CHAPTER 13
COMMON LAW CONSPIRACY AND OTHER ECONOMIC TORTS

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I. Introduction

Over time, the common law affecting business and economic interests has given rise to a tension between open and aggressive competition on the one hand, and the right to work and carry on a trade or business on the other. While Canadian courts have recognized the strong public interest in maintaining and facilitating free competition in the marketplace, the courts have also cultivated a suite of so-called "economic torts" intended to provide plaintiffs with recourse where competitors engage in unfair competition. This chapter provides a brief overview of the economic torts most relevant to competition; namely, the tort of civil conspiracy, unlawful interference with economic relations and unlawful restraint of trade. These economic torts exist at common law alongside the statutory rules and remedies governing competition prescribed in the *Competition Act* and discussed in other chapters.

II. Civil Conspiracy

A. Introduction

A civil conspiracy is an agreement of two or more persons to engage in either (i) an unlawful act, or (ii) a lawful act by unlawful means.[1] The tort of conspiracy is based on the notion that activities undertaken through an association or combination of two or more parties may be tortious, even if those activities are not otherwise actionable when undertaken by a single individual. Although the tort of civil conspiracy has evolved in recent years, it is a long-standing cause of action. In one of the earliest reported cases on the "modern"

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[1] *Mulcahy v. Queen, The* (1868), L.R. 3 H.L. 306 (H.L.).

form of this tort, an actor sued certain members of his audience for conspiring to "hoot, hiss, groan, and yell" during his performance as Hamlet at Covent Garden Theatre.[2] Unfortunately for the actor, the court found that the defendant audience members had not acted in concert, but rather each had been independently expressing their disapproval of his acting skill. Had the joint action been proven, the court observed the claim may have otherwise succeeded.

Canadian law generally recognizes two forms of civil conspiracy:[3]

- *Conspiracy to injure*: A conspiracy where the predominant purpose of the defendants' conduct is to cause injury to the plaintiff (also referred to as a predominant purpose conspiracy), regardless of whether the means used by the defendants are lawful or unlawful; and
- *Conspiracy by unlawful means*: A conspiracy where the conduct of the defendants is otherwise unlawful, and is directed towards the plaintiff (alone or together with others), in circumstances where the defendants should have known that injury to the plaintiff is likely to and does result.

The elements of each of these two types of civil conspiracy are discussed below. As described below, although the tort of civil conspiracy is fairly well-established in Canada, cases in which liability have been found are relatively rare.

B. Elements of Civil Conspiracy to Injure

A civil conspiracy to injure requires proof of the following three elements: (i) an agreement between two or more persons; (ii) the predominant purpose of which was to injure the plaintiff, whether or not the means employed were lawful; and (iii) resulting damage to the plaintiff.[4] The plaintiff bears the onus of proving all of the required elements. Each of the three elements of this tort are discussed below

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2 *Gregory v. Duke of Brunswick and Vallance* (1843), 174 E.R. 696, 1 Car. & K. 24 (Assizes), affirmed *Barnard Gregory v. C. F. A. W. Duke of Brunswick and H. W. Vallance* (1844), 134 E.R. 1178, 6 Man. & G. 953 (Com. Pleas).

3 See *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452) at 471-472, which involved a civil conspiracy to breach the Combines Investigation Act, the predecessor to the current *Competition Act*; *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 at para. 73, reversing 2011 BCCA 186, reversing 2006 BCSC 1047 [*Pro-Sys*].

1. An Agreement Between Two or More Persons

The tort of conspiracy requires an agreement between two or more parties. The concept of *agreement* is not limited to a formal contractual arrangement, but can be established based merely on "a combination and a common intention"[5] or "a common design".[6] An inference as to the existence of an agreement "may be drawn from circumstantial evidence if that inference is proven on a balance of probabilities".[7] In fact, claims of a civil conspiracy are more commonly based on an inference of an agreement, without direct evidence of an agreement.[8]

That said, mere knowledge, acquiescence or approval of a course of conduct is not sufficient to establish an agreement or to make a person a party to a conspiracy. To be a party to a conspiracy, there "must be intentional participation with a view to the furtherance of the common design and purpose".[9] Parties who act independently, each with the intention to injure the same plaintiff but in the absence of an agreement or inferred agreement, have not engaged in a conspiracy.[10]

With respect to what constitutes "two or more parties", Canadian courts have accepted in a number of decisions that affiliated corporations can conspire with each other. For example, the Ontario Court of Appeal allowed a claim of conspiracy to proceed against a parent corporation and its controlled subsidiary.[11] Similarly, in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, the British

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4 See *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452.

5 Michael A. Jones et al., eds., *Clerk & Lindsell on Torts*, 20th ed (London, UK: Sweet & Maxwell, 2010) at 24-90.

6 *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460 at para. 26.

7 *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* (1998), 40 O.R. (3d) 229 (Ont. Gen. Div.) at para. 35, additional reasons 1998 CarswellOnt 5010 (Ont. Gen. Div.), reversed on other grounds (2000), 46 O.R. (3d) 760 (Ont. C.A.), reversed on other grounds (2001), 2001 SCC 59 (S.C.C.), reconsideration / rehearing refused 2001 CarswellOnt 4155 (S.C.C.).

8 *Capital Estate Planning Corp. v. Lynch*, 2011 ABCA 224 (Alta. C.A.) at para. 81.

9 *Culzean Inventions Ltd. v. Midwestern Broom Co.*, [1984] 3 W.W.R. 11 (Sask. Q.B.) at 40.

10 *Mraiche Investment Corp. v. Paul*, 2012 ABCA 95 (Alta. C.A.) at para. 43.

11 *Smith v. National Money Mart Co.* (2006), 80 O.R. (3d) 81 (Ont. C.A.), leave to appeal refused 2006 CarswellOnt 6318 (S.C.C.). The action was subsequently certified as a class proceeding: see *Smith v. National Money Mart Co.*, 2007

Columbia Supreme Court accepted that an alleged conspiracy between affiliated corporations could constitute an agreement between "two or more persons".[12] The decision arose from a motion by Microsoft to dismiss certain claims advanced by the plaintiffs including, among others, claims which alleged a conspiracy between Microsoft and its subsidiary, Microsoft Canada. On appeal, the Supreme Court of Canada declined to make a definitive ruling, but left open the possibility of a cause of action in civil conspiracy to injure in circumstances where the alleged agreement was between affiliated corporations.[13] Such an approach is in contrast to the statutory conspiracy provisions under the *Competition Act*, where agreements between affiliates are expressly excluded.[14]

2. Predominant Purpose

To succeed in an action for conspiracy to injure, a plaintiff must establish that the defendant's *predominant* purpose in effecting the conspiracy was to injure the plaintiff.[15] This reflects the understanding that a combination in furtherance of a common purpose may be directed toward a variety of ends, many of which may be legitimate. In this regard, courts have found that defendants are not liable for conspiracy to injure where the predominant purpose of their agreement falls within the legitimate interests of the parties. For example, in *Daishowa Inc. v. Friends of the Lubicon*,[16] the defendant organized a successful boycott of the plaintiff paper manufacturer as part of a dispute between the plaintiff and the Lubicon Cree regarding logging rights. The plaintiff alleged, among other claims, that the defendants had committed the tort of conspiracy to injure. However,

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CarswellOnt 29 (Ont. S.C.J.), leave to appeal refused 2007 CarswellOnt 2177 (Ont. Div. Ct.).

12 2006 BCSC 1047 at paras. 60-66, additional reasons 2006 CarswellBC 2892 (S.C.), reversed 2011 BCCA 186, reversed 2013 SCC 57. Similarly, an agreement between an individual and two corporations that the individual owns and directs can constitute a conspiracy: see *Hall-Chem Inc. v. Vulcan Packaging Inc.*, 1994 CarswellOnt 230 (Ont. Gen. Div.).

13 *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 at para. 79, reversing 2011 BCCA 186, reversing 2006 BCSC 1047.

14 *Competition Act*, R.S.C. 1985, c. C-34, ss. 45(6), 90.1(7).

15 *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 at 456, 471.

16 *Daishowa Inc. v. Friends of the Lubicon* (1998), 158 D.L.R. (4th) 699 (Ont. Gen. Div.).

the Court dismissed the conspiracy claims on the basis that the predominant purpose of the defendants' conduct was not to injure the plaintiff, but rather to focus public attention on the plight of the Lubicon Cree.

Discerning the predominant purpose of an alleged conspiracy entails a subjective determination[17] or, as the court in *Wilnap Properties Ltd. v. Janes* confirmed, it is "a question of individual opinion — fact — in ascertaining which is the dominant motive amongst a number of possible motives".[18] In the commercial context of disputes among competitors, is often difficult to distinguish between situations where the defendant was legitimately promoting their own business interests and situations where their predominant purpose was to cause injury to the plaintiff. Distinguishing between the predominant purpose of an alleged conspiracy and other ancillary purposes introduces an element of ambiguity as the case law does not establish a bright-line rule for separating predominant from ancillary or subordinate purposes.

3. Damages

A successful claim for conspiracy to injure also requires proof that the conspiracy was implemented and damages were suffered as a result — "a conspiracy that does not result in damages is not actionable".[19] To be cognizable, the damages must relate causally to the acts taken in furtherance of the agreement between the defendants.[20]

The parties to a conspiracy are liable for the damages which were a foreseeable consequence of the conspiracy.[21] While damages for civil conspiracy most commonly take the form of economic losses, Canadian decisions are equivocal regarding whether damages suffered must be pecuniary in nature. For example, the British Columbia Supreme Court in *Valley Salvage Ltd. v. Molson Brewery*

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17 *Progressive Conservative Party of Saskatchewan v. Emsley*, 2008 SKCA 155 (Sask. C.A. [In Chambers]).

18 *Wilnap Properties Ltd. v. Janes*, 1986 CarswellNfld 216 (Nfld. T.D.) at para. 31.

19 *Lombardo v. Caiazzo* (2006), 211 O.A.C. 270 (Ont. C.A.) at para. 16.

20 *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 at 472-475.

21 *Claiborne Industries Ltd. v. National Bank of Canada* (1989), 59 D.L.R. (4th) 533 (Ont. C.A.) at 548.

concluded that actual pecuniary loss must be shown,[22] despite an earlier decision of the British Columbia Court of Appeal in *Shaw v. Lewis* which had determined that damages would be presumed merely from violation of a legal right.[23] In distinguishing *Shaw v. Lewis*, the court in *Valley Salvage* concluded that pecuniary loss must be proven "where the infringement of a plaintiff's right involves an interference with his trade or business"[24]

C. Elements of Civil Conspiracy by Unlawful Means

A civil conspiracy by unlawful means requires proof of the following three elements: (i) an agreement between two or more persons; (ii) the agreement was carried out by "unlawful means"; and (iii) resulting damage to the plaintiff. As with a conspiracy to injure, the plaintiff bears the onus of proving all of the required elements. The requirements to establish an agreement and damages are outlined above in the context of the discussion of a conspiracy to injure. The element of "unlawful means" is discussed below.

To succeed in a claim for conspiracy by unlawful means, each of the alleged-co-conspirators must have engaged in the unlawful conduct.[25] If only one of those acting in concert engaged in an unlawful act, the unlawful conduct element is not made out.

There is an ongoing debate regarding what should be considered "unlawful conduct" for the purposes of a conspiracy by unlawful means, and it is often the most contentious element of such a claim. Recent appeal court decisions have recognized that unlawful means includes quasi-criminal acts that are "wrong in law, whether actionable at private law or not".[26] Unlawful means have been

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22 *Valley Salvage Ltd. v. Molson Brewery British Columbia Ltd.* (1975), 64 D.L.R. (3d) 734 (B.C. S.C.) [*Valley Salvage*]. See also *Ali Arc Industries LP v. S & v. Manufacturing Ltd.*, 2011 MBQB 95 (Man. Master) at para. 273.

23 *Shaw v. Lewis*, [1948] 2 D.L.R. 189 (B.C. C.A.), O'Halloran JA, citing the English cases of *Ashby v. White* (1703), 92 E.R. 126, 2 Ld. Raym. 938 (Eng. K.B.) and *Embrey v. Owen* (1851), 155 E.R. 579, 6 Exch. 353 (Eng. Exch.), among others, in support of this general proposition.

24 *Valley Salvage Ltd. v. Molson Brewery British Columbia Ltd.* (1975), 64 D.L.R. (3d) 734 (B.C. S.C.).

25 *Bank of Montreal v. Tortora*, 2010 BCCA 139 at para. 47; *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460 at paras. 27-28.

26 *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460 at para. 38; *XY Inc. v. International Newtech Development Inc.*, 2013 BCCA 352 at paras. 49-50.

found to include the violation of a statute, such as a contravention of certain provisions of the *Competition Act*.[27] At the time of writing there is an issue before the courts in British Columbia as to whether breaches of the *Competition Act* can predicate claims for damages in tort. The British Columbia Court of Appeal has found that they cannot. More recent decisions of B.C. Supreme Court have refused to strike claims of conspiracy that rely on breaches of the *Competition Act* on the basis that it is not clear that breaches of this statute are precluded from constituting the unlawful means.[28] The issue was not

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[27] See *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 at 471-472; *R. v. B. (W.E.)*, 2014 SCC 2 at para. 67 [*Bram Enterprises*]; *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460 at para. 37 (breach of the *Criminal Code* constitutes unlawful conduct); *Westfair Foods Ltd. v. Lippens Inc.* (1989), [1990] 2 W.W.R. 42 (Man. C.A.) at 46, Helper J.A., leave to appeal refused 1990 CarswellMan 487 (SCC) ("the use of the breach of the *Competition Act* as proof of the 'unlawful means' of a conspiracy . . . is 'intellectually acceptable'"). See also *321665 Alberta Ltd. v. Mobil Oil Canada Ltd.*, 2011 ABQB 292 (Alta. Q.B.), reversed 2013 ABCA 221 (Alta. C.A.), additional reasons 2013 CarswellAlta 1782 (Alta. C.A.), leave to appeal refused 2014 CarswellAlta 62 (S.C.C.) (a violation of the prior section 45 of the *Competition Act* was the unlawful act underlying the civil conspiracy claim, but the finding that the Act had been violated was overturned on appeal). However, reviewable practices under the *Competition Act* cannot provide a basis for civil liability: see *Ceminchuk v. IBM Canada Ltd.* (1995), 62 C.P.R. (3d) 546 (Fed. T.D.); *Chadha v. Bayer Inc.* (1998), 82 C.P.R. (3d) 202 (Ont. Gen. Div.); *Eli Lilly & Co. v. Novopharm Ltd.* (1996), 68 C.P.R. (3d) 254 (Fed. T.D.), affirmed 1996 CarswellNat 1558 (Fed. C.A.); *ICE Fashionable Accessories Inc. v. Holt, Renfrew & Co.*, 2001 CarswellOnt 1320 (Ont. S.C.J.), additional reasons 2001 CarswellOnt 1880 (Ont. S.C.J.), reversed on other grounds 2002 CarswellOnt 337 (Ont. C.A.).

[28] See *Wakelam v. Johnson & Johnson*, 2014 BCCA 36 at paras. 89-90, leave to appeal refused 2014 CarswellBC 2617 (S.C.C.) [*Wakelam*] (a breach of Part VI of the *Competition Act* cannot give rise to restitutionary claims in unjust enrichment, constructive trust, or waiver of tort, and characterizing the *Competition Act* as a comprehensive scheme of economic regulation that Parliament did not intend to be "augmented by a general right in consumers to sue in tort or seek restitutionary remedies"); *Watson v. Bank of America Corp.*, 2014 BCSC 532 (B.C. S.C.) at paras. 182-190 [*Watson*] (applying *Wakelam* found that breaches of the *Competition Act* could not sustain an action for damages based on the tort of civil conspiracy by unlawful means). However, subsequent cases refused to apply *Wakelam* (in which no tort claims were before the court) to tort claims. In *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2014 BCSC 1280 at paras. 54-65, the Court held that *Wakelam* must be interpreted to only apply to restitutionary claims rather than to tort claims, so as not to contradict the Supreme Court's decision *Bram Enterprises*, and refusing to strike the plaintiff's unlawful means conspiracy claim for damages grounded in breaches of the *Competition Act* on the basis that it is not clear that breaches of the *Competition Act* are precluded from forming the basis of an unlawful means conspiracy claim; See also, *Fairhurst v. Anglo American PLC*, 2014 BCSC 2270 (B.C. S.C.) at paras. 14-15 (applying *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2014

conclusively determined at the time of writing. Unlawful means have also been found to consist of breach of contract[29], fraud, perjury, breach of a court order[30] and conduct that is itself otherwise tortious.[31]

However, where a defendant's actions are tortious in and of themselves, even when considered separately from the combined acts with other parties, the conspiracy claim may become unnecessary. Where the unlawful act is itself actionable and pleaded as an independent cause of action in the same proceeding, it might be found to have "merged" with the conspiracy claim, unless special damages can be shown to have arisen from the conspiracy.[32] For example, in *Hovsepian v. Westfair Foods Ltd.*,[33] the Alberta Court of Queen's Bench concluded that allegations of conspiracy merged with other causes of action alleged by the plaintiff because they were premised on the same factual and legal arguments. The application of the concept of merger has been somewhat inconsistently applied, with some courts striking claims at the pleadings stage and others allowing a determination of the concurrent claims at trial.[34]

Conspiracy by unlawful means also requires that there be actual or constructive knowledge by the defendants that the conduct was unlawful and likely to cause damage to the plaintiff.[35] The

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BCSC 1280 to refuse to strike the plaintiff's conspiracy by unlawful means claim for damages grounded in breaches of the *Competition Act* on the basis that if there is a conflict between *Wakelam* and *Bram Enterprises,* the Supreme Court decision in *Bram Enterprises* must prevail).

29 *Wallace Construction Specialties Ltd. v. Manson Insulation Inc.* (1993), 106 D.L.R. (4th) 169 (Sask. C.A.), leave to appeal refused 1994 CarswellSask 669 (S.C.C.); *Indutech Canada Ltd. v. Gibbs Pipe Distributors Ltd.*, 2011 ABQB 38 (Alta. Q.B.) at paras. 473-77, affirmed on other grounds 2013 ABCA 111 (Alta. C.A.).

30 *Soleil Hospitality Inc. v. Louie*, 2011 BCCA 305 (B.C. C.A.), leave to appeal refused 2012 CarswellBC 499 (S.C.C.), leave to appeal refused 2012 CarswellBC 500 (S.C.C.).

31 Gerald H.L. Fridman, *The Law of Torts in Canada*, 3d ed. (Toronto: Carswell, 2010) at 733-34.

32 *Allstate Insurance Co. of Canada v. Fairview Assessment Centre Inc.*, 2013 ONSC 5446 (Ont. S.C.J.) at para. 11, additional reasons 2013 CarswellOnt 15100 (Ont. S.C.J.).

33 *Hovsepian v. Westfair Foods Ltd.*, [2001] 10 W.W.R. 504 (Alta. Q.B.). See also *Napoleone v. Baraldi*, 2004 BCSC 1065.

34 Trevor Guy & Daniel Del Gobbo, "Understanding the Anomalous: The Law of Civil Conspiracy" (2013) 42 Adv Q 143 at 170-71.

35 See *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 at 472 ("[I]t is not necessary that the predominant purpose of the

predominant purpose of the defendants' acts need not be injury to the plaintiff.[36] If the acts were directed at the plaintiff, and the defendants should have known that damage was likely to result from their unlawful conspiratorial conduct, then the intent to injure may be presumed.[37] Although the circumstances in which such presumed or constructive intent will be imputed are not fully settled, constructive intent has been found where there was "greater than a 50% chance that injury to the plaintiff will occur", amounting to a "clear expectation" that injury would occur.[38]

D. Potential Defences

As with other torts such as defamation and unlawful interference with economic relations a defence of justification may exclude liability for conspiracy to injure, but only where lawful means were employed. Generally, justification is only available where the defendant causes damage to the plaintiff, but the defendant's *bona fide* dominant purpose is to advance their own lawful interests in a way that they honestly believe is legitimate.[39]

There have been relatively few Canadian decisions where this defence has been considered and justification is not a "defence" in the traditional sense, since it is the plaintiff who has the legal burden of proving that the predominant purpose of the conspiracy was to cause the plaintiff injury, and not for the defendants to establish that they were acting for another justifiable purpose.[40] As such, it is perhaps more accurate to state that the absence of justification is simply

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defendants' conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue . . .").

36 See *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452; *Lonrho Plc. v. Al-Fayed (No.1)* (1991), [1992] 1 A.C. 448 (H.L.).

37 See *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452; *Tracy (Guardian ad litem of) v. Instaloans Financial Solution Centres (B.C.) Ltd.*, 2009 BCCA 110 (B.C. C.A.) at paras. 21, 25, leave to appeal refused 2009 CarswellBC 2495 (S.C.C.) (the defendants' ignorance of the law or belief that the law does not apply to them is not an excuse where the defendants should have known injury to the plaintiffs would occur).

38 *Golden Capital Securities Ltd. v. Holmes* (2004), [2005] 1 W.W.R. 631 (B.C. C.A.) at 644.

39 See for example, *Kocsis v. Muskeg Lake Cree Nation No. 102*, 2013 SKQB 198 (Sask. Q.B.) at para. 26, affirmed 2014 SKCA 39 (Sask. C.A.).

40 Although they may have a burden of persuasion.

subsumed within the requirement to establish that the defendants acted with the predominant purpose of injuring the plaintiff.

E. Continued Evolution of the Tort of Civil Conspiracy

Common law claims framed in terms of civil conspiracy offer plaintiffs several distinct advantages. These include the ability to claim against a conspirator who would not necessarily be liable as a joint tortfeasor,[41] and the potential of increased damages through aggravated and exemplary damages.[42] Despite these advantages, there remains significant judicial and academic debate regarding the usefulness of the tort of conspiracy, particularly in the context of large corporate entities. For example, as Lord Diplock stated in *Lonrho Ltd. v. Shell Petroleum Co. (No. 2)*:

> [T]o suggest today that acts done by one street—corner grocer in concert with a second are more oppressive and dangerous to a competitor than the same acts done by a string of supermarkets under a single ownership . . . is to shut one's eyes to what has been happening in the business and industrial world since the turn of the century . . .[43]

Notwithstanding these and other criticisms, including the characterization of the tort as a "commercial anachronism", the Supreme Court of Canada in *BC Lightweight Aggregate* held that it is now "too late in the day" to dispose of the tort altogether.[44] Rather, the Supreme Court suggested that the application of civil conspiracy is likely to be further restricted in the future.[45] Accordingly, the scope and continued viability of civil conspiracy will largely depend upon the extent to which Canadian courts are willing to entertain the continued application of what may be a cause of action of diminishing and questioned importance.

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41 See T.J. Leach, "Civil Conspiracy: What's the Use?" (1999) 54:1 U Miami L Rev 1 at 2; P. Burns, "Civil Conspiracy: An Unwieldy Vessel Rides a Judicial Tempest" (1982) 16 UBC L Rev 229 at 244.

42 Trevor Guy & Daniel Del Gobbo, "Understanding the Anomalous: The Law of Civil Conspiracy" (2013) 42 Adv Q 143 at 164.

43 *Lonrho Ltd. v. Shell Petroleum Co.* (1981), [1982] A.C. 173 (U.K. H.L.) at 189.

44 *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 at 473 [*BC Lightweight Aggregate*].

45 *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 at 473. But see also *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 at 988-989, Wilson J. ("careful consideration might conceivably lead to the conclusion that the tort has a useful role to play in new contexts").

III. Unlawful Interference with Economic Interests

A. Introduction

Where one party uses unlawful means to interfere with the economic interests of another with the intention of causing injury to the plaintiff, that party may be liable for the damages caused under the tort of unlawful interference with economic interests. In recent decisions, the tort of unlawful interference with economic interests has been referred to as a *genus tort*, meaning that a number of the individual economic torts (such as inducing breach of contract, intimidation and conspiracy) fall within its ambit. Despite initial skepticism as to whether such a tort exists under Canadian law, a growing number of Canadian decisions have recognized the tort of unlawful interference with economic interests as an independent cause of action that is, in fact, separate and distinct from other economic torts, such as inducing breach of contract.[46]

The scope of this tort was clarified by the Supreme Court of Canada in the 2014 decision in *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*[47] The Supreme Court found that the tort is not intended to create a new, actionable wrong, but expands the range of persons who can seek to recover for harm intentionally caused by wrongs by third parties that are otherwise actionable.[48] The tort of unlawful interference with economic interests creates a type of "parasitic" liability in a three-party situation: it allows a plaintiff to sue a defendant for economic loss resulting from the defendant's unlawful act against the third party.[49]

B. Elements of Unlawful Interference with Economic Interests

To establish a cause of action for unlawful interference with economic interests, the plaintiff must satisfy the following four elements: (i) interference with the plaintiff's trade or business; (ii) by

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[46] See *Drouillard v. Cogeco Cable Inc.* (2007), 86 O.R. (3d) 431 (Ont. C.A.), additional reasons 2007 CarswellOnt 4106 (Ont. C.A.); *Reach M.D. Inc. v. Pharmaceutical Manufacturers Assn. of Canada* (2003), 65 O.R. (3d) 30 (Ont. C.A.); *Westfair Foods Ltd. v. Lippens Inc.* (1987), 44 D.L.R. (4th) 145 (Man. Q.B.), affirmed (1989), [1990] 2 W.W.R. 42 (Man. C.A.), leave to appeal refused 1990 CarswellMan 487 (SCC).

[47] *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, 2014 SCC 12.

[48] *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, 2014 SCC 12 at para. 45.

[49] *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, 2014 SCC 12 at para. 23.

unlawful means; (iii) with an intent to injure the plaintiff; and (iv) actual economic loss to the plaintiff caused by the defendant's conduct.[50] Each element of the tort is discussed below.

1. Interference with Plaintiff's Trade or Business

In *Colborne Capital Corp. v. 542775 Alberta Ltd.*,[51] the Alberta Court of Queen's Bench reviewed the types of economic interests which courts have endeavoured to protect in previous cases considering the tort of unlawful interference with economic interests. These included, for example, the right to farm under a lease,[52] the right to carry on a transport business,[53] the right to cash cheques,[54] and the right to sell property under a listing agreement.[55] While it is difficult to fully define the categories of economic interests that are protected, the Court proposed that "what is referred to as an economic interest . . . is an inherent right to carry out some type of economic activity, which is so entrenched in the Canadian economic community, that it will be recognized and protected by the Courts".[56]

2. Unlawful Means

The scope of conduct constituting "unlawful means" has been the subject of extensive consideration and is often the central issue in claims for unlawful interference with economic interests.[57] The trend in Canada has been to narrow the scope of conduct that can constitute

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50 See *Daishowa Inc. v. Friends of the Lubicon* (1996), 27 O.R. (3d) 215 (Ont. Div. Ct.), leave to appeal refused 1996 CarswellOnt 1553 (Ont. C.A.), leave to appeal refused (1997), 107 O.A.C. 160 (note) (S.C.C.); *Lineal Group Inc. v. Atlantis Canadian Distributors Inc.* (1998), 42 O.R. (3d) 157 (Ont. C.A.), leave to appeal refused (1999), 138 O.A.C. 197 (note) (S.C.C.).

51 *Colborne Capital Corp. v. 542775 Alberta Ltd.*, [1995] 7 W.W.R. 671 (Alta. Q.B.) at 749, additional reasons 1995 CarswellAlta 1188 (Alta. Q.B. [In Chambers]), varied on other grounds [1999] 8 W.W.R. 222 (Alta. C.A.), additional reasons 1999 CarswellAlta 1182 (Alta. C.A.).

52 See *Mintuck v. Valley River Band No. 63A*, [1977] 2 W.W.R. 309 (Man. C.A.).

53 See *J.T. Stratford & Son Ltd. v. Lindley*, [1964] 3 All E.R. 102 (U.K. H.L.).

54 See *Spicer v. Volkswagen Canada Ltd.* (1978), 91 D.L.R. (3d) 42 (N.S. C.A.).

55 See *Dufferin Real Estate Ltd. v. Giralico*, 1989 CarswellOnt 1866 (Ont. H.C.), affirmed 1992 CarswellOnt 2878 (Ont. C.A.).

56 *Colborne Capital Corp. v. 542775 Alberta Ltd.*, [1995] 7 W.W.R. 671 (Alta. Q.B.) at 749, additional reasons 1995 CarswellAlta 1188 (Alta. Q.B. [In Chambers]), varied on other grounds [1999] 8 W.W.R. 222 (Alta. C.A.), additional reasons 1999 CarswellAlta 1182 (Alta. C.A.).

57 See for example, *OBG Ltd. v. Allan*, [2007] UKHL 21 (U.K. H.L.) at paras. 45-64.

an "unlawful means". In *Bram Enterprises*, the Supreme Court clarified that for conduct to constitute "unlawful means" for the purposes of this tort, the impugned conduct must give rise to a civil cause of action by a third party, or would do so if the third party had suffered loss as a result of that conduct.[58] The conduct in issue cannot be directly actionable by the plaintiff, since the claim could then simply be made directly, and there would be no need to interpose the tort of unlawful interference with economic interests.[59] Further, intentionally interfering with another person's economic interest is not actionable if the means used were lawful, even if a corresponding loss resulted.[60]

What constitutes "unlawful means" may differ between the tort of unlawful interference with economic interests and the tort of conspiracy by unlawful means discussed above. Indeed, consistency between what constitutes "unlawful means" for the purposes of conspiracy by unlawful means and for unlawful interference with economic interests was expressly rejected by the Supreme Court in *Bram Enterprises*, on the basis that the torts have distinct historical roots and have evolved separately.[61] Similarly, in a leading U.K. case, the House of Lords found that it should resist "the temptation of elegance" in adopting the same definition of unlawful means for the

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[58] *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, 2014 SCC 12 at para. 76. Prior to the *Bram Enterprises* case, the relevant case law reflected a broader range of interpretations as to what conduct could properly constitute "unlawful means". Some authorities defined unlawful means narrowly to encompass only acts prohibited by law or by statute: see *Dunlop v. Woollahra Municipal Council*, [1981] 1 All E.R. 1202 (Australia P.C.). In other cases, unlawful means was defined more broadly to include any "act which [the defendant] is not at liberty to commit": *Torquay Hotel Co. v. Cousins* (1968), [1969] 1 All E.R. 522 (Eng. C.A.) at 530, Denning LJ. The Ontario Court of Appeal has held that unlawful means includes contravention of the governing code of a voluntary trade association: see *Reach M.D. Inc. v. Pharmaceutical Manufacturers Assn. of Canada* (2003), 65 O.R. (3d) 30 (Ont. C.A.). Conduct which is simply arbitrary, in bad faith O.R. distasteful falls short of conduct amounting to unlawful means: see *Duke v. Puts*, [2004] 6 W.W.R. 208 (Sask. C.A.).

[59] *Alleslev-Krofchak v. Valcom Ltd.*, 2010 ONCA 557 at paras. 58-60, leave to appeal refused 2011 CarswellOnt 2149 (S.C.C.).

[60] See for example, *0856464 B.C. Ltd. v. TimberWest Forest Corp.*, 2012 BCSC 597 (B.C. S.C.) at para. 68 (terminating a contract in accordance with its terms does not amount to "unlawful means").

[61] *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, 2014 SCC 12 at paras. 62, 68 ("there is no need for consistency in the unlawful means component of unlawful means conspiracy and of the tort of causing loss by unlawful means").

distinct torts.[62] Specifically, the House of Lords found that criminal conduct was within the definition of "unlawful means" for the purposes of an unlawful means conspiracy, even though it may not be actionable under the tort of unlawful interference with economic interests.

3. Intent to Injure

The Supreme Court in *Bram Enterprises* clarified that an intention to injure the economic interests of the plaintiff is an essential element of the tort. The defendant must intend to cause economic harm to the plaintiff, either as an end itself or as a necessary means of achieving some other goal.[63]

Knowledge of or recklessness as to the unlawful nature of the impugned acts is not sufficient to constitute an intention to harm.[64] The mere foreseeability of potential economic harm to the plaintiff is also not sufficient to establish this element.[65] Further, actual harm to the plaintiff as an incidental consequence of the defendants conduct is not sufficient, even if the defendant realizes such harm might occur. As the Supreme Court explained in *Bram Enterprises*, "[s]uch incidental economic harm is an accepted part of market competition."[66] However, where the defendant engages in a course of conduct with the knowledge that its probable consequence will be injury to the plaintiff, then an intent to cause injury may be inferred:

> [F]requently it will be fully appreciated by a defendant that a course of conduct that he is embarking on will have a particular consequence to a plaintiff, and the defendant will have decided to pursue that course of conduct knowing what the consequence will be. Albeit that he may have no desire to bring about that consequence in order to achieve what he regards as his ultimate ends, from the point of view of the plaintiff, whatever the motive of the defendant, the damage which he suffers will be the same. If a defendant has deliberately embarked on a course of conduct, the probable consequence of which on the plaintiff

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62 *Total Network SL v. Revenue & Customs*, [2008] UKHL 19 (U.K. H.L.) at para. 123 ("The two torts are different in their nature, and the interests of justice may require their development on somewhat different bases").

63 *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, 2014 SCC 12 at para. 95.

64 See *Cheticamp Fisheries Co-operative Ltd. v. Canada* (1995), 123 D.L.R. (4th) 121 (N.S. C.A.), leave to appeal refused (1995), 126 D.L.R. (4th) vii (note) (S.C.C.).

65 *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, 2014 SCC 12 at para. 97.

66 *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, 2014 SCC 12 at para. 95.

> he appreciated, I do not see why the plaintiff should not be compensated.[67]

4. Damages

To be actionable, the defendant's interference with the plaintiff's economic interests must result in damage to the plaintiff. In this regard, courts generally look to pecuniary damage as the most obvious form of proof,[68] though damages may also be made out where the plaintiff can show loss of goodwill, for example.[69]

C. Potential Defences

Earlier decisions recognized that in some circumstances, justification may operate as a defence to a claim for unlawful interference with economic relations. For example, in *Gershman v. Manitoba (Vegetable Producers' Marketing Board)*, a 1976 decision of the Manitoba Court of Appeal, O'Sullivan J.A. stated that "I do not think that counsel for the defendant . . . has shown any justification for the conduct of the defendant . . ."[70] It is likely that a defence of justification would be more relevant where a broader interpretation of "unlawful means" is applied. As Lambert J.A. noted in his dissent in *No. 1 Auto Collision Repair & Painting Ltd. v. Insurance Corp. of British Columbia*:

> [T]he important point is that if the unlawful act is considered to be broader than a criminal act, or a civil common law wrong, and is extended into administrative law wrongs and equitable wrongs, the more the tort is potentially in need of being properly contained by the adoption of the approach that the unlawful act underlying the tort must be one which, through the whole panoply of the law, a person is

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[67] *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.*, [1994] 5 W.W.R. 473 (Alta. Q.B.) at 566, additional reasons 1994 CarswellAlta 282 , reversed on other grounds [1996] 9 W.W.R. 449 (Alta. C.A.), additional reasons (1998), 1998 CarswellAlta 368 (Alta. C.A.), leave to appeal refused 1997 CarswellAlta 1286 (S.C.C.), citing *Lonrho plc v. Fayed* (1989), [1990] 2 Q.B. 479 (Eng. C.A.), reversed on other grounds (1991), [1992] A.C. 448 (U.K. H.L.). See also *Daishowa Inc. v. Friends of the Lubicon* (1996), 27 O.R. (3d) 215 (Ont. Div. Ct.), leave to appeal refused 1996 CarswellOnt 1553 (Ont. C.A.), leave to appeal refused (1997), 107 O.A.C. 160 (note) (S.C.C.).

[68] See *Bartrop v. Sweetgrass Band No. 113* (1987), 54 Sask. R. 213 (Sask. Q.B.).

[69] See *Reach M.D. Inc. v. Pharmaceutical Manufacturers Assn. of Canada* (2003), 65 O.R. (3d) 30 (Ont. C.A.).

[70] *Gershman v. Manitoba (Vegetable Producers' Marketing Board)*, [1976] 4 W.W.R. 406 (Man. C.A.) at 415.

> not at liberty to commit, but the tort of unlawful interference will not attract liability if, in the particular circumstances, the commission of the unlawful act was justified.[71]

However, given the recent and narrower definition of "unlawful means" adopted in *Bram Enterprises*, the defence of justification likely has less relevance.

D. Continued Evolution of the Tort of Unlawful Interference with Economic Interests

Recent decisions, such as *Bram Enterprises*, are increasingly narrowing the scope of this tort. Given the continued existence and evolution of the individual economic torts, there is a legitimate debate as to whether a tort of general application like unlawful interference with economic interests is of utility or whether it is merely duplicative of the nominate torts which it arguably subsumes. At any rate, the Supreme Court of Canada in *Bram Enterprises* clearly held that the tort will be narrowly construed:

> In light of the history and rationale of the tort and taking into account where it fits in the broader scheme of modern tort liability, the tort should be kept within narrow bounds. It will be available in three-party situations in which the defendant commits an unlawful act against a third party and that act intentionally causes economic harm to the plaintiff. (Other torts remain relevant in two-party situations, such as for example, the tort of intimidation.)[72]

Canadian courts will likely proceed with caution in response to any attempt to broaden the ambit of this tort, recognizing that a broad range of acceptable competitive conduct should be exempted from its application.

IV. Unlawful Restraint of Trade

A. Introduction

Restrictive covenants involve an agreement to restrain future conduct, and in the competition law context, typically involve

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[71] *No. 1 Collision Repair & Painting (1982) Ltd. v. Insurance Corp. of British Columbia*, 2000 BCCA 463 (B.C. C.A.) at para. 118, leave to appeal refused 2001 CarswellBC 670 (S.C.C.).

[72] *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, 2014 SCC 12 at para. 5.

agreements not to compete or not to solicit customers within certain specified parameters. Although much of the judicial interpretation of covenants in restraint of trade has occurred in the context of post-employment restrictions, courts have long considered various other forms of restrictive covenants, such as agreements to deal exclusively in products purchased from designated suppliers,[73] agreements to fix the resale prices of certain products[74] and non-compete provisions commonly found in agreements for the purchase and sale of a business.[75]

B. General Test for Enforceability

The starting position of the courts is that restraints on trade are *prima facie* unenforceable, on the basis they interfere with individual liberty and the exercise of trade. This reflects the "important public interest in discouraging restraints on trade, and maintaining free and open competition unencumbered by the fetters of restrictive covenants".[76]

A restrictive covenant will be upheld only if (i) it is reasonable with reference to the interests of the parties concerned and (ii) reasonable with regard to the interest of the public in discouraging restraints on trade.[77] The test was stated as follows by Lord Macnaghten in *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*:

> [R]estraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is sufficient justification, and indeed it is the only justification, if the restriction is reasonable — reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.[78]

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[73] See *Stephens v. Gulf Oil Canada Ltd.* (1975), 11 O.R. (2d) 129 (Ont. C.A.), leave to appeal refused (1976), 11 O.R. (2d) 129 (note) (S.C.C.).

[74] See *Wampole & Co. v. F. E. Karn Co.* (1906), 11 O.L.R. 619 (Ont. C.P.).

[75] See *Bentivogil v. W.P. Carey Securities Co.*, 1978 CarswellOnt 2872 (Ont. H.C.).

[76] *J.G. Collins Insurance Agencies v. Elsley*, [1978] 2 S.C.R. 916 at 923; *Martin v. ConCreate USL Ltd. Partnership*, 2013 ONCA 72 at para. 49.

[77] *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*, [1894] A.C. 535 (U.K. H.L.) at 565.

Each aspect of the test for enforceability is discussed in more detail below. The party seeking to enforce the covenant bears the onus of proving that the restraint is reasonable with reference to the interests of the parties concerned, while the party seeking to avoid enforcement bears the onus of proving the restraint is not reasonable with respect to the public interest.[79]

If a covenant is too ambiguous, then it will not be considered "reasonable", and it will note be enforceable. As the Supreme Court explained in *Shafron v. KRG Insurance Brokers (Western) Inc.*:

> The reasonableness of a covenant cannot be determined without first establishing the meaning of the covenant. The onus is on the party seeking to enforce the restrictive covenant to show the reasonableness of its terms. An ambiguous restrictive covenant will be *prima facie* unenforceable because the party seeking enforcement will be unable to demonstrate reasonableness in the face of an ambiguity.[80]

A basic distinction is drawn in restrictive covenant cases between those covenants given in connection with the sale of a business, and those covenants agreed to between an employer and an employee. Courts are more inclined to uphold covenants in restraint of trade as valid in the context of agreements for the purchase and sale of a business, particularly where the restraint is necessary to make the transaction effective, such as by protecting the goodwill of the purchased business.[81] Accordingly, a "less rigorous" application of the test for reasonableness will be applied where the covenant is provided in connection with the sale of a business.[82] The reasoning is that greater deference should be given to freedom of contract in the business context where the agreement is presumably between "knowledgeable persons of equal bargaining power".[83] For example, in *Rogers Communications Inc. v. Shaw Communications*

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78 *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*, [1894] A.C. 535 (U.K. H.L.) at 565.

79 *Stephens v. Gulf Oil Canada Ltd.* (1975), 11 O.R. (2d) 129 (Ont. C.A.), leave to appeal refused (1976), 11 O.R. (2d) 129 (note) (S.C.C.).

80 *KRG Insurance Brokers (Western) Inc. v. Shafron*, 2009 SCC 6 at para. 27 [*Shafron*]. See also *Mason v. Chem-Trend Ltd. Partnership*, 2011 ONCA 344 at para. 14.

81 *Tank Lining Corp. v. Dunlop Industries Ltd.* (1982), 40 O.R. (2d) 219 (Ont. C.A.) at 224. See also *Brouwer Claims Canada & Co. v. Doge*, 2002 BCSC 988.

82 *Martin v. ConCreate USL Ltd. Partnership*, 2013 ONCA 72 at para. 52; *Guay inc. c. Payette*, 2013 SCC 45 at paras. 38-39.

83 *J.G. Collins Insurance Agencies v. Elsley*, [1978] 2 S.C.R. 916 at 923.

Inc., on a motion for an interlocutory injunction the court found that a covenant in an agreement between the parties was likely reasonable, noting that "[t]he parties here were knowledgeable businessmen of equal bargaining strength, and thus taken to know what was reasonable in their own interests."[84] This is in contrast to the employment context, where there are concerns about the imbalance of power between employer and employee. A more rigorous application of the test for enforceability in the employment context is intended to mitigate this imbalance, and makes restrictive covenants agreed to by employees less likely to be upheld as reasonable.

However, the distinction between an employment agreement and an agreement for the sale of a business can be ambiguous. In *Payette v. Guay Inc.,* for example, the agreement at issue was a "hybrid" contract for the sale of assets between the parties which also contained a non-competition and non-solicitation clause. In addition, the agreement provided for the potential of a contract of employment between the appellant and the respondent (which was in fact done through a later agreement).[85] The appellant employee argued that both of the restrictive covenants should be assessed according to the standard applied to contracts of employment, while the respondent company argued the covenants were negotiated in the context of a commercial agreement. Justice Wagner of the Supreme Court explained that in assessing whether a restrictive covenant is linked to a contract for the sale of assets or to a contract of employment, it is important to clearly identify the reason why the parties entered into the restrictive covenant. The goal is to identify the nature of the "principal obligations" and determine the purpose for the "accessory obligations" of the non-competition or non-solicitation clauses.[86] In this case, the evidence established that the appellant had agreed to the non-competition and non-solicitation obligations in relation to the sale of his business, not as a consultant or employee, and therefore the obligations could not be dissociated from the contract for the sale of

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[84] *Rogers Communications Inc. v. Shaw Communications Inc.*, 2009 CarswellOnt 5489 (Ont. S.C.J.) at para. 46 [*Rogers*]. See also *Terra Engineering Ltd. v. Stewart* (1994), 56 C.P.R. (3d) 77 (B.C. S.C.); *Unisource Canada Inc. v. Network Paper & Packaging Ltd.*, 2000 BCSC 396.

[85] *Guay inc. c. Payette*, 2013 SCC 45 at para. 44. See also *Martin v. ConCreate USL Ltd. Partnership*, 2013 ONCA 72 at para. 76 (involving covenants restricting employment activities "entered into in the context of a sale of a business").

[86] *Guay inc. c. Payette*, 2013 SCC 45 at para. 45.

the assets.[87] The Court found this conclusion was supported both by the wording of the obligations at issue and by the factual context that explained and justified the acceptance of such obligations.

C. Reasonable With Regard to the Parties' Interests

The jurisprudence establishes that the test for reasonableness in the interests of a party is that it should be "not more than adequate to protect that party's interest".[88] Reasonableness is generally assessed with respect to (i) geographic coverage of the covenant; (ii) the duration for which the covenant is to be in effect; and (iii) the extent of the activities which are prohibited.[89]

Courts have refused to enforce restrictive covenants where the scope of the protected interest is excessive, such as where the restrictive covenant is unreasonable in respect of the duration[90] or too broad in terms of the geographic area covered by the restriction.[91] Non-competition and non-solicitation covenants with no outside limit on their duration have been held to be unreasonable and therefore unenforceable.[92]

The reasonableness of the restraint must be considered as at the date when the contract was made and in light of the circumstances then existing, including what the parties at that time reasonably anticipated would occur in the future. Courts will closely examine covenants which extend beyond the boundaries of the business as it stood at the time of sale. Covenants that prevent competition in areas where the company was not operating at the time of the sale of the business and entry into the covenant have been found overly broad,[93] although if there was a reasonable prospect for expansion of the

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87 *Guay inc. c. Payette*, 2013 SCC 45 at para. 46.

88 *Tank Lining Corp. v. Dunlop Industries Ltd.* (1982), 40 O.R. (2d) 219 (Ont. C.A.) at 225, citing *Herbert Morris Ltd. v. Saxelby*, [1916] 1 A.C. 688 (U.K. H.L.).

89 *KRG Insurance Brokers (Western) Inc. v. Shafron*, 2009 SCC 6 at para. 26.

90 See *Nelson Burns & Co. v. Gratham Industries Ltd.* (1983), 42 O.R. (2d) 705 (Ont. H.C.), additional reasons 1983 CarswellOnt 1317 (Ont. H.C.), affirmed (1986), 55 O.R. (2d) 426 (Ont. C.A.), leave to appeal refused (1986), 56 O.R. (2d) 604 (note) (S.C.C.).

91 See *Total Credit Recovery Ltd. v. Koyama-Asada*, 1998 CarswellOnt 398 (Ont. Gen. Div.).

92 *Martin v. ConCreate USL Ltd. Partnership*, 2013 ONCA 72 at para. 59.

93 *Chicago Blower Corp. v. 141209 Canada Ltd.*, 1989 CarswellMan 183 (Man. Q.B.) at paras. 21-28, affirmed 1990 CarswellMan 248 (Man. C.A.), reversed 1990 CarswellMan 92 (Man. C.A.).

business contemplated by both parties at the time of sale, a more extensive geographic area than the existing business may be permitted.[94] For example, where a non-compete covenant was agreed to as part of the sale of a fish restaurant, the Quebec Superior Court struck it down as overly broad because it prevented the former owner from operating *any* type of restaurant.[95]

D. Reasonable With Regard to Public Interest

The test for whether a restrictive covenant is unreasonable with regard to the public interest remains unsettled, and tends to be of lesser importance than the analysis of reasonableness as between the parties. In its decision in *Tank Lining Corp. v. Dunlop Industrial Ltd.*, the Ontario Court of Appeal indicated that the requisite assessment of the public interest was not limited to a consideration of whether the restrictive covenant violated a statute or some other established law:

> . . . I cannot refrain from expressing my concern that restricting consideration of the public interest to economic and social effects which in some fashion have acquired the status of legal dogmas, might result in the doctrine losing its utility as a valuable instrument for adjusting this branch of the law to changing economic and social conditions.[96]

When determining reasonableness in the public interest, Canadian courts have also considered the underlying policy objectives of a statute[97] and resolutions of professional bodies.[98]

A restrictive covenant that contravenes a statute, such as the *Competition Act*, would not be reasonable with regard to the public interest.[99] For example, in *Rogers,* the court considered whether a restrictive covenant that prevented each of the parties from starting a new broadband wireline cable business and from acquiring such a

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94 *Tank Lining Corp. v. Dunlop Industries Ltd.* (1982), 40 O.R. (2d) 219 (Ont. C.A.) at 226-227.

95 *7076576 Canada inc. c. Gellé*, 2014 QCCS 677 (C.S. Que.).

96 *Tank Lining Corp. v. Dunlop Industries Ltd.* (1982), 40 O.R. (2d) 219 (Ont. C.A.) at 233.

97 *Sherk v. Horwitz*, [1972] 2 O.R. 451 (Ont. H.C.), affirmed (1972), [1973] 1 O.R. 360 (Ont. C.A.), leave to appeal refused 1972 CarswellOnt 1016 (S.C.C.).

98 *Sherk v. Horwitz*, [1972] 2 O.R. 451 (Ont. H.C.), affirmed (1972), [1973] 1 O.R. 360 (Ont. C.A.), leave to appeal refused 1972 CarswellOnt 1016 (S.C.C.).

99 *Tank Lining Corp. v. Dunlop Industries Ltd.* (1982), 40 O.R. (2d) 219 (Ont. C.A.) at 231-232.

business in the other's allocated territory was reasonable in the public interest, in view of its alleged contravention of section 45 of the *Competition Act*.[100] On a motion by Rogers for an interlocutory injunction to restrain an acquisition by Shaw, the court expressed support for the argument that "the non-competition covenants are contrary to the public interest in relation to their effect on an owner of a cable television business who wants to sell his or her business in a competitive marketplace and a good case that these covenants are contrary to section 45(1)(d) of the *Competition Act* as it existed in 2000 and exists today".[101]

E. Remedies

Where a restrictive covenant is found to be unenforceable as written there are limited remedies available to preserve the covenant. The Supreme Court explained in *Shafron* that notional severance, which is the reading down of the contractual provision to make it legal and enforceable, is not available to the court to "cure" a defective restrictive covenant.[102] As there is no objective test or basis on which to determine reasonableness or legality of the restrictive covenant (unlike for some other types of contractual terms where notional severance has been applied), applying notional severance would amount to the court subjectively rewriting the covenant in a manner it considers reasonable.[103] The other concern regarding notional severance identified by courts, in the employment context in particular, was that it could open the door to employers writing employee contracts on the expectation that the court would read down to whatever obligation was considered reasonable.[104] The employer would then have little incentive to tailor covenants to try

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[100] *Rogers Communications Inc. v. Shaw Communications Inc.*, 2009 CarswellOnt 5489 (Ont. S.C.J.). In obiter, the court also canvassed whether the restrictive covenant was reasonable in the public interest as a potential violation of the amended section 45 and new section 90.1 which had yet to come into force, ultimately stating that "[a]t this stage, I cannot say that the results of the application of the new legislation are so clear as to make it frivolous or vexatious for either side to advance at a trial the arguments that they have made": see *Rogers Communications Inc. v. Shaw Communications Inc.*, 2009 CarswellOnt 5489 (Ont. S.C.J.) at para. 59.

[101] *Rogers Communications Inc. v. Shaw Communications Inc.*, 2009 CarswellOnt 5489 (Ont. S.C.J.) at para. 64.

[102] *KRG Insurance Brokers (Western) Inc. v. Shafron*, 2009 SCC 6 at paras. 37, 42.

[103] *KRG Insurance Brokers (Western) Inc. v. Shafron*, 2009 SCC 6 at paras. 38-39.

[104] *KRG Insurance Brokers (Western) Inc. v. Shafron*, 2009 SCC 6 at paras. 33, 40-41.

and ensure they are reasonable and enforceable from the outset, thereby potentially subjecting employees to overly broad restrictions.

The other means of correcting an unenforceable covenant considered in *Shafron* was "blue-pencil severance", wherein "severance is only possible if the judge can strike out, by drawing a line through, the portion of the contract they want to remove, leaving potions that are not tainted by illegality, without affecting the meaning of the part remaining".[105] The Court indicated that blue-pencil severance should be used "sparingly" for restrictive covenants that are found void, and only where the portion being removed was "clearly severable, trivial and not part of the main purport of the restrictive covenant".[106]

The permissible application of the blue-pencil rule was described by the British Columbia Court of Appeal in *Canadian American Financial Corp. (Canada) Ltd. v. King* as follows:

> It is important to understand that the rule does not automatically permit the severance of a part of a clause that could notionally be severed by merely striking out words. Rather, the rule says that only when the severance can be made simply by striking out words will a severance be permitted; but not necessarily then. Adding words or rewriting the clause is contrary to the "blue pencil" rule.[107] [citations omitted]

Accordingly, courts will typically sever only where the core of the bargain will remain after the offending portion has been removed,[108] and the blue pencil rule cannot be used to create a new bargain between the parties or otherwise rewrite the clause in issue. In an effort to come within the scope of the blue pencil rule, agreements are frequently drafted using separate and progressively narrower restraints on trade, one or more of which may be severed until the court is satisfied that the restraint is reasonable.[109] However, parties

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[105] *KRG Insurance Brokers (Western) Inc. v. Shafron*, 2009 SCC 6 at para. 29, citing *Transport North American Express Inc. v. New Solutions Financial Corp.*, 2004 SCC 7 at para. 57, Bastarache J, dissenting.

[106] *KRG Insurance Brokers (Western) Inc. v. Shafron*, 2009 SCC 6 at para. 36.

[107] *Canadian American Financial Corp. (Canada) Ltd. v. King* (1989), 60 D.L.R. (4th) 293 (B.C. C.A.) at 306. Although the case predates *Shafron*, its description is consistent with that decision.

[108] *ACS Public Sector Solutions Inc. v. Courthouse Technologies Ltd.* (2005), 48 B.C.L.R. (4th) 328 (B.C. C.A.).

[109] See *Greening Industries Ltd. v. Penny* (1965), 53 D.L.R. (2d) 643 (N.S. T.D.).

should be cautious in using such "descending scope" restrictive covenants. In *Canadian American Financial*, the British Columbia Court of Appeal found such a clause to be void for uncertainty:

> It is no function of the courts to act as de facto arbitrators over clauses that are drawn as alternatives. If the covenant says that the employee will not compete in (a) Canada, (b) British Columbia, and (c) Vancouver, for (i) ten years, (ii) five years, and (iii) one year, for example, the courts ought not to use the "blue pencil" rule to make an agreement for the parties that they have been unable to make for themselves. Such a clause, where one alternative encompasses another, but on a wider scale, is, in my opinion, void for uncertainty and should not be made valid by severance. The only point on which the terms of the covenant are clear is that the covenant is to cover at least Vancouver for at least one year. The parties could have said that. If they failed to do so, then they will risk losing the whole clause.[110]

Although some commentators have criticized the blue pencil rule as being "mechanistic"[111] and have questioned whether it should be considered a rule of law, the courts continue to make use of this principle in appropriate cases where striking down the entire restrictive covenant is considered unnecessary. However, in light of the statement from the Supreme Court in *Shafron* that the rule should only be applied sparingly, the use of the blue pencil rule may be more limited going forward.

V. Conclusion

The economic torts have weathered decades of scholarly criticism and judicial scrutiny. Although they have managed to retain some measure of utility and application, the courts are increasingly narrowing their application. Such an approach seems logical given the amendments to the *Competition Act* enacted in 2002 and 2009 to provide greater rights of private action for *Competition Act* violations. In June 2002, the *Competition Act* was amended to provide private parties with the right to apply to the Competition Tribunal for leave

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[110] *Canadian American Financial Corp. (Canada) Ltd. v. King* (1989), 60 D.L.R. (4th) 293 (B.C. C.A.) at 307; *Bonazza v. Forensic Investigations Canada Inc.*, 2009 CarswellOnt 3645 (Ont. S.C.J.) at para. 6 ("In my opinion, *Shafron* sounds the death knell for descending scope restrictive covenants").

[111] MJ Trebilcock, The Common Law of Restraint of Trade: A Legal and Economic Analysis (Toronto: Carswell, 1986) at 74.

to commence an application before the Tribunal in respect of refusals to deal (section 75), exclusive dealing, tied selling and market restriction (section 77).[112] In addition, the 2009 amendments to the Act introduced a private right of action in respect of price maintenance (section 76).[113] The evolution of these private remedies in the future may relieve courts and litigants from dealing with the ambiguity inherent to the economic torts in their current incarnations.

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[112] *An Act to amend the Competition Act and the Competition Tribunal Act*, S.C. 2002, c. 16.

[113] *Budget Implementation Act, 2009*, S.C. 2009, c. 2.