

# THE LITIGATOR

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## CANADA'S TOP COURT DISMISSES SHAREHOLDER CLASS ACTION AGAINST DANIER LEATHER

In October, Canada's Supreme Court upheld the Ontario Court of Appeal's decision overturning Canada's first-ever securities class action judgment in favour of investors relating to alleged misrepresentations on an initial public offering.

The class action in *Kerr v. Danier Leather* was brought under s. 130 of the Ontario *Securities Act*, which allows initial purchasers of securities to recover damages where the issuing company has made a misrepresentation in its prospectus. Initial purchasers of shares are *deemed to* have relied upon a company's misrepresentation. In his decision on behalf of a unanimous court, Mr. Justice Binnie made it clear that when looking at a statutory remedy such as that under s.130 of the *Securities Act*, the courts must simply interpret the statute and refrain from citing external principles and considerations to either broaden or narrow its scope.

This case involved Danier's failure, after issuing its prospectus, to release revised financial forecasts reflecting lower leather sales due to a warm spring. The trial judge held Danier liable on the basis that the revised forecasts were a material fact that both made its original prospectus inaccurate and gave rise to a disclosure obligation that Danier had not met.

What won the day for Danier in both the Ontario Court of Appeal and the Supreme Court of Canada was a simple exercise of statutory interpretation: under the *Securities Act* there was no obligation to disclose material *facts* but, rather, to disclose much more significant corporate events called material *changes*. As such, a failure to disclose only


material *facts* and could not breach the *Securities Act* and could not result in liability.

The decision of Binnie J. makes it clear that a statutory action must be brought within the four corners of the statute. Common law concepts will not be used to either broaden the basis for statutory liability or excuse a statutory breach. For example, Binnie J. rejected the Ontario Court of Appeal's citation of the business judgment rule (in which courts refrain from second-guessing management decisions made reasonably) as one of the reasons for overturning the trial judgment. In his words, disclosure under the *Securities Act* is not a matter of business judgment but a legal obligation, and the business judgment rule "should not be used to qualify or undermine the [statutory] duty of disclosure."

In the result, the action was dismissed and the representative plaintiff was ordered to pay the defendants' legal costs; a liability estimated at more than \$1 million. In making the costs order against the plaintiff, Binnie J. observed that "protracted litigation has become the sport of kings in the sense that only kings or equivalent can afford it. Those who inflict it on others in the hope of significant personal gain and fail can generally expect adverse cost consequences." KD\*

## HELLO! CASE SAYS GOODBYE TO CONFUSION IN ECONOMIC TORTS

The economic torts, including inducing breach of contract, unlawful interference with economic interests, conspiracy and breach of confidence, play an important role in curtailing certain kinds of inappropriate behaviour by competitors. It is equally important, however, to constrain these torts to their proper boundaries; otherwise they will interfere with vigorous but fair rivalry among competitors.



## There can be no liability for unlawful interference with another's business or economic interests unless the defendant committed an unlawful act.

The House of Lords recently restated the basis for - and curtailed the scope of - the torts of inducing breach of contract and unlawful interference in a decision covering three cases. In the same decision, however, the Lords expanded the reach of the tort of breach of confidence to cover a situation where a newspaper paid for the exclusive right to print photos of a celebrity wedding.

The House of Lords has clarified that:

- There can be no liability for inducing breach of contract unless the defendant knows that it is inducing a breach of contract. Honest belief that there is no breach of contract will excuse the defendant.
- There can be no liability for unlawful interference with another's business or economic interests unless the defendant committed an unlawful act.
- There is no in-between tort of preventing or interfering with the performance of a contract, where the means are not unlawful.

This decision is likely to influence the development of these torts throughout the common law world, including Canada. **MO\***

### **CABLE COMPANY LIABLE FOR INDUCING BREACH OF CONTRACT**

Ontario's Court of Appeal has also recently clarified the differences between the torts of inducing breach of contract and unlawful interference with economic relations. In *Drouillard v. Cogeco Cable Canada Inc.* it held large cable operator, Cogeco Cable, liable for telling a cable subcontractor, Mastec Canada, that it would not allow its employee, Mr. Drouillard, to work on Cogeco equipment. When this caused Mastec to withdraw its employment offer to Drouillard, he sued Cogeco.

The trial judge found Cogeco liable for unlawfully interfering with Drouillard's economic relations. Cogeco had intended to injure Drouillard by causing him to lose his job and had interfered with that employment using illegal or unlawful means.

The Court of Appeal upheld the trial judge's finding of liability against Cogeco - although on a different legal basis. Cogeco's actions had to be themselves unlawful or illegal for it to be liable for unlawfully interfering with Drouillard's economic relations. Cogeco's actions were not themselves unlawful, even though malicious and contrary to Cogeco's own internal policies.

Cogeco was nevertheless liable to Drouillard for the tort of inducing breach of contract because: (1) Drouillard had an enforceable contract with Mastec; (2) Cogeco was aware of the contract; (3) Cogeco intended to and did procure a breach of the contract; and (4) as a result, Drouillard suffered damages. **KD\***

### **ANTON PILLER ORDERS REQUIRE "COMPELLING EVIDENCE" TO ESTABLISH DISHONESTY AND A REAL POSSIBILITY THAT A PARTY WILL DESTROY EVIDENCE**

Litigants are required to disclose to their opponents all relevant documents that are not privileged. The rules rely on the good faith of the parties not to conceal or destroy any relevant documents. When, however, a party suspects that the other may destroy evidence, it can ask the court for what is called an Anton Piller order without prior notice to its opponent. Such an order compels the party subject to the order to allow access to its premises to search and seize documents specified in the order so that they may be preserved for use in the litigation. Because of their intrusive nature, Anton Piller orders are issued only when

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the applicant is able to demonstrate: (1) a strong *prima facie* legal claim; (2) very serious damages resulting from the defendant's alleged misconduct in the underlying cause of action in the litigation; (3) convincing evidence that the defendant has the documents that are sought to be seized; and (4) a "real possibility" that the defendant may destroy those documents before the discovery process if they are not preserved.

The Alberta Court of Appeal has recently made it clear that strong evidence showing a real possibility the defendant will destroy documents is necessary before such an extraordinary order will be granted.

In *Catalyst Partners Inc. v. Meridian Packaging Ltd.* Meridian did not return confidential information, including chemical formulas, to Catalyst at the end of the contract between them, as the contract required. Catalyst accused of Meridian of misusing its proprietary confidential information and obtained an Anton Piller order on the basis that Meridian might destroy the confidential, proprietary documents relating to certain chemical formulas and customer lists in its possession if those documents were not seized and preserved.

The Court of Appeal concluded that none of the circumstances alleged by Catalyst supported an inference that there was a real risk that Meridian might destroy evidence. In particular, an intention to destroy documents could not be inferred from the fact that Meridian kept its confidential information. The Court accepted Meridian's explanation that it did not return the materials simply because nobody asked it to do so. Even Meridian's failure to fully comply with a court order that it return a certain of Catalyst's property did not support an inference of dishonesty. As well, the Court rejected Catalyst's claims that billing irregularities by Meridian and inconsistencies

between the affidavit of Meridian's manager and his testimony on cross-examination indicated dishonesty; these were more indicative of carelessness than dishonesty. HZ\*

### EX-EMPLOYEES ENJOINED FROM ACCEPTING BUSINESS FROM FORMER EMPLOYER'S CUSTOMERS

Western Tank & Lining Ltd. recently obtained an extraordinarily broad interlocutory injunction restraining a group of former employees not only from soliciting Western Tank's clients but even from accepting business from customers that Western Tank did business with over the previous 5 years.

Four employees of Western Tank formed a partnership to compete with Western Tank in Manitoba, before quitting their jobs with Western Tank. None of their employment contracts contained non-compete clauses. Western Tank sued and brought a motion for an injunction.

The court found that at least one or two of the employees, who were salespeople, owed a fiduciary duty to Western Tank, because Western Tank entrusted them with all or a significant portion of its business in Manitoba. Thus all four became subject to restrictions flowing from those duties.

The ex-employees breached their duties to Western Tank because began competing with Western Tank while still employed by Western Tank, the court found.

The court also found that there was "...a real risk that the entire business operations of the plaintiff in Manitoba will be converted to the defendants' account without any form of compensation" if an injunction were not granted.

The employees were ordered not to solicit customers of Western Bank and, in addition, not to accept business from any of Western Bank's customers from the previous five years. The court stipulated that the injunction would expire about twelve months after the employees gave notice. **AW\***

### **CRIMINAL BANK SERVICE CHARGES?**

Do high service charges exacted by MBNA for credit card cash advances constitute a criminal rate of interest? This is among the issues certified as a class action by the Ontario Court of Appeal in *Markson v. MBNA Canada Bank*.

The court held that the bank could not rely on its failure to keep data to escape certification.

Markson, the representative plaintiff, is seeking declaratory and injunctive relief, damages for breach of contract, and restitution on behalf of MBNA customers who took cash advances for small amounts from their MasterCards. Some customers who took small cash advances may have been charged an effective interest rate of more than 60%, which is contrary to the *Criminal Code*, because of the bank's service charge and regular interest rate, Markson alleges.

The motion judge and the Divisional Court, on appeal, refused certification. Markson appealed to the Ontario Court of Appeal where he was allowed to make new arguments that ultimately turned the case in his favour.

The original certification motion was denied in large part because the time and cost of manually determining liability and damages from millions of transactions would have far outweighed any benefit to class members.

The Court of Appeal held that if Markson can establish that MBNA administered its cash advances in a manner that violated the *Criminal Code* or breached its contract with its customers at trial, he will have established potential liability on a class-wide basis and each member of the class would be entitled to declaratory and injunctive relief. The next step would be to determine each class member's entitlement to monetary relief.

The court accepted that section 23 of the *Class Proceedings Act*, which allows the court to use statistical information in determining the amount or distribution of a monetary award, and section 24, which provides for aggregate monetary awards where it would be impractical or inefficient to identify the class members entitled to share in the award, could be used to avoid having to look at millions of individual transactions.

MBNA argued that its clients voluntarily paid the alleged criminal rates of interest and that it could raise the so-called "voluntariness" defence. The court held that the defence could not stand in the way of certification, rather, it could be accepted as a common issue for trial. **MB\***

\* See [www.thelitigator.ca](http://www.thelitigator.ca) for additional analysis.

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