

## Litigation - Canada

### The meaning of 'unlawful' in the tort of unlawful means

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#### Introduction

#### Facts

#### Lower courts' decisions

#### Supreme Court decision

#### Conduct that constitutes unlawful means

#### Comment

#### Introduction

The test to prove the unlawful means tort has been highly debated over the last decade in Canada. More specifically, courts have long struggled to define the 'unlawful means' element of the tort and the area of law has been described as a "mess".<sup>(1)</sup> As the Supreme Court of Canada recently noted "there is not even consensus about what the tort ought to be called".<sup>(2)</sup> However, the Supreme Court's recent decision in *AI Enterprises Ltd v Bram Enterprises Ltd*,<sup>(3)</sup> provides clarity on the scope of the unlawful means element of the tort. The unlawful means tort 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.

#### Facts

The case arose out of a dispute over the ownership of a property. A group of companies – Bram Enterprises, Jamb Enterprises and AI Enterprises – acquired an apartment building in Moncton. The syndication agreement provided that if the majority decided to sell, the minority would have the right to purchase the building at its appraised value, failing which the property could be marketed to the public.

The majority investors wanted to sell, but the minority investor, AI, did not. AI also declined the opportunity to purchase the building at its appraised value. AI's president, Alan Schelew, took a series of actions to hinder the sale, preventing two third-party transactions from closing. Ultimately, AI purchased the property for substantially less than it otherwise might have been purchased by the third parties. When the majority investors sued to recover the difference between the third-party offers and the price that AI ultimately paid, the main issue was whether Alan Schelew and his company were liable under the tort of intentional interference with economic relations.

#### Lower courts' decisions

Both the trial judge and the New Brunswick Court of Appeal held that the unlawful means tort had been established. The trial judge found that the appellants "possessed actual intent to do whatever they could to pursue the interests of A.I Enterprises and they were well aware that their actions would cause harm to Jam[b] & Bram".<sup>(4)</sup> He also held that Alan Schelew had breached his fiduciary obligations to the respondent companies of which he was a director.<sup>(5)</sup>

The court of appeal also dismissed the appeal, but for different reasons. Although it found that the impugned conduct of the appellants did not satisfy the requirements of the unlawful means tort, as there was no wrong that would be actionable by the third party (the prospective purchasers) against the appellants, it allowed for a principled exception on the basis that the appellants' conduct was akin to the tort of abuse of process.<sup>(6)</sup> This approach is intended to provide judges with some wiggle room to respond adequately to unanticipated factual scenarios or changing circumstances.<sup>(7)</sup> Thus, despite not strictly falling within the definition of 'unlawful means', the New Brunswick Court of Appeal held that the appellants' conduct merited the imposition of liability under the unlawful means tort.

#### Supreme Court decision

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The main issue before the court was the scope of liability for the unlawful means tort and, in particular, what the 'unlawfulness requirement' means.

### **Unlawful means tort**

The main torts that comprise the unlawful means tort are:

- unlawful interference with economic interests;
- inducement of breach of contract;
- conspiracy; and
- intimidation.

The unlawful means tort allows a plaintiff to sue a defendant for economic loss resulting from the defendant's unlawful act against a third party. Generally, in order for the plaintiff to prove liability, the defendant must be found to have:

- used unlawful means (in the narrow sense as described below); and
- intended to harm the plaintiff through the use of unlawful means, thus causing the plaintiff to suffer economic loss.

The intent is established where a defendant acts in order to cause harm to the plaintiff either as an end in itself or as a means to accomplish some other end. The unlawful means component was the focus of the Supreme Court's analysis in *AI*.

### **Unlawful means requirement**

Ultimately, the court adopted a narrow definition of 'unlawful means'. Under the narrow definition, the tort will be available only in three-party situations where the intentional infliction of economic injury is caused to C (the plaintiff) by A's (the defendant) use of unlawful means against B (the third party). In order for conduct to constitute 'unlawful means' for this tort, the conduct must give rise to a civil cause of action by the third party, or would do so if the third party had suffered loss as a result of that conduct. The court held that the limitation of unlawful means to actionable civil wrongs provides certainty and predictability in this area of the law, since it does not seek to create new actionable wrongs, but simply expands the range of persons that may sue for harm intentionally caused by existing actionable wrongs to a third party.<sup>(8)</sup> Further, the court held that there are no exceptions to the scope of liability imposed by this approach.<sup>(9)</sup>

The court identified the rationale of the unlawful means tort as the "liability stretching rationale", which it defined as "extending civil liability without creating new actionable wrongs".<sup>(10)</sup> It thereby closes a perceived liability gap where the wrongdoer's acts in relation to a third party, which are in breach of established legal obligations to that third party, intentionally target the injured plaintiff. The court rejected the 'intentional harm' rationale, which focuses on the fact that harm has been intentionally inflicted, and instead supported the creation of new tort liabilities in order to reach clearly excessive and unacceptable intentional conduct.<sup>(11)</sup>

Therefore, conduct will constitute 'unlawful means' in order to amount to liability under the unlawful means tort where it gives rise to a civil cause of action for damages or compensation by the third party, or would do so except for the fact that the third party suffered no loss as a result of the defendant's acts. There is no requirement that these acts not be otherwise actionable by the plaintiff against the defendant, and there are no exceptions to the scope of the liability imposed by this approach.<sup>(12)</sup>

The Supreme Court's decision in *AI* adopts the majority decision of the House of Lords' 2007 trilogy<sup>(13)</sup> – *OBG v Allen*, *Douglas v Hello! Limited* and *Mainstream Properties v Young* – in which Lord Nicholls proposed a broad definition of 'unlawful means' to include conduct that is not actionable, and Lord Hoffman reasoned that a narrow definition is more appropriate. The majority of the House of Lords adopted Hoffman's reasoning in the *OBG* trilogy.

### **Application of the law to the facts of the case**

The Supreme Court accepted the court of appeal's conclusion that there was no wrong that would be actionable by the third parties against the appellants. As a result, it held that the appellants could not be found liable to Bram and Jamb on the basis of the unlawful means tort and rejected the court of appeal's application of any exceptions to the scope of liability for the unlawful means tort. However, the Supreme Court upheld the trial judge's findings that Schelew had breached his fiduciary obligations to Bram and Jamb.

### **Conduct that constitutes unlawful means**

In the past, the following conduct has been recognised by Canadian courts as potentially satisfying the unlawful means element of the unlawful means tort:

- breach of contract;
- certain tortious conduct, including conspiracy, misrepresentation and defamation;

- breach of equitable obligations, including breach of confidence and breach of fiduciary duty;
- breach of statute (however, minor statutory breaches, such as those involving provincial statutes and municipal by-laws, will not always be serious enough to qualify as unlawful);
- certain criminal conduct; and
- breach of a court order (eg, an injunction).

### Comment

Going forward, it is hard to predict what types of conduct will be considered unlawful based on this narrow test. However, in *AI* the court did provide some guidance in stating that criminal offences and breaches of statute will not be *per se* actionable under the unlawful means tort; however, the tort will be available if those acts also give rise to a civil action by the third party and interfere with the plaintiff's economic activity. For example, crimes such as assault and theft would be actionable by a third party in the torts of trespass to the person and conversion. But other breaches of criminal or regulatory law will not give rise to a civil action and there will be no potential liability under the unlawful means tort. According to the court, this approach avoids "tortifying" the criminal and regulatory law by imposing civil liability where there would otherwise not be any.<sup>(14)</sup>

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### Endnotes

- (1) *AI Enterprises Ltd v Bram Enterprises Ltd*, 2014 SCC 12 at para 28.
- (2) *Ibid*. The tort is often referred to as the tort of "intentional interference with economic relations", "interference with a trade or business by unlawful means", "unlawful interference with economic relations", "causing loss by unlawful means" or – as the Supreme Court simply stated in *AI* – the 'unlawful means' tort. For the purposes of this update, the tort is referred to as the 'unlawful means' tort.
- (3) *Ibid*.
- (4) 2010 NBQB 245 at para 287.
- (5) *Ibid* at paras 233-234, 243-248, 254, 262-268 and 270-271.
- (6) 2012 NBCA 33, 2012 CarswellNB 194 at para 82.
- (7) *Ibid* at para 81.
- (8) *Supra* note 1 at para 74.
- (9) *Supra* note 1 at para 84.
- (10) *Supra* note 1 at para 43.
- (11) *Supra* note 1 at para 42.
- (12) *Supra* note 1 at para 86.
- (13) [2007] 4 All ER 545, [2007] 2 WLR 920 [the "OBG trilogy"].
- (14) *Supra* note 1 at para 45.

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