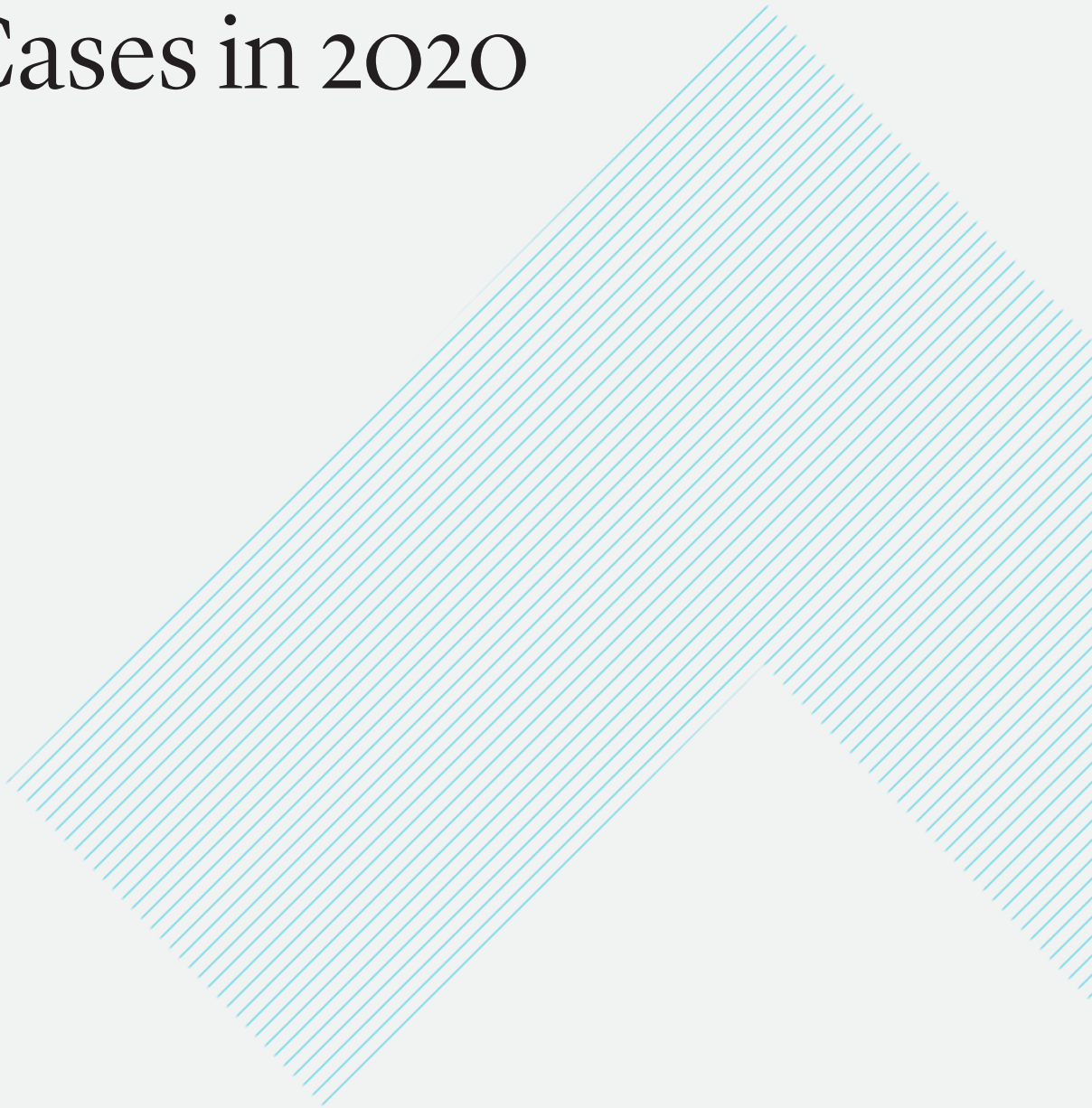
Public Values, Private Law: The Key SCC Private Law Cases in 2020



Lenczner Slaght

Introduction

In 2020 the Supreme Court of Canada tested the boundaries between public and private law, releasing several decisions in which the Court struggled with the role that Courts should be playing in holding parties to public standards of justice and fairness in their private dealings. What follows is a case commentary on those key decisions.

Case Commentary

2020 was an unprecedented year for private law cases at the Supreme Court of Canada. The Court began the year with the groundbreaking decision in *Nevsun Resources Ltd v Araya*, where a divided court debated the role of public international law norms in defining private civil remedies. It ended the year with another groundbreaking decision in *C.M. Callow Inc v Zollinger*, concerning the scope of the duty of honest performance, where the Court, while reaching a clear result, showed once again deep disagreements about how public norms of fairness and justice should inform how the Court thinks about private obligations.

Along the way, the Court made some radical changes, abolishing the doctrine of waiver of tort (in *Atlantic Lottery Corp Inc v Babstock*) and expanding the doctrine of unconscionability (in *Uber Technologies Inc v Heller*) in new ways that could invite greater scrutiny of standard-form contracts.

The issues debated in these cases—in many cases opening deep fault lines in the Court—are more than simply philosophical disagreements. At the level of principle and outcome, this year has shown (albeit not universally) a marked trend. A growing consensus in the Court is forming, showing an increasing willingness to resolve private disputes by applying more universal "public" norms in ways that undermine the common law's traditionally strong preference for individual autonomy and private ordering as the primary source of civil obligations.

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Nevsun Resources Ltd v Araya

The Court kicked off this public-private debate, and began 2020 with a bang, releasing a decision that opened the door to a wholly new private law cause of action rooted in the violation of public international law norms taking place in another country.

In *Nevsun*, three Eritrean conscripts alleged that they were forced to work in a mine in which a Canadian company, Nevsun, held an indirect majority interest. In addition to forced labour, they alleged that they were subjected to violent, cruel, inhuman and degrading treatment. They claimed damages against Nevsun for breaches of customary international law norms prohibiting this treatment. They also claimed damages for domestic torts based on the same conduct, including conversion, battery, "unlawful confinement" (false imprisonment), conspiracy, and negligence. The defendant, Nevsun, moved to strike the claims, alleging that the claims disclosed no reasonable cause of action for breach of customary international law and that the act of state doctrine precluded Canadian courts from assessing the legality of sovereign acts of the Eritrean State committed in Eritrea. Nevsun's motion to strike the claims was unsuccessful before both the British Columbia Supreme Court and the British Columbia Court of Appeal.

In a sweeping decision, a majority of a deeply divided Supreme Court of Canada dismissed the appeal, allowing the claims under customary international law to proceed. Abella J. for the majority and Brown J. for the dissenting judges espoused sharply different approaches to private law, with Abella J. finding no reason why Canadian courts could not apply customary international norms by recognizing a civil claim between private parties for breach of those norms. Brown J. strongly disagreed, noting the absence of any principled foundation for the majority's reliance on public international law norms to create a private civil claim in Canada based on conduct that occurred in a foreign country. As Brown J. noted, there is no consensus capable of creating a customary international law norm granting private parties causes of action to vindicate such norms, noting the irony that the majority would allow these private claims even though Canadian courts would not recognize similar private law claims for breach of domestic statutes such as the criminal code.

Because it arose on a pleadings motion Nevsun did not create a cause of action. But the fact the majority was prepared to consider the issue at all opened up a larger debate that continued through the year about how "public" norms of justice and fairness should influence matters of private law.

Calludus and *Capital Steel*: A Coherent Approach to Insolvency

Tellingly, the disagreement among members of the Court was less acute in the two major insolvency decisions released this year, *9354-9186 Québec inc v Callidus Capital Corp* ("*Callidus*") and *Chandos Construction Ltd v Deloitte Restructuring Inc* ("*Capital Steel*").

Callidus was a unanimous decision, and *Capital Steel* included a lone dissent by Côté J. *Callidus* was a CCAA case concerning the scope of a supervising judge's discretion to disqualify a creditor from voting on a plan where its vote is vitiated by an improper purpose. It also considered whether a supervising judge can approve a litigation funding arrangement as interim financing where the litigation involved a claim against the secured creditor whose vote was disqualified. *Callidus* was noteworthy primarily because of what it didn't decide. The issue of whether and on what grounds it was appropriate for Callidus to renounce its security and vote on its own plan of arrangement could have led the Court into a canyon that would have caused it to grapple with principles of equitable subordination. By eschewing fixed rules, both as to creditor voting and as to the appropriateness of litigation funding as interim financing, the Court preserved the wide discretion governing CCAA supervising judges to pragmatically police the good faith of stakeholders in large insolvencies.

Similarly, in *Capital Steel*, 2020's other major insolvency decision, a strong majority of eight judges reaffirmed the continuing relevance of the anti-deprivation rule, a principle of public policy that invalidates provisions in private agreements that remove value from a debtor's estate in the event of an insolvency. *Capital Steel* concerned a provision in a private agreement between a contractor and subcontractor in which the subcontractor agreed to pay the contractor an inconvenience fee of 10 per cent of the subcontract price in the event the subcontractor became bankrupt.

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Rejecting arguments that the anti-deprivation rule is unnecessary in modern insolvency regimes, a majority affirmed that the anti-deprivation rule depends on a provision's effects, not its intention. As a result, it is not relevant that a provision may have had a bona fide commercial justification. This was the main source of disagreement between the majority and the dissent: Côté J. would have upheld the decision because its intention was to compensate the contractor for the disruption of a subcontractor insolvency, not to improve the contractor's position in an insolvency.

Insolvency law involves a subtle but established social compromise between private law entitlements and public priorities concerning the orderly administration of the affairs of insolvent persons. The compromise between private wants and public needs is acute in the operation of the anti-deprivation rule at issue in *Capital Steel*. While contracts enforce and encourage private exchange, a clause that offends the anti-deprivation rule is not a true private exchange. A party agreeing to move value out of its estate in bankruptcy doesn't truly give up anything—that party is spending its creditors' money. The dynamic in cases like *Capital Steel* illustrates that where established law balances public values and private agreements, the Court this year found it much easier to find a consensus.

Public Values and Private Interests: The Anti-SLAPP Cases

On September 10, the Supreme Court of Canada released its decisions in two appeals concerning section 137.1 of the *Courts of Justice Act*, the so-called "anti-SLAPP" provisions enacted to control the use of litigation to silence speech on matters of public interests.

In *1704604 Ontario Ltd v Pointes Protection Association*, a unanimous Court outlined the approach to these provisions, affirming comparatively relaxed approaches to the first two branches of the tests set out in section 137.1. The section requires that the moving party defendant establish that the lawsuit "arises from" expression relating to a matter of public interest, whereupon the plaintiff must satisfy a motions judge that there are grounds to believe that their underlying proceeding has substantial merit and the defendant has no valid defence. The Court in *Pointes Protection* made it clear that the fundamental crux of the anti-SLAPP provisions is the final branch of the test, which requires the plaintiff to satisfy the motions judge that the alleged harm to the plaintiff outweighs the public interest in protecting the expression.

The unanimity of the Court's approach in *Pointes Protection* is unsurprising. The Court was dealing with a reasonably clear case concerning a recent statute backed by an extensive consultation process that yielded legislation having a clear purpose. On the facts of *Pointes Protection*, the Court found it easy to apply section 137.1 to dismiss the plaintiff's claim. *Pointes Protection* concerned breach of contract allegations against an association and six of its members based on testimony given by one of the association's members at an Ontario Municipal Board (OMB) hearing concerning a proposed development of the plaintiff. The plaintiff claimed that the testimony violated an agreement between the association and the plaintiff on the withdrawal of a previous judicial review application. The Court found that the plaintiff's action was of questionable merit in that

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it was based on a strained interpretation of the agreement being sued on, and that in any event, the comparatively insignificant harm suffered by the developer could not outweigh the public interest in protecting the defendant's right to express itself on the significant environmental and land use issues informing the OMB proceeding.

The Court's unanimity in *Pointes Protection* contrasts with the treatment of its companion anti-SLAPP case, *Bent v Platnick*. Unlike *Pointes Protection*, *Bent v Platnick* really turned on the role public norms should play in establishing the requirements of the defences to the tort of defamation. *Bent v Platnick* involved comments made by a lawyer on a listserv concerning alleged misconduct of a physician who was retained by insurance companies to review and integrate other physicians' assessments of persons injured in motor vehicle accidents to assist insurers in determining the accident victim's level of impairment. A narrow majority of the Supreme Court of Canada accepted that the plaintiff satisfied his onus under section 137.1, such that the claim should be permitted to proceed. While the Court agreed that the lawyer's statements met the public interest threshold, the majority noted that "the right to free expression does not confer a license to ruin reputations".

The majority determined that there were grounds to believe that the plaintiff's claim had substantial merit and that there were grounds to believe that the likeliest viable defences—justification and qualified privilege—would not be established. The plaintiff satisfied the Court that there were grounds to believe that the defendant's defence of justification would not be successful since the plaintiff led evidence that one of the defendant's statements—that the plaintiff "changed" another doctor's report—was not substantially true. Similarly, the majority also found that there were grounds to support a finding that even if the listserv discussion was an occasion of qualified privilege, that the defendant was reckless as to the truth of certain of statements made, and that the defendant exceeded the scope of the qualified privilege. The Court found that, given what the majority viewed as the gratuitous nature of the personal attacks to the plaintiff, the substantial and tangible harm alleged to have been suffered by the plaintiff outweighed the public interest in protecting the plaintiff's expression.

By contrast, Abella J., on behalf of herself and Karakatsanis, Martin and Kasirer JJ., focused on the first instance judge's finding that the defendant acted without malice and determined that the scope of the qualified privilege was sufficiently broad to justify naming the plaintiff.

The crux of the disagreement between the majority and the dissent was in the weight placed on the importance of the defendant's own perception of her obligation to inform the listserv's members about misleading expert reports that disadvantaged the vulnerable clients for whom they all acted. While this kind of disagreement typically should take place in the "balancing" stage of the anti-SLAPP analysis, it is noteworthy that it informed each judgment's treatment of the substantive requirements to establish a qualified privilege defence. The debate turned fundamentally on whether the personal attack on the plaintiff was required to achieve the objectives that the defence of qualified privilege protects. Côté J., writing

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for herself and Wagner C.J. as well as Moldaver, Brown and Rowe JJ., gave qualified privilege a narrow scope, accepting that a statement benefits from qualified privilege not simply where the statement is relevant to the discharge of the duty giving rise to the privilege, but necessary to its discharge. By contrast, Abella J., on behalf of herself and Karakatsanis, Martin and Kasirer JJ., would have accepted the viability of a defence of qualified privilege that extended to identifying the specific doctor who (in the dissent's view) the defendant reasonably believed authored misleading assessment reports.

The anti-SLAPP decisions, like the insolvency decisions released in 2020, illustrate that the Court has little difficulty interpreting established law that expressly applies public policy priorities. Disagreements seemed to arise, however, whenever the Court found itself required to weigh competing public values and private interests. In the case of *Bent v Platnick*, this debate concerned the scope of a defence (qualified privilege) that balances the public interest protected by the privilege and the private interest of the plaintiff in protecting its reputation.

***Babstock*: The Death of Waiver of Tort**

On July 24, the Supreme Court released its decision in *Atlantic Lottery Corp Inc v Babstock* ("*Babstock*"), which finally resolved the question whether "waiver of tort" could be advanced as a free-standing cause of action for disgorgement of wrongfully acquired gains. While the Court reached a clear consensus as to whether a cause of action for waiver of tort exists in Canada, familiar public/private fault lines emerged when the Court assessed the scope of disgorgement claims for breach of contract.

Babstock was a proposed class proceeding advanced by two Newfoundland residents against the defendant Atlantic Lottery Corp. The plaintiffs sought to certify a class proceeding against Atlantic Lottery on behalf of players of Video Lottery Terminals (VLTs). The claim alleged that the VLTs operate in an inherently deceptive manner, so much as to make them a game "similar to" three-card monte that contravened the prohibition in the Criminal Code against such games.

The plaintiffs relied on three causes of action, "waiver of tort", breach of contract, and unjust enrichment. Because they wished to certify a class proceeding, the plaintiffs eschewed any claim for specific losses, but instead advanced their legal theories to get at the profits earned by Atlantic Lottery attributable to VLTs. Citing the uncertainty surrounding the doctrine of waiver of tort, both Newfoundland courts below certified the proposed class proceeding. The Supreme Court of Canada allowed Atlantic Lottery's appeal, unanimously concluding that "waiver of tort" is not a free-standing cause of action in Canada and that the way VLTs were operated did not violate the criminal code.

"Waiver of tort" is a doctrine of uncertain ambit that, when advanced as a cause of action, allowed a plaintiff to claim a defendant's profit earned from committing a wrong that is actionable without proof of damage (such as conversion or trespass). The issue before the Court in *Babstock* was whether there existed a wider doctrine allowing the reversal of profits solely

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on the basis that they were somehow earned wrongfully. As extended, the doctrine would create a "super-tort" allowing recovery for conduct like breaches of statute and negligence without the constraints evolved to limit the scope of tort recovery.

Even though the Supreme Court of Canada itself refused to strike a waiver of tort claim in *Pro-Sys Consultants Ltd v Microsoft Corporation*, Brown J. determined that it was time for the Court to definitively declare that waiver of tort does not exist as an independent claim. In doing so, Brown J. affirmed the continuing relevance of the distinction between civil wrongs that depend on proof of damage and those that do not. A doctrine allowing a plaintiff to claim profit in the hands of a defendant alleging unspecific wrongs unmoored from identifiable causes of action turns tort law into an instrument of public law, "a convenient conduit of social consequences" rather than means of remedying harm in the form of a recognized loss suffered by one person at the hands of another. In unanimously rejecting waiver of tort as a cause of action, the Court as a whole strongly affirmed the need to maintain the integrity of private law as a distinct sphere.

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The Court, however, again illustrated in *Babstock* its internal divide as to how precisely "public" values should influence the content of private law. The front for this battle was the Court's treatment of the plaintiffs' claim for breach of contract. Brown J., writing on behalf of himself and Abella, Moldaver, Côté and Rowe JJ., struck the claim for disgorgement of profits as a remedy for the Atlantic Lottery's alleged breach of contract, while Karakatsanis J., writing for herself and Wagner CJ as well as Martin and Kasirer JJ., would have allowed the claim for disgorgement to proceed. The disagreement on this point reflected a philosophical dispute about the legitimacy of the plaintiff's interest in preventing the defendant's profit-making activity, which the entire court accepted was the chief criterion for allowing gain-based remedies for breach of contract. The majority could see nothing other than the plaintiffs' contention that they did not receive what they bargained for as a justification for claiming the defendant's profits, while the dissent was prepared to leave room to award lost profit damages based on the pleaded allegations that the plaintiffs were vulnerable to the defendant's abuse of its power and that the defendant's breach was self-interested, deliberate, and in bad faith.

This division reflected itself as well in the disagreement between the majority and the dissent concerning the certifiability of a claim for punitive damages. The dissenting judges determined that the plaintiffs' allegations of bad faith, typified in the allegedly misleading way that VLTs operated, could potentially support a claim for punitive damages. The majority disagreed, holding—strikingly—that "not every contract imposes actionable good faith obligations on contracting parties." This disagreement as to whether and how social values of honesty can and should be policed through contract law would bubble to the surface later in the year when the Court was called upon to consider the good faith duty of honest performance in the Court's final private law decision of 2020, *C.M. Callow Inc v Zollinger*.

Uber: Conscience and Contract

The public-private debate was especially acute almost half-way through 2020, when the Supreme Court of Canada released its much-anticipated decision in *Uber Technologies Inc v Heller* ("*Uber*"). In *Uber* the plaintiff Heller was an Uber Eats driver who commenced a class proceeding against Uber alleging that Uber breached Ontario employment standards legislation in dealing with its drivers as independent contractors. Uber successfully stayed the proceeding before Perell J., relying on an arbitration clause that required disputes under Uber's online contract with its drivers to be resolved by arbitration in the Netherlands under the Arbitration Rules of the International Chamber of Commerce. These Rules imposed up-front costs of US $14,500 simply to commence an arbitration proceeding, which fees equaled a sizeable proportion of Mr. Heller's annual income as an Uber Eats driver. The Ontario Court of Appeal reversed the stay decision, finding both that on Heller's pleaded case the arbitration clause was invalid because it contracted out of the *Employment Standards Act*, and that the clause was unconscionable.

On appeal to the Supreme Court of Canada, eight of the nine judges hearing the appeal agreed that the clause was unenforceable, but the differences in reasoning disclose fault lines in the Court's approach to how exactly "public" norms external to a contract should inform its interpretation. Abella and Rowe J., writing for a seven-judge majority addressed the problem directly at the level of contract law. Tinkering with the framework set out in *Dell Computer Corp v Union des consommateurs* and *Seidel v TELUS Communications Inc*, for when a court should decide if an arbitrator has jurisdiction over a dispute instead of referring that question to the arbitrator, the majority decided that a Court could legitimately determine the enforceability of an arbitration clause where the party seeking to avoid arbitration establishes that the process chosen by the parties may be inaccessible to one of them. Having crossed that threshold, the majority went on to find that the arbitration clause in Uber's agreement was unconscionable.

The majority's finding of unconscionability might be the most significant development in the common law of contract for over a decade. The majority unequivocally affirmed that the test for unconscionability has only two steps, and that it applies not merely to the process by which an agreement is reached, but to the substantive fairness of the transaction. A finding of unconscionability can now be made where the party attacking a transaction establishes (a) an inequality of bargaining power; and (b) an improvident bargain. It is not necessary to establish a causal connection between the inequality of bargaining power and the improvident bargain, such as by demonstrating the stronger party actually took advantage of the weaker party. As both Côté J. in dissent and Brown J. in his concurring reasons noted, this approach to unconscionability will have major implications for Courts' treatment of contracts of adhesion, a fact that the majority overtly embraced. Abella and Rowe J. observed that their decision "encourages those drafting such contracts to make them more accessible to the other party or to ensure that they are not so lopsided as to be improvident, or both."

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This is, as Brown J. observed, revolutionary, and will have major and unpredictable implications for shrink-wrap agreements and other contracts between large corporations and individual consumers. This is especially the case in light of the availability of class proceedings and the general amenability to certification of claims based on standard form agreements. It is now easier to plead that a clause is unconscionable, thereby opening up a wide scope for judicial recalibration of consumer agreements. This broad-based approach to the substantive fairness of contracts contrasts with Brown J.'s more measured approach to Uber's clause, which would have struck it down simply because it prevented any meaningful access to a remedy for breach, such that it was void on public policy grounds.

***Maple Leaf Foods*: Tort Law and Private Risk Allocation**

The boundary between contract and tort formed another front for the year's debate about the role of public values in regulating private disputes.

On November 6, the Supreme Court of Canada released *1688782 Ontario Inc v Maple Leaf Foods Inc* ("*Maple Leaf Foods*"), a significant decision concerning the scope of recovery in negligence for purely economic losses, an issue that has vexed the Court since it adopted as the framework for such cases the decision of the House of Lords in *Anns v Merton London Borough Council* ("*Anns*"). That case radically transformed the law of negligence, suggesting that recovery of damages beyond personal injury and property losses could be available to a plaintiff whenever he or she could establish that it was foreseeable that a defendant's negligence could cause economic losses. The only control on the scope of this wide duty was the *Anns* court's allowance that public policy considerations could exclude or limit the scope of that duty.

English courts quickly realized that the *Anns* duty concept was unworkable and departed from it almost immediately. It took Canadian courts more than 20 years to unequivocally accept, in *Cooper v Hobart*, that mere foreseeability of harm is not enough to impose on one person responsibility to safeguard the economic interests of others. Almost a further 20 years have elapsed since the Court's decision in *Cooper*, yet Canadian law still struggles to find coherent language to explain when one person can drag another into court to recover purely economic damages flowing from allegedly unreasonable conduct. In *Maple Leaf Foods*, the issue again arose, this time in a proposed class proceeding brought on behalf of a group of Mr. Sub franchisees against Maple Leaf, a supplier of ready-to-eat meats, for economic damages suffered as an indirect result of a product recall undertaken by Maple Leaf after it was discovered that some of its meats were contaminated with listeria.

The key aspect of the damages claim that made the case legally difficult was that the losses claimed by the franchisees were not losses occasioned directly from the contaminated product. The franchisees claimed to have suffered economic loss and reputational injury due to their association with the contaminated meat products. Maple Leaf moved for summary judgment dismissing the claims on the basis that it owed no duty of care to protect the franchisees. The motions judge ruled that Maple Leaf owed a duty of care to the franchisees. The Ontario Court of Appeal

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reversed that decision and a narrow majority of the Supreme Court of Canada agreed, holding that Maple Leaf did not owe the franchisees a duty of care.

The majority and dissenting reasons reveal a philosophical disagreement about the role duty of care plays in negligence analysis, a disagreement that reflects a broader debate concerning the role of private law. In the reasons of the majority, Brown and Martin JJ. writing for themselves and Rowe, Moldaver, and Cote JJ., saw the concept of duty of care from a traditional point of view—as requiring some element of voluntary assumption of responsibility in the form of an express or implied undertaking by the plaintiff on which the plaintiff can somehow be taken to have relied. While as a matter of private law, everyone reasonably expects others to take care to avoid causing injury to one's person or property, the right to expect others to exercise care to avoid causing economic harm is a valuable right that usually should be bargained for, usually by contract. As the majority noted, this right should only be given to a plaintiff where it can demonstrate that some undertaking of responsibility on which the plaintiff relied caused a change in position that the plaintiff can legitimately ask the defendant to restore. Recognizing a general obligation to take care not to injure others based on mere closeness can create unmanageable uncertainty, since, as the majority accepted "we live in a highly interactive world, where each of our fortunes are constantly affected, sometimes trivially, sometimes significantly, by decisions made or actions taken or avoided [by others]."

By contrast, rather than focusing on undertakings and reliance, Karakatsanis J., writing for herself and Wagner CJ, as well as Abella and Kasirer JJ., focused on circumstantial aspects of the relation of proximity between a plaintiff and defendant. The dissent placed much greater emphasis on foreseeability of harm and the directness of the impact on the Mr. Sub franchisees given the chain of contracts that required them to purchase meats supplied by Maple Leaf even though they were not in a contractual relationship with Maple Leaf. While the majority focused on the absence of any undertaking by the defendant to accept the plaintiff's business risk, the dissent focused on the absence of any provision in the franchise contracts allocating to the plaintiffs the risk of the losses they claimed. Noting that franchise contracts are typically contracts of adhesion, and citing its own earlier decision in *Uber*, the Court noted "the manner in which contracts of adhesion can exacerbate vulnerability and inequality of bargaining power" as supporting the recognition of a duty of care.

The reference to *Uber* in this context suggests that *Maple Leaf Foods* is as much about competing philosophical approaches to private law as it is about technical disagreements about the mechanics of duty analysis. The majority in *Maple Leaf Foods* approached the duty question by asking why and how a plaintiff can justify a right to reach into a defendant's pocket to cover economic losses, while the dissent asked the question from the opposite perspective—namely how a defendant who is uniquely able to impact a vulnerable plaintiff's economic interests should avoid economically answering for them. The former approach is private and

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corrective. The latter is more open to extrinsic, "public" values influencing private obligations.

Crystal Square: Contracts as Public Acts

This divided court nevertheless demonstrated a measure of unanimity in two straightforward, but nonetheless important contract cases released later in the year. On October 23, the Supreme Court released *Owners, Strata Plan LMS 3905 v Crystal Square Parking Corp* ("*Cystal Square*"). It concerned a dispute between a strata corporation and the owner of a parking facility under an agreement entered into by the developer of the complex in which the strata corporation's property was situated. The agreement concerned parking rights offered by the parking facility owner and the obligation of the strata corporation to pay for those rights. For approximately 10 years, members of the strata corporation parked in the spots allocated by the agreement, and paid the fees contemplated by the agreement entered into by the developer. When a dispute arose under the agreement, the strata corporation stopped paying, asserting that the agreement was never binding

Most modern corporate legislation specifically addresses pre-incorporation contracts, but the legislation governing the strata corporation in *Crystal Square* expressly excluded these provisions, which required the Court to consider whether at common law the agreement was binding on the strata corporation because by its conduct the strata corporation evidenced an intention to be bound by it. Côté J., writing for herself and all members of the Court except Rowe J., took the opportunity presented by *Crystal Square* to reaffirm an oft-neglected principle of contract law, namely that contracts are formed based on the parties' outward manifestation of an intention to be bound, and not based on any subjective intention. As a result, a finding that a contract existed could be made even if the strata corporation subjectively believed that it was not bound by the developer's agreement. Affirming that what is essential to contract formation is an "outward manifestation of assent by each party such as to induce a reasonable expectation in the other," the Court observed that at common law "risk arising from one party's reasonable reliance on the existence of an agreement is allocated to the party whose conduct gave rise to a reasonable expectation that a contract between the parties would be legally binding."

The unanimity of the Court on these big issues (Rowe J. dissented, but only as to the need to send the case back to the trial court to make dispositive findings of fact) contrasts with the sharp divide in the Court in most of its other private law cases decided in 2020. There was little room for debate in *Crystal Square* as to the role of public values in private disputes—neither party was particularly vulnerable, such there was no compelling public policy reason to displace the need to protect parties' reliance on contracts. Public values and private interests converged in *Crystal Square*, which explains the comparative absence of disagreement.

Matthews: Fairness and Process in Employment Contracts

A similarly atypical unanimity presented itself in the Court's principal employment law case in 2020.

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On October 9, the Supreme Court released its decision in *Matthews v Ocean Nutrition Canada Ltd* ("*Matthews*"). That case concerned a claim for constructive dismissal brought by an employee alleging dishonest conduct by a senior manager that marginalized him and eventually forced him to resign and take alternative employment. 13 months after his departure, a sale of the employer's business occurred, which would have triggered a payment entitlement under a long-term incentive (LTIP) program had the plaintiff remained employed at the time of the sale.

The trial judge awarded damages to the plaintiff based on a 15-month notice period, including an amount to compensate the plaintiff for amounts that he would have earned under the LTIP program. The trial judge stopped short of making a finding of bad faith in that connection, noting that the employer's conduct was not motivated by desire to deprive the plaintiff of his LTIP entitlement. Nevertheless, applying *Paquette v TeraGo Networks Inc* ("*Paquette*") and *Lin v Ontario Teachers' Pension Plan Board* ("*Lin*"), the trial judge held that the plaintiff would have been a full-time employee when the event occurred had he not been constructively dismissed, and that nothing in the LTIP plan deprived him of his right at common law to compensation in an amount equivalent to what he would have earned under the LTIP. The Court of Appeal reversed the trial judge's decision, holding that under the plain language of the LTIP, the plaintiff was not entitled to a payment under it because he was no longer employed.

The Supreme Court of Canada unanimously restored the trial judge's decision, accepting the *Paquette* and *Lin* approach to assessing employee entitlements under programs like the LTIP. The Court held that an employee's entitlement to damages for wrongful dismissal must be evaluated as a right to damages as compensation for the failure to give adequate notice, such that the right to damages must assess and value what would have occurred in the employment relationship had termination not occurred. In assessing such damages, even where an incentive program contains a requirement that the employee remain actively employed, this will not remove the employee's entitlement to damages to compensate for the loss of payments under such a program if the employee would have been employed but for the failure to give adequate notice.

This right to common law damages can be excluded but must be excluded explicitly and unambiguously. Tellingly, the Court observed that "it may also be appropriate in certain cases to examine whether the clauses purporting to limit or take away an employee's common law right were adequately brought to the employee's attention." This observation illustrates how the Court integrated concepts of fairness external to an employment agreement with an approach to private law that respects private ordering. An employer seeking to impose these consequences on an employee must, as it were, "own it" by clearly communicating to its employees that it is removing what would otherwise be their right to compensation if they are dismissed without notice.

It is telling that in a year typified by deep divisions in the Court concerning private law matters, the decision in *Matthews* was unanimous. By

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integrating these fairness values into the interpretation process, the Court avoided what might have been a more divisive debate about the role of good faith in the employment relationship. Tellingly, good faith was the elephant in the room in *Matthews*, generating significant discussion notwithstanding it had no material impact on the result.

***C.M. Callow Inc v Zollinger*: Good Faith, Honesty and Fairness**

The good faith elephant that was in the room in *Matthews* and perhaps even earlier in the year in *Babstock*, burst out into the open in the Court's final private law decision of the year in *C.M. Callow Inc v Zollinger* ("*CM Callow*"). That case concerned the scope of the good faith obligation of honest performance. While there was substantial consensus (an eight-judge majority) in the result in *CM Callow*, and indeed in the core reasoning necessary to the decision, the decision disclosed a deep split between the majority reasons of Kasirer J. and the concurring reasons of Brown J. This split concerned the theoretical underpinnings of the doctrine of good faith, and, more fundamentally, the role of "external" ethical values in informing the substance of private law obligations.

The facts of *CM Callow* are comparatively straightforward. The case concerned a commercial winter maintenance agreement between a group of condominium corporations and the plaintiff. The agreement clearly provided that it could be terminated by the condominium corporations on 10 days notice without cause. In early 2013, the corporations decided to terminate the agreement, but indicated through their words and conduct that they were satisfied with the plaintiff's performance. Representatives of the corporations said nothing when the plaintiff performed gratuitous services over the summer months in the mistaken belief that its contract would be renewed. The corporations did not communicate their decision to terminate the agreement until September 2013, by which time it would have been difficult for the plaintiff to find a replacement contract for the following winter.

The trial judge allowed the plaintiff's action, finding a breach of the duty of honest performance. The Ontario Court of Appeal allowed the defendant corporations' appeal, holding that the trial judge erred in expanding the scope of the duty of honest performance to cover conduct not directly linked to the performance of the winter contract. The Supreme Court of Canada restored the trial judge's finding that the duty of honest performance was breached. Eight judges (with only Côté J. dissenting), were in substantial agreement with the key principles that justified the finding that the duty of honest performance was breached, specifically:

1. That, while there is no affirmative duty to disclose in the common law of contract, there is an obligation on one party to a contract to avoid creating through conduct or half-truth, a misleading impression in the other party concerning matters linked to the performance of the contract;
2. That the defendant, through its conduct, created the misleading impression in the plaintiff that the contract would be renewed; and
3. That the plaintiff's damages could be measured principally by the

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profit it would have earned on the winter contract, but the Court viewed this measure as a proxy for what the defendant would have earned on another contract had it promptly been told of the corporations' decision to terminate the winter maintenance agreement.

In spite of this substantial agreement concerning what one would have thought would have been the core points in the decision, Kasirer and Brown J. each delivered lengthy reasons that surfaced a significant debate about the source of and principled justification for the duty of honest performance in the law of good faith. Fittingly, the debate took place between two judges whose roots were in academia—Kasirer J. from the civilian tradition and Brown J. from the common law tradition.

Kasirer J., writing for himself and Wagner CJ, and Abella, Karakatsanis and Martin JJ., while expressly honouring the distinction between the common law and civil law traditions, accepted that the common law of good faith and its associated duty of honest performance could be informed by the civil law concept of abuse of rights. Moreover, the majority regarded the duty of honest performance as related to broader concepts of good faith that require contracting parties to pay "appropriate regard" to the interests of the other contracting party. The majority also viewed the measure of damages available to the plaintiff as a form of expectation measure.

Brown J., writing for himself as well as Moldaver and Rowe JJ., saw significant uncertainty and instability in the majority's proposal to integrate common and civil law approaches to good faith, and to treat the duty of honest performance as anything other than its own internally coherent doctrine as established by the Court in *Bhasin v Hrynew*. Observing that "the common law and civil law are premised on different understandings of legal rights...and of the role of the state in mitigating the effects of harsh bargains," Brown J. warned against the risk of "jamming the civilian concept of abuse of right regarding the termination of a contract into the common law". In Brown J.'s view, what was at stake in *CM Callow* was the role of doctrines predicated on the "moralization" of contractual relations implicit in the civil law concept of abuse of right.

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Looking Ahead

In *CM Callow*, the Court ended the year by coming back full circle to the debate that informed its first major private law decision in *Nevsun*. Beginning with a decision about forced labour in Eritrea and ending with a decision concerning a snow-clearing contract in Ottawa, the Court grappled throughout the year with difficult issues concerning the role of "external" moral values in framing private law obligations. This ancient debate took many forms during the year, and at times was framed expressly in Aritotelian language that distinguishes between corrective and distributive justice. This debate provoked significant developments in private law jurisprudence, specifically in the *Uber* decision, which significantly expanded the scope of the doctrine of unconscionability and left far greater scope for courts to police the substantive fairness of private bargains.

It is fitting that the Court's private law jurisprudence ended the year with the *CM Callow* decision, which may hold a significant hint that the debates of 2020 will continue into 2021. *CM Callow* was argued on December 6, 2019 at the same time as the appeal of another good faith case, *Greater Vancouver Sewerage and Drainage District v Wastech Services Ltd* ("*Wastech*"), which arguably squarely raised for the Court the scope of many of the concepts that seem to have gratuitously appeared in *CM Callow*, including the scope of and justification for the control of discretion in private contracts, and the related question of what it means for a party to pay "appropriate regard" to the interests of another contractual party. *Wastech* concerned a long-term waste disposal contract that allowed one party through the exercise of its discretion to make decisions that significantly affected the profitability to the other. It squarely raised many of the core good faith issues that arose incidentally in *CM Callow*. *Wastech* may very well provide an occasion for the court to resolve—or, more likely intensify—the ongoing debate about the role in public norms in governing private relations.

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About the Author

Scott provides our clients with strategic advice and analysis to solve complex legal problems quickly and effectively. He crafts creative solutions that are tailored specifically to each unique litigation objective. He also leads our firm's research team.

Scott has played an instrumental role in many high-profile and precedent-setting cases involving banking, corporate oppression, insolvency and restructuring, securities, pensions, derivatives, auditors' negligence and other complex commercial disputes – at all levels of court, including the Supreme Court of Canada.

Scott also brings extensive corporate advisory experience to our firm. He has guided banking and insurance clients on the legal dimensions of providing cross-border financial services and has advised boards of directors during contested takeover bids. In addition, he has significant public law expertise, including in cases involving aboriginal issues.

Drawing on his deep knowledge of the law, Scott has contributed articles on a wide range of topics to legal publications.

Scott Rollwagen

416-865-2896
srollwagen@litigate.com