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The Top 10 Civil and Commercial Litigation Cases of 2021

By Marco P. Falco

As 2021 draws to a close, it is time to take stock of the most important civil litigation decisions affecting businesses and the practice of law in Ontario, as canvassed in Torkin Manes' *LegalWatch* newsletter.

While the decisions below are not the only ones worthy of mention, they represent those that engaged the most interest amongst the *LegalWatch* readership this year.

The themes of the case law include:

- The duty of good faith in commercial contracts (and its various manifestations);
- Determining when it is “legally appropriate” to start a civil action;
- The principle of discoverability;
- The impact of COVID-19 on civil litigation and the litigation “culture shift”;
- The ability to raise new issues on appeal; and
- How to prove a claim for pure economic loss, such as loss of profits.

Here are some of the ideas that informed Ontario case law in 2021:

a. The Duty of Good Faith in Canadian Contracts

The end of 2020 firmly established the duty of good faith that parties to a Canadian contract now owe to one another. The obligation applies regardless of the language of the contract itself or the parties' intentions.

In *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45, the Supreme Court of Canada affirmed that one branch of the duty of good faith includes an obligation by contractual parties not to lie or knowingly mislead one another about the performance of the agreement itself.

Developing on a theme already established in its leading decision, *Bhasin v. Hrynew*, 2014 SCC 71, the Court broadened the scope of what constitutes a misrepresentation for the purposes of honest contractual performance. You can read more about what this duty entails in the January, 2021 edition of *Torkin Manes' LegalWatch* here.

Months later, the Supreme Court of Canada identified another aspect of the duty of good faith between contracting parties in *Wastech Services Ltd. v. Greater Vancouver*, 2021 SCC 7.

Wastech holds that parties to all contracts in Canada owe one another a duty to exercise any discretion under that contract “reasonably”.

For an understanding of what reasonable contractual discretion means, see the February, 2021 edition of *Torkin Manes' LegalWatch* here.

The question of whether the party seeking relief for the defendant’s dishonesty must show that the defendant benefitted from their dishonesty was addressed in an Alberta Court of Appeal decision, *Canlanka Ventures Ltd. v. Capital Direct Lending Corp.*, 2021 ABCA 115. A discussion of that decision in the July, 2021 edition of *LegalWatch* is available here.

b. Summary Judgment and the Litigation “Culture Shift”

As trials become an evermore expensive way to resolve disputes in litigation, the Courts have turned to procedural mechanisms such as the summary judgment motion to provide parties with efficient, proportionate and “fast” justice.

In *Royal Bank of Canada v. 164397 Ontario Inc.*, 2021 ONCA 98, the Ontario Court of Appeal illustrated, however, that summary judgment on a paper record alone is a limited tool - particularly where there are serious credibility issues requiring the application of the Court’s ample fact-finding powers. For more information on why summary judgment may not always be the most appropriate solution in litigation, read the March, 2021 edition of *Torkin Manes' LegalWatch* here.

c. When is it “Legally Appropriate” to Start a Civil Action?

In Ontario, a plaintiff may not need to start its civil action unless it is “legally appropriate” to do so under subsection 5(1)(a)(iv) of the *Limitations Act*, S.O. 2002, c.24, Sched. B.

Thus far, the Courts have recognized two instances in which the two-year limitation period may be postponed:

1. Where there is an alternative dispute resolution process available to resolve the parties’ dispute first; or
2. Where the plaintiff is relying on the defendant (usually a professional) to mitigate or rectify their loss.

April, 2021’s *LegalWatch* examines the Ontario Superior Court’s decision, *Kulyk v. Guastella*, 2021 ONSC 584, which explores the issue of whether the mere existence of an ongoing criminal proceeding against the plaintiff may be enough to postpone the limitation clock for any subsequent civil action. You can read more about *Kulyk* here.

Later in the year, the Ontario Court of Appeal considered the issue of whether or not an action is “appropriate” if the plaintiff has yet to develop an understanding of the likelihood of success in its decision, *Dass v. Kay*, 2021 ONCA 565. You can learn more about *Dass v. Kay* here.

d. When is a Claim Discovered?

Related to the issue of when it is “appropriate” to start a civil action are the factors that a Court should consider in determining when the limitations clock began to run.

In *GrantThornton LLP v. New Brunswick*, 2021 SCC 31, the Supreme Court of Canada established that a claim is discovered when the plaintiff has actual or constructive knowledge of the material facts “upon which a plausible inference of liability on the defendant’s part can be drawn”. At that point, the plaintiff must start its action or risk that it be dismissed as statute-barred. You can read more about the *Grant Thornton* decision in the August, 2021 edition of *LegalWatch* here.

e. Raising New Issues on Appeal

In very rare circumstances, appellate Courts will allow a party to raise a new issue on appeal that was not argued in the lower Court.

The reluctance of an appeal Court to canvass questions not previously considered is grounded in notions of fairness and the proper role of appellate scrutiny in civil matters. You can read more about this issue in the May, 2021 edition of *LegalWatch* here.

f. Failing to Object at Trial

Will an appeal Court decline to review an error of a trial judge if the appellant did not object to it at first instance?

A decision of the Ontario Court of Appeal, *Parliament (Litigation guardian of) v. Conley*, 2021 ONCA 261, suggests that the answer to this question may be nuanced, depending on how material the error was to the outcome of the lower-Court proceeding. To learn more about this issue, read the June, 2021 edition of *LegalWatch* here.

g. How to Prove a Claim for Pure Economic Loss

Where a plaintiff cannot bring a claim for breach of contract, can they advance a claim for pure economic loss, such as loss of profits, in tort?

The Ontario Court of Appeal addressed this issue head-on in its decision, *2460907 Ontario Inc. v. 1521476 Ontario Inc.*, 2021 ONCA 682. This case established that for a plaintiff to claim pure economic loss, the burden lies on it to show sufficient “proximity” between itself and the defendant so as to give rise to a duty of care. You can learn more about the *1521476 Ontario Inc.* decision in November’s *LegalWatch* here.

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