The Torts of Duty of Good Faith Bargaining, Inducing Breach of Contract and Intentional Interference with Economic Interests

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I. DUTY OF GOOD FAITH BARGAINING

As a matter of contract law, an agreement to negotiate is not enforceable. However, the fact that an agreement to negotiate may not be enforceable should not necessarily be determinative of whether parties who voluntarily enter into negotiations are subject to a duty to bargain in good faith. While the House of Lords has questioned whether a duty to bargain in good faith is consistent with the position of a negotiating party, it has recognized that a negotiating party has a duty to avoid misrepresentations. Such a duty could theoretically be construed as an element of good faith bargaining. Additional elements of good faith bargaining could include a general duty of disclosure on negotiating parties and a duty to make reasonable efforts to reach an agreement. However, with the exception of a duty to avoid misrepresentations, the Courts have not consistently found that there is a duty to bargain in good faith.

While the common law has, thus far, been reluctant to recognize and enforce an obligation to bargain in good faith, the possibility of recognizing such a duty has been considered in a variety of doctrinal contexts and situations. These include certainty of terms, options to renew, tendering processes, and a duty to bargain even in the absence of contractual relations.
A. Certainty of Terms

There has been judicial scepticism to the institution of a duty to bargain in good faith in the following leading English cases, which have been influential in Canadian decisions.

In *Hillas and Co. Ltd. v. Arcos*¹, the issue in dispute was whether an agreement was precise enough to constitute a binding contract. In reaching his decision, Lord Wright considered whether an agreement to agree might be binding. He stated that if the parties had agreed to negotiate in the hope of effecting a valid contract, theoretically speaking, there was a contract to negotiate (if there had been good consideration). However, Lord Wright went on to say that in the event of repudiation by one party, the damages may be nominal, unless the opportunity to negotiate was of some appreciable value to the injured party.

In *Courtney and Fairbairn Ltd. v. Tolaini Brothers (Hotels) Ltd.*², Lord Denning concluded that the tentative opinion given by Lord Wright in *Hillas* was not well founded. Lord Denning held that if the law does not recognize a contract to enter into a contract (when there is a fundamental term yet to be agreed), the law cannot recognize a contract to negotiate. Lord Denning’s reasoning was that a contract to negotiate is too uncertain to have any binding force. No Court could estimate the damages because no one can tell whether the negotiations would have been successful or would have fallen through, and if successful, what the result would have been.

¹ [1932] All E.R. Re. 494 (H.L).
In *Walford v. Miles*,[3] the House of Lords considered whether an agreement to negotiate is enforceable. Lord Ackner concluded that agreement to negotiate is not enforceable because it lacks the necessary certainty. He held that a duty to negotiate in good faith is inconsistent with the bargaining process, as follows:

"How can a Court be expected to decide whether, subjectively, a proper reason existed for the termination of negotiations? The answer suggested depends upon whether the negotiations have been determined 'in good faith'. However the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it appropriate, to threaten to withdraw from further negotiations or to withdraw in fact, in the hope that the opposite party may seek to reopen the negotiations by offering him improved terms. [The plaintiff], of course, accepts that the agreement upon which he relies does not contain a duty to complete the negotiations. But that still leaves the vital question - how is a vendor ever to know that he is entitled to withdraw from further negotiations? How is the Court to police such an 'agreement'? A duty to negotiate in good faith is unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies. In my judgment, while negotiations are in existence either party is entitled to withdraw from those negotiations, at any time, and for any reason. There can be thus no obligation to continue to negotiate until there is a 'proper reason' to withdraw. Accordingly a bare agreement to negotiate has no legal content."[4]

**B. Options to Renew**

*Empress Towers Ltd. v. Bank of Nova Scotia*[^5] provides support for the requirement to bargain in good faith. In *Empress*, the two parties had negotiated a rental agreement whereby the landlord provided the tenant with a renewal option at a rent of the market rate prevailing at the commencement of that renewal period as mutually agreed between the parties. Lambert J.A. held that the agreement between the parties carried with it an

implied term that the landlord would negotiate in good faith with the tenant with the objective of reaching an agreement on the market rental rate.

In *Mannpar Enterprises Ltd. v. Canada*⁶, the British Columbia Court of Appeal reverted to the traditional position, and held that in the circumstances before the Court there was no duty to negotiate in good faith. Hall J.A. found that a duty to negotiate in good faith does not exist in circumstances where there is no language in the agreement that could provide an objective benchmark to measure whether the parties had in fact negotiated in good faith. He distinguished *Mannpar* from *Empress* by finding that the lack of reference to an objective standard such as "market rate" in *Mannpar* precluded the imposition of a duty to negotiate in good faith.

C. Tendering Processes

In *Healthcare Developers Inc. v. Newfoundland*,⁷ Cameron J.A. imposed a duty on the Government of Newfoundland to conduct the tendering process in good faith. As to the standard of conduct demanded by good faith, Cameron J.A. stated that at minimum it would require that a party not act in bad faith.

In *Martel Building Ltd. v. Canada*⁸, however, the Supreme Court of Canada did not follow *Healthcare Developers* and did not require that the person conducting the tendering process act in good faith. Instead, Iacobucci and Major JJ. Simply held that the person conducting the tendering process had an implied contractual duty to treat all bids fairly and equally.

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D. Duty to Bargain in Good Faith in the Absence of a Contract

In *Westcom TV Group Ltd. v. CanWest Global Broadcasting Inc.*\(^9\), the parties did not have an existing agreement in place and, therefore, if any duty to bargain in good faith existed it would have had to exist outside of contract law. Lowry J. stated that the common law has generally never recognized a duty to bargain in good faith in normal commercial transactions between parties acting at arm’s length (although he acknowledged the *Empress Towers Ltd. v. Bank of Nova Scotia*\(^10\) exception). The Court adhered to tradition by finding that neither party had a duty to bargain in good faith. In support of his decision, Lowry J. stated that “[p]arties involved in arm’s length negotiations commonly conceal their true intentions. It is part of the negotiating process that positions are advanced that do not represent what a party truly expects or is prepared to agree to in the end.”\(^11\)

In *Martel Building Ltd. v. Canada*\(^12\), the Supreme Court of Canada considered the possibility that bargaining in bad faith might constitute the tort of negligence causing economic loss. Iacobucci and Major JJ. applied the two-stage *Anns* test. With regard to proximity, the Court concluded that the causal relationship in contractual negotiations is usually significant for a finding of proximity, on the basis that it is usually foreseeable that carelessness on the part on one negotiating party may cause an opposite negotiating party economic loss. Despite finding the requisite proximity, however, the Court found that even in the absence of any serious potential for indeterminate liability, there are a number of policy considerations that would preclude the extension of a tort of negligence

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\(^10\) Supra note 5.


\(^12\) Supra note 8.
into commercial negotiations. First, the objective of each economically rational actor engaged in commercial litigation is to achieve the most advantageous financial bargain. Second, to extend a duty of care to pre-contractual commercial negotiations (such as disclosure obligations) could deter socially and economically useful conduct (the generation of information). Third, to impose a duty could interject tort law as after-the-fact insurance against failures to act with due diligence and reduce the incentive for self-vigilance. Fourth, to extend the tort of negligence into the conduct of commercial negotiations would assign the Courts a significant regulatory function and it is undesirable to place further scrutiny upon commercial parties when other causes of action (e.g. undue influence, economic duress, unconscionability, negligent misrepresentation, fraud and the tort of deceit) already provide remedies for many forms of conduct. A further but not conclusive consideration is the extent to which needless litigation should be discouraged, and that extending negligence into the conduct of negotiations could encourage a multiplicity of lawsuits.

E. Non-Disclosure and Good Faith

In 978011 Ontario Ltd. v. Cornell Engineering Co.\textsuperscript{13} Weiler J.A. acknowledged that, absent a special relationship, the common law in Canada has yet to recognize that in the negotiation of a contract, there is a duty to have regard to the other person’s interests, namely, to act in good faith. In Cornell Engineering, the person that possessed the additional information was in a position of dependency with respect to the uninformed person, and the uninformed person could have become informed simply by reading the agreement. Accordingly, Weiler J.A. did not find that in the circumstances the law

\textsuperscript{13} (2001), 198 D.L.R. (4\textsuperscript{th}) 615 (Ont. C.A.).
required more than self-interested dealing on the part of the informed person. Justice Weiler did, however, surmise that there could be circumstances where the law requires more than self-interested dealing on the part of a party. Such circumstances arise where “firstly, one party relies on the other for information necessary to make an informed choice and, secondly, the party in possession of the information has an opportunity, by withholding (or concealing) information, to bring about the choice made by the other party.”

II. INDUCING BREACH OF CONTRACT

The origin of the tort of inducing breach of contract can be found in *Lumley v. Gye.* In *Lumley,* the defendant persuaded an opera singer who was under contract to sing exclusively at the plaintiff’s theatre to break her contract and sing at his theatre. The defendant was held liable for inducing a breach of contract even though the plaintiff had a direct claim for breach of contract against the singer.

In essence, the tort of inducing breach of contract can be seen as supplementing and reinforcing the integrity of contracts. Throughout the years, the tort has been extended beyond a direct inducement to breach a contract and now covers indirect inducement to breach a contract and interference with a contract by unlawful means without causing breach.

A. Direct Inducement to Breach a Contract

Any direct inducement to breach a contract is actionable. The essential elements of the tort are i) the existence of a contract; ii) knowledge of the contractual link; iii) an

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14 Ibid., at 626.
intention to secure a breach of the contract; iv) a direct inducement to breach the contract; and v) damage. Justification is a defence.

(i) Existence of a Contract

In order for a defendant to be held liable for inducing breach of contract, there must be an existing contract between the plaintiff and the co-contractant.

The Supreme Court of Canada acknowledged this requirement in *Pepsi-Cola Canada Beverages (West) Ltd. v. R.W.D.S.U., Local 558.* In *Pepsi-Cola,* a union was engaged in a lawful strike against its employer. The strikers picketed some the employer’s retail outlets. Due the absence of evidence establishing that there were existing contracts between the employer and the retail outlets, the tort of inducing breach of contract could not be maintained.

(ii) Knowledge of the Contractual Link

The second essential element is the requirement that the defendant have knowledge of the existence of a contract between the plaintiff and the third party.

In *Posluns v. Toronto Stock Exchange,* pursuant to its by-laws, the Toronto Stock Exchange (the “Exchange”) gave approval to one of its member firms to have the plaintiff as a director, shareholder and employee. However, subsequent events involving the member and the plaintiff led the Exchange to withdraw its approval for the plaintiff with the intention that the plaintiff be dismissed as an employee of the member. The Ontario High Court found that the Exchange was aware that some contract of

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17 (1964), 46 D.L.R. (2d) 210 (Ont. H.C.), affirmed (1966), 53 D.L.R. (2d) 193 (Ont. C.A.), which was affirmed (1968), 67 D.L.R. (2d) 165 (S.C.C.).
employment, written or oral, existed between the plaintiff and the member. In requiring
an early severance of the plaintiff, the Exchange must have intended that the contract was
to be ended by whatever means necessary in the circumstances, including a breach of the
contract. In determining that the Exchange had the necessary degree of knowledge, the
Court noted that the fact that the precise terms of the contract were not known to the
governors of the Exchange was immaterial.

Furthermore, as stated by Lord Denning in *Emerald Const. Co. v. Lowthian*,18, it is
unlawful for a person to procure breach of contract knowingly, or recklessly, indifferent
to whether it is a breach or not.

(iii) Intention to Secure a Breach of the Contract

Although some cases have stated that an intention to damage or harm the plaintiff is a
required element of the tort, numerous cases have held that malicious motive is not an
element of the offence. For instance, in *Posluns*, Gale J. stated “that the wrong does not
rest upon the fact that the intervenor has acted in order to harm his victim, for a bad
motive does not per se convert an otherwise lawful act into an unlawful one, but rather
because there has been an unlawful invasion of legal relations existing between others.”19

Therefore, it is generally understood that all a plaintiff has to do to satisfy the third
requirement is prove that the defendant acted with the desire to cause a breach of
contract, or with substantial certainty that a breach would result from the defendant’s
conduct.

19 Supra note 17 at 261.
However, there is an exception to the general principle that motive is not relevant to determining whether there has been an inducement to breach a contract. In *Said v. Butt,*\(^{20}\) Justice McCardie considered a case whereby the plaintiff had procured a ticket (albeit indirectly) to a performance of a play, but was denied admission by the defendant. The plaintiff was denied admission because the plaintiff had made serious charges against the defendant and other officials of a theatre for whom the defendant was managing director. While Justice McCardie found that no contract existed between the theatre and the plaintiff, he held that even if a contract had existed, an employee of a company, acting *bona fide* in the interests of the company, who induces a breach of contract between a party and the company, would not liable for inducing breach of contract.

(iv) **Direct Inducement to Breach the Contract**

The fourth element to the tort of inducing breach of contract by direct intervention is the requirement that the defendant directly induce a third party to break a contract with the plaintiff. Throughout the years, the Courts have narrowed the scope of inducement so as not to capture the provision of advice within the definition of inducement. Included within the ambit of providing advice is informing a party of reasons why a contractual breach is in his or her best interests and even advising a party to commit a contractual breach.

For instance, in *Brown v. Spamberger*\(^{21}\), the Ontario Court of Appeal dealt with a case in which a vendor in a real estate transaction orally agreed to pay a commission to a realtor should the realtor find a purchaser for his property. Afterwards, the plaintiff introduced

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\(^{20}\) [1920] 3 K.B. 497.

\(^{21}\) (1959), 21 D.L.R. (2d) 630 (Ont. C.A.).
the defendant to the vendor and the vendor eventually sold the property to the defendant. During the negotiations, the defendant advised the vendor that since his contract with the realtor was oral, the agreement was not enforceable, and accordingly the commission need not be paid if the two dealt directly with each other. After the vendor sold the property to the defendant and no commission was paid, the plaintiff sued the defendant for inducing breach of contract. In deciding in favour of the defendant, Roach J.A. stated that “I know of no legal principle that a person acts at his peril in advising another as to the latter's legal rights arising out of an ordinary commercial transaction in order to persuade him to do something to the former's advantage and to the disadvantage of the other party to that transaction.”

Despite the fact that inducement is defined so as not to capture advice, inducement has been found where a defendant deals with a third party in a way known to be inconsistent with the contractual terms between that party and the plaintiff. For instance, in *D.C. Thomson & Co. v. Deakin*,23 Lord Jenkins surmised that if a third party, with knowledge of a contract between the contract breaker and another, has dealings with the contract breaker which the third party knows to be inconsistent with the contract, he has committed an actionable interference even if the third party does not initiate breach of the contract. This principle was applied in *Ernst & Young v. Stuart*,24 where a firm hired an accountant even though the firm knew that the accountant was in breach of a notice clause with his former employer. In *Ernst & Young*, the defendant firm was held liable for inducing breach of contract.

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22 Ibid. at ¶5.
(v) **Damage**

The final element that must be proved in order to maintain an action for inducing breach of contract is damage. In most cases, damage is the loss of the contractual bargain. While the plaintiff can recover such pecuniary damages against both the contract breaker and the third party inducer, the plaintiff cannot be paid twice for the same damages. However, it has been stated that damages for inducing breach of contract are “at large” in the sense that the Court must assess a global figure approximating the harm it thinks the plaintiff has suffered.

(vi) **Justification**

Justification is considered to be a defence to the tort of inducing breach of contract. What constitutes justifications has been, and remains, unclear. In *Glamorgan Coal Co. v. South Wales Miners’ Fed.*, the House of Lords held that even though justification was clearly a defence, “it would be extremely difficult, even if it were possible, to give a complete and satisfactory definition of what is ‘sufficient justification’ and most attempt to do so would probably be mischievous.” Despite the concern, Romer L.J. suggested the following factors were relevant: the nature of the contract broken, the position of the parties to the contract, the grounds for breach, the means employed to procure the breach,

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26 Ibid., at ¶20.
27 See *Quinn v. Leathem*, [1901] A.C. 495 at 510: “A violation of legal right committed knowingly is a cause of action, and...it is a violation of legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference.”
29 Ibid., at 573.
the relationship of the person procuring the breach to the person who breaks the contract, and the object of the person procuring the breach.30

The defence of justification was successfully raised in Posluns. In Posluns, Gale J. held that the defendants could justify inducing the member to breach their contract with the plaintiff on the grounds that there was a right impliedly given by the agreement between the plaintiff, his employer and the Exchange to exercise control over the plaintiff in accordance with the powers of the Exchange.

B. Indirect Inducement to Breach a Contract

The tort of inducing breach of contract has been extended such that indirectly inducing a breach of contract can be actionable. In general, indirectly inducing a breach of contract occurs where, rather than directly persuading the contract breaker to breach, the defendant deliberately creates an intervening event that renders the contract breaker’s performance of the contract impossible or necessarily impractical. The essential elements of the tort of indirect inducement to breach a contract are identical, with the exception that the indirect means which are used to induce breach must be unlawful in themselves.

In Dirassar v. Kelly, Douglas & Co.31 the Court recognized the inducing breach of contract can occur through indirect means, and also recognized the unlawful means requirement. In Dirassar, the defendant was a grocery store that became interested in a developer’s plan to build a shopping centre and guaranteed the developer’s bank loan. In consideration for the guarantee, the developer agreed to assign title to the defendant if the developer defaulted on certain obligations. When default occurred, the defendant took

30 Ibid., at 574.
title, which resulted in a breach of a contract between the developer and its architect. The Court found in favour of the defendant on the grounds that the defendant had exercised its legal right, and therefore that the defendant’s act was not unlawful.

C. Interference with Contractual Relations not Involving Breach

In *Torquay Hotel Co. v. Cousins*[^32], Lord Denning held that the time had come to extend liability to the case “where a third person prevents or hinders one party from performing his contract, even though it be not a breach.”[^33]

Although the principle in *Torquay Hotel* has been approved in a number of Canadian cases, it is unclear that interference with contractual relations not involving breach is actually the law in Canada. In his article “Tort Injury to Economic Interests: Some Facets of Legal Response,”[^34] Professor Peter Burns argues that *Torquay Hotel* has been adopted as the law in Canada. Professor Burns identifies and analyzes a number of cases where the Courts arguably approved *Torquay Hotel*.[^35] Furthermore, subsequent to Professor Burns’ paper, in *Garry v. Sherritt Gordon Mines Ltd.*[^36], the Saskatchewan Court of Appeal, the most recent Court of appeal to directly consider the issue, referred to *Torquay Hotel* and approved its principle.

[^33]: Ibid., at 530.
[^34]: Burns, “Tort Injury to Economic Interests: Some Facets of Legal Response” (1980), 58 CBR 103.
However, as Professor Gus Richardson notes in his paper, "Interference with Contractual Relations: Is Torquay Hotel the Law in Canada?" in Canadian jurisprudence, the Torquay Hotel principle has been unnecessary to the result, and thus approved in obiter, since in each of the cases there were either breaches of contract or no contracts at all to be breached. With respect to Sherritt, the same criticism can be levied, namely that Torquay Hotel was unnecessarily applied since the actions of the defendants had led to breaches of contract.

III. INTENTIONAL INTERFERENCE WITH ECONOMIC INTERESTS BY UNLAWFUL MEANS

The latest incarnation of the tort of inducing breach of contract is the tort of intentional interference with economic interests by unlawful means. The three essential elements to the tort are i) an intention to injure the plaintiff; ii) interference with the plaintiff’s economic interests by unlawful means; and iii) resulting economic loss. Absent from the essential elements is the requirement that a contract be breached or interfered with. However, justification remains a defence.

(i) Intention to Injure the Plaintiff

As with the inducing breach of contract, intention to injure does not require the plaintiff to show malice on the part of the defendant.

In Lineal Group Inc. v. Atlantis Canadian Distributors Inc. the Ontario Court of Appeal dealt with a situation where the defendant, a bank, was held liable by the trial judge for the non-payment of an account owed to another party. The trial judge found that the

37 Richardson, "Interference with Contractual Relations: Is Torquay Hotel the Law in Canada?" (1983), 41 U.T. Fac. L. Rev. 1.
bank intentionally but without malice put in motion a series of events which led to the cheque being deposited to its customer's account, and then the proceeds plus additional monies being transferred to reduce the bank's line of credit. The plaintiff was a supplier that, due to the redirection of funds, was not paid for its products. On appeal, however, the Court of Appeal found that the bank did not intend to injure the plaintiff, rather it intended advance its own interests through a third party.

(ii) **Unlawful Interference with Economic Interest**

In *1175777 Ontario Ltd. v. Magna International Inc.*, 39 the Ontario Court of Appeal reiterated that for an action to be maintained, the interference with economic interests had to be accomplished through unlawful means. However, Simmons, J.A. refrained from offering guidance as to what constitutes unlawful means and refused to decide whether "unlawful conduct may encompass conduct such as breach of contract, breach of a statute, contempt of a Court order, or breach of fiduciary or other duty." 40

(iii) **Resulting Economic Loss**

In *Volkswagen Canada Ltd. v. Spicer*, 41 the Court dealt with a case of an automobile dealership that was suffering operating losses. In an effort to protect itself, the franchisor had its officials instruct the franchisee’s bank that cheques over $1,000 had to bear the signature of one of the officials of the franchisor. The instructions given by the franchisor’s officials, who were also directors of the franchisee, were against the franchisee’s by-laws. The Court found that the element of intent to injure was satisfied because the conduct was intended to harm the principal shareholders of the franchisee.

41 (1978) 91 D.L.R. (3d) 42 (N.S.C.A.)
The second element of interference with economic interests by unlawful means was also satisfied on the basis that the franchisor's officials were acting contrary to the franchisee's by-laws due to a lack of a directors' resolution to alter signing authority. In terms of damages, despite the fact that the Court did not find there to be pecuniary loss, the Court found that the franchisee's principal shareholders were entitled to general damages of $5,000.