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<b>INJUNCTIONS and SPECIFIC PERFORMANCE</b> The Honourable Mr. Justice Robert J. Sharpe Release No. 1, November 2021
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### Publisher's Special Release Note 2021

The pages in this work were reissued in November 2021 and updated to reflect that date in the release line. Please note that we did not review the content on every page of this work in the November 2021 release. We will continue to review and update the content according to the work's publication schedule. This will ensure that subscribers are reading commentary that incorporates developments in the law as soon as possible after they have happened or as the author deems them significant.

Changes to chapter and heading numbering may have occurred. Please refer to the Correlation Table in the front matter if you wish to confirm references.

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## **What's New in this Update:**

### **Interlocutory Injunctions: Assessment of the Merits**

In *AC and JF v. Alberta*, 2021 ABCA 24 (Alta. C.A.), leave to appeal refused A.C., et al. v. Her Majesty the Queen in Right of Alberta, 2021 CarswellAlta 1525 (S.C.C.), the Alberta Court of Appeal observed: “Opinions expressed by a chambers judge on the merits or demerits of the moving party’s application for an interim or interlocutory injunction are tentative in nature and intended to bind the parties only until a specified date or a trial court resolves them or the parties settle their differences.”

### **Interlocutory Injunctions: Enforcement of Undertaking in Damages**

*Ralph’s Auto Supply (B.C.) Ltd. v. Ken Ransford Holdings Ltd.*, 2020 BCCA 120 (B.C. C.A.) set aside an order for an assessment of damages where the action was dismissed for want of prosecution: “when an action is dismissed for want of prosecution, equity demands that the surrounding circumstances of the obtaining of the interlocutory injunction and of the dismissal, must be considered before there can be any decision with respect to whether or not the undertaking should be enforced.” As there “was no basis...for drawing the inference from the plaintiff’s conduct that the claim lacked merit and no basis for concluding the injunction had been wrongly obtained”, awarding damages on the undertaking would not be appropriate.

### **Interlocutory Injunctions: Labour Injunction**

For detailed consideration of crafting terms of a labour injunction to protect freedom of expression see *Unifor Canada Local 594 v. Consumers’ Co-Operative Refineries Limited*, 2021 SKCA 34 (Sask. C.A.).

### **Interlocutory Injunctions: Standard of Review on Appeal**

*Turtle v. Valvoline Canadian Franchising Corp.*, 2021 SKCA 76 (Sask. C.A.), at paras 31-32, holds that as a chambers judge does not make a final or authoritative determination of how a contract should be interpreted, the usual deferential standard of review applicable to contract interpretation does not apply and the issue is whether she made an error in principle. Compare, however, *Landmark Solutions Ltd. v. 1082532 B.C. Ltd.*, 2021 BCCA 29 (B.C. C.A.), at para 8, holding that the deferential standard does apply.

### **Interlocutory Injunctions: Charter of Rights**

Although to date no s. 7 right to social welfare benefits has been recognized, in *AC and JF v. Alberta*, 2021 ABCA 24 (Alta. C.A.), leave

to appeal refused *A.C., et al. v. Her Majesty the Queen in Right of Alberta*, 2021 CarswellAlta 1525 (S.C.C.), the Alberta Court of Appeal found, at para. 46, that such a claim raised a serious question to be tried: “The evolutive nature of *Charter* rights is such that it cannot be said at this stage that the claim is frivolous and vexatious, or that it is not arguable.” However, the court went on to set aside an interlocutory injunction on the balance of convenience factor, finding that the public interest in enforcing the law as it stood should prevail.

### **Interlocutory Injunctions: COVID Restrictions**

*Beaudoin v. British Columbia*, 2021 BCSC 248 (B.C. S.C.), refused an injunction to enforce COVID restrictions imposed on religious services was refused where enforcement would be an issue and the regulatory scheme provided alternate means of enforcement.

See also *TAM v. Alberta*, 2021 ABQB 156 (Alta. Q.B.), refusing an interlocutory injunction to restrain the implementation of a revised scheme to provide Injectable Opioid Agonist Treatment to individuals suffering from opioid addiction.

### **Injunctions regarding Medical Assistance in Dying**

In *Sorenson v. Swinemar*, 2020 NSCA 62 (N.S. C.A.), the Nova Scotia Court of Appeal held that “[t]he determination of eligibility for MAID [medical assistance in dying], including whether an individual has capacity, is one that should be left to approved healthcare assessors” and that the courts lack institutional capacity to grant an injunction at the suit of one spouse to prevent the other spouse from accessing a medically approved procedure.

### **Contempt: Defence of Necessity**

Attempts to raise the defence of necessity where there has been defiance of a court orders in support of a cause have not met with success. In the words of the British Columbia Court of Appeal in *Trans Mountain Pipeline ULC v. Mivasair*, 2020 BCCA 255 (B.C. C.A.), at paras 78 and 84, a case involving protesters opposed to the Trans Mountain Pipeline: “the necessity defence presents unique and potentially insurmountable challenges where the wrongful conduct is rooted in purposeful defiance of a court order and a public display of disagreement with the lawfulness of the impeded activity, or dissatisfaction with government’s policy choices in authorizing that activity” as the “the planned public defiance of a court order to stop lawfully authorized activity in furtherance of an individual or societal goal, no matter how altruistic or serious that goal may be, is much more akin to a “choice” than to morally involuntary behaviour.”

### **Contempt: Standard of Review on Appeal**

In *Law Society of Alberta v. Beaver*, 2021 ABCA 163 (Alta. C.A.), at paras 29-30, the Alberta Court of Appeal held that the principles governing the standard of review for criminal appeals apply with respect to appeals from sanctions for civil contempt:

An appellate court may only interfere with a sentence, in this case a sanction, in one of two situations:

- (1) where the sentence (sanction) imposed by the sentencing judge is demonstrably unfit; or
- (2) where the sentencing (sanction) judge commits an error in principle, fails to consider a relevant factor, or erroneously considers an aggravating or mitigating factor, and such an error has an impact on the sentence (sanction) imposed...

Determining the appropriate sanction for civil contempt involves an exercise of discretion and the standard of review is reasonableness. The reviewing court cannot substitute its own discretion unless it finds that the chambers judge erred by failing to give sufficient weight to relevant considerations, proceeded in an arbitrary manner, relied upon erroneous facts or incorrect legal principles, or where there is likely to be a “failure of justice”.

### **Specific Performance: Sale of a Business**

Where the approval of a third party is required, as in the case of the sale of an automobile franchise business, specific performance may be refused: *Ruparell v. J.H. Cochrane Investments Inc. et al.*, 2020 ONSC 7466 (Ont. S.C.J.).

### **Specific Performance: Contract to Build**

In *Este v. Esteghamat-Ardakani*, 2020 BCCA 202 (B.C. C.A.), reconsideration/rehearing refused 2021 BCCA 78 (B.C. C.A.), leave to appeal refused *Rosa Donna Este v. Mina Esteghamat-Ardakani*, 2021 CarswellBC 947 (S.C.C.), the British Columbia Court of Appeal held that the supervision problem with a contract to build cannot be overcome by making an order requiring the parties to cooperate in the construction (at para 53):

An obvious problem presented by compelled participation in property construction is management of the myriad small and large decisions required of owners. The judge addressed this by ordering the parties to cooperate, with the court as the arbiter should they disagree. To state this proposition is, in my view, to demonstrate the impermissibly vague and unenforceable nature of the cooperation order, and the unsuitability of the court making those construction decisions is obvious. On what principle could a judge decide door handles or counter tops?

### **Specific Performance: Purchase of Real Property**

In *Lucas v. 1858793 Ontario Inc. (Howard Park)*, 2021 ONCA 52 (Ont. C.A.), the Ontario Court of Appeal stated (at para 77): “the specific performance analysis is not merely a search for uniqueness . . . other factors such as the inadequacy of damages as a remedy and the behaviour of the parties also play a role.” The court gave significant consideration to the efforts invested in finding a suitable residential condominium and the drastic increase in market prices between the time of purchase and the court judgment which made mitigation difficult.

### **Specific Performance: Commercial Property**

Existing partial interest in land and investment in obtaining full rights (time, effort, and money) are factors favouring the granting specific performance for parcels of commercial land: *Fram Elgin Mills 90 Inc. v. Romandale Farms Limited*, 2021 ONCA 201 (Ont. C.A.), at para 292.

### **Specific Performance: Promise to Make a Will**

*Munro v. James*, 2020 BCSC 1348 (B.C. S.C.), held that specific performance may be granted to enforce a promise to make a will, particularly where the claim is asserted against the estate after the will maker’s death. The rationale was described in a British Columbia case in the following terms (at para. 191):

First, a contract to make a will is a contract not only to transfer property but to create a relationship between a personal representative and a beneficiary with rights and obligations that go beyond the four corners of the contract, and indeed go beyond the bounds of contract law. A will gives rise to a fiduciary relationship between the personal representative and beneficiary, and a failure by the personal representative to fulfil her duties could give rise to a claim for breach of trust. Damages for breach of a contract to make a will risk undercompensating the plaintiff because they do not place the plaintiff in the position of beneficiary of an estate with the rights and remedies associated with this position.

Second, by its nature, a testamentary gift has an uncertain value insofar as any gift that passes through an estate is subject to probate fees and taxes triggered on death. In these cases, the consideration that is to pass to the party entitled to receive the testamentary gift is uncertain and damages for breach of a contract to make a will would be extremely difficult to calculate.

## **ProView Developments**

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