

CANADA / JUDGMENT

Latifi v. The TDL Group Corp.

2025 BCCA 45

COURT

British Columbia Court of Appeal

DECIDED

13 February 2025

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2025 BCCA 45 Latifi v. The TDL Group Corp.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Latifi v. The TDL Group Corp.,

2025 BCCA 45

Date: 20250213

Docket: CA49876

Between:

Samir Latifi

Appellant

(Plaintiff)

And

The TDL Group Corp.

Respondent

(Defendant)

Corrected Judgment: The cover page of the judgment was corrected on
February 14, 2025.

Before:

The Honourable Mr. Justice Willcock

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Justice Donegan

On appeal from: An order of the Supreme Court of British Columbia, dated

May 15, 2024 (Latifi v. The TDL Group Corp., 2024 BCSC 832,

Vancouver Docket S198150).

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Place and Date of Hearing:

Vancouver, British Columbia

December 16, 2024

Place and Date of Judgment:

Vancouver, British Columbia

February 13, 2024

Written Reasons by:

The Honourable Mr. Justice Willcock

Concurred in by:

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Justice Donegan

Summary:

This is an appeal from the dismissal of a proposed class proceeding. The appellant alleged the respondent had entered into a conspiracy with its franchisees with the predominant purpose of harming employees by limiting their employment mobility. The agreement said to constitute the conspiracy was embodied in a "No-Hire Clause" formerly found in Tim Hortons franchise agreements by which franchises agreed not to "poach" employees of other franchises. The appellant argues the chambers judge erred in characterizing the alleged injury to employees, in accepting the respondent's evidence regarding the intent of the "No-Hire Clause" and in characterizing that evidence.

Held: Appeal dismissed. The judge did not err in characterizing the alleged injury or in accepting or characterizing the respondent's evidence with respect to the intent of the "No-Hire Clause". The evidence was that the clause was intended to protect the investment made by franchises in training employees. The judge found that this evidence was uncontradicted by the evidence of the appellant which was fatal to the alleged predominant purpose conspiracy.

Reasons for Judgment of the Honourable Mr. Justice Willcock:

Introduction

- [1] This is an appeal from the summary dismissal of the appellant's claim. He sought to certify an action as a class proceeding on behalf of workers adversely affected by a term in franchise agreements between The TDL Group Corp. and franchisees who operate approximately 3,860 Tim Hortons franchises in Canada. He alleged the provision resulted in wage suppression and was anti-competitive in nature.
- [2] The action was formulated as a claim founded upon price fixing, a breach of s. 45 of the Competition Act, R.S.C. 1985, c. C-34, and allegations the respondent was a party to a civil conspiracy to use unlawful means to suppress the appellant's wages (and those of members of the class of workers he hoped to represent). By amendment to the pleadings, the appellant expressly alleged the respondent was a party to a conspiracy with the predominant purpose of causing injury to the plaintiff and members of the class. For reasons indexed at 2021 BCSC 2183, the claim founded upon a breach of the Competition Act and the allegation of an unlawful means conspiracy was dismissed, leaving only the claim of a predominant purpose conspiracy, and the tort claim founded upon such a conspiracy to injure.
- [3] When the appellant applied for class certification, the respondent applied for summary dismissal of the remaining claims pursuant to R. 9-6 of the Supreme Court Civil Rules. For reasons indexed at 2024 BCSC 832, the chambers judge held that there was no genuine issue for trial. She found the uncontradicted evidence of the respondent's purpose in engaging in the impugned conduct was a complete answer to the appellant's claim. In her view, there was no evidentiary basis upon which an inference could be drawn that the respondent acted with the predominant purpose of injuring the appellant or members of the class.
- [4] The questions before us on appeal are whether the chambers judge erred in characterizing the injury alleged by the appellant or erred in accepting or characterizing the evidence adduced by the respondent.

Background and Judicial History

The Initial Pleadings

- [5] On July 18, 2019, the appellant, who was employed at a Tim Hortons restaurant in 2012, commenced the action against The TDL Group Corp. ("TDL"), the franchisor of Tim Hortons in Canada.
- [6] His action turned upon the purpose and effect of a "No-Hire Clause" appearing in the licence agreement between TDL and franchisees from at least 2003 until September 11, 2018, but deleted thereafter and no longer required or enforced by TDL. The clause was worded as follows (or in substantially similar terms):

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

- [7] The appellant alleged TDL and its franchisees shared the anti-competitive motive of increasing profits by keeping labour costs low, and that by agreeing not to compete for labour they achieved "monopsonistic profits" that would otherwise be unattainable. The effect of the No-Hire Clause was to allow owners to retain employees without having to pay market wages or provide them with attractive working conditions and opportunities for promotion. He says the Clause could not serve the distinct interests of restaurant owners because it restricted their ability to compete to hire the most conscientious, talented and experienced employees.
- [8] It was alleged "the plaintiff and Class Members have suffered reduced wages, reduced employment benefits, loss of professional growth opportunities, and worsened working conditions (collectively, "wage suppression") because of the express unlawful agreement among TDL and its franchisees in the No-Hire Clause" (emphasis added).
- [9] By requiring the franchisees to enter into contracts containing the No-Hire Clause, TDL was alleged to have conspired with the franchisees to fix or control the price for the supply of labour, to allocate territories or markets for the supply of labour, and to fix or control the supply of labour. This conduct was said to be unlawful as a breach of s. 45, in Part VI, of the Competition Act:

45 (1) Every person commits an offence who, with a competitor of that person with respect to a product, [defined by s. 2(1) of the Act to include both a product and a service] 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.

[10] A breach of that provision is actionable at the suit of one who suffers loss:

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,

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct 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.

[11] Although it was alleged that TDL and its franchisees "intended to cause damage to the plaintiff and Class Members in order to benefit themselves", the injury was said to have been effected by illegal means. The pleadings included the following allegation:

70. TDL intentionally injured the plaintiff and Class Members by use of unlawful means. The No-Hire Clause was intended to suppress wages in order to lower the costs of running a Tim Hortons restaurant. The plaintiff and Class Members have been deprived through the suppression of their wages.

[Emphasis added.]

[12] The appellant also set out claims in unjust enrichment, the tort of economic injury by unlawful means, and for punitive damages.

First Amended Notice of Civil Claim

[13] The notice of civil claim was amended on January 13, 2021. The appellant added the following description of the legal basis of his claim:

52.1 The No-Hire Clause is an allocation of customers, markets and territories for the supply of labour. The No-Hire Clause prevents current employees from securing employment with a different Tim Hortons operator. Workers cannot leave a current labour customer to sell their labour to another customer. With less workers leaving their employment, there are fewer job openings, preventing new workers from entering the labour market and selling labour. Further, current employees cannot moonlight or otherwise work for multiple Tim Hortons operators. The defendant and franchisees have distorted the labour supply with the result that wages are lower than they would be in a competitive market. The No-Hire Clause limits worker mobility thereby fixing or controlling the supply of labour and the price of that labour.

[14] He also made the following additional allegation of civil conspiracy:

56. TDL and its co-conspirators had the predominant purpose of causing injury to the plaintiff and Class Members by suppressing wages. ...

[Emphasis added.]

Dismissal of the Competition Act Claim: 2021 BCSC 2183

- [15] On November 9, 2021, the respondent's application to strike the amended notice of civil claim, brought pursuant to R. 9-5(1)(a) of the Supreme Court Civil Rules, succeeded in part. Finding the judgment in *Mohr v. National Hockey League*, 2021 FC 488, to be persuasive, the chambers judge concluded that s. 45 of the Competition Act creates an offence if competitors act in concert to affect "the supply" or "the production or supply" of the product and does not apply to purchasing agreements.
- [16] She held:
- [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.
- [17] For that reason, the unlawful means conspiracy claim also failed, there being "no viable claim of unlawful conduct, a necessary prerequisite to pleading civil conspiracy of unlawful means": paras. 103, 116. Similarly, the unjust enrichment claim was struck as the contractual obligations between TDL and its franchisees provided a juristic reason for any benefit obtained.
- [18] There remained two arguable claims: first, the conspiracy claim founded upon an allegation of civil conspiracy with the "paramount purpose" of harming the appellant (as it was described by the chambers judge); and second, the tort founded upon interference with a trade or business by unlawful means, the "unlawful means tort". That tort, as described in *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12 at para. 5., is "parasitic" in the sense that it must be founded upon actionable conduct. While the evidence did not support the allegation of an "unlawful means" conspiracy or breach of the Competition Act, the judge held that an unlawful means tort might be founded upon a predominant purpose civil conspiracy.
- [19] Because there remained a possibility that a predominant purpose civil conspiracy could be established, the unlawful means tort claim was not dismissed in its entirety. The judge held:
- [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.

Further Amended Notice of Civil Claim

- [20] As a result, the notice of civil claim was further amended on July 15, 2022.
- [21] All of the pleadings alleging a breach of the Competition Act and the unjust enrichment allegation were deleted. The civil conspiracy pleading was amended by deleting the allegation that there was a conspiracy to breach s. 45 of the Competition Act.
- [22] The remaining allegation of a predominant purpose conspiracy was amended as follows:
56. TDL and its co-conspirators had the predominant purpose of causing injury to the plaintiff and Class Members through Wage Suppression suppressing wages. By their acts, TDL and its co-conspirators the franchisees intended to cause damage to the plaintiff and Class Members in order to benefit themselves.
- [23] The allegation of the commission of the tort of unlawful means was amended as follows:
70. TDL intentionally injured the plaintiff and Class Members by use of unlawful means. The No-Hire Clause was intended to suppress wages cause the Wage Suppression in order to lower the cost of running a Tim Hortons restaurant. The plaintiff and Class Members have been deprived through the suppression of their wages Wage Suppression.
- [24] The definition of "Wage Suppression" in the pleadings was subtly amended in the following manner, so as to add limited employment mobility to the definition of the "Wage Suppression" alleged:
34. As a direct result of TDL's actions, the plaintiff and Class Members have suffered injuries and losses including limited employment mobility, reduced wages, reduced employment benefits, loss of professional growth opportunities, and worsened working conditions (collectively, "wage suppression" "Wage Suppression") because of the express unlawful agreement among TDL and its franchisees in the No-Hire Clause.

The Order Under Appeal: 2024 BCSC 832

- [25] The respondent applied to certify the remaining claims, those resting upon the allegation that the predominant purpose of the No-Hire Clause was to injure Tim Hortons employees, as a class proceeding. TDL applied for summary judgment dismissing the remaining claims, arguing the asserted intent to injure employees was implausible and demonstrably false. It asserted the purpose of the clause was "to serve the interests of Tim Hortons franchisees for the benefit of their businesses and TDL's business, consistent with what would be expected from rational commercial actors".
- [26] In support of its application, TDL adduced the affidavit evidence of James Gregoire, its Vice President, Franchise Operations. Mr. Gregoire had been employed at TDL for 12 years and occupied positions successively as a District Manager; Manager of Business Development; Director of Business Development and Training; General Manager, Canada East, Operations Quebec & Atlantic Canada; Head of Field Operations; and, since March 2021, Vice President, Franchise Operations.

- [27] He deposed that all franchisees are required to enter into a licence agreement with TDL. The licence agreement contained a clause from "at least 2003" until September 11, 2018, prohibiting franchisees from hiring the employees of other franchisees. It was his evidence that TDL had not enforced the No-Hire Clause since then and TDL did not include the clause in licence agreements with new franchisees after that date.
- [28] It was Mr. Gregoire's evidence that the primary purpose of the No-Hire Clause was to benefit franchisees and their businesses and TDL's business. He described it as a significant challenge for franchisees to maintain the trained staff necessary to adhere to operational and service standards required by the licence agreement. The No-Hire Clause provided some assurance to them that, after incurring the significant costs associated with training new employees, those employees would not be "solicited away" by other franchisees seeking to obtain trained employees while skirting the training costs.
- [29] He deposed:
14. The purpose of the No-Solicitation [No-Hire] Clause was not to injure the Plaintiff or any other persons who are or were employees at a Tim Hortons restaurant in Canada. Its purpose was not to limit employment mobility generally, reduce or suppress wages, reduce employment benefits, cause loss of professional growth opportunities, or to worsen working conditions, as alleged by the Plaintiff. Franchisees must compete with other potential employers for labour and the No-Solicitation Clause did not preclude any employee from being solicited by another employer who was offering higher wages, better benefits, better opportunities, better working conditions, or offered a subjectively better work experience.
- [30] In order to answer an objection to his evidence founded upon his limited involvement in licensing agreements prior to 2013, he affirmed a supplementary affidavit in which he deposed:
2. Since 2013, a core part [of] my role and responsibilities for TDL has pertained to franchising Tim Hortons restaurants, including approving new franchisees and entering into licence agreements with them, renewing licence agreements with existing franchisees, and assisting franchisees to comply with their licence agreements. The "source" of the information in my prior Affidavit is my extensive personal knowledge and experience with the Tim Hortons franchise business and licence agreements through the management roles I have held at TDL.
- [31] In response to the summary judgment application, the appellant adduced the affidavit evidence of Rafael Gomez, a labour economist and Professor and Director of the Centre for Industrial Relations and Human Resources at the University of Toronto. It was his evidence that what he referred to as No-Solicitation Clauses have the effect of suppressing wages. In response to the evidence of Mr. Gregoire that the clause in this case was intended to protect the investment of franchisees in their trained employees, he expressed the following opinions, in a report appended to his affidavit:

15. No-Solicitation Clauses cannot be economically justified on the premise that these clauses induce higher internal investments in firm-specific training because they do not, as admitted by the company, prevent "poaching" from other companies outside of the Tim Horton's franchise network. If they did create firm-specific skills then there would be less fear of worker exit to nearby competitors.
16. If it is indeed the case that the training received within franchises is specific to Tim Horton's Franchise operators, then the only way to retain workers is to allow for internal worker mobility within the Franchise network and for wages to adjust accordingly, as is premised and predicted in the [Internal Labour Market] and transaction cost economic frameworks. [Internal HR practices and policies, which can resemble an internal labour market in that they can enable the attraction, development, and retention of employees with respect to an entire career path within the same firm].
- [32] The appellant adduced evidence of the terms of a settlement agreement, dated February 28, 2020, between Tim Hortons USA Inc. and certain American states, resolving an investigation into Tim Hortons USA's use of "No-Poach" provisions. In that settlement, Tim Hortons USA agreed not to include such terms in new franchise agreements and not to enforce existing No-Poach provisions.
- [33] The appellant also adduced evidence that, in June 2022, the Government of Canada made changes to the Competition Act by adding subsection 45(1.1) to the existing criminal conspiracy provisions to prohibit agreements between employers to fix wages and restrict job mobility. The evidence included the Competition Bureau's enforcement guidance on wage-fixing and "no poaching" agreements.
- [34] The chambers judge dismissed the argument that Mr. Gregoire's evidence was inadmissible as hearsay. She held:
- [76] I do not find that Mr. Gregoire's evidence is inadmissible. Corporations speak through their representatives. Mr. Gregoire's job duties over the years clearly placed him in a position to have corporate knowledge about the License Agreement and its terms, including its history. Moreover, I have been given no reason to doubt the credibility or reliability of Mr. Gregoire's evidence. For example, there is no evidence from a franchisee that contradicts, challenges, or questions Mr. Gregoire's statements about the No-hire clause.
- [77] Therefore, I accept that Mr. Gregoire has personal knowledge as to what he deposed. Accordingly, I dismiss the plaintiff's objections to the admissibility of that evidence.
- [35] She accepted TDL's submission that the plaintiff's evidence, in particular the evidence of Professor Gomez, focused almost exclusively on the effects of the No-Hire Clause, rather than the respondent's intentions. It was largely for that reason she concluded summary judgment was appropriate as there was no irreconcilable conflict in the evidence.

- [36] She noted the appellant had adduced "no evidence whatsoever" from any franchisee, and that fact alone stood as "a potentially fatal evidentiary flaw to the plaintiff's case" because the conspiracy claim required proof that the conspiring parties acted in concert for the harmful predominant purpose: at para. 87. An inference to that effect could not be drawn from the evidence of Professor Gomez.
- [37] She considered the evidence of Mr. Gregoire to be uncontradicted. She held:
- [100] In my view, the plaintiff's evidence is silent on an element critical for both predominant purpose conspiracy and unlawful means tort. Under both, the plaintiff must demonstrate that two parties acted in combination or conspired, and the predominant purpose of their conduct (by agreeing to enter the contract, which contained the No-hire Clause as one of its terms) was to injure the plaintiff and members of the proposed class. Mr. Gregoire's evidence unassailably defeats that claim. There is no evidence from any alleged co-conspirator to contradict his claim. I have been given no cogent reason to doubt his reliability or credibility.
- [101] The plaintiff relies on Mr. Gomez's evidence. His evidence does not purport to be direct evidence about TDL and its franchisees' intent in entering into agreements containing the No-hire clause. Instead, the plaintiff submits that his evidence provides sufficient reason to conclude that, at the very least, there exists a dispute on that issue, justifying sending the case to trial.
- [38] She found Professor Gomez's evidence with respect to the effect of non-solicitation clauses in employment contracts to be of limited use in the legal analysis. More importantly, she considered there to be no factual foundation for the drawing of an inference of intent to harm employees:
- [105] Neither Mr. Gomez nor the studies Mr. Gomez references analyze the intent of those who agree to non-compete clauses. Instead, the studies focus on the impact those clauses have on employee mobility and wages. They did not purport to address what was in the parties' mind when entering the contract.
- [108] Moreover, to be relevant to the issues in this case about the No-hire clause in TDL's License Agreement, one would have to accept as probably true that restricted mobility of workers for one brand in the fast-food industry does, in fact, cause both restricted mobility of those workers generally, and wage suppression across the industry. Lastly, it would also have to be true that harming employees by restricting their mobility in order to suppress wages was the paramount purpose of TDL and its franchisees agreeing to the No-hire clause.
- [109] With respect, none of the foregoing amounts to evidence about TDL's or its franchisees' intent in agreeing to the No-hire clause. Nor does it amount to non-controversial facts upon which I can draw any inference.

[39] She concluded the appellant could not demonstrate that the predominant purpose of the No-Hire Clause was to harm himself or other proposed class members and, citing *LeRoy v. TimberWest Forest Corp.*, 2020 BCSC 978 at paras. 428, 475-476, and *GEA Refrigeration Canada Inc. v. Chang*, 2015 BCSC 1593 at paras. 29-31, noted that intent to injure must be the main or primary purpose to qualify as the predominant purpose.

Grounds of Appeal

[40] The appellant contends the judge:

1. erred in law in her characterization of the injury;
2. erred in inferring Mr. Gregoire had personal knowledge of TDL's intent before he began working for TDL;
3. erred in her characterization of Mr. Gregoire's evidence;
4. erred in law by relying inappropriately on *Cement LaFarge v. B.C. Lightweight Aggregate*, [1983] 1 S.C.R. 452, 1983 CanLII 23; and
5. erred in stating there was no evidence of a conspiracy.

[41] The appellant says the first and fourth of these asserted errors are reviewable for correctness; however, the second, third and fifth are acknowledged by the appellant to be findings of fact or mixed fact and law, reviewable in the event of palpable and overriding error.

Discussion and Analysis

Applications Pursuant to R. 9-6

[42] The order under appeal was made on an application by the defendant for summary judgment pursuant to R. 9-6. A plaintiff who does not adduce evidence in response to such an application runs the risk the judge will find the defendant's evidence incontrovertible on something the plaintiff must prove and summary judgment will follow. As Fitch J.A., writing for the Court in *Sakwi Creek Hydro Limited Partnership v. Dickin*, 2023 BCCA 188, noted:

[24] Under Rule 9-6, the court is empowered to pronounce judgment or dismiss a claim if it is satisfied there is no genuine issue for trial. ...

[25] As noted in *Lameman* at para. 19, "[a] motion for summary judgment must be judged on the basis of the pleadings and materials actually before the judge, not on suppositions about what might be pleaded or proved in the future". A defendant applying for summary judgment may succeed either by demonstrating that the plaintiff's case is unsound or by adducing evidence that provides a complete answer to the plaintiff's case: *Beach Estate v. Beach*, 2019 BCCA 277 at para. 48 [Beach]. While an application under Rule 9-6 invokes the court's consideration of evidence, it is not a summary trial. The judge is not permitted to weigh evidence on a Rule 9-6 application beyond determining whether it is

"incontrovertible". If the court is satisfied that it is manifestly clear (or beyond doubt) that the plaintiff is bound to lose, the defendant must succeed on the Rule 9-6 application: Lameman at paras. 10-11; Beach at paras. 48-49. Conversely, if the plaintiff submits evidence contradicting the defendant's evidence in some material respect, the application must be dismissed: Beach at para. 48.

Predominant Purpose Conspiracy: the Applicable Law

[43] The appellant's submissions must be assessed in light of the jurisprudence on the nature of a predominant purpose conspiracy, also referred to as a lawful means conspiracy or conspiracy to injure.

[44] In *Watson v. Bank of America Corporation*, 2015 BCCA 362, this Court set out three constituent elements of the tort at para. 125:

- i) an agreement or concerted action between two or more persons;
- ii) with the predominant purpose of causing injury to the plaintiff; and
- iii) overt acts committed that cause damage to the plaintiff.

[45] The second element is often the crux of the issue. As the authors of *Clerk & Lindsell on Torts*, 24th ed (Thomson Reuters, 2023) note, at 1777, when determining whether the conspiracy has been made out:

[E]verything turns on the distinction 'between the case where the object is the legitimate benefit of the combiners and the case where the object is deliberate damage without any just cause'. Earlier cases must now be read in the light of this principle clearly established by the House of Lords in *[Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch [1942] A.C. 435]*.

[46] A combination is wrongful if the real object is an intention "to injure the plaintiff by way of punishing him, or by way of compelling him to pay a debt": *Clerk & Lindsell* at 1779, citing *Giblan v. National Amalgamated Labourers Union*, [1903] 2 K.B. 600.

[47] Pursuit of business or other similar gain is regarded as a legitimate object and, in those circumstances, resulting damage is not damage without any just cause. That is so, even where damage to a party is "known to be inevitable and is even intended": *Clerk & Lindsell* at 1778-1779.

[48] Further:

It is plain that a combination may have more than one object or purpose. If so:

"liability must depend on ascertaining the predominant purpose. If that predominant purpose is to damage another person and damage results that is tortious conspiracy if the predominant purpose is the lawful protection or promotion of any lawful interests of the combiners (no illegal means being employed) it is not a tortious conspiracy even though it causes damage to another person". [Crofter at 445]

In ascertaining that predominant purpose the court can have regard to both the short and long-term objectives of the combiners.

Clerk & Lindsell at 1780-1781.

[49] The burden of proving both the conspiracy and the purpose of damaging the claimant is borne by the plaintiff: Crofter at 471-472. The authors of Clerk & Lindsell, at 1782, observe that:

In so far as the cases talk of the need for "just excuse" or "justification" those words seem to be no more than a description of the need for evidence (as to his trade or other legitimate interests) which a defendant can put in to meet the claimant's case when the latter has adduced evidence of apparent intention to injure on the defendant's part, and do not alter the primary burden of proof. By contrast, it has been held that where the claimant can prove acts unlawful in themselves, done in pursuance of the conspiracy, the burden of justifying such acts passes to the defendant.

[50] These principles were recognized and adopted by the judge. She summarized the relevant law at paras. 41-45 as follows:

- a) The plaintiff has the burden to prove an actual agreement amongst conspirators, and not merely knowledge or approval of the impugned conduct: *Barroqueiro v. Qualcomm Incorporated*, 2023 BCSC 1662 at para. 167.
- b) Harm must be the predominant purpose of the concerted action or agreement, not merely an ancillary purpose or a resulting effect: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 74.
- c) It is insufficient if the alleged harm is the result of, or collateral to, acts pursued merely or predominantly out of self-interest: *LeRoy v. TimberWest Forest Corp.*, 2020 BCSC 978 at paras. 428, 475-476, *aff'd* 2021 BCCA 326; *Harris v. GlaxoSmithKline Inc.*, 2010 ONCA 872 at para. 39, leave to appeal to SCC *ref'd*, 34111 (14 July 2011); *Canadian Bedding Company Ltd. v. Western Sleep Products Ltd.*, 2009 BCSC 1499 at para. 146.
- d) Even in cases of clear injury to the party affected, the claim of predominant purpose conspiracy cannot succeed if the predominant object is to benefit the parties to the agreement: *Cement Lafarge; Southam Co. Ltd. v. Gouthro*, [1948] 3 D.L.R. 178, 1948 CanLII 248 (B.C.S.C); *Crofter Hand Woven Harris Tweed Co. v. Veitch*, [1942] 1 All E.R. 142, [1942] A.C. 435 (H.L.).

[51] None of these propositions is challenged.

The First Error

[52] The appellant says the judge misconstrued the argument with respect to the intended injury when she addressed only whether there was evidence that the respondent intended to injure employees by lowering wages. He sought to establish TDL in fact intended to harm employees by limiting their employment mobility. He argues the judge should have focused on whether that was TDL's predominant purpose. He suggests the judge did not appreciate the subtle evolution of the pleadings, in particular the expanded definition of "Wage Suppression" to include reduced employment mobility.

[53] I am not persuaded that the judge misconstrued the appellant's argument on limiting employment mobility. She expressly noted Professor Gomez's views with respect to the effect of non-competition clauses on worker mobility: at paras. 32, 35 and 37.

[54] When accepting the evidence of Mr. Gregoire that TDL's predominant purpose was not to harm employees, she noted at para. 28:

Mr. Gregoire denied that the purpose of the clause was to injure employees by limiting employment generally or to reduce or suppress wages.

[Emphasis added.]

[55] In any event, the judge found that wage suppression may have been the effect of the No-Hire Clause but it was not TDL's intent. The judge accepted Mr. Gregoire's evidence that there was a valid business purpose to the policy: protection of the investment in employee training. She concluded:

[85] TDL submits that to meet the test for establishing the conspiracy, the court must focus on the conspirator's intent, not only on the effect. The plaintiff's phrasing of the question avoids the central issue of intent to harm. TDL also contends that the plaintiff's evidence focusses almost exclusively on effects, which is a large reason why summary judgment is appropriate. I agree with both propositions.

[56] By the last amendment to the pleadings, specifically the re-definition of Wage Suppression to include reduced mobility, in addition to lower wages, the appellant, in my view, enlarged the description of the effect of the No-Hire Clause. Even if we assume, for the purposes of argument, that the judge was only considering wage suppression in the narrow sense when she concluded the predominant purpose of the No-Hire Clause was not to harm employees, substituting another effect, limited mobility, for lower wages, does not have any impact on that analysis.

[57] In rejecting the submission that TDL's intent to harm workers could be inferred from the evidence, she considered both limited mobility and reduction in wages as alleged effects of the policy, not its intent. She concluded:

[105] [T]he factual foundation for such an inference is absent. Neither Mr. Gomez nor the studies Mr. Gomez references analyze the intent of those who agree to non-compete clauses. Instead, the studies focus on the impact those clauses have on employee mobility and wages. They did not purport to address what was in the parties' mind when entering the contract.

[Emphasis added.]

[58] I can find no error in the judge's characterization of the alleged harm in this case and I would not accede to this ground of appeal.

The Second Error

[59] The appellant says there was an insufficient basis for drawing the inference Mr. Gregoire knew anything about the intention underlying the implementation of the No-Hire Clause in 2003, before he joined TDL and, further, no adverse inferences can be drawn on an application for summary judgment pursuant to R. 9-6, citing *Aubichon v. Grafton*, 2022 BCCA 77.

[60] The respondent contends the judge rejected the appellant's evidentiary challenge because she accepted the proposition that corporations speak through their representatives and that "Mr. Gregoire's job duties over the years clearly placed him in a position to have corporate knowledge about the Licence Agreement and its terms, including its history": at para. 76. She noted she had been "given no reason to doubt the credibility or reliability of Mr. Gregoire's evidence" (at para. 76) and that his responsive affidavit "confirmed that the source of the information in his first affidavit was his 'extensive personal knowledge and experience with the Tim Hortons franchise business and licence agreements through the management roles [he] held at TDL': at para. 75.

[61] The respondent submits that no inappropriate adverse inference was drawn. I agree. An inference was not necessary and was not drawn.

The Third Error

[62] The appellant submits the judge made a palpable and overriding error "when reviewing Mr. Gregoire's evidence" and accepting that "the primary purpose was 'to protect the costs of the training that was provided to a franchisee's employees'". The argument is conceptually vague. Fundamentally, as I read it, it is an argument that the parties to the licence agreement entered into an actionable conspiracy because they intended to limit worker mobility and that is not a legitimate objective.

[63] I would not accede to the argument for two reasons. First, it presumes that the primary objective of the parties to the franchise agreements was to restrict job mobility and, in doing so, confuses the result with the objective of the No-Hire Clause. Second, it is a veiled attempt to resurrect the dismissed unlawful means conspiracy.

Evidence of the Primary Objective of the Parties to the Franchise Agreements

- [64] Both parties accept the proposition that the judge must consider the purpose or objective of the conspirators, rather than the effects of their agreement, when considering whether a predominant purpose conspiracy case has been made out. The appellant relies upon passages in the judgment in Pro-Sys to the effect that a conspiracy to harm another may constitute a predominant purpose conspiracy even if its effect is to increase the conspirators' profits: see paras. 76-78 of Pro-Sys. The case does not, however, stand for the proposition that increasing profits is necessarily an effect of corporate policy rather than an objective in itself. Nor does it stand for the proposition that pursuit of corporate profit is an illegitimate objective.
- [65] The appellant argues when Mr. Gregoire deposed to TDL's objective of protecting costs sunk into the training of employees he was actually describing "the effects of limiting employment mobility". As I have noted above, the judge considered limited mobility and wage suppression to be potential effects, rather than the purpose of the No-Hire Clause. There was support for that conclusion in the evidence and, in my view, no basis upon which we can disturb it.
- [66] The appellant argues that the No-Hire Clause will be ineffective to reduce training costs. He says "the restriction on employee mobility is not reasonably connected to the claimed interest". It is not open to us to find that the clause is ineffective to achieve TDL's stated objectives. Even if it were, it is not open to us to say Mr. Gregoire's evidence with respect to TDL's purpose should not have been accepted by the chambers judge because we might find the clause unlikely to achieve the desired result. Mr. Gregoire's evidence was essentially unchallenged. He was not cross-examined on his affidavit. The chambers judge did not consider the evidence of both parties to be irreconcilable.

Legitimacy of the Primary Objective

- [67] The appellant contends the No-Hire Clause does not protect a legitimate proprietary interest. He argues it injures trade and "injuring trade to assist your competitors is nefarious conduct" and "the use of no-hire clauses is not a legitimate way for a franchisor to protect its franchisees' training costs": citing *Sherritt Gordon Mines Ltd. and TIW Industries Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Locals 179 and 264 (1987)*, 45 D.L.R. (4th) 22, 1987 CanLII 4897 (S.K.C.A.).
- [68] He says restrictions on job mobility are contrary to public policy because they interfere with individual liberty of action and because the exercise of trade should be encouraged: *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6 at para. 16. He notes Canadian law considers unrestricted labour mobility "to protect the employee": *Payette v. Guay inc.*, 2013 SCC 45 at paras. 35-36. Therefore, he contends it is not a legitimate purpose for TDL to say it was protecting itself by removing the protections the law provides employees.

[69] This argument is simply not open to the appellant. The pleading of an unlawful means conspiracy was dismissed and the dismissal was not appealed. The remaining claim was that there was an agreement to use lawful means with the predominant purpose of inflicting harm on a third party. If there is no basis to conclude that TDL acted in concert with franchisees with the predominant purpose of harming the appellant or others in his position, there is no room to argue that the means they employed to achieve their intended purpose were "illegitimate".

The Fourth Error

[70] The appellant contends the judge erred by accepting TDL's argument that the claim must fail if the conspirators benefit from the agreement. He says that is an error of law.

[71] In doing so, he says, the judge relied on Cement LaFarge as "a statement of settled law" to the effect that establishing that a person is acting purely out of self-interest will defeat a conspiracy claim. He contends the law is more subtle, that the law is "far from clear", and that only legitimate objectives will defeat a claim. He says:

TDL's goals were to stop employees from being hired or solicited by other Franchisees. This assured Franchisees they could maintain their trained staff without worrying about employment offers from competing Franchisees. The law does not accept this object as legitimate.

[72] The respondent says this submission misstates its position and, therefore, the judgment:

Contrary to the Appellant's factum, TDL's position on the summary judgment application was not that "the claim must fail if the conspirators benefit from the agreement." Nor is it accurate to say that the Chambers Judge "agreed" with this position (which TDL did not assert) and so made "an error of law." As recognized by the Chambers Judge, TDL's position was that it had established through uncontradicted evidence that the predominant purpose of the No-Solicitation Clause was not to cause injury. In fact, the Appellant persists in mischaracterizing TDL's position on appeal, even though the Chambers Judge noted in her decision that the Appellant had "not accurately described [TDL's] position" (mischaracterizing it in the same manner below).

[Emphasis in original.]

[73] In my view, the respondent is correct to say it did not advance, and the judge did not accept, the impugned proposition. In her reasons for judgment, the chambers judge noted that the appellant claimed that TDL's response to the claim rested on two flawed propositions, the first of which was "the plaintiff's claim fails if harm, by itself, is not the singular goal of the conspiracy": at para. 84. The judge observed that "the plaintiff has not accurately described [TDL's] position" and concluded, as I have noted above, that TDL's submission was that the court must focus on the underpinning intent rather than the effect of the alleged conspirators' actions: at para. 85.

[74] I would not accede to the argument that the judge erred in this regard at all.

The Fifth Error

- [75] Finally, the appellant says it was an error on the part of the judge to say there was no evidence of a conspiracy and no evidence from franchisees that they intended to enter into an agreement with the common design and purpose of injuring trade. Referring to the first element of the tort, "an agreement or concerted action between two or more persons", he submits that the executed licensing agreements provide the requisite evidence.
- [76] In my opinion, it is unnecessary to address this submission. I can see no reason to interfere with the chambers judge's conclusion that there was no genuine issue for trial with respect to the alleged predominant purpose conspiracy. The question whether she erred in concluding that there is no genuine issue for trial with respect to the existence of a common purpose between TDL and the franchisees is moot.

Conclusion

[77] I would dismiss the appeal.

"The Honourable Mr. Justice Willcock"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Justice Donegan"

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