

Claims Against Competitors for Business Interference Must Meet Strict New Supreme Court Test to Succeed

Date: March 31, 2014

Original Newsletter(s) this article was published in: Commercial Litigation Update: April 2014

If you are thinking about suing a competitor for interfering with your business because of its improper dealings with a third party, your case will have to pass a more exacting test if it is to have any chance of success.

The test is set out in the Supreme Court of Canada's recent decision in *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*

A.I. Enterprises focuses on a tort (a wrongful act leading to legal liability) that has been referred to by a number of different names -- "Unlawful interference with economic relations," "interference with a trade or business by unlawful means," "intentional interference with economic relations" and, as adopted by the Supreme Court in *A.I. Enterprises*, the "unlawful means" tort.

The unlawful means tort allows a plaintiff to sue a defendant for economic loss resulting from the defendant's unlawful act against a third party. In *A.I. Enterprises*, the Court used an example from the case *Tarleton v. M'Gawley* (1793), Peake 270, 170 E.R. 153 to demonstrate how the tort operates.

In *Tarleton*, the defendant, the master of a trading ship, fired its cannons at a canoe that was attempting to trade with the defendant's competitor, the plaintiff. The plaintiff was able to recover damages for the economic injury resulting from the defendant's wrongful conduct towards third parties (the occupants of the canoe).

A more modern example of how the tort could apply would be where Competitor A approaches a supplier and makes intentional misrepresentations to the supplier regarding Competitor B,

resulting in the supplier electing to cut off the supply of inventory to Competitor B. The resulting loss may give rise to the unlawful means tort.

The Supreme Court of Canada, in *A.I. Enterprises*, has defined what sort of conduct constitutes “unlawfulness” and when the “unlawful means” tort can be pursued in an action.

What Does “Unlawful Means” Mean?

The Supreme Court concluded that “unlawful means” must be interpreted narrowly and should apply only to conduct that would give rise to a civil cause of action by the third party (the canoeists in the *Tarleton* case), or would do so if the third party had suffered loss as a result of that conduct.

The Court also stated that “Mere foreseeability of economic harm does not meet the requirement for intention in the unlawful means tort. The defendant must have the intention to cause economic harm to the plaintiff *as an end in itself or the intention to cause economic harm to the plaintiff because it is a necessary means of achieving an end that serves some ulterior motive* ... It is not sufficient that the harm to the plaintiff be an incidental consequence of the defendant’s conduct, *even where the defendant realizes that it is extremely likely that harm to the plaintiff may result.*”

In adopting a narrower definition, the Court expressly rejected arguments seeking to leave open a broader definition of “unlawful means” and/or allowing a judge to find “principled exceptions” to the rule in certain circumstances.

The Court rejected both these arguments, finding that a broader definition of “unlawful” would be inconsistent with the common law historically providing less protection to purely economic interests and that it could undermine (legitimate) commercial competition in Canada.

In short, the Court found that a broad interpretation of “unlawfulness” would result in the courts making assessments of “commercial morality” and could impose liability for malicious conduct alone and that this would not promote legal or commercial certainty.

The Court similarly found that allowing “principled exceptions” to the unlawfulness requirement would invite the danger of too many *ad hoc* decisions being made by judges, which is precisely what the Supreme Court is attempting to avoid by its decision.

Of note, the Supreme Court also found that establishing that the defendant had knowledge of a valid business relationship between the plaintiff and third party was **not** an essential element of the unlawful means tort. Rather, it found that the issue to be focussed upon was whether unlawful conduct *intentionally* harmed the plaintiff’s economic interests. This seems to be consistent with the Supreme Court’s comment that to establish intention under the tort a plaintiff may demonstrate that a defendant caused economic harm as a necessary means of achieving an end that serves some ulterior motive. We query, however, how one can establish that a defendant *intentionally* harmed the plaintiff’s economic interests without the plaintiff having to show that the defendant knew about the business relationship.

When Can the Tort of “Unlawful Means” Be Pursued by a Plaintiff?

The Supreme Court of Canada expressly rejected the approach taken recently by the Court of Appeal of Ontario in *Alleslev-Krofchak v. Valcom Limited*, 2010 ONCA 557, where the Court of Appeal concluded that the tort of “unlawful means” could be pleaded *only* where there was no other cause of action open to the plaintiff.

The Supreme Court instead found that general principles of tort liability accept concurrent liability and overlapping causes of action in respect of the same incident. The Court noted, however, that based on the narrower definition of “unlawful” that it had established, pleading the tort would rarely, if ever, be more advantageous to a plaintiff rather than pursuing another available cause of action.

Application of New Definition of “Unlawful Means”

In *A.I. Enterprises*, a group of family members, through their companies, owned an apartment building. The majority of them wanted to sell it, but one of them did not. The dissenting family member took a series of actions to thwart the sale, including attempting to invoke an arbitration process under a syndication agreement, registering encumbrances against the property, and denying entry to the property to prospective purchasers. The result was that the ultimate sale price was nearly \$400,000 less than it otherwise might have been. The majority (successfully) sued the dissenting family member to recover this loss, with the trial judge finding that the dissenting family member and his company were liable under the tort of unlawful interference with economic relations.

On appeal, the New Brunswick Court of Appeal upheld the trial judge’s decision. However, it concluded that while none of the conduct against third parties was actionable as a civil claim, it applied a “principled exception” to find liability under the tort in any event.

The Supreme Court of Canada, applying the Court’s new, narrower test, concluded that because the dissenting family member’s conduct towards third parties could not result in a civil claim by them, and that no “principled exception” was permitted under the tort, the test for the “unlawful means” tort was not met. The Supreme Court did, however, find alternative, concurrent grounds (breach of fiduciary duty) to justify upholding a finding of liability against the dissenting family member and his company.