SOME RECENT DECISIONS ON THE ELEMENT OF UNLAWFULNESS IN INTENTIONAL TORTS

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Some recent decisions of the Ontario Court of Appeal have changed the legal landscape with respect to the economic torts. The Court now construes the element of unlawfulness in the economic torts more narrowly than it did previously, thus making the economic torts less available to a plaintiff. The Court's analysis brings to the fore the concept of a directly actionable wrong. If a wrong is directly actionable, then it cannot serve as the unlawful element in the torts of conspiracy and intentional interference with contractual relations, thus making these torts less available to a plaintiff. The result of the recent decisions is that the criteria for finding that a defendant has committed an economic tort are more stringent, and that some of the older jurisprudence must be treated with caution. The Court's approach attempts to follow the contours of the recent decisions of the House of Lords. While the outline is relatively clear, the detailed development has yet to be worked out.

Des arrêts récents de la Cour d'appel de l'Ontario ont modifié le paysage juridique en matière de délits à caractère économique. La Cour interprète désormais plus étroitement qu'auparavant l'élément d'illégalité de ce type de délits, ce qui a pour effet de réduire la possibilité pour les demandeurs de les invoquer. L'analyse de la Cour s'est appuyée sur le concept de « faute donnant directement ouverture à une poursuite civile » (directly actionable wrong). Ainsi, si une faute donne directement ouverture à une poursuite civile, elle ne peut alors plus servir d'élément d'illégalité dans les délits comme la conspiration ou l'interférence intentionnelle dans les relations contractuelle. Cela a pour effet de rendre moins disponibles ces délits pour les demandeurs. Ces arrêts récents ont pour conséquence que le critère pour déterminer si un défendeur a commis un délit économique est plus strict et qu'une partie de la jurisprudence antérieure en la matière doit être utilisée avec prudence. L'approche de la Cour vise à se conformer à l'esprit de décisions récentes de la Chambre des Lords. Bien que les grandes lignes de cette approche soient relativement claires, les détails restent encore à être mis au point.

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1. Introduction

In *Correia v Canac Kitchens,*[1] the Ontario Court of Appeal cited with approval the opinion of Lord Hoffman in the House of Lords decision in *OBG Ltd v Allan*.[2] In Lord Hoffman's view, inducing breach of contract and intentional interference with economic relations are both intentional torts that aim to give redress in the context of deliberate commercial wrongdoing. This is a clear statement of the connection between the intentional torts and standards of commercial morality. After reviewing the recent jurisprudence from the House of Lords, the Court of Appeal expressed its own view that the intentional torts exist to fill a gap where no action could otherwise be brought for intentional conduct that caused harm through the instrumentality of a third party.[3] This is a clear statement of the rationale for having the intentional torts.

In a later case before the Court, *Agribrands Purina Canada Inc v Kasamekas,*[4] the complainants[5] sought to rely on an intentional tort to fill a gap where they could not otherwise bring an action in contract against some of the parties who had wronged them. On the facts in *Purina*, however, the Court found that the intentional torts did not avail the plaintiffs. In the result, the plaintiffs had a good claim against only one of the parties for breach of contract, the party with whom they had, obviously enough, a contract. They could not, however, rely on the intentional torts against the other parties, with whom they did not have contractual relations. As the gap could not be filled by the intentional torts, the plaintiffs did not succeed in their claim against the other parties. In the Court's opinion, the other parties had done nothing unlawful *vis-à-vis* the plaintiffs, from which it followed that the unlawful conduct that is a prerequisite to reliance on the intentional torts was absent.

On this point, the Court of Appeal reversed the trial judge, who found that the other parties had clearly engaged in unlawful conduct *vis-à-vis* the plaintiffs.[6] Notably, the trial judge had also taken a very dim view of the commercial morality of the conduct that he found unlawful, a theme which

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1 (2008), 91 OR (3d) 353 (CA) at para 107 [*Correia*].

2 [2008] 1 AC1 (HL) [*OBG*].

3 The third party is the vehicle through which the defendant causes harm to the plaintiff; see text at note 23, *infra*.

4 2011 ONCA 460, (2011), 106 OR (3d) 427 (CA) [*Purina CA*].

5 The complainants were plaintiffs by counterclaim. For the sake of economy of expression, I will refer to them as "the plaintiffs" and to the defendants by counterclaim as "the defendants."

6 *Agribrands Purina Canada Inc v Kasamekas*, 2010 ONSC 166, [2010] OJ No 84 (QL) (Sup Ct) [*Purina SC*]

was somewhat more muted in the decision of the Court of Appeal, but not absent entirely, as the Court upheld the trial judge's award of punitive damages against the party which it found to have breached the contract. The contrast between the trial decision and the decision of the Court of Appeal raises squarely the question of what constitutes unlawful conduct in the intentional torts.

There would appear to be at least three criteria to which a court's finding of unlawful conduct, or the contrary, might answer. First, a court might proceed on the premise that, if a course of conduct is offensive to commercial morality, that provides some reason to believe that it might also be unlawful. Here, the notion of offensiveness is intended to connote nothing more weighted with theory than that the conduct in question seems wrong and might therefore be deserving of sanction. Second, in a number of recent decisions, the Ontario Court of Appeal has defined some of the intentional torts by enumerating their constituent elements. So a court might proceed on the additional premise that, if the constituent elements of the tort are present, then simply applying the definition would compel a finding that the tort be available to fill the gap noted in *Correia*, in order to maintain consistency with the definition. Third, there is also considerable jurisprudence on the intentional torts. A court might therefore proceed on the premise that a finding as to whether a course of conduct is unlawful or not should be consistent with the prior jurisprudence, so far as the latter has not been superseded by the more recent decisions. Proceeding on these premises, a court should be able to determine whether the rationale offered in *Correia* for the intentional torts ought to apply – if a party cannot rely on contract, is an intentional tort available to fill the gap?

2. The Fact Situation Presented by Purina

The facts in *Purina* were as follows. Purina carried on the sale of its food products by entering into distributorship contracts that gave dealers exclusive rights to market and sell the products in defined geographic territories. In July, 1990, Purina discovered that Ren's, a dealer of Purina's livestock and pet food, was purchasing feed from one of its competitors and selling it as food for laboratory animals. Because of this breach of Ren's dealership agreement, Purina terminated Ren's dealership. As the trial judge commented, Purina soon regretted the termination: "Perhaps Purina concluded that it had terminated Ren's dealership precipitously once it remembered that Ren's had a long dealer history and a well established clientele across a broad geographic territory."[7] Nevertheless, Purina did not reinstate Ren's as a dealer. Instead, in February, 1991, it appointed Raywalt its exclusive dealer in Ren's former territory.

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7 *Purina SC*, *supra* note 6 at para 77

Ren's customers in what had now become Raywalt's territory did not desert Ren's just because Ren's ceased to be a Purina dealer. Unfortunately for Raywalt, Purina tried to have the best of both worlds. The trial judge found that Purina's subsequent actions reflected a conscious decision that it could not run the risk of losing all or even a large part of Ren's customer base to competing feed products.[8] In furtherance of that conscious decision, Purina committed an initial breach of its agreement with Raywalt by continuing to supply feed to Ren's, thus enabling Ren's to sell Purina products to its ongoing customers in Raywalt's territory. After Raywalt discovered what Purina was doing, it complained repeatedly to Purina which, somewhat belatedly, ceased to supply Ren's directly.

Purina found a way to supply Ren's indirectly, however. McGrath was a Purina dealer in a neighbouring territory and a friend of the owner of Ren's. In order to satisfy its customers' preference for Purina feeds, Ren's approached McGrath and arranged with him that he supply Purina feed at dealer prices, enabling Ren's to continue to sell Purina products without interruption to its customers in Raywalt's territory. Purina knew of, condoned and approved this arrangement. Instead of backing Raywalt over Ren's, Purina chose not to run the risk of losing Ren's customer base to competing products, at Raywalt's expense. The result of the encroachment by Ren's in Raywalt's territory was that Raywalt's business was not as profitable as had been projected. By the end of January, 1992, cash flow problems caused Raywalt to go out of business.

The trial judge found that the effect of Ren's arrangement with McGrath was that Ren's became a sub-dealer of McGrath, though Purina's standard operating procedures did not permit or authorize a dealer in one territory to license a sub-dealer in another territory.[9] Even though the arrangement was not authorized, Purina condoned it and provided McGrath with feed for resale by Ren's. Both at trial and on appeal, the courts found Purina liable to Raywalt for breaching the contract by supplying McGrath with feed while knowing that McGrath would sell it to Ren's at dealer prices for resale in Raywalt's territory, and by condoning the arrangement.

The trial judge also found that Purina, Ren's and McGrath were liable to Raywalt for conspiracy – not conspiracy to injure, as their primary purpose was not to injure Raywalt, but unlawful conduct conspiracy.[10] The trial judge found that their conduct, undertaken in concert, was unlawful,

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8 *Ibid* at para 117.

9 *Ibid* at para 141.

10 Following the well-known distinction in *Canada Cement Lafarge v BC Lightweight Aggregate*, [1983] 1 SCR 452.

and that they knew or ought to have known that injury to Raywalt was likely to result: Purina, Ren's Feeds and McGrath

> acted in a concerted fashion to ensure that Ren's Feeds would have all the Purina feed product it required to ensure that Purina's customer position would not be compromised. Such concerted action was contrary to the applicable agreements and the legally defined roles that each of them was permitted to play.[11]

The trial judge found that Purina's, Ren's and McGrath's conduct was directed at Raywalt, in circumstances in which it was reasonably foreseeable that serious economic injury to Raywalt would result from that conduct.[12] Foreseeability together with unlawful conduct was sufficient for a finding of constructive intent to injure. The Court of Appeal accepted both the trial judge's finding of constructive intent and the finding that constructive intent is sufficient for unlawful conduct conspiracy. The critical question, then, given the finding of intent, was whether the conduct was unlawful.

The trial judge saw the "newer decisions" as supporting an expansive construal of unlawful conduct:

> The newer decisions confirm that the ambit of "illegal conduct" extends beyond strict illegality for purposes of proving the existence of tortious conduct. It includes conduct that the defendant "is not at liberty" or "not authorized" to engage in, whether as a result of law, a contract, a convention or understanding.[13]

Purina's conduct was thus unlawful because Purina had no authority or entitlement to permit McGrath to sell feed products to Ren's at dealer prices, which effectively licensed Ren's to sell products in a geographic area reserved to another dealer. McGrath's conduct was unlawful because McGrath had no authority pursuant to his dealership agreement with Purina to establish a sub-dealership in a territory assigned to another dealer. And Ren's conduct was unlawful because Ren's was not entitled to establish a sub-dealership in a territory assigned to another dealer.

The Court of Appeal did not accept the trial judge's finding that Ren's and McGrath had engaged in unlawful conduct, and reversed the finding of conspiracy. On a correct construal of unlawful conduct, in the Court's view, Ren's and McGrath had not acted unlawfully. Ren's, having no contract with either Purina or Raywalt, was free to purchase Purina feed from McGrath at the best price it could obtain and sell it wherever it could.

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11 *Purina SC*, *supra* note 6 at para 140.

12 *Ibid* at para 124.

13 *Ibid* at para 127.

Ren's required no authorization from Purina to act as it did. McGrath committed no breach of its dealership agreement with Purina, whose standard dealership agreement did not prohibit an arrangement of the kind McGrath had with Ren's. The arrangement may not have accorded with Purina's standard operating procedures, but it did not amount to a breach of the dealership agreement. Moreover, McGrath could not have breached his dealership agreement with Purina because Purina knew and approved of what McGrath was doing.[14]

The Court set out the following constituent elements of unlawful conduct conspiracy:

1. the defendants act in combination, that is, in concert, by agreement or with a common design;
2. their conduct is unlawful;
3. their conduct is directed towards the plaintiff;
4. the defendants know that, in the circumstances, injury to the plaintiff is likely to result ;
5. their conduct causes injury to the plaintiff.[15]

Conduct that is merely not authorized by a convention or an understanding does not thereby become unlawful for the purposes of either the tort of conspiracy or the tort of intentional interference with economic relations. The conduct must also be actionable.

Nor did the Court accept another submission, advanced by Raywalt for the first time on appeal, that Ren's' conduct was tortious because Ren's induced Purina to breach its contract with Raywalt. That submission could not succeed because of the trial judge's finding that, apart from conspiracy, Ren's had not committed any other tort;[16] and also because Ren's could neither have caused Purina to breach its contract with Raywalt nor McGrath to breach its contract with Purina, when Purina knew and approved of the arrangement between Ren's and McGrath. McGrath's conduct was not unlawful, because McGrath did not breach his dealership agreement with Purina. Even the standard dealership agreement that Raywalt and Ren's had with Purina did not prohibit such an arrangement. Moreover, McGrath could not have been in breach of his dealership agreement with Purina, because Purina knew and approved of what McGrath was doing. Only Purina had engaged in unlawful conduct. Because conspiracy requires that all the parties to a conspiracy act

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14 *Purina CA*, *supra* note 4 at paras 40-43.

15 *Ibid* at para 26.

16 "Ren's and McGrath do not appear to have committed a crime or tort, apart from this alleged tort;" see *Purina SC*, *supra* note 6 at para 126.

unlawfully, there could be no conspiracy among Purina, Ren's and McGrath.

A finding that Ren's and McGrath were parties to a conspiracy might have been beneficial for Raywalt, apart from the routine benefit of increasing the likelihood of recovery on any judgment by increasing the number of judgment debtors.[17] Although the Court of Appeal upheld Raywalt's claim against Purina for breach of contract, it also reduced the amount of the damages found by the trial judge. The Court held that Purina was entitled to rely on a termination provision in its agreement with Raywalt, pursuant to which Purina had the right to cancel the contract at any time on sixty days notice. Following *Hamilton v Open Window Bakery Ltd*,[18] the Court could presume in Purina's favour that Purina would have relied on the termination provision, as being the least burdensome mode of performance for it:

> Using this approach, the quantification of the damages owed by Purina for breach of contract requires the determination of the amount Raywalt lost because of Purina's breach from the time Raywalt opened for business in March 1991 until the end of March 1992, two months after it actually closed its doors.[19]

Was *Purina* an appropriate case for the application of the "least burdensome" principle? In *Hamilton*, the defendant terminated the plaintiff's contract of employment prematurely and without justification. In the sixteenth month of a thirty-six month contract, the defendant purported to terminate the plaintiff's contract of employment for cause. Had the defendant followed the termination provision in the contract, it would have been entitled to terminate in the nineteenth month of the contract, on giving the plaintiff three months notice. On these facts, the Court held that the plaintiff was entitled to damages in lieu of only three months notice, but not damages for the entire balance of the thirty-six month contract. Adopting the reasoning in *Withers v General Theatre Corp,*[20] the Court formulated the following general principle:

> The assessment of damages required only a determination of the minimum performance the plaintiff was entitled to under the contract, i.e. the performance which was least burdensome for the defendant.[21]

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17 The line of argument in what follows is highly tentative, but may still be of interest as suggesting that further clarification by the Court would be useful as to the proper boundaries of the "least burdensome" principle.

18 2004 SCC 9, [2004] 1 SCR 303 [*Hamilton*].

19 *Purina CA*, *supra* note 4 at para 55.

20 [1933] 2 KB 536 (CA) at 548-49.

21 *Hamilton*, *supra* note 18 at para 20.

The "least burdensome" principle has at least the merit of being tied reasonably closely to the factual situation in *Hamilton*, in which the defendant actually terminated the contract, albeit not in accordance with its terms. Because the defendant actually terminated the contract, a hypothetical termination in the manner least burdensome to the defendant would at least be related, at least loosely, to the facts. In contrast, in *Purina*, Purina did not terminate the contract at all. It simply waited for the plaintiff to become unable to continue in business. What then is the significance of the fact that Purina could have terminated the contract? And does it follow automatically that the other defendants should be entitled to the benefit of the same favourable presumption that Purina would have chosen to terminate in the manner most favourable to itself? It may appear obvious that the other defendants could never have been liable to the plaintiff for an amount of damages greater than that for which Purina was liable, but it would nevertheless be instructive to have the reasoning spelled out explicitly. In *Purina*, the other defendants received the benefit of the presumption twice removed. Since the Court of Appeal saw *Purina* as an appropriate case in which to apply the reasoning in *Hamilton*, however, any question as to the scope of the "least burdensome" principle may now be foreclosed.

3. Narrower Construal of Unlawful Conduct

How then did Ren's and McGrath manage to escape liability? The trial judge had taken a pretty dim view of the commercial morality of their conduct:

> … with Purina looking on as an allegedly passive observer, in fact it consciously permitted Ren's to operate as a parasite within Raywalt's territory sucking the life blood out of its commercial viability.[22]

Clearly, the problem that the trial judge attempted to circumvent by relying on the tort of conspiracy is that Purina's dealer agreements did not prohibit the sort of arrangement devised by Ren's, a former Purina dealer, and McGrath, an active Purina dealer. In Ren's case, the dealer agreement might have attempted to limit certain forms of competition by Ren's after termination. In McGrath's case, the dealer agreement might have prohibited setting up a sub-dealership in another dealer's territory. Where contract did not assist Raywalt as against Ren's and McGrath, the trial judge attempted to find a tort, the tort of conspiracy, which would assist Raywalt even though Purina's standard dealer agreements did not. The trial judge's solution to the problem was to hold that conduct not expressly permitted to Ren's and McGrath was prohibited. By contrast, the Court of

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22 *Purina SC*, *supra* note 6 at para 94.

Appeal held that conduct not expressly prohibited was permitted. This is why the Court rejected the trial judge's test for illegality. Conduct that is not authorized does not thereby become wrong or actionable.[23]

Rejecting the trial judge's test for illegality continued a retrenchment begun by the Court in *Drouillard v Cogeco Cable Inc*[24] and continued in *Correia*,[25] from an expansive construal of unlawful conduct in one of its own earlier decisions, *Reach MD Inc v Pharmaceutical Manufacturers Association of Canada*,[26] on which the trial judge relied.[27] In *Reach*, the Court of Appeal was willing to endorse a broader conception of unlawful conduct, although in the context of a discussion of the tort of intentional interference with economic relations rather than the tort of conspiracy. Reach distributed to health care professionals a wall calendar called "Herman MD," from which Reach derived profit by selling to drug companies advertising space in the calendars. Many of the advertisers were members of a pharmaceutical trade association. In March 1990 and again in August 1990, the association's marketing committee wrote to the association members that advertising in the calendar contravened the association's *Code of Marketing Practice*, as a result of which the members ceased advertising in the calendar. Reach's business could not continue. Reach claimed damages from the association. At trial, Reach's claim did not succeed, but it succeeded in the Court of Appeal.

The Court found that the association was liable to Reach for intentional interference with economic relations. The association's *Code of Marketing Practice* did not give the marketing committee jurisdiction to prohibit members from placing advertising with a non-member such as Reach:

> … where the association exercises authority beyond the scope of its own rules, a court can set aside a decision for lack of jurisdiction…Unlawful conduct means at least include what occurred here: the Committee made a ruling that it was not authorized to make. Its ruling was beyond its powers.[28]

The trial judge in *Purina* construed unlawful conduct in the tort of conspiracy the same way that the Court of Appeal in *Reach* had construed

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23 The Court of Appeal could have rejected the test for other reasons as well. The test appears to be so broad as to draw into its ambit almost any kind of conduct, including conduct that no one would regard as illegal.

24 (2007), 86 OR (3d) 431 (CA) [*Drouillard*].

25 *Supra* note 1.

26 (2003), 65 OR (3d) 30 (CA) [*Reach*].

27 *Purina SC*, *supra* note 6 at para 128.

28 *Reach*, *supra* note 26 at paras 32, 52.

unlawful conduct in the tort of unlawful interference with economic relations.

By the time of the trial decision in *Purina*, however, the Court of Appeal had already begun to draw back from its broad construal of unlawful conduct in *Reach*. In *Drouillard*,[29] the Court rejected a finding at trial that a breach by the defendant of an unwritten internal policy amounted to an unlawful act. In the Court's view, the defendant was at liberty to act contrary to the internal policy, and the plaintiff had not relied on the policy in such a way that he could require the defendant to respect it. *Reach* was distinguishable. In *Reach,* the powers given to the association were only those given to it by its members; and the marketing code was directed at protecting the interests of the members. The association's rulings against Reach went beyond the powers given to the association by its members and adversely affected Reach's interest, so the association's rulings were actionable. In *Drouillard* and *Purina*, by contrast, the defendants' conduct was not actionable and so could not constitute unlawful means. In *Purina*, the Court of Appeal again distinguished *Reach* by requiring that unlawful conduct be actionable by third parties:

> The court [in *Reach*] was clear that these actions were beyond the lawful authority that the defendant had under its constitution, and were therefore actions beyond the defendant's powers and done without jurisdiction. They could be set aside at the behest of the third parties, its members. *Reach* was a case of conduct that was wrong in law.[30]

The result was that the Court in *Purina* resiled from the earlier broad construal of unlawful conduct in *Reach*, relied on by the trial judge in *Purina*, and affirmed the narrower test in *Drouillard* pursuant to which, to be unlawful, conduct must be actionable by third parties. Yet the Court justified the actual holding in *Reach* on the basis that the defendant's conduct in that case was actionable by third parties, whereas the conduct of the defendants in *Purina* was not. The third parties, as the Court stated in *Alleslev-Krofchak v Valcom Ltd*,[31] are the vehicles through which harm is caused to the plaintiff.

In *Alleslev-Krofchak*, the Court of Appeal considered unlawful means for the purposes of the tort of intentional interference with economic relations. The Court adopted the view of Lord Hoffman in *OBG*:[32]

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29 *Supra* note 24.

30 *Purina CA*, *supra* note 4 at para 31.

31 2010 ONCA 557, (2010), 322 DLR (4th) 193 [*Alleslev-Krofchak CA*].

32 *Supra* note 2 at para 97.

> … subject to one qualification, acts against a third party count as unlawful means only if they are actionable by that third party. The qualification is that they will also be unlawful means if the only reason why they are not actionable is because the third party has suffered no loss.[33]

The Court of Appeal added that

> … to qualify as "unlawful means", the defendant's actions (i) cannot be actionable directly by the plaintiff and (ii) must be directed at a third party, which then becomes the vehicle through which harm is caused to the plaintiff.[34]

In *Barber v Molson Sport & Entertainment Inc*,[35] the Court followed *Reach* after it had already resiled in *Drouillard* and *Alleslev-Krofchak* from *Reach's* broad characterization of unlawful conduct. The Court held that, for the purposes of the tort of intentional interference with economic relations, unlawful conduct is conduct that a defendant is not at liberty to perform. The defendant Molson agreed orally to sell the defendant Vrozos the exclusive right to supply bottled water at a Rolling Stones concert in Toronto in 2003. At issue was whether Molson, knowing that Vrozos had in turn granted to the plaintiffs the exclusive right to distribute bottled water at the concert, was liable to the plaintiff for intentional interference with economic relations by entering into agreements with other suppliers to supply bottled water at the same concert. Although *Barber* came after *Drouillard*, and very shortly after *Alleslev-Krofchak*, the Court did not cite either of those decisions. As the reasoning in *Reach* no longer represents the Court's view, the same must be true of the reasoning in *Barber*, which relied on *Reach*.[36]

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33 Cited in *Alleslev-Krofchak CA*, *supra* note 31 at para 49.

34 *Ibid* at para 60.

35 2010 ONCA 570, (2010), 269 OAC 108 [*Barber*].

36 Apart from the anomaly that the Court did not cite its own previous decisions after *Reach*, there is also a further anomaly that makes *Barber* an unsatisfactory authority. It was the defendant Molson, rather than the plaintiff, that made its submission, *ibid* at para 56, as to liability on the basis of the broader characterization of unlawful conduct in *Reach*:

> Molson submits that illegal or unlawful means, in the context of this tort, are those prohibited by law or statute and are activities that the defendant is "not at liberty to commit." In other words, Molson argues, Wahta [one of the plaintiffs] had to establish that Molson committed either an illegal or tortious act.

In light of the Court's decisions after *Reach*, it is anomalous, first, that a defendant rather than a plaintiff should submit that a broader characterization of unlawful conduct is the appropriate characterization and, second, that the Court should equate conduct that the defendant is not at liberty to perform with conduct that is illegal or tortious. In *Reach*, the scope of conduct that a defendant is not at liberty to perform was substantially broader than that.

4. Earlier Jurisprudence on Inducing Breach of Contract

One of several questions to which the Court of Appeal's reliance in *Purina* on the concept of an actionable wrong gives rise is why Ren's and McGrath's conduct was not actionable by Raywalt on the basis that it amounted to inducing a breach of Purina's contract with Raywalt. Why did the Court regard Purina's knowledge and approval of the arrangement between Ren's and McGrath as sufficient to negate the possibility of inducing breach of contract?

In *Drouillard*,[37] the Court defined the elements of the tort of inducing breach of contract:

1. There must be a valid and enforceable contract between the plaintiff and a third party;
2. The defendant must be aware of the existence of the contract;
3. The defendant must have intended to procure and did procure the breach of the contract;
4. As a result of the breach, the plaintiff must have suffered damages.

The trial judge in *Purina* made an express finding with respect to McGrath's knowledge of the contract between Purina and Raywalt: "McGrath would have been aware of the Raywalt Dealership Agreement because McGrath became a Purina dealer in 1989 and signed the identical form of Dealership Agreement as Raywalt."[38] Presumably, the trial judge could have made a similar finding with respect to Ren's, because Ren's was Raywalt's predecessor as a Purina dealer in the same territory. With these findings, it would seem that each of the four elements in *Drouillard* for the tort of inducing breach of contract is present. How then did Purina's knowledge and approval of the arrangement between Ren's and McGrath negate the possibility of inducing breach? Considering either the formulation of the third element of the tort in *Drouillard* ("the defendant intended to and did procure the breach of the contract") or the corresponding formulation in *Correia* ("the defendant's conduct caused the third party to breach the contract") Ren's would appear to have procured or caused Purina to breach its contract with Raywalt. That Purina be an unwilling participant in the breach is neither required by the definition nor in accord with the established jurisprudence.

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37 *Supra* note 24 at para 26.

38 *Purina SC*, *supra* note 6 at para 82. The trial judge then went on at *ibid* to make the finding that the Court of Appeal rejected: "I find that McGrath was aware that the Purina form of Dealership Agreement did delineate territorial assignments and that it was not open to a dealer to sell feeds in an adjacent dealer's territory."

In one of the most common fact situations giving rise to the tort, an employer may claim against a departing employee for breach of contract and against a new employer for inducing breach of contract. Usually, the employee is only too willing to breach his contract with the former employer but, in the decided cases, this has not served to insulate the new employer from liability for either inducing breach of contract, or unlawful conduct conspiracy, or both. The essential element in the new employer's unlawful conduct would appear to be simply its guilty knowledge of the contract with the former employer.

The well-known starting point for the jurisprudence on the tort of inducing breach of contract is *Lumley v Wagner*,[39] in which the defendant Wagner agreed with the plaintiff to sing opera exclusively at the plaintiff's theatre for a period of three months. A competing offer from the lessee of a rival theatre induced Wagner not to perform her engagement with the plaintiff. The Lord Chancellor's Court found the lessee of the rival theatre liable to the plaintiff for inducing breach of contract. The Court did not regard it as necessary to find in addition that Wagner was unwilling to enter into the conflicting agreement with the defendant. One of the arguments advanced by the defendant in order to avoid liability was that "the breaking her contract was the spontaneous act of Miss Wagner herself, who was under no obligation to yield to the persuasion or procurement of the defendant."[40] The Court did not accept the defendant's argument.

Numerous Canadian cases follow *Lumley*. In *Trim Trends Canada Ltd v Dieomatic Metal Products Ltd*,[41] an employee, while still employed by the plaintiff, helped the defendants to set up a competing company, disclosing to the principals of the competitor confidential information belonging to his employer. The Ontario High Court found the employee, the competing company and the principals of the competing company[42] all liable to the employer for conspiracy to induce breach of contract. The competing company and its principals, by collaborating with the employee in the development of the new company, induced and actively facilitated and encouraged a breach of the employee's contract with his employer. This constituted unlawful means. As in *Lumley*, the Court did not require that the employee be an unwilling party to the breach.

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39 (1853), 2 HL & BL 216 [*Lumley*].

40 *Ibid* at 236

41 (1967), 53 CPR 245 (OHCJ).

42 One of the principals went on to greater fame: "Strohsack is a clever and ambitious man…I have no hesitation in finding that the plaintiff has established a conspiracy upon the part of the defendants Pabst, Strohsack (Stronach as he is now known) and Petre to injure it in its trade or business …;" see *ibid* at paras 26 and 63.

Similarly, in *HL Weiss Forwarding Ltd v Omnus*,[43] an employee left his employer without giving reasonable notice, which the Ontario High Court found to be a period of six months,[44] and then joined a competing company. The competitor was aware that the employee had not given proper notice. The Court found that the competitor induced the employee to breach his contract of employment with the plaintiff and held both the employee and the competing company liable to the employer for conspiracy. Again, the Court did not require that the employee be an unwilling party to the breach.[45]

These decisions do not appear to be consistent with the Court of Appeal's reasoning in *Purina*, that Purina's knowing and approving of the arrangement between Ren's and McGrath leaves little room for the conclusion that Ren's caused Purina to breach its contract with Raywalt. Do the decisions then call into question the Court's definition of inducing breach of contract in *Drouillard*? The definition could be considered materially adequate only if it were to accord substantially with the existing jurisprudence. So which is right, the existing jurisprudence or the definition? The answer must be that both are right. The Court surely did not mean to propound a revisionary definition. If the definition is adequate, however, as it appears to be, and it does not implicitly overrule the existing jurisprudence, then it is doubtful whether the Court's reasoning in *Purina* is correct.[46] In *Purina,* the elements of the tort appear to be present, yet the Court found the defendants not liable for the tort of inducing breach of contract. This in turn raises the question how the definition, particularly the third element, is to be understood. The Court would reasonably have intended that the definition be understood in such a way as to make the holding in *Purina* correct, but it is not apparent how this is possible, given the prior unrepudiated jurisprudence on inducing breach of contract.

Other decisions on inducing breach of contract may appear to conform more closely to the Court's implied requirement in *Purina* that the party

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43 (1972), 5 CPR (2d) 142 (OHCJ) [*HL Weiss*].

44 *Ibid* at para 20.

45 *Ibid* at para 22. These decisions among others, are authority for the proposition put forward in Peter Burns and Joost Blom, *Economic Interests in Canadian Tort Law* (Toronto: LexisNexis Canada, 2009) at 167 that "Examples of conspiracies involving tortious conduct include inducing breach of contract …" However, see the discussion below. The Ontario Court of Appeal has made the tort of conspiracy less available to plaintiffs, when the tort of inducing breach of contract is directly actionable by them.

46 It is possible that the decision is correct, given that the plaintiff raised the issue of inducing breach of contract for the first time on appeal, but that the Court's reasoning, that Purina's knowledge and approval of the arrangement between Ren's and McGrath is sufficient to negate the possibility of inducing breach of contract, is not correct.

induced be unwilling. In labour relations cases particularly, the third party induced to breach its contract with the plaintiff is often unwilling, indeed coerced, to do so. In *Fokhul v Raymond*,[47] for example, the defendant union induced a breach of contract between a company and its employees, who were union members, by calling the employees off the job. The Court held that the union was liable to the company for conspiracy to induce breach of contract. The Court found as well that the union had coerced the employees to leave their jobs:

> … the appellant Raymond, with a high-handed, dictatorial assumption of power, undertook to force his will and demands as an officer of the Union upon employees who were opposed to him in their views. In fact, he ordered them to cease employment when they did not wish to do so, and when there was no reason whatever for them to do so.[48]

That the party induced is unwilling is part of a common fact pattern in labour relations cases.

Another prior decision of the Court of Appeal may appear to come even closer to supporting the Court's reasoning in *Purina*. In *Harry Winton Investments Ltd v CIBC Development Corp*,[49] a tenant abandoned its leased premises because of the nearby presence of an abortion clinic. The landlord claimed against both the tenant for breach of the lease, and against the tenant's new landlord for inducing breach of contract. The landlord's claim against the new landlord did not succeed. The Court found that the new landlord approached the tenant and offered to lease space to it at a time when the tenant had already decided to vacate the old premises. Therefore, the new landlord could not be liable for inducing breach of contract. Inducement could occur only if the tenant had not yet decided to terminate its lease and had been approached by the new landlord to consider alternate premises while the tenant was still undecided. The Court quoted with approval from Gerald Fridman:

> But the fact that the contract-breaker has already determined not to perform his contract will negate liability if there is a later act by the defendant which would otherwise have amounted to an inducement.[50]

Despite the superficial similarity, this reasoning is not the same as the reasoning in *Purina*. It is one thing for the contract-breaker to have decided

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47 [1949] 4 DLR 144 (Ont CA).

48 *Ibid* at 159.

49 (2001), 52 OR (3d) 417 (CA) [*Winton*].

50 *The Law of Tort in Canada*, 2d ed (Toronto: Carswell,1990) vol 2 at 298, cited in *ibid* at para 25.

to breach the contract prior to inducement by the defendant, as in *Winton*. It is another thing for the contract-breaker to be willing to breach the contract on being induced by the defendant to do so. The holding in *Winton* is consistent with the prior jurisprudence. The holding in *Purina* is not.

One problem in *Purina*, apart from the Court's unsatisfactory formulation of the reason for rejecting a finding of inducement, is that the trial judge did not make the explicit findings of fact necessary to negate a finding of inducement along the lines of *Winton*. The idea of Purina's supplying feed to Ren's directly may have originated with Purina because, as the trial judge found, "… Purina did have a great deal to gain from taking whatever steps were required to ensure that there would be no decline in the Halton Region customers who preferred Purina feed to other brands."[51] The trial judge did not make a finding, however, that the breach originated with Purina. The trial judge's finding that Purina supplied feed to Ren's indirectly, through McGrath, is much more consistent with Purina having decided it would not breach its contract with Raywalt by supplying Ren's indirectly, prior to the arrangement between Ren's and McGrath. The tenor of the trial decision is that Ren's approached McGrath and asked McGrath to supply it with Purina feed. Then,

> [s]enior Purina management clearly voted with their feet or through inaction to support the unauthorized McGrath-Ren's sub-dealership rather than Raywalt…Purina stood by and permitted the establishment, and more importantly, the continuation of the surreptitious and unauthorized McGrath-Ren's sub-dealership.[52]

Here, the temporal sequence required by *Winton* appears to be right. Ren's started the ball rolling. The critical findings would then be that Purina's conduct amounted to inaction-condonation and that Ren's need never have approached Purina at all. Yet this could still amount to inducement, bearing in mind the formulation of the third element of the tort in *Drouillard* and *Correia*.[53] Purina was willing to go along with the arrangement initiated by Ren's and McGrath, but inducement does not require that, even after the inducement, the party induced be unwilling.

The law recognizes two forms of inducing breach of contract, direct and indirect: "…the authorities which discuss this tort [interference with contractual relations] indicate that it is not confined to specifically inducing or procuring a breach, [direct], but extends to disruption of, or

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51 *Purina SC, supra* note 6 at para 116.

52 *Ibid* at paras 137 and 236.

53 See above at 9.

interference with, contractual rights [indirect]."[54] The *Canadian Encyclopaedic Digest* formulates the distinction in similar fashion:

> Interference can arise where the defendant *directly* persuades the contracting party to break his contract or, knowing of a prior contract, has inconsistent dealings with a contracting party, as where defendant A enters into a contract with B knowing that the contract is inconsistent with a prior contract between B and C[indirect].[55]

In *Purina*, the trial judge's finding that Purina gave passive approval to the arrangement between Ren's and McGrath suggests that, if Ren's and McGrath could be liable for inducing Purina to breach its contract with Raywalt, then the inducement would have taken the form of disruption or interference with Raywalt's contractual rights, rather than direct persuasion of Purina to breach its contract with Raywalt. Ren's and McGrath, knowing of the prior contract between Raywalt and Purina, entered into an arrangement that called for inconsistent dealings with Purina. As the trial judge found, "… Purina's records would have shown an 'unexplained' geometric increase in horse feed that had suddenly commenced to be purchased by McGrath's."[56]

One of the cases cited by the *Canadian Encyclopaedic Digest* in support of its formulation of the indirect inducement branch of the tort of inducing breach of contract is *British Motor Trade Association v Salvadori*.[57] In *British Motor*, the Court held that someone may induce a third party to breach a contract simply by offering to buy from that party in such a way as to require the party to breach a prior covenant not to sell in that way. All British motor car manufacturers and their authorized dealers were members of an association which attempted to ensure that list prices of cars were neither reduced nor raised. All dealers covenanted with the association to sell cars at list prices. The defendants arranged to purchase cars at higher than list prices, thus causing their vendors to breach their covenants with the association. The Court held that, even if a covenantor offered a car for sale, the element of inducement was present, since the vendor was not prepared unconditionally to breach his covenant with the association. The vendor was willing to do so only if the price

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54 *Fraser v Central United Church* (1982), 38 OR (2d) 97 (Sup Ct) at para 35 [clarification in square brackets added]. See also *MacDonald v Klein*, [1998] OJ No 4922 (Ont CJ (Gen Div)) (QL) at para 118 :

> To "procure" the breach of a contract it was unnecessary for Corcoran to specifically induce the breach. It suffices that he disrupted or interfered with the contractual arrangements between Klein and P & L Services.

55 8 CED (Ont 3rd) "Inducing Breach of Contract" at para 15 [emphasis and clarification in square brackets added].

56 *Purina SC*, *supra* note 6 at para 137.

57 [1948] 1 All ER 208 (ChD) [*British Motor*].

offered was high enough. Accordingly, a defendant who offered such a price induced the vendor to take the final steps towards breaking his covenant by making his willingness to sell unconditional:

> …[A]ny active step taken by a defendant, having knowledge of the covenant, by which he facilitates a breach of that covenant is enough. If this be so, a defendant, by agreeing to buy, paying for, and taking delivery of a motor car known by him to be offered to him in breach of covenant, takes active steps by which he facilitates a breach of covenant.[58]

In some cases, then, inconsistent dealings are all that may be needed to push a willing party over the edge. It is true that, in *British Motor*, the purchaser or his nominee would likely have dealt face to face with the vendor, while McGrath need not have dealt face to face with Purina in purchasing extra feed for Ren's, but merely increased the size of his own orders. But is this an important distinction? It is difficult to see how it could be.

5. The Commercial Morality of the Impugned Conduct

It is a commonplace that the same action may be described in different ways. The Court of Appeal said of Ren's that "Ren's was free to purchase Purina feed from McGrath at the best price it could obtain and sell it wherever it could,"[59] and of McGrath that "… the standard dealership agreement that Raywalt and Ren's had with Purina did not prohibit such an arrangement."[60] So, in the Court's view, Ren's conduct amounted only to buying feed at an advantageous price and selling where it was not prohibited from selling; while McGrath's conduct amounted only to supplying feed to another dealer consistent with its own dealer agreement. Compare the trial judge's formulation with respect to McGrath:

> It was unlawful and unauthorized conduct from McGrath's perspective because he had no authority under his Dealership Agreement with Purina to establish a sub-dealership and to receive dealer rebates that reduced the product cost to dealer level "white list" pricing where his sub-dealer was selling Purina feed products in territory that had been assigned to another dealer.[61]

And with respect to Ren's:

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58 *Ibid* at 211.

59 *Purina CA*, *supra* note 4 at para 40.

60 *Ibid* at para 42.

61 *Purina SC*, *supra* note 6 at para 133.

> However, Ren's no longer had any right to receive Purina preferred dealer pricing. Neither should he have been able to sell Purina products to customers located in the geographic territory of another duly authorized Purina dealer.[62]

The trial judge's formulations repeatedly emphasize Purina's, Ren's and McGrath's guilty knowledge of Purina's agreement with Raywalt. The Court of Appeal's do not. The trial judge's formulations would appear to be warranted by the jurisprudence on the tort of inducing breach of contract.

In *Purina*, the Court of Appeal upheld the award of punitive damages to Raywalt, affirming some of the key findings at trial:

> Within weeks of Raywalt starting up, it learned that Purina was permitting Ren's to continue to supply Ren with feed. When challenged, Purina assured Raywalt that it would stop supplying Ren with feed. While Purina did in fact stop supplying Ren directly, it then embarked on the arrangements with McGrath to ensure that Ren continued to receive feed and sell within the Raywalt territory. That is, in essence, Purina did precisely what it told Raywalt it would not do. It did so repeatedly, over a lengthy period of time and with a complete disregard for the consequences to Raywalt…a manager at Purina…had a "clear financial and business interest in McGrath succeeding over Raywalt" and at the relevant times, took an "aggressive stance" against Raywalt. Because of the surreptitious way in which Purina supplied Ren, Raywalt had no knowledge of what was going on and therefore had no ability to take steps to address the problem or mitigate the financial harm that ensued.[63]

So there can be no question but that the Court shared the trial judge's dim view of the morality of Purina's conduct. Yet, when considering whether Ren's and McGrath had conspired against Raywalt, the Court described their conduct in such a way as to make it appear not to offend commercial morality.

6. Unlawful Means

In *Reach,*[64] the earlier decision which the Court later distinguished, the Court noted that the case law reflects two different views of "illegal or unlawful means," one narrow, the other broad. The narrow view confines illegal or unlawful means to an act prohibited by law or by statute. The broader view extends illegal or unlawful means to an act the defendant "is not at liberty to commit," an act without legal justification. Lord Denning

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62 *Ibid* at para 135.

63 *Purina CA, supra* note 4 at para 82.

64 *Supra* note 26.

espoused the broader view in *Torquay Hotel Co Ltd v Cousins*.[65] In *Reach*, the Court adopted Lord Denning's broader view of unlawful means adding, however, that, on the facts of *Reach*, it was not necessary to decide the outer limits of the principle in *Torquay Hotel*.[66] The inner limits at least, however, appeared to be decided.

In *Torquay Hotel*, Esso had contracted to supply a hotel with heating oil, subject to *force majeure*. The defendant Cousins, a trade union official, instructed Esso's drivers not to continue delivering oil to the hotel and advised Esso accordingly. Lord Denning found that Cousins had interfered directly with the hotel's contractual relations, even though, because of the *force majeure* provision, the hotel could not claim against Esso for non-delivery of the heating oil. Cousins's interference was therefore actionable.

Lord Denning later described *Torquay Hotel* as extending the law with respect to inducing breach of contract "by stretching the 'breach' part."[67] *Torquay Hotel* held it to be unlawful not only to induce a breach of contract but also to hinder or prevent the performance of it. *Torquay Hotel* made a distinction between acts which "directly" prevent or hinder the performance of a contract and those which do it "indirectly": "The interference must be *direct*. Indirect interference will not do … *Indirect* interference is only unlawful if unlawful means are used …"[68] Lord Denning added that the distinction between "direct" and "indirect" is illogical and difficult to apply, "but it seems that it has to be done."[69]

In *Drouillard*, the Court found that Cogeco was liable to Drouillard for inducing breach of contract, because its actions satisfied four criteria:

1. Drouillard had a valid and enforceable contract with his employer;
2. Cogeco was aware of the existence of the contract;
3. Cogeco intended to and did procure a breach of the contract;
4. As a result of the breach, Drouillard suffered damages.[70]

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65 [1969] 2 Ch 106 (CA) [*Torquay Hotel*].

66 *Reach*, *supra* note 26 at para 52.

67 Lord Denning, *The Discipline of Law* (London: Butterworths, 1979) at 179

68 *Torquay Hotel*, *supra* note 58 at 138 [emphasis in original].

69 Denning, *supra* note 60 at 182. But see Tony Weir, "Lecture Two – Developments at Home" in *Economic Torts* (Oxford: Oxford University Press, 1997) in which the author argues that it did not have to be done and should not have been done.

70 *Supra* note 24 at para 26.

The Court affirmed the finding at trial that Cogeco acted intending to cause a breach of Drouillard's employment contract, or with substantial certainty that its conduct would result in a breach.

However, Cogeco was not liable to Drouillard for intentional interference with economic relations. To establish intentional interference, Drouillard would have to prove that

1. Cogeco intended to injure him;
2. Cogeco interfered with his business by illegal or unlawful means;
3. he suffered economic loss.[71]

Drouillard could not prove the second element, that Cogeco had used unlawful means:

> Although there remains some uncertainty about how broadly the expression "unlawful interference" should be interpreted, it is accepted that the commission of an intentional tort constitutes unlawful means. This requirement could be satisfied if, for example, Drouillard had established that Cogeco's actions and interference were defamatory. It has also been held by this court in *Reach MD Inc v Pharmaceutical Manufacturers Assn* that unlawful means also includes acts which the tortfeasor "is not at liberty to commit." In that decision, the court adopted the view of Lord Denning as expressed in *Torquay Hotel Co v Cousins*.[72]

On the facts in *Drouillard*, a breach of Cogeco's unwritten internal policy was an act that Cogeco was at liberty to commit. *Reach* was distinguishable, because the committee's ruling against Reach, in violation of the association's *Code of Marketing Practice,* was one that the committee was not at liberty to commit.

The Court noted that *Reach* had followed *Torquay Hotel* in adopting Lord Denning's view that unlawful means include acts that the tortfeasor "is not at liberty to commit" but in *Drouillard* the Court neither affirmed nor rejected Lord Denning's expansive construal of unlawful means. It is implicit in the decision, however, that inducing breach of contract can not be unlawful means for the purposes of the tort of intentional interference, because the Court found Cogeco liable for inducing breach of contract but not for intentional interference. The Court was to provide the theoretical justification in subsequent decisions, *Correia* and *Alleslev-Krofchak*, via the concept of direct actionability.

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71 *Ibid* at para 14.

72 *Ibid* at para 19.

In *Correia*,[73] Correia sued his employer, Canac Kitchens, for wrongful dismissal; his employer's parent company, Kohler Ltd, for approving the dismissal; and a private investigation company, Aston Associates Investigations Limited, and the other defendants for conducting a negligent investigation that led to the dismissal. The Court found that Correia's claim against the investigation company for negligent investigation was tenable, based on a possible duty of care that the company owed to Correia,[74] but not against the employer or the parent company, which did not owe their employee a similar duty of care.[75] To find that the employer had such a duty would be inconsistent with the decision of the Supreme Court of Canada in *Wallace v United Grain Growers Ltd*[76] in which the Supreme Court refused to recognize an action in tort for breach of an employer's obligation of good faith and fair dealing.

The Court also found that Correia's claims for inducing breach of contract (Correia's contract with his employer) and for intentional interference with economic relations (Correia's economic relations with his employer) were not tenable. The basis of these claims was that the employer terminated Correia because the actions of the parent company and the investigation company in conducting and implementing a negligent investigation caused the employer to terminate Correia wrongfully.

The claim for inducing breach of contract was not tenable because neither the parent company nor the investigation company intended to induce the employer to breach its contract of employment with Correia: "To the contrary, their intent was not that his employment would be wrongfully terminated, but that it would be lawfully terminated for cause."[77]

To establish intentional interference with economic relations, Correia would have to prove wrongful interference by a defendant with the actions of a third party in which Correia had an economic interest, and an intention by that defendant to cause loss to Correia. This claim failed because neither the parent company nor the investigation company intended to cause harm to Correia by conducting a negligent investigation. Their conduct was not intentional. It was at most negligent.[78]

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73 *Supra* note 1.
74 *Ibid* at para 69.
75 *Ibid* at para 72.
76 [1997] 3 SCR 701
77 *Correia*, *supra* note 1 at para 105.
78 *Ibid* at para 106.

Correia contended that the negligent investigation by the investigation company and by the parent company constituted unlawful means. The Court held that the investigation company could be held responsible in law for negligent investigation, but not the parent company. Therefore, on any definition, the investigation company's conduct could amount to unlawful means, if it was intended to cause harm to Correia. The same conduct by the parent company could not. The investigation company's negligence was directly actionable by Correia, with the result that

> There is no need to interpose the tort of intentional interference to obtain redress against Aston. The intentional torts exist to fill a gap where no action could otherwise be brought for intentional conduct that caused harm through the instrumentality of a third party.[79]

This was the Court's clearest statement yet of the redundancy theory of the tort of intentional interference. If an action is available to the plaintiff apart from intentional interference – if the complaint is directly actionable – then intentional interference is not available to the plaintiff.

The Court noted[80] the contrasting views of Lord Hoffman and Lord Nicholls in *OBG*[81] as to what constitutes unlawful means, observing that Lord Nicholls's broader view was similar to the view expressed by the Court in *Reach* and by Lord Denning in *Torquay Hotel*. In *Correia*, the Court did not find it necessary to decide between Lord Hoffman's narrower view of unlawful means and Lord Nicholls's broader view: "We note that it is not necessary to fully define the scope of the 'unlawful means' component of the tort of intentional interference with economic relations to resolve this case."[82]

Correia, then, established two governing principles with respect to the intentional torts and left a third open for future discussion. The first principle is that an intentional tort must be intentional – not negligent. The second is that an intentional tort involving unlawful means is not available to a claimant where the claim is directly actionable without having to rely on the tort.[83] The Court left the third principle, the limits of the concept of unlawful means, open for future discussion.

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79 *Ibid* at para 107.

80 *Ibid* at paras 92-99.

81 *Supra* note 2.

82 *Correia, supra* note 1 at para 107.

83 In view of the first principle, was the second principle *obiter* in *Correia*?

In *Alleslev-Krofchak,*[84] the Court of Appeal clarified further the concept of an independently actionable wrong. The plaintiff was a senior project manager on a contract between Valcom Ltd and the Government of Canada, for Valcom to provide consulting services to assist the Department of National Defence (DND) in moving to systems support contracting for the servicing of its air fleets. The plaintiff provided her services to the project through her personal company Temagami Outfitting Company Canada Inc. Because Valcom did not have the capacity to bid directly on DND contracts, it did not contract with the Department by itself.

> Valcom had no experience with performance-based contracting in the aerospace industry. However, [the plaintiff] facilitated an arrangement between Valcom and ARINC, a much larger American company that had been involved for years with US military contracts of this kind. Valcom and ARINC entered into an agreement pursuant to which Valcom would be the prime contractor with DND and ARINC would be Valcom's subcontractor.[85]

On the basis of a joint proposal, a teaming arrangement between Valcom and ARINC, Valcom bid for and obtained the contract with DND. However, the plaintiff provided her services as project manager through ARINC, not through Valcom. Temagami's contract to supply the plaintiff's services was with ARINC. Valcom, with a view to expanding its presence in the Canadian aerospace industry, would have preferred that the plaintiff provide her services through it, rather than through ARINC. Valcom was frustrated and angry that the plaintiff provided her services through ARINC.

Valcom attempted to have the plaintiff removed as project manager and eventually succeeded. Although DND and ARINC were pleased with the plaintiff's performance, Valcom complained of the plaintiff's poor managerial style, a complaint that was reinforced to some extent by the fact that a number of people under the plaintiff's management left the project. Valcom introduced Lewis as a project manager under the plaintiff, hoping that Lewis would eventually replace the plaintiff. Lewis then wrote a number of e-mails to Poulin, a principal of Valcom, that the trial judge found to be highly defamatory of the plaintiff. Poulin forwarded the e-mails to others in Valcom and to ARINC. Then Valcom purported to suspend the subcontract between it and ARINC, and locked the plaintiff out of the project. The trial court found that Valcom was not entitled to suspend the subcontract because of dissatisfaction with ARINC personnel: "There is no reference in the Valcom/ARINC Subcontract to the concept

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84 *Supra* note 31.

85 *Ibid* at para 10.

of Valcom suspending work done by ARINC resources under the Subcontract."[86] As a result of Valcom's breach of the subcontract with ARINC and, in ARINC's view, Valcom's unprofessional handling of matters relating to the plaintiff, ARINC terminated the contract with Valcom. In the small Canadian aerospace community, the plaintiff suffered damage to her reputation and consequently to her subsequent marketability. Following her termination as project manager, the plaintiff never again obtained military or aerospace consulting work.

The trial judge found that the e-mails from Lewis to Poulin were defamatory of the plaintiff,[87] and this finding was not contested on appeal. The trial court found that Poulin forwarded the e-mails to others in Valcom and to ARINC. Lewis, Poulin and Valcom, the latter vicariously as Poulin's employer, were all liable to the plaintiff for defamation.[88]

The trial judge also found that Lewis, Poulin and Valcom were liable to the plaintiff for intentional interference with economic relations. Poulin and Valcom, who were aware that the plaintiff provided her services through her company Temagami, were also liable for interfering with Temagami's economic relations. Lewis, who was not aware of Temagami, was not.[89] Defamation was one unlawful means they used to interfere with the plaintiff's economic relations. Conspiracy was another unlawful means. An agreement existed between Poulin, on behalf of Valcom, and Lewis pursuant to which Valcom, with Lewis's help, would bring about the plaintiff's removal as project manager and Valcom would then replace the plaintiff with Lewis. Since Lewis and Poulin had an agreement to use defamation as an unlawful means to bring about the plaintiff's removal as project manager, which they knew would cause her injury, the agreement amounted to a conspiracy. Breach of contract was a third unlawful means. Valcom was not entitled to suspend the subcontract with ARINC because of Valcom's dissatisfaction with the plaintiff's services.[90]

The Court of Appeal reversed the trial judge's finding that defamation and conspiracy against the plaintiff could serve as unlawful means in the plaintiff's claim for intentional interference with economic relations. They could not serve as unlawful means because they were directly actionable by the plaintiff. Conspiracy as against ARINC could, however, serve as

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86 *Alleslev-Krochak v Valcom Ltd,* 2009 Carswell Ont 3501, para. 352 (Ont Sup Ct) [*Alleslev-Krofchak SC*].

87 *Ibid* at para 407.

88 *Ibid* at para 333.

89 *Ibid* at paras 320-21.

90 *Ibid* at paras 330-57.

unlawful means because this conspiracy was not directly actionable by the plaintiff:

> These findings … constitute the tort of "unlawful means" conspiracy against ARINC. The unlawful means was the defamation of [the plaintiff]. It was directed by the appellants at ARINC through [the plaintiff], an ARINC resource, with knowledge that ARINC would be harmed as a result. That is sufficient for the "unlawful means" conspiracy against ARINC. The unlawful means need not be directly actionable by ARINC, provided the means were directed at ARINC, as was the case here…This conspiracy to harm ARINC would obviously be actionable by ARINC, but not by [the plaintiff]. It caused ARINC to terminate its relationship with Valcom on this project, and curtailed its expansion plans in Canada, actions in which [the plaintiff] had an economic interest and which harmed her. In my view, therefore, this conspiracy can properly serve as the unlawful means required for [the plaintiff] to establish the intentional interference tort against Poulin, Valcom and Lewis.[91]

Breach of the subcontract between Valcom and ARINC could also serve as unlawful means.[92]

The plaintiff's claim for inducing breach of contract, Temagami's contract to provide the plaintiff's services to ARINC, also succeeded, following the familiar criteria for the tort of inducing breach:

1. The plaintiff (Temagami) had a contract with a third party (ARINC).
2. The defendants (Poulin and Valcom) were aware of the existence of the contract.
3. The defendants' conduct was intended to cause the third party to breach the contract.
4. The plaintiff suffered damage as a result of the breach.

The Court expressed the view that it now considered the extent of the concept of unlawful means in the tort of intentional interference to be resolved:

> The trial judge began her analysis of this issue by expressing uncertainty about whether recent jurisprudence from this court was intended to modify or replace the tort's essential elements as set out in earlier cases …[93]

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91 *Alleslev-Krofchak CA*, *supra* note 31 at paras 72-73.

92 *Ibid* at para 83.

93 *Ibid* at para 46.

Following Lord Hoffman in *OBG*,[94] however, "[t]he essence of the tort therefore appears to be (a) a wrongful interference with the actions of a third party in which the claimant has an economic interest and (b) an intention thereby to cause loss to the claimant."[95] Goudge JA commented:

> … [T]his court has now opted for the Lord Hoffmann side of the debate. It did so expressly in *Correia*, relying on his statement of the elements of the tort, his definition of the tort, and his rationale for it, namely, to provide otherwise unavailable recovery for harm intentionally inflicted by unlawful means through the instrumentality of a third party.[96]

In the result, "… it is now clear that to qualify as 'unlawful means' the defendant's action (i) cannot be actionable directly by the plaintiff and (ii) must be directed at a third party, which then becomes the vehicle through which harm is caused to the plaintiff."[97]

Even with this resolution of the extent of the concept of unlawful means, the Court did not say whether inducing breach of contract could serve as unlawful means, perhaps because it was not called upon to do so. *Drouillard*[98] suggests that it can not, because the defendant in *Drouillard* was found to be liable to the plaintiff for inducing breach of contract but not for intentional interference. *Correia*[99] and *Alleslev-Krofchak CA*[100] provide the rationale: inducing breach of contract has always been directly actionable by a plaintiff.

7. Conspiracy

Following the House of Lords decisions that brought to the fore the concept of an independently actionable wrong, the Court limited the scope of the intentional torts, including the scope of the tort of conspiracy. *Purina* is a clear example. Could Purina have been liable to Raywalt for conspiracy? The answer is no, since Purina's breach of contract was directly actionable by Raywalt. Could Ren's and McGrath have been liable to Raywalt for conspiracy? Again, no, since Ren's' and McGrath's inducing breach of contract was directly actionable by Raywalt. Applying the concept of an independently actionable wrong diminishes the significance of the agreement, or concerted action, by the defendants

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94 *Supra* note 2.
95 *Alleslev-Krofchak CA, supra* note 31 at para 53.
96 *Ibid* at para 57.
97 *Ibid* at para 60.
98 *Supra* note 24.
99 *Supra* note 1.
100 *Supra* note 31.

which is the essence of a conspiracy. Even though the defendants may have agreed to do something wrong, if the wrong is directly actionable, then the agreement is not actionable.[101]

This reasoning might not apply in a situation where the plaintiff had a direct claim against some of the parties to the agreement but not all. All of the parties would have had to use unlawful means but, in the case of some parties, the unlawful means might not be directly actionable by the plaintiff, which would then have to assert a claim based on the illegal agreement itself. Perhaps a defendant's breach of a statute might be an example.

This diminution in the scope of the tort of conspiracy continues an older trend. Conspiracy had already been regarded as a potentially redundant tort. Prior to the Court of Appeal's affirmation of the direct actionability principle, if Ren's and McGrath had induced Purina to breach its contract with Raywalt, then inducing the breach could be regarded as unlawful means for the purposes of the tort of conspiracy, and breach of contract as unlawful means on the part of Purina. The requirement that all parties to a conspiracy act unlawfully would be satisfied. The further question might arise whether, if Ren's and McGrath were liable for the tort of inducing breach of contract, they could also be liable for conspiracy. But that question would have arisen not because they did not use unlawful means. Rather, the doctrine that the tort of conspiracy merges in a substantive predicate tort might make a finding of conspiracy redundant.

In *Geo Cluthe Manufacturing Co v ZTW Properties Ltd*,[102] the Ontario Divisional Court considered the doctrine of merger in the context of a pleadings motion. In the statement of claim, the plaintiffs alleged that the defendants had committed the torts of slander of title, interference with contractual relations, abuse of process and negligence. The Court found that an additional plea of conspiracy was redundant: "A plea of conspiracy would add nothing to the pleas that the defendants committed the four torts alleged. The prior agreement merges in the tort (per Denning LJ in *Ward v Lewis*) …"[103] The doctrine of merger has not been applied consistently,

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[101] If inducing breach of contract can no longer serve as unlawful means for the purposes of the tort of conspiracy, then cases such as *Trim Trends Canada Ltd*, *supra* note 41, and *HL Weiss Forwarding Ltd*, *supra* note 43, would no longer be decided the same way, at least with respect to the findings of conspiracy.

[102] (1995), 23 OR(3d) 370 (Div Ct).

[103] *Ibid* at para 30. In *Normart Management Ltd v West Hill Redevelopment Co* (1998), 37 OR (3d) 97 (CA) at para 28, the Court of Appeal quoted the relevant part of the decision of Denning LJ in *Ward v Lewis* [1955] 1 All ER 55 (CA): "It is important to remember that when a tort has been committed by two or more persons an allegation of

however, and has not been accepted universally even in the limited context of determining whether a pleading of conspiracy is proper. Burns and Blom comment that

> … there are several advantages of framing an action in conspiracy. It may be easier on the ground of conspiracy as opposed to that of joint tortfeasorship to find liable instigators who do not actually participate in the commission of the substantive tort. Conspiracy may also operate in aggravation of damages, and the plaintiff may be able to obtain evidentiary advantages.[104]

It would certainly have made sense for Raywalt to allege conspiracy, since, at the commencement of the action Raywalt would not likely have been aware of the exact roles played by each of the defendants and whether it had a claim against them that was directly actionable.[105]

In one respect, however, the Court of Appeal has broadened the scope of the intentional torts, including the tort of conspiracy. The Court agreed with the trial Judge that the conduct of the defendants was directed at Raywalt in circumstances in which it was reasonably foreseeable that serious economic injury to Raywalt would result from that conduct. If the defendants had acted unlawfully, then a merely constructive intent to injure based on foreseeability would have been sufficient to ground Raywalt's claim in conspiracy.

8. Conclusion

Bearing in mind the three suggested criteria to which judicial decisions on intentional torts should be answerable, I would submit that the Ontario Court of Appeal's reasoning in *Purina* with respect to inducing breach of contract is consistent neither with the Court's own recent definition of the tort of inducing breach of contract; nor with its own stated purpose for the intentional torts, to fill a gap where no action could otherwise be brought for intentional conduct that causes harm through the instrumentality of third parties; nor with the prior jurisprudence on inducing breach of contract; nor with reasonable commercial morality. The defendants in *Purina* should not have been free to do what they did.

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a prior conspiracy to commit the tort means nothing. The prior agreement merges in the tort."

104 *Supra* note 45 at 167.

105 See the observation of Justice Jackson in *Grunewald v United States*, 353 US 391 (1957) at 402:

> For every conspiracy is, by its very nature, secret; a case can hardly be supposed where men concert together for crime and advertise their purpose to the world.

Why then did the Court come to a different conclusion from the trial Judge as to whether Ren's and McGrath were liable to Raywalt? From the decision, it is discernible only that the Court attempted to follow the most recent decisions of the House of Lords as to what constitutes unlawful conduct, departing from its own earlier decision in *Reach*, and that a narrower construal of unlawful conduct, centred on the concept of an independently actionable wrong, would leave the intentional torts less available to a complainant unable to rely on contract. I have submitted here that the Court's attempt to apply the current thinking of the House of Lords to facts of *Purina* is not convincing. Even on the narrower construal of unlawful conduct now favoured by the Court it was open to them to find Ren's and McGrath liable for inducing breach of contract.