the supervising judge considered the factors in s. 11.2(4), including the fairness at stake to all parties and the specific objectives of the *CCAA*. He found that the litigation funding agreement was fair and reasonable having regard to the terms upon which the third party funder and the debtor companies' lawyers would be paid in the event the litigation was successful, the risks they were taking in the litigation, and the extent of the third party funder's control over the litigation going forward. Further, because the approved litigation funding agreement did not propose any compromise of creditors' rights, it was not a plan of arrangement.

The Court recognized that, outside of the *CCAA* context, the approval of third party litigation funding agreements has been somewhat controversial, in part because of the potential that they will offend the common law doctrines of champerty and maintenance. However, this was the same objection that was initially raised with respect to contingency agreements, which are now common. Moreover, third party litigation funding agreements arose to address access to justice issues in class actions in circumstances in which representative plaintiffs are exposed to the risk of adverse cost awards. As the Court noted, "the jurisprudence on the approval of third party litigation funding agreements in the class action context – and indeed, the parameters of their legality generally – is still evolving, and no party before this Court has invited us to evaluate it".

Significantly, the Court concluded that third party litigation funding agreements are not *per se* illegal. This opens the door to the possibility that they will be used in the future in a wider variety of cases, in which the plaintiff cannot afford to prosecute the litigation and the agreement has no improper purpose. This may include commercial litigation in which there is a large disparity between the resources available to the plaintiff and the defendant. Third party litigation funding is also currently the subject of discussion regarding how or whether it may be used in commercial arbitrations.

Uber Technologies Inc. v. Heller, 2020 SCC 16: New test for unconscionability of contracts

This case was likely the most highly-anticipated decision of the year among arbitration practitioners, but in fact has broader significance. The plaintiff, Heller, started a class action in Ontario claiming that he was an employee of Uber and that it had violated employment standards legislation. Uber brought a motion to stay the action on the ground that the arbitration clause in the parties' agreement required Heller to arbitrate any dispute with Uber in the Netherlands under Dutch law. Heller argued that the arbitration clause was unconscionable and therefore invalid.

The motion judge stayed the action in favour of arbitration on the basis that the arbitrator, not the courts, should determine whether it had jurisdiction to decide the dispute, under the competence-competence principle. The Ontario Court of Appeal overturned this decision, finding that the arbitration clause was void because it was unconscionable and constituted an improper contracting out of employment legislation. The Supreme Court of Canada majority (7-1-1) agreed that the mandatory arbitration clause was unconscionable, dismissed Uber's appeal, and permitted the class action to proceed.

One of the issues that was controversial in the courts below was what arbitration legislation applied. The Ontario *International Commercial Arbitration Act*, S.O. 2017, c. 2, Sch. 5, applies to matters that are both "international" (defined in the legislation) and "commercial" (not defined). All other arbitrations are governed by Ontario's *Arbitration Act, 1991*, S.O. 1991, c. 17. The Supreme Court of Canada found that the domestic statute applied.

Key to the outcome of this appeal was that the parties' agreement was a contract of adhesion whose terms Heller could not negotiate, some of which he may not have understood, and that there was a real possibility that the validity of the arbitration clause would never be resolved if the matter was referred to arbitration. The majority observed at para. 47:

> *The fees impose a brick wall between Mr. Heller and the resolution of any claims he has levelled against Uber. An arbitrator cannot decide the merits of Mr. Heller's contention without those – possibly unconscionable – fees being paid. Ultimately, this would mean that the question of whether Mr. Heller is an employee may never be decided. The way to cut through this Gordian Knot is for the court to decide the question of unconscionability.*

The majority cited s. 7(2) of Ontario's *Arbitration Act, 1991*, which provides that, on a motion to stay a court proceeding on the basis of an arbitration agreement, the court has discretion to retain jurisdiction and decline to stay the proceedings in five circumstances, including where the arbitration agreement is invalid.

However, the *Act* is silent on the principles a court is to consider in exercising that discretion. Therefore, the majority took guidance from the Court's earlier decision in *Dell Computer Corp. v. Union des consummateurs*, [2007] 2 S.C.R. 34, which set out a framework to determine when a court should decide who has jurisdiction over a dispute. The extent to which courts may decide a jurisdictional issue depends upon the nature of the challenge. A court should refer to the arbitrator all jurisdiction challenges unless they raise: (a) pure questions of law, which the court *may* resolve; or (b) questions of mixed fact and law, which the court *must* refer to arbitration unless the relevant factual questions "require only a superficial consideration of the documentary evidence in the record", in which case the court *may* decide them. Where questions of fact alone are at issue, the court must "normally" refer the case to arbitration.

In this case, the validity of the arbitration clause was a matter of mixed fact and law because it involved interpretation of the parties' contract: see *Sattva Capital v. Creston Moly*, 2014 SCC 53. It was possible to resolve the validity of the arbitration clause through a superficial review of the record. Under the *Dell Computer* framework, this allowed the Court to exercise its discretion to determine the issue of the validity of the arbitration clause, rather than refer it to arbitration.

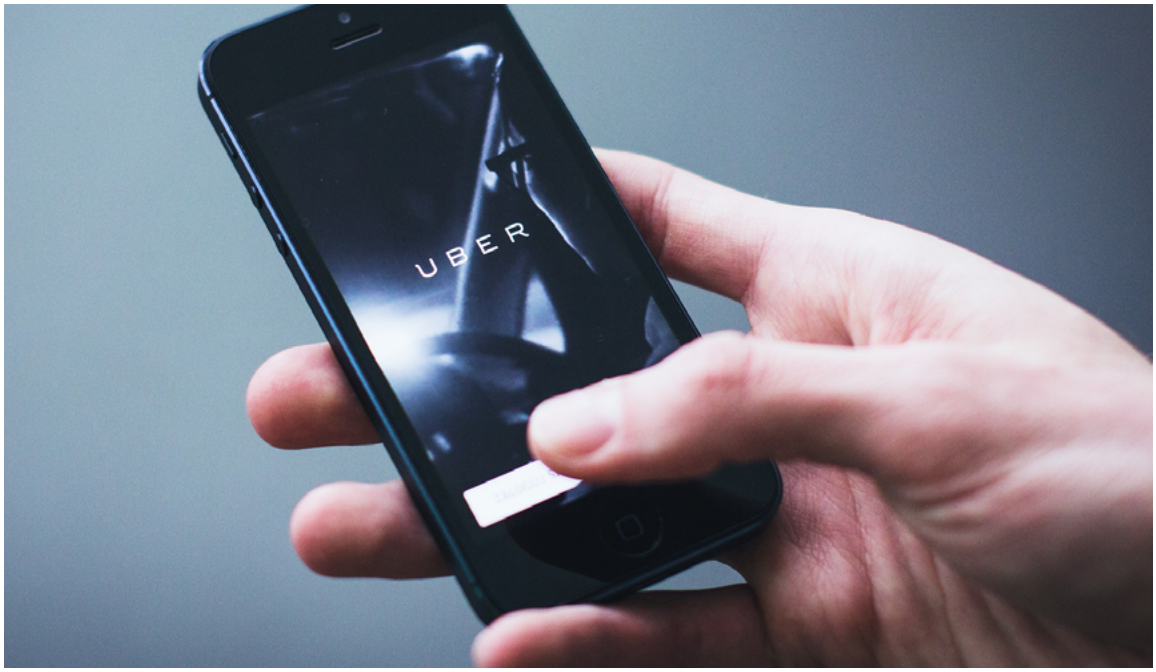
The *Dell Computer* framework presumes that if the court does not decide the jurisdictional issue, the arbitrator will do so. In this case, it was clear on the facts that if the Court did not decide the issue, no arbitration would proceed. This raised an "accessibility" issue not contemplated in *Dell Computer* and justified a departure from the general rule of referral to the arbitrator. As a result, the majority decided the validity issue and concluded that the arbitration clause was unconscionable and therefore invalid. Mr. Heller could continue his claim against Uber in the courts.

This case developed the law in three key areas:

- Firstly, the Court created a new basis to depart from the general rule of arbitral deferral: where there is a *bona fide* challenge to arbitral jurisdiction and a real prospect that the challenge may never be resolved by the arbitrator. No doubt corporations using standard form contracts are now re-visiting their dispute resolution clauses;

- Secondly, the Court expanded the scope of the contractual doctrine of unconscionability by: (a) applying the doctrine in the absence of a procedural unfairness, so that virtually any standard form agreement now may be argued to be unconscionable; (b) eliminating the requirement that the stronger party have knowledge of the weaker party's vulnerability; and (c) applying the doctrine to an individual provision of a contract rather than the bargain as a whole. Now a party need only show an inequality of bargaining power and an improvident bargain. This new test is likely to have far greater significance in commercial litigation, although its scope remains uncertain - the majority's analysis was sharply criticised by two of the justices. Here, the test was used to address access to justice concerns; and

- Thirdly, the Court provided guidance on how to determine whether a dispute falls within international or domestic arbitration legislation. The Court found that whether the "commercial" criterion in Ontario's *International Commercial Arbitration Act* is met must be based upon the nature of the parties' *dispute*, rather than the nature of their *relationship*. In this case, an employment dispute was not "commercial", so the domestic *Arbitration Act, 1991* applied.



Atlantic Lottery Corp. Inc. v. Babstock, 2020 SCC 19: Waiver of tort as a remedy

This decision brought much-needed clarity to the remedial doctrines of waiver of tort, disgorgement, and restitution.

Two individuals applied for certification of a class action against Atlantic Lottery Corporation Inc. ("ALC"), the public regulator of video lottery terminal games ("VLTs") in Newfoundland and Labrador, on behalf of any resident of the province who paid to play VLTs during a specific period. The plaintiffs' claims were that VLTs are inherently dangerous (because of the risk of addiction and suicidal ideation) and deceptive (because they give an inaccurate picture of the player's level of control and the odds of winning). Relying on various causes of action, including "waiver of tort", breach of contract, and unjust enrichment, the plaintiffs sought "disgorgement", a gain-based award quantified by the profit ALC earned by licensing VLTs, rather than damages based on any alleged harm or loss to the plaintiffs.

In a 5-4 decision, the Supreme Court of Canada struck the statement of claim on the basis that each claim disclosed no reasonable cause of action. Significantly, the Court found that the term "waiver of tort" is confusing and should be abandoned. Traditionally, the term "waiver of tort" was used to refer to circumstances where a plaintiff makes out a tort and opts to recover the defendant's ill-gotten gains rather than pursuing compensatory damages, thereby "waiving" the tort. Confusion arises from the fact that a plaintiff making such a choice does not actually forgive or waive the defendant's wrongful conduct; rather, the plaintiff elects to pursue an alternative, gain-based remedy.

The Court confirmed that waiver of tort cannot constitute an independent cause of action, preferring an approach based on the appropriate form of gain-based remedy. It clarified that "restitution" refers to an award granted in response to unjust enrichment, where there is correspondence between a defendant's gain and a plaintiff's loss. In contrast, "disgorgement" refers to awards calculated exclusively by reference to the defendant's wrongful gain. The Court held that disgorgement should be viewed as an alternative remedy for certain forms of wrongful conduct, and not as an independent cause of action. Treating disgorgement as an independent cause of action would allow "the remedy tail [to] wag the liability dog", allowing courts to grant disgorgement for negligence without proof of damage.

The Court found that neither the breach of contract nor unjust enrichment claims had a reasonable chance of success. With respect to the breach of contract claim, the remedy of disgorgement was "plainly doomed to fail", as it is available for breach of contract only where other remedies are inadequate. Here, the plaintiffs' gambling losses would be readily quantifiable, but they simply preferred to pursue disgorgement rather than prove the loss. With respect to the unjust enrichment claim, the plaintiffs' own pleadings alleged the existence of a contract between ALC and the plaintiffs. With no basis for vitiation of the alleged contract, the benefit acquired by ALC was pursuant to a valid contract, and could not constitute unjust enrichment.

Despite the strong dissent, this decision provides a helpful doctrinal analysis to support a more principled, coherent approach to gain-based remedies.

Quebec (Attorney General) v. 9147-0732 Québec Inc., 2020 SCC 32: The *Charter* does not protect corporations from cruel and unusual punishment

The Supreme Court of Canada made clear that the protections in s. 12 of the *Canadian Charter of Rights and Freedoms*, pursuant to which "[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment" extend only to human beings, not to corporations.

Quebec's *Building Act* imposes a penalty for certain offences of a mandatory minimum fine, which varies based on whether the offender is an individual or a corporation. When 9147-0732 Québec Inc. was found guilty of an offence under the *Building Act* and ordered to pay the then-minimum fine for corporations of $30,843, it challenged the constitutionality of the mandatory minimum fine on the basis that it offended its right to be protected against cruel and unusual treatment or punishment under the *Charter*.

In three concurring sets of reasons, the Court unanimously found that the protection offered by s. 12 of the *Charter* extends only to natural persons, and not to corporations. All nine justices highlighted the use of the term "cruel" in s. 12, noting that the term's ordinary meaning centres on human pain and suffering and that the section's words would be distorted should they be applied to a corporate entity.

Though ultimately arriving at the same conclusion, the Court diverged on the proper approach to constitutional interpretation, and particularly, the role of international and comparative law in that approach.

Brown and Rowe JJ., for the five-justice majority, stated that a purposive approach to constitutional interpretation must begin with, and be grounded in, the text of the provision. A purposive interpretation must not overshoot the actual purpose of the *Charter* right, which is avoided by giving primacy to the text. While Brown and Rowe JJ. did not advocate for a "purely textual interpretation" of the *Charter*, they emphasized the "primordial significance of constitutional text".

Abella J., for a three-justice minority, focused on the role of contextual factors in constitutional interpretation. She noted that examining the text is only the beginning of the interpretive exercise, as an approach treating the text as prime could unduly constrain the scope of *Charter* rights. A "living tree" approach ensures that *Charter* rights continue to represent the fundamental values of Canadian society, and prevents Canadian constitutional law from becoming more insular. While the purpose of a *Charter* right remains the central consideration when interpreting its scope and content, other factors can help inform the exercise. Those factors include the text, the historical origins and values underlying the right, and how courts around the world have interpreted international human rights instruments containing provisions that closely mirror the language of the right. Abella J. emphasized the frequency with which Canadian courts have relied on international law sources in delineating the

breadth and content of *Charter* rights, and expressed concern at an approach which would create a "hierarchical sliding scale of persuasiveness" in respect of international and comparative sources.

Brown and Rowe JJ. criticized Abella J.'s perspective on the prominence of international and comparative law in the interpretive process, finding that the *Charter* is primarily interpreted with regard to Canadian law and history. While international norms can be considered, they typically play a limited role in providing support or confirmation for a result reached through purposive interpretation. That limited role will vary in weight depending on the nature of the source of the international norm and its relationship to Canada's Constitution, so as to preserve the integrity of the Canadian constitutional structure and Canadian sovereignty.

Kasirer J., writing alone, declined to get involved in the interpretive debate, stating it was unnecessary to consider questions relating to the proper approach to constitutional interpretation for the purposes of this appeal. His brief reasons were limited to agreeing with the Quebec Court of Appeal's analysis and conclusion that a corporation cannot avail itself of the protection of s. 12 of the *Charter*.

This decision limits a corporation's avenues for challenging what it perceives as an unduly burdensome penalty or fine. Corporations will not be able to rely on s. 12 of the *Charter* as a basis for an argument that a penalty constitutes "cruel and unusual punishment". However, the Court's decision does not affect the applicability of other sentencing principles which would apply to the appropriate magnitude of a fine, such as proportionality. It also reveals again that, in matters of constitutional interpretation and the role of international law, the Court is very much divided.

1688782 Ontario Inc. v. Maple Leaf Foods Inc., et al. 2020 SCC 35: Restricting avenues of recovery of pure economic loss in tort

After a 55-week reserve, the Supreme Court of Canada released this landmark decision concerning recovery for pure economic loss in the context of a class proceeding brought on behalf of franchisees who suffered losses arising out of the production, distribution, and ultimately recall of contaminated food products.

Through a chain of contracts, Maple Leaf was the exclusive supplier of ready-to-eat meats to the franchisees of Mr. Submarine Ltd. ("Mr. Sub"). Due to a listeria outbreak, Maple Leaf temporarily closed its production plant, affecting the supply of meats to the franchisees. The franchisees commenced a class proceeding claiming that Maple Leaf had: (a) negligently manufactured and supplied potentially contaminated meat; and (b) negligently misrepresented that the supplied meats were fit for human consumption, resulting in economic loss to the franchisees. The action claimed damages for lost sales, profits, business value, and goodwill, in addition to disposal and clean-up costs.

The plaintiffs brought a certification motion, which was granted. Maple Leaf brought a summary judgment motion seeking dismissal of the action on the basis that Maple Leaf owed no duty of care to the class.

The motion judge found that Maple Leaf owed a duty of care to the franchisees on the basis of previously established or analogous duties of care owed by manufacturers to intermediary suppliers, as well as on a novel duty of care analysis, applying the frameworks for recovery of pure economic losses in cases of negligent misrepresentation and negligent supply of a shoddy or dangerous product. The Ontario Court of Appeal overturned the decision, concluding that the franchisees' economic losses – "reputational harms" – were not reasonably foreseeable because they were outside of the scope of their proximate relationship with Maple Leaf.

The Supreme Court of Canada split 5-4, with the majority confirming the Court of Appeal's decision. Brown and Martin JJ., for the majority, held that the only duty owed by Maple Leaf to provide safe products was to the end-consumers, as the franchisees could have protected themselves by contract or with insurance. The majority also held that the duty of care analysis is a question of law and therefore subject to the correctness standard of review, regardless of the motion judge's findings of fact on proximity and foreseeability.

The majority decision reflects the view that the tort of negligence should be understood through a "rights-based" view. Most pure economic loss claims fail because the claimant has no general right to be protected against negligent interference with its financial or economic affairs, not because *prima facie* duties are negated by policy. A duty of care cannot be established simply by showing that a claim fits within one of

the established categories in which pure economic loss may be recovered (negligent misrepresentation or performance of a service, negligent supply of shoddy goods or structures, relational economic loss). The plaintiff must also prove that, at the time of the loss, the parties were in a sufficiently proximate relationship to justify the recognition of a duty of care. In cases of negligent misrepresentation or performance of a service, proximity is established based on the defendant's undertaking of responsibility and the plaintiff's reasonable and detrimental reliance on that undertaking. This combination of an undertaking and reasonable reliance is the "right-creating event" upon which the plaintiff can then base its claim in tort law.

In this case, the franchisees' negligent misrepresentation claims failed for two reasons:

- First, the undertaking by Maple Leaf to provide ready-to-eat meats fit for human consumption was made to consumers, not to commercial intermediaries such as the franchisees; and
- Second, there was insufficient evidence that the franchisees detrimentally relied on Maple Leaf's undertaking, because the franchisees were bound by the exclusive supply arrangement and had no available alternative.

With respect to cases of negligent supply or shoddy goods or structures, the Court restricted the scope of recovery for economic loss. Recovery in such cases is founded upon the defendant's negligent interference with the plaintiff's right to be free from injury to one's person or property. The franchisees' economic loss claims failed under this framework because the danger posed by the supply of ready-to-eat meats was only to the ultimate consumer, not to the franchisees, and any such danger evaporated when the meats were recalled and destroyed. The franchisees' claims to recover clean-up costs and costs related to the disposal, destruction, and replacement of the potentially contaminated meats could proceed.

Considering whether the franchisees could establish a novel duty of care, the majority held that the analysis should start with the proximity stage rather than foreseeability, since what is foreseeable will be governed by the relationship of proximity. This requires asking whether, in light of the nature of the relationship at issue, the parties are in such a close and direct relationship that it would be just and fair to impose a duty of care in law. In considering proximity in cases where there are chains of contracts, the plaintiff's ability to protect itself from the loss suffered, and whether the plaintiff has actually done so, should be examined. In this case, the franchisees chose to operate within a franchise rather than independently, which entailed certain vulnerabilities in exchange for certain advantages (e.g. use of the franchisor's trademark, its system of operation, and its buying power), and chose not to avail themselves of insurance protection. This was a factor of significant importance, as courts will rarely disrupt the allocations of risk reflected in relevant contractual arrangements. No novel duty of care was recognized.

Karakatsanis J., writing for a four-judge minority, largely agreed with the majority's approach to the analytical framework for claims in negligent misrepresentation or performance of a service and negligent supply of shoddy goods. However, the minority would have recognized a novel duty of care claim on the basis that Maple Leaf "knowingly acted as an exclusive supplier of products integral to and closely associated with the franchisees' businesses", and therefore "owed the franchisees a duty to take reasonable care not to place unsafe goods into the market that could cause economic loss to the franchisees as a result of reasonable consumer response to the health risk posed by those goods" (para 130).

With respect to the contractual matrix and corresponding vulnerability placed on the franchisees, the minority noted that "a realistic approach must be taken" to whether the franchisees could have protected themselves through contract. The power imbalances and vulnerability of franchisees are well known. Rather than negating proximity, the contractual matrix pointed to "a particular dependency and proximity" in the relationship between Maple Leaf and the franchisees (para 152). The minority dismissed each of the policy concerns raised by Maple Leaf to negate the duty.

The majority decision will have a significant impact in product liability and franchise law, requiring often vulnerable small businesses and intermediary suppliers to protect themselves proactively through contract negotiations with large manufacturers or by obtaining insurance, notwithstanding the power imbalances and economic realities that may plague them. The decision also has important implications for the standard of appellate review: regardless of the findings of fact made by a motion judge or trial judge on proximity and reasonable foreseeability in the duty of care analysis, an appellate court will review the entire analysis on a correctness standard.

Disclosure: Lerners LLP acts for the appellant franchisees.

CM Callow Inc. v. Zollinger, 2018 ONCA 896: Revisiting the *Bhasin* duty of good faith contractual performance

One of the most significant Supreme Court of Canada cases in recent years for those litigating business disputes is *Bhasin v. Hrynew*, 2014 SCC 71, in which the Court found that "good faith contractual performance is a general organizing principle" of contract law and imposed a new "duty... to act honestly in the performance of contractual obligations". This means that parties to a contract must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This development was intended to "bring a measure of coherence and predictability to the law and... bring [it] closer to what reasonable commercial parties would expect it to be".

The outcome in *Bhasin* turned on a consideration of the respondents' honesty. However, elsewhere in the decision, the Court also described the new duty more broadly - requiring parties to generally perform their contractual duties "honestly and reasonably and not capriciously or arbitrarily". Courts since *Bhasin* have grappled with how to deal with conduct that falls short of dishonesty but constitutes acting "unreasonably" or "capriciously or arbitrarily". This is challenging, in part, because of the limits that the Court placed on the new duty:

- The principle of good faith must be applied in a manner that is consistent with the law of contract, which values the freedom of contracting parties to pursue their individual self-interest. In commerce, a party may sometimes cause loss to another – even intentionally – in the legitimate pursuit of economic self-interest. Doing so is not necessarily contrary to good faith. However, a party may not seek to undermine the other party's legitimate interests in bad faith;
- The organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties; and
- Where the contract is not one of utmost good faith (uberrimea fidei), which may require disclosure of a material fact, a clear distinction can be drawn between a failure to disclose and active dishonesty.

In *Bhasin*, the Court noted that the organizing principle of good faith had already manifested itself through existing doctrines in which the law required "honest, candid, forthright or reasonable contractual performance". In some cases, good faith requires more than honesty on the part of the contracting party, or that a party's discretionary power not be exercised in a manner that is "capricious" or "arbitrary". In other contexts, courts previously had been reluctant to extend the requirements of good faith beyond honesty for fear of causing undue judicial interference in contracts.

This former analytical approach created complexity and uncertainty; hence the need for a unifying principle. However, the application of *Bhasin* in the courts below has not

led to the predictability which had been hoped, and lower court decisions conflict. It is still not clear whether or when dishonesty is required for a breach of the duty of good faith, and when "unreasonableness" or "capriciousness" or "arbitrariness" will suffice.

The Supreme Court of Canada's decision to hear the appeal in *CM Callow Inc. v. Zollinger* provided hope that there would be clarification of the *Bhasin* principles. Unfortunately, the Court delivered another split decision (5-3-1), in which it was deeply divided not only on how to determine if the dishonesty is directly linked to the performance of a contract, but also on the role of the civil law in providing guidance or a framework for the development of common law good faith duty principles.

In *CM Callow*, the plaintiff Callow provided maintenance services to the defendants/appellants pursuant to two two-year contracts (one for summer maintenance and the other for winter maintenance). The contracts provided for early termination on 10 days' notice. The defendants made the decision to terminate the winter contract about six months before they provided Callow with notice, to avoid jeopardizing Callow's work on the summer contract. During this period, Callow provided "freebie" landscaping work in the hope that it would incentivize the defendants to renew the contracts.

The trial judge decided that the defendants had breached their contractual duty of honest performance to Callow by acting in bad faith by (1) withholding the fact that they intended to terminate the winter contract to ensure that Callow performed the summer contract; and (2) continuing to represent to Callow that the winter contract would be renewed. The Ontario Court of Appeal allowed the appeal, holding that the trial judge had "improperly expanded the duty of honest performance" in a manner that went beyond the terms of the winter contract and, in effect, modified the termination provision in the contract. It held that the defendants may not have acted honourably, but their conduct did not rise to the "high level" required to establish a breach of the duty of honest performance. The duty of honest performance required the parties only to be honest with respect to matters directly linked to the performance of the winter contract then in effect, not future potential contracts.

The majority of the Supreme Court of Canada, Kassirer J. writing, allowed Callow's appeal. The majority found that, in this case, the dishonesty of the defendants was related to the exercise of rights or obligations of performance under the existing contract, and was not in respect of future contracts as found by the Court of Appeal. While there was no duty to disclose the intention to terminate, the defendants did have the (negative) obligation to refrain from misleading Callow. It is a "requirement of justice" that a contracting party have due regard for the legitimate interests of the counterparty. The majority elected not to answer the question as to whether there was a free-standing duty to exercise contractual powers in good faith.

In its analysis, the majority drew upon the civil law on abuse of rights in Quebec. The majority found that the civil law serves as persuasive authority for an understanding of the relevant legal principles, even where there are no gaps in the common law. In determining when a party's dishonesty is directly linked to the performance of a

contract, one can look to rights under civil law to serve as a framework for analysis. Based on this analysis, the majority held that the link will be established "when the party performs their obligation or exercises their rights under the contract, dishonestly." Thus, while there is no general duty to disclose, a failure to speak out on a manner related to the performance of a contract can be "active dishonesty" for the purposes of the *Bhasin* principles.

The majority found that there is conduct that is between "outright lies" and "silence". Concealment of material facts, half truths or deliberate silence in the face of knowing that the counterparty had made a mistaken inference (as the majority found occurred here) were all sufficient for the application of the *Bhasin* principles.

Brown J., writing the concurring decision, came to the same result via a different route. In his view, all that was necessary was to apply *Bhasin*. The duty owed by a contracting party includes the duty to correct a misrepresentation to which the party had contributed (as the defendants were found to have done here). It was not necessary and threatens to distort the *Bhasin* principles to focus, as the majority did, on the wrongful exercise of a right. Rather, the question is about whether there has been a "dishonest representation concerning contractual performance that caused loss" (para 177), not whether any rights have been exercised wrongfully.

Brown J. strongly disagreed that any reliance should be placed on civil law. He noted that the common law and civil law represent two different systems of law that ought to be kept separate. He warned against the use of a comparative law analysis in the absence of any need to fill a "gap" in the common law. Doing so can complicate the straightforward and be destabilizing. In circumstances where, like here, the issues can be determined on the existing principles, no reference to the civil law was appropriate or necessary.

Côté J., in dissent, agreed that no reliance should be placed on the civil law. The only issue here was whether there was active misleading as opposed to permissive non–disclosure. Based on the facts, she would have found that this case was not one of active dishonesty.

The Court's decision did not provide guidance on what conduct falling short of dishonesty will constitute a breach. Instead, one of the key issues to watch going forward will be whether the Court's division on the role of the civil law and the importance of comparative analysis will permeate decisions beyond the *Bhasin* or *Callow*-type situations.

Looking forward to 2021

Greater Vancouver Sewerage and Drainage District v. Wastech Services Ltd., 2019 BCCA 66: Awaiting clarification on standard of conduct for duty of good faith

The Court has another opportunity in 2021 to clarify *Bhasin* in *Greater Vancouver Sewerage and Drainage District v. Wastech Services Ltd*. In *Wastech*, the parties had a long-term agreement for the removal and hauling of the City's solid wastes. The contract's profitability to Wastech depended upon the allocation by the City of such waste between short-haul and long-haul destinations. When the City exercised its discretion to change this allocation, causing loss to Wastech, Wastech started an arbitration.

The arbitrator found that the City's conduct had been honest and reasonable from its point of view (including its legitimate desire to reduce the volume of waste going to the long-haul landfill to increase its lifespan), but that it had failed to give "appropriate regard" to Wastech's interests and expectations, and that this constituted "dishonesty" for the purposes of the *Bhasin* duty of good faith.

The City appealed the arbitrator's decision to the British Columbia Supreme Court, which allowed the appeal. Wastech's further appeal to the British Columbia Court of Appeal was allowed. The Court of Appeal found that *Bhasin* was concerned with conduct that has "at least a subjective element of improper motive or dishonesty". It considered the meaning of "bad faith", defining it as "conduct that is contrary to community standards of honesty, reasonableness or fairness", connoting "malice, untruthfulness, ulterior motive or…other intentional conduct equivalent to fraud", or conduct that "is so reckless that absence of good faith can be deduced and bad faith presumed".

Because the arbitrator had made no finding that the City had sought to undermine Wastech's interests or acted in bad faith and found that the decision to reallocate waste was both honest and reasonable from the City's perspective, the Court of Appeal concluded: "I doubt the Court in *Bhasin* intended that the principle of good faith would be extended so far as to attribute 'dishonesty' (which, it will be remembered, carries a 'stench') to a party in the circumstances of [the City] in this case".

Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65: Application to standard of review of arbitral awards?

Last year, we reported on this landmark decision, which significantly altered the framework for determining the standard of review by courts of administrative law decisions. This year, *Vavilov* generated debate about its application to the standard of review by courts of arbitral awards. That issue remains unresolved.

According to *Vavilov*, in the administrative law context, the starting point for the standard of review analysis is a "reasonableness review", to be derogated from only where required by a clear indication of legislative intent, including by provision for a statutory appeal to a court, thereby signalling the application of appellate standards. Questions of law require the standard of correctness, while questions of fact and mixed questions of fact and law (where the legal principle is not readily extricable) will attract the standard of palpable and overriding error.

The question has arisen as to whether these principles apply to a court review of an arbitral award, and in particular, whether the new *Vavilov* framework affects the Supreme Court of Canada's earlier leading decisions with respect to standard of review for court intervention in commercial arbitrations: *Sattva Capital v. Creston Moly*, 2014 SCC 53; and *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32.

Sattva and *Teal Cedar* state that in domestic commercial arbitrations, where appeals are restricted to questions of law, the presumptive standard of review on appeal will be reasonableness unless there are questions of broad importance. This achieves the policy objectives of efficiency and finality in arbitration. These decisions were not cited in *Vavilov*, nor can they be reconciled with *Vavilov* if the latter applies to arbitral award appeals.

The conflict cannot be resolved simply by applying *Vavilov* only to the administrative law context on the basis that it did not mention arbitrations (or *Sattva* and *Teal Cedar*) and therefore has no application to them. The Court made statements of principle and policy that seem to apply more broadly. Further, many policy reasons in the administrative law context also apply to arbitrations. For example, arbitration legislation delegates to arbitrators what would otherwise be judicial functions; arbitrators are expressly expected to function with minimal judicial interference; and arbitrations serve access to justice goals by providing an alternative to the courts. In *Sattva*, the Supreme Court characterized judicial review of administrative tribunal decisions and appeals of arbitration awards as "analogous".

To add to the uncertainty, the Court stated in *Vavilov* that it must be presumed that legislatures intended the word "appeal" to be interpreted consistently in all legal contexts. The domestic and international arbitration statutes in Ontario provide for both "appeals" and court "reviews" in limited circumstances, which may now attract different standards of review from the reasonableness standard set out in *Sattva* and *Teal Cedar*.

There is, therefore, some basis to argue that *Vavilov* has overturned *Sattva* and *Teal Cedar* insofar as those cases set out the standard of review with respect to appeals of arbitral awards. On the other hand, while the Court in *Vavilov* acknowledged that its analysis was a departure from its recent jurisprudence and that earlier case law would have to be revisited, it did not mention either arbitrations or *Sattva* and *Teal Cedar*, which leaves room for uncertainty.

Not surprisingly, subsequent court decisions considering this issue have been conflicting. In some cases, courts have held that *Vavilov* did not overrule the prior jurisprudence with respect to appeals of arbitral awards.[1] In others, courts have held that *Vavilov* overruled *Sattva* and *Teal Cedar* with respect to appeals of arbitral awards.[2] Some courts have even held that *Vavilov* applies to court reviews of arbitral awards that are not appeals.[3]

Vavilov enunciates broad principles which appear to transcend the administrative law context, which has led to this uncertainty. The case law suggests that the standard of review may depend upon whether the arbitration itself was mandated by statute or arose out of an agreement between the parties, and whether the court is considering an appeal or other review of an arbitral award. Arguably, the application of *Vavilov* principles to the arbitration context is a departure from both the expectations of the parties to an arbitration and the weight of the jurisprudence (including the Court's own case law), in which the courts show significant deference to the decisions of arbitrators who are voluntarily appointed by the parties to resolve their disputes. On the other hand, there seems to be no good reason to interpret the word "appeal" in an arbitration statute differently than in any other statute. The question then arises as to whether the parties can specify a different standard of review in the event of an appeal in their arbitration agreement.

We predict that this issue will find its way to more appellate courts in 2021. Hopefully, some consistent principles will emerge. The Supreme Court of Canada itself has an opportunity to provide clarity on this issue in the *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District* case (appeal from 2019 BCCA 66 heard and reserved December 6, 2019), an appeal from an arbitral award in which *Sattva* and *Teal Cedar* were considered before the release of *Vavilov*. This case will also address another important legal issue, as described below.

1. See, for example, *Cove Contracting Ltd. v. Condominium Corporation No. 012 5598 o/a Ravine Park*, 2020 ABQB 106; *Ontario First Nations (2008) Limited Partnership v. Ontario Lottery and Gaming Corporation*, 2020 ONSC 1516; *Alberta Union of Provincial Employees v. Alberta Health Services*, 2020 ABCA 4.
2. See, for example, *Buffalo Point First Nation et al. v. Cottage Owners Association*, 2020 MBQB 20; *Allstate Insurance Company v. Her Majesty the Queen,* 2020 ONSC 830.
3. See, for example, *Edmonton (City of) v. Edmonton Police Association,* 2020 ABCA 182; *Freedman v. Freedman Holdings Inc.,* 2020 ONSC 2692.

Donovan v. Sherman Estate, 2019 ONCA 376: New test for sealing orders?

The tragic and unique facts of this case provide an opportunity for the Supreme Court of Canada to re-consider its own test, established almost two decades ago in the leading case *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, with respect to when a sealing order will be granted. The Supreme Court of Canada heard argument on the *Donovan v. Sherman Estate* matter on October 6, 2020. Judgment is under reserve and is expected to be rendered in 2021.

It has been widely reported in the media that Bernard and Honey Sherman were brutally murdered in their home on or about December 15, 2017, and that no person has been charged with their murders. In June, 2019, the trustees of the estates of the Shermans brought *ex parte* applications for the issuance of Certificates of Appointment of Estate Trustee and for orders sealing the court file. They argued that there was no public interest to be served by allowing the privacy of the victims and their family to be invaded and "adding more fuel to the publicity fire". They also argued that the lack of tangible information about the motives and perpetrator(s) creates a reasonable apprehension of risk of physical harm to those who are the administrators or beneficiaries of the estates of the two victims. Sealing orders were granted on June 29, 2018.

In July, 2018, Kevin Donovan sought and was denied access to the estate court files. Donovan is a Toronto Star journalist, who wrote the book, "The Billionaire Murders: The Mysterious Deaths of Barry and Honey Sherman". Thereafter, the Toronto Star and Donovan brought an application to terminate or vary the sealing orders. By order dated August 2, 2018, the application judge varied the sealing orders to provide for a two-year expiry.

Upon appeal by Donovan, the Ontario Court of Appeal set aside the sealing orders. It noted that sealing orders are exceptional because of the well-established open court principle, pursuant to which court proceedings and filings are accessible to the public. The party seeking a sealing order prohibiting access to the public bears the burden of demonstrating both:

a) that the order is necessary to prevent a serious risk to an important public interest which cannot be protected by any other reasonable alternative methods, and under this branch of the test, the nature and significance of the public interest in access to the material is irrelevant (the necessity requirement); and

b) that the salutary effects of the sealing order outweigh its deleterious effects, including the negative effects on the right to freedom of expression and other public interests served by open and accessible court proceedings (the balancing requirement).

The Court of Appeal recognized the understandable desire of the Sherman family to grieve out of the public spotlight and to keep family and estate-related matters private, but said that personal concerns, without more, cannot justify a sealing order. There must be a public interest component. It found that the personal safety of individuals is an important public interest that can warrant a sealing order, but not in this case. The application judge relied upon speculation, not evidence, about the risk of physical harm. The inference to be drawn is that evidence of a reasonable apprehension of physical harm to an individual *could* be an important public interest that *could* meet the "necessity" requirement of the test for a sealing order.

The Supreme Court of Canada granted the Sherman Estate's application for leave to appeal. The issues squarely before the Court are: (1) as to the "necessity" part of the test for a sealing order, whether there is room for recognition that a party's personal privacy rights may constitute a public interest worthy of protection by a sealing order and, if so, what evidence will be required to establish it; and (2) as to the "balancing" part of the test, how fundamental rights of privacy and the open court principle will be weighed as against each other. The open court principle is said to further the important policy objective of enhancing public confidence in the administration of justice by making court proceedings open and transparent. It is also consistent with s. 2(b) *Charter* rights, and is one of the bases upon which the media invariably rely when challenging sealing orders.

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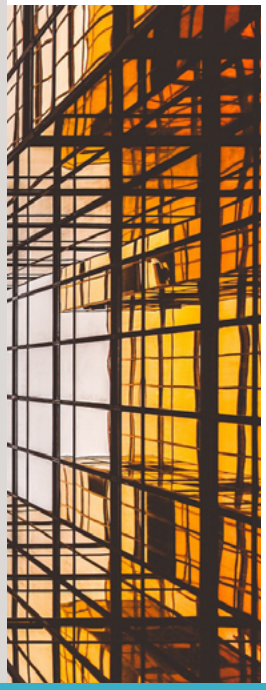

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