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THE DUTY OF HONESTY IN COMMERCIAL CONTRACTS: WHAT YOU NOW NEED TO KNOW

— Marco P. Falco, Torkin Manes LLP.

In 2014, the Supreme Court of Canada recognized that all parties to a contract have a duty to act honestly: *Bhasin v. Hrynew*, 2014 SCC 71. This includes the obligation that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract.

Legal abstractions aside, however, does the duty of honest contractual performance prevent parties from actively deceiving each other? Is there now a duty to look out for the opposing parties' interest in a commercial contract? And would a party's silence or failure to disclose a material fact to the other side of a commercial contract meet the threshold for "dishonesty"?

At the end of 2020, the Supreme Court of Canada issued its much-anticipated decision, *C. M. Callow Inc. v. Zollinger*, 2020 SCC 45. *Zollinger* grapples with the questions above and establishes that determining what constitutes dishonest contractual performance is a fact-dependent exercise. The case also expands the scope of dishonest conduct to include active deception.

The Winter's Tale

The facts of *Zollinger* are not complex.

The plaintiff provided winter maintenance services to the defendant condominium corporations, including snow removal.

To that end, the parties entered into a winter maintenance agreement, which included a two-year term from November 1, 2012 to April 30, 2014 (the "Agreement").

Under the Agreement, the defendant corporations had a unilateral, unfettered right to terminate the contract for convenience:

> ...if for any other reason [the plaintiff's] services are no longer required for the whole or part of the property covered by this Agreement, then the [defendants] may terminate this contract upon giving ten (10) days' notice in writing to [the plaintiff].

In the first year of the Agreement, the defendant's property manager advised the condominium Board to terminate due to the plaintiff's poor workmanship during the winter. The Board voted to terminate shortly thereafter, but the defendants did not inform the plaintiff of that decision.

Over the course of the Agreement, the plaintiff had discussions with various Board members about the Agreement's renewal. On the basis of these discussions, the plaintiff thought it was likely the Agreement would be renewed for a further two years.

In the meantime, the plaintiff continued to fulfill his duties under the Agreement and even performed "freebie" work as an incentive for the defendant to renew the Agreement. In correspondence, a Board member advised that, in conversations with the plaintiff, the plaintiff expressed the belief that the Agreement would be renewed. The Board member said nothing as he did not want to "get involved".

It was not until the end of the Agreement, in September, 2013, that the defendant finally advised the plaintiff about its decision to terminate the Agreement. The defendant did so on the belief that all that was required was that it provide the plaintiff with ten days' notice of non-renewal under the Agreement.

The plaintiff started an action against the defendant for, amongst other things, breach of contract. The plaintiff alleged that the defendant had acted in bad faith and contrary to its obligation of honest contractual performance, as set out in the Supreme Court of Canada's *Bhasin* decision, *supra*.

In particular, the plaintiff argued that the defendant had accepted the plaintiff's free services knowing they were being offered to maintain their future contractual relationship, that the defendant exercised the termination clause dishonestly by withholding information that the contract was in danger of termination, and that the plaintiff had not pursued other maintenance contracts on the belief that the Agreement would have been renewed.

The trial judge granted the plaintiff's action. The lower Court held that the duty of honest contractual performance had been breached by the defendant by "actively deceiving" the plaintiff from the time the termination decision was made to the time the plaintiff was notified of the termination in 2013. The Court awarded damages representing the value of the winter maintenance agreement for one year, $64,306.96, in addition to the value of a one-year equipment lease for the equipment the plaintiff would have leased had the Agreement been renewed, in the amount of $14,835.14.

The Court of Appeal reversed, holding that the defendant was free to terminate the Agreement provided it informed the plaintiff of its intention to do so and gave the required 10-days' notice. In the Court of Appeal's view, the defendant's conduct did not rise to the necessary level of dishonesty required to establish a breach of contract.

The majority of the Supreme Court of Canada restored the trial judge's original decision.

The Court held that the duty of honest contractual performance now precludes active deception. The defendant breached this duty by knowingly misleading the plaintiff into believing that the Agreement would not be terminated and, accordingly, exercised the termination clause dishonestly.

The Scope of Honest Contractual Performance

Zollinger establishes and reaffirms four important points about the duty of honest contractual performance:

1. The duty of honest contractual performance is contract law doctrine.

Reiterating the theme from *Bhasin*, the Court emphasized that the doctrine of honest contractual performance is a free-standing, contract law doctrine. Its existence and application does not depend on the intentions of the contracting parties, nor is it an implied term in any given contract. It is imposed, like other contractual doctrines such as unconscionability or *non est factum*, on every agreement at common law.

The duty applies even where, as in the *Zollinger* case, "the parties have expressly provided for...termination" in their agreement. The Court affirmed that no "contractual right, including a termination right, can be exercised dishonestly and, as such, contrary to the requirements of good faith".

2. Dishonesty Includes More Than Outright Lies.

The Court revisited its decision in *Bhasin*, observing that the duty of honest contractual performance most certainly precludes outright lies and half-truths by the parties to the agreement.

However, expanding upon this definition, the Court noted that the issue of whether a party has "knowingly misled" its counterparty to the contract is a "highly fact-specific determination" which can include "lies, half-truths, omissions, and even silence, depending on the circumstances".

The list of dishonest acts "is not closed" and, in the Court's view, "merely exemplifies that dishonesty or misleading conduct is not confined to direct lies".

In expanding the definition of dishonesty in this way, the Court was careful to note that this did not mean a contractual party had a general duty to subordinate its interests to that of the other party or a duty to disclose. This caveat addresses the concern that an overly-expansive view of honest contractual performance would lead to commercial uncertainty and confer unbargained-for benefits on the aggrieved party. On the other hand, recognizing that honest contractual performance includes more than direct lies promotes the idea of "contractual justice":

> ...Yet where the failure to speak out amounts to active dishonesty in a manner directly related to the performance of the contract, a wrong has been committed and correcting it does not serve to confer a benefit on the party who has been wronged.

The Court also noted that the duty to act honestly is a negative obligation, i.e. the parties have a duty not to act dishonestly. Accordingly, the doctrine is sufficiently narrow in this regard to protect the principles of freedom of contract, contractual autonomy and corrective justice.

In *Zollinger*, the fact that the defendant condominium corporation had an unfettered right to terminate the contract did not mean that its conduct was unrestricted by the duty of honest contractual performance. The contractual right to terminate could not be exercised "in a manner that transgresses the core expectations of honesty required by good faith in the performance of contracts".

The defendant had deceived the plaintiff with its "active communications". The defendant also accepted the "freebies" from the plaintiff knowing it had no intention of renewing the Agreement. Overall, the defendant intentionally withheld information in anticipation of exercising the termination clause, knowing that its silence and active communications had misled the plaintiff. The defendant was liable for breach of honest contractual performance and therefore breach of contract.

3. The Dishonesty Must be Directly Linked to the Contract.

The Court further noted that the nature of the dishonesty by the defendant could not be assessed in the abstract. There must be a nexus between the defendant's dishonesty and its rights or obligations under the contract. The question is whether the defendant exercised its contractual rights in a dishonest manner: "[d]ishonesty is directly linked to the performance of a given contract where it can be said that the exercise of a right or the performance of an obligation under that contract has been dishonest".

4. Damages for Dishonesty are Ordinary Expectation Damages.

When calculating damages for a breach of contract arising from dishonest contractual performance, the ordinary measure of expectation damages is applied. That is, the damages must put the plaintiff in the same position it would have been in had the duty been performed. This approach stands in contrast to what are known as "reliance damages", where the injured party is placed in the position it would have been in had the contract not been entered into at all.

The duty of honest performance protects expectation, not reliance interests. Moreover, damages were to be measured against the defendant's least onerous means of performance.

Applying these principles, the Court held that the least onerous means of performance in *Zollinger* would have been to correct the misrepresentation once the defendant knew the plaintiff had drawn a false inference about the renewal. If the defendant had in fact done so, the plaintiff could have secured a new contract for the upcoming winter.

Accordingly, the Court upheld the trial judge's ruling that the plaintiff was entitled to compensation for both the opportunity to bid on other maintenance contracts and the cost of leasing winter maintenance equipment for one year.

A Brave New Contractual World?

While much of *Zollinger* is devoted to reaffirming or clarifying principles established in *Bhasin*, the Court did make some bold legal gestures.

The expansion of the definition of dishonesty in the performance of the contract, coupled with the Court's view that the list of dishonest acts is both contextual and "not closed", means that the boundaries of dishonest conduct will be tested in the years to come. The extent to which a defendant's omissions or half-truths amount to active deception will inevitably vary from case-to-case, granting significant discretion to the lower Courts.

Moreover, defendants will no doubt also argue that if the doctrine is applied to the individual facts of its case, the Court will have promoted a form of commercial uncertainty that is unacceptable and contrary to the principle of freedom of contract. From a policy perspective, this argument in any individual case may have merit. If *Bhasin* represented a modest, incremental change to the law of contract, then the Courts will likely be hesitant to view *Zollinger* as a revolution.

LEGISLATIVE UPDATE

Alberta

Financial Statutes

Bill 44, the *Financial Statutes Amendment Act, 2020*, came into force on December 9, 2020, and amends several statutes pertaining to the financial sector in Alberta.

The Government of Alberta website provides the following highlights of the amendments introduced by Bill 44:

- *ATB Financial Act*: enables access to the Bank of Canada's Standing Term Liquidity Facility and facilitates information sharing.
- *Credit Union Act*: reduces the size of the Credit Union Deposit Guarantee Board by two directors, allows Alberta credit unions to conduct virtual general meetings, and makes it easier to share information and services.
- *Credit Union Amendment Act, 2016*: repeals unproclaimed provisions.
- *Loan and Trust Corporations Act*: allows the President of Treasury Board and Minister of Finance to dissolve unregistered corporations and enable more timely incorporation of new corporations in Alberta.
- *Local Authorities Capital Financing Act*: allows the President of Treasury Board and Minister of Finance to provide emergency loans to select local authorities as necessary.
- *Freedom of Information and Protection of Privacy Act*: changes references to ATB Financial to align with its new legal name.

RECENT CASES

Franchisee Served Valid Notice of Rescission

Ontario Superior Court of Justice, November 6, 2020

The plaintiff/defendant by counterclaim, 2619506 Ontario Inc. (the "Franchisee"), and the defendant/plaintiff by counterclaim, 2082100 Ontario Inc. (the "Franchisor"), entered into a franchise agreement on May 7, 2018 for one of the Franchisor's quick service restaurants. Prior to signing the franchise agreement, Vaishali Paralekar, the defendant by counterclaim and the president of the Franchisee, met twice with the defendant, Farhan Absar, a representative of the Franchisor. The first meeting was to discuss the franchise application, and the second meeting was to provide the Franchisee with the franchise disclosure document ("FDD") executed by the defendant, Samuel Davis, who was sole director and president of the Franchisor. The only financial statements included in the FDD were unaudited statements from 2016. The Franchisee began operations in August 2018, experienced low sales and financial difficulties, and served notice of rescission on May 13, 2019 pursuant to the *Arthur Wishart Act (Franchise Disclosure), 2000*, SO 2000, c. 3 (the "Act"). The Franchisee alleged that the FDD failed to provide the required financial disclosure. Under s. 5(4) of the Act, the FDD was required to include the prescribed financial statements, which were either audited financial statements for the most recently completed fiscal year or a financial statement for the most recently completed financial year. Under s. 6(2) of the Act, a franchisee had

two years from the date of the franchise agreement to rescind if the franchisor provided no FDD. The Franchisee sought compensation pursuant to s. 6(6) of the Act, providing that the Franchisor and its associates were personally liable to the Franchisee for prescribed payments and losses following a valid rescission. The Franchisee brought a motion for summary judgment, a declaration that the personal defendants were the Franchisor's associates, and dismissal of the Franchisor's counterclaim which alleged that the Franchisee removed equipment from the premises.

The motion for summary judgment was granted. The counterclaim was dismissed. There was no genuine issue requiring a trial. The parties agreed on all amounts that would be owed to the Franchisee, if successful, for compensation pursuant to s. 6(6) of the Act. The FDD provided by the Franchisor was entirely deficient because it failed to satisfy the requirement under s. 5(4) of the Act for the FDD to include the prescribed financial disclosure. Appellate jurisprudence emphasized the Act's intention to protect the interests of franchisees and to address the imbalance of power between the parties to a franchise agreement by imposing strict penalties for non-compliance with the rigorous disclosure obligations on franchisors. Financial disclosure was of utmost importance to a potential franchisee's ability to make an informed decision. The Franchisor's FDD was so deficient it amounted to no disclosure at all and supported the Franchisee's entitlement to rescind under s. 6(2) of the Act. Both personal defendants satisfied the definition of a franchisor's associate in s. 1(1) of the Act. As sole director and president of the Franchisor, Davis was clearly in direct control of the Franchisor, and, as the signer of the FDD certificate, he was directly involved in the grant of the franchise. Despite the Franchisor's argument that Absar was not an employee, he was under the control of the group of companies controlled by Davis, which included the franchise at issue. Further, Absar made representations to the Franchisee at their meetings for the purposes of marketing and granting the franchise. Under the circumstances, the Franchisee's notice of rescission was valid, and the Franchisee was entitled to compensation pursuant to s. 6(6) of the Act. The Franchisor failed to provide any basis to substantiate the counterclaim and dismissal was warranted.

2619506 Ontario Inc. v. 2082100 Ontario Inc., 2020 CCLG ¶ 26-065

Court Resolves Conflicting Claims to Bankrupt's Sole Asset

British Columbia Supreme Court, October 29, 2020

The bankrupt, Dawn Michie, filed for bankruptcy in January 2015 under the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 ("BIA"). The sole asset of her estate was a fund of approximately $108,000 held in court to the credit of a foreclosure proceeding against certain property (the "Property") and paid to her trustee in bankruptcy, the respondent, Grant Thornton Limited. Shortly after the money was paid to the trustee, it was claimed by the appellant, Jodie Guthrie, pursuant to a costs award in her favour made by the Court of Appeal. Guthrie was the first wife of James Michie, and the costs award arose as a result of Guthrie's successful litigation invalidating as a fraudulent conveyance James Michie's transfer of the Property to his then second wife, the bankrupt. Guthrie registered the costs order against title to the Property on May 17, 2013. The Property subsequently was foreclosed by the lender and proceeds of the sale comprised the fund paid into court. The trustee unsuccessfully disputed Guthrie's claim. The Court of Appeal ordered the trustee to make the funds available for Guthrie to satisfy her judgment for costs, and also granted the trustee its costs out of the bankrupt's estate. The trustee claimed costs of more than $90,000, Guthrie was owed approximately $91,000, and the trustee argued its claims had priority over Guthrie's entitlement. The trustee proposed payment to Guthrie of $14,000 less the costs the trustee incurred in fighting the current application. The parties brought cross-applications.

The trustee was entitled to recover 50 per cent of its reasonable fees and disbursements from the funds in its possession, and the balance of the funds held by the trustee on account of his estate was to be paid to Guthrie. Several considerations favoured the trustee's claim to a charge over the funds at issue, despite the general rule that a trustee did not have access to trust assets to fund its own work. The trustee was clearly justified in taking initial steps to secure the funds held in court in the foreclosure proceeding for the orderly administration of the bankrupt's affairs. Because the trustee came into possession of the funds in issue before Guthrie asserted her claim, the trustee was obliged to address the ownership issue when Guthrie raised it. Guthrie's claim for costs initially was unquantified, and, even if the trustee had recognized Guthrie's claim as valid, the trustee would not have been in a position to satisfy it until Guthrie's costs were assessed. Given the nature of the dispute on a question of Guthrie's legal entitlement to pursue the costs order, the trustee's point was found to be arguable at trial, but the decision of the Court of Appeal showed the trustee's position was legally mistaken. However, reconciling the competing considerations was warranted. Guthrie's costs order and the costs certificate quantifying the amount payable under the costs order were valid orders with immediate legal effect. She

was entitled to be paid all funds in the trustee's possession following satisfaction of the trustee's claim. It was not in the interests of justice that the trustee should obtain a full indemnity for fees and costs incurred in taking a position that was legally misconceived, when the burden of that indemnity would fall substantially on the party that got the law right.

Michie (Re), 2020 CCLG ¶ 26-066

Franchisees Not Entitled to Recover for Pure Economic Loss from Allegedly Negligent Supplier

Supreme Court of Canada, November 6, 2020

The appellant, 1688782 Ontario Inc., was the representative plaintiff in a certified action on behalf of Mr. Sub franchisees (the "Franchisees") who were required under their franchise agreements to use meats that were supplied exclusively by the respondents, Maple Leaf Foods Inc. and Maple Leaf Consumer Foods Inc. ("Maple Leaf"). The Franchisees were affected by a widely publicized outbreak of listeria in 2008 caused by Maple Leaf which required the recall of meat products and resulted in a six to eight-week shortage of product. The class action claimed that the Franchisees suffered economic loss and reputational injury due to their association with contaminated meat products and sought monetary damages for negligent manufacture and negligent misrepresentation. Following certification, Maple Leaf brought an unsuccessful motion for summary dismissal on the basis it owed no duty of care to the Franchisees. The judge disagreed, finding that Maple Leaf owed a duty of care to the Franchisees to supply a product fit for human consumption and that the contaminated meat products posed a real and substantial danger so as to ground a duty of care. The judge also found the harm to the Franchisees was reasonably foreseeable, and there was sufficient proximity between the Franchisees and Maple Leaf to support compensable economic relief. Maple Leaf successfully appealed. The Court of Appeal found that Maple Leaf's duty of care did not extend to the Franchisees' claim for loss arising from reputational harm, and that Maple Leaf's duty was aimed at protecting human health and was owed to the end consumer, not to the Franchisees. The trial judge's decision on the duty of care was set aside (*1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2018 ONCA 407, 2018 CCLG ¶ 25-853). The Franchisees appealed.

A majority of the Court dismissed the appeal. Pure economic loss might be recoverable in certain circumstances, but there was no general right in tort to recover pure economic loss in negligence. Maple Leaf's liability for the breach of its duty in the negligent supply of contaminated meat was to remove the danger, which it did by recalling and destroying the contaminated meat. The core inquiry was whether the parties were in a relationship of proximity to justify imposing a duty of care. A proximate relationship arose when the defendant undertook responsibility, inviting reasonable and detrimental reliance by the plaintiff for that purpose. Reliance outside the scope of the undertaking fell outside of the scope of the proximate relationship and was not reasonably foreseeable. Maple Leaf's undertaking to provide meats fit for human consumption was made to consumers, and not to commercial intermediaries such as the Franchisees. The business interests of the Franchisees lay outside the scope and purpose of the undertaking. Proximity could not be established by reference to a recognizable category of proximate relationship, nor by conducting a full proximity analysis. Although the franchise agreement worked a vulnerability upon the Franchisees, the vulnerability resulted from the parties' contractual arrangements. The Franchisees were commercial actors whose choice to enter into that arrangement substantially informed the expectations of their relationship with Maple Leaf. As there was no relationship of proximity between Maple Leaf and the Franchisees, there was no proximity for the purpose of recognizing a novel duty of care. The dissenting judges would have allowed the appeal based on recognizing a novel duty of Maple Leaf to take reasonable care not to place unsafe goods into the market that could cause economic losses to the Franchisees because of consumer response to the health risks posed by the product.

1688782 Ontario Inc. v. Maple Leaf Foods Inc., 2020 CCLG ¶ 26-067

Federal Court Has Unequivocal Jurisdiction to Interpret Contracts in Patent Cases

Federal Court, November 12, 2020

Mud Engineering Inc., the plaintiff/defendant by counterclaim ("Mud Engineering"), brought an action for patent infringement alleging that the defendants, Secure Energy Services Inc. and Secure Energy (Drilling Services) Inc. ("Secure

Energy"), sold products that infringed its patents (the "Disputed Patents"). Secure Energy defended on the basis that it was the rightful owner of the Disputed Patents based on an employment contract, confidentiality agreement, and assignment agreements with the named inventor of the Disputed Patents arising out of his former employment by Secure Energy. Secure Energy also raised the issue of the Federal Court's jurisdiction to decide the ownership issue. Mud Engineering also commenced an infringement action in the Alberta Court of Queen's Bench, then brought an application to stay all issues concerning patent infringement, validity, and title to the Disputed Patents in favour of a determination of those issues in the Federal Court. Secure Energy opposed the relief on the grounds that the Federal Court had no jurisdiction to hear the ownership issue because it required interpreting various contracts. The judge dismissed the application to stay, noting the significant issue of jurisdiction was unclear, and invited the parties to seek a preliminary determination from the Federal Court on that issue. Mud Engineering brought an application for a determination on a question of law: whether the Federal Court had jurisdiction to decide the ownership of the Disputed Patents.

The application was granted. The answer to the proposed question was an unequivocal yes. The proposed question satisfied all three requirements under r. 220 of the *Federal Courts Rules*, SOR/98-106, for asking the Court to determine a question of law before a trial. First, the proposed question went to the heart of a seriously disputed issue: whether the Federal Court had jurisdiction to interpret contracts to determine patent ownership. The decision in *Salt Canada Inc. v. Baker*, 2020 FCA 127, 2020 CCLG ¶ 26-042 ("*Salt Canada*"), regarding the Federal Court's jurisdiction, should have answered that question in the affirmative. However, as this action continued to plead that the ownership determination was outside the Federal Court's jurisdiction, the question was not academic. Second, the question whether the Federal Court had the necessary jurisdiction was a pure question of law, and no findings of fact were necessary. Third, there was little doubt that providing an answer to the proposed question would result in a saving of expense, judicial resources, and time. Two trials in two different courts on overlapping issues were not necessary to determine the issues between the parties. Avoiding a multiplicity of proceedings relating to the same issues also avoided the possibility of inconsistent findings and decisions. *Salt Canada* was a complete answer to the jurisdictional issue. The fact that it dealt with patent ownership in the context of registration did not limit its authority, nor did it leave open the question whether the Federal Court had jurisdiction to interpret contracts in a patent infringement case. Each party was required to amend its pleadings in accordance with these reasons.

Mud Engineering Inc. v. Secure Energy Services Inc., 2020 CCLG ¶ 26-068

Unpaid Overtime Action Certified for Settlement Purposes

Ontario Superior Court of Justice, November 12, 2020

The plaintiff, Aps, was employed by the defendant, Flight Centre Travel Group (Canada) Inc. ("Flight Centre"), as a travel consultant and was the proposed representative plaintiff in a class action for unpaid overtime on behalf of Flight Centre employees. The company had 150 physical locations in seven provinces, and the claim was based on the employment standards legislation in each province. The claim alleged breach of contract, unjust enrichment, and negligence, and sought damages of $100 million. The proposed class was comprised of approximately 10,000 members and rested on the assumption that class members worked an average of about 50 hours per week. The class period ran from December 2008 to the date of certification. Subsequently, the parties settled pre-certification for $7 million. Flight Centre also agreed to implement a new system for tracking employees' actual hours of work rather than just their scheduled hours. Under the settlement, the average individual payment to a class member was in the range of $1,500. Flight Centre also agreed to a distribution protocol where class member entitlements would be determined by a formula accounting for the length of employment and the province of employment, adjusted for the different overtime thresholds in each province. Aps brought a motion for certification of the action for settlement purposes and for approval of class counsel's legal fees and a $10,000 honorarium paid to Aps.

The proposed class action was certified for settlement purposes. The $7 million settlement amount, distribution protocol, legal fees, and honorarium were approved. The proposed class action satisfied the requirements set out in s. 5(1) of the *Class Proceedings Act, 1992*, SO 1992, c. 6 ("CPA"). The pleadings disclosed accepted causes of action; there was an identifiable class; the proposed common issues, primarily breach of contract, could be decided on a class-wide basis; a class action was the preferable procedure; and Aps was a suitable representative plaintiff. Approving the settlement pursuant to s. 29(2) of the CPA required a judge to be satisfied that the proposed settlement was fair, fell within a zone of reasonableness, and was in the best interests of the class. Despite an initial skepticism about the reasonableness of the

$7 million settlement, a review of class counsel's explanation of the settlement terms supported the settlement amount. The original pleading overestimated the size of the claim, the size of the class, and the average weekly hours of work. For a class size of just under 5,000 members, damages were $6.7 million if the work week was 45 hours, and $15 million if the work week was 47.5 hours. The $7 million settlement amount was at the least an immediate offer and not outside the settlement norm of similar overtime settlements in both Canada and the United States. In addition to the usual risks of continued litigation, the COVID-19 pandemic had a devastating economic impact on Flight Centre, and there was a significant risk that even if the plaintiffs prevailed after trial and related appeals, Flight Centre might not be able to satisfy the judgment. The proposed honorarium to Aps was warranted. Based on the evidence, he had lost significant job opportunities and income by agreeing to be class representative. Class counsel's legal fees based on the 25 per cent contingency arrangement were presumptively valid and warranted approval.

Aps v. Flight Centre Travel Group, 2020 CCLG ¶ 26-069

Appellants' Right to Procedural Fairness Denied in CCAA Proceeding

Alberta Court of Appeal, November 9, 2020

The respondent (plaintiff), Weinrich Contracting Ltd. ("Weinrich"), entered into a contract to construct a runway at the Parkland Airport. In 2014, Weinrich commenced action against the Parkland Airport Development Corporation ("Parkland Airport"), the appellants (defendants), Roy Wiebe and Parkland Aerospace Corp. ("Parkland Aerospace"), and other parties, alleging negligent and fraudulent representations leading up to the contract. Before Weinrich's claim was dealt with, Parkland Airport successfully applied for protection under the *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36 ("CCAA"), in November 2016, and a monitor was appointed. All actions, including Weinrich's action against Parkland Airport, were stayed under the initial order, but the parties disputed whether the initial order stayed the action against Wiebe and Parkland Aerospace. The stay orders were extended several times by a series of orders to April 30, 2019. The limitation periods that had been suspended by the initial stay order were also extended by later orders to July 14, 2019. The supervising judge issued a vesting and sale order of Parkland Airport's lands and assets. Two paragraphs in the order preserved the claims of creditors against parties other than Parkland Airport, and provided that legal claims would not be affected by the CCAA proceedings or the failure to meet the time limits applicable to the commencement of certain creditors' actions against Parkland Airport. Wiebe and Parkland Aerospace challenged the two paragraphs (the "Impugned Paragraphs"), arguing that the supervising judge exceeded his jurisdiction by retroactively expanding the scope of the initial stay and/or his limitation order. They also argued that the supervising judge decided the Impugned Paragraphs of the order on his own motion without reasonable notice to the affected parties. Wiebe and Parkland Aerospace appealed the Impugned Paragraphs of the vesting and sale order.

The appeal was allowed. The Impugned Paragraphs were struck. The matter was remitted back to the supervising judge to reconsider whether Weinrich's actions against Wiebe and Parkland Aerospace were preserved by previous orders or should be preserved by a new one. Given the record, it was impossible to discern whether the supervising judge intended merely to clarify the initial stay or limitation order, believing they already encompassed Weinrich's entire action, or whether he intended to retroactively expand the terms of those orders to preserve the entirety of Weinrich's action. The authority of a supervising judge in CCAA proceedings to grant a retroactive stay of proceedings regarding third party claims was a novel issue yet to be considered by a Canadian Court, but deciding the issue was not necessary to resolve the appeal. Despite the pressure of real-time litigation that marked insolvency proceedings, the principles of procedural fairness could not be ignored, and that included a party's right to know the case that must be met. What was to have been an application for approval of the offer to purchase Parkland Airport quickly evolved to include a discussion about preserving Weinrich's action against Wiebe and Parkland Aerospace. Counsel for Wiebe and Parkland Aerospace had only minutes before being called upon to respond. There was no particular time urgency to decide whether Weinrich's action against Wiebe and Parkland Aerospace was preserved by previous orders or should be preserved by a new one, nor was that question inextricably linked to the sale of Parkland Airport's assets to the proposed purchaser. Wiebe and Parkland Aerospace did not receive sufficient notice that the supervising judge might grant an order preserving Weinrich's action. As a result, they were not afforded a reasonable opportunity to respond to the issue raised by the proposed purchaser. The Impugned Paragraphs were granted in circumstances that denied procedural fairness to the appellants, and appellate intervention was warranted.

Wiebe v. Weinrich Contracting Ltd., 2020 CCLG ¶ 26-070

Court Reverses Denial of Certification for Absence of Identifiable Class

Ontario Superior Court of Justice (Divisional Court), November 23, 2020

The plaintiff/appellant, McGee, was the proposed representative plaintiff in a proposed class action alleging negligence and breach of fiduciary duty by the defendants/respondents, Dr. Christiane Farazli and C. Farazli Medicine Professional Corporation, who operated a medical clinic that performed endoscopies (the "Clinic"). The Clinic was the subject of a highly critical report by medical investigators which disclosed unsanitary conditions and a risk of exposure to blood borne pathogens. A further public health investigation of the Clinic found there was a very low, but not absent, risk of transmission of Hepatitis B, Hepatitis C, and Human Immunodeficiency Virus (the "Diseases"). The public health agency notified 6,800 patients who had undergone endoscopies between 2002 and 2011. A final report concluded that no transmissions of the Diseases was confirmed within the Clinic. The proposed class action was commenced in November 2011, and McGee was the only representative plaintiff when the claim was amended in May 2016. The original proposed class definition was all persons who had an endoscopy performed by Dr. Farazli at the Clinic between 2002 and 2011 (the "Primary Class"). Two proposed class definitions were added later, to include all persons treated within the relevant time frame who contracted one of the Diseases (the "Infected Subclass"), and to include family members with a derivative claim. At the certification hearing, the only direct evidence of class members who suffered harm came from McGee and a potential class member who had an endoscopy in 2004, was hospitalized for kidney failure in 2009, and believed he had contracted one of the Diseases at the Clinic which led to his kidney failure. The motion judge denied certification on the basis that McGee failed to satisfy the identifiable class criterion pursuant to s. 5(1) of the *Class Proceedings Act, 1992*, SO 1992, c. 6. The motion judge found that McGee did not establish there was some basis in fact that there was an identifiable class of two or more people who suffered the harm alleged in the claim. The motion judge did not address the common issues and preferable procedure criteria for certification. McGee appealed.

The appeal was allowed. The order respecting certification was set aside, and the certification motion was remitted to the judge to consider the balance of the certification criteria in deciding whether to certify the action. The judge erred by focusing on whether there was some basis in fact for finding that anyone suffered harm other than McGee. The certification criterion did not require McGee to demonstrate there were two or more people who suffered harm. Instead, the identifiable class inquiry should have focused on whether the class definition provided an objective basis on which individual class members could know whether or not they were members of the class. The Primary Class definition, consisting of all persons who had a test performed by the respondents during a specified time period, met the requirement. Evidence demonstrated there were at least 6,800 people who met the definition. The Primary Class was defined objectively without reference to the merits and the evidence established it was possible to identify members of the class, and that was all that was required to meet the identifiable class requirement. With respect to the Infected Subclass, there was no evidence on the motion that anyone was infected as a result of conditions at the Clinic. The speculation that the potential class member's endoscopy in 2004 led to his kidney failure in 2009 was unequivocally refuted by the respondents' expert evidence. Under the circumstances, there was no basis in fact for certifying the Infected Subclass. Having allowed the appeal, there was no need to decide whether to grant McGee leave to appeal the costs award on the certification motion.

McGee v. Farazli, 2020 CCLG ¶ 26-071

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