

CANADA / JUDGMENT

Latifi v. The TDL Group Corp.

2021 BCSC 2183

COURT

Supreme Court of British Columbia

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2021 BCSC 2183 Latifi v. The TDL Group Corp.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Latifi v. The TDL Group Corp.,

2021 BCSC 2183

Date: 20211109

Docket: S198150

Registry: Vancouver

Between:

Samir Latifi

Plaintiff

And

The TDL Group Corp.

Defendant

Corrected Judgment: The text of the judgment was corrected at paragraph 130 on January 12, 2022.

Before: The Honourable Madam Justice Sharma

Reasons for Judgment

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Place and Date of Trial/Hearing:

Vancouver, B.C.

May 13-14, 2021

Place and Date of Judgment:

Vancouver, B.C.

November 9, 2021

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- [1] This judgment addresses the defendant's application to strike the amended notice of civil claim in this proposed class action. Its application is brought pursuant to R. 9-5(1)(a) of the Supreme Court Civil Rules.
- [2] The parties agreed it was appropriate for the court to determine this application notwithstanding the general rule that no applications should precede the certification application. Specifically, the parties agreed:
- a) this judgment would be determinative of the issue of whether the pleadings disclose a cause of action pursuant to s. 4(1)(a) of the Class Proceedings Act, R.S.B.C. 1996, c. 50;
 - b) neither party would seek nor be awarded costs of this application; and
 - c) if the defendant is unsuccessful, it would not seek to appeal this judgment until after a determination is made on the remaining certification criteria.
- [3] While their agreement is not determinative nor binding on this Court, having considered all the circumstances, I agree with the parties that it is in the interest of justice to rule on this application prior to the certification application.

I. FACTS

- [4] The defendant, The TDL Group Corp. ("TDL"), owns the Tim Hortons brand, and is the franchisor for Tim Hortons restaurants in Canada. TDL also operates corporate Tim Hortons restaurants. Collectively, the corporate restaurants and franchisees employ thousands of employees throughout Canada. For convenience, I will use "Tim Hortons" to mean both TDL's corporate restaurants and franchisees' restaurants.
- [5] The plaintiff, Mr. Latifi, was employed at a Tim Hortons in Surrey, British Columbia in 2012. He did not work at any other location. He brings the claim on behalf of all Tim Hortons' employees in Canada, who are the proposed class members (for convenience, I will refer to these as Class Members).
- [6] At issue is a specific clause that exists in the standard Tim Hortons franchise agreements (the "No-hire clause"). Pursuant to that clause, franchisees agree:

not to employ or seek to employ any person who is at the time employed by [TDL] or by any other licensee of the [TDL] operating the same or similar business, or otherwise directly or indirectly to induce such person to leave his or her employment thereat without the prior written consent of the [TDL].

- [7] The plaintiff alleges the No-hire clause violates provisions of the Competition Act, R.S.C. 1985, c. C-34 by unlawfully suppressing Class Members' wages. The plaintiff alleges the wage suppression conferred benefits on TDL and its franchisees by way of increased profits. As such, he claims damages ought to be ordered pursuant to s. 36 of the Competition Act.

- [8] The plaintiff also alleges TDL, in insisting and enforcing the No-hire clause, has committed civil conspiracy and/or the tort of unlawful means for which either an accounting and restitution, or disgorgement of benefits, should be ordered.
- [9] TDL says the plaintiff's claim for damages based on the Competition Act is bound to fail because the legislation, on its face, does not apply to the No-hire clause. It submits the relevant section of the legislation only applies to price-fixing, or other prima facie unlawful "sell-side" agreements. TDL maintains the No-hire clause is "buy-side" agreement and, therefore, is not captured by the provision that creates a civil cause of action under the legislation for damages. TDL further says the other causes will also fail because absent the violation of the Competition Act, there is no unlawful activity that is a prerequisite for both conspiracy and the tort of unlawful means.
- [10] The plaintiff submits TDL's application should be dismissed because it cannot meet the high bar of establishing that it is plain and obvious that his claim is bound to fail. The plaintiff contends that TDL's interpretation of the legislation is too narrow. Even if the issue is doubtful, the case law requires that doubt to be resolved in his favour.

A. The Amended Notice of Civil Claim

- [11] There is no dispute that an application pursuant to R. 9-5(1)(a) is resolved by deeming the facts pleaded as true, and applying the legal test without considering any evidence. Thus, the pleadings are central to the application.
- [12] The plaintiff claims the No-hire clause harms Class Members by suppressing their wages, which benefits Tim Hortons' bottom-line. The plaintiff asserts that among others, the following facts support his claim:
- a) TDL's franchisees operate pursuant to standard, non-negotiable franchise agreements they must enter with TDL.
 - b) In addition to the No-hire clause, the standard franchise agreements require franchisees to agree that TDL has a unilateral right to terminate the agreements for default, including violation of the No-hire clause.
 - c) Each franchise is independently owned and operated businesses, and therefore are direct competitors of one another.
 - d) Because TDL also owns some corporate restaurants, it is also a direct competitor of its franchisees.
 - e) Tim Hortons restaurants are in direct competition amongst themselves for hourly-wage labour.
 - f) TDL implemented the No-hire clause deliberately "in order to suppress employees' wages" and to increase the profits for it and its franchisees at the expense of its employees.

- g) The No-hire clause provides no benefit to the public nor the plaintiff and Class Members.
- h) As a direct result of TDL's actions, the plaintiff and Class Members have suffered reduced wages, reduced employment benefits, loss of professional growth opportunities, and worsened working conditions.

[13] Based on the foregoing and other facts asserted in the amended notice of civil claim, the plaintiff seeks the following relief in the proposed class action:

- a) Damages under s. 36 of the Competition Act.
- b) General damages for the tort of conspiracy.
- c) General damages for the tort of unlawful means.
- d) An accounting and restitution of benefits received by TDL and its franchisees, or in the alternative, disgorgement of those benefits.
- e) Punitive damages.
- f) Interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79.

B. The Legislation

[14] The plaintiff claims the No-hire clause violates s. 45 of the Competition Act, which appears in Part VI of the legislation:

45(1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges

- (a) to fix, maintain, increase or control the price for the supply of the product;
 - (b) to allocate sales, territories, customers or markets for the production or supply of the product; or
 - (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.
- (2) Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable on conviction to imprisonment for a term not exceeding 14 years or to a fine not exceeding \$25 million, or to both.

[15] Section 45(8) specifies definitions that apply to the rest of the section. The definition of "competitor" is a "person who it is reasonable to believe would be likely to compete with respect to a product in the absence of a conspiracy, agreement or arrangement to do anything referred to in paragraphs (1)(a) to (c)."

[16] The following terms that appear in s. 45 are defined in s. 2:

"product" includes an article and a service;

"service" means a service of any description whether industrial, trade, professional or otherwise;

"supply" means,

- (a) in relation to an article, sell, rent, lease or otherwise dispose of an article or an interest therein or a right thereto, or offer so to dispose of an article or interest therein or a right thereto, and
- (b) in relation to a service, sell, rent or otherwise provide a service or offer so to provide a service;

[17] The legislation creates a cause of action for damages for violations of Part VI:

36(1) Any person who has suffered loss or damage as a result of

- (a) conduct that is contrary to any provision of Part VI, or
- (b) the failure of any person to comply with an order of the Tribunal or another court under this Act,

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

[18] TDL submits it is important to consider s. 90.1 in assessing its application. That section confers certain powers on the Competition Tribunal, which is established by the Competition Tribunal Act, R.S.C. 1985, c. 19 (2nd Supp.). Pursuant to s. 8(1), the Tribunal has jurisdiction to hear and dispose of all matters falling under Parts VII.1 and VIII of the Competition Act, which includes s. 90.1 but not s. 45. Section 90.1 states:

90.1(1) If, on application by the Commissioner, the Tribunal finds that an agreement or arrangement -- whether existing or proposed -- between persons two or more of whom are competitors prevents or lessens, or is likely to prevent or lessen, competition substantially in a market, the Tribunal may make an order

- (a) prohibiting any person -- whether or not a party to the agreement or arrangement -- from doing anything under the agreement or arrangement; or
 - (b) requiring any person -- whether or not a party to the agreement or arrangement -- with the consent of that person and the Commissioner, to take any other action.
- (2) In deciding whether to make the finding referred to in subsection (1), the Tribunal may have regard to the following factors:
- (a) the extent to which foreign products or foreign competitors provide or are likely to provide effective competition to the businesses of the parties to the agreement or arrangement;

- (b) the extent to which acceptable substitutes for products supplied by the parties to the agreement or arrangement are or are likely to be available;
- (c) any barriers to entry into the market, including
 - (i) tariff and non-tariff barriers to international trade,
 - (ii) interprovincial barriers to trade, and
 - (iii) regulatory control over entry;
- (d) any effect of the agreement or arrangement on the barriers referred to in paragraph (c);
- (e) the extent to which effective competition remains or would remain in the market;
- (f) any removal of a vigorous and effective competitor that resulted from the agreement or arrangement, or any likelihood that the agreement or arrangement will or would result in the removal of such a competitor;
- (g) the nature and extent of change and innovation in any relevant market; and
- (h) any other factor that is relevant to competition in the market that is or would be affected by the agreement or arrangement.

[19] The statute was amended in 2009. TDL submits the change in wording which resulted from the amendment is significant. Prior to 2009, s. 45 stated:

45(1) Every one who conspires, combines, agrees or arranges with another person

- (a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,
- (b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,
- (c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or
- (d) to otherwise restrain or injure competition unduly,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.

[Emphasis added.]

II. THE LEGAL TEST UNDER RULE 9-5(1)(a)

[20] The test for applications brought pursuant to R. 9-5(1)(a) is well established. In *BNSF Railway Company v. Teck Metals Ltd.*, 2016 BCCA 350 at para. 2, the court of appeal stated:

- [2] It is settled law that an application made by a defendant to have a plaintiff's pleadings struck is brought on the basis that the action(s) asserted therein cannot succeed as a matter of law. The chambers judge considers only the plaintiff's pleadings, and assumes them to be true. The threshold to be met by the plaintiff is a low one; an order striking out pleadings is made only in "plain and obvious" cases. (See *A.G. of the Duchy of Lancaster v. London & North Western Railway Co.* [1892] 3 Ch. 274; *Hunt v. Carey Canada Inc.* [1990] 2 S.C.R. 959; *International Taoist Church of Canada v. Ching Chung Taoist Association of Hong Kong Ltd.* 2011 BCCA 149 at para. 9.) Courts are enjoined not to rule out pleadings merely because the cause of action asserted is novel. If the claim is arguable, or can be amended to be so, it should be permitted to proceed: see *R. v. Imperial Tobacco Ltd.* 2011 SCC 42 at para. 21.
- [21] Also helpful are the following recent comments from this Court in *Walter v. Insurance Corporation of British Columbia*, 2020 BCSC 758, aff'd 2021 BCCA 259 on a separate point, at para. 88:
- [88] Under Rule 9-5, the Court is loath to strike a claim (and by analogy, remove a party) unless it is plain and obvious that the claim is irretrievably bound to fail. In *Stewart v. Stewart*, supra, at para. 53, Abrioux J (as he then was) summarized the liberal approach to allowing an impugned claim to survive an interlocutory attack except in the clearest of cases:
- (a) if there is some realistic chance that the cause of action could be saved by a future development in the law, the court should allow the action to proceed. The law is not static and unchanging: *Moses v. Lower Nicola Indian Band*, 2015 BCCA 61 at para. 41;
 - (b) a judge hearing a motion to strike pleadings founded upon a complex question of statutory interpretation is not obliged to come to a conclusion on the interpretation of the provisions in issue. The judge can leave the matter to trial in the exercise of his discretion: *British Columbia (Director of Civil Forfeiture) v. Flynn*, 2013 BCCA 91 at paras. 13 and 15;
 - (c) any doubt on the plain and obvious test must be resolved in favour of permitting the pleading to stand: *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress*, [1999] B.C.J. No. 2016 (S.C.) at para. 34; and
 - (d) "an excellent statement of the test for striking out a claim" is found in *Hunt v. Carey Canada Inc.*, being that "if there is a chance that the plaintiff might succeed, then [he] should not be driven from the judgment seat": *Odhavji Estate v. Woodhouse*, 2003 SCC 69 at para. 15.
- [22] TDL does not take issue with these statements of the law, but submits that two recent cases represent an important cultural shift in how the principles expressed therein are applied. In *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, the Court addressed the power to strike out claims that have no reasonable prospect of success. Chief Justice McLachlin referred to it as an important housekeeping function that promotes two goods: efficiency in the conduct of litigation, and correct results.

- [19] The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.
- [20] This promotes two goods -- efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. The litigants can focus on serious claims, without devoting days and sometimes weeks of evidence and argument to claims that are in any event hopeless. The same applies to judges and juries, whose attention is focused where it should be -- on claims that have a reasonable chance of success. The efficiency gained by weeding out unmeritorious claims in turn contributes to better justice. The more the evidence and arguments are trained on the real issues, the more likely it is that the trial process will successfully come to grips with the parties' respective positions on those issues and the merits of the case.
- [23] Additionally, TDL emphasizes the Chief Justice's comments at para. 22 that plaintiffs must clearly plead facts to support their claim, and they are "not entitled to rely on the possibility that new facts may turn up as the case progresses".
- [24] TDL also relies on Justice Brown's decision in *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 [Babstock] at para. 18, where he references previous comments from that court on the need for a cultural shift to promote "timely and affordable access to the civil justice system", citing *Hryniak v. Mauldin*, 2014 SCC 7 at para 2. Specifically, TDL relies on para. 19 of Justice Brown's reasons:
- [19] Of course, it is not determinative on a motion to strike that the law has not yet recognized the particular claim. The law is not static, and novel claims that might represent an incremental development in the law should be allowed to proceed to trial (*Imperial Tobacco*, at para. 21; *Das v. George Weston Ltd.*, 2018 ONCA 1053, 43 E.T.R. (4th) 173, at para. 73; see also *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 670). That said, a claim will not survive an application to strike simply because it is novel. It is beneficial, and indeed critical to the viability of civil justice and public access thereto that claims, including novel claims, which are doomed to fail be disposed of at an early stage in the proceedings. This is because such claims present "no legal justification for a protracted and expensive trial" (*Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83, at para. 19). If a court would not recognize a novel claim when the facts as pleaded are taken to be true, the claim is plainly doomed to fail and should be struck. In making this determination, it is not uncommon for courts to resolve complex questions of law and policy (see e.g. *Imperial Tobacco*; *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537; *Syl Apps*; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261).

- [25] The plaintiff submits that nothing said by the Supreme Court of Canada alters the existing law in British Columbia, even if a claim is novel: see *Endean v. Canadian Red Cross Society* (1998), 157 D.L.R. (4th) 465 (B.C.C.A.) at para. 8.
- [26] I agree. While the Supreme Court of Canada's comments referenced above do speak to the importance of a cultural shift in civil litigation, I do not take them as altering in any way the legal test under R. 9-5(1)(a).
- [27] Specifically, Justice Brown's comments in *Babstock* about novel cases being struck does not, in my view, modify the comments of the Court of Appeal in *BNSF Railway Company* that the threshold for a plaintiff to defeat an application to strike is low. His discussion about novel claims not surviving an application to strike must be understood in the context of that case. In *Babstock* the Supreme Court of Canada held that there is no cause of action for waiver of tort in Canada. Thus, the commentary about novel causes of action was informed by, and directed to, the main issue regarding the status in Canada of that tort. The comments were not focussed as sharply, nor intended to modify, the test for striking pleadings.
- [28] As Justice Abrioux noted in his summary of the law in *Stewart* at para. 53 (quoted in *Walter*), "any doubt on the plain and obvious test must be resolved in favour of permitting the pleading to stand". This tracks the Supreme Court of Canada's comments that if there a chance a plaintiff's claim may succeed, that plaintiff "should not be driven from the judgment seat": *Odhavji Estate v. Woodhouse*, 2003 SCC 69 at para. 15, citing *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980.
- [29] TDL also emphasized the importance of pleading material facts, relying on paras. 33-36 from *Kindylides v. Does*, 2020 BCCA 330. I do not understand the plaintiff to disagree with the principle from that case that the analysis under R. 9-5(1)(a) includes looking at the pleading to ensure the material facts pled relate to the causes of action being asserted. Nor do I understand that case to alter the test to be applied on this application.
- [30] With those principles in mind, I turn to each of the plaintiff's claims.

III. THE CLAIM UNDER S. 45 OF THE COMPETITION ACT

- [31] TDL submits s. 45 was never meant to apply to the type of agreement in which the No-hire clause appears. Its position rests on distinguishing between "buy-side" and "sell-side" agreements. TDL submits s. 45 applies to inherently anti-competitive "sell-side" agreements, specifically those where competing suppliers agree to fix prices, allocate markets, or limit output.

- [32] These are contrasted to "buy-side" agreements where purchasers of a product agree to fix the price of products they purchase. TDL submits buy-side agreements are not inherently anti-competitive; therefore, they are not captured by s. 45, which has penal consequences. Instead, buy-side agreements can in some circumstances enhance competitiveness, for example, allowing medium-sized business to pool their purchasing power to better compete with larger businesses.
- [33] The plaintiff argues TDL's interpretation is not supported by the words used in s. 45. He further submits TDL's approach is an overly narrow interpretation of the Competition Act.
- [34] The plaintiff submits Class Members' labour is a "product" within the meaning of the legislation. His position is that Tim Hortons restaurants compete with one another for that product, and their agreement not to hire employees from one another amounts to a conspiracy to manipulate the supply of that labour.
- [35] The resolution of this issue is a matter of statutory interpretation. It is uncontroversial that the modern approach to statutory interpretation requires that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21.
- [36] TDL says its position is supported by both the plain wording of s. 45, and a reading of the entire legislation in its proper context, as well as considering the legislative history of s. 45.

A. Plain Wording of s. 45 and Reading the Competition Act in Its Proper Context

- [37] TDL submits it is clear on its face that s. 45 is aimed at the supply or the production of products, not the purchase of products. Its position is that the provision aims to prohibit certain conspiracies or agreements amongst competitors engaged in the supply of a product, which are deemed to be anti-competitive. Specifically, competitors who supply the same product run afoul of s. 45 if they conspire to: (a) fix the price for the supply of that product; (b) allocate customers or markets for the production or supply of that product; or (c) fix or eliminate production or supply of that product.
- [38] The plaintiff's position is that nothing in the wording of s. 45 limits its application in the manner suggested by TDL. He also submits even if that it not clear, that doubt should be resolved in favour of allowing the claim to stand.
- [39] The starting point of the plaintiff's position is to ascertain what is targeted by the No-hire clause. His position is that nothing in s. 45(1) requires that the competitors must, themselves, be suppliers of the product. He submits Class Members' labour is the "product" within the meaning of s. 45.
- [40] Looking only at the words of s. 45 (and their respective definitions), the plaintiff's theory of the case is as follows:

- a) product is defined to include a service;
- b) service means a service of any description, and therefore includes Class Members' labour;
- c) supply, in relation to a service, means to "sell, rent or otherwise provide a service or offer to provide a service";
- d) Class Members offer and then provide a service (their labour); therefore, their labour is "the supply of a product", as that phrase is used in s. 45;
- e) absent the No-hire clause, it is reasonable to believe that TDL would compete with its franchisees for Class Members' labour, and thus, Tim Hortons are "customers" of their employees' labour; and
- f) by prohibiting Tim Hortons restaurants from hiring Class Members, the No-hire clause restricts the mobility of the Class Members, which has the effect of, among other things, suppressing their wages.

[41] For convenience, I reproduce here s. 45:

45(1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges

- (a) to fix, maintain, increase or control the price for the supply of the product;
- (b) to allocate sales, territories, customers or markets for the production or supply of the product; or
- (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

[42] Applying the logic of the plaintiff's position, one would read s. 45 in the following manner. TDL is a "person who with [its franchisees] with respect to [Class Members' labour]" conspired, agreed or arranged "(a) to fix or control the price for the supply of [Class Members' labour]; (b) to allocate customers or markets for the supply of [Class Members' labour]; or (c) to fix or control the supply of [Class Members' labour]".

[43] TDL's position is that that approach makes no sense. TDL contends the only coherent reading of s. 45 is one that recognizes that it prohibits agreements or conspiracies between people who compete with one another with regard to the production or supply (not the purchase) of a product. Thus, even if one agreed that employees' labour fell within the definition of "product", and one accepted that TDL and its franchisees were competitors for that product, they purchase that product; they do not produce or supply it. As such, s. 45 has no application.

[44] This reflects what TDL say is Parliament's intent to prohibit inherently anti-competitive supply-side agreements. TDL maintains the No-hire clause is not a supply-side agreement, and therefore the claim is bound to fail.

[45] Although TDL submits its position is supported by the words of s. 45 alone, it submits its position is buttressed by looking at the rest of the legislation.

[46] The starting point to understanding any provision within the Competition Act is its purpose articulated in s. 1.1:

The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

[47] The Supreme Court of Canada has commented on these objectives in *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641 at 676, finding, among other things, that the legislation "embodies a complex scheme of economic regulation" and "constitute[s] a well-integrated scheme of regulation designed to discourage forms of commercial behaviour viewed as detrimental to Canada and the Canadian economy". Particularly relevant to s. 45, the Supreme Court of Canada has noted that conspiracy for price-fixing is antithetical to the objectives of the legislation: *Pioneer Corp. v. Godfrey*, 2019 SCC 42 at para. 65.

[48] With regard to the civil remedies established by s. 36, the Court has stated that "[t]here is a close congruence between the goal of enhancing healthy competition in the economy and [s. 36] which creates a private remedy dependent for its effectiveness on individual initiative": *General Motors of Canada Ltd.* at 685; *Pioneer Corp.* at paras. 64-68.

[49] TDL submits Parliament made a choice to strictly prohibit inherently anti-competitive "sell-side" agreements by criminalizing those falling under s. 45's ambit. On the other hand, buy-side agreements may or may not be prohibited. Section 90.1 grants the Tribunal a discretion whether to prohibit any agreement amongst competitors that "prevents, lessens or is likely to prevent or lessen, competition substantially in a market". The section then lists a number of factors the Tribunal may consider in making that determination.

[50] However, s. 90.1 is not in Part VI of the legislation, and therefore cannot be the basis for an action for damages. Section 36(1)(a) restricts the recovery of damages by way of civil action to activity that violates Part VI of the Competition Act, or contravenes a court or Tribunal order.

[51] I agree that s. 90.1 is much broader in scope than s. 45 because it does not purport to define the ways in which agreements may prevent or lessen competition. That conclusion is left to the Tribunal's determination based on a number of listed factors. Conversely, s. 45 does define the types of agreement to which it applies, which are those where a "person with a competitor of that person with respect to a product, conspires, agrees or arranges" to do the specific things articulated in subsections (a) to (c).

- [52] The plaintiff contends that nothing in the wording of s. 45, or any other provision in the legislation, purports to differentiate "supply-side" agreements from "buy-side" agreements. He submits that s. 45 does not even contain the word "supplier", unlike other sections of the legislation.
- [53] The plaintiff's point is that "supplier" is referenced in Parts VII.1 and VIII, so its absence in s. 45 is meaningful. This submission is based on the doctrine of implied exclusion. That doctrine provides that "explicit expression of one thing in a statute suggests the exclusion of another", such that the failure to include an expected term leads to the inference that it was deliberately excluded: *Li v. Rao*, 2019 BCCA 265 at para. 74.
- [54] I do not find the plaintiff's position on this point compelling. One must read the words of s. 45 in their "grammatical and ordinary sense". Supplier is not a defined term in the Competition Act, so the ordinary meaning of the word applies. A supplier is someone who "supplies" a product.
- [55] Section 45 uses the phrases "the supply of the product" and "the production or supply of the product". It also identifies in subsections (a)-(c) the specific types of agreements amongst competitors that are prohibited. Notably, each one refers to a prohibited activity with regard to "the supply" of the product.
- [56] I find a plain reading of section 45 supports TDL's position. The focus of s. 45 is to prohibit certain agreements amongst people who are competitors with each other "with respect to a product". It creates an offence if those competitors do certain things with regard to "the supply" or "the production or supply" of "the product". Grammatically, there is no need to include the word supplier in s. 45, and arguably, it would be unwieldy and redundant to do so.
- [57] TDL submits the plaintiff's case rests on interpreting s. 45 in a non-sensical way because it requires one to assume that the persons captured could be simultaneously a competitor and a customer of "the product".
- [58] Indeed, that is explicitly what the plaintiff proposes (see above, para. 39). I agree with TDL that such an approach does not accord with a common-sense or logical interpretation of section 45. However, even if I was unsure in that conclusion, I agree the legislative history of s. 45 clearly supports TDL's position.

B. Legislative History and the Mohr Decision

- [59] TDL provided detailed background of what it says led to the legislation's amendment in 2009, including the consultation sought and advice received by the government before the amendments were enacted.

- [60] While that background was helpful to understand the context in which the legislation was amended, the issue before me is narrow, and turns on an analysis of statutory interpretation. As noted, I must determine the issue by accepting the pleaded facts as true, and in the absence of evidence. Thus, the issue is this: do the facts as stated in the amended notice of civil claim, which are deemed to be true, establish a viable claim when one considers them in light of the relevant statutory provisions?
- [61] The pre-amendment version of s. 45 is clearly relevant to the statutory interpretation of the current version: *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56 at paras. 33-34; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 at para. 43. It is less clear to me whether evidence about the legal opinions rendered before the amendments were enacted can properly be considered on a R. 9-5(1)(a) application.
- [62] However, I do not need to resolve that issue. After the hearing concluded, the parties forwarded to me a copy of *Mohr v. National Hockey League*, 2021 FC 488. The decision addresses the interpretation of s. 45, and specifically comments on the legislative history of s. 45. I find the *Mohr* decision to be instructive and directly applicable to the issues before me.
- [63] In *Mohr*, the Federal Court accepted arguments about the interpretation of s. 45 that parallel TDL's arguments before me. That case also addressed an application to strike a pleading for failing to disclose a reasonable cause of action in a proposed class proceeding.
- [64] The plaintiff alleged the defendants breached s. 48 of the Competition Act, which specifically applies to professional sports. Section 48(1) creates an offence, and prohibits those who limit unreasonably certain opportunities for participants in professional sports. The defendants gave notice of their intention to apply to strike the statement of claim as disclosing no cause of action. In response to that, the plaintiff applied to amend their pleadings to include, among other things, that the defendants violated s. 45 of the Competition Act.
- [65] Broadly speaking, the allegations were that the defendant hockey associations illegally conspired to engage in a number of agreements that violated s. 45 of the Competition Act (*Mohr* at para. 29).
- [66] The Federal Court first considered the application to amend the pleadings. That legal test required the court to consider whether it was plain and obvious, if the proposed pleaded facts were true, that the amended pleadings disclosed no reasonable cause of action. Thus, the court considered whether the pleadings failed to plead a reasonable cause of action under s. 45 of the Competition Act. So, even though the analysis was undertaken for the application to amend pleadings, the court explicitly adopted and applied that reasoning to the application to strike (paras. 138, 141). I find that analysis to be applicable to the issues before me.

- [67] The defendants in Mohr raised arguments identical to those raised by TDL in this case. Specifically, they argued that s. 45 only applies where the defendants are competitors with respect to "the supply" of the product, and not to competitors for the purchase of a product.
- [68] The Federal Court agreed, finding that the legislative history supports the position that s. 45 does not apply to purchasing agreements. Instead, it was "clear that Parliament intended to limit the application of section 45" to what the federal court termed "hard core cartel agreements, namely, agreements that are unambiguously harmful to competition" (para. 57). The court also held:
- [35] As is apparent from the plain language of subsection 45(1), it applies only to "competitors" who enter into a conspiracy, agreement or arrangement concerning either the "supply" or the "production or supply" of the product in respect of which they compete. These elements of subsection 45(1) pose an insurmountable hurdle for the plaintiff.
- [69] The plaintiff's theory in Mohr was that the "product" at issue were the services of the proposed class members in that case (para. 40), which likens the case to the facts before me. The Federal Court held:
- [42] On their face, the three offences proscribed in subsection 45(1) of the Act apply solely to either the "supply" or the "production or supply" of the same product in respect of which the alleged conspirators are competitors. This is readily apparent from the use of the definite article "the" before the word "product" in each of paragraphs 45(1)(a)-(c).
- [43] By their express terms, those provisions do not apply to the purchase or other acquisition of a product, although I do not exclude the possibility that paragraph 45(1)(c) may apply to a supplier boycott or other "hard core cartel" agreement among competitors in a downstream market to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product in respect of which they compete. The agreements alleged in the Amended Statement of Claim are plainly not of this type.
- [70] Moreover, the Federal Court noted that even if there was ambiguity, because s. 45 is penal in nature, that ambiguity would need to be resolved in favour of a narrower reading of s. 45, which supported the defendants' position. TDL raised the same argument in this case.
- [47] To the extent that the words in subsection 45(1) might somehow be said to permit a broader interpretation that would bring within its scope the sorts of agreements alleged in the Amended Statement of Claim, the penal nature of that provision would entitle the defendants to the benefit of any ambiguity: *R v McLaughlin*, [1980] 2 SCR 331 at 335; *R v McIntosh*, [1995] 1 SCR 686 at 702 and 705.
- [71] The Federal Court specifically agreed that the removal of the word "purchase" from the predecessor to s. 45 supported its conclusions. This mirrors one of TDL's submissions on this application:

- [50] Prior to entry into force of the current wording of that provision in March 2010, paragraph 45(1)(c) applied to any agreement between competitors that prevented or lessened competition unduly "in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property" (emphasis added).
- [51] The fact that the word "purchase" was eliminated from the text of subsection 45(1) is a strong indication of Parliament's intention to exclude from the scope of that provision agreements and other arrangements that, in pith and substance, pertain to the purchase or other acquisition of a product. That amendment was made following a long period of consultation and assessment.

[Emphasis in original.]

- [72] The Federal Court also noted that the Competition Bureau shares this interpretation of s. 45 (para. 60), referring to Competitor Collaboration Guidelines dated May 6, 2021, and Competition Bureau statement on the application of the Competition Act to no-poaching, wage-fixing and other buy-side agreements, dated November 27, 2020. In those statements, the Competition Bureau stated that based on legal advice, it would consider buy-side agreements for the purchase of products and services, including employee no-poaching and wage-fixing agreements, to fall outside the ambit of section 45.
- [73] It is not clear to me whether statements from the Competition Bureau constitutes the type of evidence that is admissible on this application. However, even if those statement were admissible, I agree with the plaintiff that those statements are neither binding nor determinative: Li at para. 60.
- [74] However, even if I were to give no weight to those statements, I cannot ignore the Federal Court's decision. The conclusions about the meaning of s. 45 do not turn on the consideration of the Competition Bureau's interpretation. The Federal Court simply noted that its approach coincided with the Competition Bureau's interpretation.
- [75] For that reason, I find it unnecessary to consider the material adduced by TDL that preceded the legislation's amendment in 2009.

C. Conclusions

- [76] I find the Mohr decision to be highly persuasive. The Federal Court has greater familiarity with the Competition Act than this Court, although that factor is not determinative. What is persuasive is that the Federal Court considered and rejected the identical arguments raised in this case on an application involving the same legal test. The decision focussed on the statutory interpretation without consideration of evidence.
- [77] Moreover, there is a strong equivalency between the underlining facts in Mohr and those before me on this application. In Mohr, the allegation was a conspiracy amongst hockey team associations with regard to the purchase of a product, which was the proposed class

members' "services". Since the defendants were not the ones who supplied or produced that product, the Federal Court concluded that s. 45 could not be invoked. That conclusion was based purely on the wording of the section and its legislative history. That reasoning applies with equal force to the plaintiff's position in this case.

[78] I conclude, for the reasons expressed by the Federal Court, that it is plain and obvious that the plaintiff's claim that the No-hire clause violates s. 45 is bound to fail. I agree with the Federal Court that s. 45 cannot apply to situations where the competitors of a product are not also the same entity who supply or produce that product. This conclusion is supported by the plain wording of s. 45, buttressed by its legislative history. This forecloses the ability of the plaintiff to rely on s. 45 in this case.

IV. OTHER CLAIMS

[79] In addition to violation of s. 45 of the Competition Act, the plaintiff claims TDL is liable for civil conspiracy, the tort of unlawful means, and/or unjust enrichment.

[80] TDL submits each of those claims are also bound to fail because they rest entirely on there being a violation of s. 45. While his primary position does link the alleged s. 45 violation to the other claims, the plaintiff submits there are other reasons why the remaining claims can stand independently.

A. Civil Conspiracy

[81] The plaintiff has pleaded two types of conspiracy: predominant purpose conspiracy and unlawful means conspiracy. While they have unique characteristics, they also share some legal elements.

[82] The legal test for conspiracy requires a demonstration of: (i) an agreement between two or more persons; (ii) concerted action pursuant to the agreement; (iii) if the action is lawful, evidence that the conspirators intended to cause damage to the plaintiff; if the action is unlawful, evidence that the conspirators knew or ought to have known that their action would injure the plaintiff (i.e., constructive intent); and, (iv) actual damage suffered by the plaintiff: *Can-Dive Services Ltd. v. Pacific Coast Energy Corp.* (1993), 96 B.C.L.R. (2d) 156 (C.A.) at 158.

[83] In *Can-Dive* at 159, the court of appeal approved of Justice Esson's comments in *Thompson v. Coquitlam* (1979), 15 B.C.L.R. 59 (S.C.) at 63 that the "gist of the tort of conspiracy is not the conspiratorial agreement alone, but that agreement plus the overt acts causing damage."

1. Predominant Purpose Conspiracy

[84] The plaintiff's original pleading alleged that the purpose of the No-hire clause was to increase Tim Hortons' profits. The amended claim added a claim that the purpose of the No-hire clause was to injure the plaintiff and Class Members by suppressing their wages.

- [85] TDL submits the alleged agreement amounting to a conspiracy must have a single or paramount purpose: *Cement LaFarge v. B.C. Lightweight Aggregate*, [1993] 1 S.C.R. 452 at 471-472. By not removing the previous pleading (the purpose of the No-hire clause was to "increase profits"), TDL's position is that the plaintiff has run afoul of the paramount purpose doctrine, and its claim is bound to fail.
- [86] The gravamen of this conspiracy is conspirators having a predominant purpose to cause injury to the plaintiff. TDL submits that a pleading will be insufficient where two paramount or predominant purposes are pleaded: *Watson v. Bank of America Corporation*, 2015 BCCA 362 at para. 136.
- [87] However, in *Watson*, the Court of Appeal declined to overturn the chambers judge's certification order on the basis that the claim referred to two paramount purposes or concerns. Instead, the court agreed that the paragraph in the pleadings that identified the predominant purpose was to cause injury was sufficient, notwithstanding certain vagueness or duality of purposes in other paragraphs (para. 139).
- [88] Furthermore, the court held that even if it had concluded the pleading incorrectly posited two predominant purposes, the appropriate remedy was to allow clarification rather than strike the claim (para. 140).
- [89] The plaintiff submits he is not required to identify a solitary, predominant purpose "at this stage of the proceeding", and it is sufficient to state that TDL's primary intent was to injure the plaintiffs, and unlawfully increasing its profits was a result of that intention: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 [Pro-Sys] at paras. 76-78.
- [90] The wording of the amended notice of civil claim is key to resolving this issue. I do not agree with TDL that the plaintiff's claim for conspiracy is contradictory or improperly lists dual paramount purposes.
- [91] In Part 1: Statement of Facts, it is clear that the plaintiff alleges a primary intention to injure the plaintiff by suppressing wages (para. 2). At para. 21, the plaintiff repeats that the No-hire clause was put in place "in order to suppress employees' wages", adding that the suppression was "deliberate and was intended to increase profits for TDL and its franchisees at the expense of its employees" (emphasis added).
- [92] I do not read para. 21 as positing two independent purposes to the No-hire clause. The plaintiff alleges the purpose (wage suppression) was "at the expense" of employees, and therefore injurious to them. The No-hire clause was also beneficial to TDL, but that was its effect, and does not detract from what the plaintiff alleges was its "purpose": wage suppression.

- [93] Moreover, in Part 3: Legal Basis, the plaintiff specifies that the "predominant purpose" of the clause is causing injury to the plaintiff "by suppressing wages in order to benefit" TDL and its franchisees. This repeats the recitation of facts and, in my view, does not present dual predominant purposes.
- [94] In any event, at best, the pleading is unclear, and given the approach under R. 9-5(1)(a), I would resolve that doubt in favour of the plaintiff rather than striking the claim: Pro-Sys at para. 78.
- [95] TDL also submits no material facts are pleaded to support the claim that the No-hire clause's pre-dominant purpose is wage suppression. Instead, it submits the plaintiff has made a bald assertion of a conclusion which does not amount to the pleading of a material fact.
- [96] TDL relies on the maxim that a pleading is insufficient to establish predominant conspiracy if the alleged harm is a "collateral result" of acts pursued predominantly out of self interest: *LeRoy v. TimberWest Forest Corp.*, 2020 BCSC 978 at para. 428.
- [97] TDL supports its position by arguing that the idea of TDL and its franchisees engaged in a conspiracy for the predominant purpose of injuring their employees, rather than facilitating the efficient operation of their businesses or increasing their profits, is preposterous because it makes no commercial sense.
- [98] I do not agree that the pleading fails to set out material facts supporting the allegation of predominant purpose conspiracy. The following paragraphs from Part I: Statement of Facts, set out the manner in which the plaintiff alleges the No-hire clause injures Class Members, including how it suppresses wages.
23. The No-Hire Clause artificially restricts the ability of Tim Hortons restaurant owners to compete to hire employees in a manner consistent with their individual economic interests. But by acting in concert, they protect themselves from having their own employees poached by other Tim Hortons restaurants that may place a higher value on those employees for their training, experience or work ethic. This allows Tim Hortons restaurant owners to retain their best employees without having to pay market wages or provide them with attractive working conditions and opportunities for promotion.
24. The No-Hire Clause does not benefit consumers or the public because it does not help to ensure that Tim Hortons restaurants produce competitive working conditions or incentivise TDL or its franchisees to invest in training workers to improve the food, experience, and service they provide to customers.
28. Employment categories, job descriptions, and career trajectories are rigidly standardised at Tim Hortons restaurants. If Tim Hortons restaurant owners had to either pay and promote good employees, or lose them to competitor locations, they would be forced to pay competitive wages and provide competitive promotion opportunities.

29. However, because of the No-Hire Clause - and because their workers' level of education, training and experience within Tim Hortons restaurants are not readily transferrable to non-Tim Hortons brand restaurants - franchisees do not compete with each other or TDL, and they do not have to compete with non-Tim Hortons businesses for their employees.
35. The No-Hire Clause significantly restricts employment opportunities for low-wage workers at all Tim Hortons restaurants, including those who have not sought employment with a competitor restaurant and those who have not been contacted by a competitor restaurant. Such an unlawful restriction causes a broad effect on all Tim Hortons employees of TDL and its franchisees.
- [99] TDL's position must be that even if the plaintiff could prove that wage suppression occurred as a result of the No-hire clause, TDL and its franchisees agreed to it for the commercially valid purpose of increasing profits rather than with an intention to injure the plaintiffs. However, the pleading addresses that position by asserting in para. 22 that the No-hire clause "would not be in the independent interest" of Tim Hortons restaurant because the "profitability of each restaurant is dependent on the quality of workers they employ".
- [100] Nor do I agree that the plaintiff has not pleaded material facts as to "why" the TDL and its franchisees would agree to a term whose predominant purpose was to injure Class Members. The plaintiff alleges the No-hire clause "allows Tim Hortons restaurant owners to retain their best employees without having to pay market wages or provide them with attractive working conditions and opportunities for promotion" (para. 23 of the amended notice of civil claim).
- [101] Given that I must take the facts pleaded as being true for the purpose of this application, I do not agree that it is "preposterous" or "speculative and fanciful" to assert that TDL and its franchisees agreed to the No-hire clause for the predominant purpose of injuring their employees. To succeed at trial, the plaintiff will have to prove the facts, but I cannot conclude at this stage that it is plain and obvious that the claim would fail.
2. Unlawful Means Conspiracy
- [102] Proving unlawful means conspiracy requires that the unlawful conduct in question be directed toward the plaintiff, that the defendant know that injury to the plaintiff is likely to result, and that the injury to the plaintiff does, in fact, occur: Pro-Sys at para. 80.
- [103] TDL submits this claim must fail because there is no viable claim of unlawful conduct, a necessary prerequisite to pleading civil conspiracy of unlawful means.
- [104] The plaintiff relies on its pleadings of breaches of the Competition Act. I agree with TDL that given my analysis that the claim is bound to fail, this cannot support the unlawful mean conspiracy.

- [105] However, the plaintiff also pleads that the No-hire clause amounts to a "restraint on trade". A restraint on trade may be the unlawful activity upon which a claim of unlawful means conspiracy rests: *Fairhurst v. Anglo American PLC*, 2014 BCSC 2270 at para. 35. The plaintiff submits the intention and effect of the No-hire clause falls squarely within the restrictive practices identified in *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6.
- [106] *Shafron* was a case about the validity of restrictive covenants in an employment contract. Such terms are presumptively unenforceable as they are considered at common law to be a restraint on trade (para. 17), but reasonable ones may be enforced. The Supreme Court of Canada discusses how the debate over the enforceability of these restrictions reveal a tension in the common law between the freedom to contract and public policy considerations disapproving of restraints on trade (para. 16).
- [107] However, TDL's position is that the plaintiff's claim is misconceived. It submits the claim cannot succeed because the No-hire clause does not exist in any contract between TDL (or its franchisees) and Class Members. When applied, the doctrine of restraint of trade relieves a party from a contractual term to which that party agreed because the term is *prima facie* unenforceable. The Class Members are strangers to the contract that contains the No-hire clause. Therefore, any restraint on trade arising from it could only restrain TDL or its franchisees.
- [108] The plaintiff argues that the Class Members are not "strangers" to the No-hire clause: they are its "intended victims". In essence, his position is that the lack of privity of contract is no bar to his claim. In support of that position, the plaintiff submits a number of cases illustrate that "necessity of contractual privity has weakened considerably in recent years, allowing its absence to be used as both a shield and a sword".
- [109] While the doctrinal requirement for privity of contract may have been relaxed in some circumstances, the parties cited no authority where a stranger to a contract sought both to have a contractual term declared unenforceable, and to receive damages because the contracting parties agreed to the term in the first place.
- [110] Instead, in all cases relied upon by the plaintiff, the issue was whether contractual provisions could be extended to someone not a party to the contract. Nor do any of the cases deal with a contractual term alleged to be an unenforceable restraint on trade amounting to unlawful means civil conspiracy, upon which the non-contracting party seeks to rely to recover damages.
- [111] For instance, in *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299, employees were strangers to the relevant contract, which limited their employers' liability for property damage. Notwithstanding that, the Court held that they were third-party beneficiaries of that contract and, thus, they could benefit from that limitation of liability. The case is distinguishable because it addressed connections between routes of liability for economic loss under tort and contract.

- [112] Similarly, in *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108, the Supreme Court of Canada created what was then a new principled exception to the doctrine of privity of contract. Until then, privity precluded third-party beneficiaries from relying on the terms of an insurance policy. Again, this was the case of a third party to a contract seeking to enforce a term, rather than seeking to invalidate a term.
- [113] The plaintiff also relied on *Brown v. Belleville (City)*, 2013 ONCA 148. That case is unhelpful. The plaintiffs wanted to enforce a contractual term and faced the argument that as strangers to the contract, they had no standing to do so. However, the court agreed that an "enurement clause" in the contract itself defeated the challenge to the plaintiffs' standing. Similarly, *Moss v. BMO Nesbitt Burns Inc.*, 2013 MBQB 127, aff'd 2013 MBCA 86 does not support the plaintiff's position. The court agreed in that case that lack of privity precluded the plaintiff's claim, and it was struck as disclosing no cause of action.
- [114] TDL aptly described in its written submissions why restraint of trade cannot be invoked in the fashion proposed by the plaintiff in this case:
71. In other words, the purpose of the contractual doctrine is to protect a contracting party's ability to carry out its work to carry on its trade, to carry out its business; the doctrine is about a party voluntarily contracting to restrict its own business activities to its own detriment. The doctrine is not about a contractual restraint that impacts a stranger to the contract to the stranger's detriment.
- [Emphasis in original.]
- [115] That passage is sound and supported by, among others, *Shafron* at para. 15, *Elsley v. J.G. Collins Ins. Agencies*, [1978] 2 S.C.R. 916 at 923, and *Rhebergen v. Creston Veterinary Clinic Ltd.*, 2014 BCCA 97 at para. 24.
- [116] For those reasons, I conclude that the plaintiff's conspiracy claim to the extent that it is based on an allegation of unlawful means is bound to fail.

B. Unlawful Means Tort

- [117] This is a parasitic tort in the sense that it stretches liability for unlawful conduct in a three-party situation. Critically, unlawful activity must already exist before the tort can apply: *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12 at para. 5.
- [118] To establish the tort, one must show: (i) intentional infliction of economic injury on the plaintiff by one party; and (ii) the defendant's use of unlawful means against another party.
- [119] Because I have found the Competition Act and unlawful means civil conspiracy claims are bound to fail, the route of liability for the unlawful means tort cannot rest of those asserted claims.

- [120] The plaintiff's written submissions state that he has "pleaded that [TDL] intimidates its franchisees" such that the tort of intimidation could support the unlawful means tort. Intimidation is not pleaded in the amended statement of claim, nor are there any material facts amounting to intimidation. Also, Part 3: Legal Basis does not include a claim for damages for the tort of intimidation. In my view, in light of the pleadings, this cannot be the basis for the tort of unlawful means.
- [121] However, for the reasons I have already explained, TDL has not established that it is plain and obvious that the plaintiff's claim of paramount purpose civil conspiracy is bound to fail. Therefore, there exists the possibility that the plaintiff could establish the tort of unlawful means on that basis, so the claim is not struck.

C. Unjust Enrichment

- [122] The elements to establish unjust enrichment are: (i) an enrichment of the defendant by the plaintiff; (ii) a corresponding deprivation by the plaintiff, and (iii) absence of a juristic reason for the enrichment: *Kerr v. Baranow*, 2011 SCC 10 at paras. 36-41.
- [123] The plaintiff alleges the No-hire clause causes wage suppression, and the amount of those lowered wages was both an enrichment to TDL's benefit and a deprivation to Class Members' detriment.
- [124] To the extent the plaintiff's claim for unjust enrichment depends upon the alleged violation of the Competition Act or unlawful means civil conspiracy, it is bound to fail based on my discussion of those topics.
- [125] In its written submissions, the plaintiff submits TDL breached certain corporate policies. He submits a breach of corporate policy can support an allegation of unjust enrichment, and the determination must await trial: *Pro-Sys* at para. 88. However, that allegation is not contained in the amended notice of civil claim.
- [126] Even if it was, I do not agree breach of corporate policy alone can found a claim in unjust enrichment. With respect, the plaintiff has overstated the finding in para. 88 of *Pro-Sys*. It is clear that the violation of corporate policies was not an independent basis upon which the Court refused to strike the claim. In that case, the allegation was that the impugned contracts were a restraint of trade at common law, violated the Competition Act and the US antitrust laws.
- [127] I agree with TDL that absent a viable claim that the No-hire clause runs afoul of the Competition Act or amounts to an unlawful means civil conspiracy, there exists a juristic reason for it: the contractual obligations between TDL and its franchisees. In my view, it is plain and obvious that this claim is bound to fail.

V. CONCLUSIONS

[128] For the reasons explained in this judgment, I conclude that it is plain and obvious that the following claims are bound to fail:

- a) the claim for damages under s. 36 of the Competition Act;
- b) that aspect of the claim for damages for civil conspiracy based on unlawful means civil conspiracy;
- c) the claim for damage for the tort of unlawful means to the extent it relies on breach of the Competition Act or unlawful means civil conspiracy; and
- d) the claims for an accounting and restitution or, in the alternative, disgorgement for unjust enrichment.

[129] I do not find it plain and obvious that the aspect of the claim of civil conspiracy based on paramount purpose is bound to fail, and it will not be struck. Accordingly, the tort of unlawful means is not struck but only insofar as it corresponds to the claim of paramount purpose civil conspiracy.

[130] As a result, the following portions of the amended notice of civil claim are struck as disclosing no cause of action pursuant to R. 9-5(1)(a) (these correspond to the conclusions in para. 128):

- a) paragraphs 48-54;
- b) paragraph 57;
- c) the phrases "Through the use of", "TDL has breached of the Competition Act, s. 45 and this conduct", "and unjust enrichment", and the word "otherwise" in para. 66, and the phrase "and unjust enrichment" in para. 69; and
- d) paragraphs 60-65;
- e) the phrases "the Competition Act, RSC 1985, c 34 and" and "These agreements are prohibited by the Competition Act because Tim Hortons and its franchisees are competitors with each other in the market for hourly-wage labour" in para. 1;
- f) the word "express" in para. 34;
- g) the words "an unlawful" be replaced with "a" in para. 35; and
- h) paragraphs 40 and 43.

[131] The parties did not address, in the alternative, what alteration to the pleadings would be required in the event the amended notice of civil claim was not struck in its entirety. For that reason, if the parties do not agree that para. 130 correctly identifies the necessary modifications to the amended notice of civil claim, they may seek a brief appearance before me to address that issue. However, that request must be made no later than 14 days after the date of this judgment. That appearance would be limited to addressing whether the

proposed redactions and modifications identified in para. 130 accurately reflect the conclusions in para. 128 of this judgment.

"Sharma J."

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