



February 2014

Stop Shooting Cannonballs at my Customers' Canoe! Welcome Clarification on the "Unlawful Means" Tort from the Supreme Court of Canada

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On January 31, 2014, the Supreme Court of Canada released its decision in [A.I. Enterprises Ltd. v. Bram Enterprises Ltd.](#), 2014 SCC 12. This is an important commercial decision as it clarifies and narrows the scope of the tort of unlawful interference in economic relations. Canadian businesses will also welcome the Court's reference to commercial certainty as one of the principal reasons to clarify and limit the scope of this tort.

As the Court noted, the tort goes by various names, including "causing loss by unlawful means", "intentional interference with economic relations" and "interference with a trade or business by unlawful means." Consistent with the decision, this article will use the short form "unlawful means tort."

The Tort is Only Available in Three-Party Situations

One of the components of the unlawful means tort that surprises or confuses students or the uninitiated is its triangular nature, or what Mr. Justice Cromwell describes the tort's creation of "parasitic" liability in a three-party situation. It is only where a defendant engages in an unlawful act that could give rise to civil liability to a third party, and that conduct is intended to cause harm to the plaintiff, that the tort arises. I have always used the example of a defendant illegally blockading a supplier's warehouse with the intention of causing economic harm to a plaintiff who relies on that warehouse for supply of goods as an illustration of how the tort may be committed.

The example plucked from historical case law by the Supreme Court is a better (and more graphic) illustration. In *Tarleton v. M'Gawley* (1793), Peake 270, 170 E.R. 153, the defendant, the master of a trading ship, fired cannons at a canoe of the coast of Cameroon that was attempting to trade with the ship's competitor, seeking to deter the canoe's occupants from trading with that competitor. The plaintiff ship owners recovered damages for the economic injury resulting from the defendant's wrongful conduct towards third parties (i.e., the hapless canoe occupants, one of whom apparently was killed), which was intended by the defendant to cause economic harm to the plaintiffs.

The Court confirms what was uncontroversial, but often misunderstood – this tort is not suitable when what the plaintiff is complaining about is conduct immediately directed at him (the cannons have to be pointed at someone else). Perhaps this confirmation will eliminate pleadings in which plaintiffs allege the unlawful means tort when the conduct they are complaining about is some other tort arising in a strictly two-party situation.



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Narrow Scope of the Tort and its Policy Underpinning

Mr. Justice Cromwell examined the various rationales put forward for the existence of the tort. He rejected rationales rooted in the fact that harm has been intentionally inflicted because, in his view, such a rationale would lead to an unwieldy concept of what might fall within “unlawful means” and result in commercial uncertainty. He preferred what he called the “liability stretching” rationale, which posits that tort law should extend an existing right to sue from the immediate victim of the unlawful act to another party whom the defendant intended to target with the unlawful conduct. “The focus,” he states at paragraph 37 of the reasons, “is not on enlarging the basis of civil liability, but on allowing those intentionally targeted by already actionable wrongs to sue for the resulting harm.”

Endorsement of this rationale allows the Court to conclude that the scope of the tort is narrow, consistent with tort law’s reticence to intrude too far into the realm of competitive economic activity.
Conduct Constituting Unlawful Means

There was inconsistency in the prior jurisprudence in terms of what types of conduct constituted unlawful means. Some cases embraced a broad definition that included “any act that the defendant is not at liberty to commit”, which would include criminal acts and breaches of statute. Other Canadian courts followed English authority ([OBG Ltd. v. Allan](#), [2007] UKHL 21) and held that the plaintiff would only have a claim where the wrong to the third party would have been actionable in a civil suit at the instance of that third party (including in situations where the third party would have had an action but for the fact that they suffered no loss).

The Supreme Court of Canada’s conclusion on what constitutes “unlawful means” is consistent with the approach of the House of Lords. To constitute unlawful means for this tort, the conduct must give rise to a civil cause of action by the third party or would do so if the third party had suffered loss as a result of that conduct.

Thus, pleading conduct that is not actionable by civil suit, such as breach of a regulatory statute that does not include a statutory cause of action for its breach, will not found a claim in this tort. Note, however, that Mr. Justice Cromwell did not endorse the additional requirement imposed by the House of Lords – namely that the unlawful means employed must interfere with the third party’s freedom to deal with the plaintiff. Counsel should therefore rely on the Supreme Court of Canada articulation of the tort when pleading, prosecuting and defending claims based on the unlawful means tort, rather than citing the House of Lords decision as many litigators did in the past.

Finally, the Court cautioned that the approach in Québec, under the doctrine of “abuse of rights” is fundamentally different, in that liability may be imposed on the defendant for conduct that is otherwise lawful but done with the intent to injure the plaintiff or in a manner inconsistent with the social ends of the given right.

Relationship to Other Torts Requiring Unlawful Means

In considering the unlawful means component of the tort, the Court asked itself whether it was necessary to require identical treatment of this component in relation to all the torts of which it forms an element. Mr. Justice Cromwell noted that the Court had clearly taken a different approach to “unlawful means” in the context of unlawful means conspiracy and the tort of intimidation. He concluded that there were historical and contextual reasons for the differences.

Litigators should therefore be alive to the fact that “unlawful means” means different things for different torts.

Gap-Filling Role of the Tort

In a number of cases, many of which were decided by B.C. courts, claims under the unlawful means tort failed because the plaintiff had available some other cause of action in tort, such as negligence or defamation. Judges took the view that the unlawful means tort should be conscribed by its role as a “gap-filling” tort.





Mr. Justice Cromwell held that this limitation imposed in prior cases was unnecessary to ensure that the unlawful means tort was properly limited. He noted that general principles of tort liability accept concurrent liability and overlapping causes of action. Therefore, going forward, it is not open to a defendant to argue that liability for the unlawful means tort must be rejected on the basis that his or her conduct is or was directly actionable by the plaintiff under some other tort.

Rejection of Principled Exceptions to the Unlawful Means Requirement

While the New Brunswick Court of Appeal had also adopted a narrow view of the unlawful means requirement, it held that it was subject to principled exceptions. The conduct of the defendants in this case included filing encumbrances against the real property which the plaintiff majority shareholders had a right to sell and denying entry to prospective buyers. The Court of Appeal viewed this conduct as akin to the tort of abuse of process (even though the conduct was not actionable by third parties). Mr. Justice Robertson stated that allowing for principled exceptions would provide judges with some “wiggle room” to respond to unanticipated factual scenarios or changing circumstances.

The Supreme Court of Canada nipped this potential black hole of judicial discretion in the bud. In Cromwell J.’s view, allowing for exceptions without clear-cut principles to guide the development of the law would invite ad hoc decisions, which would be the antithesis of a principled approach.
Revisiting the Elements of the Tort

As clarified by the Supreme Court, the elements of the unlawful means tort are:

- Conduct by the defendant that constitutes unlawful means, in that it would be actionable by the third party or parties at whom it is directed (or would be actionable if they had suffered a loss);
- An intention by the defendant to cause economic harm to the plaintiff by engaging in this conduct; and
- Economic loss or a related injury suffered by the plaintiff as a consequence of the conduct.

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