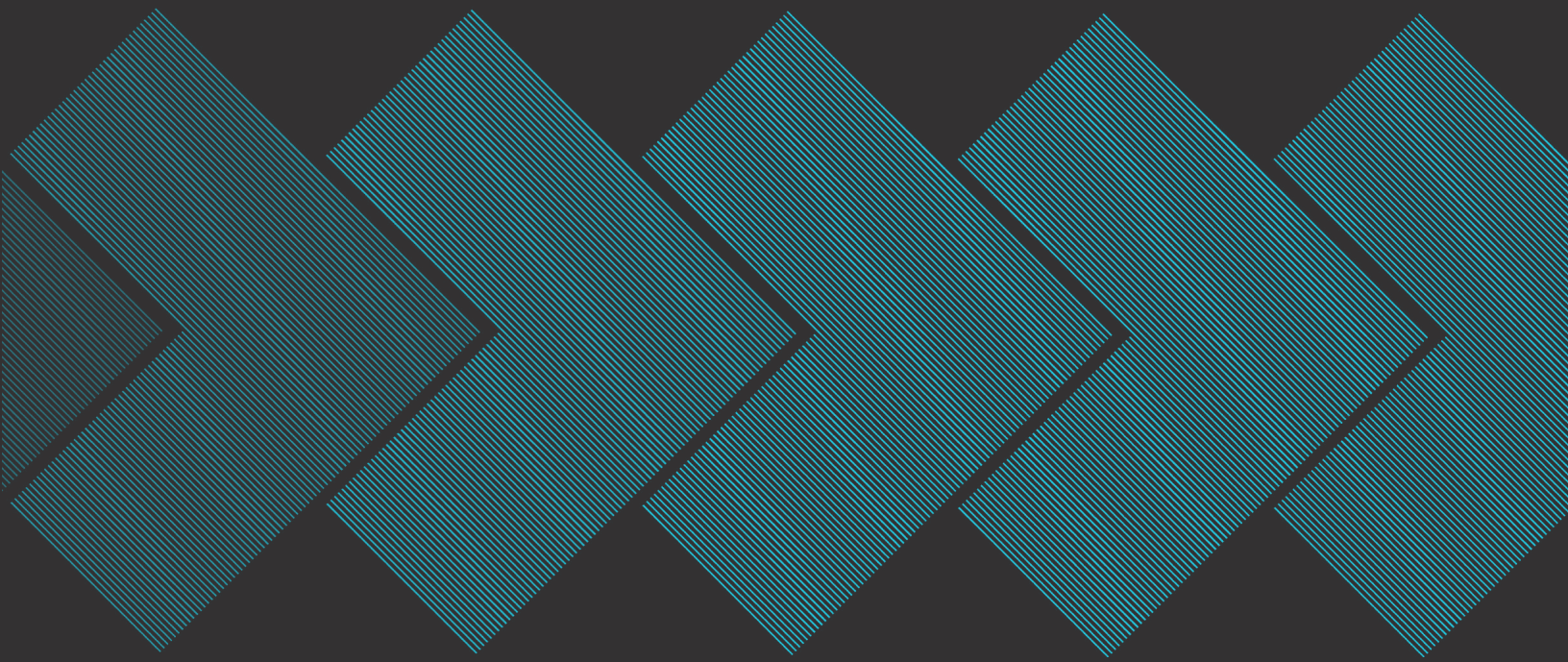
The Court Stresses Stability and Coherence: The Top 10 SCC Private Law Cases in 2021



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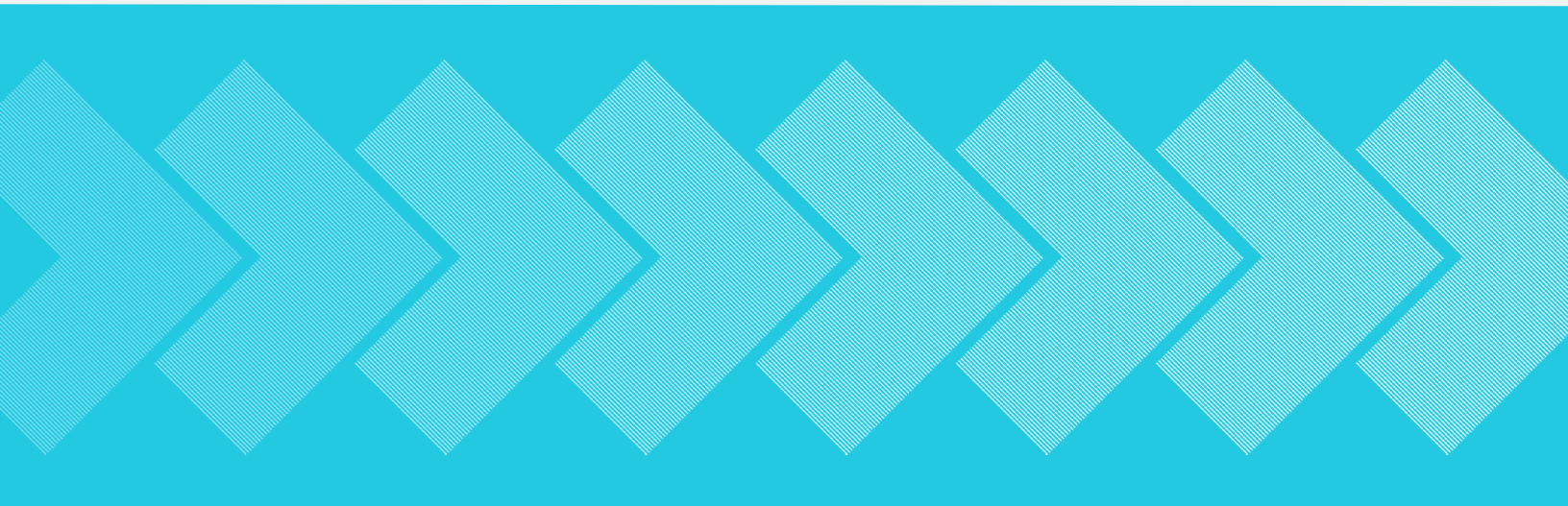
Contents

MAIN

Introduction

Our survey of the key private law cases of 2020 described a Supreme Court of Canada exploring the boundaries between public and private law. If there is a theme unifying the Court's most significant private law decisions of 2021, that theme is coherence. From the principles of good faith policing contractual discretion, to the principles defining what policy decisions of public authorities are immune from negligence, this year's decisions display a Court paying careful attention to order and structure.

Coherence, though, is not the same thing as certainty. While decisions like *Northern Regional Health Authority v Horrocks* illustrate a marked concern for clear lines, other cases such as *Corner Brook (City) v Bailey* departed from previous jurisprudence because the legal principles involved (there, the "Blackmore Rule" governing the interpretation of releases) had evolved to make a previously clear rule obsolete.



Case Commentary

Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District

Very early in the year, on February 5, 2021, the Supreme Court of Canada released its long-anticipated decision in *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District* ("*Wastech*"), a major decision concerning the scope of the obligation to perform and enforce contracts in good faith. While it rejected any suggestion that it is the Court's role to impose unbargained-for terms on a private agreement, the Court affirmed a general power—that cannot be excluded—to police the exercise of discretion under contracts where its exercise would undermine the purpose of the parties' agreement.

The decision in *Wastech* had been under reserve since December 6, 2019, which was curious since it was argued at the same time as *C.M. Callow Inc v Zollinger* ("*CM Callow*") (previously discussed here), the last major private law decision delivered by the Court in 2020. While *CM Callow* and *Wastech* both considered the organizing principle of good faith in Canadian contract law, the core issue in each case concerned a different dimension of the doctrine of good faith.

CM Callow concerned the extent of the duty of honest performance recognized in *Bhasin v Hrynew* ("*Bhasin*"). *Wastech* concerned a different aspect of the doctrine of good faith—one whose antecedents are much older—namely, the idea expressed in *Bhasin* that "in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner." After *Bhasin*, there was uncertainty as to what this aspect of the doctrine of good faith means, how far it extends, and, most importantly, whether it can impose on parties' obligations for which they did not explicitly bargain.

The facts in *Wastech* raised exactly this issue. The parties entered into a long-term agreement for removal and hauling of solid waste by Wastech on behalf of the Greater Vancouver Sewerage and Drainage District ("Metro"). The profitability of the contract to Wastech depended on the destination to which the waste was to be removed, with long-haul destinations being more profitable and short-haul destinations being less so. Wastech claimed compensation when Metro substantially re-allocated waste in 2011 between short-haul and long-haul destinations, increasing Wastech's costs to the point that it could not meet the operating ratio defined in the agreement. This ratio yielded an operating profit of 11%. The agreement provided for certain adjustments to protect Wastech's profitability but provided no guarantee of the 11% figure. Under these adjustments, Metro paid Wastech some $2.8 million as a result of the re-allocation, but still left Wastech with a level of profitability short of the 11% figure.

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Wastech commenced an arbitration claim, arguing that a term should be implied or that a duty of good faith should apply to entitle it to a further $2.8 million. The arbitrator declined to imply a term since the parties deliberately chose not to include such an adjustment. The arbitrator nevertheless found that although Metro's conduct had been honest and reasonable from its own point of view, it had failed to give "appropriate regard" to Wastech's interests or expectations, and hence could be regarded as "dishonest" within the meaning of *Bhasin*. This, the arbitrator found, breached Metro's obligations of good faith.

Both the Supreme Court of British Columbia and the Court of Appeal set aside the arbitrator's decision. The Court of Appeal determined that the arbitrator erred in law by misapprehending how a party can be obligated under *Bhasin* to have "appropriate regard" for a counterparty's interests. The Court of Appeal held that "appropriate regard" had to be understood in the context of the good faith jurisprudence that preceded *Bhasin*. The Court of Appeal held that this notion looked back to earlier case law that saw the obligation of good faith as requiring parties to not engage in conduct calculated to undermine the other party's legitimate contractual interests by substantially nullifying the parties' bargain. Because the arbitrator found that Metro had acted honestly and failed to imply a term protecting Wastech's profit margin expectation, the doctrine of good faith was not available to entitle Wastech to any greater right.

The Supreme Court of Canada unanimously dismissed the appeal, but in doing so departed from the Court of Appeal's apparent suggestion that the recognized requirement that a contractual discretion must be exercised in good faith is limited to circumstances where the impugned exercise of discretion would "eviscerate" or "nullify" the parties bargain.

The majority held that the duty to exercise contractual discretion in good faith requires the parties to exercise discretion reasonably, which the Court understood to mean as consistent with the purposes for which it was granted in the contract. A breach of this duty occurs only where the discretion is exercised unreasonably, in a manner unconnected to the purposes underlying the discretion. The majority regarded this control of discretion as not an imposition of terms on an agreement, but rather as a means of enforcing the parties' bargain.

The key criterion is whether the impugned exercise of discretion related to the purposes for which the discretion was provided for in the agreement. It is not necessary to demonstrate that the impugned exercise of discretion substantially eviscerated or nullified the bargain. All that must be demonstrated is that the exercise of discretion was made unreasonably in the sense of being extraneous to the parties' bargain. In language questioned by Brown and Rowe JJ. in concurring reasons, a court must "form a broad view of the purposes of the venture to which the contract gives effect, and of what loyalty to that venture might involve for a party to it, and to take those broad purposes as providing the inherent limits for the exercise of the power."

"The majority held that the duty to exercise contractual discretion in good faith requires the parties to exercise discretion reasonably, which the Court understood to mean as consistent with the purposes for which it was granted in the contract."

Significantly, the majority also observed that the principle that contractual discretion must be exercised in good faith is a "general doctrine of contract law", not a term implied into bargains. As a result—like the duty of honest performance in *Bhasin*—it cannot be disclaimed by parties to a contract. In principle, the majority stressed that prohibiting the parties from contracting out of the obligation to exercise discretion in good faith is not an interference with freedom of contract because the express parameters of the agreement define the scope of the parties' discretion, and therefore the scope of the Court's ability to police it.

The facts of *Wastech* illustrate the limits of the principle enunciated in it. Because the arbitrator rejected the implication of a term that would protect Wastech's profit margin, and because the arbitrator found that Metro acted in a subjectively honest way for legitimate commercial reasons in making its decision, to impose on Metro an extra-contractual obligation to protect Wastech's margins would be imposing unbargained-for terms on the parties' relationship in the face of a deliberate decision not to include such an explicit term.

Concurring reasons of Brown and Rowe JJ., on behalf of themselves and Côté J., mirror Brown J.'s concurring reasons in *CM Callow*, particularly insofar as they caution against the importation into the common law of Civilian concepts, particularly of abuse of right. While the concurring judges express concern about the breadth (and source) of the majority's description of a court's power to police the exercise of discretion by parties to a contract, the disagreement more concerns the outer boundaries of the court's power. It does not appear to have erupted into the major philosophical rift reflected in disagreement between Brown J. and Kasirer J. in *CM Callow*.

Wastech is a significant development in Canadian contract law. Its principled exposition of the role of good faith in constraining parties' freedom to operate within the confines of a contractual relationship will seem like judicial moralizing to some. Nevertheless, and perhaps because an effort seems to have been made to bridge some of the disagreements reflected in the companion decision in *CM Callow*, the majority's approach positions itself not as an imposition on private bargains, but as a means of facilitating their true purpose.

There is much to commend this perspective. Twenty-first century life—and therefore 21st century contracts—are far removed from the world of discrete, one-off contractual relationships in which the modern law of contract was born in the late 19th and early 20th century. A generalized obligation of good faith that polices the exercise of contractual rights beyond mere identified breaches of express terms can facilitate private bargains by controlling transaction costs. It is difficult to control risk under an agreement if the only way to obtain protection from opportunistic behaviour that undermines a bargain is to include an express term prohibiting it.

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Corner Brook (City) v Bailey

On July 23, 2021, the Supreme Court of Canada released another major decision clarifying the law governing the interpretation of releases. In *Corner Brook (City) v Bailey* ("*Corner Brook*"), the Court reconciled the ancient "Blackmore Rule" governing the interpretation of releases with modern principles of contractual interpretation.

The Blackmore Rule set out in *London and South Western Railway v Blackmore* (1870) (L.R. 4 H.L. 610), stipulated that the general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time the release was given. For some time commentators struggled with how to reconcile this special rule with more recently-evolved principles governing the interpretation of contracts. The Blackmore Rule responded to a specific need that arose in the 19th century when most significant disputes about written instruments were not the detailed relational contracts we know today but were rather deeds. Deeds needed to be drafted to anticipate being construed many years after their execution when evidence of context may have completely disappeared. Governing rules of interpretation reflected this difficulty and favoured interpretations that were as independent of context as they could be.

In modern times, courts confront detailed commercial agreements far more frequently than they encounter deeds. Instantaneous written communication and the ease of producing and preserving documents makes information about the context within which contractual language is to be construed available and accessible to the courts. The Court's decision in *Sattva Capital Corp v Creston Moly Corp* ("*Sattva*") recognized and affirmed an evolving consensus that contractual interpretation is as much a context-sensitive factual exercise as it is a legal question applying rules of construction governing specific forms of language.

Before the Court's decision in *Corner Brook*, commentators began to question the continuing relevance of rules of interpretation specific to releases given the evolution of the rules of interpretation. A rule specific to releases could be expected to cause mischief to the extent that courts regarded it as necessary to overweight context and eschew a common-sense interpretation of releases in the belief that their task was not to interpret a document, but rather find what was specifically in the parties' contemplation.

The context of *Corner Brook* invited the Court to clarify whether the Blackmore Rule served any purpose in the aftermath of *Sattva*. It concerned a release given by the driver of a vehicle to settle a claim for negligence against the City of Corner Brook arising from a motor vehicle accident that also injured a City employee. The release was given in exchange for a comparatively small monetary payment. The employee sued the driver in a separate action for damages he sustained in the accident. A year after the release was signed, the driver issued a third-party claim against the City claiming contribution and indemnity against the City for amounts for which it might be held liable to the employee.

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The City pleaded the release, and the Supreme Court of Newfoundland and Labrador granted summary judgment against the driver based on the release. The Court of Appeal reversed this decision, holding that the release concerned the driver's claim for damages against the City and did not specifically contemplate a third-party claim in relation to the employee's claim against the driver. The Supreme Court of Canada restored the motion judge's decision. In doing so, the Court affirmed that "The Blackmore Rule and the jurisprudence pursuant to it should no longer be referred to, as the function that it had served has been subsumed entirely by the approach set out in *Sattva*. There is no principled reason to have a special rule applicable only to releases, in light of the contemporary approach to contract interpretation."

The Court did, however, observe that the peculiar character of releases supplies a vital aspect of context that can and should be considered in interpreting them. This may yield a restrictive interpretation of specific release language, "not because there is any special rule of interpretation that applies to releases, but simply because the broad wording of releases can conflict with the circumstances, especially for claims not in contemplation at the time of the release. The broader the wording of the release, the more likely this is to be so.

In so finding, the Court decisively set aside an anachronism that had informed the interpretation of releases while still preserving the functional approach to releases that animated prior jurisprudence. In so doing, the Court supplied necessary coherence without upsetting that prior case law.

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Corner Brook (City) v Bailey, 2021 SCC 29

Trial Lawyers Association of British Columbia v Royal & Sun Alliance Insurance Company of Canada

Trial Lawyers Association of British Columbia v Royal & Sun Alliance Insurance Company of Canada ("*Trial Lawyers Association*") is an important insurance case out of Ontario focused on the issue of promissory estoppel. While the Supreme Court of Canada agreed as to the result, and largely agreed as to the test for promissory estoppel, the majority opinion (Wagner CJ., and Moldaver, Côté, Brown, Rowe and Kasirer JJ.) and the concurring opinion (Karakatsanis J.) disagreed as to the role the representor's subjective knowledge plays in establishing the intention to affect legal relationship in the first part of the test for promissory estoppel.

Following a fatal motorcycle accident, the motorcycle driver's insurance company (Royal & Sun Alliance Insurance Company of Canada, "RSA") defended his estate in lawsuits initiated by others injured in the accident. Over a year into the litigation (and years following the accident), RSA learned that the motorcycle driver had consumed alcohol immediately prior to the fatal accident putting him in breach of his insurance policy. RSA stopped defending the motorcycle driver's estate and denied coverage. This resulted in a reduction of value of the policy to the statutory minimum. Years later, one of the lawsuits went to trial resulting in a judgement for one of the people injured in the accident.

When enforcing the judgement, the injured person disputed RSA's position that its exposure was confined to an applicable statutory minimum and advanced two grounds: (1) waiver by conduct, and (2) promissory estoppel.

The trial judge granted the injured person a declaration to recover judgment against RSA, finding that RSA waived its right to deny coverage by failing to take an off-coverage position and by providing a defence as the litigation progressed. Having found waiver by conduct, the trial judge did not consider the estoppel argument. The Ontario Court of Appeal allowed RSA's appeal rejecting the injured person's waiver argument. The promissory estoppel argument also failed on appeal because RSA lacked knowledge of the policy breach, such knowledge could not be imputed to RSA, and the injured person was unable to establish detrimental reliance.

The case reached the Supreme Court of Canada in an unusual way. The insurer and insured reached a settlement after leave was granted. The Court then granted the request of the Trial Lawyers Association of British Columbia to be substituted as the appellant. At the Court, the parties agreed that section 131(1) of the *Insurance Act* required that waiver be given in writing and that RSA did not do so. Therefore, promissory estoppel was the only issue before the Court.

The Court affirmed that promissory estoppel is an equitable defence that protects against the inequity of allowing the other party to resile from statements or assurances impacting their obligations where they were relied on to the detriment of the counterparty to whom they were directed.

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Promissory estoppel requires that:

1. The parties are in a legal relationship at the time of the promise or assurance;
2. The promise or assurance is intended to affect that relationship and to be acted on; and
3. The other party relied on the promise or assurance (to the promisee's detriment).

The Court found that the estoppel argument failed because RSA gave no assurance intended to affect its legal relationship with the injured person (a third party). Further, RSA lacked knowledge at the time it provided its defence that the motorcycle driver breached his policy by consuming alcohol.

The absence of an unequivocal assurance was sufficient to resolve the case. Yet a significant disagreement arose between the majority and the concurring opinion, written by Karakatsanis J., concerning the promisor's intention to affect the parties' legal relationship. The majority interpreted the intention to affect legal relations as requiring actual knowledge of the facts underlying the legal rights, such that the promisor could not intend to affect the legal relationship without actual knowledge.

Karakatsanis J.'s regarded the majority's addition of an absolute requirement of actual knowledge of facts as inconsistent with the conventional objective approach to contracts. The role of knowledge in promissory estoppel should be consistent with that objective analysis. The subjective intent of the promisor, which is unknowable to the promisee, is not an appropriate focus for promissory estoppel. Accordingly, in order to determine if the words or conduct objectively convey an intention to vary legal rights, the fact-finder must look at the entire context—including what the promisor knew or can be taken to have known. While there remains a role for knowledge, it is simply part of the context that informs the reasonable interpretation of the promisor's conduct. Despite this dispute, Karakatsanis J. agreed with the majority that RSA's conduct could not be interpreted as an unequivocal assurance that RSA would continue to provide coverage even if the policy was void.

The Court noted that the Trial Lawyers' arguments on promissory estoppel may be better framed as supporting estoppel by representation, but given the similarities between the doctrines, the Court resolved the appeal applying only the principles of promissory estoppel, while noting that a similar reasoning would apply if the claim was grounded in estoppel by representation.

Perhaps because of the unusual route by which it reached the Court, *Trial Lawyers Association* is a notable exception to this year's trend toward stability and coherence. By engaging in an unnecessary debate about the role of subjective knowledge in the second branch of the test for promissory estoppel, the *Trial Lawyers Association* case introduced some uncertainty into an otherwise well-established doctrine.

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Southwind v Canada

On July 16, 2021, the Supreme Court of Canada released its decision in *Southwind v Canada* ("*Southwind*") concerning the principles governing an award of equitable compensation. *Southwind* illustrates the importance of principles governing remedy in complex cases. Often the character of the alleged wrong attracts focus in a civil case to the exclusion of a coherent and predictable approach to remedy.

The facts of *Southwind* were compelling. It was a claim by the Lac Seul First Nation ("LSFN"), a First Nation occupying a reserve on the southeastern shore of Lac Seul northeast of Kenora, Ontario. LSFN's claim was for equitable compensation for flooding on LSFN's reserve. The flooding was caused by a deliberate decision by Canada in the early 20th century to promote a hydro-electric project that was later built under an agreement between Canada, Ontario, and Manitoba.

The Supreme Court of Canada observed that Canada was aware from the outset that flooding Lac Seul would cause "very considerable" damage to the reserve, leaving the LSFN "helpless to avert this calamity", such that that they viewed their future "with utter dismay".

Yet, despite repeated warnings from government officials about the impact that the project would have on the First Nation, the project advanced without the consent of the LSFN, without appropriate compensation, and without lawful authorization. Ironically—given the sacrifices suffered by the LSFN to make the hydro-electric project possible—the reserve itself was not provided with electricity until the 1980s.

LSFN commenced a claim in the Federal Court seeking equitable compensation against Canada for breach of fiduciary duty and breach of Canada's obligations under Treaty 3. The trial judge, in a decision affirmed by the Federal Court of Appeal, found that Canada breached its fiduciary duty to the LSFN in failing to secure compensation for the flooding of LSFN's reserve. The resulting award of equitable compensation, however, valued the LSFN's loss on the assumption that Canada could have simply expropriated the necessary land and compensated LSFN in an amount that reflected its value to the LSFN, but not the land's (greater) value to the hydro-electric project made possible by the flooding.

On an appeal by the LSFN, the case reached the Supreme Court of Canada on the issue of remedy. In the Court, Canada accepted the trial judge's finding of a breach of fiduciary duty. The Court allowed the LSFN's appeal and sent the case back to the trial judge to consider an award of equitable compensation that reflected the flooded land's value to the hydro-electric project.

In doing so, the Court clarified the principles of equitable compensation for breach of fiduciary duty. The Court emphasized the difference in principle between equitable compensation awarded for breach of fiduciary duty and the measure of common law damages available for other civil wrongs. Remedies available for negligence and breach of contract contemplate that the parties—including wrongdoers—will be concerned primarily with their own self-interest.

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By contrast, equitable compensation available for a breach of fiduciary duty is uncompromising. Its primary purpose is to enforce the trust-like right of the fiduciary duty to protect. While common law remedies are usually measured by the minimum conduct expected of parties acting in their own interest, equity can and does hold fiduciaries to standards of conduct surpassing the bare minimum that the law expects of them.

The law also does not concern itself primarily with punishing or deterring breaches. In some cases—as reflected in the theory of efficient breach—the law recognizes the economic efficiency of encouraging breach if the harm to the breaching party of offering performance exceeds the loss to the innocent party. Equitable compensation, by contrast, is especially concerned with deterring wrongful conduct by fiduciaries.

These core principles drove the result in *Southwind*. Karakatsanis J., writing for an eight-judge majority, could not accept the trial judge's award of damages calculated on the factual assumption that Canada could simply have expropriated the land. The principles governing equitable compensation required more given the specific context of this fiduciary relationship, including the LSFN's interest in the reserve land and the impact on LSFN.

This meant that Canada was required to attempt to negotiate a surrender and, if that was not possible, to ensure that the LSFN's interest was protected to the greatest extent possible. This entailed an obligation to negotiate compensation based on the best price that could have been obtained for the land's use for hydro-electricity generation. The Court determined the best price could be estimated based on comparable agreements with other First Nations who were compensated with respect to other hydro-electric projects causing flooding on reserve land.

The lone dissenting judge, Côté J., did not disagree with the substantive principles applied by the majority. Rather, she stressed the absence of an evidentiary foundation for compensation reflecting the value of the LSFN's lands to the hydro-electric project. The trial judge faced an almost binary choice between the measure offered by Canada based on expropriation principles, and the measure offered by the plaintiffs, which was based on the loss of an opportunity to negotiate a revenue-sharing agreement that the trial judge found would not realistically have been achieved.

Southwind illustrates the significant principled difference between equitable and common law remedies. Equitable remedies are specific and quasi-proprietary—they typically entail higher compensation unburdened by common law limiting principles. Equity will risk granting a windfall to a beneficiary to avoid under-compensating a victim of a breach of a trust-like duty.

It remains to be seen whether *Southwind* will influence fiduciary remedies in cases involving more commercial fiduciary relationships. Other fiduciary jurisprudence at the Court stresses the precise commercial context in which the duty arises in defining its scope. *Southwind* stressed that remedies for breach of fiduciary duty must tune themselves to the specific circumstances of the obligation, which in this case was very trust-like.

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Nelson (City) v Marchi

On October 21, 2021, the Court released its decision in *Nelson (City) v Marchi* ("*Marchi*"), which concerned the scope of public authorities' liability for negligence. It involved a very Canadian set of facts. The plaintiff sued the defendant, City of Nelson, when she was injured climbing a snowbank left by City snow clearing personnel in downtown Nelson after a heavy snowfall.

The trial judge dismissed the plaintiff's claim primarily on the basis that the City's decisions with respect to snow clearing were core policy decisions immune from liability in negligence. The Court of Appeal for British Columbia reversed this decision and the Supreme Court of Canada agreed.

Defining the liability of public authorities for negligence raises basic questions about the scope of negligence law. In the Court's decision in *R v Imperial Tobacco Canada Ltd*, the Court recognized the "elusiveness of a workable test to define policy decisions protected from judicial review."

The challenge is almost as old as modern negligence law that emerged in the wake of *Donoghue v Stevenson* ([1932] A.C. 562), which consolidated the idea that, without a contract, any person can owe a duty of care to those whom they ought reasonably to have in contemplation as being at risk when they act. This idea collided with the gradual acceptance in Crown liability statutes that governments should be subject to the same liability in tort as any private subject.

Governments are not, however, like any other private citizen. Just as negligence law has expanded, so has government reach. In this environment, few private injuries would escape a plausible argument that some government action or inaction caused them in a "but for" sense. Courts have had to grapple with the reality that without some special rule for the actions of governments, they would face crippling liability exposure.

The result was the exception for "core policy" decisions. While it has been traditionally analyzed as one component of the duty of care analysis, the Court in *Marchi* avoids identifying how exactly it relates to duty, describing it at one point as a "core policy defence" that governments bear the onus of establishing.

The *Marchi* trial judge's fixation on policy as a ground for denying the plaintiff's claim drove the Court to establish a more systematic framework for identifying "core policy" decisions that do not give rise to liability in negligence. The Court observed that identifying a policy decision (which, the Court stressed, is a question of law) requires assessing:

1. The level and responsibilities of the decision-maker;
2. The process by which the decision was made;

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3. The nature and extent of budgetary considerations; and
4. The extent to which the decision was based on objective criteria (such as technical standards or general reasonableness considerations, which are less likely to embrace policy concerns).

The ultimate goal, the Court affirmed, is to protect the separation of powers by insulating core government functions from the scrutiny of the civil justice system.

The facts of *Marchi* illustrate the subtlety of the distinctions it introduces. The City snow clearing employees were following government policy in clearing Nelson's downtown first, and snowbanks later. However, while clearing streets in the core was part of the City's policy, clearing parking spaces was not. City officials made an operational decision to clear parking spaces, thereby inviting residents to park in the stalls without providing a path through the snowbanks. This decision invited people to park, creating a foreseeable risk of harm to drivers who had to exit their cars and find a way over the snowbanks.

On one level, *Marchi* simply evolves the public authority liability jurisprudence. On a more fundamental level it illustrates an increasing focus on principled coherence in duty of care jurisprudence. It recognizes that in common law jurisdictions, duty of care is a functional concept—it does not describe or impose obligations (which is the function of standard of care). Rather, the duty analysis is a gateway that defines tort law as much as it is a creature of it.

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Grant Thornton LLP v New Brunswick

On July 29, 2021, the Supreme Court of Canada released its decision in *Grant Thornton LLP v New Brunswick* concerning the interpretation of language in limitations legislation governing discoverability of claims.

The case concerned an audit of the financial statements of a New Brunswick company that was prepared at the request of the province, who required it before issuing a loan guarantee to secure the advance of $50 million to the company. After receiving the required audit opinion, New Brunswick advanced the money to the company, only to see the company run out of working capital four months later.

After a receiver was appointed over the company's assets, New Brunswick engaged another accounting firm, who identified misstatements in the company's financial statements in a report issued on February 4, 2011.

New Brunswick did not commence a claim until June 23, 2014, even though the *Limitation of Actions Act* in the province stipulated a two-year limitation period. The motion judge granted summary judgment in favour of the auditor on the basis that New Brunswick's action was out of time. The New Brunswick Court of Appeal reversed this decision, holding that for a claim to be discovered, a plaintiff must have actual or constructive knowledge of the constituent elements of the claim, including that the standard of care was breached. New Brunswick did not possess this knowledge because it did not have access to the audit firm's working papers.

The Supreme Court of Canada reversed the Court of Appeal's decision and restored the decision of the motion judge. In doing so, the Court clarified the governing approach to the discoverability language in limitations statutes. While the Court stressed that the question is always one of statutory interpretation, the Court emphasized that clear language is required to displace the common law's conventional interpretation of limitations statutes. Under this approach, "a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence."

The language in the New Brunswick legislation referred to the plaintiff's actual or constructive knowledge that:

1. That the injury, loss or damage had occurred;
2. That the injury, loss or damage was caused by or contributed to by an act or omission; and
3. That the act or omission was that of the defendant.

The Court interpreted this language consistently with the common law rules governing the discoverability of a cause of action, specifying that a claim will be discoverable where a plaintiff acquires actual or constructive knowledge "of the material facts upon which a plausible inference of liability on the defendant's part can be drawn."

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Applied to New Brunswick's claim of professional negligence, this standard did not require New Brunswick to have knowledge that it could satisfy the constituent elements of a claim, including, notably knowledge that an applicable standard had been breached. Such granular knowledge is typically only in the possession of a plaintiff after discovery. If such knowledge were required before a claim accrued, many professional negligence claims could be postponed almost indefinitely, since in many such cases the plaintiff will not have access to sufficient information as applicable standards of care and the defendant's compliance with them until discovery.

The Court concluded that New Brunswick had sufficient knowledge on February 4, 2011 to understand that it had a plausible claim against the auditor, with the result that motion judge correctly dismissed the claim as statute-barred. It remains to be seen how the standard established by the Court will be applied in cases where a precise date of discoverability is less clear. While the Court observed that the discoverability threshold does not require knowledge of a duty of care or breach of a standard, it also framed the threshold as "actual or constructive knowledge of the material facts from which a plausible inference can be made that the defendant acted negligently."

This latter formulation may cause mischief in closer cases. "Negligence" is not something that ordinary people can assess as a matter of common experience. It is a term of art that typically refers to a failure to abide by a standard of conduct that applies to a defendant who is found to owe a duty of care to a plaintiff. It is difficult to reconcile the Court's reference to an inference "that the defendant acted negligently" with its clear direction that knowledge of duty and standard is not required. Since negligence in a layperson's terms can refer to a failure to abide by standards of reasonable conduct, a workable gloss on the Court's conclusion may be that a claim is discovered when the plaintiff has "actual or constructive knowledge of the material facts from which a plausible inference can be made that the plaintiff's injuries were caused by the defendant's failure to act reasonably."

These observations aside, the Court's decision in *Grant Thornton* adds reasoned coherence to the law of discoverability. This is a welcome development. Conventions in limitations legislation evolved during a time when civil liability typically flowed from discrete acts such as personal torts, trespass, or failure to pay debts. These are unusually either discovered when they happen or at least concern occurrences about which one either does or does not know. These conventions require updating to embrace complex claims.

More problematic issues arise with complex claims like environmental claims or claims for professional negligence. It is no accident that *Grant Thornton* was such a case. These cases require a more pragmatic balancing of the values that inform modern limitations law. The Court in *Grant Thornton* struck that balance in a way that will promote uniformity in the interpretation of limitations statutes.

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Sherman Estate v Donovan

More than four years ago, billionaires, Honey and Barry Sherman, were found dead in their Toronto home. The cause of their deaths has led to significant speculation, the homicide investigation continues, and the case remains unsolved.

During the appointment of estate trustees for Honey and Barry Sherman, the Trustees (plaintiffs in this case) sought a sealing order to spare the estate trustees and beneficiaries further intrusions into their private lives and to protect their safety. The Trustees argued that information in the court files would pose a safety risk and intrude on the beneficiaries' privacy given the unsolved and unexplained nature of the Shermans' deaths.

The application judge at the Ontario Superior Court granted the sealing order for an initial period of two years, with the possibility to renew, finding that harmful effects of the sealing order were substantially outweighed by the beneficial effects on the rights and interests of the beneficiaries. The Court of Appeal lifted the sealing orders finding that personal concerns, without more, cannot justify a sealing order, and that the privacy interest lacked a public interest component.

In this appeal, *Sherman Estate v Donovan*, the Supreme Court of Canada considered whether privacy can amount to a public interest, and whether the balance of openness in the open courts principle puts privacy at serious enough risk to justify sealing orders. The Court recognized that privacy is an important interest in the context of the test for discretionary limits on open courts, but that it is not decisive. There was also a motion for new evidence before the Court that did not require the Court's consideration.

Canadian courts recognize the constitutionally protected open court principle as a central feature in liberal democracies that helps make the justice system fair and accountable. There is a strong presumption in favour of open courts. Still, this public scrutiny can be a source of inconvenience and embarrassment to litigants. Unfortunately, this discomfort is not enough to overturn the heavy presumption of open courts.

The open courts principle is not absolute and an exceptional circumstance can arise to justify a restriction. The Court took this case as an opportunity to discuss the test for discretionary limits on open courts.

An applicant to a court seeking an exception to open court principles is guided by the two-step inquiry of (1) necessity and (2) proportionality as set out in *Sierra Club of Canada v Canada (Minister of Finance)* ("*Sierra Club*").

Writing for the unanimous court, Kasirer J. stated that *Sierra Club* rests on three prerequisites that the person seeking the limit (for example, a sealing order) must show (and all three must be met):

"In this appeal, *Sherman Estate v Donovan*, the Supreme Court of Canada considered whether privacy can amount to a public interest, and whether the balance of openness in the open courts principle puts privacy at serious enough risk to justify sealing orders."

1. Court openness poses a serious risk to an important public interest;
2. The order sought is necessary to present this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
3. As a matter of proportionality, the benefits of the order outweigh its negative effects.

This set of prerequisites preserves the essence of *Sierra Club*, and therefore cases previously decided under the *Sierra Club* test remain good law. The Court affirmed *Sierra Club*.

The Court determined that the broad privacy interest invoked by the Trustees did not qualify as an important public interest within the scope of *Sierra Club* (prerequisite #1, above), but this does not mean that privacy could never ground an exceptional measure such as a sealing order.

While agreeing as to the result, the Court disagreed with how the Court of Appeal dismissed the Trustees' claims that there is a serious risk to the interest in protecting personal privacy in this case. The Court found that the Court of Appeal was mistaken in the emphasis it placed on personal concerns as a means of deciding that the sealing orders failed to meet the necessity requirement.

The Court noted that certain "personal concerns" can coincide with important public interests. The importance of privacy is deeply rooted in Supreme Court jurisprudence. Privacy can not be rejected as merely a personal concern. But this does not mean that privacy generally is to be given decisive weight in the context of limits on open courts. When dissemination of personal information is an affront to a person's dignity, insofar as privacy can protect a person from this affront it is a public interest served under *Sierra Club*. Evidence is necessary to support this claim and unsubstantiated claims for the public interest of dignity will not be sufficient under *Sierra Club*. The applicant must show on the facts of the case that the important interest of dignity dimension of privacy is at serious risk.

In the present case, the Court found that the information in the court files was not of a highly sensitive nature and that lifting the sealing orders would not engage the dignity of the beneficiaries. The Court also found that there was no serious risk of physical harm to the beneficiaries and concluded that this is not an appropriate case for sealing order.

The presumption in favour of open courts will not be overcome lightly, and that disclosure of embarrassing or distressing information will not be sufficient for a sealing order. This decision will be an important precedent where sensitive personal information will become part of a court record.

"The Court determined that the broad privacy interest invoked by the Trustees did not qualify as an important public interest within the scope of *Sierra Club*, but this does not mean that privacy could never ground an exceptional measure such as a sealing order."

York University v Canadian Copyright Licensing Agency

In May 2021, the Supreme Court of Canada released its decision in the long-standing dispute between York University and the Canadian Copyright Licensing Agency ("Access Copyright"). The unanimous Court provided a straightforward, but still important, intellectual property decision in *York University v Canadian Copyright Licensing Agency (Access Copyright)* giving a clear distinction between public law and private law as it relates to tariffs, and comments strongly on the lower courts' treatment of fair dealing.

From 1994-2010, Access Copyright and York maintained a licence agreement which permitted university instructors to make copies of published works in Access Copyright's repertoire and set applicable royalties. In 2010, the relationship between Access Copyright and York deteriorated as licence negotiations were underway. York began using materials without payment. Unsure they would be able to reach an agreement before the expiry of the licence, Access Copyright filed a proposed tariff with the Copyright Board, assuming that Board approval of a tariff would create a mandatory legal relationship between Access Copyright and the universities.

The Board approved an interim tariff. York initially paid the royalties. In July 2011, York informed Access Copyright that it would not continue as a licensee, claiming that its copying constituted fair dealing, and that the interim tariff was not enforceable. In December 2019, the Board approved final tariffs. The Board did not comment on whether the tariffs created a mandatory legal relationship between Access Copyright and universities who do not sign a licensing agreement.

Access Copyright went to the Federal Court to enforce the interim tariff for York's copying activities. York counterclaimed for a declaration that any copying was protected by the fair dealing rights in the *Copyright Act*. The Federal Court found that the interim tariff was enforceable against York and that neither York's Fair Dealing Guidelines nor its actual practices constituted fair dealing. The Federal Court of Appeal allowed York's appeal on the tariff enforcement action but dismissed its appeal on the fair dealing counterclaim.

Access Copyright argued a theory of mandatory tariffs suggesting that a user would be liable to pay royalties set by the Copyright Board as soon as the user became responsible for any infringing use of work within the collective society's repertoire. Upon extensive review of the text, legislative context, purpose and supporting jurisprudence, the Court concluded that tariffs approved by the Copyright Board apply to voluntary licensees, but do not provide for mandatory royalties. The scheme in place required users to choose to be licensed on the approved terms. Access Copyright's appeal was dismissed by the Court and the tariff approved by the Copyright Board was not binding on York as it did not accept the licence.

"The unanimous Court provided a straightforward, but still important, intellectual property decision in *York University v Canadian Copyright Licensing Agency (Access Copyright)* giving a clear distinction between public law and private law as it relates to tariffs, and comments strongly on the lower courts' treatment of fair dealing."

While the Copyright Board can set fair and flexible payment structures, users (in this case the universities) maintain the right to choose to be licensed by the terms. The application of the collective society to gather royalties on behalf of copyright holders provides efficiencies for both the rights holders and the users, however, the collective society has limited remedies should a user choose not to be licenced or choose not to pay the royalties. The collective society does not have a collective infringement right. Consequently, copyright infringement against unlicensed users must be asserted by the rights holders themselves.

Given that the Court found that the tariff was not enforceable, a determination of York's appeal seeking declaratory relief was not necessary. Nevertheless, the Court provided comment on the Federal Court and the Federal Court Appeal's treatment of fair dealing. The Court agreed that the declaration sought by York should not be granted, but the Court stated that this agreement with the outcome should not be viewed as endorsement of the lower courts' reasoning on the fair dealing issue and identified "some significant jurisprudential problems".

The Court's objective in commenting on fair dealing was to correct what it viewed as the lower courts' errors in reasoning. A significant issue with the lower courts' analysis was approaching the fairness analysis exclusively from the institutional perspective. This approach overlooked the perspective of the students who use the materials—both perspectives need to be considered. This was the same error made by the Copyright Board in *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*. The Court reiterated that, as in this case, all relevant facts must be considered in order to determine the fairness of the dealing. When assessing a university's fair dealing practice, the question is whether the practice actualizes the students' right to receive the material for education purposes in a fair manner, consistent with the balance of user and creator's rights.

"The Court's objective in commenting on fair dealing was to correct what it viewed as the lower courts' errors in reasoning. A significant issue with the lower courts' analysis was approaching the fairness analysis exclusively from the institutional perspective and overlooking the perspective of the students who use the materials."

Montréal (City) v Deloitte Restructuring Inc

On December 10, 2021, the Supreme Court of Canada released *Montréal (City) v Deloitte Restructuring Inc* ("*SM Group*"), a significant decision concerning the law of compensation and set-off in *Companies' Creditors Arrangement Act* ("CCAA") restructurings. Specifically, it concerned a problem unique to CCAA restructurings—namely how the law of compensation (or set-off) works when a creditor incurs a liability to a CCAA debtor while the debtor is under CCAA protection and seeks to set off against that liability amounts that the debtor owes to the creditor under transactions that preceded the restructuring.

Common and civil law jurisdictions answered this question of "pre-post" set-off (or compensation) differently. The Court of Appeal for Quebec had interpreted its earlier decision in *Quebec (Agence du revenu) v Kitco Metals Inc* ("*Kitco*") as prohibiting "pre-post" set-off. The sparse common law jurisprudence on the point was ambivalent.

A majority of the Supreme Court of Canada overruled *Kitco* and established that "pre-post" set-off or compensation is a matter of discretion for the CCAA supervising judge exercising the broad powers under section 11 of the CCAA.

The facts of *SM Group* illustrate the challenges courts face in managing rights of set-off in an active restructuring where the debtor continues to operate. SM Group is a consulting engineering firm that provided work for the City of Montreal both before and after it became subject to a CCAA initial order. It also had entered into a Voluntary Reimbursement Program agreement under Quebec's Bill 26 in connection with allegations of collusion connected with City contracts. The City also asserted civil claims connected with other allegations of collusion.

The City asserted that it was entitled to set-off these claims—which related to pre-filing obligations—against amounts owing to SM Group for services provided to the City post-filing. On an application by the Monitor for a declaration that compensation could not be affected in connection with the post-filing obligations, both the CCAA judge and the Court of Appeal for Quebec found that the decision in *Kitco* precluded this "pre-post" compensation and that the City's argument that the pre-filing amounts were attributable to fraud was not an exception to the rule in *Kitco*.

A six-judge majority of the Court affirmed the decision of the Court of Appeal. The Court nevertheless overruled the absolute bar established in *Kitco*, finding that a supervising judge has the discretion to stay the exercise of a right to pre-post compensation, or set-off, invoked by a creditor under the civil law or the common law. However, the supervising judge may refuse to stay this right, or may lift such a stay, only in exceptional circumstances, given the high disruptive potential of this form of compensation. Claims to set off pre-filing indebtedness against post filing amounts owing to the insolvent need to be approached with care.

"*Montréal (City) v Deloitte Restructuring Inc*, a significant decision concerning the law of compensation and set-off in *Companies' Creditors Arrangement Act* restructurings."

As the Court observed, "If a creditor could rely on compensation to refuse to pay for goods or services supplied by the debtor during the status quo period, the restructuring could be torpedoed."

An important dimension of *SM Group*—and one of the reasons it was necessary to consider the set-off issue—was that the Court refused to find that SM Group's liabilities were debts "resulting from obtaining property or services by false pretences or fraudulent misrepresentation" within the meaning of paragraph 19(2)(d) of the CCAA. Such debts cannot be compromised under the CCAA unless specifically provided for with the consent of the creditor to which they relate.

Under that paragraph, a creditor that seeks to avoid the stay must establish, on a balance of probabilities, the following four elements:

1. The debtor made a representation to the creditor;
2. The representation was false;
3. The debtor knew that the representation was false; and
4. The false representation was made to obtain property or a service.

The City did not establish these requirements concerning its claims against SM Group, such that the claims were subject to the CCAA stay. In deciding whether the Court's broad discretion under the CCAA should be exercised to allow pre-post compensation, the Court stressed that the interest of all stakeholders in the CCAA process—and not simply those of the creditor claiming set-off—needed to factor into whether pre-post set-off should be allowed. The public interest is a relevant factor, but the public interest in a successful restructuring—which includes the interests of employees whose jobs are threatened or of the community in which the debtor company operates—also must be weighed against the public interest in deterring the kinds of claims advanced by the City against SM Group.

In rejecting the bright-line rule in *Kitco*, the Court affirmed a principled approach to set-off in CCAA restructurings that is rooted in its core purpose. While in other 2021 private law cases like *Northern Regional Health Authority v Horrocks*, the Court stressed the need for bright-lines, its emphasis on flexibility is understandable in an insolvency context.

CCAA restructurings take many different forms. Routinely allowing pre-post set-off in insolvencies can create challenges for debtors continuing to carry on business after an initial order, since they will not be able to offer reasonable certainty of payment. Nevertheless, the core principle animating the CCAA is the flexibility typified by the broad power to make orders under section 11. The result in *SM Group* signals the importance the Court places on preserving flexibility to accommodate circumstances that it may not be easy to foresee.

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Northern Regional Health Authority v Horrocks

In October, the Supreme Court of Canada released *Northern Regional Health Authority v Horrocks* ("*Horrocks*"), which concerned whether a labour arbitrator or a human rights commission had exclusive jurisdiction over an employee's claim to have been discriminated against when dismissed from her employment. *Horrocks* concerned a ruling by an adjudicator under the Manitoba Human Rights Code that the adjudicator had jurisdiction to consider a complaint by the employee that her dismissal amounted to discrimination based on a disability (alcoholism).

The adjudicator found that she had jurisdiction over the complaint that was not ousted by the exclusive jurisdiction of a labour arbitrator. This decision was set aside on judicial review but restored by the Manitoba Court of Appeal. The appeal from this decision to the Supreme Court of Canada gave the Court the opportunity to clarify whether the principles in *Weber v Ontario Hydro* ("*Weber*") (which precluded most court actions concerning issues subject to the exclusive jurisdiction of labour arbitrators) apply equally where the contest is between the jurisdiction of a labour arbitrator and the jurisdiction of another statutory tribunal.

Brown J., writing for a majority of six of seven sitting judges, held that the *Weber* principles apply equally to resolving competing jurisdictional lines between labour arbitrators and other statutory tribunals, including human rights commissions. Where labour legislation provides for the final settlement of disputes arising from a collective agreement, the jurisdiction of the decision-maker empowered by that legislation—generally, a labour arbitrator—is exclusive. Competing statutory tribunals may carve into that sphere of exclusivity, but only where such legislative intent is clearly expressed. Significantly, the strong judicial tendency to respect the exclusivity of labour arbitrators' jurisdiction does not depend on the nature of the alternative tribunal.

In rejecting the discretionary approach proposed by Karakatsanis J. in dissent, the majority enunciated a strong preference for clarity and coherence. It would have been consistent with the statutory language for the majority to have adopted the dissent's tolerance for non-exclusive jurisdiction. But the majority, carrying forward the values of certainty and predictability enunciated in its earlier decision in *Canada (Minister of Citizenship and Immigration) v Vavilov* ("*Vavilov*"), established a strong sensitivity to "the concern expressed in *Vavilov* for predictability, finality and certainty in respect of jurisdictional lines between competing tribunals. Conditioning the effect of a mandatory dispute resolution clause on the nature of the competing forum would result in persistent jurisdictional confusion, leaving members of the public unsure 'where to turn in order to resolve a dispute'." Affirming that the same principles apply in every context avoids this state of affairs.

"In rejecting the discretionary approach proposed by Karakatsanis J. in dissent, the majority enunciated a strong preference for clarity and coherence."

Conclusion

Horrocks typifies the Court's 2021 private law jurisprudence and illustrates an approach to private law cases that mirrors the disciplined coherence that the Court enunciated in 2019 when it released *Vavilov*. The pre-*Vavilov* jurisprudence concerning judicial review was burdened by an essentialism that preferred defensibility at the level of policy over clarity and reasoned coherence. This year's private law jurisprudence—typified by cases like *Wastech* and *Horrocks*—reflect an approach that balances defensibility at the level of policy with the need to establish pragmatic rules that are understandable, readily applicable in practice, and rooted in the specific circumstances that give rise to them.

Wastech could very well have accepted the plaintiff's claimed right to ask a tribunal to police the fairness of the respondent's conduct by standards of commercial morality introduced by the Court. *Horrocks* could have adopted the dissenting judge's more open-ended accommodation of multiple remedial paths available to employees subject to collective agreements. The Court's refusal to do so illustrates a concern with stability and coherence. As we saw with the *Trial Lawyers Association* case, and less problematically, in *SM Group*, this trend was not entirely uniform. But it was noticeable, and welcome. An approach to law that seeks perfect justice or fairness in every case—even assuming such a thing existed—carries with it systemic transaction costs in the form of uncertainty and expense. This year's private law decisions—while they do not perfectly reflect this approach—evidence an unmistakeable trend in that direction.

"This year's private law jurisprudence reflect an approach that balances defensibility at the level of policy with the need to establish pragmatic rules that are understandable, readily applicable in practice, and rooted in the specific circumstances that give rise to them."

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