Canada's key commercial cases of 2020 – What you should know and why they matter

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Canadian courts decide thousands of cases each year and keeping track of legal developments and how they might affect your business can be a difficult task, particularly with the widespread disruption that continues to impact the business and legal marketplace.

In this article, we highlight the key cases from across the country that were decided in 2020, ranging from contractual drafting issues to regulatory review, and summarize what you should know, and why they should matter to you and your business. Where available, we also provide links to BLG's other in-depth treatment of these cases.

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Good faith in contracts

C.M. Callow Inc. v. Zollinger

In its recent decision in *C.M. Callow Inc. v. Zollinger*, the Supreme Court of Canada recognized that the duty of good faith in contractual performance requires one party per contract to correct a reasonable misapprehension its deceptive representations induced in the other party.

Background

This case concerns a contract for snow removal at a group of condominiums. The condominium corporations (Baycrest) contracted with C.M. Callow Inc. (Callow) for snow removal.

In 2012, Baycrest entered into a two-year contract with Callow for snow removal in the 2012/13 and 2013/14 winters. The contract provided that Baycrest could terminate for any reason, giving 10 days' notice to Callow.

In the spring of 2013 (after the first of the two winters covered by the contract), Callow began negotiations with Baycrest to extend the term of the contract. Unbeknownst to Callow, around the same time, Baycrest decided it was going to terminate the contract, relying on the termination for convenience provision.

Throughout the summer of 2013, Callow had conversations with Baycrest that led Callow to believe all was well with the snow removal contract and that renewal discussions were progressing. During the summer of 2013, Callow performed "freebie" landscaping services for Baycrest, as a goodwill gesture.

In September 2013, Baycrest gave Callow 10 days' notice that it was terminating the contract.

Callow filed a claim for breach of contract. The trial judge held in Callow's favour, holding that Baycrest had actively deceived Callow. The judge awarded damages including lost profits under the contract (less the overhead) for snow removal during the 2013-2014 winter, the cost of the work done in the summer and the cost of leasing the equipment the Court found Callow would not have leased but for the prospect of the Baycrest contract.

The Court of Appeal overturned the trial judge's decision, holding that the discussions related to a future contract, not performance of the existing contract, and that the duty of good faith in contractual performance in *Bhasin v. Hrynew* (Bhasin) did not apply to these circumstances.

It is notable that the Supreme Court's decision on appeal took more than a year to release, which is longer than average. The appeal was heard at the same time as the appeal in *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, which remains under reserve.

What you need to know

- Parties to contracts have a duty to correct false impressions their deceptive representations have given to the other party to the contract

Key takeaways

The Court held that the duty of honest performance it recognized in Bhasin not only precludes a party to a contract from directly lying to the other party, but also precludes a party from remaining silent while the other party operates under a misapprehension that the first party created by making deceptive representations.

In this case, a group of condominium corporations breached this duty by making deceptive representations that led a snow removal contractor to believe that “all was fine” with the contract when, in fact, the corporation had already decided to exercise its right to terminate for convenience.

The Court held that expectation damages are the appropriate measure of damages for such a breach, which, in this case, amounted to putting the contractor in the position he would have occupied, had the corporations corrected his misapprehension at the time.

Going forward, parties will need to consider not just the content of their communications with their co-contracting parties, but also the context of their communications, to ensure that they cannot be accused of deception.

For a more in-depth treatment of this case, please see BLG’s discussion on *C.M. Callow Inc. v. Zollinger*.

Securities disclosure requirements and role of special committees

The Catalyst Capital Group Inc. (Re), 2020 ONSEC 6

The reasons for the decision of the Ontario Securities Commission (the Commission) in *(Re) The Catalyst Capital Group Inc.* discuss important disclosure requirements and obligations relating to the role of special committees in material conflict of interest transactions.

Background

The Commission considered a complaint brought by The Catalyst Capital Group regarding a going-private transaction involving Hudson’s Bay Company (HBC), and a group of shareholders led by Mr. Richard Baker, HBC’s Governor and Executive Chairman (the Transaction).

The Committee considered whether the actions of the special committee, formed by HBC to consider the Transaction, were deficient under the requirements of Multilateral Instrument 61-101 – *Protection of Minority Security Holders in Special Transactions* (MI 61-101), and whether any deficiency warranted a cease-trade of the Transaction.

The Commission determined that certain elements of the Transaction required additional disclosure relevant to the interests and considerations of the minority shareholders, and noted in many instances that the special committee should have been formed earlier in the process to properly assess business judgments or decisions involving Mr. Baker and the other members of the going-private group.

What you need to know

- If a board establishes a special committee when it is not strictly required to do, the disclosure related to its process will be subject to the same scrutiny as if a special committee was legally required.
- In the context of potentially material conflict of interest transactions, special committees should be created early in the process before any important decisions are made.

Key takeaways

While the deficiencies in respect of the Transaction were able to be addressed sufficiently by additional disclosure, and did not require the Commission to cease-trade the Transaction, this decision provides clear guidance on the role of special committees, and the need to proactively engage independent parties to review and approve decisions related to transactions that fall within the scope of MI 61-101.

In addition, Boards and their advisors should be mindful of the Commission's statements regarding creating special committees early on in any process involving a potentially material conflict of interest transaction. This is particularly relevant in the case of take-private transactions by management or large shareholders, where there is likely to be conflicts of interest.

This decision may add to the continued debate on the roles of securities regulators and courts in contested conflicted M&A transactions regarding if greater deference should be shown to directors by securities regulators.

Significant disclosure regarding any flaws is required to ensure that minority shareholders are able to make informed decisions.

For a more in-depth treatment of this case, please see BLG's discussion on The Catalyst Capital Group Inc. (Re), 2020 ONSEC 6.

Enforcement of arbitration agreements

Uber Technologies Inc. v. Heller, 2020 SCC 16

In *Uber Technologies Inc. v. Heller*, 2020 SCC 16, issued on 26 June 2020, a majority of the Supreme Court of Canada (SCC) invalidated the arbitration agreement between Uber and drivers who subscribe to Uber's ride or delivery-origination software.

Background

David Heller (Heller) entered into several agreements with Uber Technologies Inc. and its affiliates (Uber) in order to access Uber's ride or delivery-origination software. The agreements between Uber and Heller contained arbitration clauses requiring mediation and then arbitration, pursuant to the arbitration rules of the International Chamber of Commerce (ICC Rules). Amsterdam was named as the "place of arbitration."

Heller sought to bring a class action on behalf of Uber drivers seeking, among other remedies, a declaration that he and the other drivers are employees of Uber and, therefore, entitled to benefits under the Employment Standards Act (ESA). Uber moved to stay the legal proceeding in favour of arbitration on the basis that the arbitration clause in the service agreement required disputes to be arbitrated in the Netherlands under the International Chamber of Commerce (ICC) rules.

The SCC accepted Mr. Heller's position and refused to uphold the Court of Appeal's decision not to stay the proceedings. In addition, the majority identified a new exception to the rule of systematic referral to arbitration. This new exception was stated to apply in "abnormal" circumstances where there is a *bona fide* challenge to the arbitrator's jurisdiction that only the court can determine.

The Court determine the question of validity on the issue of unconscionability alone. The majority set out a two-part test to determine whether a contract (or, it appears, even a provision within a contract) is unconscionable. The test requires:

- Proof of inequality in the positions of the parties; and
- Proof of an improvident bargain

On the first branch of the test, the majority of the Court found that there was an inequality in bargaining power between Uber and Heller. Among other things, the majority relied on the fact that the contract was a standard form agreement that Heller had no ability to negotiate, there was an apparent gulf in sophistication between the parties, and the arbitration agreement did not spell out the details of mediating and arbitrating disputes under the ICC Rules, nor did it contain an explanation of Dutch law.

On the second branch of the test, the majority considered an improvident bargain to be one that, in the court's view, unduly advantages the stronger party or unduly disadvantages the weaker party. The majority found that the fees required by the ICC Rules were prohibitive to Heller based on (i) his income, (ii) their disproportionate size as compared to any foreseeable award, and (iii) the "impression" that the arbitration agreement provided that the arbitration would take place in the Netherlands.

What you need to know

- The Court decided that arbitration clause was unconscionable (and unenforceable), allowing the proposed class action to proceed.
- Quantum to commence arbitration and location of arbitration, coupled with the inequality of bargaining power between the individual drivers and the defendants, factored heavily into unconsionability determination.

Key takeaways

During the pandemic, there has been an increased interest in the opportunities for more efficient dispute resolution offered by arbitration.

While potentially beneficial, arbitration clauses must be carefully drafted, particularly in the consumer context, where contracts of adhesion are in use with careful attention to choice of arbitral institution and applicable rules.

Parties should promptly assess their existing arbitration agreements, particularly those found in standard form contracts, to ensure that they are not at risk of being found to be unenforceable and to ensure efficiency and predictability in their practical operation.

For a more in-depth treatment of this case, please see BLG's discussion on *Uber v. Heller*.

Pandemic: Refusal to close transaction

Fairstone Financial Holdings Inc. v. Duo Bank of Canada

In its recent decision in *Fairstone Financial Holdings Inc. v. Duo Bank of Canada*, the Ontario Superior Court ordered specific performance and required a buyer to complete a share purchase transaction. The Court held that while the COVID-19 pandemic constituted a material adverse effect as defined by the share purchase agreement, it fell into the carve-out for "emergencies, crises and natural disasters".

Background

Fairstone Financial Holdings Inc. v. Duo Bank of Canada concerned an agreement, the Sales and Purchase Agreement (SPA), for the purchase of the shares of Fairstone Financial Holdings Inc. (Fairstone) by Duo Bank of Canada (Duo). Fairstone is Canada's largest consumer finance company that targets near-prime borrowers. Duo is a privately owned Schedule I Canadian Bank.

On Feb. 18, 2020, Fairstone and Duo entered into the SPA, which contemplated a purchase price that was estimated to be over $1 billion at closing. The SPA anticipated that the closing would occur on June 1, 2020, but provided for an extended closing up to Aug. 14, 2020. On April 1, 2020, Duo took the position that Fairstone may have already breached the "material adverse effect" (MAE) and ordinary course covenants in the SPA, in addition to other breaches. On May 27, 2020, Duo indicated to Fairstone that it did not intend to close on June 1, as anticipated.

In response, Fairstone commenced litigation. The trial took place over six days in September 2020. Duo conceded that, should the Court find the appropriate remedy was specific performance for Fairstone, which would require Duo to close the transaction.

What you need to know

- A "material adverse effect" must be unknown when the parties enter the agreement; a threat to the company's overall earnings potential; and, of durational significance.
- The court will consider the risk allocation the parties agreed to when interpreting a material adverse effect clause.

Key takeaways

This is the first case where a Canadian court considered whether a purchaser could refuse to close in the context of the pandemic.

It is also the first Canadian case to extensively consider the interpretation and operation of MAE clauses that are common in purchase agreements.

The Court adopted the American interpretation of when an MAE condition can be relied upon, which requires that the event be: unknown; a threat to the overall earnings potential; and, of durational significance.

The Court's decision as it relates to MAE clauses is consistent with the recent Delaware court of Chancery's judgment in *AB Stable VIII LLC v. MAPS Hotels and Reports One LLC* (AB Stable), where the Delaware court for the first time considered MAE clauses in the context of mergers and acquisitions during a global pandemic.

Where the purchaser does not terminate (as in this case), the time to assess whether an MAE exists is at the outside date.

The Court interpreted the covenant requiring the seller to operate "in the ordinary course" in the context of responding to a disaster and did not allow the purchaser to use that covenant to escape the operation of the MAE clause. However, the Canadian court found that in determining ordinary course of business it was appropriate to consider what may be ordinary in extraordinary circumstances. In *AB Stable*, the Delaware court found that "ordinary course" means what is ordinary without regard to extraordinary circumstances.

For a more in-depth treatment of this case, please see BLG's discussion on *Fairstone Financial Holdings Inc. v. Duo Bank of Canada*.

Waiver of tort

Atlantic Lottery Corp. Inc. v. Babstock, 2020 SCC 19

In Atlantic Lottery Corp. Inc. v. Babstock, 2020 SCC 19, the Supreme Court of Canada has refused to certify a class action, which alleged that video lottery terminal games were illegal. Importantly, the Supreme Court clarified that the doctrine of "waiver of tort" is not an independent cause of action in Canada.

Background

The appeal in *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 (Babstock) stemmed from an application for certification of a class action against Atlantic Lottery Corporation (ALC). The application was on behalf of Newfoundland and Labrador residents who paid to play video lottery terminal games (VLTs) in the province. The plaintiffs claimed that VLTs are inherently dangerous and deceptive, and relied on three causes of action: waiver of tort, breach of contract and unjust enrichment. The plaintiffs sought a gain-based award made up of the profit ALC earned by licensing VLTs.

The certification judge dismissed ALC's motion to strike the claim and certified the action. The Court of Appeal of Newfoundland and Labrador substantially upheld the certification judge's conclusions, allowing all three causes of action to proceed. The majority of the Supreme Court of Canada allowed ALC's appeal, set aside the certification order, and struck the plaintiffs' statement of claim in its entirety.

What you need to know

- Waiver of tort does not exist in Canada.
- Disgorgement is not a cause of action, but is available as a remedy for provable torts.
- Disgorgement will rarely be a remedy for breach of contract.
- Claims for nominal damages are not certifiable.

Key takeaways

This decision will have a significant impact on Canadian law and will be of significant interest to a wide variety of litigators and their clients, given the intersection between tort law, civil procedure and class action proceedings.

Perhaps most notably, the majority's decision to abandon the concept of waiver of tort and clarify the availability of disgorgement as a remedy will make it more difficult for plaintiffs to advance class actions in cases where damages cannot be proven on a class-wide basis.

The effect of the Supreme Court's decision could lower settlement ranges, particularly in large consumer class actions where the spectre of a potential disgorgement remedy was impactful.

It is probable that the representative plaintiff in *Babstock* expressly intended to forego any claim to compensatory damages specifically in order to make the case appear more suitable for certification. In the past, representative plaintiffs have often chosen to seek certification only of non-compensatory damages for this same reason. The majority's decision has effectively stripped would-be plaintiffs of this previously viable strategy.

Finally, the majority has signalled a more liberal approach to striking out pleadings than in previous cases.

Some might interpret this as pushback against some cases that suggested that if a party could not point to a case where the same claim was struck, it would survive a motion under Section 5(1)(a) of the Ontario *Class Proceedings Act* or a motion under Rule 21 of the Ontario *Rules of Civil Procedure* (and their equivalents in other jurisdictions).

Overall, would-be defendants will warmly receive the Supreme Court's decision in *Babstock*, as it likely makes class actions more difficult to have certified, and novel claims easier to have struck.

For a more in-depth treatment of this case, please see BLG's discussion on *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19: Supreme Court doesn't gamble on waiver of tort.

Canadian court jurisdiction regarding alleged foreign conduct

Nevsun Resources Ltd. v. Araya (SCC, BCCA)

In its February 28, 2020 decision in *Nevsun Resources Ltd. v. Araya*, the majority of the Supreme Court of Canada (the Court) dismissed a motion to strike a proceeding started against Nevsun Resources Ltd. (Nevsun) for actions that took place in Eritrea, opening the door for litigation in Canada to hold corporations civilly liable for breaches of international human rights law. This decision has important implications for Canadian companies operating in foreign jurisdictions.

Background

The plaintiffs in the action are refugees and former Eritrean nationals. They commenced an action against Nevsun, a 60 per cent shareholder in the Bisha mine, a gold-copper-zinc mine in Eritrea. The plaintiffs claimed that they were indefinitely conscripted through Eritrea's military service into a forced labour regime and forced to work at the Bisha mine. They also claimed that they were subjected to violent, cruel, inhuman and degrading treatment.

The plaintiffs sought damages for breaches of customary international law prohibitions against forced labour, slavery, cruel, inhuman and degrading treatment and crimes against humanity. Nevsun brought a motion to strike the pleadings on the basis of the "act of state doctrine", which precludes domestic courts from assessing the sovereign acts of a foreign government. It also argued that the claims based on customary international law should be struck because they disclosed no reasonable claim. The majority dismissed Nevsun's appeal.

On the first issue, the majority of the Supreme Court of Canada (after a review of the doctrine in England) and of the practice of Canadian courts in assessing the sovereign acts of foreign States in certain circumstances, held that the act of state doctrine is not a part of Canadian common law.

On the second issue, the majority held that the claims satisfied the applicable threshold such that they should not be struck. It quoted the Court of Appeal judge who explained: "The current state of the law in this area remains unsettled and, assuming that the facts set out in the [notice of civil claim] are true, Nevsun has not established that the [customary international law] claims have no reasonable likelihood of success". The majority went on to observe that Canada has long followed the conventional path of automatically incorporating customary international law into domestic law via the doctrine of adoption, making it part of the common law of Canada in the absence of conflicting legislation (absent a conflicting law). The Court further identified certain relevant customary law applicable in this case and dismissed the argument that Nevsun was shielded from such law by virtue of its status as a corporation (as opposed to a state).

What you need to know

- The act of state doctrine does not exist in Canada
- Customary international law is part of the common law in Canada
- Corporations may be held liable in Canada for breaches of customary international law in foreign jurisdictions

Key takeaways

The majority's decision highlights the possibility that Canadian courts can hold entities to account domestically for direct and indirect breaches of customary international law.

All Canadian corporations should apply particular due diligence and implement safeguards to protect human rights abroad in connection with their operations and investments, or with those of their subsidiaries

In these cases, the consequences of sustained litigation can be as damaging as the ultimate outcome. After the release of this decision in February 2020, Nevsun settled with the Eritrean workers in November 2020.

For a more in-depth treatment of this case, please see BLG's discussion on *Nevsun Resources Ltd. v. Araya* in: SCC decision in Nevsun a warning for Canadian companies operating overseas.

Review of administrative (regulatory) decisions: Standard of review

Alexis v. Alberta (Environment and Parks), 2020 ABCA 188

Alexis v. Alberta (Environment and Parks) provides guidance from the Alberta Court of Appeal regarding judicial review of administrative decisions following the landmark ruling in Canada *(Minister of Citizenship and Immigration) v. Vavilov (Vavilov)*.

Background

In *Alexis,* the majority for the Court of Appeal found that a decision of the Director of Environmental Assessment regarding whether an environmental impact assessment (EIA) was required in respect of a major silica-sand project was unreasonable.

The decision of the Director determined that an EIA was not required under the *Environmental Protection and Enhancement Act* (EPEA) and regulations, but did not provide reasons. Utilizing the direction provided by the Supreme Court in Vavilov, the Court of Appeal undertook its own analysis of the provisions of the EPEA and their application to the silica sand project. The Court of Appeal found that the only reasonable outcome was requiring the proponent to submit an EIA in respect of the project.

What you need to know

- Vavilovcontinues to provide further application to administrative decisions across different regulatory bodies.
- *Alexis v. Alberta* provides clarity to Alberta's previously inconsistent treatment of major silica sand projects for the purposes of EPEA.
- Even where an administrative decision does not require written reasons, it will be subject to review for consistency with the decision-maker's enabling legislation.

Key takeaways

Alexis v. Alberta is an early example of appellate-level judicial review post-Vavilov. It demonstrates how courts, even in the absence of reasons, may engage in a searching review of the reasonableness of administrative decisions.

This case is of particular note for proponents of projects, and likely extends in application to any business or industry that is subject to administrative decisions.

This provides proponents an avenue to challenge decisions that may have been afforded greater deference by reviewing courts pre-Vavilov, a useful tool to have in increasingly difficult to navigate regulatory environments.

For a more in-depth treatment of this case, please see BLG's discussion on *Canada (Minister of Citizenship and Immigration) v. Vavilov*.

Litigation funding

9354-9186 Québec inc. v. Callidus Capital Corp

This case relates to an ongoing proceeding instituted under the Companies' Creditors *Arrangement Act*, R.S.C. 1985, c. C-36 (CCAA), in which a single supervising judge in Quebec has been responsible for its oversight. In this capacity, the judge made numerous discretionary decisions. One of those decisions relates to whether a supervising judge can approve third party litigation funding as interim financing, pursuant to s. 11.2 of the CCAA.

Background

As explained by the Supreme Court in this case, third party litigation funding (TPF) generally involves "a third party, otherwise unconnected to the litigation, agree[ing] to pay some or all of a party's litigation costs, in exchange for a portion of that party's recovery in damages or costs".

For most of the twentieth century, the legal landscape regarding TPF was overshadowed by the common law doctrines of maintenance and champerty. In *McIntyre Estate v. Ontario (AG)*, the Court of Appeal of Ontario explained these terms as follows: "[m]aintenance is directed against those who, for an improper motive, often described as wanton or officious intermeddling, become involved with disputes (litigation) of others in which the maintainer has no interest whatsoever. Champerty is an egregious form of maintenance in which there is the added element that the maintainer shares in the profits of the litigation." Traditionally, maintenance and champerty have been unlawful in Ontario, whether under the Criminal Code, the *Champerty Act*, or both.

More recently, TPF has been embraced into the mainstream of Canadian litigation, including in terms of the types of parties using litigation funding, the scenarios in which parties rely upon litigation funding and the perspectives expressed by courts and lawmakers. Initially, lower courts assessing funding agreements in the context of class actions determined that in light of the access to justice that such agreements can provide, TPF was not per se champertous. This jurisprudence has recently evolved into new litigation contexts, including single-party commercial litigation and bankruptcy proceedings.

In this case, the funder and claimant appealed a decision of the Québec Court of Appeal, refusing to confirm the funding agreement.

From the bench, the Supreme Court of Canada overturned the decision of the Québec Court of Appeal and reinstated the judgment of the court of first instance. The Court unanimously found that the Companies' Creditors Arrangement Act Court properly exercised its discretion to approve the relevant TPFA after finding it to be 'fair and reasonable', drawing guidance from the principles relevant to approving litigation funding agreements in the class actions context.

What you need to know

- Third party funding arrangements may be approved by the courts in a range of litigation contexts provided the funding agreement is “fair and reasonable” in light of certain principles, such as the expected return on investment of the funder and the role and powers of client
- Third party litigation is available to all manner of parties to assist in access to justice

Key takeaways

Litigation funding provides an opportunity for would-be claimants to advance meritorious claims and preserve cash flow for other priorities

Counsel with experience in working with funders is critical to ensure an enforceable funding agreement that achieves its purpose of de-risking litigation for a party

For a more in-depth treatment of this case, please see BLG’s discussions on: *9354-9186 Québec inc. v. Callidus Capital Corp*.

Additional Resources

Here are some other recent BLG thought leadership articles on related topics:

- Supreme Court of Canada revisits good faith in contracts
- Court guidance on application of MAE and ordinary course provisions in M&A deals

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