



**INTERFERENCE WITH
ECONOMIC RELATIONS**

By [Wendy Matheson](#)

Alexandra Clark†

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INTERFERENCE WITH ECONOMIC RELATIONS

The tort of interference with economic relations is seldom advanced as a sole or even central cause of action. Despite the frequency with which this tort is pleaded, its scope is not well delineated and successful trial claims are rare. In light of the foregoing, interference with economic relations has developed an informal reputation as a “catch all” or “last hope” cause of action and has proved to be a fruitful field for pleadings motions. It is clear, however, that the tort is here to stay, and through a developing body of jurisprudence, it is becoming one of the more frequently pleaded intentional business torts in Canada.

History of the Tort

The origins of the tort of interference with economic relations can be traced back as far as the late 19th century¹. A leading case in this area is the House of Lords decision in *Rookes v Barnard*² that demonstrates the labour law origins of this tort. *Rookes*, which consolidated a variety of older precedents, set out the parameters of the tort of intimidation, in this case involving union pressure to enforce a “closed shop” policy in order to force the dismissal of a non-union worker. It quickly proved to be an important weapon in an employer’s labour relations arsenal, since it could be applied to many union activities, including picketing, secondary picketing and boycotts.

Subsequent English decisions³ have made it clear that the tort of intimidation is only one part of a wider range of torts, which encompasses a broader range of intentional conduct beyond threats to breach a contract.

The persistence of this labour heritage can be seen in decisions such as the Ontario Divisional Court’s ruling in the 1996 case of *Daishowa v. Friends of the Lubicon*.⁴ In this case, a public interest advocacy group, the Friends of the Lubicon, organized a consumer boycott targeted against Daishowa, a large paper manufacturer, alleging that Daishowa was carrying out logging activities on lands claimed by the Lubicon Cree of northern Alberta. The boycott included picketing of Daishowa customers who refused to honour the boycott. Daishowa’s motion for an interlocutory injunction to prevent the picketing of its customers was granted, with the Court holding that Daishowa had established a *prima facie* case that the Friends were wrongfully interfering with Daishowa’s economic relations.

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1 *Allen v. Flood*, [1898] A.C. 1 (HL).

2 [1964] A.C. 1129.

3 *Torquay Hotel v. Cousins* [1969] 2 Ch 106, *Acrow v. Rex Chainbelt* [1971] 1 WLR 1676 (C.A.), *Hadmor Products v. Hamilton* [1983] 1 AC 190 (H.L.), *Merkur Island v. Laughton* [1983] 2 A.C. 570 (H.L.) and *Lonrho PLC v. Fayed*, [1990] A.C. 1129 (H.L.).

4 (1996), 27 O.R. (3d) 215 (Div. Ct.) leave to appeal refused [1996] O.J. No. 1442 (Ont. C.A.) application for leave to appeal dismissed [1996] S.C.C.A No. 528 (“*Daishowa*”).

In contrast to *Daishowa*, the majority of recent Canadian decisions have been more conventional commercial law claims.⁵ The 1978 Nova Scotia decision, *Volkswagen Canada Ltd. v. Spicer*,⁶ is an oft-cited example of this latter trend. In *Volkswagen*, a car dealership franchisee was successful in a claim of unlawful interference against Volkswagen Canada for improperly instructing the franchisee's bank not to honour a cheque. In one of the few successful trial claims in Canada, the owners of the franchise were awarded \$10,000 in damages for loss of their business as a consequence of the dishonoured cheque. In spite of such successful claims, however, many aspects of the tort remain to be clarified.

Elements of the Tort

Canadian cases commonly list three elements to the tort.⁷ In order to make out a claim of interference with economic interests, a plaintiff is required to prove:

1. an intention to injure the plaintiff;
2. through interference with the plaintiff's economic interests;
3. made by unlawful means; and
4. resulting economic loss.⁸

Each of these requirements is examined in turn below.

1. Intention to Injure

The Ontario Court of Appeal has stated that the actions of the defendant must be "targeted" against the plaintiff in order to satisfy the "intention to injure" requirement⁹. In *Lineal*, a leading decision in Ontario, a bank was held not to be liable for intentional interference with economic relations as it had targeted its acts against a party other than the plaintiff. Accordingly, it will not suffice that injury to the plaintiff was

5 See, for example, *Balanyk v University of Toronto* (1999), 1 C.P.R. (4th) 300 (Ont. S.C.J.), *Reach M.D. Inc. v. Pharmaceutical Manufacturers Assn. of Canada* (1999), 1 C.P.R. (4th) 533 (Ont. S.C.J.) ("Reach M.D."), *Potechin v. Yashin* [2000] O.J. No. 2 (S.C.J.), *Rogers Cablesystems Ltd. v. Look Communications Inc.* (1999), 89 O.T.C. 374 (Sup. C.J.), aff'd (2000), 129 O.A.C. 324 (C.A.), *Canadian Community Reading Plan Inc. v. Quality Service Programs Inc.* (2001), 141 O.A.C. 289 (C.A.) and *1175777 Ontario Ltd. v. Magna International Inc.*, (2001) 200 D.L.R. (4th) 521 (Ont. C.A.) ("Magna").

6 (1978), 91 D.L.R. (3d) 42 (N.S.C.A.) ("Volkswagen").

7 *Lineal Group Inc. v. Atlantis Canadian Distributors Inc.* (1998), 42 O.R. (3d) 157 at 159 (C.A.) appl'n for leave to appeal dismissed (1999), 138 O.A.C. 197n (S.C.C.) ("Lineal").

8 *Lineal*, supra citing *Daishowa*, supra at p. 230. In *671122 Ontario Limited v. Sagaz Industries Canada Inc.* (1998), 40 O.R. (3d) 229 (Gen. Div.), varied on other grounds (2000) 46 O.R. (3d) 760 (C.A.) affirmed [2001] 2 S.C.R. 983 ("Sagaz") Cumming J. described six elements to this tort, described as (1) the existence of a valid business relationship or business expectancy between the plaintiff and another party; (2) knowledge by the defendant of that business relationship or expectancy; (3) intentional interference which induces or causes a termination of the business relationship or expectancy; (4) the interference is by way of unlawful means; (5) the interference by the defendant must meet the proximate cause of the termination of the business relationship or expectancy; and (6) there is resultant loss to the plaintiff.

9 *Lineal*, supra note 7.

foreseeable as a result of the defendant's actions. Mere negligence will not do to ground a successful claim of intentional interference with economic interests.

This threshold of intentionality is high. Essentially, the decision in *Lineal* can be interpreted to stand for the proposition a defendant will be absolved of liability where it can establish that it acted in furtherance of its own benefit rather than with the goal of harming the plaintiff¹⁰. The difficulty is that it will be rare to find a situation in which a party has acted with the exclusive intent of harming another, without any component of self-interest informing its behaviour. In any event, the existence of a valid self-interest does not remove the issue of intention to injure another. Various cases decided after *Lineal* have required that the intent to injure be a significant if not predominant element of the tort¹¹.

2. Economic Interest

The question of what forms of interest will qualify as an "economic interest" has also not been well defined. In one Alberta case, the Court defined the protected interest as "an inherent right to carry out some type of economic activity which is so entrenched in the Canadian economic community that it will be recognized and protected by the courts".¹² One commentator has speculated that the tort "probably includes any interference with trade, business, livelihood, and economic expectancies short of contract".¹³ Case law to date has identified interests such as the expectation of a fair bidding process in a real estate transaction,¹⁴ and the expectation of future purchase orders from existing customers,¹⁵ as falling within the ambit of this tort.

3. Unlawful Means

The interference with economic relations must be accomplished through unlawful means. 'Unlawful means' has been described as an act that one is "not at liberty to commit"¹⁶ – a general proposition which permits a very flexible standard.

10 See, for example, the trial decision in *Rogers Cablesystems, supra*, note 5 where Nordheimer J. found that the defendants' intention to further their own best interests was insufficient to satisfy the element of intentional interference. However, in upholding the trial decision, the Court of Appeal expressly refused to decide this point.

11 *Amherst Fabricators Ltd. v. Nova Scotia (Attorney General)*, [2002] N.S.J. No. 537 (S.C.). See also *Reach M.D., supra*, note 5.

12 *Colborne Capital Corp. v. 542775 Alberta Ltd.*, [1995] 7 W.W.R. 671 at 749 (Alta. Q.B.).

13 P. Osborne, *The Law of Torts* (Toronto: Irwin Law, 2000) at 293.

14 *Dufferin, supra* note 12.

15 *Daishowa, supra* note 4.

16 This phrase is taken from the following quote of Lord Denning, M.R. in *Torquay Hotel v. Cousins*, [1969] 1 All E.R. 522 at 530:

"I have always understood that if one person deliberately interferes with the trade or business of another, and does so by unlawful means, that is, by an act which he is not at liberty to commit, then he is acting unlawfully, even though he does not procure or induce any actual breach of contract."

In addition to criminal conduct, it appears that the commission of other torts, such as defamation or misrepresentation, may qualify as unlawful acts, as would common-law claims based on crimes, such as assault, battery or fraud. At least two cases have found that offering a bribe constitutes a wrongful act for the purposes of this tort.¹⁷ Another two decisions have interpreted “unlawful” to include actions such as a breach of a company’s by-laws,¹⁸ or a regulatory body’s internal rules of procedure.¹⁹ In *Cheticamp Fisheries Co-operative Ltd. v. Canada*²⁰, the Nova Scotia Court of Appeal held that the actions of the Department of Fisheries and Oceans in imposing dockside monitoring fees upon fishermen were “unlawful in that they were not authorized by law”²¹.

4. Economic Loss

As successful trial claims are rare, the type of required loss and how damages are to be assessed remain unclear. Actual pecuniary loss is sufficient, but can be difficult to prove. In the *Volkswagen*²² case, the Nova Scotia Court of Appeal indicated that while it is preferable to have evidence of actual pecuniary loss suffered by the plaintiff, the courts retain discretion to make an award of general damages. In that case, they awarded each of the owners of the franchise \$5,000 for the loss of their business, even though the evidence suggested that the business would eventually have been lost even without Volkswagen’s wrongful conduct.

In the *Sagaz*²³ case, another successful claim at first instance, the trial judge examined the net loss in fair market value of the assets of the plaintiff company as a result of the defendant’s interference with the plaintiff’s relationship with a long-standing customer. The court awarded \$1,807,500 in damages based on a comparison of the company’s fair market value at the outset of the events in question with the fair market value at the time that the division in question was sold.

Where it Fits

The relationship of this tort to other intentional business torts is not difficult to trace, as it appears to broaden the existing causes of action considerably. In the view of Cumming J:

This quote was relied on in Ontario by Maloney J. in *Reach M.D. Inc.*, supra note 5 and by Lambert J.A. in his dissenting decision in *No. 1 Collision Repair & Painting (1982) Ltd. v. Insurance Corp. of British Columbia*, [2000] B.C.J. No. 1634 (BCCA).

17 *Sagaz*, supra note 8 and *Dufferin Real Estate v. Giralico*, [1989] O.J. No. 1525 (H.C.J.) (“*Dufferin*”).

18 *Volkswagen*, supra note 6.

19 *Reach MD*, supra note 5.

20 (1995), 123 D.L.R. (4th) 121 (N.S.C.A) leave to appeal ref’d, [1995] S.C.C.A No. 202.

21 *Ibid.*, at p. 127. However, in the result, the D.F.O. was held not to be liable for intentional interference with economic relations as its actions were held to be directed at the proper management of the fishery rather than at injuring the fishermen.

22 *Supra*, note 6.

23 *Supra*, note 8.

[T]his tort is, in effect, what can be referred to as a “genus tort”. That is, it embraces or subsumes a class of specific torts developed historically that have common characteristics. These are traditionally independent economic torts linked to “unlawful means” such as the torts of intimidation, indirect interference with contractual relations and unlawful conspiracy.²⁴

The tort is broader than that of inducing breach of contract, although the two causes of action are often pleaded together. A successful inducement claim has 5 elements:

1. an enforceable contract;
2. knowledge of the plaintiff’s contract by the defendant;
3. an intentional act on the part of the defendant to cause a breach of that contract;
4. wrongful interference on the part of the defendant; and
5. resulting damage to one of the parties to the contract.²⁵

The primary distinction appears to be that the tort of interference with economic relationships does not require that the plaintiff be in a valid contractual relationship with another party, as is required for a successful inducement claim.²⁶ Therefore this tort appears to protect a wider range of economic interests and expectations from interference.

The differences between the two torts are illustrated by the case of *Dufferin Real Estate v. Giralico*.²⁷ The case is an intriguing one as, in the words of the trial judge, “[t]he tale is sordid, involving religious duplicity, secular chicanery and, above all, human greed. At trial, the sanctity of the oath was all but dishonoured, except by a few witnesses. The oath took quite a beating”.

The claim involved the loss of a real estate sale. In this case, the plaintiff acted as agent to a corporation, Oakfield Investments, that was bidding to purchase a piece of property owned by Mrs. Giralico. The plaintiff alleged that two co-defendants committed the tort of interference with economic relations by bribing Mrs. Giralico’s advisors to persuade her to sell the property to them rather than to

24 *Sagaz*, *supra* note 8 at 243.

25 *Harry Winton Investments Ltd. v. C.I.B.C. Development Corp. et al.* (2001), 52 O.R. (3d) 417 (C.A.) (“*Winton*”), *Colonia Life Holdings v. Fargreen Enterprises* (1990), 1 O.R. (3d) 703 (Gen. Div.), *Ontario Store Fixtures Inc. v. Mmmuffins Inc.* (1989), 70 O.R. (2d) 42 (H.C.J.), *Posluns v. Toronto Stock Exchange*, [1966] 1 O.R. 285 (C.A.).

26 The requirement for a separate unlawful act may also be less stringent: *Winton*, *supra*.

27 *Dufferin*, *supra* note 12.

Oakfield. There was no concluded contract between Mrs. Giralico and Oakfield, and thus a claim of inducing breach of contract could not be made out. But the trial judge found that in offering a secret commission to Mrs. Giralico's advisers, the co-defendants induced a breach of the fiduciary duties that her advisers owed to her. Further, the judge found that Oakfield had a valid business expectancy in competing for the property, and was entitled to expect that the bidding for purchase would be fair and equitable.

In the final analysis, the claim did not succeed because the judge found that, in spite of the secret commission, the co-defendant's offer for the property was more valuable, and thus that Mrs. Giralico would have sold the property to them in any event. On different evidence, however, it seems clear that the intentional interference claim might have succeeded where the inducement claim failed.²⁸

As a further example, in the *Daishowa* case, Corbett J. expressed the view that "interference with a contract or an existing contractual relationship which falls short of causing an actual breach but results in the untimely conclusion of relations is nonetheless actionable".²⁹ In that case, the trial judge had found that the Friends of the Lubicon did not cause the breach of any existing supply contracts between Daishowa and its customers, but rather encouraged customers not to enter into new contracts with Daishowa. In the Divisional Court's view, while these facts would not make out an inducement claim, they could support a claim for intentional interference.

Defence of Justification

In *Daishowa*³⁰, the Divisional Court indicated that the defence of justification – that is, that the alleged unlawful act was justified in the pursuit of a legitimate goal – is unlikely to be accepted by Canadian courts. In that case, the Court held that the trial judge erred in examining the Friends of the Lubicon's motives for picketing Daishowa's customers. In considering the picketing of Daishowa's customers, the Divisional Court concluded that:

Interference with the economic relations of Daishowa and its customers could reasonably be expected to cause damage to Daishowa and this result must have been taken to have been intended. The question then becomes to what extent is the ultimate or overall intention, or goal, or purpose, pertinent in respect of the intentions with which the acts were undertaken. The answer to this question is the same as determining

28 A similar result was reached in the case of *Reach M.D.*, *supra* note 5 where Maloney J. found that the defendant had improperly interfered with the plaintiff's economic interests, but that the damages suffered would have occurred in any event.

29 *Daishowa*, *supra* note 4 at 232.

30 *supra*, note 4.

whether there is sufficient justification for interference with economic relations.³¹

The Court examined the Friends' aim of supporting the Lubicon Cree, but concluded that "the ultimate moral goal cannot justify an otherwise illegal act in the absence of some duty to interfere".³² This would seem to suggest a fairly limited role for this defence, but the question has not been extensively canvassed in the jurisprudence to date.

Claims against Officers and Directors

Intentional interference with economic relations is often pleaded against corporate officers and directors. This is sometimes done for tactical reasons, including as a means of attempting to pierce the corporate veil of insolvent enterprises, to put pressure on senior management or as a means of obtaining broader discovery rights in an action against a corporation. In such cases, another important defence to be considered is that of the so-called *Said v. Butt* exception to officers and directors liability.

As the Ontario Court of Appeal established in *ADGA Systems International Ltd. v. Valcom Ltd.*,³³ corporate officers can be held personally liable in tort for actions carried out in the course of their corporate duties even when such actions were performed in the interests of the company. The sole exception to this principle, however, was first carved out in the English case of *Said v. Butt*,³⁴ and relates to claims of inducing breach of contract. In such cases, the Court wrote, "if a servant acting *bona fide* within the scope of his authority procures or causes the breach of a contract between his employer and a third person, he does not thereby become liable to an action of tort at the suit of the person whose contract has thereby been broken".³⁵

In *ADGA Systems*, the Court of Appeal suggested that this exception exists in order to prevent double recovery against both a corporation and its officers in breach of contract claims, and to preserve the concept of "efficient contractual breach":

the exception...assures that officers and directors, in the process of carrying on business, are capable of directing that a contract of employment be terminated or that a business contract not be performed

31 *Ibid.* at 236.

32 *Ibid.*

33 (1999), 43 O.R. (3d) 101 (C.A.) application for leave to appeal dismissed (2000) 134 O.A.C. 400n (S.C.C.) ("*ADGA Systems*").

34 [1920] K.B. 497.

35 *Ibid.* at 506.

on the assumed basis that the company's best interest is to pay the damages for failure to perform."³⁶

The immediate question raised is whether such an exception also exists for directors and officers faced with an allegation of intentional interference with economic interests, particularly in cases also containing an allegation of inducing breach of contract. The Ontario Court of Appeal has recently addressed this question on a pleadings motion in the case of *1175777 Ontario Ltd. v. Magna International Inc.*³⁷. In that case, the Court considered allegations of breach of contract, inducing breach of contract, conspiracy to injure and intentional interference with economic relations, levelled against both Magna International and Frank Stronach, the Chair of Magna's Board of Directors. The plaintiff alleged that Stronach had instructed Magna not to sign a lease agreement with the plaintiff, causing damages in the form of lost rents and other lease-related revenues.

The Court of Appeal began by observing that in the absence of a duty to negotiate in good faith, instructing a corporate entity not to execute a contract did not constitute unlawful conduct, and thus could not found a claim of intentional interference with economic relations.

In examining the claim of conspiracy to injure, however, the Court of Appeal concluded that all of the requisite elements of this tort had been pleaded. The Court also concluded that this conspiracy claim, which once again was based on the alleged instruction not to execute the lease, was merely a reformulation of the claim of inducing a breach of contract. The Court therefore held that the conspiracy claim was equally subject to the *Said v. Butt* defence. In reaching this conclusion, the Court stated pointedly that "the [plaintiff] cannot escape the application of the [*Said v. Butt*] rule simply by attaching a different label to the impugned conduct".³⁸

This conclusion strongly suggests that any intentional interference claim that is, at its heart, an inducing breach of contract claim, will be equally susceptible to the *Said v. Butt* defence. Given that it will be the rare intentional interference claim that will not have some contractual basis, this exception may have far-reaching consequences for claims against corporate directors and officers.

Conclusion

This tort, as with other intentional economic torts, is seldom pleaded as a sole cause of action. It is frequently advanced with other claims, including other intentional economic torts, in a manner that may suggest that the plaintiff is stretching for a legitimate foundation for the action. It may be that there was no direct interaction between the plaintiff and the defendant based upon which a more conventional cause of

³⁶ *ADGA Systems*, *supra* note 32 at 106.

³⁷ *Supra* note 5.

³⁸ *Ibid* at 532.

action would arise. Alternatively, it may be that the party against whom the plaintiff has a more conventional cause of action is impecunious. There may also be strategic reasons for a plaintiff to seek to involve additional defendants in the action. It often appears that an allegation of intentional interference with economic relations is a sign of desperation, suggesting that the plaintiff is unable to find a more conventional claim to obtain a remedy from the principal defendant.

However, in appropriate cases, a claim for interference of economic relations is an entirely legitimate cause of action, which has been successful in a number of cases. Such claims routinely survive motions to strike, and a few have succeeded at trial. A defendant should therefore not assume that the claim is without potential merit. In appropriate cases, it is an effective route to a remedy, filling a gap left by other torts.