Top 10 recent legal developments impacting commercial litigation in Alberta

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The past year has seen a number of significant legal developments that impact Albertans and Alberta businesses. From recognizing the new tort of public disclosure of private facts, clarifying the duty of honest contractual performance, to paving the way to more significant costs awards for successful litigants, the Courts have released a number of decisions that will affect the matters brought before them and how parties conduct themselves in litigation.

In this article, we highlight ten recent judicial and legislative developments of interest to both existing and prospective litigants in Alberta.

1. Duty of Honest Performance: *Canlanka Ventures Ltd v Capital Direct Lending Corp*., 2021 ABCA 115

In *Canlanka Ventures Ltd v Capital Direct Lending Corp*., the Alberta Court of Appeal confirmed that a party may breach its duty of honest contractual performance even if the conduct that constituted the breach was not for personal gain.

What you need to know

- The duty of good faith in contractual performance exists in every contract and operates irrespective of the intentions of the parties. Parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract.
- A breach of the duty of honesty in contractual performance does not turn on whether the underlying misrepresentation was made for personal gain.

Background

Canlanka Ventures Ltd. (Canlanka) bought a number of second mortgages from Capital Direct Lending Corp. (Capital) and hired Capital to administer its mortgages in exchange for a fee. The “administration agreement” between the parties expressly stated that, “[t]he Administrator [Capital] agrees to act in good faith and to the best of its ability in the best interest of the Mortgage Holder [Canlanka]”.

Canlanka advised Capital that it had stopped receiving payments with respect to its "Bastien mortgage". Capital then sent an email to Canlanka with an updated loan payment schedule for the Bastien mortgage and stated, "… the aforementioned mortgage is in foreclosure." In fact, and as Capital knew, only the first mortgage on the property was in foreclosure, not Canlanka's second mortgage. Capital took no steps to clarify or remedy the misleading statement, and the trial judge found Capital's actions were deliberate. Canlanka's mortgage was removed from title during the foreclosure of the first mortgage, resulting in Canlanka losing its entire investment.

The trial judge found that, as a result of the misrepresentations, Canlanka was precluded from making an informed decision as to whether to foreclose on its Bastien mortgage, seek to obtain its own appraisals, or to offer to buy out the first mortgage, and awarded damages for loss of opportunity.

Summary of the Alberta Court of Appeal decision

Capital argued before the Court of Appeal that it did not breach its obligations to act in good faith because, while its misrepresentations were deliberate, they were not for personal gain. Instead, Capital submitted it reasonably concluded, although without advising Canlanka or seeking its permission, that no action should be taken because of the respondent's limited equity in the secured property and because the costs of foreclosure and sale would make a recovery action uneconomical. The Court of Appeal disagreed and held that Capital's acts were not simply a failure to advise of general information, but an active misrepresentation that deprived Canlanka of the right to make its own decision in relation to taking action to protect its investment.

The Court of Appeal held that a finding of a breach of the duty of honesty in contractual performance does not turn on whether the underlying misrepresentation was made for personal gain. In this case, the misrepresentations were active, intentional, well beyond innocent non-disclosure and amounted to a breach of the duty of honest contractual performance.

The duty of good faith in contractual performance exists in every contract and operates irrespective of the intentions of the parties. Parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. In the *Canlanka* decision, the Alberta Court of Appeal confirmed that a party may breach these obligations even where its conduct was not engaged in for personal gain.

2. Duty of good faith: *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*

In its decision *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District* (Wastech), the Supreme Court of Canada recognized that parties need to exercise contractual discretion in good faith. This means making decisions that are reasonable in light of the bargain the parties made, which we cover in our full case summary.

3. Legislation: *The COVID-19 Related Measures Act,* S.A. 2021, c.C-31.1

In response to anticipated claims against health service providers related to the transmission of COVID-19, the Alberta government enacted the *COVID-19 Related Measures Act* (CRMA) on June 17, 2021, which took effect retroactively to March 1, 2020.

What you need to know

- The CRMA protects health care providers against civil liability for the transmission of COVID-19 in health care settings provided they acted in good faith to comply with all applicable laws and public health measures.
- The CRMA prohibits an action for damages against a protected party as a direct or indirect result of an individual being infected with or exposed to COVID-19 in health care settings as a direct or indirect result of an act or omission of the protected party.

Background

The protected parties include Alberta Health Services; regulated health professionals including hospitals, long-term care facilities, supportive living accommodations, pharmacies; and health service facilities, as well as their respective owners, employees and contractors.

For the protection to apply, the protected party must have acted in good faith to comply with public health guidance related to COVID-19[1], and any federal, provincial or municipal laws related to COVID-19.

The CRMA does not provide protection to parties who are grossly negligent. Gross negligence generally involves a significant departure from the reasonable standard of care, or willful, wanton or reckless misconduct.

As a result of the CRMA, individuals that have contracted COVID-19 in health care settings in Alberta are generally precluded from seeking compensation from health service providers unless they can demonstrate that the transmission was the result of a failure to follow public health measures.

4. Class Proceedings: *Spring v Goodyear Canada Inc.*, 2021 ABCA 182

In *Spring v. Goodyear Canada Inc.*(Goodyear), the Alberta Court of Appeal clarified the evidence required in order to certify a claim as a class action. Despite a manufacturer's recall on the product in question, the Alberta Court of Appeal overturned a decision to certify the claim as a class action due to a lack of evidence that the failure was due to negligence in the manufacturing process.

What you need to know

At the certification stage, a representative plaintiff is not required to prove the merits of their claim, rather they must provide "some basis in fact" supporting the commonality of issues.

Background

Mr. Spring was injured following an accident after his Goodyear tire failed, which he alleged was due to a manufacturing defect. He commenced an action for damages against Goodyear, as a representative plaintiff for all other persons who purchased the same model of Goodyear tires, which had been the subject of a recall notice and attempted to certify it as a class action. Goodyear argued that Mr. Spring's tire failed because of over-inflation or operational causes.

In order to certify a matter as a class action under the *Class Proceedings Act*, SA 2003 c C-16.5 (the Act), the court must be satisfied of a number of requirements, including:

i. that the claims of the prospective members raise a common issue, and
ii. that a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues.

While a certification proceeding does not involve weighing the merits of the representative plaintiff's claim, the applicant is required to demonstrate that there is "some basis in fact" to show a common issue.

The only direct evidence that Mr. Spring presented to support a common defect amongst the Goodyear tires in question was a recall notice issued by Goodyear. He did not produce evidence showing the cause of the tread separation of his tires or those covered by the recall notice, evidence of any specific or systemic manufacturing defect, or evidence of any negligence behind his observed tire separation.

Summary of the Alberta Court of Appeal decision

The Court of Appeal held that, although the representative plaintiff is not required to prove the merits of his claim at the certification hearing, he must provide "some basis in fact" supporting the commonality of issues. The potential common issue in this case was that one factor was responsible for any tire failures within the proposed class. However, Mr. Spring's acknowledgement that there may be other factors that would only be identified at trial confirmed that a common issue justifying certification of a class proceeding had not been identified. The Court of Appeal held that he failed to demonstrate that whatever factors were identified at trial would be applicable to the claims of all members of the defined class, and accordingly allowed the appeal and set the certification order aside.

This decision provides an important reminder to prospective representative plaintiffs in product liability cases that although they are not required to prove the merits of their case at the certification hearing, evidence must be adduced to demonstrate a common defect amongst all members of the defined class.

5. Bankruptcy Proceedings: *DGDP-BC Holdings Ltd v Third Eye Capital Corporation,* 2021 ABCA 226, 2021 ABCA 284

During 2021, the highly contentious insolvency proceedings involving Accel Canada Holdings Limited (Holdings) and Accel Energy Canada Limited (Energy, and together with Holdings, Accel) resulted in several appellate decisions with significant implications for Alberta businesses and particularly lenders.

The decisions in *DGDP-BC Holdings Ltd. v. Third Eye Capital Corporation* (the Accel Decisions) affirmed the very broad jurisdiction conferred upon a judge supervising insolvency proceedings under section 243(1)(c) of the *Bankruptcy and Insolvency Act,* RSC 1985, c B-3 to "take any other action that the court considers advisable in the circumstances". They also provide a cautionary tale for lenders that court-ordered charges are not sacrosanct in insolvency proceedings, and a reminder that there are still risks inherent in lending into an insolvency or restructuring proceeding.

For Alberta businesses, and particularly lenders, the Accel Decisions have several important implications, which we cover in our full case summary.

6. Public Disclosure of Private Facts: *ES v Shillington,* 2021 ABQB 739

In *ES v Shillington* (*Shillington*), the Court of Queen's Bench of Alberta formally recognized the tort of public disclosure of private facts, which provides recourse to individuals where offensive, private information is publically disclosed without their consent.

In the age of smart phones and readily shared images, the newly recognized tort of public disclosure of private facts provides common law recourse to individuals whose private images are shared publicly without their consent.

What you need to know

- The tort of public disclosure of private facts is available in Alberta.
- The plaintiff must prove that the defendant publicized an aspect of the plaintiff's private life, the plaintiff did not consent to the publication, the matter publicized or its publication would be highly offensive to a reasonable person in the position of the plaintiff, and the publication was not of legitimate concern to the public.

Background

In this case, the Plaintiff had been romantically involved with the Defendant between 2005 and 2016, during which time she shared intimate photographs of herself in various states of undress with the Defendant, all with the understanding that these were a private gift to him and not to be shared. The Defendant posted her photographs online as early as 2006, and as late as 2018, after their relationship had ended. As a result, the Plaintiff alleged she suffered from nervous shock, psychological and emotional suffering, depression, humiliation, and other negative impacts to her wellbeing.

Summary of the Court of Queen's Bench decision

The Court held that in Alberta, as in Ontario, to establish liability for the tort of public disclosure of private facts, a plaintiff must prove four elements:

i. The defendant publicized an aspect of the plaintiff's private life;
ii. The plaintiff did not consent to the publication;
iii. The matter publicized or its publication would be highly offensive to a reasonable person in the position of the plaintiff; and
iv. The publication was not of legitimate concern to the public.

The Court found that the elements were established by the Defendant uploading the Plaintiff's explicitly sexual images to accessible websites. The Defendant was found liable for the tort of public disclosure of private facts, and the Plaintiff was awarded damages as well as a permanent injunction prohibiting the Defendant from any further public disclosure of the Plaintiff's private images.

7. Public Interest Litigants: *Justice Centre for Constitutional Freedoms v Alberta,* 2021 ABCA 415

The Alberta Court of Appeal decision in *Justice Centre for Constitutional Freedoms v Alberta* (Justice Centre) provides clarity with respect to the legal test for public interest standing in the context of a constitutional challenge. Public interest litigation allows parties with a genuine interest in important public issues to commence litigation in limited circumstances where it may not otherwise be practical to do so through traditional private litigation.

What you need to know

- Absent extant legislation, it is not the court's role to advise the legislative branch of government how to legislate.
- Although it will not refuse judicial review of an enactment on the basis that it may be amended by the legislature, extant legislation is a prerequisite to public interest standing for the purpose of a constitutional challenge.

Background

The Justice Centre for Constitutional Freedoms (JCCF) applied for public interest standing to launch a constitutional challenge to certain provisions of the *Public Health Act,* RSA 2000, c P-37 (the PHA) that allowed the Minister of Health during a public health emergency to specify or set-out provisions that apply in addition to, or instead of, any provision in an enactment, by order and without consultation. JCCF argued that the impugned provisions undermined the principles of Parliamentary sovereignty because they permitted the executive branch to unilaterally amend legislation and thus intrude into the legislative branch's exclusive powers to enact and amend laws.

Courts have recognized that public interest standing serves an important judicial function and will be granted in circumstances where:

1. there is a serious justiciable issue raised;
2. the plaintiff has a real stake or genuine interest in the issue; and

3. the proposed suit is a reasonable and effective way to bring the issue before the courts.[2]

The case management judge held that although the JCCF established the first two branches of the test, the third branch had been not been met on the basis that the Minister of Health had announced that the amendments to the Act would be repealed and therefore granting public interest status for a challenge to legislation which may no longer exist would not serve a legal purpose or justify the use of judicial resources. The case management judge granted leave to the JCCF to bring another application in the event that the Minister of Health failed to repeal the impugned provisions of the Act.

Summary of the Alberta Court of Appeal decision

While the impugned provisions were ultimately repealed, the JCCF nonetheless appealed the decision on the following two grounds: whether there still existed a justiciable issue; and whether the case management judge erred in refusing to grant public interest standing in any event.

On the first ground, the Court of Appeal considered whether there still existed a justiciable issue in light of the fact that the impugned provisions were repealed. The Court acknowledged "curiosities" in the impugned provisions but held that absent extant legislation, the appellant was effectively left seeking to challenge the legislative process and it is not the Court's role to advise the legislative branch of government how to legislate.

With respect to the second issue, the Court of Appeal considered the argument presented by the British Columbia Civil Liberties Association, acting as intervenor, that the case management judge erred in her consideration of the Minister of Health's announcement that the amendments would be repealed, which in accordance with the principle of parliamentary sovereignty did not bind the legislature. The Court confirmed that where a justifiable issue regarding the constitutionality of legislation has been raised, the court should not refuse to judicially review it on the basis that the legislature might deal with it. In the unique circumstances of this case, however, the Court found that the case management judge properly considered that the constitutional challenge might shortly be rendered moot, and that her approach to granting leave to re-apply in the event that the legislation was not repealed was reasonable.

In the *Justice Centre* decision, the Court clarified that although it will not refuse judicial review of an enactment on the basis that it may be amended by the legislature, extant legislation is a prerequisite to public interest standing for the purpose of a constitutional challenge.

8. Limitation Periods: *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31

A plaintiff is typically required to commence an action within two years of when they 'knew or ought to have known' they had a claim against the other party; failure to do so may result in their claim being dismissed under limitations legislation. In *Grant Thornton LLP v. New Brunswick*, the Supreme Court of Canada (SCC) clarified when a claim is

considered to have been ‘discovered’ in this context, which we cover in our full case summary.

BLG acted for the intervener Chartered Professional Accountants of Canada, led by Guy J. Pratte, Nadia Effendi and Julien Boudreault.

9. Court rules party cannot rely on exculpatory clause to avoid liability for deceit

This article was originally posted on May 4, 2021 by Michael A Marion, Miles F. Pittman, Laura Poppel.

In *NEP Canada ULC v MEC OP LLC*, 2021 ABQB 180 (NEP), the Alberta Court of Queen’s Bench rendered an important judgment ruling on the interplay between an action for a deceitful contractual representation and an exclusionary clause contained within that same contract. In short, a party will not be able to escape liability through reliance on a contractual limitation of liability clause where the party has made fraudulent misrepresentations in that very contract. In this case, the consequences of this finding were significant, as the Court ultimately awarded the Plaintiff approximately $185,000,000 in damages, which included a $120,750,000 award for loss of opportunity, despite a limitation of liability clause, which barred liability for consequential and indirect damages, including loss of profits. We cover the full details in our previous case summary.

10. Law of Costs: *McAllister v Calgary,* 2021 ABCA 25

In *McAllister v Calgary* (McAllister), the Alberta Court of Appeal provided significant guidance on the practice of quantifying costs awards. Specifically, the Court emphasized the importance of considering the degree to which a costs award covers a successful party’s actual legal expenses, and discouraged the practice of mechanically awarding the amounts set out in Schedule C to the *Alberta Rules of Court*.

What you need to know

- While the application of Schedule C to the *Alberta Rules of Court* may be instructive or appropriate, when quantifying a costs award, a court must always consider the factors set out in the *Rules* to determine a “reasonable and proper” costs award.
- Absent aggravating or mitigating circumstances, assuming legal fees were reasonably incurred, and subject to the trial courts’ discretion in each particular case, costs awarded to a successful party should represent an indemnification of a party’s total legal fees in the range of 40-50 per cent.

Background

At trial, Mr. McAllister was successful in establishing liability against the City of Calgary arising from his assault on the Plus-15 walkway at the Canyon Meadows C-Train Station.

In determining costs, the trial judge rejected Mr. McAllister's argument that a successful party should receive 40-50 per cent of incurred legal fees. The trial judge suggested that absent extraordinary circumstances, costs should be awarded pursuant to the Tariff of Recoverable Fees set out in Schedule C of the *Rules of Court*, Alta Reg 124/2010 without regard to the actual legal costs incurred by the plaintiff. The trial judge awarded Mr. McAllister costs pursuant to Column 3 of Schedule 3, adjusted for inflation, resulting in a costs award of $70,294.70.

Summary of the Alberta Court of Appeal decision

Mr. McAllister, whose actual legal fees amounted to $389,711.78, appealed to the Court of Appeal on grounds that the costs award was not reasonable as it did not provide him with a sufficient level of indemnification.

The Court of Appeal noted that the Alberta *Rules of Court* provides a menu of possible orders that may be made with respect to costs, including an order for "all or part of reasonable and proper costs with or without reference to Schedule C". This order provides significant discretion to the trial judge in implementing a reasonable and proper costs award, and would permit a lump sum percentage of legal costs.

After noting that the *Rules of Court* provide little guidance as to what quantum of costs indemnification constitutes "reasonable and proper costs", the Court held that the general principle of awarding a level of 40-50 per cent of the successful party's incurred legal costs (subject to a review for reasonableness) provides a reasonable guideline upon which "reasonable and proper costs" may be measured. In so doing, the Court was clear that it is within the trial court's discretion to move the appropriate level of indemnification up or down depending on various factors in each individual case and although Schedule C may not constitute the appropriate level of indemnification, it can be used by trial judges as a "reality check" when fashioning cost awards.

The appeal was allowed and the matter was returned to the trial judge to determine a reasonable level of indemnification.

In many cases, the amounts set out in Schedule C represent a small fraction of the legal costs actually incurred by the successful litigant. The *McAllister* decision is an important reminder that Alberta Courts may depart from the amounts set out in Schedule C and instead impose a much more significant costs award that will indemnify the successful party in the range of 40-50 per cent of its incurred legal fees.

[1] CRMA s 1(1)(e)"Public health guidance" is broadly defined as advice, recommendations, directives, guidance, or other instructions in respect of public health, by various entities including the Crown, regional health authorities, ministers, public health officials, and municipalities, among other groups.

[2] *Canada (Attorney General) v Downtown Eastside Workers United Against Violence Society*, 2012 SCC 45 at para 37 (Factors relevant to this part of the test include: the plaintiff's capacity to bring the matter before a court whether the issues transcend the rights of those most directly impacted by the decision at hand; whether the issues at hand have the potential to provide access to justice to those who may otherwise be disadvantaged yet could be impacted by the decision; whether there are better or more efficient alternatives to granting standing to the party to bring the matter before a court;

and how the outcome of the case might impact those who are equally or more directly affected by the issues at hand, and whether there is potential for a conflict between private and public interests.)

By

Clay Jacobson, Matti Lemmens, Jack Maslen, Stela Hima Bailey, Taylor Kemp, Brett Carlson, Michael Gaber, Emma Morgan, Valeria Baptie, Alana Hannaford, Serine Fakih, Jessica Schuldhaus

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BLG Offices

Calgary
Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3
T 403.232.9500
F 403.266.1395

Ottawa
World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9
T 613.237.5160
F 613.230.8842

Vancouver
1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2
T 604.687.5744
F 604.687.1415

Montréal
1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4
T 514.954.2555
F 514.879.9015

Toronto
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3
T 416.367.6000
F 416.367.6749

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