THE "UNLAWFUL MEANS" ELEMENT OF THE ECONOMIC TORTS: DOES A COHERENT APPROACH LIE BEYOND REACH?

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The key to keeping the economic torts in harmony with contemporary legal values without overruling Allen v. Flood . . . *is to give a sound, economically relevant and judicially supported interpretation to the concept of unlawful means.*[1]

He'll cheat without scruple, who can without fear.[2]

I. INTRODUCTION

1. Overview

The intentional economic torts are one of the last great frontiers in the Canadian law of obligations.[3] Once relegated almost exclusively to the field of labour

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1 *No. 1 Collision Repair & Painting (1982) Ltd. v. Insurance Corp. of British Columbia* (2000), 80 B.C.L.R. (3d) 62, ¶19 (C.A.), per Lambert J.A. (dissenting); leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 488.

2 Benjamin Franklin, *Poor Richard's Almanack* (1732–1758).

3 As discussed below, the law has traditionally identified the "core" intentional economic torts as: (1) conspiracy; (2) unlawful interference with economic interests; (3) inducing breach of contract; and (4) intimidation. There is a prolific secondary literature on these torts, much of which is catalogued by Anthony M. Dugdale *et al*, eds., *Clerk & Lindsell on Torts*, 19th ed. (London: Sweet & Maxwell, 2006) at 1492. For extensive scholarly treatments of the torts from an Anglo-Canadian perspective, see: I.M. Christie, *The Liability of Strikers in the Law of Tort: A Comparative Study of the Law in England and Canada* (Kingston, Ont.: Queen's University, Industrial Relations Centre, 1967); J.D. Heydon, *Economic Torts*, 2nd ed. (London: Sweet & Maxwell, 1978); Tony Weir, *Economic Torts* (Oxford: Clarendon Press, 1997); Hazel Carty, *An Analysis of the Economic Torts* (Oxford: Oxford University Press, 2001); and Peter T. Burns and Joost Blom, *Economic Interests in Canadian Tort Law* (Markham, Ont.: LexisNexis Canada

disputes, they are now a staple of commercial litigation. However, despite having roots which date to the thirteenth century, the law surrounding these torts is complex, frequently unsettled and generally underdeveloped.[4]

The prominence of these causes of action is not surprising. The torts have long been applied in a way that offers unique opportunities to courts and litigants alike. They have enabled the recovery of pure economic loss outside the citadel of privity of contract, and without the doctrinal restrictions imposed on claims framed in negligence. They have also brought with them several procedural advantages, including broader discovery rights, and an increased opportunity for punitive damages. Finally, and perhaps most fundamentally, they have been amenable to judicial manipulation, with their innate malleability facilitating a just outcome in individual cases.

The flexibility inherent in these causes of action arises, in large part, from their amorphous nature. In this respect, the most intriguing and historically uncertain aspect of the economic torts is the common requirement that a defendant use "unlawful means"[5] to injure the plaintiff.

This "unlawful means element" is not a mere idiosyncrasy. Instead, it is one of the basic features that distinguishes the Anglo-Canadian law of torts from the governing principles in several American and civilian jurisdictions. In contrast to large portions of the United States, our tradition has not recognized the so-called "*prima facie* tort" of intentional and unjustified interference with economic interests.[6]

Inc., 2009). A 2010 edition of Hazel Carty's book is forthcoming, but remained unpublished as of the date of this paper.

4 See: *Tardif v. McGrath* (2002), 635 A.P.R. 362, ¶38 and 40 (N.S.C.A.); leave to appeal to S.C.C. refused [2002] S.C.C.A. No. 261; *Revenue and Customs Commissioners v. Total Network SL*, [2008] 1 A.C. 1174, ¶216 (H.L.), per Lord Neuberger of Abbotsbury; and Hazel Carty, *An Analysis of the Economic Torts* (Oxford: Oxford University Press, 2001) at 15.

5 The phrase "unlawful means" in this context is often used interchangeably with several other phrases, such as "illegal means", "unlawful conduct", "illegal acts", etc. . . . For the purposes of this article, we have used the phrase "unlawful means" in a manner which includes all such synonymous terminology.

6 See: *Canada Cement LaFarge v. B.C. Lightweight Aggregate*, [1983] 1 S.C.R. 452 at 469 and 471; *Sanders v. Snell* (1998), 196 C.L.R. 329, ¶32 (H.C.A.); *No. 1 Collision Repair & Painting (1982) Ltd. v. Insurance Corp. of British Columbia* (2000), 80 B.C.L.R. (3d) 62, ¶12–16 (C.A.), per Lambert J.A. (dissenting); leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 488; *OBG v. Allan*, [2008] 1 A.C. 1, ¶14 and 145 (H.L.) and *O'Dwyer v. Ontario Racing Commission* (2008), 293 D.L.R. (4th) 559, ¶57 (Ont. C.A.) (although the situation is different where the defendant causes injury to the plaintiff's *person*: see *Wilkinson v. Downton*, [1897] 2 Q.B. 57 at 58-59 (Q.B.D.)). This is so despite some suggestions in favour of adopting the *prima facie* tort (also known as the tort of "abuse of rights"): see, *e.g.* J.D. Heydon, *Economic Torts*, 2nd ed. (London: Sweet & Maxwell, 1978) at 123–132 and 138; R.V.F. Heuston R.A. Buckley, *Salmond and Heuston on the Law of Torts*, 21st ed. (London: Sweet & Maxwell, 1996) at 345-346; and Peter T. Burns and Joost Blom, *Economic Interests in Canadian Tort Law* (Markham, Ont.: LexisNexis Canada Inc., 2009) at 197–205. For a discussion of the *prima facie* tort doctrine in the United States, see: Kenneth J. Vandevelde, "A History of Prima Facie Tort: The Origins of a General Theory of Intentional Tort" (1990) 19

Rather, since the seminal ruling in *Allen v. Flood*,[7] Anglo-Canadian law has generally limited recovery for intentional economic injury to cases where the defendant acts (or threatens to act) unlawfully, conspires with another party, or violates (or induces the violation of) not merely the plaintiff's economic interests but also its legal rights.[8]

Notwithstanding its unquestioned importance, it has been over thirty years since the unlawful means element of the intentional economic torts was last addressed by the Supreme Court of Canada.[9] As a result, the unlawful means element remains a source of confusion.[10] The Canadian judiciary has failed to develop a consistent or principled approach to the unlawful means criterion that rationalizes its function across each of the economic torts. Fundamental issues, such as the relationship between unlawful means, and the parallel requirement of "unlawful conduct" in the context of tortious abuse of public office, remain unexplored.[11] The same is true of the doctrinal relationship between the unlawful means element of the intentional economic torts, and the restrictions imposed on the recovery of "pure economic loss" in negligence.[12]

Hofstra L. Rev. 447; Kenneth J. Vandevelde, "The Modern Prima Facie Tort Doctrine" (1991) 79 Ky. L.J. 519; and American Law Institute, *Restatement (Second) of Torts* (St. Paul, Minn.: American Law Institute Publishers, 1979) at §766–768 and (particularly) 870. At §870, the *Restatement* indicates that "[o]ne who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances. This liability may be imposed although the actor's conduct does not come within a traditional category of tort liability". The Supreme Court of the United States recently affirmed this principle from the *Restatement* in *Bridge v. Phoenix Bond & Indemnity Co.*, 128 S.Ct. 2131 , 2143 (2008). See also Tony Weir, *Economic Torts* (Oxford: Clarendon Press, 1997) at 45–77 (where comparable doctrines are explored in France and Germany).

7 [1898] A.C. 1 (H.L.) [*Allen*]. The rejection of the *prima facie* tort doctrine in *Allen* was recently replayed when the Supreme Court of Canada rejected the *per se* actionability of secondary picketing: see *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156, ¶52 and 72.

8 This statement does not hold true in respect of *public* authorities, however. Pursuant to the tort of abuse of public office, any conduct by a single public authority taken with the specific intent of inflicting economic harm upon the plaintiff is *per se* actionable.

9 The last case in which the Supreme Court substantively considered the unlawful means element in relation to the economic torts (specifically, the tort of intimidation) was *Central Canada Potash Co. v. Saskatchewan*, [1979] 1 S.C.R. 42.

10 As noted in W.V.H. Rogers, *Winfield & Jolowicz on Tort*, 17th ed. (London: Sweet & Maxwell, 2006) at 826, "unlawful means . . . has played the leading role in the development of the modern law on economic torts . . . but the question of definition has tended to be passed over in many case with little analysis and many of them have been striking-out applications".

11 See *O'Dwyer v. Ontario (Racing Commission)* (2008), 293 D.L.R. (4th) 559, ¶56, n4 (Ont. C.A.).

12 See *No. 1 Collision Repair & Painting (1982) Ltd. v. Insurance Corp. of British Columbia* (2000), 80 B.C.L.R. (3d) 62, ¶18 and 112 (C.A.), per Lambert J.A. (dissenting), leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 488. An even broader area of concern that has yet to be satisfactorily explored is the relationship between the eco-

Accordingly, the Ontario Court of Appeal did not exaggerate when it observed that "[t]he question of what amounts to 'unlawful means' is the [issue] that has caused the most difficulty for judges and scholars."[13] Even more recently, the same Court acknowledged that "there may be aspects of the concept of 'unlawful means' yet to be fully defined."[14]

The protean nature of the unlawful means element has historically been a source of both strength and weakness in this area of the law: the lack of definitive parameters has created inconsistency in the jurisprudence, but it has also facilitated a flexibility that, on a case-by-case basis, has added significantly to the practical usefulness of the economic torts. However, a series of recent judicial developments has so amplified the uncertainty surrounding the unlawful means element that it now threatens to undermine the integrity of the economic torts themselves.

In 2007 and 2008, the House of Lords released two decisions that engaged in the most fundamental rethinking of the economic torts since *Allen v. Flood*: (1) in *OBG Ltd. v. Allan*,[15] the Law Lords radically altered the scope of the unlawful means element of the tort of interference with economic interests; and (2) in *Revenue and Customs Commissioners v. Total Network SL*,[16] they similarly clarified the scope of the unlawful means element of the separate tort of conspiracy, but did so on the basis of logic that was not entirely consistent with *OBG*.

Serendipitously, one day prior to the issuance of *OBG* in 2007, the Ontario Court of Appeal released its own decision in *Drouillard v. Cogeco Cable Inc.*[17] It significantly narrowed the unlawful means element of the unlawful interference tort, while following a markedly different approach than that adopted by the House of Lords in either *OBG* or *Total Network*.

Subsequently, in 2008, the Ontario Court of Appeal revisited the unlawful means element of interference with economic interests in two near-contemporaneous rulings. Each of these addressed the place of the *OBG* analysis in Canadian law: (1) in *O'Dwyer v. Ontario (Racing Commission)*,[18] the Court appeared to adopt key components of the Law Lords' reasoning, virtually without comment or explanation; while, in contrast, (2) in *Correia v. Canac Kitchens*,[19] the Court appeared content to leave unresolved the domestic relevance of *OBG*, while suggesting its own significant refinements to the unlawful means prerequisite.

With each of *Drouillard*, *O'Dwyer* and *Correia*, the Ontario Court of Appeal

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nomic torts and the law of contract: see Peter T. Burns and Joost Blom, *Economic Interests in Canadian Tort Law* (Markham, Ont.: LexisNexis Canada Inc., 2009) at 22.

13 *Correia v. Canac Kitchens* (2008), 91 O.R. (3d) 353, ¶102 (C.A.). Several commentators have noted that it is the uncertainty surrounding the unlawful means element that gives rise to the complexity of the economic torts: Hazel Carty, *An Analysis of the Economic Torts* (Oxford: Oxford University Press, 2001) at 109.

14 *Alleslev-Krofchak v. Valcom Ltd.*, 2010 ONCA 557, ¶63.

15 (sub nom. *Douglas v. Hello! Ltd.*) (sub nom. *Mainstream Properties Ltd. v. Young*) [2008] 1 A.C. 1 (H.L.) [*OBG*].

16 [2008] 1 A.C. 1174 (H.L.) [*Total Network*].

17 (2007), 86 O.R. (3d) 431 (C.A.) [*Drouillard*].

18 (2008), 293 D.L.R. (4th) 559 (Ont. C.A.) [*O'Dwyer*].

19 (2008), 91 O.R. (3d) 353 (C.A.) [*Correia*].

cast increasing doubt upon the ongoing authority of the very liberal approach to unlawful means enunciated by that Court in its earlier, milestone decision in *Reach M.D. Inc. v. Pharmaceutical Manufacturers Assn. of Canada*.[20] However, although these more recent rulings strongly suggested that the Court of Appeal viewed *Reach* as having been overtaken by subsequent jurisprudence, many other Canadian courts (in Ontario and elsewhere) have continued to consistently treat *Reach* as if *it* remained the governing articulation of the proper approach to unlawful means. For reasons that remain opaque, the watershed developments of 2007-2008 have caused barely a ripple within the intervening Canadian jurisprudence. Indeed, no Canadian appellate courts outside Ontario have engaged in a substantive review of the unlawful means element since the seminal ruling in *OBG* (whether in relation to unlawful interference with economic interests, conspiracy, or any other economic tort, such as intimidation).

It was against this backdrop that, on August 24, 2010, the Ontario Court of Appeal released its reasons in *Alleslev-Krofchak v. Valcom Ltd.*.[21] With that ruling, the Court forcefully and explicitly confirmed its intention, as indicated earlier in *Correia* and *O'Dwyer*, to adopt large portions of *OBG*, in preference to the (related but somewhat inconsistent) approaches that earlier panels of the Court had previously endorsed in *Reach* and in *Drouillard*.

Incredibly, however, on September 3, 2010, the same Court issued a very different judgment in *Barber v. Molson Sport & Entertainment Inc.*[22] The reasons in *Barber* relied entirely upon the approach to unlawful means articulated seven years earlier in *Reach*, without once referencing the intervening rulings in *Alleslev-Krofchak*, *Correia*, *O'Dwyer* or even *Drouillard* (to say nothing of *OBG* and *Total Network*). No explanation for this oversight was offered by the Court.

Given these recent developments, it remains to be seen whether other Canadian courts, in Ontario and elsewhere, will follow *Barber* and continue to apply the *Reach* approach, or whether they will adopt the more recent approach symbolized by *Alleslev-Krofchak*. Indeed, it will be interesting to see whether such courts pay greater attention to *Alleslev-Krofchak* than they did to either *Correia* or *O'Dwyer*.

The aim of this paper is to critically assess the current state of the unlawful means element in Canada, particularly in light of this 2007-2008 jurisprudence — namely, *Drouillard*, *OBG*, *Total Network*, *O'Dwyer* and *Correia* — together with this 2010 jurisprudence — namely, *Alleslev-Krofchak* and *Barber*. We begin by tracing the history of the economic torts, outlining their origins in England and their adoption and evolution in Canada. We then discuss the unlawful means element for the two principal economic torts, conspiracy and unlawful interference with economic interests, as it existed prior to 2007. Thereafter, we examine the 2007-2008 jurisprudence, and the intervening reaction (and non-reaction) of the Canadian courts, including the diametrically inconsistent approaches of the Ontario Court of Appeal itself in the 2010 jurisprudence. We conclude by considering whether a unified theory of the unlawful means element is currently possible in Canada, i.e., whether a coherent approach to this element lies "beyond *Reach*".

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20 (2003), 65 O.R. (3d) 30 (C.A.) [*Reach*].

21 2010 ONCA 557 [*Alleslev-Krofchak*].

22 sub nom. *Barber v. Vrozos*, 2010 ONCA 570 [*Barber*].

By way of summary, it is our view that a coherent approach is only possible if courts can first identify the essential rationale for why liability in respect of intentional economic harm is justified (but generally *only* justified) in the presence of unlawful means. This rationale is elusive, and the current justifications for such liability are either unconvincing, or inconsistent with the caselaw. In the submission of the authors, the most compelling rationale is that, in the context of the competitive "game" for economic reward, the use of unlawful means to intentionally injure a competitor is best viewed as a form of *cheating*. As in other competitive contexts (e.g., a sporting event or a card game), such "cheating" in the commercial context amounts to a wrong that is committed directly against, and suffered directly by, the competitor (regardless of whether it is achieved through the medium of a third party). It injures the plaintiff through conduct that is legally forbidden to the plaintiff itself (or that would be were it the position of the defendant), and thereby violates the plaintiff's right to compete equally under the law.

In light of this rationale, it is not necessary to limit the scope of the unlawful means requirement to conduct that is directed at and independently actionable by a third party (as was done in *OBG*). Conversely, it is entirely appropriate (as was done in *Correia* and *Alleslev-Krofchak*) to restrict the scope of unlawful means, as an element of the intentional economic torts, by excluding conduct which is independently actionable by the plaintiff, and hence independently censured for the unlawfulness that is used as a form of cheating.

Finally, it is neither necessary nor desirable to draw an arbitrary distinction between the scope of unlawful means as an element, respectively, of the torts of unlawful interference, intimidation and conspiracy (as was done in *OBG*, *Total Network* and, perhaps, *Alleslev-Krofchak*). Instead, provided that these torts are restricted to the field of competitive behaviour, we would propose that unlawful means be given a common definition, applicable across all of the intentional economic torts. Our suggested global definition is as follows:

> *"Unlawful Means" consist of the deliberate and material breach of a binding legal obligation, whatever its source, and whether by action or omission, which is not otherwise prohibited from giving rise to liability, in which the defendant lacks an honest belief as to the legality of its conduct, and for which the plaintiff could not obtain an adequate remedy against the defendant(s) under any independent head of liability that is alleged to make the conduct unlawful.*[23]

2. The Unlawful Means Torts

Prior to examining the history of the intentional economic torts, it is useful to explain precisely what causes of action will form the subject of our discussion. Although there are several other intentional torts that protect economic interests (most notably, misrepresentation-based torts such as deceit and injurious false-

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23 This definition of unlawful means is not intended to alter or incorporate any of the *other* elements of each unlawful means tort (such as the discrete intentionality and causation/damage elements).

hood[24]), the "core" economic torts are: (1) conspiracy; (2) unlawful interference with economic interests; (3) inducing breach of contract; and (4) intimidation.[25] Each of these torts, or at least a discrete branch of each such tort, has been traditionally understood to contain an unlawful means element.[26]

The primary focus of the current article is the role of unlawful means in the torts of (i) conspiracy and (ii) unlawful interference with economic interests.[27] In

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24 See Anthony M. Dugdale *et al*, eds., *Clerk & Lindsell on Torts*, 19th ed. (London: Sweet & Maxwell, 2006) at 1492-1493. The rigid division between the core economic torts, and the misrepresentation-based torts, has been criticized: Hazel Carty, *An Analysis of the Economic Torts* (Oxford: Oxford University Press, 2001) at 2-3 and 269-270. However, it has also been affirmed by some Canadian courts: see, e.g., *Bass Clef Entertainments Ltd. v. HOB Concerts Canada Ltd.* (2007), 31 B.L.R. (4th) 255, ¶118 (Ont. S.C.J.). In addition to the core economic torts and the misrepresentation-based torts, there are other torts (e.g., conversion and abuse of public office) that incidentally protect economic interests but that are primarily focused upon the protection of other rights and interests. There are also equitable causes of action (e.g., breach of fiduciary duty), and *sui generis* causes of action (e.g., breach of confidence), that incidentally protect economic interests. Finally, the tort of negligence offers some protection to economic interests, as do torts of strict liability or torts which border upon strict liability (such as passing off). See generally Peter T. Burns and Joost Blom, *Economic Interests in Canadian Tort Law* (Markham, Ont.: LexisNexis Canada Inc., 2009), Ch. 1.

25 Anthony M. Dugdale *et al*, eds., *Clerk & Lindsell on Torts*, 19th ed. (London: Sweet & Maxwell, 2006) at 1492. See also *Total Network*, *supra* note 16, ¶216, per Lord Neuberger.

26 To the extent that they exist as discrete torts (see below), it is clear that both interference with economic interests and intimidation expressly require the use of unlawful means as a key prerequisite to liability. In contrast, conspiracy has been historically divided into two branches, one of which ("unlawful means conspiracy") requires unlawful means as a necessary element of the cause of action. Similarly, the economic tort of inducing breach of contract was sometimes historically described as having two identifiable variants, one of which ("indirectly inducing breach of contract") required the use of unlawful means by the defendant (although, as discussed below, this tort has either ceased to exist or is in the process of ceasing to exist). See Anthony M. Dugdale *et al*, eds., *Clerk & Lindsell on Torts*, 19th ed. (London: Sweet & Maxwell, 2006) at 1587.

27 There remains reason to doubt the independent existence of both intimidation and "indirectly" inducing breach of contract. In *OBG*, *supra* note 15, ¶7, Lord Hoffmann suggested that, rather than constituting a separate (albeit underdeveloped) tort, intimidation is simply one variant of unlawful interference with economic interests. Similarly, in *OBG*, *supra* note 15 and *Correia*, *supra* note 19, it appears to have been accepted that there exists no separate tort of indirectly inducing breach of contract (using unlawful means), in contrast to the accepted tort of directly (but lawfully) inducing breach of contract. These rulings may help resolve long-standing uncertainty as to whether "indirectly" inducing breach of contract exists as a discrete cause of action or merely as a sub-category of one of the other intentional economic torts. The historical uncertainty on this point has been exacerbated by the inconsistency of the terminology used to describe indirectly inducing breach of contract. Although originally introduced as a species of inducing breach of contract, this head of liability was sometimes described using terminology indicative of a nominate tort — *e.g.*, (i) "interference with contrac-

contrast to both intimidation and indirectly inducing breach of contract, the separate existence of both conspiracy and unlawful interference is beyond debate. It is also these latter torts that have largely driven the jurisprudence in this area.

An overlapping issue which should be noted at this juncture is the terminological confusion that has accompanied the courts' inconsistent use of labels such as "interference with economic interests," "interference with economic relations," "interference with contractual relations," "interference with economic and contractual relations," "unlawful interference with trade," and so on.[28] For the purposes of this article, we have used the phrase "unlawful interference with economic interests" (or "unlawful interference") in a manner that includes all such synonymous terminology.

In this regard, we note that *OBG*, *Correia* and *Alleslev-Krofchak* appear to reject the existence of a separate nominate tort of "interference with contractual relations."[29] It appears that any tort claim for intentionally inflicted, contract-based economic loss must properly be brought under one of the two following rubrics (although, as discussed below, it may be possible for the same conduct to ground liability simultaneously under each): (i) inducing breach of contract (if an actual breach can be established); or (ii) unlawful interference with economic interests (which interests may well include "contractual relations" in circumstances where the inference with them falls short of inducing a contractual breach).[30] Accordingly, in this article, we shall treat the unlawful means element of "interference with contractual relations" under the more general rubric of unlawful interference with economic interests.[31]

II. THE HISTORY OF THE ECONOMIC TORTS

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tual relations" (see *Frame v. Smith*, [1987] 2 S.C.R. 99 at 129, per Wilson J. (dissenting on other grounds); and *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156, ¶116); (ii) "interference by unlawful means with the performance of a contract" (see *Merkur Island Shipping Co. v. Laughton*, [1983] 2 A.C. 570 at 606-607 (H.L.)); and (iii) "interference with contractual rights" (*Ibid.*). Such labels are also sometimes used to refer to cases where the defendant interferes with a third party's performance of its contract with the plaintiff, in a manner falling short of actual breach (a cause of action also rejected in *OBG*, *supra* note 15, *Correia*, *supra* note 19, and *Alleslev-Krofchak*, *supra* note 21, as discussed below). The imprecision of such terminology suggests that it should be viewed with caution.

28 For a recent example of how such confusion may obfuscate a pleading, see *SAR Petroleum Inc. v. Peace Hills Trust Co.* (2010), 318 D.L.R. (4th) 70, ¶37-38 (N.B.C.A.).

29 See also *SAR Petroleum Inc. v. Peace Hills Trust Co.* (2010), 318 D.L.R. (4th) 70, ¶31–38 (N.B.C.A.).

30 See *Alleslev-Krofchak*, *supra* note 21, ¶97.

31 Another reason for doing so is that courts have often "blended" the elements of interference with contractual relations, inducing breach of contract, and unlawful interference with economic interests in giving content to the unlawful means element. See, e.g., *Verchere v. Greenpeace Canada* (2004), 241 D.L.R. (4th) 327, ¶28 and 35-36 (B.C.C.A.); leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 332.

1. Origins in England

(a) Overview

The unlawful means element was established by the "famous trilogy of cases"[32] decided by the House of Lords between 1892 and 1901: (1) *Mogul Steamship Co. Ltd. v. McGregor, Gow & Co.*;[33] (2) *Allen v. Flood*; and (3) *Quinn v. Leathem*[34] (the "1892–1901 Trilogy"). This trio of rulings, which are explored in detail below, laid the groundwork for the economic torts.

Prior to the 1892–1901 Trilogy, the principles that would eventually develop into the economic torts existed in four streams of jurisprudence: (1) cases where the defendant, acting alone, injured the plaintiff's economic interests by inducing a third party to itself violate the plaintiff's legal rights (*i.e.*, inducing breach of contract); (2) cases where the defendant, by combining with another party to commit an unlawful act, or to commit a lawful act by unlawful means, injured the plaintiff's economic interests (*i.e.*, conspiracy); (3) cases where the defendant, acting alone, injured the plaintiff's economic interests by directing or threatening unlawful means towards a third party, who thereby lawfully withdrew from its business relationship with the plaintiff (*i.e.*, unlawful interference with economic interests and intimidation); and (4) cases where the defendant, acting alone, injured the plaintiff's economic interests through lawful means, but was motivated to do so by malice (i.e., the so-called "*prima facie* tort").[35] It is useful to consider each of these

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32 *Sorrell v. Smith*, [1925] A.C. 700 at 711 (H.L.), per Viscount Cave L.C.

33 [1892] A.C. 25 (H.L.) [*Mogul*].

34 [1901] A.C. 495 (H.L.) [*Quinn*].

35 Cases also existed where the defendant, acting alone, injured the plaintiff's economic interests through unlawful means directed at the plaintiff. These included the misrepresentation-based torts that are sometimes grouped under the rubric of "deceptive market practices" (e.g., deceit, injurious falsehood and passing-off), but they appear to be based upon a different rationale (i.e., "lying") than the "core" economic torts, and are usually analyzed separately. In other such cases, the plaintiff could recover based upon the independently actionable violation of its traditional legal right implicated within the direct unlawful means (e.g., a physical right, as in the case of battery, a real, personal or intellectual property right, as in cases of trespass, conversion or passing-off, or a reputational right, as in cases of defamation), wherein the injury to the plaintiff's economic interests became secondary to the injury to his or her traditional legal right. As a result, the core economic torts were largely relegated to three-party situations, where there was no independent violation of the plaintiff's traditional legal rights by the defendant itself. As noted by J.H. Baker, *An Introduction to English Legal History*, 4th ed. (London: Butterworths LexisNexis, 2002) at 448, "[t]he principal common feature of the economic torts is that they usually involve three or more parties: the plaintiff, the defendant, and a party whose relationship with the plaintiff is interfered with, or unspecified people (such as potential customers) who might but for the interference have entered into a relationship with the plaintiff". See also R.V.F. Heuston and R.A. Buckley, *Salmond and Heuston on the Law of Torts*, 21st ed. (London: Sweet & Maxwell, 1996) at 345. In this sense, they are analogous to the body of negligence case law

categories in turn.

(b) Inducing breach of contract

While the tort of inducing breach of contract has its roots in the fourteenth century,[36] it was not until *Lumley v. Gye*[37] that the tort was firmly recognized as having general application.[38] As originally formulated in *Lumley*, the tort required the defendant's conduct to directly result in an actual breach of contract between the third party and the plaintiff. The Court did not consider whether liability would arise in circumstances where the defendant merely prevented the plaintiff from entering into a contract with the third party, or otherwise hindered the parties' performance of the contract in a manner falling short of its breach.

Further, the Court in *Lumley* did not suggest that the use of unlawful means in inducing the breach was a requisite element of the tort.[39] Instead, it merely required that the defendant induce the breach "wrongfully and maliciously, or, which is the same thing, with notice [of the contract]."[40] Accordingly, at its inception, the tort of inducing breach of contract did not require unlawful means by the defendant; instead, it required the violation of the plaintiff's legal right by a third party, at the instance of the defendant.

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addressing relational economic loss, as opposed to consequential or non-relational economic loss: see *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021 at 1054, per La Forest J. (dissenting on other grounds). Interestingly, it has been suggested that, because financial ruination effectively requires the defendant to inhibit the plaintiff's dealings with third parties, the core economic torts (not the direct misrepresentation torts of deceit and negligence) have played the predominant role in setting the limits of fair competition: Hazel Carty, *An Analysis of the Economic Torts* (Oxford: Oxford University Press, 2001) at 2.

36 It was during the fourteenth century that legislation was introduced from which the courts later implied a right of action for enticing away a servant by persuasion: see W.S. Holdsworth, *A History of English Law*, 5th ed. (London: Methuen & Co. Ltd., 1956), Vol. IV, at 383–385. For a judicial discussion of the history, see *SAR Petroleum Inc. v. Peace Hills Trust Co.* (2010), 318 D.L.R. (4th) 70, ¶31 (N.B.C.A.).

37 (1853), 118 E.R. 749, 2 El. & Bl. 216 [*Lumley*].

38 Prior to *Lumley*, claims for inducing breach of contract (appearing as early as 1529) were largely limited to the master-servant context: see J.H. Baker, *An Introduction to English Legal History*, 4th ed. (London: Butterworths LexisNexis, 2002) at 457.

39 The Court in *Lumley* did, however, suggest that the commission of the tort *itself* was unlawful. See Crompton J., at 227, stating that "the remedy . . . may well apply to all cases where there is an *unlawful* and malicious enticing away of any person employed to give his personal labour or service for a given time under the direction of a master or employer who is injured by the wrongful act". [emphasis added]

40 *Lumley*, *supra* note 37, at 224, per Crompton J. See also *South Wales Miners' Federation v. Glamorgan Coal Co. Ltd.*, [1905] A.C. 239 at 250 (H.L.), per Lord James. However, as confirmed in the latter case, there is no requirement of malice in an action for inducing breach of contract: see *SAR Petroleum Inc. v. Peace Hills Trust Co.* (2010), 318 D.L.R. (4th) 70, ¶32 (N.B.C.A.).

(c) Conspiracy

The tort of conspiracy has a more complicated origin.[41] Although it has been characterized as a "modern invention altogether,"[42] it may be traced to a number of historical sources (the most prominent being the crime of conspiracy).[43] Criminal conspiracy had long included an "unlawful means" element,[44] and this element was

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41 It would appear that the genesis of conspiracy remains shrouded in controversy: see I.M. Christie, *The Liability of Strikers in the Law of Tort: A Comparative Study of the Law in England and Canada* (Kingston, Ont.: Queen's University, Industrial Relations Centre, 1967) at 62. Interestingly, it has also been suggested that conspiracy is the subject of more decisions by the House of Lords than any other tort: R.V.F. Heuston and R.A. Buckley, *Salmond and Heuston on the Law of Torts*, 21st ed. (London: Sweet & Maxwell, 1996) at 356.

42 *Midland Bank Trust Co. Ltd. v. Green*, [1982] Ch. 529 at 539 (C.A.), per Lord Denning M.R. See also *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch*, [1942] A.C. 435 at 461 (H.L.), per Lord Wright.

43 These sources include: (1) certain statutes of the thirteenth century, which created a writ of conspiracy that lay where the defendants combined to indict or appeal an acquitted person of felony; (2) the medieval common law, which developed an action on the case where the defendants combined to defraud the plaintiff through the fraudulent use of the legal system; and (3) the criminal offence of conspiracy developed by the Star Chamber, which punished not only conspiracies to abuse the legal process, but also conspiracies to commit any wrongful act. The medieval action on the case later evolved into the torts of malicious prosecution and abuse of process. However, another action developed, via analogy with the criminal offence of conspiracy that was adopted by the common law courts from the Star Chamber. It was this action, about which "very little authority can be found . . . before the latter half of the nineteenth century", that became the modern tort of conspiracy. See W.S. Holdsworth, *A History of English Law*, 5th ed. (London: Methuen & Co. Ltd., 1956), Vol. VIII, at 378-379, 385 and 392. The history of the tort of conspiracy is also discussed judicially in: *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch*, [1942] A.C. 435 at 443-444 (H.L.), per Viscount Simon L.C.; *McKinnon v. F.W. Woolworth Co.* (1968), 70 D.L.R. (2d) 280 at 285-286 (Alta. C.A.); and *Amirault v. Westminier Canada Holdings Ltd.* (1994), 355 A.P.R. 241, ¶98–101 (N.S.C.A.); leave to appeal to S.C.C. refused [1994] S.C.C.A. No. 117. The tort appears to have risen to prominence only after 1875, when English legislation decriminalized conspiracies in furtherance of trade disputes, but left open the possibility of tortious liability for the same: see J.H. Baker, *An Introduction to English Legal History*, 4th ed. (London: Butterworths LexisNexis, 2002) at 462. For a judicial discussion of the events leading up to this development, see *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, ¶45–51.

44 See *Metall und Rohstoff A.G. v. Donaldson Lufkin & Jenrette Inc.*, [1990] 1 Q.B. 391 at 452 (C.A.). Thus, in *Mulcahy v. The Queen* (1868), 3 H.L. 306 at 317, Willes J. famously declared that: "[a] conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means". This definition of criminal conspiracy at common law has been accepted in Canada: see, e.g., *U.S.A. v. Dynar*, [1997] 2 S.C.R. 462, ¶86. It appears that the requirement to combine in pursuance of either an unlawful act, or a lawful act effected by unlawful means, in the context of criminal conspiracy, was developed by

carried forward into the tort of conspiracy which evolved from the criminal offence.[45] However, neither the necessity of this unlawful means requirement, nor its underlying rationale, were substantively explored until the 1892–1901 Trilogy, discussed below.

(d) Unlawful interference with economic interests and intimidation

The third category of cases referred to above had yet to be organized into a discrete theory of liability prior to the nineteenth century, but rather involved the seeds of two torts: (1) unlawful interference with economic interests; and (2) intimidation. An early case that is commonly associated with this category is *Garret v. Taylor*.[46] It involved an action against the defendant for injuring the plaintiff's business by intimidating his workmen and customers (through threats of "mayhem"

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the post-Restoration common law courts, drawing upon the practice of the Star Chamber: see W.S. Holdsworth, *A History of English Law*, 5th ed. (London: Methuen & Co. Ltd., 1956), Vol. VIII, at 379–384.

45 It is notable that the tort became differentiated from the crime in that the tort required the commission of acts which caused damage to the plaintiff, whereas the agreement itself would suffice for the crime (W.S. Holdsworth, *A History of English Law*, 5th ed. (London: Methuen & Co. Ltd., 1956), Vol. VIII at 393). See also *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch*, [1942] A.C. 435 at 439-440 and 461 (H.L.). This distinction between criminal and tortious conspiracy has been accepted in Canada: see, e.g., *Gagnon v. Foundation Maritime Ltd.*, [1961] S.C.R. 435 at 439. However, the principles applicable to criminal conspiracy have sometimes been stated to have application to civil conspiracy, on the ground that the only difference between them is the necessity of establishing damages in the case of the tort: see *Claiborne Industries Ltd. v. National Bank of Canada* (1989), 69 O.R. (2d) 65 at 79 (C.A.) (although *cf.* Anthony M. Dugdale *et al*, eds., *Clerk & Lindsell on Torts*, 19th ed. (London: Sweet & Maxwell, 2006) at 1610, n23). It should also be noted that conspiracy is also a criminal offence pursuant to s. 465 of the *Criminal Code* R.S.C. 1985, c. C-46 (s. 423). Prior to 1985, the predecessor to s. 465 of the *Criminal Code*, criminalized the commission of "common law" conspiracy, i.e., a conspiracy to effect an *unlawful* purpose, or a lawful purpose by *unlawful* means. However, this form of criminal conspiracy was abandoned in 1985, and the *Criminal Code* since that time has generally required that the accused conspire to commit an actual *offence*. Accordingly, there is no longer any criminal offence of "unlawful means" conspiracy nor "lawful means" conspiracy (at least in the sense contemplated at common law). A similar position appears to prevail in England: see W.V.H. Rogers, *Winfield & Jolowicz on Tort*, 17th ed. (London: Sweet & Maxwell, 2006) at 812-813.

46 (1621), 79 E.R. 485, Cro. Jac. 567 [*Garret*]. For an even earlier case, see *Abbot of Eversham's Case* (1355), Y.B. 29, Edw. III, which is discussed in *Earl of Shewsbury's Case* (1610), 77 E.R. 798, 9 Co. Rep. 46b at 50b, and *Northern Territory of Australia v. Mengel* (1995), 185 C.L.R. 307 at 340 (H.C.A.) (defendant using force of arms to disturb persons attending plaintiff's fair). Additional cases that date from the Year Book period are referred to in American Law Institute, *Restatement (Second) of Torts* (St. Paul, Minn.: American Law Institute Publishers, 1979) at §766B.

and lawsuits). Although additional cases prior to the nineteenth century were rare,[47] a similar action was brought in *Tarleton v M'Gawley*,[48] where the defendant fired a cannon at a canoe of native traders to dissuade them from trading with the plaintiff.

As is evident, these cases involved unlawful acts, or threats thereof, directed against a third party by the defendant, thereby injuring the plaintiff's relationship, or potential relationship, with that third party. Again, however, prior to the 1892–1901 Trilogy, the theoretical grounds of such liability were largely unexplored.

(e) The *prima facie* tort

The final category of cases referred to above has a more tenuous existence. It is generally linked to *Keeble v. Hickeringill*,[49] where the court appeared to recognize an action for maliciously interfering with another's economic interests, while acting alone and in the absence of unlawful means. *Keeble* was largely overlooked until the 1892–1901 Trilogy.[50]

Nonetheless, in *Rogers v. Dutt*,[51] the Privy Council left open the question of whether an act which caused economic injury to the plaintiff, but which did not violate the plaintiff's legal rights, was actionable where motivated by malice. Further, in *Bowen v. Hall*,[52] the English Court of Appeal suggested that the gist of the action for inducing breach of contract was not the breach of contract itself, but the malice which underlay the inducement. Such observations lent credibility to the existence of a *prima facie* tort of maliciously interfering with the plaintiff's economic interests, regardless of whether the interference was effected alone, through lawful means, and without the inducement of a third party's violation of the plain-

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47 J.H. Baker, *An Introduction to English Legal History*, 4th ed. (London: Butterworths LexisNexis, 2002) at 460.

48 (1790), 170 E.R. 153, 1 Peake NPC 270 [*Tarleton*].

49 (1738), 103 E.R. 1127, 11 East 574 [*Keeble*]. In *Keeble*, the defendant was held liable for lawfully discharging his gun, apparently on his own land, near the plaintiff's duck pond, with the aim (and the effect) of frightening any fowl away. Holt C.J. asserted (at 575) that, as a general principle, "he that hinders another in his trade or livelihood is liable to an action for so hindering him" (at 575). Holt C.J. also appeared to view conduct that was merely malicious as being sufficient to engage liability on this ground, stating (at 576) that "where a violent or *malicious* act is done to a man's occupation, profession or way of getting a livelihood; there an action lies in all cases". [emphasis added] For discussion of the case, see J.H. Baker, *An Introduction to English Legal History*, 4th ed. (London: Butterworths LexisNexis, 2002) at 460.

50 See *Allen*, *supra* note 7, at 100–107 and 134–136. The case that is most commonly cited as applying *Keeble* is *Carrington v. Taylor* (1809), 170 E.R. 1148, 2 Camp. 258. However, there are some other cases in which *Keeble* was referred to: see, e.g., *Hannam v. Mockett* (1824), 107 E.R. 629, 2 B & C 934 at 943-944. Notably, *Keeble* was also referred to by Crompton J. in *Lumley v. Gye* (1853), 118 E.R. 749, 2 El. & Bl. 216 at 229(a), even though some of the Law Lords in *Allen* suggested that it had not been cited to or considered by the Court in that case.

51 (1860), 15 E.R. 78, 8 Moo. P.C. 209 at 240-241.

52 (1881), 6 Q.B.D. 333 at 338 (C.A.), per Brett L.J. [*Bowen*]

tiff's legal rights.

2. The 1892–1901 Trilogy

The tensions between rulings such as *Keeble*, with its seeming acceptance of a *prima facie* tort characterized by malicious interference, and the more conservative approach reflected in cases like *Garret*, which imposed liability in response to unlawful means, were not fully explored until the end of the nineteenth century. It was then that the economic torts came to prominence, driven by the mass deregulation of industry "under the influence of the doctrine of laissez faire."[53] This gave rise to an explosion of claims involving economic interests, particularly in the labour context. The doctrinal implications of these claims formed the subject matter of the 1892–1901 Trilogy.

(a) *Mogul Steamship*

The facts in *Mogul* may be briefly stated. The defendants were a group of shipowners, who formed an association in which they agreed to collude in certain activities in order to increase shipping rates at a loading port. When the plaintiffs, who were not members of the association, sent ships to the loading port, the defendants flooded the port with their own ships, and drastically reduced their rates. The defendants also threatened to dismiss agents who loaded the plaintiffs' ships, and refused to offer a rebate to any person shipping cargo with the plaintiffs. The plaintiffs responded by bringing an action for conspiracy.

The action was dismissed by the Trial Judge,[54] in a ruling affirmed by the Court of Appeal.[55] Lord Esher M.R. delivered a dissent in which he opined that the defendants had entered into an agreement in restraint of trade, and therefore conspired to commit an unlawful act.[56] In addition, he cited *Keeble* and *Bowen* in support of the proposition that "a malicious motive in the defendant may make an act which would not be wrongful without the malice, a wrongful act when done with malice."[57] According to Lord Esher, "an act of competition, otherwise unobjectionable, done not for the purpose of competition, but with intent to injure a rival trader in his trade, is . . . actionable if injury ensue."[58] Thus, a conspiracy to effect such an

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53 W.S. Holdsworth, *A History of English Law*, 5th ed. (London: Methuen & Co. Ltd., 1956), Vol. VIII, at 431. See also Hazel Carty, *An Analysis of the Economic Torts* (Oxford: Oxford University Press, 2001) at 5: "[t]hough most have their origins much earlier the real development of all these torts took place in the late nineteenth and early twentieth centuries".

54 *Mogul Steamship Co. Ltd. v. McGregor, Gow & Co.* (1888), 21 Q.B.D. 544 (Q.B.D.); aff'd (1889), 23 Q.B.D. 598 (C.A.); aff'd [1892] A.C. 25 (H.L.).

55 *Mogul Steamship Co. Ltd. v. McGregor, Gow & Co.* (1889), 23 Q.B.D. 598 (C.A.); aff'd [1892] A.C. 25 (H.L.).

56 *Ibid.* at 606.

57 *Ibid.* at 608-609.

58 *Ibid.* at 609-610.

act was equally actionable.[59]

Lord Esher's reasoning was rejected by the majority of the Court of Appeal, in a decision that was affirmed by the House of Lords. The Law Lords confirmed that, in order for a conspiracy to be actionable, the defendants either had to conspire for an object that was unlawful (or perhaps purely malicious), or to use unlawful means in giving effect to their conspiracy.[60] They accepted that there were some things which, while done lawfully by an individual, could become unlawful when done in combination.[61] However, they emphatically rejected the suggestion that intentionally inflicting economic injury upon a competitor, for the purpose of improving one's own economic position, was a *prima facie* unlawful (or purely malicious) object, whether done alone or in combination.[62] They also held that the defendants were not acting maliciously on the facts found below, but were acting solely to protect their legitimate commercial interests.[63] Accordingly, the Law Lords concluded that the conspiracy could only be actionable if it was effected through unlawful means.[64] Since no unlawful means were used by the defendants, the plaintiffs' claim failed.

In the course of their judgment, the Law Lords had occasion to consider the concept of unlawfulness (with respect to both the achieving of an "unlawful object," and the use of "unlawful means" to achieve an object). They held that conduct was not "unlawful" simply because it was unfair to a competitor.[65] In addition, they rejected the proposition that conduct was unlawful where it involved entry into an agreement, such as one in restraint of trade, that was unenforceable at common law on the grounds of public policy or immorality (and thus illegal as between the contracting parties *inter se*).[66] Instead, the Law Lords seemed to require that the act in question violate a person's legal rights[67] (above and beyond the plaintiff's "right" to trade). They gave as examples intimidation, violence, molestation, inducing breach of contract, trespass, force, fraud, breach of contract, direct torts and

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59 *Ibid.* at 610.

60 *Mogul*, *supra* note 33, at 41-42, 52 and 59.

61 *Ibid.* at 38, 45 and 60.

62 *Ibid.* at 36–38, 42, 48-49, 52 and 58-59.

63 *Ibid.* at 36, 43, 53-54 and 56-57.

64 Note, however, Lord Field at 52 (*ibid.*), suggesting on the basis of *Keeble* that malicious interference with another person's trade, by the defendant alone, and in the absence of unlawful means, could be actionable.

65 *Ibid.* at 43. See also 47 and 49–51. As discussed at footnote 640 below, the non-actionability of intentionally inflicting economic injury upon another by lawful means, in the name of competition, was recognized as early as *The Schoolmasters of Gloucester Case* (1410) Y.B. 11, Hen. IV, f. 47, pl. 21.

66 *Ibid.* at 39, 42, 46, 51 and 57-58. Under Canadian law, this particular aspect of *Mogul* must be read in light of s. 466 of the *Criminal Code*, which makes it an offence to conspire to enter into an agreement in restraint of trade. See also s. 45(1) of the *Competition Act*, R.S.C. 1985, c. C-34. For a recent discussion of this issue in the context of U.K. law, see *Norris v. United States*, [2008] 1 A.C. 920 (H.L.).

67 *Ibid.* at 37-38, 44, 48 and 51.

other violations of the plaintiff's legal rights.[68] Some of the Law Lords also advanced a deeper rationale for the existence of the unlawful means element. Both Lord Bramwell and Lord Morris seemed to view the element as a safeguard against illegitimate judicial moralizing.[69] Lord Morris put the matter this way:

> I am not aware of any stage of competition called "fair" intermediate *between lawful and unlawful. The question of "fairness" would be relegated to the idiosyncrasies of individual judges.* I can see no limit to competition, *except that you shall not invade the rights of another.*[70]

(b) *Allen v. Flood*

The next case in the 1892–1901 Trilogy is *Allen*, a decision that has been called "perhaps the most important in the whole history of the law of torts."[71]

At issue was the liability of the appellant, a union representative for a group of boiler-makers. The boiler-makers were conducting repairs to the ironwork of a ship, and the respondents, two members of a rival shipwright union, were employed to conduct repairs to the ship's woodwork. The boiler-makers had a large amount of antipathy toward the respondents, since the latter had previously performed ironwork on a different ship, contrary to the practices of the boiler-makers' union. In an apparent effort to punish the respondents for this act (as opposed, *e.g.*, to advancing the competitive interests of the boiler-makers), the appellant informed the employers that the boiler-makers would (lawfully) cease working on the ship (and on all other ships stationed at the employer's docks) unless the respondents were discharged.[72] The employers decided to (lawfully) discharge the respondents, whose employment was terminable at will, and refused to engage them in any new work. The respondents sued the appellant. While they alleged several causes of action, the appellant was found liable, after a jury trial, of maliciously inducing the employer to lawfully discharge the respondents and to no longer engage them.

This finding of liability was initially upheld by the Court of Appeal.[73] Lord Esher M.R. once again took the view that a malicious interference with economic interests was actionable even in the absence of unlawful means or conspiracy, and this time, the other members of the Court agreed. Rather than relying upon *Keeble*,

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68 *Ibid.* at 37 and 44.

69 *Ibid.* at 47, 49 and 50-51. See also John G. Fleming, *The Law of Torts*, 9th ed. (Sydney: LBC Information Services, 1998) at 751. A similar tendency can be observed in the development of other economic torts: Hazel Carty, *An Analysis of the Economic Torts* (Oxford: Oxford University Press, 2001) at 8.

70 *Ibid.* at 51, emphasis added.

71 R.V.F. Heuston, "Judicial Prosopography" (1986) 102 L.Q.R. 90 at 97. See also *Total Network*, *supra* note 16, ¶71, per Lord Walker of Gestingthorpe. It is ironic, therefore, that the decision is so often ignored: Tony Weir, *Economic Torts* (Oxford: Clarendon Press, 1997) at 5-6.

72 The facts did not clearly establish whether the appellant was simply conveying the boiler-makers' own resolution to the employers, or whether he threatened to call the boiler-makers off from their work.

73 *Allen v. Flood*, [1895] 2 Q.B. 21 (C.A.); rev'd [1898] A.C. 1 (H.L.).

Lord Esher relied upon his own judgment in *Temperton v. Russell*,[74] a case decided after *Mogul*. In *Temperton*, Lord Esher (invoking *Bowen*) had suggested that merely inducing a party to refrain from entering into future contractual relations with the plaintiff (as opposed to inducing the breach of an existing contract with the plaintiff) was actionable where motivated by malice (even, it seemed, in the absence of a conspiracy or unlawful means).[75]

On further consideration, the House of Lords reversed the judgments below. It did so despite the fact that the Law Lords summoned eight other judges to attend and give their opinion on the case, and six of those judges concluded that the respondents' action should be allowed and the appeal dismissed.[76] Several of those judges relied upon a critical *dictum* delivered by Bowen L.J. for the Court of Appeal in *Mogul*, where he stated that "intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable *if done without just cause or excuse*."[77] Taken literally, this comment suggested that the intentional infliction of economic harm by an individual was actionable, even in the absence of unlawful means or conspiracy, provided only that it was "unjustified".[78]

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74 [1893] 1 Q.B. 715 at 728 (C.A.) [*Temperton*]. This case was also decided upon the alternative ground that the defendants had conspired for the predominant purpose of inducing a third party to refrain from entering into contractual relations with the plaintiff. This latter aspect of *Temperton* would greatly influence the ruling in *Quinn*.

75 See *Allen v. Flood*, [1895] 2 Q.B. 21 at 37-38 (C.A.); rev'd [1898] A.C. 1 (H.L.).

76 Thus, of the 21 judges (including those in the House of Lords) who ultimately considered the matter, only 8 held that the respondents' action should be rejected. Significantly, the eight judges who were summoned for their views were summoned after the case was originally argued before seven judges of the House of Lords. Once the views of the eight judges were made known, the case was reargued before nine judges of the House of Lords. This was to be the last time that the House of Lords would summon the lower judges for their opinion on a case: J.H. Baker, *An Introduction to English Legal History*, 4th ed. (London: Butterworths LexisNexis, 2002) at 463, n94. For a discussion of the procedural history of *Allen*, and its significance, see: *Perrault v. Gauthier* (1897), 28 S.C.R. 241 at 245–248 and 253–257, per Girouard J.; *No. 1 Collision Repair & Painting (1982) Ltd. v. Insurance Corp. of British Columbia* (2000), 80 B.C.L.R. (3d) 62, ¶111 (C.A.), per Lambert J.A. (dissenting), leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 488; and *Total Network*, *supra* note 16, ¶71, per Lord Walker. As Girouard J. noted in *Perrault v. Gauthier* (1897), 28 S.C.R. 241 at 246, "probably no precedent exists in which their Lordships have overruled such a preponderance of judicial opinion".

77 *Allen*, *supra* note 7, at 39–42, 48 and 57, citing *Mogul Steamship Co. Ltd. v. McGregor, Gow & Co.* (1889), 23 Q.B.D. 598 at 613 (C.A.); aff'd [1892] A.C. 25 (H.L.), emphasis added.

78 The statement by Bowen L.J. in *Mogul* was also relied upon by Holmes J. in *Aikens v. Wisconsin*, 195 U.S. 194 , 204 (1904) where, in laying the groundwork for the American *prima facie* tort doctrine, he famously declared that "[i]t has been considered that, *prima facie*, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape. *Mogul Steamship Co. v. McGregor*, 23 Q.B.D. 598 , 613; *S.C.*, [1892] A.C. 25". See also *Tuttle v. Buck*, 119 N.W. 946 (Minn. 1909).

Of the nine Law Lords who ultimately decided the appeal, six concurred in allowing it. In the opinion of the majority, the appellant's lawful act could not be converted into a civil wrong owing merely to the presence of a bad motive.[79] They rejected the argument that intentionally interfering with another person's economic interests in the absence of an unlawful act or unlawful means (or in the absence of conspiracy)[80] was a *prima facie* wrong, wherein the defendant could be relieved from liability by establishing good faith.[81] They also rejected the argument that there should be an exception to this rule where the right of the plaintiff to practise its trade or employment was interfered with.[82] They therefore rejected Bowen L.J.'s *dictum* in *Mogul*.[83]

The majority also held that Lord Esher's reliance upon *Temperton* was misplaced. They found that it was the breach of contract, and not malice, that was the gist of the tort of inducing breach of contract recognized in *Lumley*[84] (although several of the majority judges reserved on the question of whether inducing breach of contract was itself an actionable tort).[85] Further, the Law Lords distinguished *Keeble* on the ground that it involved tortious nuisance, and had not been relied upon by subsequent courts as establishing the *prima facie* actionability of malicious economic interference.[86] Other than cases, such as *Lumley*, in which the defendant had committed or induced a violation of the plaintiff's rights (and hence an unlawful act directed against the plaintiff), the only cases in which the defendant had been held liable for interference with trade in the absence of conspiracy were decisions such as *Garret* and *Tarleton* (where the defendant had directed unlawful

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Interestingly, Bowen L.J.'s *dictum* has also been referenced in some Canadian cases: see *McGillivray v. Kimber* (1915), 52 S.C.R. 146 at 163-164, per Duff J.; and *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at 160, per Martland J.

79 *Allen*, *supra* note 7, at 92, 100–108, 123-124, 127-128, 165, 167-168 and 171-172. This proposition had earlier been endorsed, in relation to the use of property rights, in *Bradford Corp. v. Pickles*, [1895] A.C. 587 at 594 and 598-599 (H.L.). The Law Lords reached this conclusion even though they acknowledged that: (a) in some exceptional torts (e.g., slander), the absence of a bad motive could afford a defence to liability; and (b) in other exceptional torts (e.g., malicious prosecution), the presence of malice was an essential element. See 106, 125-126 and 172. In qualification of the Law Lords' reasoning, however, it should be noted that the defendant's mental state can seemingly convert an otherwise *unlawful* act into an actionable one, since a negligent breach of statute is not *per se* actionable in Canada (but only actionable under the rubric of the intentional economic torts): see *Holland v. Saskatchewan*, [2008] 2 S.C.R. 551, ¶9.

80 *Ibid.* at 123-124, 168-169 and 172.

81 *Ibid.* at 125, 127-128 and 172-173.

82 *Ibid.* at 98-99, 137–141, 173 and 179-180.

83 *Ibid.* at 139-140, per Lord Watson.

84 *Ibid.* at 121–123, 127 and 179. Accordingly, the Law Lords rejected the actionability of maliciously inducing a third party to refrain from entering into contractual relations with the plaintiff (in the absence of unlawful means). Such a claim involved no independent violation of the plaintiff's legal rights, unlike in the case where a third party was induced to actually *breach* its contract with the plaintiff. See 121 and 171.

85 *Ibid.* at 123, 153-154, 168 and 171.

86 *Ibid.* at 100–104, 132–136, 169 and 174.

means against a third party, who thereby withdrew from its relationship with the plaintiff).[87]

In the result, the majority affirmed a non-conspiratorial defendant's right to advance its economic interests in any manner that did not involve the commission or inducement of an unlawful act, or a lawful act through unlawful means.[88] Lord Watson, who is often considered to have delivered the leading judgment in *Allen*,[89] summarized the principle this way:

> There are, in my opinion, *two grounds* only upon which a person *who procures the act of another* can be made legally responsible for its consequences. In the *first* place, he will incur liability *if he knowingly and for his own ends induces that other person to commit an actionable wrong*. In the *second* place, *when the act induced is within the right of the immediate actor*, and is therefore not wrongful in so far as he is concerned, *it may yet be to the detriment of a third party; and in that case*, according to the law laid down by the majority in *Lumley v. Gye, the inducer may be held liable if he can be shewn to have procured his object by the use of illegal means directed against that third party.*[90]

Lord Watson thus appeared to recognize a tort of unlawful interference with economic interests in the second part of this passage (although the tort remained innominate at this time).[91]

The types of conduct that were contemplated as being "unlawful" or "illegal" in the sense required for such liability included breach of contract,[92] fraud,[93] nuisance,[94] violence,[95] menacing threats (*e.g.*, of violence to person and property),[96] tortious conspiracy[97] and obstruction.[98] They were also described, more generally, as including conduct which was beyond the defendant's "rights,"[99] conduct in the

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87 *Ibid.* at 104 and 136–138.

88 *Ibid.* at 97–99, 106-107, 126-127, 129–131, 140-141, 151-152, 166-167 and 180.

89 See: *Quinn v. Leathem*, *supra* note 34, at 509, per Lord Macnaghten; and *OBG*, *supra* note 15, ¶13, per Lord Hoffmann.

90 *Allen*, *supra* note 7, at 96, emphasis added. As recognized in subsequent case law, the reference to *Lumley* in the second part of this passage is a "slip", and was meant to apply to the first cause of action: see *OBG*, *supra* note 15, ¶13, per Lord Hoffmann.

91 In *No. 1 Collision Repair & Painting (1982) Ltd. v. Insurance Corp. of British Columbia* (2000), 80 B.C.L.R. (3d) 62, ¶13 (C.A.); leave to appeal to S.C.C. refused [2000] S.C.C.A. No. 488, Lambert J.A. (dissenting) referred to the unlawful interference tort as the "corollary *obiter dicta* arising from the *ratio decidendi*" of *Allen*.

92 *Allen*, *supra* note 7, at 96, per Lord Watson.

93 *Ibid.* at 167, per Lord Shand.

94 *Ibid.* at 101 and 173.

95 *Ibid.* at 105, per Lord Watson.

96 *Ibid.* at 104-105, 128–130, 165,

97 *Ibid.* at 108-109, per Lord Watson.

98 *Ibid.* at 173, per Lord Davey.

99 *Ibid.* at 133, 165 and 167-168.

nature of "civil wrongs,"[100] conduct that was "improper,"[101] and conduct which was "wrongful."[102]

These various characterizations suggest the lack of any principled approach to the unlawful means element. However, the seeds of such an approach may arguably be found in the majority's focus upon the requirement for some violation of a *legal right* in order for the defendant's conduct to be tortiously actionable[103] (*i.e.*, a right beyond the plaintiff's economic "right" to carry on its trade, which was qualified by the same "right" of the defendant).[104] This focus is seen most clearly in the passages where the Law Lords distinguished the facts before them from the earlier ruling in *Lumley*, where there was a violation of the plaintiff's legal rights (albeit not by the defendants directly) in the form of the third party's breach of contract. Thus, Lord Herschell stated that:

> . . . it was said that there seemed to be no good reason why, if an action lay for maliciously inducing a breach of contract, it should not equally lie for maliciously inducing a person not to enter into a contract. So far from thinking it a small step from the one decision to the other, *I think there is a chasm between them.* The reason for a distinction between the two cases appears to me to be this: that *in the one case the act procured was the violation of a legal right*, for which the person doing the act which injured the plaintiff could be sued as well as the person who procured it; *whilst in the other case no legal right was violated* by the person who did the act from which the plaintiff suffered: he would not be liable to be sued in respect of the act done, whilst the person who induced him to do the act would be liable to an action.[105]

Accordingly, for the House of Lords in *Allen*, it appears that the requirement that the defendant direct unlawful means at a third party served as a substitute for the lack of a violation (or an inducement of a violation) by the defendant of the plaintiff's own traditional legal rights. In addition, some of the Law Lords (echoing their comments in *Mogul*) suggested that an unlawful means requirement was necessary in light of the impropriety of basing tortious liability upon judicial assess-

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100 *Ibid.* at 92-93 and 97-98, per Lord Watson.

101 *Ibid.* at 152 and 165.

102 *Ibid.* at 94, 96, 118, 135, 137-138 and 140.

103 *Ibid.* at 92, 104, 121, 137, 151-152, 154, 171 and 173. See also the earlier judgment of the Privy Council in *Rogers v. Dutt* (1860), 15 E.R. 78, 8 Moo. P.C. 209 at 241, stating that "it is essential to an action in tort that the act complained of should, under the circumstances, be *legally wrongful* as regards the party complaining; *that is, it must prejudicially affect him in some legal right; merely that it will, however directly, do him harm in his interests, is not enough.*" [emphasis added] Similar comments can be found in the judgment of Lord Lindley in *Quinn*, *supra* note 34, at 539.

104 *Ibid.* at 137–140, 166-167 and 173. See, in this respect, John Murphy, *Street on Torts*, 12th ed. (Oxford: Oxford University Press, 2006) at 322, noting that *Allen* established "[t]he absence of any general *right* to protection of economic interests in English law", and recognized "only a *freedom* to pursue one's livelihood or business". [*emphasis in original*]

105 *Ibid.* at 121, emphasis added.

ments of fairness and malice.[106]

(c) *Quinn v. Leathem*

Subsequent to *Mogul* and *Allen*, the House of Lords revisited the tort of conspiracy in *Quinn*. The facts in *Quinn* involved an action by the plaintiff butcher against a group of union officials. The defendants, in retaliation for the plaintiff's refusal to employ union members, threatened his main customer with a labour disruption, and issued "black lists" containing the names of his employees. This conduct led the customer to end his business relationship with the plaintiff. It also caused several of the plaintiff's employees to depart from their employment.[107]

The House of Lords found as a fact that, although the defendants did not participate in the use of unlawful means, they nevertheless conspired for the purpose of injuring the plaintiff, rather than for purposes of promoting their own legitimate business interests.[108] The principal question was thus whether, in light of the ruling in *Allen*, a conspiracy that was effected by lawful means, but that was undertaken for the malicious purpose of injuring the plaintiff, was actionable.[109]

The Law Lords, affirming the rulings below, unanimously held that such a conspiracy was actionable[110] (and also appeared to affirm the actionability of in-

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106 *Ibid.* at 118-119, 142 and 152-153. As Lord Macnaghten stated, at 152, "[t]he truth is that *questions of this sort belong to the province of morals rather than to the province of law*. Against spite and malice the best safeguards are to be found in self-interest and public opinion". [emphasis added] It is this aspect of *Allen*, more than any other, which renders it arguably "the most important [case] in the whole history of the law of torts" (as suggested by Heuston in the text accompanying footnote 71 above). In holding that a defendant will not be liable, in the absence of unlawful means, where it maliciously injures the plaintiff's economic interests, *Allen* severs private law from the field of morality. In the wake of *Allen*, therefore, the law of torts must be seen to possess its own unique logic, one that cannot be reduced to a traditional system of moral philosophy.

107 This included one employee who did so by breaching his contract with the plaintiff, although the employee's breach did not appear to cause any damage to the plaintiff. Although it is not entirely clear, it seems that the lack of damage to the plaintiff resulting from the employee's breach was the reason why the defendants were not found to have committed an actionable tort in the form of inducing breach of contract (which would have then enabled the plaintiff to allege unlawful means conspiracy, based on the principles in *Mogul*). Contrast this aspect of *Quinn* with Lord Hoffmann's ruling in *OBG*, discussed below, where he found that unlawful means for the purposes of the unlawful interference tort could include conduct that met all the elements of a tort, but for the fact that it failed to cause loss to the plaintiff.

108 *Quinn*, *supra* note 34, at 514. See also the discussion of this aspect of *Quinn* in *Sorrell v. Smith*, [1925] A.C. 700 at 735-736 (H.L.), per Lord Sumner.

109 It appears that this question had previously been answered in the negative in *Perrault v. Gauthier* (1897), 28 S.C.R. 241.

110 *Quinn*, *supra* note 34, at 505-506, 510, 512–514, 529–531 and 538-539. The finding of liability in *Quinn* has been explained on the more cynical ground that, unlike in *Mogul* (where the Court held that an anti-competitive conspiracy by *traders* did not involve an

ducing breach of contract, a question that was left open in *Allen*).[111] The decision in *Allen* was distinguished on the ground that it did not involve a conspiracy,[112] and only stood for the proposition that a harmful but lawful act which did not otherwise violate the plaintiff's legal rights did not become actionable simply because it was motivated by an improper intent.[113] In circumstances where there was a conspiracy for no purpose other than injuring the plaintiff, liability for injury caused by a lawful act was justified, since "it is a very different thing . . . when one man has to defend himself against many combined to do him wrong."[114]

At the same time, the Law Lords also affirmed the principle in *Allen* that, where an act was unlawful, it could result in liability to the plaintiff where the defendant, *acting alone*, directed it towards a third party. Lord Lindley, in particu-

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unlawful purpose), the anti-competitive conspiracy in *Quinn* involved *workmen*: see I.M. Christie, *The Liability of Strikers in the Law of Tort: A Comparative Study of the Law in England and Canada* (Kingston, Ont.: Queen's University, Industrial Relations Centre, 1967) at 69.

111 *Ibid.* at 510 and 535. In a critical *dictum* on this point, Lord Macnaghten stated (at 510) that "a violation of legal right committed knowingly is a cause of action, and that *it is a violation of legal right to interfere with contractual relations* recognised by law if there be no sufficient justification for the interference". [emphasis added] As noted in *OBG*, *supra* note 15, ¶15-16, this *dictum* planted the seeds for the later growth of the nominate "tort" of interference with contractual relations.

112 *Ibid.* at 507, 525 and 532-533.

113 *Ibid.* at 508-509, 524, and 538. Some of the Law Lords did, however, adopt a more radical interpretation of *Allen*. Thus, at 506-507 and 514, Earl Halsbury L.C. and Lord Shand suggested that the appellant in *Allen* did not act with malice. Further, at 537-538, Lord Lindley appeared to suggest that a single individual who commits a lawful act for the predominant purpose of harming the plaintiff will engage in actionable behaviour. Although this suggestion, which is clearly inconsistent with *Allen*, did not appear to be taken up by the other Law Lords, some commentators have suggested that other comments in *Quinn* also support the existence of the *prima facie* tort: Hazel Carty, *An Analysis of the Economic Torts* (Oxford: Oxford University Press, 2001) at 102.

114 *Ibid.* at 511, per Lord Macnaghten. The Law Lords held that such a conspiracy was itself, "from the moment of its formation, unlawful and criminal" (at 530, per Lord Brampton), and could thus render unlawful in combination that which was lawful when done alone (at 515, per Lord Shand). Accordingly, in the words of Earl Halsbury L.C., the added element of a combination negated the requirement for unlawful means, and necessitated liability under the "jurisprudence . . . of a civilized community" (at 506). Ironically, the civilized community extolled by Earl Halsbury reacted to the *Quinn* decision by enacting legislation that rendered conspiracy (in addition to interference with trade or employment, and inducing breach of contract) non-actionable where it was done in furtherance of a trade dispute: see J.H. Baker, *An Introduction to English Legal History*, 4th ed. (London: Butterworths LexisNexis, 2002) at 463. Similar (but not identical) legislation exists in some Canadian provinces. See, e.g., s. 3(1) of the *Rights of Labour Act*, R.S.O. 1990, c. R.33. For a discussion of the English legislation, and subsequent legislative developments in both England and Canada, see I.M. Christie, *The Liability of Strikers in the Law of Tort: A Comparative Study of The Law in England and Canada* (Kingston: Industrial Relations Centre, Queen's University, 1967) at 3–14.

lar, provided an important rationalization for this principle. He theorized that the wrong done to the third party would "reach" the plaintiff (and thus effect a violation of the plaintiff's *own* legal rights), since by restricting the third party's liberty to deal with the plaintiff, it also restricted the plaintiff's liberty to deal with the third party, and was therefore not too remote where this result was intended by the defendant. In his words:

> . . . *a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him.* If such interference is justifiable in point of law, he has no redress. Again, if such interference is wrongful, the only person who can sue in respect of it is, as a rule, the person immediately affected by it; another who suffers by it has usually no redress; the damage to him is too remote, and it would be obviously practically impossible and highly inconvenient to give legal redress to all who suffer from such wrongs. But if the interference is wrongful and is intended to damage a third person, and he is damaged in fact — in other words, *if he is wrongfully and intentionally struck at through others*, and is thereby damnified — the whole aspect of the case is changed: *the wrong done to others reaches him, his rights are infringed although indirectly, and damage to him is not remote or unforeseen, but is the direct consequence of what has been done.*[115]

Henceforth, conspiracy was actionable both where it involved an agreement to carry out a lawful act by unlawful means ("unlawful means conspiracy"), and an agreement taken for no purpose other than causing harm to another person, by lawful means ("lawful means conspiracy").[116]

In a passage later adopted by the House of Lords,[117] Atkin L.J. (as he then was) summarized the effect of the 1892–1901 Trilogy as follows:

> . . . that on the one hand a lawful act done by one does not become unlawful if done with an intent to injure another, whereas an otherwise lawful act done by two or more in combination does become unlawful if done by the two or more in combination with intent to injure another.[118]

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115 *Ibid.* at 534-535, emphasis added.

116 *Ibid.* at 528-529, per Lord Brampton. Lawful means conspiracy is sometimes also referred to as "unlawful object" conspiracy: see *Total Network*, *supra* note 16, ¶73, per Lord Walker. The ruling in *Quinn* suggests that a third branch of conspiracy may exist where the agreement is to carry out, by lawful means, a wrongful act other than causing injury to the plaintiff. However, it is not clear whether this branch of conspiracy was actually viewed as being distinct from the other two.

117 See *Sorrell v. Smith*, [1925] A.C. 700 at 719 and 747 (H.L.).

118 *Ware and de Freville Ltd. v. Motor Trade Assn.*, [1921] 3 K.B. 40 at 90 (C.A.). See also the summary of principles in *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch*, [1942] A.C. 435 at 442-443 and 486-487 (H.L.). As stated by Lord Wright at 474 of *Crofter*, "*Quinn's* case was in fact the complement of *Allen* . . . The latter case gave effect to the rule where there was no combination, the former to the rule where there was combination". Like the tort of abuse of public office, therefore, conspiracy became an exception to the "general rule that . . . if conduct is lawful apart from motive, a bad motive will not make [the defendant] liable": *Three Rivers District Council v. Governor and Co. of the Bank of England (No. 3)*, [2003] 2 A.C. 1 at 190 (H.L.), per Lord Steyn.

3. Subsequent Developments

(a) 1901–1950

In the first half of the twentieth century, the 1892–1901 Trilogy largely defined the parameters of the economic torts. While the House of Lords issued several further decisions during this time (most in the context of labour disputes),[119] they generally went no further than clarifying what the Supreme Court of Canada called the "glorious uncertainty"[120] of *Allen*.[121] The Canadian cases of this era addressing the economic torts (which were also largely limited to the labour context) applied the principles established in the 1892–1901 Trilogy, and the succeeding House of Lords jurisprudence, with little criticism[122] (save where modified by statute).[123]

The 1901–1950 jurisprudence affirmed that inducing breach of contract was an actionable tort (even in the absence of malice),[124] since it involved a violation (albeit not directly by the defendant itself) of the plaintiff's legal rights.[125] It also affirmed (but narrowed) the principle in *Quinn*, holding that a conspiracy action would lie in the absence of unlawful means where the predominant object or purpose (as opposed to the predominant motive or intention) of the combination was to

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119 Despite this fact, the Law Lords did not view the applicable principles as being limited to the labour context: see *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch*, [1942] A.C. 435 at 446-447 and 478-479 (H.L.).

120 *Perrault v. Gauthier* (1897), 28 S.C.R. 241 at 245, per Girouard J.

121 The leading such cases include: *South Wales Miners' Federation v. Glamorgan Coal Co. Ltd.*, [1905] A.C. 239 (H.L.); *Sorrell v. Smith*, [1925] A.C. 700 (H.L.); and *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch*, [1942] A.C. 435 (H.L.).

122 See, *e.g.*: *Perrault v. Gauthier* (1897), 28 S.C.R. 241; *Patterson v. Canadian Pacific Railway* (1917), 38 D.L.R. 183 (Alta. C.A.); *United Mine Workers of America, Local No. 1562 v. Williams* (1919), 59 S.C.R. 240; *Schuberg v. I.A.T.S.E., Local 118*, [1927] 2 D.L.R. 20 (B.C.C.A.); *Hay v. Local Union No. 25 Ontario Bricklayers and Masons International Union*, [1929] 2 D.L.R. 336 (Ont. C.A.); *Divers v. Burnett*, [1930] 1 D.L.R. 930 (B.C.C.A.); *Klein v. Jenoves*, [1932] O.R. 504 (C.A.); *Besler v. Matthews*, [1939] 1 D.L.R. 499 (Man. C.A.); *Garbutt Business College Ltd. v. Henderson Secretarial School Ltd.*, [1939] 4 D.L.R. 151 (Alta. C.A.); *Corbett v. Canadian National Printing Trades Union*, [1943] 4 D.L.R. 441 (Alta. C.A.); *Fokuhl v. Raymond*, [1949] O.R. 704 (C.A.); and *Newell v. Barker*, [1950] S.C.R. 385. However, *cf.*, *Shaw v. Lewis*, [1948] 2 D.L.R. 189 (B.C.C.A.), suggesting that the 1892–1901 Trilogy may only have limited application to tort claims not alleging injury to economic interests.

123 See *Weidman v. Shragge* (1912), 46 S.C.R. 1.

124 *South Wales Miners' Federation v. Glamorgan Coal Co. Ltd.*, [1905] A.C. 239 at 244–246, 249-250 and 253-254 (H.L.). See also *Jasperson v. Dominion Tobacco Co.*, [1923] A.C. 709 at 712-713 (P.C.).

125 *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch*, [1942] A.C. 435 at 465-466 (H.L.), per Lord Wright.

injure the plaintiff[126] (with malice itself not being required).[127]

At the same time, the House of Lords affirmed the principle in *Mogul*, and limited the scope of *Quinn*. They held that a lawful means conspiracy action would not lie where the predominant purpose of the combination was not to injure the plaintiff (but merely to promote the defendants' commercial or other legitimate interests).[128] Further, the House of Lords rejected as "the leading heresy" the suggestion that *Quinn* had application outside the context of conspiracy, and that it had somehow overruled *Allen* by causing lawful acts by a single defendant to become tortiously actionable based simply on the motive or intent behind them.[129] Thus, during this era, the Law Lords affirmed their stance against a *prima facie* tort of intentional and unjustified interference with economic interests, in circumstances not involving conspiracy, unlawful means, or (as in the case of inducing breach of contract) the violation of the plaintiff's traditional legal rights.[130]

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126 See: *Sorrell v. Smith*, [1925] A.C. 700 at 712-713, 719, 723-724, 735–739 and 744 (H.L.); and *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch*, [1942] A.C. 435 at 444-445, 448-449, 474 and 488-489 (H.L.). The precise nature of the mental state required is discussed in *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch*, [1942] A.C. 435 at 444–446, 448–454, 468–472, 478, 486, 489-490 and 494-495 (H.L.). See also, in Canada, *Roman Corp. v. Hudson's Bay Oil & Gas Co.*, [1973] S.C.R. 820 at 830.

127 See *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch*, [1942] A.C. 435 at 448–451 and 469–471 (H.L.).

128 See: *Sorrell v. Smith*, [1925] A.C. 700 at 712-713, 718, 733–735 and 741-742 (H.L.); and *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch*, [1942] A.C. 435 at 449-450, 453-454, 456, 462, 472, 478, 486 and 491–495 (H.L.). See also *McKernan v. Fraser* (1931), 46 C.L.R. 343 at 361-362 (H.C.A.), per Dixon J. Thus, the Law Lords rejected the notion that the right to trade without interference was an absolute right, that could not be qualified by the rights of other parties: see *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch*, [1942] A.C. 435 at 463–465 (H.L.), per Lord Wright.

129 See: *Sorrell v. Smith*, [1925] A.C. 700 at 719-720 and 723-724 (H.L.), per Lord Atkinson; and *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch*, [1942] A.C. 435 at 466 (H.L.), per Lord Wright.

130 *Sorrell v. Smith*, [1925] A.C. 700 at 727-728 (H.L.), per Lord Atkinson. See also *OBG*, *supra* note 15, ¶12, per Lord Hoffmann. There were, however, occasional judicial statements in support of the *prima facie* tort doctrine: see R.V.F. Heuston and R.A. Buckley, *Salmond and Heuston on the Law of Torts*, 21st ed. (London: Sweet & Maxwell, 1996) at 345. Interestingly, the Law Lords also more clearly accepted that an intentional interference with the plaintiff's *legal rights* (as opposed to its economic interests) was a *prima facie* tort that was actionable in the absence of justification (and characterized this as the principle underlying the decision in *Lumley*). See: *Allen*, *supra* note 7, at 92, per Lord Watson; *Quinn*, *supra* note 34, at 510, per Lord Macnaghten (*cf.* Lord Lindley at 535); *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch*, [1942] A.C. 435 at 465-466 (H.L.), per Lord Wright; and *Best v. Samuel Fox & Co. Ltd.*, [1952] A.C. 716 at 729 (H.L.), per Lord Goddard. This principle has also been accepted by Canadian courts: see *Newell v. Barker*, [1950] S.C.R. 385 at 393-394. Further, it has been relied upon to extend liability for inducing breach of contract to situations where the defendant induces a third party's breach of other, non-contractual rights held by the plaintiff: see *Amirault v. Westminer Canada Holdings Ltd.* (1994), 355

Notwithstanding these developments, the jurisprudence of this period did not yet recognize a nominate tort of unlawful interference with economic interests, but only an inchoate principle of such liability based upon the reasoning in *Allen*. Further, the House of Lords did not engage in a substantive examination of the "unlawful means" element. In the context of tortious conspiracy,[131] the Law Lords held, or suggested, that unlawful means would include conduct such as violence,[132] threats of violence,[133] threats of tortious action,[134] fraud,[135] inducing breach of contract,[136] and conduct prohibited by certain statutes.[137] However, the precise ambit of the unlawful means requirement remained largely unexplored.[138]

(b) 1950–2006

The second half of the twentieth century witnessed a number of major developments in relation to the unlawful means element, and the economic torts more generally. These developments occurred in both Canada and England. Significantly, they also were accompanied by an increasing reliance upon the economic torts outside the context of labour disputes.

A.P.R. 241, ¶116–121 (N.S.C.A.); leave to appeal to S.C.C. refused [1994] S.C.C.A. No. 117; and *Law Debenture Trust Corp. v. Ural Caspian Oil Corp. Ltd.*, [1995] Ch. 152 at 164-165 and 171 (C.A.).

131 In the context of criminal conspiracy, some courts were prepared to view conduct that would undermine principles of commercial or moral conduct as being sufficiently unlawful to satisfy the unlawful means element: see *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch*, [1942] A.C. 435 at 439 (H.L.), per Viscount Simon L.C. See also: *Shaw v. D.P.P.*, [1962] A.C. 220 (H.L.); *Knuller (Publishing, Printing and Promotions) Ltd. v. D.P.P.*, [1973] A.C. 435 (H.L.); and *R. v. Gralewicz*, [1980] 2 S.C.R. 493 at 509–511.

132 See: *Sorrell v. Smith*, [1925] A.C. 700 at 714 (H.L.), per Viscount Cave L.C.; and *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch*, [1942] A.C. 435 at 462 (H.L.), per Lord Wright.

133 *Sorrell v. Smith*, [1925] A.C. 700 at 714 and 747 (H.L.).

134 *Ibid.* at 730, per Lord Atkinson.

135 See: *Sorrell v. Smith*, [1925] A.C. 700 at 714 (H.L.), per Viscount Cave L.C.; and *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch*, [1942] A.C. 435 at 462 (H.L.), per Lord Wright.

136 *Larkin v. Long*, [1915] A.C. 814 at 825-825, 830-831 and 842 (H.L.).

137 *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch*, [1942] A.C. 435 at 462 (H.L.), per Lord Wright.

138 See, e.g., *Hardie and Lane Ltd. v. Chilton*, [1928] 2 K.B. 306 at 330-331 (C.A.), per Sankey L.J.: "[i]t would not only be dangerous but impossible to lay down by anticipation a category of unlawful means". See also *Total Network*, *supra* note 16, ¶76, describing the (mainly conspiracy) jurisprudence of this period as focusing upon the element of intent rather than unlawful means.

First, in *D.C. Thomson & Co. Ltd. v. Deakin*,[139] the English Court of Appeal (relying upon certain *dicta* in *Quinn*) extended the tort of inducing breach of contract so that it applied not only to cases where the defendant *directly* induced the counterparty to breach the contract with the plaintiff, but also where the defendant *indirectly* induced the contract's breach through unlawful means.[140] Thus, unlawful means became an element of a third tort, beyond unlawful means conspiracy and the innominate tort recognized in *Allen*. This tort (or this branch of the existing tort of inducing breach of contract) was soon recognized in Canada.[141]

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139 [1952] Ch. 646 (C.A.) [*D.C. Thomson*]. See also: *GWK Ltd. v. Dunlop Rubber Co. Ltd.* (1926), 42 T.L.R. 376 (K.B.); aff'd (1926), 42 T.L.R. 593 (C.A.); *Torquay Hotel Co. Ltd. v. Cousins*, [1969] 2 Ch. 106 at 138-139 (C.A.), per Lord Denning M.R.; and *Stocznia Gdanska SA v. Latvian Shipping Co.*, [2002] 2 Lloyd's Rep. 436, ¶130 (C.A.). In *Unique Pub Properties Ltd. v. Beer Barrels & Minerals (Wales) Ltd.*, [2004] EWCA Civ 586 ¶27-28, the Court, building upon *D.C. Thomson*, suggested that a defendant could induce a breach of contract where it simply had dealings with a third party that it knew were inconsistent with the contract.

140 The Court held that indirect interference would be actionable where the defendant engaged in an unlawful act, which prevented the counterparty from performing the contract with the plaintiff (or where the defendant induced a third party to itself commit an unlawful act, that prevented the counterparty from performing the contract with the plaintiff). This requirement was rationalized in part on the theory (suggested by the *dicta* in *Quinn*) that a direct inducement of breach of contract was itself a "wrongful" act, such that a similar wrongful (and hence unlawful) act was required in the absence of direct inducement. See *D.C. Thomson*, *supra* note 139, at 675-676, 678, 681-682, 693–696 and 720. See also the interesting discussion of *D.C. Thomson* in *Middlebrook Mushrooms Ltd. v. Transport and General Workers' Union*, [1993] I.C.R. 612 at 623–626 (C.A.), per Hoffmann L.J.

141 See: *Bennett & White Alberta Ltd. v. Van Reeder* (1956), 6 D.L.R. (2d) 326 at 333-334 (Alta. C.A.); *Dirassar v. National Trust Co.* (1966), 59 D.L.R. (2d) 452 at 501–503 and 506-507 (B.C.C.A.), per Branca J.A., aff'd (1967), 64 D.L.R. (2d) 456 (S.C.C.); *Winnipeg School Division No. 1 v. Winnipeg Teachers' Assn. No. 1*, [1976] 2 S.C.R. 695 at 710, per Laskin C.J. (dissenting on other grounds); *Potash Corp. of Saskatchewan Mining Ltd. v. Todd*, [1987] 2 W.W.R. 481 at 488 (Sask. C.A.), per Cameron J.A. (concurring); *Sherritt Gordon Mines Ltd. v. Garry* (1987), 45 D.L.R. (4th) 22 at 31–36 and 54-55 (Sask. C.A.); *College of Dental Surgeons of Saskatchewan v. Thorvaldson* (1991), 82 D.L.R. (4th) 537 at 546-547 (Sask. C.A.); *Noel & Lewis Holdings Ltd. (Trustee of) v. Bank of Montreal* (1991), 85 D.L.R. (4th) 514 at 530-531 (B.C.C.A.); leave to appeal to S.C.C. refused [1992] S.C.C.A. No. 41; *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.* (1998), 167 D.L.R. (4th) 220, ¶37 (Sask. C.A.); aff'd [2002] 1 S.C.R. 156; *Tardif v. McGrath* (2002), 635 A.P.R. 362, ¶55 (N.S.C.A.); leave to appeal to S.C.C. refused [2002] S.C.C.A. No. 261; and *Duke v. Puts*, [2004] 6 W.W.R. 208, ¶69-70 (Sask. C.A.). The Supreme Court of Canada has also recognized the tort of *directly* inducing breach of contract on a number of occasions, including: *Newell v. Barker*, [1950] S.C.R. 385 at 393-394; *Canadian Pacific Railway Co. v. Zambri*, [1962] S.C.R. 609 at 616 and 624; *Fabbi v. Jones*, [1973] S.C.R. 42 at 52; *Roman Corp. v. Hudson's Bay Oil and Gas Co.*, [1973] S.C.R. 820 at 829; *H.L. Weiss Forwarding Ltd. v. Omnus*, [1976] 1 S.C.R. 776 at 777-778; *Winnipeg School Division No. 1 v. Winnipeg Teachers' Assn. No. 1*, [1976] 2 S.C.R. 695 at 710, per Laskin C.J. (dissenting on other grounds); *R.W.D.S.U., Local 580 v.*

Second, in *Rookes v. Barnard*,[142] the House of Lords revisited the 1892–1901 Trilogy, and recognized the existence of a tort of intimidation.[143] It was held to lie where economic loss was caused by the mere threat of unlawful means,[144] and could be asserted by the plaintiff as either the person directly threatened, or as a third party who the defendant sought to injure by virtue of the threat.[145] Thus, unlawful means (or at least the threat of such unlawful means) became an element of a fourth tort. As with the tort of indirectly inducing breach of contract, this tort was also recognized in Canada.[146]

Third, the Supreme Court of Canada, in line with the English courts,[147] recognized a discrete tort of unlawful interference with economic interests, even in circumstances which did not result in a breach of the plaintiff's contract, based on the

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Dolphin Delivery, [1986] 2 S.C.R. 573 at 588–590; *Frame v. Smith*, [1987] 2 S.C.R. 99 at 129, per Wilson J. (dissenting on other grounds); and *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156, ¶63, 73, 77, 103 and 116.

142 [1964] A.C. 1129 (H.L.) [*Rookes*].

143 *Ibid.* at 1167, 1182–1185, 1198, 1205-1206 and 1233. The precise lineage of the tort was unclear. Some of the Law Lords in *Rookes* viewed it as having been established in *Garret* and *Tarleton* (at 1198, per Lord Hodson), others viewed it a species of the innominate cause of action in *Allen* (at 1167, per Lord Reid), and still others viewed it as a "relatively modern judicial creation" (at 1185, per Lord Evershed). Assuming that this tort survives the ruling in *OBG*, *supra* note 15, it must now contend with the emerging theory of liability for economic duress (and, where the threatened unlawful means involves a breach of contract in a two-party situation, with the concept of anticipatory breach): see Simon Deakin *et al*, *Markesinis and Deakin's Tort Law*, 6th ed. (Oxford: Clarendon Press, 2008) at 595 (although *cf. Kingstreet Investments Ltd. v. New Brunswick (Finance)*, [2007] 1 S.C.R. 3 ¶54, where the Court appeared to treat liability for duress under the rubric of intimidation).

144 *Ibid.* at 1167, 1182-1183 and 1207. The threat in *Rookes* was that the defendant union officials and unionized employees would initiate a strike, in violation of their employment contracts with the plaintiff's employer, unless the employer dismissed the plaintiff. Similar to the recognition of lawful means conspiracy in *Quinn*, the recognition of intimidation in *Rookes* soon led to the enactment of legislation in England (but not in Canada) to preclude the tort from operating in this type of trade union context: see I.M. Christie, *The Liability of Strikers in the Law of Tort: A Comparative Study of the Law in England and Canada* (Kingston, Ont.: Queen's University, Industrial Relations Centre, 1967) at 179–181.

145 *Ibid.* at 1183 and 1205-1206.

146 See: *Roman Corp. v. Hudson's Bay Oil and Gas Co.*, [1973] S.C.R. 820 at 829-830; *Central Canada Potash Co. v. Saskatchewan*, [1979] 1 S.C.R. 42 at 81–91; and *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156, ¶63, 73, 77, 103 and 116. Interestingly, intimidation may also be a criminal offence pursuant to s. 423(1) of the *Criminal Code* (depending upon the nature of the unlawful means which are threatened).

147 See, *e.g.*: *J.T. Stratford & Son Ltd. v. Lindley*, [1965] A.C. 269 at 324 and 328-329 (H.L.); *Hadmor Productions v. Hamilton*, [1983] 1 A.C. 191 at 202-203 and 228-229 (H.L.); and *Merkur Island Shipping Co. v. Laughton*, [1983] 2 A.C. 570 at 609-610 (H.L.).

innominate tort from *Allen*. The clearest instance of this occurring was in *I.B.T., Local 213 v. Therien*.[148] It involved threats of picketing made by a trade union, in breach of a grievance procedure mandated by both statute and a collective agreement, to a company that employed the plaintiff as an independent contractor. The Supreme Court in *Therien* held that "to ascertain whether the means employed were illegal[,] inquiry may be made both at common law and of the statute law."[149] Thus, the Court took the view that the unlawful means element of the unlawful interference tort could be satisfied by either violations of common law or statutory duties.

Fourth, the ruling in *Therien* was applied by the Supreme Court of Canada, in the context of a conspiracy claim, in *Gagnon v. Foundation Maritime Ltd.*[150] The

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148 [1960] S.C.R. 265 at 267, 278–81 and 284 [*Therien*]. To some extent, the claim in this case could also be viewed as one for intimidation (insofar as intimidation is even a distinct tort from unlawful interference), although the threats in *Therien* appeared to themselves amount to breaches of the statute and the collective agreement, and not simply to proposals of such breaches in the future (thus rendering the plaintiff's claim more properly one for unlawful interference than intimidation). However, it is clear that no claim for conspiracy was alleged in *Therien*: see *I.B.T., Local 213 v. Therien* (1958), 16 D.L.R. (2d) 646 at 658 and 678 (B.C.C.A.); aff'd [1960] S.C.R. 265; and I.M. Christie, *The Liability of Strikers in the Law of Tort: A Comparative Study of the Law in England and Canada* (Kingston, Ont.: Queen's University, Industrial Relations Centre, 1967) at 172. At 280 of *Therien*, Locke J., referring to the 1892–1901 Trilogy, accepted that "even though the dominating motive in a certain course of action may be the furtherance of your own business or your own interests, *you are not entitled to interfere with another man's method of gaining his living by illegal means*". [emphasis added] For earlier cases in which the Supreme Court of Canada appeared to contemplate the existence of the unlawful interference tort, but without clearly endorsing it, see: *Perrault v. Gauthier* (1897), 28 S.C.R. 241 at 254–257, per Girouard J. (a civil case that predated *Quinn*, where the majority did not pronounce upon the issue); *McGillivray v. Kimber* (1915), 52 S.C.R. 146, per Duff J. (a case which may be equally explained as an early instance of abuse of public office); *United Mine Workers of America, Local No. 1562 v. Williams* (1919), 59 S.C.R. 240 at 254-255 and 261 (which may also have been decided on the ground of conspiracy); and *Orchard v. Tunney*, [1957] S.C.R. 436 at 454–456, per Locke J. (concurring in the result). For cases decided subsequent to *Therien* in which the Supreme Court recognized the tort, see: *Canadian Ironworkers Union No. 1 v. International Assn. of Bridge, Structural & Ornamental Ironworkers Union, Local 97*, [1972] S.C.R. 295 at 300–302; *Roman Corp. v. Hudson's Bay Oil & Gas Co.*, [1973] S.C.R. 820 at 822 and 831 and *Western Construction and Lumber Co. Ltd. v. Jorgensen*, [1974] S.C.R. 826 at 829. The treatment of the tort in Canada prior to *Therien* is also discussed in I.M. Christie, *The Liability of Strikers in the Law of Tort: A Comparative Study of the Law in England and Canada* (Kingston, Ont.: Queen's University, Industrial Relations Centre, 1967) at 167-168.

149 *Ibid.* at 280.

150 [1961] S.C.R. 435 at 446 [*Gagnon*]. Upon citing *Therien*, the majority stated that "when inquiry is 'made of the statute law' in the present case it discloses . . . that the means here employed by the appellants were prohibited, and this of itself supplies the ingredient necessary to change a lawful agreement which would not give rise to a cause of action into a tortious conspiracy".

majority had no difficulty in relying upon the definition of unlawful means articulated in *Therien*, despite the fact that the claim in *Gagnon* was for conspiracy rather than for unlawful interference with economic interests.[151] Accordingly, in Canada, the boundaries between the economic torts with respect to the unlawful means element began to collapse.[152] The situation was not entirely identical in England, since the House of Lords left open the question of whether a distinction existed between the economic torts in regard to the element of unlawful means.[153]

Fifth, in *Torquay Hotel Co. Ltd. v. Cousins*,[154] the English Court of Appeal again extended the tort of inducing breach of contract, this time to situations where the defendant's conduct did not result in an actual breach of the plaintiff's contract, but only prevented or interfered with the contract's performance (*e.g.*, where the counterparty's non-performance was excused via a *force majeure* clause).[155] Once again, this development was largely accepted in Canada[156] (although some courts

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151 The majority reached its decision despite a vigorous dissenting judgment from Judson J. He opined that unlawful means in the context of conspiracy was limited to nominate crimes and torts (460–463), and that *Therien* should not be applied since it involved the cause of action in *Allen*, instead of a claim for conspiracy (461-462). See also *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 at 470.

152 See, e.g., I.M. Christie, *The Liability of Strikers in the Law of Tort: A Comparative Study of the Law in England and Canada* (Kingston, Ont.: Queen's University, Industrial Relations Centre, 1967) at 170, writing around this time that "[t]here is no reason to think that the element of wrongfulness required is any different in the action for illegal interference than it is in conspiracy".

153 See *Rookes*, *supra* note 142, at 1209-1210, per Lord Devlin (unlawful means in intimidation not necessarily the same as in unlawful means conspiracy). See, however, *Surzur Overseas Ltd. v. Koros*, [1999] 2 Lloyd's Rep. 611 at 617 (C.A.), questioning whether there should be any variance between the treatment of unlawful means in different economic torts.

154 [1969] 2 Ch. 106 (C.A.) [*Torquay Hotel*].

155 *Ibid.* at 137-138 and 147. This matter was previously left open by Lord Reid in *J.T. Stratford & Son Ltd. v. Lindley*, [1965] A.C. 269 at 324 (H.L.). Notably, however, it was held in *R.C.A. Corp. v. Pollard*, [1983] Ch. 135 at 156 (C.A.), per Slade L.J., that the tort does not create liability where the defendant does not interfere in the performance of the plaintiff's contract, but merely renders the plaintiff's contractual rights less valuable. This proposition was accepted in *National Hockey League v. L.A. Kings Ltd. (c.o.b. "Los Angeles Kings")* (1995), 122 D.L.R. (4th) 412, ¶19 (B.C.C.A.). See, however, *Gershman v. Manitoba (Vegetable Producers' Marketing Board)* (1976), 69 D.L.R. (3d) 114 at 118 (Man. C.A.), where the tort was applied to a situation where the defendant's conduct precluded the plaintiff from extending his existing contractual rights.

156 See: *Mark Fishing Co. v. United Fisherman & Allied Workers' Union* (1972), 24 D.L.R. (3d) 585 at 608 and 619-620 (B.C.C.A.); aff'd [1973] 3 W.W.R. 13 (S.C.C.); *Edinburgh Developments Ltd. v. Vanderlaan* (1974), 43 D.L.R. (3d) 354 at 365 (Alta. C.A.), per Clement J.A., leave to appeal to S.C.C. refused, [1976] 1 S.C.R. 294; *McKenzie v. Peel County Board of Education* (1974), 5 O.R. (2d) 549 at 562 (C.A.); *Western Stevedoring Co. v. Pulp Paper & Woodworkers of Canada* (1975), 61 D.L.R. (3d) 701 at 708-709 (B.C.C.A.); *Sherritt Gordon Mines Ltd. v. Garry* (1987), 45

declined to adopt the proposition).[157] In *Merkur Island Shipping Co. v. Laughton*,[158] the House of Lords characterized this cause of action (together with the separate wrong of "indirectly" inducing breach of contract) as the tort of "interference with contractual rights," and distinguished it from the tort of interference with economic interests (or "trade or business").[159] Lord Diplock viewed the latter tort as a "genus" tort, which was broader than inducing breach of contract and interference with contractual rights (these being mere "species" of the genus tort).[160]

Sixth, in *Central Canada Potash Co. v. Saskatchewan*,[161] the Supreme Court of Canada developed the distinction (first introduced in *Rookes*), between "three-party" intimidation (where the defendant threatened a third party with unlawful means, to the economic detriment of the plaintiff) and "two-party" intimidation

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D.L.R. (4th) 22 at 30-31 (Sask. C.A.), per Bayda C.J.S.; *Stevenson, Doell & Co. v. Yorath* (1987), 18 B.C.L.R. (2d) 354 at 560 (C.A.); *College of Dental Surgeons of Saskatchewan v. Thorvaldson* (1991), 82 D.L.R. (4th) 537 at 545 (Sask. C.A.); and *Ed Miller Sales and Rentals Ltd. v. Caterpillar Tractor Co.*, [1996] 9 W.W.R. 449 at 457 (Alta. C.A.); leave to appeal to S.C.C. refused [1996] S.C.C.A. No. 511.

157 See: *Mintuck v. Valley River Band No. 63A* (1977), 75 D.L.R. (3d) 589 at 604-605 (Man. C.A.), per O'Sullivan J.A.; and *Merchants Consolidated Ltd. (Receiver and Manager of) v. Ince Holdings Ltd. (c.o.b. Boyd Distributors)* (1994), 113 D.L.R. (4th) 505 at 510 (Man. C.A.). See further *Roman Corp. v. Hudson's Bay Oil and Gas Co.*, [1973] S.C.R. 820 at 829, where the Court (without referring to *Torquay Hotel*) seemed to suggest that conduct which prevented the performance, as opposed to causing the breach, of a contract, did not engage the tort of inducing breach of contract. More recently, as discussed further below, while the existence of such a tort of was left open in *Drouillard*, *supra* note 17, ¶34, it appears to have been subsequently rejected in *Correia*, *supra* note 19, ¶93–99, and more definitively in *Alleslev-Krofchak*, *supra* note 21, ¶92–98. The tort would also seem to be inconsistent with *Allen*, at least insofar as the interference does not involve unlawful means: see W.V.H. Rogers, *Winfield & Jolowicz on Tort*, 17th ed. (London: Sweet & Maxwell, 2006) at 795. Moreover, consistent with *Allen*, Canadian courts have clearly rejected the somewhat analogous proposition (advanced in *Temperton*, and dismissed in *Allen*) that the tort of inducing breach of contract extends to *future* contracts that are not yet concluded: see, *e.g. JWJ Developments Ltd. v. Chase (Village)*, [1989] 2 W.W.R. 626 at 630-631 (B.C.C.A.); and *O'Dwyer*, *supra* note 18, ¶54-55. An interference with the plaintiff's interest in a future contract should instead be considered under the rubric of unlawful interference with economic interests (or intimidation): see *Gershman v. Manitoba (Vegetable Producers' Marketing Board)* (1976), 69 D.L.R. (3d) 114 at 117–120 (Man. C.A.) (and *cf. Seneca College v. Bhadauria*, [1981] 2 S.C.R. 181 at 190).

158 [1983] 2 A.C. 570 (H.L.) [*Merkur*].

159 *Ibid.* at 606–610. As indicated earlier, the terminology of "interference with contractual relations" appears to have been first proposed by Lord Macnaghten in *Quinn*, *supra* note 34, at 510. See also *GWK Ltd. v. Dunlop Rubber Co. Ltd.* (1926), 42 T.L.R. 376 (K.B.) aff'd (1926), 42 T.L.R. 593.

160 *Ibid.* This view has been supported by some commentators: see, e.g., Tony Weir, *Economic Torts* (Oxford: Clarendon Press, 1997) at 28.

161 [1979] 1 S.C.R. 42 [*Central Canada Potash*].

(where the defendant threatened the plaintiff itself with unlawful means).[162] The Court found that the distinction had a material bearing upon the unlawful means element, and precluded breach of contract from serving as the threatened unlawful means in a case of two-party (as opposed to three-party) intimidation.[163] This distinction came to be applied in determining the ambit of other economic torts.[164]

Seventh, parallel but inconsistent developments emerged in Canada and the United Kingdom in relation to the unlawful means element of tortious conspiracy. First, the House of Lords, in *Lonrho Ltd v. Shell Petroleum Co. Ltd.*[165] — often labelled "*Lonrho 1*," in order to distinguish it from a later decision of the same court — fundamentally (albeit temporarily) emasculated the tort of unlawful means conspiracy. In *Lonrho 1*, the Law Lords ruled that, in the absence of a predominant purpose to injure the plaintiff, tortious conspiracy could not be made out based on conduct that was in breach of criminal law, unless such conduct would also have been independently civilly actionable at the suit of the plaintiff had it been committed by one party alone.[166] Very shortly thereafter, the Supreme Court of Canada issued its own seminal conspiracy ruling, *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*,[167] which steered Canadian law on a markedly different course.[168] In *Canada Cement LaFarge*, the Court ruled that tortious conspiracy could be made out in cases where the defendants utilized unlawful means (which, in *Canada Cement LaFarge*, took the form of non-actionable breaches of statute) in an effort to achieve a predominant purpose other than injuring the plaintiff, provided that the unlawful conduct in question was "directed" towards the plaintiff and that injury to the plaintiff was foreseeable as a result.[169] The

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162 *Rookes*, *supra* note 142, at 1183 and 1205-1206. See also: *J.T. Stratford & Son Ltd. v. Lindley*, [1965] A.C. 269 at 325 (H.L.), per Lord Reid; and *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156, ¶113.

163 *Central Canada Potash*, *supra* note 161, at 86–88.

164 See, e.g., *Mintuck v. Valley River Band No. 63A* (1977), 75 D.L.R. (3d) 589 at 605-606 (Man. C.A.), per O'Sullivan J.A.

165 [1982] A.C. 173 (H.L.) [*Lonrho 1*].

166 *Ibid.* at 189. In *Metall und Rohstoff A.G. v. Donaldson Lufkin & Jenrette Inc.*, [1990] 1 Q.B. 391 at 459–467 (C.A.), it was held that *Lonrho 1* eliminated the tort of unlawful means conspiracy entirely (even where the unlawful means involved tortious conduct that was independently actionable by the plaintiff).

167 [1983] 1 S.C.R. 452 [*Canada Cement LaFarge*].

168 At a minimum, it is clear that the Supreme Court in *Canada Cement LaFarge* declined to follow *Lonrho 1* to the extent that *Lonrho 1* could itself be characterized as having rejected the existence of unlawful means conspiracy as a separate branch of the conspiracy tort.

169 *Canada Cement LaFarge*, *supra* note 167, at 468 and 471-472. The unlawful means at the heart of *Canada Cement LaFarge* involved a market-sharing agreement in violation of the federal *Combines Investigation Act*, R.S.C. 1970, c. C-23. The requirement in *Canada Cement LaFarge* that the conduct be "directed" at the plaintiff appeared to relate to the intentionality element of the tort, not the unlawful means element of the tort, and therefore did not limit unlawful means conspiracy to the two-party context (as evidenced by the Court's statement, at 471, that the unlawful means could be "directed towards the plaintiff (*alone or together with others*)" [emphasis added]). Indeed, the

Supreme Court's position was reiterated and reinforced (albeit on a pleadings motion) in *Hunt v. Carey Canada Inc.*[170] As a post script, it is notable that, a decade after issuing *Lonrho 1*, the House of Lords itself reversed course in *Lonrho Plc v. Fayed*[171] (invariably labelled "*Lonrho 2*" in the subsequent jurisprudence). In *Lonrho 2*, the Law Lords effectively retreated from the position they appeared to have taken in *Lonrho 1*, and held that a claim for unlawful means conspiracy could be brought (in circumstances where the defendants' predominant purpose was the protection of its own legitimate interests through the unlawful means, with a subsidiary intent being the infliction of injury to the plaintiff).[172] Accordingly, despite a ten-year interval in which the economic tort jurisprudence of Canada and England diverged, the existence of unlawful means conspiracy as a discrete branch of the tort was confirmed in both countries.[173]

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unlawful means alleged in *Canada Cement LaFarge* (which the Court accepted were "unlawful" for purposes of the tort) were committed as against the public at large. The sense in which the Court understood the term "directed" (i.e., as requiring that the unlawful conduct be "directed. . .towards causing injury" to the plaintiff, rather than as requiring that the unlawful conduct be "unlawful" because of its victimization, in the first instance, of the plaintiff) is illustrated by the following comments of Estey J., at 472:

> *There is no doubt, however, that the conduct of the appellants, although not directed towards the plaintiff, was unlawful. . .*The unlawfulness or illegality accompanying the alleged tortious conduct is said to be the breach of the conspiracy section, s. 32(1)(c), of the Combines Investigation Act. That conspiracy of course was *not directed towards the respondent* as a supplier to the conspirators, *but to the public* who were purchasers of the products of the conspirators. It may also be argued, as indeed it was, that some of the fictitious tenders submitted by the appellants on construction projects requiring concrete in British Columbia fell into *the category of unlawful activities directed towards the respondent.* Again, heinous as the conduct of the appellant was, it cannot be said in fact or in law that those tenders were *directed in any way towards causing injury* to the respondent. [emphasis added]

170 [1990] 2 S.C.R. 959 at 984–986 [*Hunt*]. For other cases in which the Supreme Court has recognized the tort of unlawful means conspiracy, see: *Gagnon, supra* note 150, at 439; and *Frame v. Smith*, [1987] 2 S.C.R. 99 at 123, per Wilson J.

171 [1992] 1 A.C. 448 (H.L.) [*Lonrho 2*].

172 *Ibid.* at 463–469. In *Lonrho 2*, the unlawful means assumed the form of fraudulent statements made to a third party.

173 See the description of the English position in *Kuwait Oil Tanker Co. SAK v. Al Bader*, [2000] 2 All E.R. (Comm) 271, ¶16–108 (C.A.). However, the English and Canadian approaches to unlawful means conspiracy are still not completely *ad idem*, since Canadian law requires only a constructive intent to injure (*Canada Cement LaFarge, supra* note 167, at 471-472), whereas English law appears to require an actual (but not predominant) intent to injure (*Lonrho 2, supra* note 171, at 455-456). See also the discussion of this issue in footnotes 555 and 556, and the text accompanying them, below. In addition to lawful means conspiracy (where the defendants' predominant purpose is to injure the plaintiff, but through the use of lawful means) and unlawful means conspiracy (where the defendants' predominant purpose is not to injure the plaintiff, but they

Finally, building upon earlier decisions, the courts began to develop certain defences to the economic torts. One such defence was the doctrine of "merger". This doctrine precluded an allegation of unlawful means conspiracy where the ability to demonstrate the "unlawfulness" of the unlawful means was necessarily dependent upon establishing the actionability of that conduct, under a separate head of liability, for which the plaintiff had also brought a parallel claim against the defendants (provided that such conduct was not merely criminal,[174] and was committed by all of the conspirators).[175] The doctrine was based on the theory that, in such cases, the conspiracy allegation would "merge" with the independent head of liability if the latter were successful, owing to the superfluity of the parasitic conspiracy claim.[176] However, the defence of merger was accepted with trepidation by some courts,[177] and was rejected by the English Court of Appeal[178] (although sub-

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employ unlawful means directed towards the plaintiff where the likelihood of injury to the plaintiff is foreseeable), the Court in *Hunt*, *supra* note 170, at 985-986, also suggested the existence of a third branch of conspiracy. This branch will arise where the defendants' conduct satisfies the essential elements for *both* lawful and unlawful means conspiracy (i.e., the defendants combine with the predominant purpose of injuring the plaintiff, and employ unlawful means directed towards the plaintiff to this end). However, this third branch of conspiracy does not extend liability to any situation that is not already encompassed by the lawful and unlawful means branches of conspiracy. Further, it is included within the formulation of the lawful means branch of conspiracy provided in *Canada Cement LaFarge*, *supra* note 167, at 471-472 ("whether the means used by the defendants are *lawful or unlawful*, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff"). See also *HM Revenue & Customs v. Begum*, [2010] EWHC 1799, ¶44 (Ch. D.) (accepting that the first, "predominant purpose" branch of conspiracy, can include either lawful or unlawful means). The third form of conspiracy proposed by the Court in *Hunt* is therefore largely superfluous.

174 *Smith v. National Money Mart Co.* (2006), 80 O.R. (3d) 81, ¶20 (C.A.); leave to appeal to S.C.C. refused [2006] S.C.C.A. No. 267.

175 If the unlawful conduct was only committed by one of the conspirators, the doctrine of merger would not apply: *Andersen Consulting Ltd. v. Canada (A.G.)* (2001), 150 O.A.C. 177, ¶29, n1 (C.A.).

176 See: *Fuller v. Stoltze*, [1939] S.C.R. 235 at 241; *Ward v. Lewis*, [1955] 1 W.L.R. 9 at 11 (C.A.), per Lord Denning; *Gagnon v. Foundation Maritime Ltd.*, [1961] S.C.R. 435 at 463, per Judson J. (dissenting in the result); *Metall und Rohstoff A.G. v. Donaldson Lufkin & Jenrette Inc.*, [1990] 1 Q.B. 391 at 454 (C.A.); *Amirault v. Westminer Canada Holdings Ltd.* (1994), 355 A.P.R. 241, ¶113 (N.S.C.A.); leave to appeal to S.C.C. refused [1994] S.C.C.A. No. 117; and *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97 at 105-106 (C.A.). The defence of merger appears to have been first contemplated in *Sorrell v. Smith*, [1925] A.C. 700 at 716-717 (H.L.), per Lord Dunedin.

177 See, e.g., *Anderson Consulting Ltd. v. Canada (A.G.)* (2001), 150 O.A.C. 177, ¶29–32 (C.A.).

178 *Kuwait Oil Tanker Co. SAK v. Al Bader*, [2000] 2 All E.R. (Comm) 271, ¶119 and 122–132 (C.A.). See also *Cornwall Gardens PTE Limited v. R O Garrard & Co Ltd.*, 2001 WL 542210, ¶72 (Eng. C.A.).

sequently left open by the House of Lords).[179] Its existence in Canada remains uncertain (although the better view is that it does exist).[180]

Another important defence was the doctrine of "justification". In the context of conspiracy, the justification defence was associated with the principle in *Mogul* that there could be no lawful means conspiracy where the defendant's predominant purpose was to protect its own legitimate interests.[181] In the context of inducing breach of contract, it was generally applied where the defendant was acting under an equal or superior legal right, or a duty to intervene.[182] It was also suggested that

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179 See *Total Network*, *supra* note 16, ¶94, per Lord Walker. This decision is discussed in detail below.

180 For a case which suggested that merger does not exist in Canada, see *Horn Abbot Ltd. v. Reeves* (2000), 189 D.L.R. (4th) 644, ¶18-19 (N.S.C.A.). This was on the basis of *Hunt*, *supra* note 170, at 991-992, a case in which the Supreme Court of Canada refused to strike out a conspiracy claim based on merger. Significantly, however, the Court in *Hunt* noted that it was "arguable" that the doctrine of merger existed; it therefore did not reject the doctrine, but simply declined to apply it in the pleadings context. Additionally, as discussed at footnote 517-520, and the accompanying text, below, there are several recent Canadian appellate cases in which the doctrine has been recognized or applied (even at the pleadings stage).

181 See: *Newell v. Barker*, [1950] S.C.R. 385 at 397, per Rand J.; and *Sherritt Gordon Mines Ltd. v. Garry* (1987), 45 D.L.R. (4th) 22 at 58 (Sask. C.A.), per Cameron J.A. See also *Total Network*, *supra* note 16, ¶229, per Lord Neuberger. Conversely, there is no defence of "predominant legitimate motive" in relation to unlawful means conspiracy: *Canada Cement LaFarge*, *supra* note 167, at 469.

182 See: *Posluns v. Toronto Stock Exchange*, [1966] 1 O.R. 285 at 300 (C.A.); aff'd [1968] S.C.R. 330; *Roman Corp. v. Hudson's Bay Oil and Gas Co.*, [1973] S.C.R. 820 at 829; *Winnipeg School Division No. 1 v. Winnipeg Teachers' Assn. No. 1*, [1976] 2 S.C.R. 695 at 710-711, per Laskin C.J. (dissenting on other grounds); *Thermo King Corp. v. Provincial Bank of Canada* (1982), 34 O.R. (2d) 369 at 383-384 (C.A.); leave to appeal to S.C.C. refused [1982] S.C.C.A. No. 251; *Pacific Western Airlines Ltd. v. B.C. Federation of Labour* (1986), 26 D.L.R. (4th) 87 at 91-92 (B.C.C.A.); *Sherritt Gordon Mines Ltd. v. Garry* (1987), 45 D.L.R. (4th) 22 at 55 and 58-59 (Sask. C.A.), per Cameron J.A.; *Banco Do Brasil S.A. v. Alexandros G. Tsavliris*, [1992] 3 F.C. 735 at 756–757 (C.A.); *Royal Bank of Canada v. Wilton* (1995), 123 D.L.R. (4th) 266 at 273-274 (Alta. C.A.); leave to appeal to S.C.C. refused [1995] S.C.C.A. No. 145; *Parks Mall West Ltd. v. Jennett*, [1996] 4 W.W.R. 87 at 93 (Alta. C.A.); leave to appeal to S.C.C. refused [1996] S.C.C.A. No. 200; *369413 Alberta Ltd. v. Pocklington* (2000), 194 D.L.R. (4th) 109, ¶57–69 (Alta. C.A.); and *Walsh v. Nicholls* (2004), 241 D.L.R. (4th) 643, ¶65 (N.B.C.A.). For more recent cases, see: *Drouillard*, *supra* note 17, ¶39-40; *Delphinium Ltée v. 512842 N.B. Inc.* (2008), 296 D.L.R. (4th) 694, ¶40–43 (N.B.C.A.); *Brae Centre Ltd. v. 1044807 Alberta Ltd.* (2008), 302 D.L.R. (4th) 252, ¶33–38 (Alta. C.A.); and *SAR Petroleum Inc. v. Peace Hills Trust Co.* (2010), 318 D.L.R. (4th) 70, ¶70–78 (N.B.C.A.). The defence of justification appears to have been first contemplated, in relation to inducing breach of contract, in *Quinn*, *supra* note 34, at 510, per Lord Macnaghten. Extensive discussions of the defence can be found in: *Edwin Hill & Partners v. First National Finance Corp.*, [1989] 1 W.L.R. 225 at 229–235 (C.A.); *ZHU v. Treasurer of the State of New South Wales* (2004), 218 C.L.R. 530, ¶105–174 (H.C.A.); and *Even v. El Al Israel Airlines Ltd.* (2006), 15 B.L.R. (4th) 265, ¶78–116 (Ont. S.C.J.).

the justification defence may have application with respect to unlawful interference with economic interests,[183] and intimidation,[184] although these questions were not settled.

Throughout this period, the types of conduct that were viewed as amounting to unlawful means for the purposes of the various economic torts were expanding. In addition to the crimes and intentional torts that were focused upon by the majority of judges in the 1892–1901 Trilogy, the courts began to affirm earlier indications that breaches of contract,[185] and breaches of non-criminal statutes,[186] could suffice. This broadening trend culminated in *Torquay Hotel*, where Lord Denning suggested that unlawful means could include any act which the defendant was "not at liberty to commit."[187] In the wake of Lord Denning's comments, courts throughout the Commonwealth began to diverge over the breadth of the unlawful means element. This division, and the Canadian reaction to it, form the subject of the discussion below.[188]

III. THE CANADIAN APPROACH TO UNLAWFUL MEANS PRIOR TO 2007

1. Unlawful Means Conspiracy

(a) Overview of the tort

The accepted rationale for the tort of conspiracy is that a combination may make oppressive or dangerous that which would not be so were it effected by a

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183 See: *Gershman v. Manitoba (Vegetable Producers' Marketing Board)* (1976), 69 D.L.R. (3d) 114 at 122–124 (Man. C.A.); *Spicer v. Volkswagen Canada Ltd.* (1978), 91 D.L.R. (3d) 42 at 62 (N.S.C.A.); *Daishowa Inc. v. Friends of the Lubicon* (1996), 27 O.R. (3d) 215 at 236-237 (Div. Ct.); leave to appeal to Ont. C.A. refused [1996] O.J. No. 1442 (C.A.); leave to appeal to S.C.C. refused [1996] S.C.C.A. No. 528; *No. 1 Collision Repair & Painting (1982) Ltd. v. Insurance Corp. of British Columbia* (2000), 80 B.C.L.R. (3d) 62, ¶118 and 186–191 (C.A.); leave to appeal to S.C.C. refused [2000] S.C.C.A. No. 488; and *Duke v. Putts*, [2004] 6 W.W.R. 208, ¶83 (Sask. C.A.).

184 See: *Roman Corp. v. Hudson's Bay Oil and Gas Co.*, [1973] S.C.R. 820 at 829-830; and *Banco Do Brasil S.A. v. Alexandros G. Tsavliris*, [1992] 3 F.C. 735 at 754 (C.A.).

185 See *Rookes*, *supra* note 142, at 1167–1169, 1185–1188, 1198–1201, 1206–1210 and 1233–1235.

186 See *Daily Mirror Newspapers Ltd. v. Garnder*, [1968] 2 Q.B. 762 at 782-783 and 787 (C.A.).

187 *Torquay Hotel*, *supra* note 154, at 139.

188 The later evolution of the unlawful means element in England is traced, in detail, by Anthony M. Dugdale *et al*, eds., *Clerk & Lindsell on Torts*, 19th ed. (London: Sweet & Maxwell, 2006), Ch. 25.

single person.[189] However, courts have long recognized the anomalous nature of the tort, and the frequent calls for its abolition.[190] In view of the foregoing, the Supreme Court has emphasized that conspiracy should be given a restricted application[191] (albeit without foreclosing the possibility that it can be extended to new, non-economic contexts).[192] It is therefore largely limited to commercial disputes,[193] and has been said to require careful definition.[194]

Such definition was provided by the Supreme Court in *Canada Cement LaFarge*, where it cast the elements of the tort as follows:

> . . . the law of torts does recognize a claim against [persons] in combination as the tort of conspiracy if:
>
> > (1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,
> >
> > (2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.
>
> In situation (2) it is not necessary that the pre-dominant purpose of the defendants' conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue. In

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189 *Frame v. Smith*, [1987] 2 S.C.R. 99 at 124-125, per Wilson J. (dissenting on other grounds).

190 See: *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch*, [1942] A.C. 435 at 443, 462, 467-468 and 487–489 (H.L.); *Lonrho Ltd v. Shell Petroleum Co. Ltd.*, [1982] A.C. 173 at 188-189 (H.L.); *Canada Cement LaFarge*, *supra* note 167, at 473; and *Frame v. Smith*, [1987] 2 S.C.R. 99 at 109 and 124-125. For a contrary view, see *Total Network*, *supra* note 16, ¶56 and 77. There, the Law Lords took up the principle, which had been suggested in earlier cases, that the "anomalous" nature of conspiracy could be justified by the fact that it was not merely a tort, but itself a *criminal* offence. However, as noted at footnote 45 above, the torts of lawful and unlawful means conspiracy are no longer criminal offences in Canada (in that s. 465 of the *Criminal Code* only prohibits a conspiracy to commit a criminal offence). Accordingly, the rationale behind the tort of conspiracy may have to be revisited.

191 *Canada Cement LaFarge*, *supra* note 167, at 473. See also *Frame v. Smith*, [1987] 2 S.C.R. 99 at 109 and 124-125. Note, however, that in *Lonrho 2*, *supra* note 171, at 464, Lord Bridge of Harwich suggested that the traditional criticisms of conspiracy had no application to unlawful means, as opposed to lawful means, conspiracy. See also *Kuwait Oil Tanker Co. SAK v. Al Bader*, [2000] 2 All E.R. (Comm) 271, ¶118 (C.A.).

192 *Hunt*, *supra* note 170, at 988-989. The Court in *Hunt* refused to strike out an allegation of conspiracy by a plaintiff who alleged that he had contracted mesothelioma as a result of the defendants' asbestos products.

193 *Frame v. Smith*, [1987] 2 S.C.R. 99 at 109 and 124-125.

194 See *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch*, [1942] A.C. 435 at 462 (H.L.), per Lord Wright. The tort is still often recognized as a "developing" one: *Lawrence v. Peel (Regional Municipality) Police Force* (2005), 250 D.L.R. (4th) 287, ¶8 (Ont. C.A.).

> both situations, however, there must be actual damage suffered by the plaintiff.[195]

It is the second branch of this definition that forms the modern basis of the tort of unlawful means conspiracy in Canada.

(b) The unlawful means element

Prior to 2007, the leading Canadian decision regarding the unlawful means element of conspiracy was *Gagnon*. It involved a case in which the defendant union officials organized a picket of the plaintiff in order to induce a strike by the plaintiff's employees. The strike caused injury to both the plaintiff's contractual relations with its employees, and its contractual relations with a government body for whom the plaintiff had agreed to perform certain work. It was determined, after a lengthy interpretive analysis, that this conduct was in violation of provincial labour legislation. However, the statute in question did not provide an express cause of action to the plaintiff for its breach. The majority of the Court, in finding the defendants liable for unlawful means conspiracy, relied upon the definition of "unlawful means" in *Therien* (i.e., "[t]o ascertain whether the means was illegal enquiry may be made both at common law and at statute law"). The Court held that "when inquiry is 'made of the statute law' in the present case", the statutory violation sufficed to ground a claim for unlawful means conspiracy.[196]

Accordingly, the Court in *Gagnon* held that unlawful means for the purposes of conspiracy could include conduct which was: (1) proscribed by statute (even if non-criminal), in addition to being forbidden at common law; (2) not independently actionable by the plaintiff; and (3) two-party, in the sense that it was directed at the plaintiff (rather than, as in *Lonrho 2*, three-party, in the sense that it was directed at a third party to the detriment of the plaintiff). These propositions were subsequently affirmed by the Supreme Court in both *Canada Cement LaFarge* (where a non-actionable breach of competition legislation, directed not at the plaintiff but at consumers generally, was held to constitute unlawful means),[197] and *Hunt* (where torts directed at and independently actionable by the plaintiff were accepted as unlawful means in the pleadings context).[198]

However, beyond these parameters (which were not themselves always ob-

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195 *Canada Cement LaFarge*, *supra* note 167, at 471-472. See also *Can-Dive Services Ltd. v. Pacific Coast Energy Corp.* (1993), 26 C.P.C. (3d) 395, ¶5 (B.C.C.A.); leave to appeal to S.C.C. refused [1993] S.C.C.A. No. 159. The distinction between lawful and unlawful means conspiracy set out in *Canada Cement LaFarge* bears a strong conceptual affinity to the distinction between the two forms of abuse of public office in *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, ¶23.

196 *Gagnon*, *supra* note 150, at 446.

197 *Canada Cement LaFarge*, *supra* note 167, at 472. Notably, at the time when it was breached, the competition legislation in *Canada Cement LaFarge* did yet provide a civil right of action for damages for the violation in question. It was therefore not actionable.

198 *Hunt*, *supra* note 170, at 964-965 and 992.

served), no clear approach to the unlawful means element of conspiracy had emerged prior to 2007. A handful of cases suggested that unlawful means, in this context, could include an act which, as described in *Torquay Hotel*, the defendant was "not at liberty to commit".[199] However, this approach was inconsistent with cases like *Mogul*, which held that entry into an agreement that is unenforceable at common law, on grounds of public policy or immorality, is not sufficiently "unlawful" to ground an action for unlawful means conspiracy (despite clearly involving conduct which the defendant is "not at liberty to commit").[200] In addition, other courts emphasized the restrictive approach to conspiracy that had been endorsed by the Supreme Court of Canada,[201] and suggested that unlawful means for the purposes of conspiracy must amount to conduct that is forbidden by law.[202] Some courts even suggested, contrary to *Gagnon* and *Canada Cement LaFarge*, that such unlawful means must amount to an actionable wrong[203] (although these cases divided over whether the wrong had to be actionable at the suit of the plaintiff,[204] or at the suit of a third party[205]). It was also seemingly held (contrary to *Canada Cement LaFarge* and *Lonrho 2*) that the conduct must be "unlawful" as against the plaintiff, instead of as against a third party.[206]

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199 See: *Reach M.D. Inc. v. Pharmaceutical Manufacturers' Assn. of Canada* (1999), 1 C.P.R. (4th) 533, ¶47 and 55-56 (Ont. S.C.J.); rev'd on other grounds (2003), 65 O.R. (3d) 30 (C.A.); and *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, [2007] 1 W.W.R. 541, ¶14–25 (B.C.S.C.). See also *Dresna Pty Ltd. v. Misu Nominees Pty Ltd.*, [2004] FCAFC 169, ¶16.

200 *Mogul*, *supra* note 33, at 39, 42, 46, 51 and 57-58.

201 *Surrey (District) v. Marall Homes Ltd.* (1988), 48 C.C.L.T. 70 at 77 and 79 (B.C.S.C.). See also *Firemaster Oilfield Services Ltd. v. Safety Boss (Canada) (1993) Ltd.*, [2001] 4 W.W.R. 256, ¶106 (Alta. Q.B.).

202 *Edmonton Regional Airports Authority (c.o.b. Edmonton Airports) v. North West Geomatics Ltd.*, [2003] 10 W.W.R. 268, ¶120-121 (Alta. Q.B.). For a curious case which adhered to this view, but stretched the concept of what was "forbidden by law", see *Shaw v. Lewis*, [1948] 2 D.L.R. 189 at 194 (B.C.C.A.), stating that unlawful means in the context of conspiracy meant "means forbidden by law . . . such as oppression, coercion or intimidation".

203 *Chahal v. Khalsa Community School* (2000), 2 C.C.E.L. (3d) 120, ¶114 (Ont. S.C.J.).

204 See: *Rogers v. Bank of Montreal*, [1985] 5 W.W.R. 193 at 229 (B.C.S.C.); aff'd [1987] 2 W.W.R. 364 (B.C.C.A.); leave to appeal to S.C.C. refused [1987] S.C.C.A. No. 143; and *Samos Investments Inc. v. Pattison* (2002), 5 B.C.L.R. (4th) 389, ¶7 and 18 (S.C.).

205 *Newfoundland Processing Ltd. v. DGH Construction Ltd.* (1994), 121 Nfld. & P.E.I.R. 91 at 145-146 (S.C.).

206 *Knoch Estate v. Jon Picken Ltd.* (1991), 4 O.R. (3d) 385 at 393-394, 403, 405 and 416 (C.A.). It is possible that this case was merely intending to express the mental element of unlawful means conspiracy (i.e., that the defendant's conduct be ultimately "directed" against the plaintiff, in the sense that the defendant actually or constructively intended an injury to the plaintiff as a result). However, the Court's language is suggestive of a requirement that that the unlawful conduct be targeted at the plaintiff in the sense occurring in "two-party" situations (i.e., where the "unlawfulness" of the conduct arises through its victimization, in the first instance, of the plaintiff), rather than that it be targeted at the plaintiff through the intermediary of a third party.

In the end, *circa* 2006/2007, the Canadian courts recognized a number of different acts (with varying degrees of enthusiasm) as potentially satisfying the unlawful means element of conspiracy. These acts included: criminal conduct[207] (such as the payment of bribes,[208] theft[209] and obstruction of justice[210]); tortious conduct[211] (such as defamation,[212] intimidation,[213] inducing breach of contract,[214] unlawful interference with economic interests,[215] abuse of process,[216] nuisance,[217] and mis-

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207 See: *Varner v. Morton* (1919), 46 D.L.R. 597 at 603-604 (N.S.C.A.), per Ritchie E.J.; and *Korte v. Deloitte, Haskins and Sells* (1993), 135 A.R. 389 at 393 (C.A.); leave to appeal to S.C.C. refused [1993] S.C.C.A. No. 178. However, it was also held that a criminal act, which cannot itself be tortious for reasons of public policy (e.g., perjury), may not satisfy the unlawful means element of conspiracy, or be used as a basis for inferring the intent necessary to ground a claim for unlawful means conspiracy: see *Horn Abbot Ltd. v. Reeves* (2000), 189 D.L.R. (4th) 644, ¶17–31 (N.S.C.A.). It has also been suggested that unlawful means in the context of conspiracy cannot include the commission of a criminal conspiracy: see *Lokos v. Manfor Ltd.* (1990), 33 C.P.R. (3d) 552 at 562 (Man. Q.B.); var'd on other grounds [1995] 2 W.W.R. 709 (Man. C.A.) (although *cf. Giles v. Alty*, [1992] O.J. No. 925 (Gen. Div.)).

208 *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* (1998), 40 O.R. (3d) 229 at 241-242 (S.C.J.); rev'd on other grounds (2000), 46 O.R. (3d) 760 (C.A.); rev'd [2001] 2 S.C.R. 983.

209 *Claiborne Industries Ltd. v. National Bank of Canada* (1989), 69 O.R. (2d) 65 at 69 and 82-83 (C.A.).

210 *Kish v. Chapple* (1999), 179 Sask. R. 124, ¶23 (Q.B.).

211 See: *Levy-Russell Ltd. v. Tecmotiv Inc.* (1994), 13 B.L.R. (2d) 1 at 175-176 (Ont. Gen. Div.); and *McKinlay Transport Ltd. v. Motor Transport Industrial Relations Bureau of Ontario (Inc.)*, [1996] O.J. No. 461, ¶186 (Gen. Div.). However, it was also held that a tortious act would not qualify where the defendant was subject to a statutory immunity in respect of it: *Kohn v. Globerman* (1986), 27 D.L.R. (4th) 583 at 599 (Man. C.A.); leave to appeal to S.C.C. refused (1986), 72 N.R. 160n.

212 *Chahal v. Khalsa Community School* (2000), 2 C.C.E.L. (3d) 120, ¶119 (Ont. S.C.J.).

213 *United Mine Workers of America, Local No. 1562 v. Williams* (1919), 59 S.C.R. 240 at 255, per Anglin J.

214 *Cotter v. Osborne* (1909), 18 Man. R. 471 at 476 (C.A.); leave to appeal to P.C. refused (1911), C.R. [1] A.C. 137 at 159.

215 *Meehan v. Tremblett* (1994), 154 N.B.R. (2d) 241, ¶101 (Q.B.); aff'd (1996), 133 D.L.R. (4th) 738 (N.B.C.A.).

216 This appears to be the effect of *Amirault v. Westminer Canada Holdings Ltd.* (1994), 355 A.P.R. 241, ¶94, 108 and 124 (N.S.C.A.); leave to appeal to S.C.C. refused [1994] S.C.C.A. No. 117. See also *Sprecher Grier Halberstam Llp v Walsh*, [2008] EWCA Civ 1324, ¶46.

217 *Hammer v. Kemmis* (1956), 7 D.L.R. (2d) 684 at 702, 705 and 706 (B.C.C.A.).

representation);[218] breach of contract;[219] breach of statute[220] (including competi-

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218 *Daishowa Inc. v. Friends of the Lubicon* (1996), 27 O.R. (3d) 215 at 229-230 (Div. Ct.); leave to appeal to Ont. C.A. refused 1996 CarswellOnt 1553 (C.A.); leave to appeal to S.C.C. refused [1996] S.C.C.A. No. 528.

219 See: *Wallace Construction Specialities Ltd. v. Manson Insulation Inc.* (1993), 106 D.L.R. (4th) 169 at 174 (Sask. C.A.); leave to appeal to S.C.C. refused [1993] S.C.C.A. No. 407; and *Cortina Foods Inc. v. Bari Cheese Ltd.* (1996), 30 B.L.R. (2d) 133 at 146 (B.C.S.C.). A similar view was taken in: *Midland Bank Trust Co. Ltd. v. Green (No. 3)*, [1982] Ch. 529 at 539 (C.A.), per Lord Denning M.R.; and *Kuwait Oil Tanker Co. SAK v. Al Bader*, [2000] 2 All E.R. (Comm) 271, ¶130 (C.A.). This matter was, however, left open by other courts: see *Nicholls v. Richmond (Township)*, [1984] 3 W.W.R. 719 at 732-733 (B.C.S.C.); *475920 Ontario Ltd. v. Forty Gerrard Apartments Ltd.*, [1994] O.J. No. 1499, ¶13–17 (Gen. Div.); and *923087 N.W.T. Ltd. v. Anderson Mills Ltd.* (1997), 40 C.C.L.T. (2d) 15 at 32 (N.W.T.S.C.). Note also that while *Rookes* held that breach of contract could qualify as the threatened unlawful means in a case of three-party intimidation, the Supreme Court of Canada appeared to reject it as unlawful means in a case of two-party intimidation, in *Central Canada Potash*, *supra* note 161, at 82. See also the discussion of this issue in Anthony M. Dugdale *et al*, eds., *Clerk & Lindsell on Torts*, 19th ed. (London: Sweet & Maxwell, 2006) at 1576-1577, and John Murphy, *Street on Torts*, 12th ed. (Oxford: Oxford University Press, 2007) at 377. This suggests that breach of contract may not amount to unlawful means in a case of two-party conspiracy (at least insofar as both conspirators are parties to the contract with the plaintiff). On the other hand, *Central Canada Potash* has not always been followed on this point. For a case which held, despite *Central Canada Potash*, that threatened breach of contract can found a claim for two-party intimidation, see *Golden Hill Ventures Ltd. v. Kemess Mines Inc.* (2002), 7 B.C.L.R. (4th) 1, ¶670–675 (S.C.). Nevertheless, accepting that breach of contract can ground an unlawful means conspiracy claim even in the case of two-party claims, the court must still consider whether a co-conspirator who is not actually party to the contract with the plaintiff is liable for *inducing* the breach of the plaintiff's contract, or whether it is liable for *conspiring* to commit such a breach: see *Digicel (St Lucia) Ltd. v Cable & Wireless Plc*, [2010] EWHC 774 (Ch. D.), Annex I, ¶63–68; and *Aerostar Maintenance International Ltd. v. Wilson*, [2010] EWHC 2032, ¶17 (Ch. D.). As to the nature of the breach in question, a breach of contract would presumably always qualify as unlawful means (whether in the two or three-party context) where it is a *criminal* breach of contract (e.g., one that endangers human life, causes serious bodily injury, or destroys or injures valuable property) pursuant to s. 422(1) of the *Criminal Code*: see *Johnston v. McKay*, [1937] 1 D.L.R. 443 (N.S.C.A.); leave to appeal refused [1937] 2 D.L.R. 751 (N.S.C.A.). Conversely, a merely *technical* breach of contract may not suffice: see *Rookes*, *supra* note 142, at 1218-1219, per Lord Devlin; and *Morgan v. Fry*, [1968] 2 Q.B. 710 at 737–739 (C.A.), per Russell L.J. It is also worth considering whether permitting breach of contract to satisfy the unlawful means element is inconsistent with the "efficient breach" theory, accepted in cases such as *Bank of America v. Mutual Trust Co.*, [2002] 2 S.C.R. 601, ¶31. Arguably, the characterization of a breach as "efficient" should only go to damages, not to the actual establishment of unlawful means: see *Delphinium Ltée v. 512842 N.B. Inc.* (2008), 296 D.L.R. (4th) 694, ¶51–55 (N.B.C.A.).

220 See: *Korte v. Deloitte, Haskins and Sells* (1993), 135 A.R. 389 at 393 (C.A.); leave to appeal to S.C.C. refused [1993] S.C.C.A. No. 178; *Levy-Russell Ltd. v. Tecmotiv Inc.* (1994), 13 B.L.R. (2d) 1 at 175-176 (Ont. Gen. Div.); and *McKinlay Transport Ltd. v. Motor Transport Industrial Relations Bureau of Ontario (Inc.)*, [1996] O.J. No. 461,

tion legislation,[221] health legislation,[222] and fraudulent conveyances legislation);[223] oppression;[224] breach of equitable obligations[225] (including breach of confidence,[226] and breach of the fiduciary obligations owed by directors to their corporations under statute and common law);[227] the infringement of constitutional

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¶186 (Gen. Div.). However, it was also suggested that a breach of statute (e.g., human rights legislation) which has itself been held not to constitute an actionable tort, should not be permitted to serve as the unlawful means for a claim in conspiracy: *Dorus v. Taylor* (2003), 11 B.C.L.R. (4th) 260, ¶12 (C.A.); leave to appeal to S.C.C. refused [2003] S.C.C.A. No. 243. In the context of criminal conspiracy, some courts also suggested that minor statutory breaches, such as those involving provincial statutes and municipal by-laws, will not always be serious enough to qualify as an "unlawful" purpose: *R. v. Jean Talon Fashion Centre Inc.* (1975), 56 D.L.R. (3d) 296 at 305-306 (Que. Q.B.). However, there are cases holding that breach of subordinate legislation (e.g., orders-in-council) may supply the unlawful means for conspiracy: *Southam Co. v. Gouthro*, [1948] 3 D.L.R. 178 at 187-188 (B.C.S.C.).

221 See: *Westfair Foods Ltd. v. Lippens Inc.* (1989), 64 D.L.R. (4th) 335 at 337–339 and 345 (Man. C.A.); leave to appeal to S.C.C. refused [1990] S.C.C.A. No. 17; *Canadian Community Reading Plan Inc. v. Quality Service Programs Inc.* (2001), 141 O.A.C. 289, ¶5 and 29 (C.A.); and *Apotex Inc. v. Hoffmann La-Roche Ltd.* (2000), 195 D.L.R. (4th) 244, ¶21 (Ont. C.A.). However, such cases generally involved a breach of Part VI of the *Competition Act*. Several other cases held that conduct which may potentially qualify as a reviewable practice under Part VIII of the *Competition Act* may not qualify as unlawful means for the purposes of conspiracy: see *Chadha v. Bayer Inc.* (1998), 82 C.P.R. (3d) 202, ¶9-10 (Ont. Gen. Div.); and *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, [2006] 11 W.W.R. 688 at 703–708 and 710 (B.C.S.C.); add'n reasons [2007] 1 W.W.R. 541 (B.C.S.C.).

222 *Apotex Inc. v. Hoffmann La-Roche Ltd.* (2000), 195 D.L.R. (4th) 244, ¶24 and 28–31 (Ont. C.A.).

223 See: *American Reserve Energy Corp. v. McDorman* (1999), 48 B.L.R. (2d) 167, ¶190 (Nfld. S.C.); var'd on other grounds (2002), 29 B.L.R. (3d) 161 (Nfld. C.A.); and *Lombardo v. Caiazzo* (2003), 30 C.L.R. (3d) 128, ¶112 and 128 (Ont. S.C.J.); aff'd (2006), 211 O.A.C. 270 (C.A.).

224 *American Reserve Energy Corp. v. McDorman* (1999), 48 B.L.R. (2d) 167, ¶190 (Nfld. S.C.); var'd on other grounds (2002), 29 B.L.R. (3d) 161 (Nfld. C.A.).

225 It has, for instance, been suggested that knowing assistance by one conspirator, in another conspirator's theft, may found a claim for unlawful means conspiracy: *Claiborne Industries Ltd. v. National Bank of Canada* (1989), 69 O.R. (2d) 65 at 111-112 (C.A.), per McKinlay J.A. (dissenting on other grounds). However, other courts have questioned whether there should be liability in conspiracy for knowing assistance: *Aerostar Maintenance International Ltd. v. Wilson*, [2010] EWHC 2032, ¶170 (Ch. D.).

226 *Rodaro v. Royal Bank of Canada*, [2000] O.J. No. 272, ¶972 (S.C.J.); rev'd on other grounds (2002), 59 O.R. (3d) 74 (C.A.).

227 See: *Levy-Russell Ltd. v. Tecmotiv Inc.* (1994), 13 B.L.R. (2d) 1 at 175-176 (Ont. Gen. Div.); and *McKinlay Transport Ltd. v. Motor Transport Industrial Relations Bureau of Ontario (Inc.)*, [1996] O.J. No. 461, ¶186 (Gen. Div.).

rights;[228] and breach of a court order[229] (such as an injunction).[230] It was also suggested that simply aiding and abetting a co-conspirator to commit unlawful means could itself qualify as unlawful means.[231] Indeed, the courts appeared to recognize that it was not necessary for both conspirators to engage in the unlawful act, so long as the unlawful act of one conspirator was a probable consequence of the original common design.[232]

2. Unlawful Interference with Economic Interests

(a) Overview of the tort

Despite having its origins in cases which date to the Year Book period, unlawful interference with economic interests is still viewed as a tort of "uncertain ambit", that remains "novel" and "developing".[233] Like conspiracy, the tort has been approached with hesitancy,[234] and is largely restricted to the commercial context.[235] Although the tort was recognized in *Therien*, the Supreme Court of Canada has yet to provide a clear statement of its elements. Accordingly, the task of de-

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228 *Duca Community Credit Union Ltd. v. Giovannoli*, [2000] O.J. No. 1199, ¶55 (S.C.J.); aff'd [2003] O.J. No. 1914 (C.A.). See also *Canada Cement LaFarge*, *supra* note 167, at 468.

229 *Frame v. Smith*, [1987] 2 S.C.R. 99 at 123-124, per Wilson J. (dissenting on other grounds).

230 *Kotch v. Casino St. Albert Inc.*, 2005 ABQB 649, ¶141.

231 *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.* (2007), 45 C.P.C. (6th) 375, ¶23–29 (Ont. S.C.J.); leave to appeal to Ont. Div. Ct. refused [2007] O.J. No. 2404 (Div Ct.). See also *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, 2010 ONCA 466, ¶46–49.

232 *Claiborne Industries Ltd. v. National Bank of Canada* (1989), 69 O.R. (2d) 65 at 79-80 (C.A.). See also: *Kuwait Oil Tanker Co. SAK v. Al Bader*, [2000] 2 All E.R. (Comm) 271, ¶110 and 133 (C.A.); *Golden Capital Securities Ltd. v. Holmes*, [2005] 1 W.W.R. 631, ¶74 (B.C.C.A.); and *HM Revenue & Customs v. Begum*, [2010] EWHC 1799, ¶86 (Ch. D.). For a contrary view, see: *Jarman & Platt Ltd. v. I Barget Ltd.*, [1977] F.S.R. 260 at 278 (C.A.); and *Bank of Montreal v. Tortora* (2010), 3 B.C.L.R. (5th) 39, ¶42–47 (C.A.). This matter was also left open in *Stolzenberg v. CIBC Mellon Trust Co. Ltd.*, [2004] EWCA Civ 827, ¶135.

233 See: *Cheticamp Fisheries Co-op Ltd. v. Canada* (1995), 123 D.L.R. (4th) 121, ¶24 (N.S.C.A.); leave to appeal to S.C.C. refused [1995] S.C.C.A. No. 202; *Conversions by Vantasy Ltd. v. General Motors of Canada Ltd.*, [2006] 8 W.W.R. 413, ¶30 (Man. C.A.); leave to appeal to S.C.C. refused [2006] S.C.C.A. No. 358; and *Swift Current (City) v. Saskatchewan Power Corp.*, [2007] 5 W.W.R. 387, ¶85-86 (Sask. C.A.). See also Anthony M. Dugdale *et al*, eds., *Clerk & Lindsell on Torts*, 19th ed. (London: Sweet & Maxwell, 2006) at 1579.

234 *Cheticamp Fisheries Co-op Ltd. v. Canada* (1995), 123 D.L.R. (4th) 121, ¶44 (N.S.C.A.); leave to appeal to S.C.C. refused [1995] S.C.C.A. No. 202.

235 *Frame v. Smith*, [1987] 2 S.C.R. 99 at 109 and 129.

lineating unlawful interference has been left to the provincial courts. Prior to 2007, most appellate formulations of the tort involved the following three-fold statement of elements:

> (i) an intention to injure;
>
> (ii) interference with the other party's business by illegal or unlawful means; and
>
> (iii) resultant economic loss.[236]

However, other formulations of the tort abound. Thus, one lower court, in an oft-cited passage, has described the elements of the tort as follows:

> (1) the existence of a valid business relationship or business expectancy between the plaintiff and another party;
>
> (2) knowledge by the defendant of that business relationship or expectancy;
>
> (3) intentional interference which induces or causes a termination of the business relationship or expectancy;
>
> (4) the interference is by way of unlawful means;
>
> (5) the interference by the defendant must be the proximate cause of the termination of the business relationship or expectancy; and
>
> (6) there is a resultant loss to the plaintiff.[237]

It has been suggested that these two formulations of the elements of the tort are not in conflict, but that the first, less extensive formulation, "simply boils the elements down to those that are likely to be in dispute between the parties".[238] There would appear to be some merit to this position. The most significant element in the second formulation that is not also present in the first is the requirement that the economic interest interfered with take the form of a relationship or expectancy between the plaintiff and "another party" (and hence not merely the business relations between the plaintiff and defendant *inter se*). This proposition is supported by the case law,[239] and is consistent with the inherently multilateral nature of economic interests.

It should also be noted that another formulation of the tort suggests that the defendant can incur liability through "unfair" means, in addition to "unlawful" means.[240] However, the weight of appellate jurisprudence is firmly to the effect

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236 See, *e.g.*: *Reach*, *supra* note 20, ¶44; and *Conway v. Zinkhofer*, 2008 ABCA 392, ¶41.

237 *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* (1998), 40 O.R. (3d) 229 at 244 (S.C.J.); rev'd on other grounds (2000), 46 O.R. (3d) 760 (C.A.); rev'd [2001] 2 S.C.R. 983.

238 *Rogers Cablesystems Ltd. v. Look Communications Inc.*, [1999] O.J. No. 2534, ¶23 (S.C.J.); aff'd (2000), 129 O.A.C. 324 (C.A.).

239 See, e.g., *R.L.T.V. Investments Inc. v. Saskatchewan Telecommunications*, [2009] 9 W.W.R. 15, ¶48 (Sask. C.A.); leave to appeal to S.C.C. refused [2009] S.C.C.A. No. 388. It is also supported by the fact that courts commonly refer to the tort of interference with economic interests as "interference with economic *relations*".

240 *Dufferin Real Estate Ltd. v. Giralico*, [1989] O.J. No. 1525 (H.C.J.); aff'd [1992] O.J. No. 947 (C.A.). For a more recent case that seemed to endorse this principle (while

that unlawful (rather than simply unfair) means is essential to the tort.[241] Accordingly, in keeping with *Allen*, there seems to be little doubt that unlawful means is a necessary element of unlawful interference with economic interests.

(b) The unlawful means element

The leading pre-2007 case regarding the unlawful means element of the tort is *Therien* (although this ruling is often inexplicably overlooked in the more recent jurisprudence). As indicated earlier, the Supreme Court of Canada held in *Therien* that, in order to ascertain whether unlawful means had been employed, "inquiry may be made both at common law and of the statute law".[242] On the facts in *Therien* (which involved threats of picketing by a trade union to a company that employed the plaintiff as an independent contractor), the Court held that unlawful means existed because the defendant's threats were in violation of a grievance procedure set out in a provincial labour statute, in addition to the collective agreement between it and the company. As in *Gagnon*, the relevant statute did not appear to provide a civil right of action to either the company or the plaintiff.[243]

Accordingly, the Court in *Therien* held that unlawful means for the purposes of the unlawful interference tort could include conduct which was: (1) proscribed by statute (even if non-criminal), in addition to being forbidden at common law; (2) in breach of a (collective) agreement (between the defendant and a third party); (3) not independently actionable by the plaintiff; (4) three-party, in the sense that it was directed at the company (with the intention of injuring the plaintiff) rather than being directed at the plaintiff itself; and (5) either independently actionable (insofar as breach of a collective agreement is "independently actionable," as that concept has developed in the context of the intentional economic torts), or non-actionable, by the third party.[244]

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also suggesting, somewhat inexplicably, that "unlawful interference with contractual relations and economic interest", and "unlawful interference with legitimate business expectancy", were two separate torts), see *Homelife Realty Services Inc. v. Homelife Performance Realty Inc.* (2007), 64 R.P.R. (4th) 102, ¶241-242 (Ont. S.C.J.).

241 See: *Murray v. Canada* (1983), 47 N.R. 299 at 306 (F.C.A.); *Parkinson v. Health Sciences Centre* (1996), 1 C.P.C. (4th) 392, ¶22 (Man. C.A.); *117577 Ontario Ltd. v. Magna International Inc.* (2001), 200 D.L.R. (4th) 521, ¶12 (Ont. C.A.); and *Genesis Land Development Corp. v. Alberta*, [2010] 6 W.W.R. 77, ¶7 (Alta. C.A.).

242 *Therien*, *supra* note 148, at 280.

243 This is reflected in the Court's statement, at 280, that "in relying upon these sections of the Act the respondent is asserting, not a statutory cause of action, but a common law cause of action". There has been some suggestion that, in *Therrien*, a direct right of action for breach of the statute could have been implied from the statute itself, although it has generally been dismissed: see I.M. Christie, *The Liability of Strikers in the Law of Tort: A Comparative Study of the Law in England and Canada* (Kingston, Ont.: Queen's University, Industrial Relations Centre, 1967) at 170-171.

244 The fact that *Therien* supports the proposition that conduct need not be independently actionable to qualify as the unlawful means for the unlawful interference tort is supported by the Supreme Court's reliance upon *Therien* in *Gagnon*, where it cited the statement in *Therien* that "inquiry may be made both at common law and of the statute

Since *Therien*, Canadian courts have recognized that a wide range of conduct may potentially satisfy the unlawful means element of the unlawful interference tort. Such acts include: criminal conduct (e.g., the payment of bribes);[245] tortious conduct (including defamation,[246] misrepresentation,[247] conspiracy[248] and inducing breach of contract);[249] breach of equitable obligations[250] (such as breach of fiduciary duty);[251] breach of contract[252] (in the context of both two-party[253] and

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law" in holding that a breach of statute which did not provide an express right of action could nevertheless meet the unlawful means element of conspiracy.

245 *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* (1998), 40 O.R. (3d) 229 at 244–255 (S.C.J.); rev'd on other grounds (2000), 46 O.R. (3d) 760 (C.A.); rev'd [2001] 2 S.C.R. 983.

246 *Duke v. Puts*, [2004] 6 W.W.R. 208, ¶92 (Sask. C.A.).

247 *Daishowa Inc. v. Friends of the Lubicon* (1996), 27 O.R. (3d) 215 at 229-230 (Div. Ct.); leave to appeal to Ont. C.A. refused 1996 CarswellOnt 1553 (C.A.); leave to appeal to S.C.C. refused [1996] S.C.C.A. No. 528.

248 *Canadian Community Reading Plan Inc. v. Quality Service Programs Inc.* (2001), 141 O.A.C. 289, ¶33 (C.A.).

249 *Duke v. Puts*, [2004] 6 W.W.R. 208, ¶92 (Sask. C.A.).

250 Some courts have, however, suggested that unjust enrichment (insofar as it represents an equitable cause of action) may not found a claim for unlawful interference: see *Quintette Coal Ltd. v. Bow Valley Resource Services Ltd.* (1986), 6 B.C.L.R. (2d) 347 at 358 (S.C.). For a case which held that breach of confidence could found a claim for unlawful interference, see *Indata Equipment Supplies Ltd. v. ACL Ltd.*, [1998] F.S.R. 248 at 260 and 262-263 (C.A.) (but *cf. Van Camp Chocolates Ltd. v. Aulsebrooks Ltd.*, [1984] 1 N.Z.L.R. 354 (C.A.)).

251 *Olive Hospitality Inc. v. Woo* (2006), 23 B.L.R. (4th) 78, ¶218 (B.C.S.C.); var'd on other grounds (2007), 70 B.C.L.R. (4th) 31 (C.A.); leave to appeal to S.C.C. refused [2007] S.C.C.A. No. 486.

252 See the discussion of this issue above in relation to conspiracy, at 219. Some courts have held that breach of an implied contractual term may not found a claim for unlawful interference: see *Quintette Coal Ltd. v. Bow Valley Resource Services Ltd.* (1986), 6 B.C.L.R. (2d) 347 at 358 (S.C.). Nevertheless, it is not clear whether this rule is defensible in light of the fact that "[t]he law has always treated express and implied contract terms as being equivalent in effect": *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12 at 31. See also *Spira v. Commonwealth Bank of Australia*, [2003] N.S.W.C.A. 180, ¶74-75 (holding that a threat to breach an implied contractual term of good faith was a threat of unlawful means for the tort of intimidation).

253 *Selaive v Meyer*, [1998] B.C.J. No. 2629, ¶33 (S.C.). As indicated above in relation to conspiracy, however, note the Supreme Court of Canada's ruling in *Central Canada Potash*, *supra* note 161, at 87, which holds that a threatened breach of contract may not serve as the unlawful means in a case of two-party intimidation.

three-party[254] claims); breach of statute[255] (including competition legislation[256] and health legislation);[257] breach of the duty of natural justice;[258] misuse of physical force;[259] and breach of a court order.[260]

However, as with conspiracy, there was no unanimous approach to the unlawful means element in the unlawful interference tort prior to 2007. This was reflected in two unsettled questions. The first was whether, like conspiracy, the unlawful means could arise in the two-party context (i.e., in cases where the impugned conduct directly victimized the plaintiff), or only in the three-party context (i.e., cases where the conduct directly victimized a third party, with the intention of causing resulting injury to the plaintiff). Some courts suggested that two-

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254 *Ed Miller Sales and Rentals Ltd. v. Caterpillar Tractor Co.*, [1996] 9 W.W.R. 449 at 464–466 (Alta. C.A.); leave to appeal to S.C.C. refused [1996] S.C.C.A. No. 511.

255 See *Tardif v. McGrath* (2002), 635 A.P.R. 362, ¶74–78 (N.S.C.A.); leave to appeal to S.C.C. refused [2002] S.C.C.A. No. 261, in relation to a claim for indirect interference with contractual relations. Note, however, that some courts have held that where the statute itself creates a remedial procedure before a tribunal, its breach cannot found an action for unlawful interference: *I.B.T., Local 362 v. Midland Superior Express Ltd.* (1974), 43 D.L.R. (3d) 540 at 561-562, 567-568 and 570 (Alta. C.A.). Some courts have also suggested that minor technical breaches of legislation will not suffice: *Murray v. Canada* (1983), 47 N.R. 299 at 308-309 (F.C.A.).

256 See: *Westfair Foods Ltd. v. Lippens Inc.* (1989), 64 D.L.R. (4th) 335 at 337-339 and 345 (Man. C.A.); leave to appeal to S.C.C. refused [1990] S.C.C.A. No. 17; *Apotex Inc. v. Hoffmann La-Roche Ltd.* (2000), 195 D.L.R. (4th) 244, ¶21 (Ont. C.A.); and *Canadian Community Reading Plan Inc. v. Quality Service Programs Inc.* (2001), 141 O.A.C. 289, ¶33 (C.A.). However, such cases generally involved a breach of Part VI of the *Competition Act*. Several other cases have held that conduct which may potentially qualify as a reviewable practice under Part VIII of the *Competition Act* may not qualify as unlawful means for the purposes of unlawful interference: see *Harbord Insurance Services Ltd. v. Insurance Corp. of British Columbia* (1993), 9 B.L.R. (2d) 81 at 87 (B.C.S.C.); *Chadha v. Bayer Inc.* (1998), 82 C.P.R. (3d) 202, ¶9-10 (Ont. Gen. Div.); *Ice Fashionable Accessories Inc. v. Holt, Renfrew & Co.*, [2001] O.J. No. 1527, ¶18 (S.C.J.); var'd on other grounds (2002), 155 O.A.C. 355 (C.A.); and *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, [2006] 11 W.W.R. 688 at 703–708 (B.C.S.C.); add'n reasons [2007] 1 W.W.R. 541 (B.C.S.C.). See also *Cellular Rental Systems Inc. v. Bell Mobility Cellular Inc.* (1995), 23 O.R. (3d) 766 at 773–778 (Div. Ct.), where the Court held that Part VIII of the *Competition Act* could not ground any cause of action in "common law or equity" which would support the granting of an interlocutory injunction.

257 *Apotex Inc. v. Hoffmann La-Roche Ltd.* (2000), 195 D.L.R. (4th) 244, ¶24 and 28–31 (Ont. C.A.).

258 See *Tardif v. McGrath* (2001), 198 N.S.R. (2d) 60, ¶58-59 (S.C.); aff'd (2002), 635 A.P.R. 362 (N.S.C.A.); leave to appeal to S.C.C. refused [2002] S.C.C.A. No. 261 (finding a strong *prima facie* case to this effect in the context of an injunction for indirect interference with contractual relations). But *cf. Cimaco International Sales, Inc. v. British Columbia (A.G.)*, 2010 BCCA 342, ¶58–62.

259 *Shore Gold Inc. v. Walker*, [2007] 6 W.W.R. 99, ¶72–75 (Sask. Q.B.); aff'd [2008] 11 W.W.R. 255 (Sask.C.A.).

260 *Conway v. Zinkhofer*, 2008 ABCA 392, ¶42.

party claims for unlawful interference could be valid (although such cases were rare at the appellate level).[261] However, as the facts in most cases involved three-party claims, the tort's application in the two-party context was not settled.[262]

The second, and more contested, issue was whether unlawful means were limited to conduct that was merely proscribed by statute and/or the common law (the "narrow" view), or extended also to conduct that was *ultra vires*, in the sense of being unauthorized under applicable law (the "broad" view). As to this, there were two divergent streams of authority prior to 2007.

Perhaps the leading case in support of the narrow view was the ruling of the Privy Council in *Dunlop v. Woollahra Municipal Council*.[263] There, the plaintiff developer sued the defendant municipal council, alleging that it had suffered economic loss as a result of resolutions which were passed by the latter. A court had declared those resolutions to be *ultra vires*, but not enacted in bad faith. The plaintiff framed its claim not only in negligence and abuse of public office, but also under the cause of action recognized in *Beaudesert Shire Council v. Smith*.[264] In *Beaudesert*, the High Court of Australia, drawing upon cases such as *Garret*, *Tarleton*, *Keeble* and *Mogul*, found that "independently of trespass, negligence or nuisance . . . a person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another is entitled to recover damages from that other".[265] It thus appeared to recognize a cause of action equivalent to unlawful interference with economic interests (although the intentionality element of the *Beaudesert* action followed a different pattern, in that it was focused solely upon the deliberateness of the defendant's act rather than the intention to injure the plaintiff as a result).[266] The Privy Council in *Dunlop*, affirming the judgment below, held that there was no justification for imposing liability under the *Beaudesert* principle where the allegedly "unlawful" act was only "unlawful" in the sense that it was "null and void" and "invalid", as opposed to being "forbidden by law".[267] In

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261 For a recent case, see *Swift Current (City) v. Saskatchewan Power Corp.*, [2007] 5 W.W.R. 387, ¶74–86 (Sask. C.A.); rev'g in part (2005), 272 Sask. R. 160, ¶42-43 and 47-48 (Q.B.) (permitting an unlawful interference claim to proceed to trial where one of the alleged unlawful means took the form of a defendant's breach of contract with the plaintiff). Another appellate case that is sometimes cited as an example of two-party unlawful interference is *Acrow (Automation) Ltd. v. Rex Chainbelt Inc.*, [1971] 1 W.L.R. 1676 (C.A.). Note also the apparent recognition of two-party intimidation in *Central Canada Potash*, *supra* note 161.

262 Thus, some courts held that the unlawful interference tort could not be brought against a defendant whose unlawful act consisted of breaching its contract with the plaintiff, since it was restricted to claims against defendants who disturb the relationship between the plaintiff and a third party: *William E. Robb Enterprises Inc. v. ATI Technologies Inc.*, [2006] O.J. No. 4711, ¶23-24 (S.C.J.).

263 [1982] A.C. 158 (P.C.) [*Dunlop*].

264 (1966), 120 C.L.R. 145 (H.C.A.) [*Beaudesert*].

265 *Ibid.* at 156.

266 See *Northern Territory of Australia v. Mengel* (1995), 185 C.L.R. 307 at 342-343 (H.C.A.).

267 *Dunlop*, *supra* note 263, at 170-171. The House of Lords has also stated that there is no general principle of liability for *ultra vires* acts, even where they are "intentional":

arriving at this conclusion, Lord Diplock drew support from the distinction drawn in *Mogul* between "unlawfulness or illegality on the one hand and invalidity on the other".[268]

The ruling in *Dunlop* was referred to by the House of Lords, in *Lonrho 1*, in rejecting the view that English law recognized an action for intentional unlawfulness in the broad sense potentially contemplated by *Beaudesert*.[269] However, the Law Lords in *Lonrho 1* appeared to go even further than *Dunlop*, suggesting that conduct which was "forbidden by law", such as a breach of statute, would not satisfy the unlawful means element of the unlawful interference tort if such conduct was not also independently actionable.[270] In addition to *Lonrho 1*, *Dunlop* was applied by the High Court of Australia, in *Sanders v. Snell*,[271] where it held that a breach of the duty of procedural fairness by a public official could not ground the unlawful interference tort. Finally, the *Dunlop* approach was accepted by some Canadian courts,[272] and was consistent with the distinction drawn by the Supreme Court of Canada (in other contexts) between conduct that is unlawful, and conduct that is merely unenforceable on grounds of public policy.[273]

The leading pre-2007 case in support of the broad view of unlawful means was *Torquay Hotel*. There, in the course of discussing liability for interference with contractual relations in a manner short of inducing breach, Lord Denning opined, in *obiter*, that:

> I must say a word about unlawful means, because that brings in another principle. I have always understood that if one person deliberately interferes with the trade or business of another, *and does so by unlawful means, that is, by an act which he is not at liberty to commit*, then he is acting unlawfully, even though he does not procure or induce any actual breach of contract. If the means are unlawful, that is enough.[274]

Three Rivers District Council v. Governor and Co. of the Bank of England (No. 3), [2003] 2 A.C. 1 at 190 and 229 (H.L.). However, this statement appears to mean that there is no presumptive liability for "deliberate" acts that are also *ultra vires* (as suggested in *Beaudesert*), not that *ultra vires* acts are non-actionable where (as in the tort of unlawful interference) there is an intent to injure the plaintiff.

268 *Ibid.* at 171. As noted in the text accompanying footnote 66 above, the House of Lords in *Mogul* rejected the proposition that an unlawful conspiracy could be established simply by virtue of the fact that the defendants entered into an agreement that was void on account of public policy. It was in this context that they drew a distinction between unlawfulness and invalidity.

269 *Lonrho 1*, *supra* note 165, at 187-188.

270 *Ibid.* at 183–188.

271 (1998), 196 C.L.R. 329, ¶28–41 (H.C.A.). [*Sanders*]. See also *Deepcliffe Pty Ltd. v. Gold Coast City Council*, [2001] Q.C.A. 342, ¶24–26 and 76-77 (C.A.).

272 See, e.g., *Edgeworth Helicopters Ltd. v. Salmon Arm (District)* (1990), 1 M.P.L.R. (2d) 261 at 280 (B.C.S.C.).

273 See *Continental Bank Leasing Corp. v. Canada*, [1998] 2 S.C.R. 298, ¶115–117. See also ¶71, where Bastarache J. (dissenting on other grounds) drew a distinction between conduct that is *ultra vires*, and conduct that is illegal.

274 *Torquay Hotel*, *supra* note 154, at 139, emphasis added.

Lord Denning did not cite any authority for this definition of unlawful means (although a similar, but arguably narrower, definition had been proposed by Lord Reid in *Rookes*),[275] and his observations in this regard were not clearly adopted by the other two members of the Court. Nevertheless, his definition of unlawfulness was relied upon in subsequent English decisions.[276]

The *Torquay Hotel* test, or a variant of it, was also accepted by Canadian courts.[277] In addition, the broad view of the test was consistent with the developing parallel tort of abuse of public office.[278]

(That latter tort, based upon the ruling in *Ashby v. White*,[279] is used to impose liability upon public bodies who engage in unlawful conduct.[280] Similar to the broad view of unlawfulness in *Torquay Hotel*, such conduct has been held to include acts that are in excess of the public body's statutory authority.[281] Although

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275 *Rookes*, *supra* note 142, at 1168-1169 ("doing what you have no legal *right* to do") [emphasis added].

276 See: *Acrow (Automation) Ltd. v. Rex Chainbelt Inc.*, [1971] 1 W.L.R. 1676 at 1682 (C.A.); *Carlin Music Corporation v. Collins*, [1979] F.S.R. 548 at 551-552 (C.A.); and *Associated British Ports v. Transport and General Workers Union*, [1989] 3 All E.R. 796 (C.A.), per Stuart-Smith L.J., rev'd on other grounds, [1989] 1 W.L.R. 939 (H.L.). Another "broad" test for unlawful means that was occasionally proposed in England was whether the conduct could have been restrained by an injunction: see *Indata Equipment Supplies Ltd. v. ACL Ltd.*, [1998] F.S.R. 248 at 262-263 (C.A.), per Owen J. This test was also suggested in *No. 1 Collision Repair & Painting (1982) Ltd. v. Insurance Corp. of British Columbia* (2000), 80 B.C.L.R. (3d) 62, ¶183 (C.A.), per Lambert J.A. (dissenting), leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 488.

277 See: *Spicer v. Volkswagen Canada Ltd.* (1978), 91 D.L.R. (3d) 42 at 61-62 (N.S.C.A.) (directors of company changing signing authority for corporate cheques without directors' resolution required under by-laws); and *Cheticamp Fisheries Co-op Ltd. v. Canada* (1995), 123 D.L.R. (4th) 121 at 126-127 (N.S.C.A.); leave to appeal to S.C.C. refused [1995] S.C.C.A. No. 202 (defendant government imposing fees not authorized by legislation).

278 For cases which have characterized the unlawful means element of the torts of abuse of public office and unlawful interference with economic interests along similar lines, see *1515545 Ontario Ltd. v. Niagara Falls (City)* (2006), 78 O.R. (3d) 783, ¶43–48 (C.A.); and *Romantiek BVBA v Simms*, [2008] EWHC 3099, ¶108 (Q.B.D.).

279 (1703), 92 E.R. 126, 2 Ld. Raym. 938 [*Ashby*].

280 See, e.g., *McGillivray v. Kimber* (1915), 52 S.C.R. 146.

281 This aspect of the tort of abuse of public office was recently confirmed by the Supreme Court of Canada in *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263. There, the Court held that the "unlawful conduct" element of abuse of public office could be satisfied not only by the violation of a statute or the abuse of a statutory power, but also by acts (or omissions) which were in excess of such power, or which failed to discharge the public officer's statutory obligations. Iacobucci J. stated that (¶30, emphasis added):

> . . . there is no principled reason, in my view, why a public officer who wilfully injures a member of the public through intentional *abuse* of a statutory power would be liable, but not a public officer who wilfully injures a member of the public through an intentional *excess* of power or a deliberate *failure* to discharge a statutory duty. In each instance,

the tort of abuse of public office has occasionally been viewed as a corollary to the ruling in *Allen*,[282] it remains unclear whether the commission of the independent tort of abuse of public office is itself capable of meeting the unlawful means requirement for purposes of the intentional economic torts.)[283]

> the alleged misconduct is equally inconsistent with the obligation of a public officer not to intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of public functions.

282 In this regard, see *Roncarelli v. Duplessis*, [1959] S.C.R. 121 [*Roncarelli*], which is widely viewed as the modern foundation for the tort of abuse of public office in Canada (see *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, ¶19). In *Roncarelli*, Rand J. distinguished the rejection of liability for malicious but lawful economic injury in *Allen*, when recognizing liability for the malicious exercise of public power. He did so on the ground that *Allen* did not involve the intentional violation of an implied *statutory* duty (at p. 143). This reasoning suggests that Rand J. viewed the conduct in *Roncarelli* as being sufficient to satisfy the unlawful means element of the (then) innominate tort in *Allen*. Some courts have since relied upon *Roncarelli* in holding that a public body's improper act, taken in excess of its powers, can satisfy the unlawful means element of the tort of unlawful interference with economic interests. (See, e.g., *Gershman v. Manitoba (Vegetable Producers' Marketing Board)* (1976), 69 D.L.R. (3d) 114 at 123–125 (Man. C.A.). This also appears to have been suggested in *Roman Corp. v. Hudson's Bay Oil and Gas Co.*, [1973] S.C.R. 820 at 831. See further *Posluns v. Toronto Stock Exchange*, [1964] 2 O.R. 547 at 605-606 (H.C.J.); aff'd [1966] 1 O.R. 285 (C.A.); aff'd [1968] S.C.R. 330, where the Court cited *McGillivray v. Kimber* (1915), 52 S.C.R. 146 for this proposition.) Another intriguing example of the relationship between abuse of public office and unlawful interference with economic interests can be found in *Orchard v. Tunney*, [1957] S.C.R. 436. There, the plaintiff was a member of a union. The union had a "union shop" agreement with the plaintiff's employer, which prohibited the employer from employing persons who did not continue to exist as union members. The defendant union officials, in excess of their statutory powers, purported to temporarily suspend the plaintiff, and provided notification of this fact to his employer. The employer, as it was required to do under the union shop agreement, terminated the plaintiff's employment. The Supreme Court of Canada found that the defendant officials were liable for interfering with the plaintiff's right to continue in the employment of his employer (there being no claim for inducing breach of contract — see 454, per Locke J. (concurring)). The majority, without referring to the 1892–1901 Trilogy, grounded liability upon the principle in *Ashby* (at 446–448). However, they did so by analogy (since the defendants were not actually public authorities), and emphasized the *ultra vires* nature of the defendants' acts. This case may arguably be viewed as early example of the application of the "broad approach" to unlawful means in a claim for unlawful interference with economic interests (albeit one that was decided at a time when the unlawful interference tort was still innominate). This appears to have been the view of the other two judges: see Locke J. (concurring) at 455-456 (who would have found the defendants liable for unlawful interference, albeit on the ground of their fraudulent statements to the plaintiff's employer rather than their *ultra vires* acts).

283 For a case which persuasively decided that acts which may potentially give rise to liability for abuse of public office should never qualify as unlawful means for the purposes of unlawful interference (except, perhaps, insofar as they permit abuse of public

The tensions between the narrow and the broad views of unlawful means underlay much of the pre-2007 jurisprudence regarding the tort of unlawful interference. A striking example of the two approaches can be found in the divided judgment of the British Columbia Court of Appeal in *No. 1 Collision Repair & Painting (1982) Ltd. v. Insurance Corp. of British Columbia*.[284] The facts of *No. 1 Collision* are complex, although they may be generally stated as follows. The defendant was a statutory insurer, which was required to indemnify drivers who caused damage to another vehicle for the vehicle's repair costs. The legislation also empowered the defendant to establish fair and reasonable prices for motor vehicle repairs, but did not empower it to refuse to provide indemnity where the established price was lower than the actual repair price. The defendant established a tariff of authorized prices, which it paid directly to the repairer selected by the vehicle owner. The plaintiff, a luxury car repair shop, had repair prices that were frequently in excess of the tariff prices. It requested that its customers pay the difference (or "surcharge") themselves, and encouraged them to sue the defendant for that amount. This led to friction between the plaintiff and the defendant. The defendant ultimately refused to pay any repair costs directly to the plaintiff (even those falling within its tariff), thus forcing the plaintiff's customers to sue the defendant for all such costs. When the plaintiff sued the defendant for unpaid amounts, the defendant suspended the plaintiff's vendor number, and warned car owners that the costs

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office to be itself advanced as a tort), see the judgment of the High Court of Australia in *Sanders*, *supra* note 271, ¶36-37 and 39. This aspect of *Sanders* was rejected by Lambert J.A. (dissenting) in *No. 1 Collision Repair & Painting (1982) Ltd. v. Insurance Corp. of British Columbia* (2000), 80 B.C.L.R. (3d) 62, ¶154-155 (C.A.); leave to appeal to S.C.C. refused [2000] S.C.C.A. No. 488. See also *R. Cruickshank Ltd. v. Chief Constable of Kent*, [2002] EWCA Civ 1840, ¶47 and 48–53. However, the possible overlap between the two torts suggested by *Sanders* was left open by the Ontario Court of Appeal in *O'Dwyer*, *supra* note 18, ¶56, n4. As a practical matter, it may be that an unauthorized act committed by a public body, while "unlawful", cannot found a claim for unlawful interference with economic interests if it does not also amount to the tort of abuse of public office. This is because such an act must logically fail to meet one of the other two elements of the tort of unlawful interference by virtue of failing to meet the elements of the tort of abuse of public office. As with the unlawful interference tort, abuse of public office requires that the unlawful act result in damage. Further, abuse of public office requires that the defendant either intend to injure the plaintiff (the mental element required in unlawful interference with economic interests), or, at a minimum, be aware that the unlawful act is likely to injure the plaintiff. While it may be possible for a public body's unauthorized act to meet the mental requirement for abuse of public office but fail to meet the mental requirement for unlawful interference (because, i.e., the public body did not intend, but was merely aware, that the act would injure the plaintiff), it does not seem possible for the unauthorized act to fail to meet the mental requirement for abuse of public office but meet the mental requirement for unlawful interference. In such a case, there is, by definition, no intent to injure the plaintiff: see *Cheticamp Fisheries Co-op Ltd. v. Canada* (1995), 123 D.L.R. (4th) 121 at 127, 131, 136 and 140 (N.S.C.A.); leave to appeal to S.C.C. refused [1995] S.C.C.A. No. 202.

284 (2000), 80 B.C.L.R. (3d) 62 (C.A.); leave to appeal to S.C.C. refused [2000] S.C.C.A. No. 488 [*No. 1 Collision*].

of any repairs conducted with the plaintiff could not be recovered from it. The plaintiff responded by bringing an action for (*inter alia*) unlawful interference with economic interests, intimidation and "restraint of trade".

The plaintiff's tort claims were dismissed at trial, in a judgment affirmed by the majority of the Court of Appeal. Donald J.A. (with whom Hall J.A. concurred) held that the conduct of the defendant did not amount to unlawful means for the purposes of the economic torts. He found that, even if in some cases the tariff prices were unreasonable (and thus not strictly "authorized" by the legislation),[285] the defendant did not violate its statutory obligation, which was to pay proper indemnity for repair costs. This was because the vehicle owner could still sue the defendant for the extra reasonable amounts.[286] Further, Donald J.A. held that the defendant's actions in regard to the plaintiff were justified in the context of the "increasingly acrimonious" "economic struggle" between the two entities.[287] Both Donald J.A. and Hall J.A. distinguished the facts from cases where a public authority engaged in "wholly unauthorized", "improper", "vindictive" and "reprehensible" conduct, and thus conduct tantamount to abuse of public office.[288]

Lambert J.A. delivered a powerful dissent. In his view, the test for unlawful means proposed in *Torquay Hotel* was the preferable one (provided it was qualified by an amplified defence of justification).[289] He defined an act which one is "not at liberty to commit" as an act for which the law is capable of granting a remedy of some kind (regardless of whether the remedy could be denied on discretionary grounds, or would not otherwise be granted in the particular case).[290] Such acts could include not only criminal and civil wrongs, but also administrative law and equitable wrongs.[291] Based on this test, he would have found that the defendants engaged in several unlawful acts.[292]

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285 In assuming tariff prices could have been unreasonable in some circumstances, Donald J.A. appears to have assumed that the defendant had established prices that were "unauthorized" under the governing legislation. However, it should be emphasized that Donald J.A. never expressly indicated whether he believed that unreasonable rates were "unauthorized". Accordingly, it is not clear whether the majority actually rejected the proposition that the defendant had engaged in unlawful means even though it found that the defendant's conduct satisfied the "broad" test for unlawfulness.

286 *Ibid.* ¶213.

287 *Ibid.* ¶220 and 222.

288 *Ibid.* ¶225 and 233.

289 *Ibid.* ¶19-20, 114 and 186.

290 *Ibid.* ¶118.

291 *Ibid.*

292 *Ibid.* ¶4. The unlawful acts cited by Lambert J.A. were: failure to honour contracts of insurance with the insureds; failure to pay financial obligations when they became due; abuse of statutory powers by discriminatory application of those powers; abuse of a state-owned monopolistic position in the motor vehicle insurance market for improper purposes; and unreasonable restraint of trade. It is not clear whether all of these forms of unlawfulness were dealt with by the majority. Interestingly, in finding that restraint of trade could qualify as the unlawful means element of the torts, Lambert J.A. did not refer to the House of Lord's rejection of this proposition in *Mogul* (despite identifying it, ¶10, as one of the three leading cases on the economic torts). For a more recent case

Although Lambert J.A.'s judgment was a dissenting one, it has been frequently cited in later jurisprudence regarding the economic torts.[293] Further, it was accepted by the Ontario Court of Appeal in *Reach*. The decision in *Reach* is arguably the leading pre-2007 Canadian case regarding the distinction between the broad and narrow approaches to unlawfulness in the context of the unlawful interference tort.

Reach involved a claim against the defendant, a voluntary trade association for pharmaceutical manufacturers. The defendant advised (and appeared to direct) its members to refrain from advertising in the plaintiff's calendar, on the ground that such advertising would contravene the association's code of marketing practices. However, contrary to the association's position, the code did not prohibit the members from advertising in a calendar distributed by a non-member (such as the plaintiff), but merely from distributing such items themselves. In light of this error, the defendant's directive to its members was not authorized under its code.

The plaintiff sued for (*inter alia*) unlawful interference with economic interests. In allowing the claim, Laskin J.A., writing for a unanimous Court, engaged in a comprehensive discussion of the unlawful means element. He noted that "[t]he case law reflects two different views of 'illegal or unlawful means', one narrow, the other broad".[294] He referred to *Dunlop* in connection with the narrow view, and *Torquay Hotel* in connection with the broader view. He also characterized the *Torquay Hotel* test — requiring an act which the defendant "is not at liberty to commit" — as involving "in other words, an act *without legal justification*".[295] Laskin J.A. asserted that this test had been adopted by several Canadian appellate courts, including by Lambert J.A. (dissenting) in *No. 1 Collision*.[296] While Laskin J.A. declined to decide the "outer limits" of the *Torquay Hotel* principle, he endorsed the broad approach taken by Lord Denning.[297] In his view, there were "no policy reasons" to the contrary, and a narrow view of unlawful means could preclude claims for acts that "on a common sense view" would be considered unlawful.[298] Accordingly, because the defendant's directive was a "ruling beyond its powers", Laskin J.A. concluded that the defendant had engaged in unlawful means for the

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which rejected the proposition that acting in restraint of trade can meet the unlawful means element, see *Even v. El Al Israel Airlines Ltd.* (2006), 15 B.L.R. (4th) 265, ¶63–66 (Ont. S.C.J.). See, however, *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, [2006] 11 W.W.R. 688 at 708-709 (B.C.S.C.); add'n reasons [2007] 1 W.W.R. 541 (B.C.S.C.), where the Court followed Lambert J.A.'s reasoning in declining to strike out an allegation of unlawful means based on restraint of trade.

293 See, e.g., *Humby Enterprises Ltd. v. Humby* (2003), 225 Nfld. & P.E.I.R. 268, ¶52 (Nfld. C.A.); and *Swift Current (City) v. Saskatchewan Power Corp.*, [2007] 5 W.W.R. 387, ¶83–86 (Sask. C.A.).

294 *Reach*, *supra* note 20, ¶49.

295 *Ibid.* ¶50, emphasis added.

296 *Ibid.* ¶51.

297 *Ibid.* ¶52.

298 *Ibid.* ¶52.

purposes of the tort.[299]

While some pre-2007 courts adopted the broad definition of unlawful means proposed in *Reach*,[300] others remained undecided on the matter.[301] In addition, it was clear that certain aspects of Laskin J.A.'s judgment were open to question. In particular, the *Reach* definition of an act "without legal justification", read literally, appeared to remove the requirement for unlawful means altogether.[302] It effectively substituted the unlawful means element (a threshold criterion) for the defendant's inability to establish justification (a separate defence),[303] and reversed the onus of establishing the unlawful means requirement by requiring the defendant to provide a legal justification for its conduct. More fundamentally, it harkened back to *prima facie* tort doctrine suggested by Bowen L.J., in the Court of Appeal, in *Mogul*, i.e., that "intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable *if done without just cause or excuse*".[304] As noted earlier, the

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299 *Ibid.* ¶52-53. For an earlier case which held, contrary to *Reach*, that violation of an internal administrative policy could not satisfy the unlawful means element of the tort of unlawful interference with economic interests, see *Nichols Gravel Ltd. v. Delhi (Township)*, [1996] O.J. No. 2973, ¶66–68 (Gen. Div.); aff'd 1999 CarswellOnt 4868 (Div. Ct.); leave to appeal to Ont. C.A. refused 1999 CarswellOnt 4867 (C.A.); leave to appeal to S.C.C. refused [2000] S.C.C.A. No. 44.

300 See, e.g., *Duke v. Puts*, [2004] 6 W.W.R. 208, ¶83–87 and 92 (Sask. C.A.). See also: *Verchere v. Greenpeace Canada* (2004), 241 D.L.R. (4th) 327, ¶36 (B.C.C.A.); leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 332. (where the Court described unlawful means in the context of interference with contractual relations as an act "which one has no lawful right to do", without citing *Torquay Hotel*, *No. 1 Collision* or *Reach*); and *Poirier v. Community Futures Development Corp. of Mt. Waddington*, 2005 BCCA 169 ¶14 (where the *Torquay Hotel* test was cited, without reference to either *No. 1 Collision* or *Reach*, in the context of a pleadings motion).

301 *Conversions by Vantasy Ltd. v. General Motors of Canada Ltd.*, [2006] 8 W.W.R. 413, ¶23–31 (Man. C.A.); leave to appeal to S.C.C. refused [2006] S.C.C.A. No. 358.

302 In fairness to Laskin J.A., the statement that "unlawful means" included "an act without legal justification" was *obiter* on the facts of *Reach*, since the defendant's conduct was not merely unjustified but was *ultra vires*. However, the statement does illustrate the uncomfortable proximity between the "broad view" of unlawful means from *Torquay Hotel*, and the *prima facie* tort doctrine, a point discussed in greater detail below.

303 That *Torquay Hotel* was not intended to conflate these concepts is supported by Lord Denning's following statement in *Acrow (Automation) Ltd. v Rex Chainbelt Inc.*, [1971] 1 W.L.R. 1676 at 1682 (C.A.):

> I take the principle of law to be that which I stated in *Torquay Hotel Co. Ltd. v. Cousins*, [1969] 2 Ch. 106 , 139, namely, that if one person, *without just cause or excuse*, deliberately interferes with the trade or business of another, *and does so by unlawful means, that is, by an act which he is not at liberty to commit*, then he is acting unlawfully. [emphasis added]

304 *Mogul Steamship Co. Ltd. v. McGregor, Gow & Co.* (1889), 23 Q.B.D. 598 at 613 (C.A.); aff'd [1892] A.C. 25 (H.L.), emphasis added.

rejection of this doctrine was at the very heart of *Allen*.[305]

3. A Comparative Assessment of Unlawful Means Principles *Circa* 2006

As will be seen, 2007-2008 was an eventful period in the evolution of Anglo-Canadian legal principles addressing the unlawful means element of interference with economic interests and, to a lesser extent, conspiracy. In order to more fully understand the developments which took place during that time, it is useful to briefly summarize the pre-existing governing principles. The following high-level legal propositions compare and contrast the state of the law in Canada and in the U.K,[306] *circa* 2006:

> (1) Under both U.K. and Canadian law, there remained some uncertainty as to whether the unlawful means required to make out the tort of interference with economic interests must invariably involve conduct directed towards a third party, or whether conduct directed against the plaintiff itself could suffice.
>
> (2) Under U.K. law, it was not fully settled whether, for the purposes of the unlawful interference tort, the unlawful means directed at a third party needed to take the form of conduct which was independently and civilly actionable by the third party. In Canada, it appeared from *Therien* that no such requirement of independent actionability by an affected third party was a mandatory characteristic of the element of unlawful means.
>
> (3) Under both U.K. and Canadian law, it remained unclear whether the unlawful means required to make out the tort of interference with economic interests could include the same conduct as that which was independently actionable at the suit of the plaintiff.
>
> (4) Under U.K. law, there was uncertainty regarding the role of the broad view of unlawful means (*i.e.*, conduct the defendant was "not at liberty to commit") in the context of unlawful interference (with divergent views in cases such as *Dunlop*, *Lonrho I* and *Torquay Hotel*). Under Canadian law, there was a greater acceptance of the broad view of unlawful means (particularly in *Reach*), although this matter was again not fully settled (given cases like *No. 1 Collision*). However, the outer limits of the broad view in Canada had yet to be defined.

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305 See Hazel Carty, *An Analysis of the Economic Torts* (Oxford: Oxford University Press, 2001) at 6-7, 109 and 123-124. Indeed, some commentators have noted that it is precisely *because* the Anglo-Canadian courts felt uneasy about determining the scope of the "justification" concept as a basis for liability that they rejected the *prima facie* tort in favour of the unlawful means requirement: see, e.g., John G. Fleming, *The Law of Torts*, 9th ed. (Sydney: LBC Information Services, 1998) at 41 and 767. The attitude of the Commonwealth courts to this doctrine is summarized by Atkin L.J., in *Ware & De Freville Ltd. v. Motor Trade Assn.*, [1921] 3 K.B. 40 (C.A.) at 79: "[t]he effect of such a doctrine on commerce would be incalculable. I cannot conceive that the common law imposes such grievous fetters upon individual liberty".

306 The discussion of U.K. law *circa* 2006, i.e., prior to *OBG*, is largely adapted from the description provided by the House of Lords in *OBG* and *Total Network*.

(5) Under U.K. law, it was not settled whether the concept of unlawful means had a different meaning in the context of conspiracy than it did in the context of interference with economic interests. In Canada, the ruling of the Supreme Court in *Gagnon* suggested that the concept of unlawful means in both contexts was the same (subject to the proviso that the broad view of unlawful means had yet to attract a large measure of support in conspiracy cases).

(6) Under both U.K. and Canadian law, it appeared that the unlawful means criterion of tortious conspiracy could be satisfied through conduct which was either directed against the plaintiff (as in *Gagnon* and *Hunt*), or was directed against a third party intermediary and thereby caused injury indirectly to the plaintiff (as in *Canada Cement LaFarge* and *Lonrho* 2).

(7) Under U.K. law, there remained uncertainty as to whether the unlawful means lying at the heart of a tortious conspiracy must themselves have been independently actionable by either the plaintiff or by any directly affected third party. Under Canadian law, in contrast, it appeared from *Gagnon* and *Canada Cement LaFarge* that unlawful means did not have to be independently actionable, whether they were directed at the plaintiff or a third party.

(8) Under U.K. law, the courts appeared to have rejected the doctrine of "merger", which holds that a separate conspiracy cannot validly be made out in circumstances where the ability to demonstrate the "unlawfulness" of the unlawful means in the conspiracy claim is necessarily dependent upon establishing the actionability of that conduct, under a separate head of liability, for which the plaintiff has also brought a parallel claim against the defendants. Under Canadian law, although the matter was not settled, some courts had accepted the doctrine.

IV. 2007-2008: EVOLUTION AND REVOLUTION

1. The 2007-2008 Jurisprudence

Beginning in 2007, five decisions (the "2007-2008 Jurisprudence") were released that have invited a critical reappraisal of the foregoing principles. The first ruling, *Drouillard*, represents an evolution in the Canadian broad view of unlawfulness famously enunciated in *Reach*. The second and third rulings, *OBG* and *Total Network*, represent a revolution that overthrew 100 years of U.K. jurisprudence, and returned it to its roots in *Allen*. The last two rulings, *O'Dwyer* and *Correia*, represent seemingly divergent Canadian attempts to grapple with the consequences of *OBG* (and, indirectly, *Total Network*), in light of *Drouillard*.

(a) *Drouillard*

Drouillard was decided on May 1, 2007.[307] It was the first case in which the Ontario Court of Appeal substantively revisited the test for unlawful means following its influential articulation of the broad view in *Reach*.

The facts of *Drouillard* involved a claim by the plaintiff, a former cable installer, against the defendant cable company, his ex-employer. Subsequent to departing from his employment with the defendant, the plaintiff obtained employment with a third party, which worked as a contractor for the defendant. The defendant maliciously informed the third party that it would not permit the plaintiff to work on any of its equipment. This resulted in the plaintiff's dismissal, and inability to obtain employment with another contractor. The defendant's conduct represented a violation of an internal corporate policy, in which it undertook not to instruct contractors that certain individuals were prohibited from working on its projects where (as in this case) it did not have "reasonable cause" to do so. The plaintiff, relying on *Reach*, sued the defendant for "tortious interference with his employment", and the claim proceeded on the basis of both unlawful interference with economic interests and inducing breach of contract.

The plaintiff was successful on both torts at trial (where the two causes of action were conflated by the Trial Judge).[308] However, only the plaintiff's inducing breach of contract claim was upheld by the Court of Appeal. On behalf of a unanimous panel, Rouleau J.A. held that the Trial Judge had erred in finding the defendant liable for unlawful interference with economic interests. This was because the defendant's conduct was not actually unlawful. In arriving at this finding, Rouleau J.A. rejected the proposition (also famously rejected in *Allen*) that the defendant had acted unlawfully merely by acting arbitrarily and in bad faith.[309] Further, although the defendant had acted contrary to its internal policy, Rouleau J.A. found that the situation was not analogous to the facts at issue in *Reach*. He expressed his reasons on this point as follows:

> *Reach* is readily distinguishable from the facts in this case. *In Reach, the PMAC's powers were circumscribed to a certain degree by its members and the Code was directed at protecting the interests of its members.* In *Reach*, the PMAC's actions were problematic as the association's ruling *went beyond the limits of the powers which its members had given it* and the ruling adversely affected the interests of a member, Reach M.D. Inc. *In the present case, however, Cogeco's unwritten internal policy was not put in place to protect the interests of Drouillard or Mastec. It does not appear that Drouillard or Mastec were aware of or relied on this policy. Further, there was no indication that Cogeco and the employees involved in the decision regarding Drouillard were "not at liberty" to suspend or simply disregard this unwritten policy.* Although the limits of this tort have yet to be set, it would be inappropriate, in my view, to extend the application of this tort to breaches of a corporation's internal policies in circumstances such as those

307 *Drouillard*, *supra* note 17.

308 *Ibid.* ¶13.

309 *Ibid.* ¶25.

found in this case.[310]

Thus, Rouleau J.A. seems to have found that the broad approach to unlawful means taken in *Reach* will not apply to conduct that is not in violation of a *legally binding* obligation. In *Drouillard*, no such obligation arose from the defendant's internal policy. Unlike the internal code at issue in *Reach*, the internal policy in *Drouillard* did not impose a jurisdictional limitation on the defendant. Further, it did not give rise to any detrimental reliance by the plaintiff.

Accordingly, the decision in *Drouillard* significantly narrowed the broad approach to unlawful means taken in *Reach*. This is also implicit in Rouleau J.A.'s treatment of the plaintiff's inducing breach of contract claim. In allowing that claim, Rouleau J.A. expressly declined to exonerate the defendant on the basis of the justification defence (in part because the defendant had acted contrary to its internal policy).[311] Thus, Rouleau J.A. held that the same conduct which was incapable of being justified was also incapable of amounting to "unlawful means" for the purposes of the unlawful interference tort. He therefore seems to have implicitly overruled Laskin J.A.'s suggestion in *Reach* that unlawful means extends to conduct which is merely without legal justification.

(b) *OBG*

One day after the Court of Appeal issued *Drouillard*, the House of Lords released its reasons in the watershed ruling in *OBG*.[312] The Law Lords' decision resolved three different appeals, and, in so doing, addressed a number of key torts.

In the first appeal (from *OBG Ltd. v. Allan*),[313] the plaintiffs were a company and its affiliate. The company's creditor invalidly appointed the two defendants as its receivers. The defendant receivers, acting in good faith, settled some of the company's contractual claims against third parties for amounts that were less than the company's liquidator would have received. The plaintiffs sued the defendants for (*inter alia*) unlawful "interference with contractual relations", in addition to conversion of their contractual rights. Both claims were rejected by the Court of Appeal.

In the second appeal (from *Douglas v. Hello! Ltd. (No. 3)*),[314] the plaintiff was a magazine publisher. It entered into an agreement with two film actors, in which it was granted the exclusive right to publish photos of their wedding for a limited duration. The defendant was a rival magazine publisher, who obtained and pub-

310 *Ibid.* ¶23-24, emphasis added.

311 *Ibid.* ¶39-40.

312 *OBG*, *supra* note 15. The case has been commended as a decision "which has much to offer with respect to the genealogy and physiology of the intentional economic torts": *SAR Petroleum Inc. v. Peace Hills Trust Co.* (2010), 318 D.L.R. (4th) 70, ¶2 (N.B.C.A.). However, as was also noted in *SAR Petroleum* (at ¶35), "it is not easy to navigate one's way through the four sets of concurring/dissenting opinions embracing three separate appeals and five different torts, all of which is canvassed in a 330 paragraph decision".

313 [2005] Q.B. 762 (C.A.); aff'd [2008] 1 A.C. 1 (H.L.) ["*OBG* Appeal"].

314 [2006] Q.B. 125 (C.A.); rev'd [2008] 1 A.C. 1 (H.L.) ["*Douglas* Appeal"].

lished illicit photographs of the wedding. The plaintiff sued the defendant for (*inter alia*) "interference by unlawful means with its contractual or business relations", in addition to breach of confidence. Both claims were also rejected by the Court of Appeal.

In the third appeal (from *Mainstream Properties Ltd. v. Young*),[315] the plaintiff was a property developer. Two of its employees were charged with the task of locating development properties. In breach of their contractual and fiduciary duties to the plaintiff, they diverted the purchase of one such property to a joint venture financed by the defendant. The defendant, while aware of the employees' obligations to the plaintiff, was falsely assured by them that the transaction did not raise a conflict of interest with those obligations (on the pretext that the employees had offered the property to the plaintiff, but it had declined to purchase it). The defendant therefore entered into the transaction in the genuine belief that he was not assisting the employees in the breach of their duties to the plaintiff. The plaintiff sued the defendant for inducing breach of contract. Once again, the claim was rejected by the Court of Appeal.

On further appeal to the House of Lords, the *OBG* Appeal was dismissed, since the defendant receivers did not breach any of the plaintiff company's contracts, nor use unlawful means or intend to injure the company (and because the tort of conversion did not extend to choses in action). The *Douglas* Appeal was dismissed on the ground that the defendant had not employed unlawful means in a way that restricted the film actors' liberty to deal with the plaintiff (although the appeal was allowed on the limited ground of breach of confidence). The *Mainstream* Appeal was also dismissed, since the defendant did not know that he was inducing a breach of the plaintiff's contract with the employees, and did not use any unlawful means.

The five Law Lords who heard the appeals split on several points, and formed a shifting majority.[316] However, in relation to the unlawful means element of the unlawful interference tort (a cause of action referred to in varying forms throughout the judgment), a three-member majority emerged under the judgment of Lord Hoffmann (with Lord Nicholls dissenting, and Lord Walker appearing to reserve judgment).

Both Lord Hoffmann and Lord Nicholls agreed that there could be no "unified theory" of the economic torts, at least in the sense suggested by *Merkur*, where unlawful interference was treated as a "genus" tort (of which inducing breach of contract was but a "species").[317] Instead, the Law Lords drew a sharp distinction between: (1) inducing breach of contract, and (2) unlawful interference with eco-

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315 [2005] I.R.L.R. 964 (C.A.); aff'd [2008] 1 A.C. 1 (H.L.) ["*Mainstream* Appeal"].

316 Lord Nicholls of Birkenhead dissented in relation to the *OBG* Appeal (with respect to the tort of conversion), the *Douglas* Appeal (with respect to the breach of confidence claim), and the "unlawful means" element in the unlawful interference tort more generally (including through his adoption of a different approach to the application of this element in the *Douglas* Appeal). Lord Walker dissented in relation to the *Douglas* Appeal (with respect to the breach of confidence claim). Baroness Hale of Richmond dissented in relation to the *OBG* Appeal (with respect to the tort of conversion).

317 *OBG*, *supra* note 15, ¶264, per Lord Walker.

nomic interests (which they referred to by various names, such as "causing loss by unlawful means").

They began by noting that, as originally formulated in *Lumley*, inducing breach of contract rested upon a principle of *"accessory"* liability — i.e., the defendant was held liable as an accessory to the commission of an actionable wrong by the plaintiff's contractual counterparty.[318]

In contrast, the unlawful interference tort, as formulated by Lord Watson in *Allen* on the basis of cases like *Garret* and *Tarleton*, rested upon a principle of *"primary"* liability.[319] Unlike inducing breach of contract, this tort involved holding the defendant liable as a result of its own commission of an unlawful act, which interfered with the liberty of a third party to deal with the plaintiff.[320]

The two torts were also characterized by several further differences, including the facts that: (a) inducing breach of contract does not require unlawful means by the defendant; (b) unlawful interference does not require damage to the plaintiff's contractual relations, but merely to its economic interests and expectations more generally; and (c) the intent requirement in unlawful interference must be an intent to cause damage to the plaintiff (even if such damage is only a means of enhancing the defendant's own economic position), whereas the intent requirement in inducing breach of contract is merely an intent to effect a breach of the plaintiff's contract (whether damage results or not).[321]

The Law Lords therefore viewed it as necessary to keep the torts distinct. Further, they found that these two forms of liability, although originally distinguished

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318 *Ibid.* ¶5, 8, 172 and 194. The Law Lords therefore rejected the suggestion by Tony Weir, *Economic Torts* (Oxford: Clarendon Press, 1997) at 29–34, that inducing breach of contract is not a tort of secondary liability, but is rather a tort in which the defendant itself commits a direct wrong against the plaintiff (specifically, by "perverting" the plaintiff's contractual counterparty into a means for injury to the plaintiff). Lord Hoffmann (at ¶32) also suggested that liability for inducing breach of contract could be justified on the ground that "[i]t treats *contractual rights as a species of property* which deserve special protection". [emphasis added] A similar rationale has been put forward by some authors, who suggest that the basis of the inducing breach of contract tort is that it involves the appropriation of a "quasi-proprietary" contract right by the defendant: see, e.g., J.W. Neyers, "The Economic Torts as Corrective Justice" (2009) 17 Torts L.J. 162. However, while it is beyond the scope of the present paper to engage in a detailed discussion of the basis for the inducing breach of contract tort, it should be observed that this "quasi-proprietary" theory does not clearly explain why the tort has been thought to apply where the defendant induces the violation of non-contractual rights, which are not necessarily "quasi-proprietary": see the discussion at footnote 130 above (although it may be argued, in reply, that this extension of the tort cannot survive *OBG*). Note also *Lumley*, *supra* note 37, at 232, where Erle J. stated that "the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong, as in violations of *a right to property*, whether real or personal, *or to personal security*". [emphasis added]

319 In reaching this distinction, the Law Lords acknowledged (¶65, 195 and 306) that they were drawing upon the work of Hazel Carty. See Hazel Carty, *An Analysis of the Economic Torts* (Oxford: Oxford University Press, 2001).

320 *OBG*, *supra* note 15, ¶6–8, 173 and 194.

321 *Ibid.* ¶8, per Lord Hoffmann.

by Lord Watson in *Allen*,[322] had come to be improperly conflated through the rulings in cases like *D.C. Thomson* and *Torquay Hotel*.[323] In holding that liability for inducing breach of contract could extend to the situation where the defendant indirectly prevented the counterparty's performance of the contract through unlawful means, such cases conflated accessory liability and primary liability.[324] Accordingly, the Law Lords held that the distinction between direct and indirect inducement, as enunciated in *D.C. Thomson*, should be abandoned.[325] In addition, they rejected *Torquay Hotel*'s extension of inducing breach of contract to situations where the defendant's conduct merely interfered with or hindered the counterparty's performance, and without causing an actual breach.[326] In short, they held that the torts of inducing breach of contract and unlawful interference should be "restored to the independence which they enjoyed at the time of *Allen*."[327]

Critically, however, the Law Lords did accept that the same conduct could ground both causes of action. As Lord Hoffmann observed:

> . . .*there is no reason why the same facts should not give rise to both accessory liability under Lumley v Gye and primary liability for using unlawful means*. If A, intending to cause loss to B, threatens C with assault unless he breaks his contract with B, he is liable as accessory to C's breach of contract under *Lumley v Gye* and he commits the tort of causing loss to B by unlawful means.[328]

Where Lord Hoffmann and Lord Nicholls parted company was in their divergent articulations of the unlawful means element of the tort of unlawful interference,[329] a matter that was recognized as "[t]he most important question concerning this tort".[330]

Writing for the majority, Lord Hoffmann described the two elements of the tort as consisting of: "(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".[331] In giving content to the first of these elements, he relied upon several of the leading cases (e.g., *Allen*, *Quinn*, *Rookes* and *Lonrho I*). In

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322 *Ibid.* ¶9–13, per Lord Hoffmann.

323 *Ibid.* ¶15–38 and 174–190.

324 As stated by Lord Hoffmann ¶36, "the real question which has to be asked in relation to *Lumley v Gye* [is] did the defendant's acts of encouragement, threat, persuasion and so forth have *a sufficient causal connection with the breach* by the contracting party *to attract accessory liability*?" [emphasis added]

325 *Ibid.* ¶38, 180 and 186.

326 *Ibid.* ¶44, 184-185 and 189-190.

327 *Ibid.* ¶38, per Lord Hoffmann.

328 *Ibid.* ¶21, emphasis added. See also ¶ 37, where Lord Hoffmann stated that: "there is no reason why the same act should not create both accessory liability for procuring a breach of contract and primary liability for causing loss by unlawful means".

329 Lord Hoffmann and Lord Nicholls appeared to be *ad idem* with respect to the elements of inducing breach of contract. See ¶39–44 and 181–193 (*ibid.*).

330 *Ibid.* ¶45, per Lord Hoffmann.

331 *Ibid.* ¶47.

addition, he relied upon *RCA Corporation v Pollard*[332] and *Isaac Oren v Red Box Toy Factory Ltd.*[333] These were two earlier decisions in which a defendant's infringement of a third party's intellectual property rights, previously licensed to the plaintiff, was found not to qualify as unlawful means. This was because (pursuant to Lord Hoffmann's interpretation) the infringement did not interfere with the third party's ability to perform its licence obligations to the plaintiff, even though the infringement was actionable by the third party, and even though it rendered the plaintiff's licence less profitable.

Based upon these cases, Lord Hoffmann appeared to conclude that unlawful means could only include acts which were *actionable* at the suit of the *third party* with whose *liberty of action to deal with the plaintiff* such acts interfered (subject to the rather counter-intuitive qualification that the third party need not have suffered any loss).[334] This was said to be consistent with the rationale for the tort provided by Lord Lindley in *Quinn* (i.e., that a wrong will "reach" the plaintiff, and "indirectly" infringe its rights, where it restricts a third party's liberty to deal with the plaintiff, and hence the plaintiff's liberty to deal with that third party), which Lord Hoffmann appeared to adopt in its entirety.[335] Lord Hoffmann's approach was also necessitated by the judicial reluctance (as evidenced in cases like *Mogul*) to wade into the fields of economics and morality, and the corresponding need to carefully circumscribe the unlawful interference tort.[336]

Accordingly, in Lord Hoffmann's view, conduct that was merely unlawful (in the sense that it was contrary to statute) would not satisfy the unlawful means re-

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332 [1983] Ch 135 (C.A.) [*RCA*].

333 [1999] FSR 785 (Ch. D.) [*Red Box*].

334 *OBG*, *supra* note 15, ¶49. It is not clear why Lord Hoffmann viewed this qualification as being consistent with the rationale for the unlawful interference tort provided by Lord Lindley in *Quinn*, *supra* note 34, at 535, since this rationale holds that "if the interference is wrongful and is intended to damage a third person, and he is damaged in fact. . . the whole aspect of the case is changed: *the wrong done to others reaches him*". [emphasis added]

335 *Ibid.* ¶46 and 56. See also ¶266, per Lord Walker.

336 *Ibid.* at 56, where Lord Hoffmann stated that:

> *The common law has traditionally been reluctant to become involved in devising rules of fair competition*, as is vividly illustrated by *Mogul Steamship Co Ltd v McGregor, Gow & Co*, [1892] AC 25. It has largely left such rules to be laid down by Parliament. In my opinion *the courts should be similarly cautious in extending a tort which was designed only to enforce basic standards of civilised behaviour in economic competition*, between traders or between employers and labour. Otherwise *there is a danger that it will provide a cause of action based on acts which are wrongful only in the irrelevant sense that a third party has a right to complain if he chooses to do so.* [emphasis added]

See also ¶147-148, where Lord Nicholls noted that "in this difficult and uncertain area of the law there is perhaps something to be said for having an *objective* element of unlawfulness as the boundary of liability". [emphasis added]

quirement.[337] Nor, it appeared, would conduct be sufficient merely because it was unlawful in the "broad" sense proposed in *Torquay Hotel* and adopted in *Reach*.[338] Lord Hoffmann further seemed to reject as insufficient conduct that was unlawful as against the plaintiff, but not also unlawful (in the sense of actionable) against a third party (although he left open the possibility of liability in a case of two-party intimidation).[339]At the same time, he did not expressly require that the conduct be non-actionable by the plaintiff itself, since (as noted above) he accepted that the same facts could give rise to simultaneous liability to the plaintiff for both unlawful interference with economic interests, and inducing breach of contract.

Finally, even where conduct was actionable as against a third party (or would have been but for the fact that the third party did not suffer any loss), it would only qualify under the unlawful means element where it interfered with the third party's liberty to deal with the plaintiff.[340] This test was not met on the facts of the *Doug-*

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337 *Ibid.* ¶57. Lord Hoffmann did, however, appear to contemplate that conduct could be "actionable" where it gave rise to a statutory (and not merely a common law) cause of action: see ¶52–55.

338 *Ibid.* ¶59-60.

339 *Ibid.* ¶61. This aspect of *OBG* is particularly opaque. Lord Hoffmann (at ¶7 and 47) refers to intimidation as a "variant" of the broader tort of unlawful interference. Thus, in suggesting that his analysis did not apply to two-party intimidation, Lord Hoffmann could be taken to suggest that his analysis only applied where a claim for unlawful interference *is* asserted in the three-party context, not that all claims for unlawful interference *must* be asserted in the three-party context. Indeed, some commentators have observed that *OBG* does not necessarily foreclose the possibility that non-actionable conduct directed at the plaintiff may qualify as unlawful means: see Simon Deakin *et al*, *Markesinis and Deakin's Tort Law*, 6th ed. (Oxford: Clarendon Press, 2008) at 593; and Hazel Carty, "The Economic Torts in the 21st Century" (2008) 124 L.Q.R. 641 at 660. However, it has also been argued that Lord Hoffmann did not intend to collapse the tort of intimidation into the tort of unlawful interference: Michael A. Jones *et al*, eds., *Clerk & Lindsell on Torts*, 4th Supp. to the 19th ed. (London: Sweet & Maxwell, 2009) at 302 (although Lord Hoffmann, writing extra-judicially, had earlier opined that intimidation should be treated as a variant of the unlawful interference tort: Hazel Carty, *An Analysis of the Economic Torts* (Oxford: Oxford University Press, 2001) at 99). It is also arguable that there is a greater justification for two-party liability in intimidation than in the unlawful interference tort: Hazel Carty, *An Analysis of the Economic Torts* (Oxford: Oxford University Press, 2001) at 120. In any event, as discussed below, it appears that the House of Lords in *Total Network* interpreted *OBG* as restricting the unlawful means element for the unlawful interference tort to conduct directed at and actionable by a third party.

340 *Ibid.* ¶51–54 and 129. See also *McLeod v. Rooney*, [2009] CSOH 158, ¶21; and *Future Investments SA v. Federation Internationale De Football Association*, [2010] EWHC 1019, ¶19–25 and 34–36 (Ch. D.). Interestingly, at ¶17 of the former decision, the Court appears to suggest that this requirement in *OBG* goes to the *damage* rather than the unlawful means element of the tort. A somewhat similar observation is made by Burton Ong, "Two Tripartite Economic Torts" (2008) 8 J.B.L. 723 at 737, who notes that the requirement that the unlawful means affect a third party's freedom to deal with the plaintiff relates to the *factual impact* rather than the *legal character* of the kinds of acts which may qualify as unlawful means.

las Appeal, given the similarity of those facts to *RCA* and *Red Box*. Lord Hoffmann summarized his definition of unlawful means this way:

> *Unlawful means therefore consists of acts intended to cause loss to the claimant by interfering with the freedom of a third party in a way which is unlawful as against that third party* and which is intended to cause loss to the claimant. It does not in my opinion include acts which may be unlawful against a third party but which do not affect his freedom to deal with the claimant.[341]

Lord Nicholls, writing for himself on this point, took a different approach. In his opinion, the rationale behind the unlawful interference tort was not to provide a remedy where intentional economic injury was inflicted upon the plaintiff "indirectly". Instead, the purpose of the tort was to "curb clearly excessive conduct," wherein the law "regards all unlawful means as unacceptable."[342] Lord Nicholls did suggest that (as demonstrated by *Red Box*) the tort's rationale, in the three-party situation, was to "provide a remedy where the claimant is harmed through the *instrumentality* of a third party" (and therefore proposed that such "instrumentality" be required as a control mechanism for the tort).[343] However, Lord Nicholls did not appear to view the tort as being restricted to the three-party situation, and refused to accede to the proposition that "in a two-party situation, the courts would decline to give relief to a claimant whose economic interests had been deliberately injured by a crime committed against him by the defendant".[344]

Based on this approach, Lord Nicholls held that (subject to the requirement of "instrumentality" in three-party situations) "unlawful means" should include "all acts a defendant is not permitted to do, whether by the civil law or the criminal law,"[345] provided the resulting injury to the plaintiff was intended by the defendant and was not merely the result of the defendant's *negligence*.[346] In his view, unlawful means could thus extend to "common law torts, statutory torts, crimes, breaches of contract, breaches of trust and equitable obligations, breaches of confidence, and so on."[347] However, Lord Nicholls did not clearly endorse the proposition from *Torquay* and *Reach* that unlawful means (whether directed at the plaintiff or a third party) could extend to conduct that was merely *ultra vires*.[348]

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341 *Ibid.* ¶51, emphasis added.

342 *Ibid.* ¶153–155 and 161.

343 *Ibid.* ¶159-160, emphasis in original.

344 *Ibid.* ¶161.

345 *Ibid.* ¶162.

346 *Ibid.* ¶141.

347 *Ibid.* ¶150. One court has suggested that, because Lord Nicholls referred only to "statutory torts" rather than "breaches of statute", he did not clearly hold that non-actionable breaches of statute could satisfy the unlawful means element for the unlawful interference tort: *Digicel (St Lucia) Ltd. v Cable & Wireless Plc*, [2010] EWHC 774 (Ch. D.), Annex I, ¶36.

348 ¶162, Lord Nicholls indicates that "the expression 'unlawful means' embraces all acts a defendant is *not permitted to do*, whether by the civil law or the criminal law". [emphasis added] It is arguable that this statement should be read to mean that unlawful means only extend to acts *positively forbidden* by the law, and not also to acts (as in *Reach*)

(c) *Total Network*

In *OBG*, Lord Walker suggested that, in view of the differences between the approaches to unlawful means taken by Lord Hoffmann and Lord Nicholls, "neither is likely to be the last word on this difficult and important area of the law."[349] This observation proved to be prophetic, since, one year later, in *Total Network*, the House of Lords returned to the subject, this time in the context of the tort of unlawful means conspiracy.[350]

The facts in *Total Network* involved a conspiracy by the defendant English and foreign companies to engage in a series of transactions that were designed to defraud the revenue. The plaintiff revenue authority sued the defendants for unlawful means conspiracy. With respect to the unlawful means element of the tort, the plaintiff relied upon the fact that some of the conspirators committed the common law criminal offence of cheating the public revenue.[351] The Court of Appeal struck out the claim on the ground that unlawful means conspiracy requires conduct which is independently actionable at the suit of the plaintiff, and therefore could not extend to a criminal offence. This judgment was reversed by the House of Lords.

Although five different judgments were delivered, all of the Law Lords agreed that unlawful means, for the purposes of conspiracy, need not be independently actionable by the plaintiff, but could include conduct that was criminal under either statute or at common law.[352] This was clearly true in situations like the one at issue, where (in contrast to the situation in *OBG*) the unlawful means were directed at the plaintiff rather than at a third party.[353]

Consistent with *OBG*, the Law Lords did not reject the proposition that unlawful means must be independently actionable by the person against whom they are

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that are simply beyond the defendant's *legal capacity*. On the other hand, ¶150, Lord Nicholls does suggest that the view which he endorses was encapsulated by Lord Reid's description in *Rookes* of "doing what you have *no legal right to do*". Such a definition is closer to the *Torquay* test, although may not be identical insofar as a "liberty" to act may be broader than a "right" act.

349 *Ibid.* ¶269.

350 *Total Network*, *supra* note 16. Interestingly, *Total Network* would appear to be the first case in which the House of Lords has substantively considered the unlawful means element in the context of unlawful means conspiracy: see Hazel Carty, "The Economic Torts in the 21st Century" (2008) 124 L.Q.R. 641 at 660. For a useful discussion of *Total Network*, see Peter Edmundson, "Conspiracy by Unlawful Mean: Keeping the Tort Untangled" (2008) 16 Torts L.J. 20.

351 The plaintiff also relied upon an alleged fraudulent misrepresentation by one of the defendants, but this point did not form part of the analysis before the House of Lords.

352 *Total Network*, *supra* note 16, ¶43, 45, 56, 95, 116 and 227. See also *HM Revenue & Customs v. Begum*, [2010] EWHC 1799, ¶43 (Ch. D.). This marked a significant departure from *Lonrho 1*. As discussed below, however, a recent case has held that *Total Network* only permits non-actionable *crimes*, as opposed to other non-actionable statutory breaches, to satisfy the unlawful means element for conspiracy: *Digicel (St Lucia) Ltd. v Cable & Wireless Plc*, [2010] EWHC 774 (Ch. D.), Annex I, ¶55–62.

353 *Ibid.* ¶43 and 124.

directed where that person is a third party rather than the plaintiff.[354] They also did not appear to reject the proposition that unlawful means must be independently actionable where they form the basis of a claim for unlawful interference with economic interests rather than conspiracy.[355]

However, in what may be a clarification of *OBG*, the Law Lords appeared to suggest that unlawful interference (except perhaps in "exceptional" cases of intimidation) was a three-party tort, in which the defendant is only liable where it injures the plaintiff through the instrumentality of a third party, against whom it directs independently actionable conduct (and *vis-à-vis* whom it is or could be primarily liable).[356] The gist of the unlawful interference tort was therefore "striking at the claimant through a third party, and doing so by interfering with his freedom of economic activity".[357]

In *Total Network*, this approach to the unlawful interference tort was contrasted with the approach to conspiracy endorsed by the Law Lords. Although unlawful means conspiracy was (similar to unlawful interference) recognized to be a tort of primary rather than secondary liability,[358] its gist was said to be "damage intentionally inflicted by persons who combine for that purpose".[359] It could therefore include a situation where the defendant injured the plaintiff through unlawful means targeted at the plaintiff directly.[360] As a result, it could include unlawful means that were not independently actionable by their target,[361] provided it was through such unlawful conduct that harm was intentionally inflicted upon the plaintiff.[362] However, the Law Lords declined to fully delineate the precise scope of

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354 *Ibid.* ¶43, 100 and 123-124.

355 *Ibid.* ¶67, 100, 123-124 and 220. Although see Lord Walker's comment ¶93 that "all the statements of general principle in the classic cases seem to me to be consistent with the proposition that unlawful means, both in the intentional harm tort and in the tort of conspiracy, include both crimes and tort".

356 *Ibid.* ¶43, 99–104, 121–124 and 223. See also *McLeod v. Rooney*, [2009] CSOH 158, ¶18.

357 *Ibid.* ¶100, per Lord Walker.

358 *Ibid.* ¶101–104, 116, 124 and 225. Thus, the Law Lords rejected the view, popularized by Hazel Carty, *An Analysis of the Economic Torts* (Oxford: Oxford University Press, 2001) at 24–26 and 103, that unlawful means conspiracy is (similar to inducing breach of contract) a form of "secondary" liability whose rationale flows from the co-conspirator's status as a joint tortfeasor.

359 *Ibid.* ¶100, per Lord Walker.

360 *Ibid.* ¶99–104, 123 and 223. Some commentators appear to suggest that *Total Network* actually *limits* unlawful means conspiracy to the two-party context: Peter T. Burns and Joost Blom, *Economic Interests in Canadian Tort Law* (Markham, Ont.: LexisNexis Canada Inc., 2009) at 11-12. However, the better view is that the House of Lords found unlawful means conspiracy, like intimidation, to be both a two-party and a three-party tort. If the House of Lords had intended to limit unlawful means conspiracy to the two-party context, they would surely have made this explicit, since it would be inconsistent with *Lonrho 2* (as well as *Canada Cement LaFarge*).

361 *Ibid.*

362 *Ibid.* ¶93–96, per Lord Walker.

such conduct.[363]

The House of Lords found that to hold otherwise would render the tort of conspiracy barren in the two-party context (since the co-conspirators could be held liable as joint tortfeasors in any case in which the unlawful means were independently actionable).[364] Further, there was a greater delimitation of liability in the two-party context than in the three-party context, which justified giving unlawful means a wider scope in the former.[365] Finally, the tort of conspiracy possessed certain unique features (such as being itself a criminal offence) that distinguished it from the tort of unlawful interference.[366]

Accordingly, the Law Lords were "driven to the conclusion that, as the economic torts have developed, 'unlawful means' has a wider meaning in the tort of conspiracy than it has in the intentional harm tort".[367] They therefore refused to accede to the "temptation of elegance", and concluded that the same conception of "unlawful means" need not be applied in the context of both unlawful means torts.[368]

(d) *O'Dwyer*

Shortly after *Total Network*, the Ontario Court of Appeal returned to the tort of unlawful interference with economic interests in its little-noted ruling in *O'Dwyer*.[369]

The case involved a claim against a government agency (the "Commission"), which was the regulatory authority for Ontario horseracing. The plaintiff had been employed as a horse racing starter with a race track (the "Raceway") for several years on a temporary and seasonal basis. An official of the Commission determined that the plaintiff should not be permitted to continue any professional involvement

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363 In finding that criminal conduct could suffice, Lord Mance suggested (¶119, *ibid.*) that not all proscribed conduct could qualify as unlawful means (e.g., breaking speed limits or driving through red lights), and that the criminality must have something to do with the damage inflicted upon the plaintiff. Further, Lord Neuberger suggested (¶224) that the crime may have to be one that exists for the protection of the victim.

364 *Ibid.* ¶94, 116 and 225-226.

365 *Ibid.*, ¶124, per Lord Mance.

366 *Ibid.* ¶56, 77, 124 and 221-222.

367 *Ibid.* ¶100, per Lord Walker

368 *Ibid.* ¶123, per Lord Mance. See also ¶224, per Lord Neuberger. In this respect, and as observed by Hazel Carty, "The Economic Torts in the 21st Century" (2008) 124 L.Q.R. 641 at 664, *Total Network* played the role of "*Quinn*" to the role of "*Allen*" played by *OBG*, extending the scope of liability for conspiracy in response to an earlier judgment that had restricted the scope of liability for individually inflicting economic harm.

369 *O'Dwyer*, *supra* note 18. The Ontario Court of Appeal issued another judgment concerning this tort subsequent to *OBG*, but prior to *O'Dwyer*, in *Lucien Groulx & Son Planing & Saw Mill Ltd. v. Nipissing Forest Resource Management Inc.*, 2007 ONCA 801, ¶18–21. However, the *Lucien Groulx* ruling did not substantively consider the unlawful means element, and did not refer to *Drouillard*, *OBG* or *Total Network* (but instead relied exclusively upon *Reach*).

in the horseracing industry. On this basis, the official, exercising his statutory authority, phoned the Raceway to inform it that the plaintiff would no longer be approved as a racing official. This dissuaded the Raceway from re-hiring the plaintiff for a new season. The Commission then prevented the plaintiff from exercising his legal right to review the official's "decision" (as represented by the phone call). The plaintiff sued the Commission for abuse of public office, inducing breach of contract and unlawful interference with economic interests.

Rouleau J.A. (the author of *Drouillard*) delivered judgment for a unanimous panel. The Court imposed liability against the Commission on the basis of only one of the three torts — abuse of public office. The Court concluded that the key element of this tort (a consciously unlawful act) was satisfied through the frustration, by the Commission, of the plaintiff's legal right to an appeal of the official's decision (i.e., his phone call to the Raceway).[370] This was so despite the Court's finding that the phone call was not itself an unlawful act. (More specifically, the Court concluded that the phone call itself was authorized by the Commission's enabling legislation, and was hence "lawful," even if the Commission's subsequent conduct was not.)[371] At the same time, Rouleau J.A. refused to impose liability on the basis of inducing breach of contract, since there was no existing agreement between the plaintiff and the Raceway.[372]

Rouleau J.A. also refused to impose liability on the basis of unlawful interference with economic interests. Unfortunately, the reasoning of the Court on this matter is, with great respect, somewhat opaque. In considering the elements of unlawful interference with economic interests, the Court referred to *Allen* as the decision that initially recognized the tort.[373] It then noted (without referring to *Total Network*) that the most recent discussion of the tort was that of the House of Lords in *OBG*.[374] In this respect, Rouleau J.A. cited with evident approval two passages from the ruling of Lord Hoffmann. The first passage reproduced the rationale for the tort expressed by Lord Lindley in *Quinn* (*i.e.*, that the tort served as a vehicle permitting compensation to be granted in circumstances where the defendant's wrongdoing against a *third party* reaches the plaintiff).[375] The second quoted passage confirmed that "[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."[376] No mention was made by Rouleau J.A. of the fact that this articulation of the elements of the tort was different than the articulation put forward in *Reach*, and repeatedly endorsed by the Ontario Court of Appeal (and other Canadian courts) in previous decisions (including by Rouleau J.A. himself in *Drouillard*).

It is interesting that the foregoing two passages from *OBG*, together with Lam-

370 *Ibid.* ¶31–38 and 45–53.

371 *Ibid.* ¶25–30.

372 *Ibid.* ¶54-55.

373 *Ibid.* ¶57.

374 *Ibid.* ¶58.

375 *Ibid.*

376 *Ibid.* ¶58 and 59, quoting from *OBG*, *supra* note 15, ¶46 and 47.

bert J.A.'s dissenting ruling in *No. 1 Collision*,[377] were the *only* judicial authorities cited by Rouleau J.A. addressing the substantive elements of the unlawful interference tort. Building on this consideration of the governing principles, the Court rejected liability for interference with economic interests in the following terms:

> *In this case, the "third party" is the raceway. The difficulty however, is that no wrongful interference was procured against the actions of the raceway. The phone call and the decision not to approve the respondent as a starter were*, for the reasons already described, *entirely legitimate* in the circumstances. I have instead concluded that the Commission acted with reckless indifference as to the legality of its authority to make a decision while depriving the respondent of his statutory right to challenge the decision and that the Commission was subjectively reckless or wilfully blind to the harm it would cause to the respondent. Thus, the circumstances necessary to make out the tort of intentional interference with economic relations are not present in this case.[378]

While this passage is somewhat unclear, it appears Rouleau J.A. accepted that — despite the Commission's "reckless indifference" to the illegality of its course of conduct (namely, the making of the decision, the communication of that decision to the Raceway, and the refusal to allow the plaintiff to challenge it) — there was no unlawful means *per se* as required by the unlawful interference tort itself. Rouleau J.A. seems to have reached this conclusion on the basis that, pursuant to *OBG*, he was only permitted to assess the "unlawfulness" of the Commission's conduct *vis-à-vis* the *third-party* Raceway, considered in strict isolation. Because the only conduct directed against the Raceway (the phone call) was not itself "unlawful" (whether *vis-à-vis* the Raceway, or *vis-à-vis* the plaintiff), but only became unlawful through the Commission's further conduct which was not directed at the Raceway (*i.e.*, its denial of the plaintiff's appeal right), the requisite element of the unlawful interference tort had not been satisfied.

The Court reached this conclusion even though the Commission was found to have committed the independent tort of abuse of public office as against the plaintiff. There was no discussion of whether the tort of abuse of public office was itself capable of serving as the unlawful means required to make out the unlawful interference claim (with Rouleau J.A. merely referring to *Sanders* as suggestive of the proposition that abuse of public office "should not be subsumed in some wider economic tort").[379]

It is difficult to determine what can or should be made of this ruling.[380] It seems clear that this panel of the Court of Appeal accepted that only conduct directed against a *third party* could satisfy the unlawful means element of the tort of unlawful interference. There is no indication, however, based on the somewhat am-

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377 *Ibid.* ¶57, n5.

378 *Ibid.* ¶60, emphasis added.

379 *Ibid.* ¶56, n4.

380 This uncertainty is exacerbated by the fact that, in the years since it was released, the *O'Dwyer* ruling appears to have been cited only once in connection with the unlawful interference tort. That sole subsequent reference is found in the Court of Appeal's own August 2010 decision in *Alleslev-Krofchak*, *supra* note 21 (as discussed below).

biguous language quoted above, that Rouleau J.A. also endorsed Lord Hoffmann's further conclusion that, in order to be "unlawful," such conduct must not only be unlawful as against that third party, but must also: (a) be independently and civilly actionable at the suit of the third party, and (b) interfere with the third party's liberty to deal with the plaintiff. Indeed, it is notable that *O'Dwyer* includes no principled discussion whatsoever of the meaning of "unlawful means." It is particularly surprising that the Court acknowledged no inconsistency in this regard between the majority view of Lord Hoffmann in *OBG*, and the broad view of unlawful means accepted in such Ontario precedents as *Reach* (as subsequently narrowed by Rouleau J.A.'s own ruling in *Drouillard*).[381]

(e) *Correia*

The next significant development in the law occurred almost immediately, with the Ontario Court of Appeal's release of its reasons in *Correia*.[382] The rulings in *O'Dwyer* and *Correia* had originally been argued in January 2008, and December 2007, respectively, and were each on reserve for approximately six months. The decisions were ultimately issued by different panels of the Court a mere three weeks apart.[383] It is intriguing, therefore, that in *Correia*, Justices Rosenberg and Feldman appeared to adopt a somewhat different approach than Rouleau J.A. in assessing the domestic implications of the House of Lords' ruling in *OBG*.

The facts in *Correia* revolved around the investigation of an employee, conducted by the defendant firm ("Aston"), which had been hired by the defendant parent company ("Kohler") of the defendant employer ("Canac"). Kohler requested that Aston undertake the investigation after Kohler began to suspect that certain of Canac's employees were engaged in criminal conduct. The plaintiff, a long-time employee of Canac, was mistakenly accused of the criminal conduct based on confusion between himself and another employee with a similar name. He was fired by Canac for cause, and later arrested by the defendant police officers (who did not conduct any investigation). When the mistake was eventually discovered, the plaintiff sued these defendants (and several other parties), alleging (*inter alia*) the torts of inducing breach of contract and intentional interference with contractual relations against Kohler and Aston. These causes of action were dismissed on summary judgment.

The Ontario Court of Appeal allowed the plaintiff's appeal in relation to some of the causes of action (including negligent investigation and intentional infliction of mental distress against Aston). However, it affirmed the motion judge's decision to dismiss the economic tort claims.

The ruling of Rosenberg and Feldman JJ.A. represented, at the time, the most extensive Canadian appellate analysis of the divergent approaches to unlawful

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381 The Court in *O'Dwyer* cited *Drouillard* in passing, but only in the context of dismissing the separate claim for the tort of inducing breach of contract: see ¶54.

382 *Correia*, *supra* note 19.

383 With *O'Dwyer* (*per* Rouleau J.A. (Weiler J.A. and Pardu J. *ad hoc*, concurring)) being released on June 6, 2008 and *Correia* (*per* Rosenberg and Feldman JJ.A. (O'Connor A.C.J.O. concurring)) on June 24, 2008.

means articulated respectively by the Court of Appeal in *Drouillard* and by the House of Lords in *OBG*. (In contrast, the intervening ruling in *Total Network* was ignored entirely by the Ontario Court.) Unfortunately, like the earlier decision in *O'Dwyer* (to which Rosenberg and Feldman JJ.A. did not refer), it is ultimately unclear to what degree the decision in *Correia* was intended to adopt the reasoning in *OBG*.

The Court in *Correia* began by referring to both *Drouillard* and *OBG* as cases that had "sought to reconcile confusing historical case law and to clarify and rationalize the elements" of the torts of inducing breach of contract and unlawful interference.[384] It then engaged in a respectful, but inconclusive, exegesis of Lord Hoffmann's judgment in *OBG*. Given the deferential language utilized by the Court, it is difficult to determine the extent to which Rosenberg and Feldman JJ.A. were merely *summarizing* the reasons in *OBG*, and to what extent they were more actively *endorsing* the analysis and conclusions embodied in the majority's ruling.[385]

A notable instance of this ambiguity is found in the Court's statement that "[t]he elements of the tort of causing loss by unlawful means *are* . . . (1) wrongful interference by the defendant with the actions of a third party in which the plaintiff has an economic interest" and "(2) an intention by the defendant to cause loss to the plaintiff."[386] While this statement is consistent with the Court's earlier ruling in *O'Dwyer*, it ignores the fact that the elements identified in *OBG* are different than those identified by the Court of Appeal itself in several previous cases, such as *Reach*. It also ignores the fact that the first element from *OBG* ("wrongful interference by the defendant with the actions of a *third party* in which the plaintiff has an economic interest") involves a fundamental revision of the traditional Canadian approach to the unlawful interference tort, effectively restricting it to the third-party context.

The Court of Appeal not only reiterated the Law Lords' enunciation of the elements of the tort of unlawful interference, but also referred to several other propositions from *OBG*. Without explicitly endorsing these propositions as reflective of Canadian law, Rosenberg and Feldman JJ.A. specifically mentioned the following:

> (1) Inducing breach of contract is a tort of "accessory" liability, whereas unlawful interference is a tort of "primary" liability in which the defendant causes the plaintiff's loss by "unlawfully interfering with the liberty

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384 *Correia*, *supra* note 19, ¶92.

385 See, for example, the laudatory language used *ibid.* ¶97: "[i]n *OBG*, the House of Lords determined to clarify and specifically define the elements of each tort. In doing so, the Lords corrected and, where necessary, overruled formerly precedential cases that, in hindsight, had introduced confusion and error into the definition of the two torts. *The result is a clear definition of the two torts and their elements*". [emphasis added] In thus describing the House of Lords as having "corrected" the law by overruling "confus[ing]" and erro[neous]" jurisprudence, it is unclear whether the Court of Appeal intended to convey a parallel message regarding the continuing authority of long-established Canadian legal precedent.

386 *Ibid.* ¶100, emphasis added.

of others".[387]

(2) The elements of the torts of inducing breach of contract and unlawful interference had "come to be confused" (which appears to be a reference to the House of Lord's rejection of the claim for indirectly inducing breach of contract).[388]

(3) As part of this confusion, courts had come to recognize an action where the defendant interfered with the plaintiff's contractual relations in a manner short of causing breach, which action was rejected by the House of Lords.[389]

(4) Because both torts are intentional, they require deliberate wrongdoing, such that merely negligent conduct must be actionable using negligence principles rather than through the vehicle of the economic torts.[390]

Finally, Rosenberg and Feldman JJ.A. turned to the treatment of unlawful means in *OBG*, acknowledging that this issue "has caused the most difficulty for judges and scholars."[391] Interestingly, the Court of Appeal's analysis of the divergent approaches to this issue is framed almost exclusively in the context of the majority and minority rulings in *OBG*:

(1) The Court noted that the majority of the House of Lords had endorsed a very narrow view of unlawful means, which encompassed only acts, intended to cause loss to the plaintiff by interfering with the freedom of a third party, which are themselves "unlawful as against the third party," in the sense that such acts "are actionable by that third party, or would have been actionable if the third party had suffered loss." For this reason, as the Court noted in passing, criminal conduct would not satisfy the requisite element of "unlawful means" under the *OBG* approach.[392] In making this point, the Court did not refer to *Therien* (which does not appear to have been cited to it), in which the Supreme Court of Canada held that a non-actionable (and even non-criminal) breach of statute could satisfy the unlawful means element of the unlawful interference tort.

(2) Turning to the dissenting ruling of Lord Nicholls in *OBG*, the Court of Appeal described his approach as "similar" to the approach to unlawful means endorsed in *Reach* (i.e., "acts which the tortfeasor 'is not at liberty to commit'"). Rosenberg and Feldman JJ.A. were careful to note, however, that the broad *Reach* principles must be read in light of subsequent domestic developments. As they cautioned, "Rouleau J.A. in *Drouillard* . . . distinguished *Reach M.D.* and limited its scope, when he

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387 *Ibid.* ¶94-95.

388 *Ibid.* ¶96 and n3. In this respect, it is interesting to note the comment in Michael A. Jones *et al*, eds., *Clerk & Lindsell on Torts*, 4th Supp. to the 19th ed. (London: Sweet & Maxwell, 2009) at 403 that the Court in *Correia* was incorrect when it stated, at n3, that *OBG* overruled cases such as *D.C. Thomson*, *Torquay Hotel* and *Merkur*.

389 *Ibid.* ¶96 and 99.

390 *Ibid.* ¶98–101.

391 *Ibid.* ¶102.

392 *Ibid.* ¶102-103.

> concluded that [the facts of that case] did not amount to unlawful means and that the tort of intentional interference with economic relations was therefore not made out in that case."[393]

Having thus usefully summarized the irreconcilable approaches to "unlawful means" identified in *OBG*, and having accurately noted that the dissenting approach of Lord Nicholls bore a marked similarity to existing Canadian principles, the Court of Appeal was presented with an invaluable opportunity to clarify and/or confirm the substance of domestic law on point. Regrettably, this was an opportunity which the Court chose not to exploit.

Rosenberg and Feldman JJ.A. *could* have adopted *holus bolus* the approach of Lord Hoffmann, thereby fundamentally rewriting established legal principles in Ontario (with inevitable ramifications elsewhere in the country). Alternatively, the Court *could* have rejected the approach of the majority in *OBG*, and instead endorsed Lord Nicholls's more flexible enunciation of unlawful means (thereby largely confirming the continuing force of domestic precedent). In the further alternative, the Court *could* have seized the opportunity to introduce salutary changes in the law, perhaps by incorporating certain elements of Lord Hoffmann's approach, but without embracing in all regards the radical retrenchment of the tort which the House of Lords ultimately accepted.

Instead, Rosenberg and Feldman JJ.A. determined, based on the facts before them, that "it [was] not necessary to fully define the scope of the 'unlawful means' component of the tort of intentional interference with economic relations."[394]

Upon completing its exegetical overview of *OBG*, the Court of Appeal turned, "[w]ith the background of this recent judicial consideration of the two torts",[395] to the claims before it. In rejecting both tort claims, the Court found that Kohler and Aston lacked the necessary intent to procure a breach of Canac's contract with the plaintiff, or to cause the plaintiff economic harm.[396] In this respect, the Court noted that the defendants' conduct "was not intentional — at most it was negligent".[397]

Accordingly, whatever else the Court of Appeal may have adopted from the ruling in *OBG*, it appears to have firmly accepted Lord Nicholls' finding that negligent conduct will not suffice for the unlawful interference tort (although it was not entirely clear whether this was on the basis that such conduct fails to qualify as unlawful means, or on the basis that a defendant who engages in merely negligent conduct cannot satisfy the intentionality requirement of both torts).[398] Justices Ro-

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393 *Ibid.* ¶103-104.

394 *Correia*, *supra* note 19, ¶107. This aspect of *Correia* is emphasized in Michael A. Jones *et al*, eds., *Clerk & Lindsell on Torts*, 4th Supp. to the 19th ed. (London: Sweet & Maxwell, 2009) at 313. The Court later took the same approach in *Alleslev-Krofchak*, *supra* note 21, ¶63, as discussed further below.

395 *Ibid.* ¶105.

396 *Ibid.* ¶105-106.

397 *Ibid.* ¶106. See also ¶98.

398 The Ontario Court of Appeal had earlier made a similarly opaque finding in *Lineal Group Inc. (c.o.b. Samsonite Furniture) v. Atlantis Canadian Distributors Inc.* (1998), 42 O.R. (3d) 157, ¶7 (C.A.); leave to appeal to S.C.C. refused [1998] S.C.C.A. No. 608.

senberg and Feldman also appear to have adopted the general view expressed by Lord Hoffmann in *OBG* that the tort of unlawful interference (similar to the tort of conspiracy) should be carefully circumscribed.[399]

In addition, the concluding portion of the Court's reasons suggests that Rosenberg and Feldman JJ.A. intended to adopt at least part of the further proposition from *OBG* that unlawful means must be targeted at a third party, and not directly at the plaintiff. They stated that:

> The contention of the appellant is that the negligent investigation conducted by Aston and Kohler constituted the unlawful means. As discussed above, although Aston may be held responsible in law for such negligence, Kohler may not. Therefore, *on any definition, Aston's conduct could amount to unlawful means if it was intended to cause harm to the appellant.* The same conduct by Kohler could not. *However, again as discussed above, Aston's alleged negligence is directly actionable by the appellant*, based on duty of care and foreseeability principles. *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.*[400]

This passage does not hold, as *OBG* appears to have done, that conduct can only qualify as unlawful means for the purposes of the unlawful interference tort where it is *actionable* by a third party. (Such a proposition, to the extent that it were adopted by the Court, would have not only overruled the "broad" approach in *Reach*, but would be potentially *per incuriam*, given the Court of Appeal's failure in *Correia* to refer to the contrary and binding Supreme Court ruling in *Therien*.)[401] Nor does the approach of Rosenberg and Feldman JJ.A. explicitly require, as in *OBG*, that the unlawful conduct interfere with the third party's liberty to deal with the plaintiff. However, the quoted passage does suggest (in a manner similar to *O'Dwyer*) that the conduct *must* be targeted at a third party, through whose "instrumentality" the plaintiff is injured. What is more (and unlike both *O'Dwyer* and *OBG*), the passage also suggests that the conduct must *not* be independently actionable by the *plaintiff* (at least where the plaintiff brings a successful independent claim for that conduct, as did the plaintiff in *Correia* in relation to the negligence of Aston).[402]

Thus, pursuant to *Correia*, it appears that conduct may amount to unlawful

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399 *Correia*, *supra* note 19, ¶101. The Court stated that "[t]he two economic torts are *strictly limited in their purpose and effect in the commercial world*, where much competitive activity is not only legal but is encouraged as part of competitive behaviour that benefits the economy". [emphasis added]

400 *Ibid.* ¶107, emphasis added.

401 See, in this respect, *Tardif v. McGrath* (2002), 635 A.P.R. 362, ¶74–78 (N.S.C.A.); leave to appeal to S.C.C. refused [2002] S.C.C.A. No. 261, where Cromwell J.A. (as he then was) found that *Therien* and *Gagnon* precluded the argument that a non-actionable breach of statute could not serve as the unlawful means for indirectly interfering with contractual relations.

402 Interestingly, the proposition that a plaintiff need not rely upon the tort of unlawful interference, where it is grounded upon a tort that is independently actionable by the

means where it is either: (1) targeted at a third party, and actionable by the third party, but not directly actionable by the plaintiff (as in *OBG*); or (2) targeted at a third party, but not actionable by the third party, and also not directly actionable by the plaintiff, although nevertheless still "unlawful" (as in *Therien*).

Left unsettled by the Court of Appeal was the continuing authority of the established broad view of unlawful means from *Reach* (although, to the extent that unlawful conduct targeted directly at or actionable by the plaintiff does *not* suffice, it would seem that many forms of conduct the defendant is "not at liberty to commit" would for this reason alone be found not to qualify as unlawful means). The Court's silence on this issue is particularly surprising given that both Feldman and O'Connor were members of the panel in *Drouillard* (where the *Reach* approach was affirmed, although limited in its scope). Also left unsettled was the domestic applicability, if any, of the remaining aspects of Lord Hoffmann's exceedingly narrow understanding of unlawful means.

2. A Comparative Assessment of Unlawful Means Principles *Circa* 2008

Based on the foregoing, it is plain that the 2007-2008 Jurisprudence effected a number of significant changes to the unlawful means requirement in both Canada and England. The following high-level legal propositions compare and contrast the state of the law in Canada and in the U.K, *circa* 2008:

> (1) Under U.K. law, pursuant to *OBG* and *Total Network*, the unlawful means necessary to make out the tort of interference with economic interests were required to involve conduct directed towards a third party through whose instrumentality the plaintiff was injured, and not merely against the plaintiff directly (save perhaps in exceptional cases of two-party intimidation). This proposition also appeared to have been accepted in Ontario (via *O'Dwyer* and *Correia*), although its status elsewhere in Canada remained uncertain.
>
> (2) Under U.K. law, pursuant to *OBG*, the unlawful means directed at a third party would only satisfy the requirements of the unlawful interference tort if such conduct was: (i) at least theoretically, independently and civilly actionable by the third party (or would have been had the third party suffered a loss); and (ii) of a kind that interfered with the third party's liberty to deal with the plaintiff. In contrast, while the law was somewhat unsettled in Ontario (given *O'Dwyer* and *Correia*), these propositions had not been clearly adopted in Canada. Moreover, the first proposition, at least, appeared inconsistent with the Supreme Court of Canada's ruling in *Therien*.
>
> (3) Under U.K. law, pursuant to *OBG*, the same conduct by the defendant could be both independently actionable at the suit of the plaintiff, and simultaneously satisfy the unlawful means element of the tort of interference with economic interests, at least where the conduct was indepen-

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plaintiff, was emphasized by Lambert J.A. (dissenting) in *No. 1 Collision*, *supra* note 284, ¶128.

dently actionable on the ground of inducing breach of contract (and provided that inducing breach of contract *per se* was not relied upon as the "unlawful" means in question). In contrast, under Ontario law (following *Correia*), that same conduct by the defendant could not be both independently actionable at the suit of the plaintiff (at least in the sense that the plaintiff actually brings a successful independent claim for that conduct), and simultaneously satisfy the unlawful means element of the tort of interference with economic interests (at least when relied upon for this purpose in its independently actionable capacity). Elsewhere in Canada, this matter appeared not to be fully settled.

(4) Under U.K. law, pursuant to *OBG*, it was clear that the broad view of unlawful means could not be reconciled with the House of Lords' restrictive approach to the unlawful interference tort. While the law was somewhat unsettled in Ontario (given *O'Dwyer* and *Correia*), the better view appeared to be that such conduct could still satisfy the tort. This was, however, subject to two qualifications: (a) *Drouillard* indicated that the conduct must involve the violation of a legally binding obligation, and that the tort required more than conduct which was simply unjustified (as suggested in *Reach*); and (b) *Correia* indicated that the conduct must be intentional rather than merely negligent. Outside Ontario, many Canadian courts continued to apply the broad view (as discussed further below).

(5) Under U.K. law, pursuant to *Total Network*, the concept of unlawful means had been accepted by the House of Lords to possess an entirely different meaning in the context of conspiracy than the meaning applied in the context of interference with economic interest. Under Canadian law, the Supreme Court ruling in *Gagnon* had long ago indicated that "unlawful means" had an equivalent meaning in both contexts (subject to the proviso that the broad view of unlawful means might not apply in the conspiracy context). However, because *Gagnon* also indicated that unlawful means for conspiracy could include conduct directed at the plaintiff itself, contrary to what *O'Dwyer* and *Correia* held in the context of unlawful interference, there might yet have been a difference in the scope of unlawful means as between conspiracy and unlawful interference in Ontario.

(6) Under both U.K. law (pursuant to *Lonrho 2* and *Total Network*), and Canadian law (pursuant to *Gagnon*, *Canada Cement LaFarge* and *Hunt*), the unlawful means criterion of tortious conspiracy could be satisfied through conduct which was either directed against the plaintiff, or was directed against a third party intermediary and thereby caused injury indirectly to the plaintiff.

(7) Under both U.K.law (pursuant to *Total Network*) and Canadian law (pursuant to *Gagnon*) the unlawful means lying at the heart of a tortious conspiracy need not have been independently actionable where such conduct was directed at the plaintiff (although *Total Network* did not say whether this principle applied where the unlawfulness took the form of a non-actionable statutory breach that was not also criminal). Under U.K. law (pursuant to *Total Network*) it was unclear whether the unlawful

means for conspiracy must be independently actionable where such conduct was directed at a third party. In Canada, it appeared to have been settled by *Canada Cement LaFarge* that unlawful means could include non-actionable conduct when directed at a third party.

(8) Under U.K. law (pursuant to *Total Network*), the courts appeared to have left open the doctrine of "merger", which holds that a separate conspiracy cannot be made out in circumstances where the ability to demonstrate the "unlawfulness" of the unlawful means in the conspiracy claim is necessarily dependent upon establishing the actionability of that conduct, under a separate head of liability, for which the plaintiff has also brought a parallel claim against the defendants. Under Canadian law, although the matter was not settled, some courts had accepted the doctrine.

V. 2010: HAS THE ONTARIO COURT OF APPEAL FINALLY PUSHED THE LAW BEYOND *REACH*?

1. The 2010 Jurisprudence

At the date of the present paper (*circa* September, 2010), more than two years have elapsed since the release of *O'Dwyer* and *Correia* by the Ontario Court of Appeal. During that time, dozens of rulings addressing the unlawful means torts have been issued by courts across the country.

As will be discussed in greater detail in Part VI of this paper, the substantial body of Canadian case law issued during this period has, with very limited exceptions, simply ignored these twin rulings of the Ontario Court of Appeal (to say nothing of the painstaking analysis offered by the House of Lords in *OBG* and *Total Network*). Instead, courts (both in Ontario and elsewhere) have continued to accept the broad view of unlawful means favoured by *Reach*, and have even begun to apply the *Reach* approach interchangeably to both interference with economic interests and the separate tort of conspiracy. On the rare instances in which recent Canadian decisions have acknowledged the rulings in *OBG* and/or *Correia*, the consensus among these courts has been that the concept of unlawful means remains in flux, and that the legal principles established prior to the 2007-2008 Jurisprudence continue to play a central and largely unchanged role in domestic law.

It was in this context that the Ontario Court of Appeal recently returned to the unlawful means element in two decisions (the "2010 Jurisprudence") which starkly illustrate the continuing divisions among Canadian courts. In the first ruling, *Alleslev-Krofchak*, the Court grappled with each of *Drouillard*, *OBG*, *Total Network*, *Correia* and *O'Dwyer*, in an apparent attempt to finally push the law "beyond *Reach*". In the second ruling, *Barber*, the same Court ignored all five of these cases (as well as *Alleslev-Krofchak* itself), offering instead a retrograde analysis that drew exclusively upon the *circa* 2003 definition of "unlawful means" endorsed in *Reach*.

(a) *Alleslev-Krofchak*

On August 24, 2010, a three-member panel of the Ontario Court of Appeal delivered its reasons in *Alleslev-Krofchak*.[403] Writing on behalf of a unanimous Court, Goudge J.A. embarked upon a detailed review of the 2007-2008 Jurisprudence, and clarified several aspects of the Court's reasoning in *Drouillard*, *O'Dwyer* and *Correia*. Regrettably, in so doing, the Court's analysis will almost certainly contribute to the growing confusion surrounding the unlawful means element, and particularly the domestic implications of the reasoning found in *OBG* and *Total Network*.

The plaintiffs in *Alleslev-Krochak* were an individual ("AK") and a corporation ("Temagami") that AK controlled and through which she provided services as an expert in military contracting. The defendants were a second corporation ("Valcom"), and two of that corporation's employees ("Poulin" and "Lewis").

The facts giving rise to the plaintiffs' claims are complex, but they may be summarized as follows. Valcom wished to bid on an RFP by the Department of National Defence ("DND"). Because DND required a bidder with AK's expertise, Valcom sought her assistance with the RFP process. AK then facilitated a relationship between Valcom and a U.S. company ("ARINC"), which had experience in projects of the kind contemplated by the RFP. AK wished to provide her services to DND through the subcontractor ARINC, rather than directly through the primary contractor Valcom.

With the assistance of AK and ARINC, Valcom was ultimately successful in the RFP with DND. The parties' relationship was embodied in a chain of three agreements:

> (1) The primary agreement between DND and Valcom (the "DND/Valcom Contract");
>
> (2) A second-level subcontract between Valcom and ARINC, whereby ARINC provided both ARINC's and AK's services under the DND/Valcom Contract to DND (the "Valcom/ARINC Subcontract"); and
>
> (3) A tertiary subcontract between ARINC and Temagami, whereby AK's services were provided, at first instance, to ARINC through Temagami (the "ARINC/Temagami Subcontract").

The specific conduct that gave rise to the action involved a series of escalating attacks on AK, orchestrated by Poulin and Lewis: (a) Poulin and Lewis first sent a series of defamatory emails and other communications, concerning AK, to ARINC, to DND and to other members of Valcom; (b) Poulin further caused Valcom to suspend, and thereby breach, the Valcom/ARINC Subcontract, after ARINC refused Poulin's request to remove AK from the project; and (c) Poulin next physically locked AK out of the project.

These actions by Poulin and Valcom also amounted to a breach of the DND/Valcom Contract. Further, they induced a breach by ARINC of the ARINC/Temagami Subcontract (since ARINC was required to prematurely remove

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403 *Alleslev-Krofchak*, *supra* note 21.

AK from the DND project), and frustrated the ARINC/Temagami Subcontract for the same reason.

AK and Temagami sued the three defendants, alleging three overlapping causes of action:

> (1) Defamation of AK committed by Poulin and Lewis (a claim brought exclusively by AK);
>
> (2) Inducing breach of the ARINC/Temagami Subcontract committed by Valcom and Poulin (a claim brought exclusively by Temagami); and
>
> (3) Unlawful interference with the economic interests of both AK and Temagami committed by Valcom, Poulin and Lewis (a claim brought by both AK and Temagami).

The unlawful means alleged in support of this final tort were: (a) the aforementioned defamation of AK committed by Poulin and Lewis; (b) an unlawful means conspiracy between Valcom, Poulin and Lewis to injure AK and ARINC (with the unlawful means for the conspiracy being the same defamation of AK committed by Poulin and Lewis): and (c) Valcom's breach of both the DND/Valcom Contract and the Valcom/ARINC Subcontract.[404]

At trial before Aitken J., AK was successful on both of the causes of action upon which she relied (i.e., defamation, and her allegation of unlawful interference, for which the Court accepted each of the three categories of unlawful means identified above).[405] Temagami was also successful on its inducing breach of contract claim, and its unlawful interference claim against Valcom and Poulin (with the Court again accepting each of the three alleged forms of unlawful means).[406]

The Ontario Court of Appeal affirmed Aitken J.'s findings of liability against the three defendants. In doing so, however, Justice Goudge rejected or varied certain aspects of the trial judge's underlying analysis regarding the unlawful means element.

The most important aspect of Goudge J.A.'s reasons was his treatment of the relationship between *OBG* and the existing Ontario jurisprudence on unlawful means in the context of unlawful interference with economic interests. Goudge J.A. began by acknowledging the Trial Judge's uncertainty as to whether the Court in *Correia* had intended to abandon its traditional approach to the unlawful means element, as reflected in cases such as *Reach* and *Drouillard*.[407] In downplaying these concerns, Justice Goudge took the view — perhaps surprisingly, in light of

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404 Thus, the defamation of AK alleged to have been committed by Poulin and Lewis was successively characterized by the plaintiffs: (i) as an independent cause of action, and also (ii) as one of the unlawful means grounding the separate interference with economic interests claim, and further (iii) as the unlawful means grounding the conspiracy claim, with that conspiracy itself representing a second form of unlawful means grounding the separate claim for interference with economic interests.

405 *Alleslev-Krofchak v. Valcom Ltd.*, [2009] O.J. No. 2469 (S.C.J.); aff'd 2010 ONCA 557.

406 Temagami was unsuccessful only as to its unlawful interference claim against Lewis (since Aitken J. found that Lewis was unaware of the existence of Temagami and did not intend to injure it).

407 *Alleslev-Krofchak*, *supra* note 21, ¶46.

the analysis above — that the law following *O'Dwyer* and *Correia* was clear.

After setting out the competing approaches to the unlawful means element articulated by each of Lords Hoffmann and Nicholls in *OBG*, (including the rationale for the unlawful means tort adopted by Lord Hoffmann from Lord Lindley's ruling in *Quinn*), Goudge J.A. stated unreservedly that the Ontario Court of Appeal "has now opted for the Lord Hoffmann side of the debate" given both *O'Dwyer* and *Correia*.[408] He summarized the effect of this as follows:

> In my view, therefore, it is now clear 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.[409]

Accordingly, as result of *Alleslev-Krofchak*, it seems clear that unlawful interference with economic interests is now exclusively a three-party tort in Ontario. To the extent that *Drouillard* suggested that unlawful means could be established on the basis of the defendant's defamation of the plaintiff (*i.e.*, as part of a two-party conceptualization of the unlawful interference tort), Goudge J.A. held that *Drouillard* had been overtaken by subsequent jurisprudence.[410]

One of the most interesting things about Goudge J.A.'s definition of "unlawful means" is that, despite purporting to base his definition upon Lord Hoffmann's judgment in *OBG*, Goudge J.A. stated that"the defendant's actions. . . cannot be actionable directly by the plaintiff". As in *Correia* (where the Court adopted a similar requirement), there was no discussion of how this requirement could be reconciled with Lord Hoffmann's holding that the same act which grounds the unlawful means element may be simultaneously actionable by the plaintiff under the rubric of inducing breach of contract. Indeed, Goudge J.A.'s failure to consider this issue is particularly curious in that, as discussed below, he found that the breach of the Valcom/ARINC Subcontract by Valcom served both as one of the unlawful means in Temagami's unlawful interference claim against Valcom, and as one of the factual bases for Temagami's inducing breach of contract claim against Valcom in relation to the ARINC/Temagami Subcontract (the very situation postulated by Lord Hoffmann in OBG).

It seems that the only way to reconcile this aspect of *Alleslev-Krofchak* with Goudge J.A.'s statement that unlawful means "cannot be actionable directly by the plaintiff" is to conclude that, where conduct is independently actionable by the plaintiff, it cannot qualify as unlawful means if that same head of independent liability is put forward as the reason for characterizing the conduct as "unlawful" vis-à-vis the unlawful interference tort. In *Alleslev-Krofchak*, although the breach of the Valcom/ARINC Subcontract by Valcom was independently actionable by Temagami under the tort of inducing breach of contract (i.e., the ARINC/Temagami Subcontract), it was not put forward as the "unlawful" means for Temagami's unlawful interference claim on that (inducement) basis, but instead on the different basis that it amounted to a breach of contract (i.e., the Valcom/ARINC Subcontract).

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408 *Ibid.* ¶57–59.

409 *Ibid.* ¶60, emphasis added.

410 *Ibid.* ¶62.

This interpretation of *Alleslev-Krofchak* would also seem to be consistent with *Correia* (where the prohibition upon independent actionability by the plaintiff was applied to a successful negligence claim whose "unlawfulness" vis-à-vis the unlawful interference tort was predicated upon the actionability of the negligence *qua* tort of negligence). At the same time, Goudge J.A. went further than the Court of Appeal in *Correia*, since he found that the prohibition upon conduct being "actionable directly by the plaintiff" extended to a purported ground of unlawful means for which the plaintiff could bring, but did not actually bring, a successful independent claim against the defendant. This is the necessary consequence of Goudge J.A.'s decision (discussed in greater detail below) to reject AK's unlawful interference claim insofar as it was based upon the unlawful means of a conspiracy against AK by the defendants (given that AK did not actually bring a claim in conspiracy in *Alleslev-Krofchak*).[411] In contrast, in *Correia*, although the Court held that the plaintiff could not rely upon the negligence of a defendant as the unlawful means element for the unlawful interference tort, it did so in circumstances where the plaintiff was actually successful in bringing an independent negligence claim against that defendant in the same action.

Given the foregoing aspect of *Alleslev-Krofchak*, it would seem that the prohibition upon conduct being "actionable directly by the plaintiff" in the context of the unlawful means element of the unlawful interference tort is, at least within Ontario, different than the principle of merger in the tort of unlawful means conspiracy (since merger, as discussed earlier, only applies where the ability to demonstrate the "unlawfulness" of the unlawful means in the conspiracy claim is necessarily dependent upon establishing the actionability of that conduct, under a separate head of liability for which the plaintiff has also brought a further claim against the defendants).

Another interesting aspect of *Alleslev-Krofchak* is that Goudge J.A., was largely silent about the continued validity of *Reach* in light of the new definition of unlawful means, noting only that the above-quoted definition of this concept was "not inconsistent" with cases like *Reach* and *Drouillard*.[412] Plainly, insofar as unlawful means must now be directed at a third party, and cannot be independently actionable by the plaintiff, such unlawful means can no longer be defined simply as an act which the defendant "is not at liberty to commit" (nor, even more exceptionally, as an act that is "without legal justification"). In purporting to thus expressly affirm *O'Dwyer*'s and *Correia*'s earlier adoption in Ontario of Lord Hoffman's restrictive approach to unlawful means, the Court in *Alleslev-Krofchak* may therefore be taken to have overruled a significant aspect of *Reach* and even of *Drouillard*. (One might reasonably have thought that the overruling of such a key element of

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411 *Ibid.* ¶66-68. The same analysis applies to Goudge J.A.'s ruling, at ¶ 64, that none of the *five acts* of defamation alleged by AK could qualify as unlawful means for the purposes of her unlawful interference claim, since AK did not bring a separate claim in defamation for two of those acts. As Goudge J.A. stated: "the trial judge erred in finding that the appellants' five acts of defamation against AK could satisfy the unlawful means requirement. . .These claims were *all directly actionable* by AK based on the tort of defamation. Indeed, *she did so successfully in respect of three of the acts* of defamation." [emphasis added]

412 *Ibid.* ¶46 and 61.

provincial common law, particularly one that continues to be broadly cited as a seminal principle in numerous cases, would have justified, and indeed required, the convening of a five-judge panel of the Court.)[413] Goudge J.A.'s failure to explicitly address this issue is particularly surprising given that he was himself a member of the panel that decided *Reach*.

Goudge J.A. was also silent on how Lord Hoffmann's definition of unlawful means could be reconciled with the decisions of the Supreme Court of Canada in *Therien* and *Gagnon*. Like the Court in *O'Dwyer* and *Correia* — and *Drouillard* and *Reach* before them — the Court in *Alleslev-Krofchak* inexplicably failed to acknowledge these presumptively governing and applicable rulings.[414] Significantly, *Therien* and *Gagnon* establish that unlawful means in the context of both unlawful interference and conspiracy can include conduct that is not directly actionable, whether by a plaintiff or a third party. (One wonders whether this consistent failure by the Court of Appeal to consider or apply these authoritative decisions from the Supreme Court is sufficient to leave all five of these rulings subject to challenge on the basis that they were made *per incuriam*.)[415]

In this regard, it is noteworthy that Justice Goudge found that all of the unlawful means alleged by the plaintiffs were "clearly actionable" under private law, even though two of the acts of defamation did not meet the technical pleading requirements for that tort (and hence could not have been advanced "as separate causes of action" by AK). He nevertheless concluded that all such acts of defamation satisfied the definition of unlawful means vis-à-vis unlawful interference with Temagami's interests, and also satisfied the definition of unlawful means vis-à-vis the separate conspiracy directed at ARINC.[416]

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413 On the other hand, as discussed below, Goudge J.A. did *not* expressly adopt Lord Hoffmann's requirement that unlawful means must involve conduct which is independently actionable by the third party against whom it is directed. Instead, the Ontario Court of Appeal merely required that unlawful means be directed at someone other than, and not be independently actionable by, the plaintiff. This potential divergence from the majority approach in *OBG* means that, hypothetically, the facts in *Reach* could still justify a finding of liability under the *Alleslev-Krofchak* test, provided that the precise form of unlawfulness vis-à-vis the third party may include conduct that is merely *ultra vires* (as opposed to conduct that is only actionable, or only actionable and in breach of statute). It is perhaps in this sense that Goudge J.A. suggested his revised definition of unlawful means was consistent with *Reach*.

414 This failure is particularly surprising in that the Court of Appeal did reference *Therien* in its judgment in *Lineal Group Inc. v. Altantis Canadian Distributors Inc.* (1998), 42 O.R. (3d) 157 (C.A.); leave to appeal to S.C.C. refused [1998] S.C.C.A. No. 608 (to which Goudge J.A. also referred in *Alleslev-Krofchak*, and in which Goudge J.A. was also a member of the deciding panel).

415 To be fair to Justice Goudge, he declined to "fully define" the extent to which the defendant's conduct must be actionable by the third party in order to qualify as unlawful means, and opted not to address any "qualifications" that applied to such a requirement, to the extent that it was ultimately found to exist: see *Alleslev-Krofchak*, *supra* note 21, ¶63.

416 *Alleslev-Krofchak*, *supra* note 21, ¶34, 45 and 69–75. This aspect of *Alleslev-Krofchak* is discussed in greater detail below. Goudge J.A (at ¶64) also held that neither the two

It is significant that Goudge J.A. opted not to expressly adopt the remaining component of the unlawful means definition proposed by Lord Hoffmann in *OBG* — i.e., the requirement that the defendant's conduct must interfere with the third party's "freedom to deal with the claimant". Goudge J.A. did hold that "there must be a causal connection between the unlawful means and the loss suffered by the plaintiff", and stated that the unlawful means "must be directed at a third party, *which then becomes the vehicle through which harm is caused to the plaintiff*".[417] Nevertheless, he appeared to stop short of limiting the unlawful interference tort to the situation contemplated by Lord Hoffmann, where the *only* protected interest of the plaintiff is its correlative liberty to deal with the third party.[418]

In the result, despite purporting to side with Lord Hoffmann in *OBG*, the Court in *Alleslev-Krofchak* ultimately adopted a hybrid definition of unlawful means, which borrowed certain components from the House of Lords and disregarded others. Following *Alleslev-Krofchak*, in Ontario, the unlawful means element of the unlawful interference tort is characterized by the following principal features:

> (1) Consistent with *OBG*, (and both *O'Dwyer* and *Correia*), the unlawful means utilized by the defendant must be directed at a third party, rather than at the plaintiff.
>
> (2) However, consistent with *Correia*, but in a seeming departure from *OBG*, the unlawful means must not be "directly actionable" by the plaintiff. In the sense understood by the Court of Appeal, this appears to require that: (a) the conduct cannot be independently actionable by the plaintiff under the *same* head of liability which is put forward as the reason why the conduct amounts to "unlawful" means; and (b) it does not matter whether the plaintiff has actually brought a successful claim under this independent head of liability, provided that the plaintiff *could* bring such a claim if it chose to do so.
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> (3) In a further departure from *OBG*, the Ontario Court of Appeal left open the question of whether the defendant's conduct must be directly actionable by the third party. (As a subsidiary question, the Court of Appeal completely ignored the question of whether such unlawful means, if they could be non-actionable by the third party, can include not only breaches of statute but also conduct which is merely *ultra vires*, as was

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allegations of defamation which failed to meet the defamatory pleading standards, nor the remaining allegations of defamation that did meet this standard, could serve as unlawful means vis-à-vis AK, since they would have been "directly actionable" by her.

417 *Ibid.* ¶50 and 60. See also ¶ 78.

418 See, in this respect, Goudge J.A.'s comments (at ¶81 and 84, *ibid.*), where he suggested that Valcom's breaches of contract with ARINC and DND could only be unlawful means insofar as they interfered with the actions of ARINC and DND in which AK and Temagami had an "economic interest". No mention was made of any requirement that this economic interest arise from a restraint upon ARINC and DND's liberty to deal with AK and Temagami (and hence take the form of AK and Temagami's correlative liberty to deal with ARINC and DND).

the case in *Reach*).[419]

(4) Finally, in what appears to be a relaxation of the narrow approach from *OBG*, the Court of Appeal required that the defendant's conduct must have a causal connection with the loss suffered by the plaintiff through the "vehicle" (or instrumentality) of the third party. However, it did not specifically require that the requisite loss take the form of a limitation on the third party's liberty to deal with the plaintiff (and the plaintiff's correlative liberty to deal with the third party).

It remains to be seen whether this piecemeal adoption of *some* of the principles endorsed by the House of Lords will succeed as an "Ontario-made" solution to the difficulties raised by the concept of unlawful means, or will simply exacerbate the existing uncertainty and confusion.

The complex facts of *Alleslev-Krofchak* provided a multi-faceted context in which to apply the Court of Appeal's newly emphatic definition of unlawful means:

- Ultimately, Goudge J.A. held that the unlawful interference claim of AK could not succeed to the extent that it was based upon the unlawful means of defamation and conspiracy committed by the defendants against AK herself. This was because neither form of unlawful means was directed at a third party, and also because both forms of conduct were themselves directly actionable by AK (although, as discussed above, no separate claim in conspiracy was ever brought by AK, and two of the acts of defamation had not been properly pleaded).[420]
- In contrast, Goudge J.A. found that AK's unlawful interference claim could succeed to the extent that it was premised upon the separate tort of unlawful means conspiracy directed against ARINC.[421] Ironically, he arrived at this finding even though the unlawful means alleged in support of the conspiracy against ARINC (i.e., the defamation of AK), was itself insufficient to constitute unlawful means when alleged in support of the unlawful interference with economic interests claim against AK herself.

Thus, although conduct that is directed at a plaintiff cannot itself qualify as unlawful means in the context of the unlawful interference tort, it may, by a type of

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419 The Court did not aver to the seeming unintelligibility of requiring that the conduct be directed at a third party, while not simultaneously requiring that the conduct be directly actionable by that third party, when the only rationale it offered for the first requirement was that of Lord Lindley in *Quinn*, *supra* note 34, at 535. It will be recalled that Lord Lindley explained that: "if the interference is wrongful and is intended to damage a third person, and he is damaged in fact — in other words, if [the plaintiff] is wrongfully and intentionally struck at through others, and is thereby damnified — the whole aspect of the case is changed: *the wrong done to others reaches him, his rights are infringed although indirectly*". [emphasis added]

420 *Alleslev-Krofchak*, *supra* note 21, ¶ 64-68. Goudge J.A. (at ¶44-45) noted that there was no appeal concerning the Trial Judge's finding that Temagami's unlawful interference claim could succeed on the basis of defamation and conspiracy (whether the conspiracy was as against AK or ARINC).

421 *Ibid.* ¶69–75.

renvoi, nevertheless ground an unlawful means conspiracy that is directed against a third party,[422] which conspiracy may then ground a claim for unlawful interference by the plaintiff.

Continuing to focus upon the unlawful means element of the unlawful interference claims asserted by AK and Temagami, Goudge J.A. considered whether the requisite unlawful means could be established by Valcom's breaches of both the DND/Valcom Contract and the Valcom/ARINC Subcontract. He found that Valcom's breach of the Valcom/ARINC Subcontract did support these claims, since it caused economic loss to AK and Temagami (even though, as discussed elsewhere, that same conduct was also found to render Valcom directly liable to Temagami for inducing breach of the ARINC/Temagami Subcontract).[423] In contrast, however, Goudge J.A. held that Valcom's breach of the DND/Valcom Contract was insufficient to fulfil the wrongful means element of the plaintiffs' unlawful interference claim. He reasoned that the breach of this agreement did not cause DND to act in a manner that affected AK's economic interests, as AK's services were provided on the project by ARINC rather than by DND.[424] Accordingly, there was no causal connection between the unlawful means and the plaintiffs' loss.

Another potentially significant aspect of the *Alleslev-Krofchak* decision arises from Goudge J.A.'s treatment of the unlawful means element in relation to the separate tort of conspiracy. The Court's ruling focused primarily upon the definition of unlawful means in the context of the unlawful interference tort, and it did not suggest that the hybrid definition which it adapted from *OBG* should be carried over into the context of unlawful means conspiracy. Nevertheless, in potentially important *obiter dicta*, Goudge J.A. made the following comments concerning the role of the unlawful means element in the separate tort of conspiracy:

> . . . An actionable conspiracy exists if the defendants combine to act unlawfully, *their conduct is directed towards the plaintiff (or the plaintiff and others)* and the likelihood of injury to the plaintiff is known to the defendants or should have been known: see *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at pp. 985-86. . . .
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> . . .
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> . . . [The defendants' actions, which were intended to harm AK, but which were also foreseeably harmful to ARINC] constitute the tort of "unlawful means" conspiracy against ARINC. *The unlawful means was the defamation of AK. It was directed by the appellants at ARINC through AK*, an ARINC

422 Presumably, such conduct could also ground an unlawful means conspiracy claim by the plaintiff itself given the seeming ability of conspiracy to serve as a two-party tort (subject to the doctrine of merger).

423 *Alleslev-Krofchak*, *supra* note 21, ¶76–83.

424 *Ibid.* ¶84. With respect, this conclusion appears somewhat difficult to justify. It seems more reasonable to conclude that Valcom's breach of the DND/Valcom Contract did indeed interfere with DND's liberty to deal with AK, as per the definition of unlawful means favoured by Lord Hoffmann in *OBG*. (On the other hand, the remoteness of the DND/AK relationship is arguably supported by *Design Services Ltd. v. Canada*, [2008] 1 S.C.R. 737, where the Court held that no duty of care in tort arises as between a project owner and a sub-contractor where the project owner breaches its agreement with the primary contractor).

> 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: see *Total Network SL v. Her Majesty's Revenue and Customs*, [2008] U.K.H.L. 19, ¶104.[425]

Thus, for purposes of the tort of conspiracy (in this case, a conspiracy against ARINC), the Court of Appeal appeared to accept on the facts of *Alleslev-Krofchak* that unlawful means could include (i) conduct directed at a third party (in this case, the defamatory statements regarding AK), (ii) where such unlawful means were independently actionable by that third party, but also (iii) where such conduct supporting the conspiracy claim was not directly actionable at the suit of the prospective plaintiff (ARINC).

While this goes a long way towards clarifying the place of the unlawful means element in the separate tort of conspiracy, Goudge J.A.'s description, in the foregoing passage, of the unlawful means having been "directed at ARINC" (through unlawful means consisting of the defamation of AK) appears to equate two different concepts of "direction":[426]

> (1) the targeting of the person against whom the defendant's conduct is directed for the purposes of the *intentionality* element of the tort (i.e., whether the conduct is actually or constructively directed towards the ultimate injury of that person), which seems, in large part, to be the sense of "directed" used by the Supreme Court in *Hunt* and *Canada Cement LaFarge*;[427] and
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> (2) the targeting of the person against whom the defendant's conduct is directed for the purposes of the *unlawful means* element of the tort (i.e., whether the conduct becomes "unlawful" because of its victimization, in the first instance, of that person), which is the sense of "directed" used by

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425 *Ibid.* ¶69 and 72, emphasis added.

426 It is clear that the defendant's unlawful conduct must, in order to be actionable under unlawful means conspiracy (or the unlawful interference tort), be "directed" toward the plaintiff in the broad sense that the defendant actually or constructively intends for the plaintiff to be injured by that conduct. However, the defendant may achieve this intention whether the unlawful conduct is committed against the plaintiff itself, or whether it is committed solely against a third party whose injury from or reaction to that conduct results in a corresponding injury to the plaintiff. Indeed, there are both conspiracy cases (such as *Canada Cement LaFarge* and *Lonrho 2*), and unlawful interference cases (such as *Garret*, *Tarleton* and *Therien*), where the defendant's unlawful conduct has been directed at a third party, in circumstances where the defendant knew that its conduct would result in injury to the plaintiff (or where the defendant possessed a subsidiary intent to injure the plaintiff as a result), and the courts have not rejected the conduct's ability to satisfy the "unlawful means" element. The distinction between these two concepts is also clear from the fact that in *Alleslev-Krofchak* itself, the Court held that the unlawful interference tort requires unlawful means which are directed at a third party, notwithstanding that the same tort requires the defendant to intend an injury to the plaintiff as a result.

427 See footnote 169 above. See also the statement of the elements of the tort from *Canada Cement LaFarge*, found in the text accompanying footnote 195 above.

the House of Lords in *Total Network*.[428]

In asserting that the defamation of AK was "directed at ARINC", Goudge J.A. can only properly be taken to have used the former sense of "directed" (i.e., that the defamation was actually or constructively intended to injure ARINC), since the defamation itself was an act that directly victimized AK rather than ARINC. Nevertheless, Goudge J.A. appears to equate this intentionality concept of "directed" with the unlawful means concept of "directed", by referring to *Total Network* (which was concerned with the latter concept) in support of the proposition that "[t]he unlawful means need not be directly actionable by ARINC, *provided* the means were directed at ARINC". Thus, Goudge J.A. can be taken to suggest (perhaps unwittingly) that the absolute requirement of conduct "directed" against the plaintiff in the sense of intentionality (from *Hunt* and *Canada Cement LaFarge*) creates (or is identical to) a further absolute requirement of conduct "directed" against the plaintiff in the sense of unlawful means. In short, he can be taken to have suggested that unlawful means conspiracy is an exclusively two-party tort, even though, on the facts of *Alleslev-Krofchak*, any claim by ARINC in conspiracy based on the defamation of AK would have been a three-party claim.[429] In the authors' view, this would not be a proper interpretation of Goudge J.A.'s comments given the factual context in which they were made. Nevertheless, it remains to be seen whether subsequent cases will interpret *Alleslev-Krofchak* as mandating this dramatic reduction in the scope of unlawful means conspiracy.

One other aspect of *Alleslev-Krofchak* that merits brief attention is Goudge J.A.'s treatment of Temagami's claim for the separate tort of inducing breach of contract:

- Goudge J.A. affirmed the liability of Valcom and Poulin based upon their having induced the actual *breach* (committed by ARINC) of the ARINC/Temagami Subcontract, by locking AK out of the project and suspending the Valcom/ARINC Subcontract. (This latter conduct, as

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428 This notion that the unlawful conduct may be "directed" at a third party for the purpose of the unlawful means element does not appear to require that the conduct must be *unlawful* as against that party (e.g., because it is actionable by the third party). There may be situations (as in *Canada Cement LaFarge*) in which the defendant's conduct in relation to a third party is not unlawful against the third party *per se*, but is unlawful more generally because of its *impact* upon the third party (e.g., because it is a criminal act). Instead, it should only require that the conduct become "unlawful" because of the *victimization*, in the first instance, of the third party, rather than the plaintiff.

429 It is noteworthy in this respect that *Total Network* did not expressly hold that unlawful means conspiracy can only be a two-party tort (indeed, this may have required overruling *Lonrho 2*). It is also noteworthy that, Goudge J.A. (at ¶66–68 of *Alleslev-Krofchak*) appears to suggest that AK could have been successful had she brought an unlawful means conspiracy claim based upon the defamation of her by the defendants. This indicates that he was also willing to view unlawful means conspiracy as being available on facts that are truly "two-party", as was the House of Lords in *Total Network*. Nevertheless, given that much of the defamation in *Alleslev-Krofchak* was independently actionable by AK, Goudge J.A.'s recognition of AK's possible success on a conspiracy claim seems inconsistent with the doctrine of merger (although merger does not appear to have been raised before the Court).

noted above, was also simultaneously found to qualify as a breach by Valcom of the Valcom/ARINC Subcontract and, in that capacity, as the unlawful means for Temagami's unlawful interference claim against Valcom.)[430]

- Interestingly, however, Goudge J.A. rejected Aitken J.'s parallel imposition of liability on Valcom and Poulin for inducing breach of contract based on the further ground that their conduct had had the effect of *frustrating* the ARINC/Temagami Subcontract.[431]

In doing so, Goudge J.A. echoed the Court of Appeal's earlier ruling in *Correia*, in which Rosenberg and Feldman JJ.A. had endorsed the rejection (in *OBG*) of a discrete tort of "interference with contractual relations" (where the interference in question falls short of causing a breach), as was initially proposed by Lord Denning in *Torquay Hotel*.

Justice Goudge concluded his analysis of the law on this point with several sweeping observations regarding the respective roles of inducing breach of contract (as a tort of accessory liability) and unlawful interference with economic interests (as a tort of primary liability):

> In my view, therefore, not only is the Ontario jurisprudence [governing inducing breach of contract] now clear, but the policy it reflects is also sound, particularly when the tort is considered along with the tort of intentional interference with economic relations.
>
> If the defendant induces a third party to breach its contract with the plaintiff, the defendant ought to be liable to the plaintiff as an accessory to the unlawful conduct, namely the breach of contract, suffered by the plaintiff. That is the role of the inducement tort. If the third party does not breach a contract with the plaintiff, but instead interferes with the plaintiff's economic relations as a result of unlawful means used by the defendant against that third party, the defendant ought to be liable to the plaintiff because unlawful means were employed by the defendant to intentionally harm the plaintiff. That is the role of the intentional interference tort.
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> *This leaves to the marketplace those competitive practices that, though they may be aggressive, are otherwise lawful. In a case, where the defendant has interfered with the third party's performance of its contract with the plaintiff, but without the use of otherwise unlawful means and without inducing the third party to actually breach that contract, the court is not well placed to determine what sorts of otherwise lawful competitive practices should attract liability. That is a task better left to parliament.*[432]

These observations by the Court of Appeal do not acknowledge Lord Hoffmann's point in *OBG* that the same conduct may give rise to simultaneous liability to the plaintiff for both unlawful interference, and inducing breach of contract. Nevertheless, they are still of assistance in understanding the distinctions between these two key economic torts, and serve as a refreshing reminder of the House of Lords' rejection of the *prima facie* tort in *Allen* more than a century ago.

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430 *Alleslev-Krofchak*, *supra* note 21, ¶27, 29, 76–77, 79 and 86–91.

431 *Ibid.* ¶92–99.

432 *Ibid.* ¶96–98, emphasis added.

(b) *Barber*

Similar to the relationship between *O'Dwyer* and *Correia*, the rulings in *Alleslev-Krofchak* and *Barber* had been argued in close proximity to one another (in both cases, in March 2010), and were on reserve for approximately six months. The decisions were issued ten days apart.[433] Although *Alleslev-Krofchak* and *Barber* were considered by different panels of the Ontario Court of Appeal, LaForme J.A. sat on both, and was a co-author of the reasons in *Barber*. It is both troubling and surprising, therefore, that *Barber* makes absolutely no reference to *Alleslev-Krofchak*, nor to the 2007-2008 Jurisprudence more generally, in imposing liability for the tort of unlawful interference with economic interests.

Although *Barber* involved a number of different claims, counterclaims and crossclaims, it is sufficient, for the purposes of this paper, to focus solely upon the claim for unlawful interference that was brought by the plaintiffs (collectively, "Wahta") against one of the defendants ("Molson"). The claim arose out of the 2003 benefit concert staged in Toronto in the wake of the SARS epidemic. Molson, which held all beverage rights for the concert, entered into a contract (the "Molson/Vrozos Contract") with a third party ("Vrozos"), in which it sold Vrozos the exclusive right to supply water at the concert. Vrozos then entered into a secondary contract with the plaintiffs (the "Vrozos/Wahta Contract"), in which Wahta acquired this exclusive water supply right.

Molson, in breach of the Molson/Vrozos Contract, made agreements with other parties that allowed them to supply water at the concert alongside Vrozos. In addition, Molson threatened to breach the Molson/Vrozos Contract, so as to pressure Vrozos (and, by extension, Wahta) into giving away free water at the concert, so that Molson could fulfil the obligations which had been imposed upon it by certain public health authorities. Both of these acts (and others) were successfully relied upon by Wahta at trial as satisfying the unlawful means element in its claim for unlawful interference against Molson.

On appeal, Molson's liability to Wahta for unlawful interference was affirmed by the Court. In delivering judgment for a unanimous panel, Gillese and LaForme JJ.A., referred only to a single case in support of their conclusion that the defendant had utilized unlawful means: the seemingly superseded ruling in *Reach*.

Gillese and LaForme JJ.A. began by citing *Reach* for its tripartite formulation of the elements of the unlawful interference tort.[434] There was no discussion of the fact that, in each of the Ontario Court of Appeal's three immediately preceding (and post-*Reach*) rulings — *O'Dwyer*, *Correia* and *Alleslev-Krofchak* — the Court had adopted the bipartite formulation of elements articulated by Lord Hoffmann in *OBG*.

Next, Gillese and LaForme JJ.A. found that Molson's conduct satisfied the intentionality element of the unlawful interference tort. In doing so, they cited *Reach* for the proposition that Molson's conduct need only be "in some measure

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433 With *Alleslev-Krofchak* (per Goudge J.A., with MacFarland and LaForme JJ.A. concurring) being released on August 24, 2010, and *Barber* (per Gillese and LaForme JJ.A., with Juriansz J.A. concurring) being released on September 3, 2010.

434 *Barber*, *supra* note 22, ¶47.

directed against" Wahta.[435] Based on this test, Molson was liable even though it did not act with the predominant purpose of injuring Wahta, since it was aware that its conduct vis-à-vis Vrozos would interfere with Wahta's rights under the "Vrozos/Wahta Contract", and it "was willing to impose hardship on Wahta".[436] Again, there was no discussion of the fact that, in both *Correia* and *Alleslev-Krofchak*, the Court had held that mere foreseeability (or even recklessness) as to the harm suffered by the plaintiff as a consequence of the defendant's acts is not sufficient to meet the test of intention for the unlawful interference tort, since this requires an actual specific intent to injure the plaintiff.[437]

Finally, Gillese and LaForme JJ.A. turned to the question of whether the two acts of Molson identified above satisfied the unlawful means element of the unlawful interference tort. Incredibly, without making any reference to the 2007-2008 Jurisprudence (or even to the *Alleslev-Krofchak* ruling in which LaForme J.A. had recently concurred), Gillese and LaForme JJ.A. stated simply that:

> We begin by noting that *in Reach M.D., the scope of activities that a defendant is "not at liberty to commit" is interpreted broadly*: see paras. 48-52. In that case, it was found that a voluntary trade association making decisions not authorized by its internal regulations amounted to such an act: para. 53. *It is against this legal backdrop that one must assess Molson's acts, as found by the trial judge.*[438]

It is unclear what these comments portend. It is unimaginable that the Court of Appeal elected, *sub silentio*, to return the unlawful means element to the state in which it existed at the time of *Reach*. At the same time, read literally, the Court's failure to address both the 2007-2008 Jurisprudence and *Alleslev-Krofchak* suggests that it did not view the unlawful means element as having been materially altered by that case law.

However, on any view of the law, it is unfathomable why the Court would ignore the complex architecture that has been layered onto the unlawful means element since the 2007-2008 Jurisprudence, and suggest that the element may be reduced to the simple formulation that was popularized in *Reach* in 2003.[439] At the

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435 *Ibid.* ¶ 52.

436 *Ibid.* ¶ 52 and 55.

437 See the discussion at footnote 553 below. See also *OBG*, *supra* note 15, ¶ 62, where Lord Hoffmann stated, in relation to the intentionality element in the unlawful interference tort, that "it is necessary to distinguish between ends, means and consequences. One intends to cause loss even though it is the means by which one achieved the end of enriching oneself. On the other hand, one is not liable for loss which is neither a desired end nor a means of attaining it but merely a foreseeable consequence of one's actions".

438 *Barber*, *supra* note 22, ¶58, emphasis added.

439 One might speculate that the reason why the Court did not refer to this jurisprudence is because, in *Alleslev-Krofchak*, the Court refused to "fully define" the extent to which conduct that is directed at a third party, and that is not "actionable directly by the plaintiff", must also be actionable by the third party in order to qualify as unlawful means (thus perhaps leaving the door open for such conduct to include acts which the defendant is "not at liberty to commit"). Further, the facts in Barber appear to fit within the two components of the unlawful means test that were definitively articulated in *Alles-*

very least, conduct which does not amount to the breach of a binding legal obligation, or that is only unlawful on the ground of negligence, should be exempted from the category of acts which a defendant is "not at liberty to commit" given *Drouillard* and *Correia*. Moreover, in *Correia*, the Ontario Court of Appeal stated, in reference to *OBG*, that "Lord Nicholls' approach may be viewed as similar to the one espoused by the decision of this court in *Reach*. . . as acts which the tortfeasor 'is not at liberty to commit'".[440] Subsequently, in *Alleslev-Krofchak*, the Ontario Court of Appeal stated, in reference to the debate between Lord Hoffmann and Lord Nicholls in *OBG*, that "this court has now opted for the Lord Hoffmann side of the debate".[441] To now revert to the *Reach* approach, without referencing any of these cases, gives rise to precisely the type of "uncertainty" that the Court in *Alleslev-Krofchak* was so eager to dismiss.

This uncertainty is compounded by the manner in which Gillese and LaForme JJ.A. applied the *Reach* test to the facts before them. In addition to finding that Molson's breach of the Molson/Vrozos Contract was an act that Molson "was not at liberty to commit",[442] the Court found that Molson's threatened breach of the Molson/Vrozos Contract was also such an act. As to this, it stated that:

> Effectively, the trial judge found that after entering into the Vrozos water contract in which it gave Vrozos exclusive water distribution rights, *Molson threatened to breach the contract without lawful reason* and knowing that the result would be to cause Vrozos to breach his contract with Wahta. *Molson was not at liberty to do that.* Once Molson was told that it was responsible for providing a significant quantity of free water for health reasons, *its only lawful course of action was to negotiate in good faith with its supplier for the purchase of that water.*[443]

It is not clear why Gillese and LaForme JJ.A. believed it was necessary to predicate the unlawfulness of Molson's threatened breach of the Molson/Vrozos Contract upon the *Reach* test (i.e., an act that Molson was "not at liberty to commit"). Presumably, such conduct could have been directly actionable by Wahta under the tort of intimidation (subject to *Central Canada Potash*),[444] or by Vrozos (and hence by Wahta under the tort of unlawful interference) as an anticipatory

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lev-Krofchak, since Molson's conduct was both targeted at a third party (Vrozos), and was not independently actionable by Wahta owing to the same head of liability that was put forward as the reason for why the conduct amounted to "unlawful" means (i.e., breach of the Molson/Vrozos Contract, and threatening to breach the Molson/Vrozos Contract). Nevertheless, even accepting these propositions, it would have been preferred had the Court at least cited the 2007-2008 Jurisprudence and/or *Alleslev-Krofchak* to confirm the continuity of the law.

440 *Correia*, *supra* note 19, ¶104.

441 *Alleslev-Krofchak*, *supra* note 21, ¶57.

442 *Barber*, *supra* note 22, ¶59.

443 *Ibid.* ¶62, emphasis added.

444 This is a matter of some subtlety. In light of Central Canada Potash, *supra* note 161, Molson's breach of the Molson/Vrozos Contract may not have been directly actionable by Vrozos under the tort of intimidation, since (as discussed earlier) *Central Canada Potash* indicates that a threatened breach of contract cannot qualify as the unlawful means in a case of two-party intimidation. However, this should not have precluded the

breach of contract. In suggesting that Molson's conduct amounted to unlawful means simply because Molson failed to "negotiate in good faith" with Vrozos, and thus follow "its only lawful course of action", the Court appeared to use the broad test from *Reach* to impose a legal obligation upon Molson that may not otherwise have arisen as between Vrozos and itself.[445] This approach seems contrary to the limitation that was placed upon *Reach* in *Drouillard*. Further, as in *Reach* itself, it undermines the integrity of the unlawful means element, thus threatening to collapse the boundaries between unlawful interference with economic interests, and the *prima facie* tort.

2. A Comparative Assessment of Unlawful Means Principles *Circa* 2010

In the wake of the 2010 Jurisprudence, it appears that the Ontario Court of Appeal has yet to adopt a unified approach to the unlawful means element. The position of other Canadian courts (as is discussed in Part VI below) may, perhaps ironically, be more consistent (albeit more anachronistic). The following high-level legal propositions compare and contrast the state of the law in Canada and in the U.K., circa 2010:

> (1) Under U.K. law, pursuant to *OBG* and *Total Network*, the unlawful means necessary to make out the tort of interference with economic interests are required to involve conduct directed towards a third party through whose instrumentality the plaintiff is injured, and not merely against the plaintiff directly (save perhaps in exceptional cases of two-party intimidation). This proposition has been repeatedly accepted in Ontario (via *O'Dwyer*, *Correia* and *Alleslev-Krofchak*), although *Barber* raises some doubt about whether it remains an absolute requirement. The status of the requirement elsewhere in Canada remains uncertain.
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> (2) Under U.K. law, pursuant to *OBG*, the unlawful means directed at a third party will only satisfy the requirements of the unlawful interference tort if such conduct is: (i) at least theoretically, independently and civilly actionable by the third party (or would have been had the third party suffered a loss); and (ii) of a kind that interferes with the third party's liberty to deal with the plaintiff. In Ontario, the first requirement appears to have been rejected in *Barber*, and the second requirement appears not to have been accepted in *Alleslev-Krofchak*. The status of these requirements elsewhere in Canada remains uncertain (although the first requirement, at

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threatened breach of contract from being actionable by Wahta, in a claim for three-party intimidation.

445 Canadian courts have historically refused to recognize a duty to act in good faith in relation to contractual negotiations: *Peel Condominium Corp. No. 505 v. Cam-Valley Homes Ltd.* (2001), 53 O.R. (3d) 1, ¶40 (Ont. C.A.). For a case in which the Ontario Court of Appeal appeared to reject the possibility that unlawful means, for the purposes of the unlawful interference tort, could include even the interference by a third party in contractual negotiations between the plaintiff and defendant (let alone the breach by the defendant of any obligation to negotiate in good faith), see *1175777 Ontario Ltd. v. Magna International Inc.* (2001), 200 D.L.R. (4th) 521, ¶9–13 (Ont. C.A.)

least, appears inconsistent with the Supreme Court of Canada's ruling in *Therien*).

(3) Under U.K. law, pursuant to *OBG*, the same conduct by the defendant can be both independently actionable at the suit of the plaintiff, and simultaneously satisfy the unlawful means element of the tort of interference with economic interests, at least where the conduct is independently actionable on the ground of inducing breach of contract (and provided that inducing breach of contract *per se* is not relied upon as the "unlawful" means). Under Ontario law, following *Alleslev-Krofchak*: (a) the conduct cannot be independently actionable by the plaintiff owing to the same head of liability which is put forward as the reason for characterizing the conduct as "unlawful" means; and (b) it does not matter whether the plaintiff has actually brought a successful claim under this independent head of liability, provided that the plaintiff could bring such a claim if it chose to do so (although *Barber* raises some doubt about whether this remains an absolute requirement). Elsewhere in Canada, this matter appears not to be fully settled.

(4) Under U.K. law, pursuant to *OBG*, it seems clear that the broad view of unlawful means from *Reach* cannot be reconciled with the House of Lords' restrictive approach to the unlawful interference tort. Under Ontario law, in light of *Barber*, conduct which meets the broad view may possibly once again qualify as unlawful means. (However, this may still be limited by the fact that *Drouillard* indicated that such conduct must involve the violation of a legally binding obligation, while *Correia* indicated that such conduct must be intentional rather than merely negligent. Additionally, *Alleslev-Krofchak* raises questions about the continued applicability of the broad view in general.) Outside Ontario, many Canadian courts continue to apply the broad view (as discussed further below).

(5) Under U.K. law, pursuant to *Total Network*, the concept of unlawful means has been accepted by the House of Lords to possess an entirely different meaning in the context of conspiracy than the meaning applied in the context of interference with economic interests. Under Canadian law, the Supreme Court ruling in *Gagnon* long ago indicated that "unlawful means" possessed an equivalent meaning in both contexts, and lower courts in both Ontario and elsewhere have begun to apply the "broad view" of unlawful means (as developed in the context of the unlawful interference tort) to the conspiracy tort (as discussed below). However, because *Gagnon* also indicates that unlawful means for conspiracy can include conduct directed at the plaintiff itself, contrary to what *O'Dwyer*, *Correia* and *Alleslev-Krofchak* hold in the context of unlawful interference, there may yet be differences in the scope of unlawful means as that concept is applied, respectively, to the torts of conspiracy and unlawful interference in Ontario.

(6) Under U.K. law, pursuant to *Lonrho 2* and *Total Network*, it seems that the unlawful means criterion of tortious conspiracy can be satisfied through conduct which is either directed against the plaintiff, or is directed against a third party intermediary and thereby causes injury indi-

rectly to the plaintiff. The same proposition appears to apply in Canada given *Gagnon*, *Canada Cement LaFarge* and *Hunt* (although there are ambiguous and *obiter* statements in *Alleslev-Krofchak* which might be construed, wrongly, in the authors' view, as limiting unlawful means conspiracy to two-party claims in Ontario).

(7) Under both U.K. law (pursuant to *Total Network*), and Canadian law (pursuant to *Gagnon*), the unlawful means lying at the heart of a tortious conspiracy need not be independently actionable where such conduct is directed at the plaintiff. It is notable, however, that a recent English decision, *Digicel (St Lucia) Ltd. v Cable & Wireless Plc*,[446] holds that the unlawfulness cannot take the form of a non-actionable breach of a non-criminal statute contrary to *Gagnon*. Under U.K. law (pursuant to *Total Network*), it is unclear whether the unlawful means for conspiracy must be independently actionable where such conduct is directed at a third party. In Canada, it appears to have been settled by *Canada Cement LaFarge* that unlawful means can include non-actionable conduct when directed at a third party.

(8) Under U.K. law, pursuant to *Total Network*, the courts appear to have left open the doctrine of "merger", which holds that a separate conspiracy cannot validly be made out in circumstances where the ability to demonstrate the "unlawfulness" of the unlawful means in the conspiracy claim is necessarily dependent upon establishing the actionability of that conduct, under a separate head of liability, for which the plaintiff has also brought a parallel claim against the defendants. Under Canadian law, there is a growing appellate recognition that the doctrine continues to exist (as discussed below).

VI. BEYOND THE ONTARIO COURT OF APPEAL: RECONCILING BROADER CANADIAN DEVELOPMENTS IN 2007–2010

1. Overview

Despite the significant changes contemplated by the 2007-2008 Jurisprudence, its effect upon the unlawful means element has yet to be widely acknowledged (or even considered) by Canadian courts:

(a) The most extreme example of this phenomenon is, of course, the failure of the Ontario Court of Appeal, in its recent *Barber* decision, to apply — or to even acknowledge the existence of — the milestone 2007-2008 Jurisprudence.

(b) While the least significant of the 2007-2008 decisions may have been the Ontario Court of Appeal's 2008 ruling in *O'Dwyer*, it is nevertheless surprising that not a single Canadian ruling (from Ontario or elsewhere)

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446 *Digicel (St Lucia) Ltd. v Cable & Wireless Plc*, [2010] EWHC 774 (Ch. D.) Annex I, ¶55–62 [*Digicel*].

had cited this forgotten case (or Rouleau J.A.'s endorsement of the *OBG* approach to unlawful means) until the Court of Appeal itself did so in *Alleslev-Krofchak* in August 2010.

(c) Similarly, *Total Network*, the House of Lords' milestone analysis of the tort of unlawful means conspiracy, was ignored entirely in Canada until mid-2010 when two Ontario decisions (one of which was *Alleslev-Krofchak*) briefly cited it in passing.[447]

(d) An even more groundbreaking development in the doctrine of unlawful means was, of course, the House of Lords' ruling in *OBG*. Other than the Ontario Court of Appeal rulings in *O'Dwyer*, *Correia* and *Alleslev-Krofchak*, in the nearly three years since the release of the House of Lords' revolutionary decision, only two other Canadian appellate rulings have cited *OBG*, and both did so principally in the context of the parallel tort of inducing breach of contract.[448] Of these appellate rulings, only one — *SAR Petroleum Inc. v. Peace Hills Trust Co.*[449] — acknowledged the House of Lords' analysis of unlawful interference, and noted (without express endorsement) Lord Hoffmann's restrictive iteration of the unlawful means element.[450] Also interesting is the New Brunswick Court of Appeal's apparent endorsement of the distinction between inducing breach of contract (as a tort of "secondary liability") and unlawful interference (as a tort of the "primary liability"), and its rejection of any intermediate torts of indirectly inducing breach of contract through unlawful means, and interference with contractual relations in a manner short of causing breach.[451]

(e) Leaving aside *Alleslev-Krofchak*, a number of Canadian appellate cases released since 2007 have specifically addressed unlawful interfer-

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447 The only other Canadian case that has referenced *Total Network* to date has been *Harris v. GlaxoSmithKline Inc.*, 2010 ONSC 2326, ¶79.

448 The first of these rulings is *Brae Centre Ltd. v. 1044807 Alberta Ltd.* (2008), 302 D.L.R. (4th) 252, ¶29 (Alta. C.A.), where the Court cited the reasons of Lord Nicholls in *OBG* solely in conjunction with the mental element for inducing breach of contract. For other Canadian cases that have referenced *OBG* in connection with matters not involving the unlawful interference tort (e.g., conversion or breach of confidence), see: *UBS Wireless Services Inc. v. Inukshuk Wireless Partnership*, [2008] O.J. No. 1704, ¶35 (S.C.J.); and *Gold Reserve Inc. v. Rusoro Mining Ltd.* (2009), 54 B.L.R. (4th) 226, ¶49 (Ont. S.C.J.); leave to appeal to Ont. Div. Ct. refused (2009), 251 O.A.C. 127 (S.C.J.).

449 (2010), 318 D.L.R. (4th) 70 (N.B.C.A.) [*SAR Petroleum*].

450 *Ibid.* ¶ 36. At ¶ 34, the Court noted that "the question of what qualifies as 'unlawful conduct' outside the field of labour relations has always been problematic and this remains true even after the decision of the House of Lords in *OBG*". Interestingly, SAR Petroleum also suggests that *Correia* adopted large aspects of *OBG*: see ¶ 35, 60 and 77.

451 *Ibid.* ¶ 31-42. These findings are echoed in the subsequent ruling of Goudge J.A. in *Alleslev-Krofchak*.

ence[452] and/or conspiracy.[453] None have acknowledged or applied the 2007-2008 Jurisprudence in relation to these unlawful means torts. Indeed, no Canadian appellate cases outside Ontario have even engaged in a substantive assessment of the unlawful means element since 2007.

(f) Only a small handful of Canadian lower court rulings have addressed the 2007-2008 Jurisprudence (or aspects thereof) in connection with the unlawful means element.[454] For the most part, these cases have emphasized the "conflicting views"[455] emerging from this 2007-2008 Jurisprudence and the absence of a "fully defined"[456] conception of unlawful means. Several of these cases suggested that this Jurisprudence raised

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452 See, *e.g.*: *Lucien Groulx & Son Planning & Saw Mill Ltd. v. Nipissing Forest Resource Management Inc.*, 2007 ONCA 801, ¶18–21; *Conway v. Zinkhofer*, 2008 ABCA 392, ¶41–43; *Polar Ice Express Inc. v. Arctic Glacier Inc.* (2009), 446 A.R. 29, ¶7–13 (C.A.); *R.L.T.V. Investments Inc. v. Saskatchewan Telecommunications*, [2009] 9 W.W.R. 15, ¶47–49 (Sask. C.A.); leave to appeal to S.C.C. refused [2009] S.C.C.A. No. 388; *Genesis Land Development Corp. v. Alberta*, [2010] 6 W.W.R. 77, ¶3 and 7 (Alta. C.A.); and *Merrill Lynch Canada Inc. v. Soost*, 2010 ABCA 251, ¶43 (Alta. C.A.).

453 See, *e.g.*: *Ascent Financial Services Ltd. v. Blythman* (2007), 302 Sask. R. 118, ¶31 (C.A.); *Tracy (Representative ad litem of) v. Instaloans Financial Solution Centres (B.C.) Ltd.* (2009), 309 D.L.R. (4th) 236, ¶19–29 (B.C.C.A.); leave to appeal to S.C.C. refused [2009] S.C.C.A. No. 194; *R.L.T.V. Investments Inc. v. Saskatchewan Telecommunications*, [2009] 9 W.W.R. 15, ¶42–46 (Sask. C.A.); leave to appeal to S.C.C. refused [2009] S.C.C.A. No. 388; *Keeton v. Bank of Nova Scotia* (2009), 254 O.A.C. 251, ¶78–80 (C.A.); *Bank of Montreal v. Tortora* (2010), 3 B.C.L.R. (5th) 39, ¶35–62 (C.A.); *Dean v. Mister Transmission*, 2010 ONCA 443, ¶12 and 19; and *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, 2010 ONCA 466, ¶46–49.

454 These include: *Carney Timber Co. v. Pabeninskas*, [2008] O.J. No. 4818, ¶36 (S.C.J); *Westcoast Landfill Diversion Corp. v. Cowichan Valley (Regional District)* (2009), 55 M.P.L.R. (4th) 208, ¶377–384 (B.C.S.C.); *Zuckerman-Honickman Inc. v. MPI Packaging Inc.*, [2009] O.J. No. 2209, ¶64-65 (S.C.J.); leave to appeal to Ont. Div. Ct. refused [2009] O.J. No. 4110; *Dirckx v. Ontario*, [2009] O.J. No. 3809, ¶33–35 (S.C.J. (Small Claims Div.)); *Tireco, Inc. v. YHI (Canada) Inc.* (2009), 53 E.T.R. (3d) 12, ¶19-20 and 25 (Ont. S.C.J.); leave to appeal to Ont. Div. Ct. refused [2009] O.J. No. 4245, ¶6–8 (Div. Ct.); *Soost v. Merrill Lynch Canada Inc.* (2009), 13 Alta. L.R. (5th) 286, ¶148–151 (Q.B.); aff'd 2010 ABCA 251; *Cherubini Metal Works Ltd. v. Nova Scotia (A.G.)* (2009), 285 N.S.R. (2d) 255, ¶313–316 (S.C.); *New Solutions Extrusion Corp. v. Gauthier*, 2010 ONSC 1037, ¶48; aff'd 2010 ONCA 348; *Hunt Oil Co. of Canada, Inc. v. Galleon Energy Inc.*, 2010 ABQB 212, ¶43–45; *595799 Ontario Ltd. v. Galpin*, 2010 ONSC 2083, ¶10–14; *Harris v. GlaxoSmithKline Inc.*, 2010 ONSC 2326, ¶79; *WP (33 Sheppard) Gourmet Express Restaurant Corp. v. WP Canada Bistro & Express Co.*, 2010 ONSC 2644, ¶68 and 83; and *Schumm v. A-1 Storage Space Ltd.*, 2010 ONSC 4088, ¶59.

455 *Westcoast Landfill Diversion Corp. v. Cowichan Valley (Regional District)* (2009), 55 M.P.L.R. (4th) 208, ¶378 (B.C.S.C.). See also the uncertainty expressed by Aitkin J. in the trial-level decision in *Alleslev-Krofchak v. Valcom Ltd.*, 2009 CarswellOnt 3501, [2009] O.J. No. 2469 (Ont. S.C.J.); aff'd 2010 ONCA 557.

456 *Tireco, Inc. v. YHI (Canada) Inc.*, [2009] O.J. No. 4245, ¶8 (Div. Ct.).

more questions than it answered, and expressed doubt as to the proper characterization of unlawful interference as a tort with two elements or three,[457] and as to the continuing existence of actionable interference with contractual relations in the absence of a breach.[458]

(g) An array of Canadian decisions issued since 2007 have continued to recognize a wide variety of conduct as falling within the scope of the unlawful means criterion, both for unlawful interference and for conspiracy. The vast majority of such cases have included no consideration of whether the concept of unlawful means was altered by the 2007-2008 Jurisprudence:

- Such cases have held that the following conduct may potentially qualify as unlawful means for the purposes of the tort of *unlawful interference*: crimes (including the offering of bribes)[459] breaches of statute (including competition legislation;[460] and collection agencies legislation);[461] torts (including deceit,[462] defamation,[463] injurious falsehood,[464] slander of goods,[465] intimidation,[466] abuse of process,[467] inducing breach

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457 This concern is not without justification. For a case which cited *Correia* in support of the two-fold formulation, see *New Solutions Extrusion Corp. v. Gauthier*, 2010 ONSC 1037, ¶48; aff'd 2010 ONCA 348. It is interesting that the *New Solutions* case did not also refer to the ruling in *O'Dwyer*, where the Ontario Court of Appeal again appeared to adopt the two-fold statement of elements from *OBG*. In *Alleslev-Krofchak*, *supra* note 21, at ¶ 53 and 57, the Court also cited and appeared to approve the two-fold statement of elements from *OBG*. However, in *Barber*, the Court cited only the tripartite test from *Reach*.

458 For a case which cited *Correia* and *OBG* in support of the proposition that the "essence" of the tort of inducing breach of contract is "bringing about the breach of another party's contract with the plaintiff", see *Tireco, Inc. v. YHI (Canada) Inc.* (2009), 53 E.T.R. (3d) 12, ¶16 and 19 (Ont. S.C.J.); leave to appeal to Ont. Div. Ct. refused [2009] O.J. No. 4245, ¶6–8 (Div. Ct.).

459 *Polar Ice Express Inc. v. Arctic Glacier Inc.* (2007), 434 A.R. 261, ¶91-92 (Q.B.); var'd on other grounds (2009), 446 A.R. 295 (C.A.).

460 *Ibid.* ¶93–95. This case involved allegations that the defendant breached Part VI of the *Competition Act*. However, courts have continued to reject a violation of Part VIII as the unlawful means element of the unlawful interference tort: *Novus Entertainment Inc. v. Shaw Cablesystems Ltd.*, 2010 BCSC 1030, ¶23–37.

461 *Paulin v. P.C.M. Collections Ltd. (c.o.b. Professional Collection Management)*, [2007] O.J. No. 4619, ¶37-38 (S.C.J.).

462 *Facilities Subsector Bargaining Assn. v. British Columbia Nurses' Union*, 2009 BCSC 1562, ¶30–34.

463 *Lebovic Enterprises Ltd. v. Negru*, [2007] O.J. No. 2151, ¶12 (S.C.J.).

464 *Zuckerman-Honickman Inc. v. MPI Packaging Inc.*, [2009] O.J. No. 2209, ¶64-65 (S.C.J.); leave to appeal to Ont. Div. Ct. refused [2009] O.J. No. 4110.

465 *Lebovic Enterprises Ltd. v. Negru*, [2007] O.J. No. 2151, ¶12 (S.C.J.).

466 *Ibid.*

467 *Gray Investigations Inc. v. Mitchell*, [2007] O.J. No. 1936, ¶16 and 21–23 (S.C.J.).

of contract,[468] and intimidation);[469] breach of contract (in the context of both two-party[470] and three-party[471] claims); breach of a court order;[472] and other conduct beyond the defendant's legal authority.[473]

- Such cases have also held that the following conduct may potentially satisfy the unlawful means element of the tort of *conspiracy*: crimes (including perjury,[474] and the charging of unlawful interest[475]); breaches of statute[476] (including

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468 See: *Polar Ice Express Inc. v. Arctic Glacier Inc.* (2007), 434 A.R. 261, ¶87 (Q.B.); var'd on other grounds (2009), 446 A.R. 295 (C.A.); and *Tireco, Inc. v. YHI (Canada) Inc.*, [2009] O.J. No. 4245, ¶8 (Div. Ct.).

469 *Polar Ice Express Inc. v. Arctic Glacier Inc.* (2007), 434 A.R. 261, ¶90 (Q.B.); var'd on other grounds (2009), 446 A.R. 295 (C.A.).

470 *Mega Wraps B.C. Inc. v. Mega Wraps Holdings Inc.*, [2008] O.J. No. 221, ¶87 (S.C.J.); var'd on other grounds 2008 ONCA 887.

471 *Polar Ice Express Inc. v. Arctic Glacier Inc.* (2007), 434 A.R. 261, ¶89 (Q.B.); var'd on other grounds (2009), 446 A.R. 295 (C.A.).

472 *Conway v. Zinkhofer*, 2008 ABCA 392, ¶42.

473 See: *Greey Realty Holdings Ltd. v. Greey Esplanade Ltd.*, [2008] O.J. No. 2692, ¶7 and 16 (S.C.J.); leave to appeal to Ont. Div. Ct. refused (2008), 241 O.A.C. 123 (Div. Ct.); and *First Choice Outfitters Ltd. v. Neilly* (2008), 322 Sask. R. 200, ¶22-23 (Q.B.). See also *M.B. Kouri Insurance Brokers Ltd. v. R.L. Gougeon* (2009), 72 C.C.L.I. (4th) 296, ¶116 (Ont. S.C.J.); add'n reasons (2009), 78 C.C.L.I. (4th) 104 (Ont. S.C.J.), where the Court referred to conduct in "deliberate disregard for the protection of [the plaintiff's] financial interest and that of [its] clients" as unlawful means. It is not clear whether the Court viewed such conduct as being independently unlawful.

474 *Le Soleil Hospitality Inc. v. Louie*, 2010 BCSC 1183, ¶353.

475 *Tracy (Representative ad litem of) v. Instaloans Financial Solution Centres (B.C.) Ltd.* (2008), 293 D.L.R. (4th) 60, ¶75–87 (B.C.S.C.); aff'd (2009), 309 D.L.R. (4th) 236, ¶19–29 (B.C.C.A.); leave to appeal to S.C.C. refused [2009] S.C.C.A. No. 194.

476 Some courts have also assumed that the relevant conduct may involve the breach of *foreign* statutes, as well as domestic ones: see *Robinson v. Medtronic, Inc.* (2009), 80 C.P.C. (6th) 87, ¶109-110 (Ont. S.C.J.); aff'd 2010 ONSC 3777 (Div. Ct.); *Silver v. Imax Corp.* (2009), 86 C.P.C. (6th) 273, ¶89 and 95-96 (Ont. S.C.J.); and *McKenna v. Gammon Gold Inc.*, 2010 ONSC 1591, ¶53 and 64; leave to appeal to Ont. Div. Ct. granted 2010 ONSC 4068. For discussion of this issue, see: *Davidson Tisdale Ltd. v. Pendrick* (1998), 116 O.A.C. 53, ¶26 (Div. Ct.); and *Pro Sys Consultants Ltd. v. Microsoft Corp.*, [2007] 1 W.W.R. 541, ¶9–25 (B.C.S.C.). See also *Hurst v. Hone*, [2010] EWHC 1159 (Q.B.D.) ¶325, where the question of whether foreign unlawfulness could satisfy the unlawful means element of conspiracy was described as a "point which the courts have not had to grapple with before". Interestingly, some courts have further assumed that the violation of *non-statutory instruments* (e.g., regulatory requirements) may amount to unlawful means: see, e.g., *Silver v. Imax Corp.* (2009), 86 C.P.C. (6th) 273, ¶89 and 95-96 (Ont. S.C.J.), and *McKenna v. Gammon Gold Inc.*, 2010 ONSC 1591, ¶53 and 64; leave to appeal to Ont. Div. Ct. granted 2010 ONSC 4068.

competition legislation,[477] health legislation,[478] consumer protection legislation[479] and securities legislation);[480] torts (including deceit[481] and abuse of process);[482] breach of contract (in the context of both two-party[483] and three-party);[484] claims); breach of equitable obligations (including breach of fiduciary duty[485] breach of court orders;[486] and other conduct beyond the defendant's legal authority.[487]

In summary, as at the date of the present paper, a small handful of Canadian decisions (post-dating the 2007-2008 Jurisprudence) have acknowledged and attempted to understand the implications of *Drouillard*, *OBG*, *Total Network*, *O'Dwyer* and/or *Correia*. The vast majority of decisions issued between 2007 and the fall of 2010 contain no acknowledgment of these significant developments.

In this regard, it is interesting to note that a number of these post-2007/2008 authorities have either already proceeded to appeal,[488] or are scheduled to do so in

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477 *Axiom Plastics Inc. v. E.I. DuPont Canada Co.* (2007), 87 O.R. (3d) 352, ¶40 (S.C.J.); leave to appeal to Ont. Div. Ct. refused (2008), 90 O.R. (3d) 782 (Div. Ct.). This case involved allegations that the defendant had breached provisions of Parts VI and VII of the *Competition Act*.

478 See: *Peter v. Medtronic Inc.* (2007), 50 C.P.C. (6th) 133, ¶37 (Ont. S.C.J.); leave to appeal to Ont. Div. Ct. refused (2008), 55 C.P.C. (6th) 242 (Ont. Div. Ct.); and *Robinson v. Medtronic, Inc.* (2009), 80 C.P.C. (6th) 87, ¶109-110 (Ont. S.C.J.); aff'd 2010 ONSC 3777 (Div. Ct.).

479 *Dean v. Mister Transmission (International) Ltd.* (2008), 66 C.P.C. (6th) 287, ¶53 (Ont. S.C.J.).

480 See: *Silver v. Imax Corp.* (2009), 86 C.P.C. (6th) 273, ¶89 and 95-96 (Ont. S.C.J.); and *McKenna v. Gammon Gold Inc.*, 2010 ONSC 1591, ¶53 and 64; leave to appeal to Ont. Div. Ct. granted 2010 ONSC 4068.

481 *Ontario Realty Corp. v. P. Gabriele & Sons Ltd.*, [2009] O.J. No. 286, ¶188 (S.C.J.). See also *Le Soleil Hospitality Inc. v. Louie*, 2010 BCSC 1183 ¶353, where the unlawful means appeared to take the form of a fraudulent conveyance.

482 *Harris v. GlaxoSmithKline Inc.*, 2010 ONSC 2326, ¶79.

483 *Ontario Realty Corp. v. P. Gabriele & Sons Ltd.*, [2009] O.J. No. 286, ¶188 (Ont. S.C.J.).

484 *Ibid.*

485 *Ibid.*

486 *Le Soleil Hospitality Inc. v. Louie*, 2010 BCSC 1183, ¶353.

487 See: *Agribrands Purina Canada Inc. v. Kasamekas*, 2010 ONSC 166, ¶127–142; and *DataNet Information Systems, Inc. v. Belzil*, 2010 ABQB 72, ¶91.

488 Two such cases are, of course, the appeal rulings in *Alleslev-Krofchak* and *Barber*. Coincidentally, in the short period between the Ontario Court of Appeal's release of these two rulings, the Alberta Court of Appeal issued its reasons in *Merrill Lynch Canada Inc. v. Soost*, 2010 ABCA 251. (Regrettably, the narrow scope of the *Soost* appeal negated any need for a principled consideration of the unlawful means concept, although, the Court of Appeal ¶43 expressly noted that the trial judge's reasons justified a finding that the plaintiff had failed to establish "interference with contractual relations[,] conspiracy [or] intentional infliction of harm [*sic*].") Several other potentially important trial-level rulings progressed to appeal, only to be abandoned or dis-

the relatively near future.[489] It must be assumed that these future appellate rulings (emanating from various provinces) will necessarily require Canadian courts to belatedly grapple with the implications of the 2007-2008 Jurisprudence, *vis-à-vis* both unlawful interference and conspiracy. It is difficult to imagine that the prevailing judicial indifference can continue in light of the Ontario Court of Appeal's intervening ruling in *Alleslev-Krofchak*, with its forceful affirmation that the 2007-2008 Jurisprudence represented a fundamental turning point in the evolution of the concept of unlawful means. On the other hand, as *Barber* shows, the place of the 2007-2008 Jurisprudence remains insecure even in Ontario.

In light of the foregoing, it is no exaggeration to say that the economic torts have entered a period of significant uncertainty and upheaval. Based on the 2007-2008 Jurisprudence and the 2010 Jurisprudence, there are four issues in particular which merit a closer examination:

> (1) Must the defendant's conduct now be directed towards a *third party*, instead of the plaintiff itself, in order to qualify as unlawful means for the purposes of either unlawful interference, or conspiracy?
>
> (2) Must (or can) the defendant's conduct now be *independently actionable*, whether by the plaintiff or a third party, in order to qualify as unlawful means for the purposes of either unlawful interference, or conspiracy?
>
> (3) Does the *broad view* of unlawful means continue to be relevant in Canadian law, either for the purposes of unlawful interference, or conspiracy?
>
> (4) What is the nature of the *mental state* required in connection with the unlawful means element, both for the purposes of unlawful interference, and conspiracy?

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missed for delay (see, *e.g. Westcoast Landfill Diversion Corp. v. Cowichan Valley (Regional District)* (2009), 55 M.P.L.R. (4th) 208 (B.C.S.C.); and *Fraleigh v. R.B.C. Dominion Securities* (2009), 99 O.R. (3d) 290 (S.C.J.)).

489 Assuming that such appeals proceed to judgment, potentially relevant guidance on the unlawful means element of the *unlawful interference tort* may be expected to emerge from a number of proceedings, including the following: *Cherubini Metal Works Ltd. v. Nova Scotia (A.G.)* (2009), 285 N.S.R. (2d) 255 (S.C.) [appeal scheduled to be heard by the Nova Scotia Court of Appeal in February 2011]; *M.B. Kouri Insurance Brokers Ltd. v R.L. Gougeon* (2009), 72 C.C.L.I. (4th) 296 (Ont. S.C.J.) [appeal scheduled to be heard by the Ontario Court of Appeal in November 2010]; *595799 Ontario Ltd. v. Galpin*, 2010 ONSC 2083 [appeal perfected, but hearing before the Ontario Court of Appeal not yet scheduled]; and *First Choice Outfitters Ltd. v. Neilly* (2008), 322 Sask. R. 200 (Q.B.) [appeal file opened, but no date yet set for hearing before the Saskatchewan Court of Appeal]. Of equal (and perhaps even greater) potential relevance will be the appeal rulings addressing the unlawful means element of *conspiracy* likely to emerge from one or more of the following proceedings: *Ontario Realty Corp. v. P. Gabriele & Sons Ltd.*, [2009] O.J. No. 286 (S.C.J.) [appeal scheduled to be heard by the Ontario Court of Appeal in September 2010]; *DataNet Information Systems, Inc. v. Belzil*, 2010 ABQB 72 [appeal likely to be heard by the Alberta Court of Appeal in 2011]; and *Agribrands Purina Canada Inc. v. Kasamekas*, 2010 ONSC 166 [appeal before the Ontario Court of Appeal in the process of being perfected].

An assessment of these interlocking questions will facilitate several goals. First, it is hoped that our review of Canadian caselaw since mid-2007 — assessed in light of both long-standing principles and recent developments — will facilitate a depiction of the current state of Canadian law on point. Second, it is intended that this exercise will identify the most significant issues that still require judicial clarification. Finally, the review will lay the groundwork for a suggested "principled definition" of unlawful means that it is hoped will be useful to both Canadian practitioners and the courts.

2. Conduct Directed (and Not Directed) at a Third Party as Unlawful Means

(a) Unlawful interference

The rulings in *OBG*, *O'Dwyer* and *Correia* all suggest that unlawful means, for the purposes of the tort of unlawful interference, may only include conduct that is directed towards a third party, instead of the plaintiff. The effect of these cases is to reject the possibility of "two-party" unlawful interference (save, perhaps, in exceptional cases of intimidation). In Ontario, this position was recently confirmed, by *Alleslev-Krofchak*, although (implicitly) undermined by *Barber*.

Notwithstanding the 2007-2008 Jurisprudence, however, it is notable that several recent Canadian cases have held that unlawful conduct directed towards the plaintiff (e.g., breaching a contract between the plaintiff and the defendant,[490] or inducing a third party's breach of its contract with the plaintiff[491]) may qualify as unlawful means.[492] Indeed, some courts have specifically declined to reject this proposition *despite* the rulings in *OBG* and *Correia*.[493]

Thus, in *Westcoast Landfill Diversion Corp. v. Cowichan Valley*,[494] one of the few Canadian cases to refer to *OBG* in connection with the unlawful means element of the unlawful interference tort, Shabbits J. noted that Lord Hoffmann's "narrow" view of the element required that the defendant's conduct be such that it enabled a third party to bring an action against the defendant. While Shabbits J. did not expressly reject this aspect of *OBG*, he appeared not to endorse it. This emerges from the fact that, in contrasting the "conflicting" approaches to unlawful means, Shabitts J. initially described how Lord Hoffmann's principle could limit the plain-

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490 See: *Swift Current (City) v. Saskatchewan Power Corp.*, [2007] 5 W.W.R. 387, ¶74–86 (Sask. C.A.); rev'g in part (2005), 272 Sask. R. 160, ¶42-43 and 47-48 (Q.B.); and *Mega Wraps B.C. Inc. v. Mega Wraps Holdings Inc.*, [2008] O.J. No. 221, ¶87 (S.C.J.); var'd on other grounds 2008 ONCA 887.

491 *Polar Ice Express Inc. v. Arctic Glacier Inc.* (2007), 434 A.R. 261, ¶87-88 (Q.B.); var'd on other grounds (2009), 446 A.R. 295 (C.A.).

492 The courts have also held, of course, that conduct directed towards a third party may qualify as unlawful means: see, e.g., *Facilities Subsector Bargaining Assn. v. British Columbia Nurses' Union*, 2009 BCSC 1562, ¶30–34.

493 See, e.g., *Tireco, Inc. v. YHI (Canada) Inc.*, [2009] O.J. No. 4245, ¶8 (Div. Ct.).

494 (2009), 55 M.P.L.R. (4th) 208, ¶379–382 (B.C.S.C.) [*Westcoast*].

tiff's claim on the facts of the case before him.[495] However, he then declined to analyze the claim within the contours of that principle, in subsequently holding the defendant not liable.[496]

It would appear that some confusion on this front has also been introduced by the fact that, as part of the primary mental element of the tort of unlawful interference, courts have traditionally required that the defendant's conduct be "directed" (at least in some measure) towards the plaintiff.[497] This mental element has led appellate courts to reject claims for unlawful interference where the alleged interference was "directed" at a third party rather than the plaintiff.[498]

Nevertheless, as discussed above in connection with *Alleslev-Krofchak*, the question of whether a defendant's unlawful conduct is "directed" towards the plaintiff, for the purposes of the intentionality requirement, is distinct from the question of where it is "directed" for the purposes of the unlawful means element. It is imperative that Canadian courts recognize this distinction. It is only in this way that the consequences of the 2007-2008 Jurisprudence can be properly understood and evaluated.

(b) Conspiracy

In contrast to the tort of unlawful interference, the House of Lords' ruling in *Total Network* holds that unlawful means conspiracy is a two-party (and presumably also a three-party) tort. One would think that this aspect of the 2007-2008 Jurisprudence is uncontroversial. Indeed, Canadian cases since 2007 (like *Gagnon*, *Canada Cement LaFarge* and *Hunt* before them) have held that unlawful conduct directed against the plaintiff,[499] or against a third party,[500] may count as unlawful means for the purposes of conspiracy.

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495 *Ibid.* ¶382.

496 *Ibid.* ¶388–486.

497 See, *e.g. Lineal Group Inc. v. Atlantis Canadian Distributors Inc.* (1998), 42 O.R. (3d) 157 at 159 (C.A.); leave to appeal to S.C.C. refused [1998] S.C.C.A. No. 608, stating that "[a]lthough the actions of the Bank were intentional, *the actions* of the Bank *must be targeted against* Lineal *for the intention required* by the tort of economic interference *to be made out*". [emphasis added] See also *Reach*, *supra* note 20, ¶46. The primary mental element required for the tort of unlawful interference is discussed in greater detail below.

498 See *R.L.T.V. Investments Inc. v. Saskatchewan Telecommunications*, [2009] 9 W.W.R. 15, ¶48 (Sask. C.A.); leave to appeal to S.C.C. refused [2009] S.C.C.A. No. 388. See also *Parkinson v. Health Sciences Centre* (1996), 1 C.P.C. (4th) 392 (Man. C.A.) at 396, suggesting that the elements of the unlawful interference tort include the following: ". . . (2) the act must be *directed toward the plaintiff*; (3) the act must be *intended to* and in fact *interfere with the plaintiff's economic interests*". [emphasis added]

499 See: *Ontario Realty Corp. v. P. Gabriele & Sons Ltd.*, [2009] O.J. No. 286, ¶188 (S.C.J.); and *DataNet Information Systems, Inc. v. Belzil*, 2010 ABQB 72, ¶91.

500 See: *Driskell v. Dangerfield*, [2007] 9 W.W.R. 323, ¶31 (Man. Q.B.); var'd on other grounds [2008] 6 W.W.R. 615 (Man. C.A.); and *Ontario Realty Corp. v. P. Gabriele & Sons Ltd.*, [2009] O.J. No. 286, ¶188.

On the other hand, as discussed above, some of Goudge J.A.'s comments in *Alleslev-Krofchak* may arguably be taken to suggest that unlawful means conspiracy is exclusively a two-party tort (although this interpretation of *Alleslev-Krofchak* is certainly not the better view). This appears to have occurred on the basis of confusion between the concept of "direction" in the unlawful means element, and the traditional requirement in the primary mental element of conspiracy that the defendants' conduct be "directed" (at least in some measure) towards the plaintiff.[501] In addition to *Alleslev-Krofchak*, other appellate courts have suggested that claims for unlawful means conspiracy should be rejected where the acts alleged were "directed" at a third party rather than the plaintiff.[502] As discussed above, it is hoped that Canadian courts will eventually distinguish between conduct that is "directed" at a third party for the purposes of the unlawful means element of conspiracy, and conduct that is "directed" at a third party for the purposes of the primary mental element (i.e., the requirement of a constructive intent to injure).

3. Conduct Independently Actionable (and Not Actionable) as Unlawful Means

(a) Unlawful interference

The question of whether conduct can, or must, be independently actionable in order to satisfy the unlawful means element of the unlawful interference tort presents two discrete questions: (1) whether conduct directed towards a third party *must* be independently actionable by the third party in order to qualify as unlawful means; and (2) whether conduct directed towards the plaintiff *can* qualify as unlawful means *despite* the fact that it is independently actionable by the plaintiff.

As regards the first question, Lord Hoffmann concluded in *OBG* that the defendant's conduct must be independently actionable by the third party against whom it is directed (and, in addition, must be actionable in a way that interferes with the third party's liberty to deal with the plaintiff). However, this aspect of *OBG* was not directly endorsed by the Ontario Court of Appeal in either *O'Dwyer* or *Correia*, and was recently left open in *Alleslev-Krofchak*. In addition, it is inconsistent not only with *Barber* and *Reach*, but with the Supreme Court of Canada's ruling in *Therien*. It is not surprising, therefore, that no Canadian court has clearly adopted this principle from *OBG*. Instead, courts have continued to find that conduct directed at a third party which breaches the criminal law can nevertheless satisfy the unlawful means element on account of its criminality, without regard to whether it is independently actionable.[503]

The law relating to the second question is more complex. In *Correia*, the

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501 See, e.g., *Canada Cement LaFarge*, *supra* note 167, at 471-472. The primary mental element required for the tort of unlawful means conspiracy is discussed in greater detail below.

502 *R.L.T.V. Investments Inc. v. Saskatchewan Telecommunications*, [2009] 9 W.W.R. 15, ¶45 (Sask. C.A.); leave to appeal to S.C.C. refused [2009] S.C.C.A. No. 388.

503 See *Polar Ice Express Inc. v. Arctic Glacier Inc.* (2007), 434 A.R. 261, ¶91-92 (Q.B.); var'd on other grounds (2009), 446 A.R. 295 (C.A.).

Court of Appeal held that the defendant's negligent investigation could not qualify as unlawful means, in part because it was independently actionable (under the rubric of negligence) by the plaintiff. A similar finding was made in relation to the defendants' acts of defamation and conspiracy, vis-à-vis the individual plaintiff, in *Alleslev-Krofchak*. However, the Court in *Alleslev-Krofchak* appeared to add a significant refinement to the prohibition upon independent actionability by the plaintiff, suggesting that: (a) in order to constitute unlawful means, the relevant conduct cannot be independently actionable by the plaintiff under the same head of liability which is put forward as the reason for characterizing the conduct as "unlawful" means; and (b) it does not matter whether the plaintiff has actually brought a successful claim under this independent head of liability, provided that the plaintiff could bring such a claim if it chose to do so (although *Barber* raises some doubt about whether this remains an absolute requirement).

This aspect of *Alleslev-Krofchak* is consistent with the Supreme Court of Canada's decision in *Central Canada Potash*, where it was held that a threatened breach of contract between the plaintiff and the defendant could not amount to unlawful means for the purposes of two-party intimidation. This was so even though, on the facts of *Central Canada Potash*, the plaintiff did not actually bring an independent claim for breach of contract. Instead, the Court noted that the plaintiff "*would have been* entitled to pursue its contractual remedies had that contract been illegally breached".[504]

Despite these authorities, the courts have not always been *ad idem* on this issue. Cases decided prior to *Correia* exist in which conduct that was independently actionable by the plaintiff (e.g., breach of contract, or inducing breach of contract) was found capable of qualifying as unlawful means for the purposes of the unlawful interference tort.[505] Further, no reference to this requirement was made in *Barber*.

Intriguingly, in the wake of the 2007-2008 Jurisprudence, there has been a virtual absence of any subsequent Canadian recognition of the significant restriction imposed on the scope of unlawful means in *Correia* (and subsequently affirmed in *Alleslev-Krofchak*). Only one trial-level ruling outside Ontario has even acknowledged this aspect of the Court of Appeal's reasoning.

That lone ruling is *Westcoast*, in which the court considered a claim for unlawful interference brought by a waste recycling facility against the local regional

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504 *Central Canada Potash*, *supra* note 161, at 86–88, emphasis added. Although *Central Canada Potash*, *supra* note 161 at 87, appeared to leave open whether certain *torts* could satisfy the unlawful means element of intimidation, some courts, applying that judgment, have held that the threat of a tort in a two-party situation should not result in liability for intimidation where the threatened tort would be itself actionable by the plaintiff: see, e.g., *Dusik v. Gooderham* (1985), 62 B.C.L.R. 1 at 31-32 (C.A.).

505 See: *Swift Current (City) v. Saskatchewan Power Corp.*, [2007] 5 W.W.R. 387, ¶74–86 (Sask. C.A.); rev'g in part (2005), 272 Sask. R. 160, ¶42-43 and 47-48 (Q.B.); *Polar Ice Express Inc. v. Arctic Glacier Inc.* (2007), 434 A.R. 261, ¶87-88 (Q.B.); var'd on other grounds (2009), 446 A.R. 295 (C.A.); and *Mega Wraps B.C. Inc. v. Mega Wraps Holdings Inc.*, [2008] O.J. No. 221, ¶87 (S.C.J.); var'd on other grounds 2008 ONCA 887.

government.[506] The principal "unlawful means" identified by the plaintiff was the alleged making of various defamatory statements by representatives of the regional authority. In the course of rejecting the plaintiff's claim of interference with economic interests, Shabbits J. relied upon the ruling in *Correia* for the proposition that conduct which was independently actionable by the plaintiff could not qualify as unlawful means.[507] Shabbits J. found that this principle was justified not only by the nature of the unlawful interference tort itself,[508] but also by the fact that the principles applicable to unlawful interference and to defamation (e.g., those relating to pleading, defences and damages) were different.[509] In his view, a plaintiff should not be permitted to "repackage" an unsuccessful defamation claim under the guise of the unlawful interference tort.[510] Moreover, even assuming that an independently actionable tort could form the basis of an unlawful interference claim, Shabbits J. held that the plaintiff would be required to establish all the elements of the underlying tort (including, in this case, the technical pleading defences applicable to the tort of defamation).[511]

Shabbits J. therefore accepted the principle from *Correia* (later affirmed in *Alleslev-Krofchak*) that conduct which is independently actionable by the plaintiff cannot qualify as unlawful means in the context of the unlawful interference tort. Nevertheless, *Westcoast* is also inconsistent with *Alleslev-Krofchak* insofar as it holds that unlawful means may not take the form of a tort which fails to meet the separate pleading standards that are applicable to that tort.

Thus, in light of recent jurisprudence, it appears that the availability of an unlawful interference claim based upon "unlawful means" which are independently actionable by the plaintiff — as well as the determination of which legal principles should govern the pleading of such a "parasitic" unlawful interference claim — re-

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506 For another case in which the court, despite *Correia*, declined to reject the proposition that conduct which is independently actionable by the plaintiff can satisfy the unlawful means element of unlawful interference, see *Tireco, Inc. v. YHI (Canada) Inc.*, [2009] O.J. No. 4245, ¶8 (Div. Ct.). In light of *Alleslev-Krofchak*, this aspect of *Tireco* is no longer good law.

507 *Westcoast*, *supra* note 494, ¶386-387 and 431–436. For another case in which the court held that conduct independently actionable by the plaintiff cannot satisfy the unlawful means element, see *Soost v. Merrill Lynch Canada Inc.* (2009), 13 Alta. L.R. (5th) 286, ¶152–156 (Q.B.); aff'd 2010 ABCA 251 ¶43 (although this case may be limited to the situation where the independently actionable conduct takes the form of the defendant's wrongful dismissal of the plaintiff).

508 *Ibid.* ¶431.

509 *Ibid.* ¶432.

510 *Ibid.* ¶435-436.

511 *Ibid.* ¶436. Similar to *Westcoast*, there are other recent cases in which courts have held that allegedly tortious or unlawful conduct may not qualify as unlawful means where the defendant is able to assert a defence to the specific unlawfulness in question (such as absolute privilege in the case of defamation): see, e.g., *Gray Investigations Inc. v. Mitchell*, [2007] O.J. No. 1936, ¶16–20 (S.C.J.); *Fraleigh v. RBC Dominion Securities Inc.* (2009), 99 O.R. (3d) 290, ¶23 and 39–41 (S.C.J.); *Hunt Oil Co. of Canada, Inc. v. Galleon Energy Inc.*, 2010 ABQB 212, ¶48; and *Novus Entertainment Inc. v. Shaw Cablesystems Ltd.*, 2010 BCSC 1030, ¶38–47.

mains to be conclusively determined outside Ontario.

(b) Conspiracy

Similar to the tort of unlawful interference, there are two question associated with whether conduct can, or must, be independently actionable in order to satisfy the unlawful means element of conspiracy: (1) whether conduct directed towards a third party *must* be independently actionable by the third party in order to qualify as unlawful means; and (2) whether conduct directed towards the plaintiff *can* qualify as unlawful means *despite* the fact that it is independently actionable by the plaintiff.

The law relating to the first question has not undergone any appreciable development since the 2007-2008 Jurisprudence. The ruling in *Total Network* arguably suggests that, where the defendant's conduct is directed at a third party, it must be actionable by the third party, based on the principles earlier laid down in *OBG*. However, in Canada, the Supreme Court's ruling in *Canada Cement LaFarge* suggests that conduct directed towards a third party (in that case, the public at large), instead of the plaintiff specifically, can qualify as unlawful means even though it involves a non-actionable breach of competition legislation. In the absence of a further ruling on this subject by the Supreme Court, it would appear that the unlawful means required for an unlawful means conspiracy claim need not be actionable where directed towards a third party.

Canadian courts have traditionally addressed the second question under the rubric of the merger doctrine.[512] In that context, the Supreme Court held in *Hunt*

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512 Insofar as the second question involves the issue of whether the conduct constituting the unlawful means *must* be independently actionable by the plaintiff, where such conduct has been directed towards the plaintiff, the decisions in both *Gagnon* and *Total Network* indicate that there is no such requirement. See also: *Tracy (Representative ad litem of) v. Instaloans Financial Solution Centres (B.C.) Ltd.* (2008), 293 D.L.R. (4th) 60, ¶75–87 (B.C.S.C.); aff'd (2009), 309 D.L.R. (4th) 236, ¶19–29 (B.C.C.A.); leave to appeal to S.C.C. refused [2009] S.C.C.A. No. 194; and *DataNet Information Systems, Inc. v. Belzil*, 2010 ABQB 72, ¶91. For an interesting appellate case that touches upon this issue, see *Keeton v. Bank of Nova Scotia* (2009), 254 O.A.C. 251, ¶80 (C.A.). There, the Ontario Court of Appeal considered an allegation of conspiracy in a case where the defendant, a supplier of the plaintiff company, agreed with one of the company's directors to have false invoices submitted to the company on his behalf. While the invoices were false, and the defendant knew that they were false, he nevertheless believed (based on the assurances of the director) that the arrangement was being conducted with the approval of the company, in order to provide a financial benefit to the company's principal. Accordingly, the Court rejected claims against the defendant sounding in conspiracy, in addition to deceit and knowing assistance of breach of fiduciary duty. The Court's reasoning is of interest, however, since it rejected the conspiracy claim solely on the ground that the defendant did not possess an actual or constructive intent to injure. In doing so, the Court noted that the defendant had agreed to commit "unlawful acts" by submitting the inflated invoices, even though it rejected the actionability of the defendant's conduct (under any of the enumerated causes of action). Given this latter conclusion, it is not entirely clear on what basis the Court viewed the defendant's conduct as being "unlawful". Arguably, the Court simply found

that the merger doctrine could not be used, at the pleadings stage, to strike out a claim for lawful or unlawful means conspiracy simply because the plaintiff may ultimately be successful at trial in its independent claim for the overt acts and the unlawful means alleged (in *Hunt*, fraud and negligence).[513] Owing to *Hunt*, there has been long-standing uncertainty in Canada as to whether the requirement of unlawful means can be satisfied by conduct which could, at the pleadings stage, be independently actionable by the plaintiff against some or all of the co-conspirators under a separate claim brought by plaintiff pursuant to an independent head of liability.[514]

Recent case law suggests that this uncertainty continues to exist, and may even be exacerbated by the prohibition upon independent actionability recognized in the context of the unlawful interference tort by *Alleslev-Krofchak*. Unlike the merger doctrine (which has traditionally required the plaintiff to actually bring an independent claim for the unlawful means in addition to the conspiracy tort itself), the *Alleslev-Krofchak* prohibition applies where the plaintiff merely could have, but did not, bring an independent claim for the discrete cause of action constituting the unlawful means. Some courts, in seeming recognition of this distinction, have found that conduct may qualify as unlawful means for the purposes of conspiracy even though it could have been independently actionable by the plaintiff, where the possibility of that actionability arises through a hypothetical independent claim that was not actually brought by the plaintiff.[515] Nevertheless, in *Alleslev-Krofchak*, Goudge J.A. appeared to suggest that the individual plaintiff may have been successful had she brought a conspiracy claim based upon the defendants' defamation of her, even though she did bring a separate claim in defamation (on which she succeeded).[516] Taken literally, this would suggest that not even the doctrine of

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that the defendant had agreed to commit acts which were "unlawful" by reason of the fact that they were unlawful when committed by his co-conspirator, the company's director (who was found liable for breach of fiduciary duty at trial). Such a principle has been endorsed in previous judgments: see footnote 232 (although the possibility of liability for unlawful means conspiracy where the defendant agrees to a co-conspirator's unlawful conduct was rejected in *Bank of Montreal v. Tortora* (2010), 3 B.C.L.R. (5th) 39, ¶42–47 (C.A.), in which the Court failed to refer to its earlier and seemingly inconsistent judgment in *Golden Capital Securities Ltd. v. Holmes*, [2005] 1 W.W.R. 631, ¶74 (B.C.C.A.)). However, the Court's reasons in *Keeton* may also suggest that the defendant himself engaged in "unlawful" conduct, perhaps in the form of conduct that he was "not at liberty to commit" (notwithstanding that this conduct was not independently actionable vis-à-vis the defendant).

513 *Hunt*, *supra* note 170, at 991-992.

514 See the cases referenced at footnotes 173–179 above.

515 See *e.g.*, *Ontario Realty Corp. v. P. Gabriele & Sons Ltd.*, [2009] O.J. No. 286, ¶188 (S.C.J.).

516 *Alleslev-Krofchak*, *supra* note 21, ¶66–68. On the other hand, *Alleslev-Krofchak* did support the statement from *Correia* that "[t]he 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". [emphasis added] Read broadly, this reference to intentional "torts" could be taken to include a reference to conspiracy, which would suggest that the prohibition on independent actionability recognized by *Correia* and

merger itself applies to the tort of conspiracy.

At the same time, the last three years have witnessed a growing number of appellate cases (from different provinces) in which the doctrine of merger has not only been approved, but has been applied (contrary to *Hunt*) to *strike out* allegations of unlawful means conspiracy.[517] Most recently, in *Bank of Montreal v. Tortora*,[518] the British Columbia Court of Appeal affirmed the motion judge's decision to strike out claims for unlawful means conspiracy, which were founded upon breaches of contract and fiduciary duty as between the plaintiff and the defendants. Chiasson J.A. distinguished *Hunt* on the basis that there could be no unlawful means in *Tortora* if the allegations of breach of contract and fiduciary duty were unsuccessful (such that the "unlawfulness" of the unlawful means was necessarily dependent upon establishing the actionability of conduct for which the plaintiff had brought a further claim against the defendants under a separate head of liability).[519] While Chiasson J.A.'s rationale for distinguishing *Hunt* may be questioned,[520] *Tortora* nevertheless supports the continued vitality of the merger doctrine as a substantive legal principle in Canada (although debate over its application at the pleadings stage will likely continue).

Alleslev-Krofchak in relation to unlawful interference has application in conspiracy as well (although this prohibition is, as discussed earlier, different than the doctrine of merger, since it requires only hypothetical actionability rather than actual actionability by the plaintiff). Further, it does not appear that the application of merger to the individual plaintiff's hypothetical conspiracy claim was ever argued before the Court of Appeal in *Alleslev-Krofchak*.

517 See, *e.g. Hall v. MacPherson Leslie and Tyerman LLP*, [2007] 5 W.W.R. 112, ¶29 (Sask. C.A.); and *Hughes (Estate) v. Hughes* (2007), 285 D.L.R. (4th) 57, ¶50 (Alta. C.A.). See also *Dean v. Mister Transmission*, 2010 ONCA 443 ¶12 and 19, where the existence of the merger doctrine appears to have been accepted (but not applied) by the Court in a summary judgment motion.

518 (2010), 3 B.C.L.R. (5th) 39, ¶50–62 (C.A.) [*Tortora*].

519 *Ibid.* ¶52–53.

520 Chiasson J.A.'s distinction may be defensible insofar as it relies upon the fact that, in *Hunt*, the plaintiff alleged *lawful* means conspiracy in addition to unlawful means conspiracy. Thus, a significant aspect of the plaintiff's conspiracy claim in *Hunt* could have succeeded (or failed) regardless of the plaintiff's success with respect to the underlying torts that formed the subject of the unlawful means conspiracy claim. Moreover, the underlying torts that supported the unlawful means conspiracy claim in *Hunt* included not only negligence, but also fraud and deceit, and it was not clear whether the plaintiff in *Hunt* independently sued the defendant for fraud and deceit (as opposed to negligence). Nor is it clear (as noted in *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97, ¶27 (C.A.)) whether the allegation of negligence in *Hunt* was based upon the same facts as the allegation of unlawful means. In contrast, in *Tortora*, the conspiracy claim was exclusively framed in unlawful means conspiracy, and the unlawful means alleged were also advanced as independent torts by the plaintiff. Accordingly, the conspiracy claim necessarily rose or fell with the success of the underlying torts. See also *McKenna v. Gammon Gold Inc.*, 2010 ONSC 4068, ¶44-45.

4. The Broad (and Narrow) View of Unlawful Means

(a) Unlawful interference

In the aftermath of the 2007-2008 Jurisprudence, a survey of recent case law gives little indication that the "broad view" of unlawful means has been the subject of any dramatic transformation. As indicated earlier, the Ontario Court of Appeal in *Drouillard* significantly narrowed the scope of the broad view, and the same Court in *Correia* and *Alleslev-Krofchak* appeared prepared to consider its outright rejection (at least insofar as the broad view enables conduct which is not directed at a third party and/or which is independently actionable by the plaintiff to qualify as unlawful means based simply on the proposition that it is conduct which the defendant is "not at liberty to commit"). Nevertheless, in *Barber*, the Ontario Court of Appeal applied the *Reach* approach without any seeming limitations. Further, since the 2007-2008 Jurisprudence, a sizeable body of lower court decisions have continued to regard the test in *Torquay* and *Reach* — along with similar rulings in other provinces — as the key principle governing unlawful means in the context of interference with economic interests.[521]

For instance, in *Greey Realty Holdings Ltd. v. Greey Esplanade Ltd.*,[522] Macdonald J. held (in the context of an injunction) that unlawful means had been committed where the defendant, a co-lessor with the plaintiff, delivered a direction to the lessee which it had no power to do unilaterally under the terms of the lease. The Court noted simply that such conduct was "beyond its legal rights".[523] Similarly, in

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521 See, *e.g. Bass Clef Entertainments Ltd. v. HOB Concerts Canada Ltd.* (2007), 31 B.L.R. (4th) 255, ¶126 (Ont. S.C.J.); *Rosenhek v. Windsor Regional Hospital*, [2007] O.J. No. 4486, ¶22 (S.C.J.); rev'd on other grounds (2010), 257 O.A.C. 283, ¶19, n2 (C.A.); *Chisum Log Homes & Lumber Ltd. v. Investment Saskatchewan Inc.*, [2008] 2 W.W.R. 320, ¶101–104 (Sask. Q.B.); *Paulin v. P.C.M. Collections Ltd. (c.o.b. Professional Collection Management)*, [2007] O.J. No. 4619, ¶35 (S.C.J.); *Polar Ice Express Inc. v. Arctic Glacier Inc.* (2007), 434 A.R. 261, ¶87 (Q.B.); var'd on other grounds (2009), 446 A.R. 295 (C.A.); *Homelife Realty Services Inc. v. Homelife Performance Realty Inc.* (2007), 64 R.P.R. (4th) 102, ¶235–238 (Ont. S.C.J.); *M.B. Kouri Insurance Brokers Ltd. v. R.L. Gougeon* (2009), 72 C.C.L.I. (4th) 296, ¶116 (Ont. S.C.J.); *Soost v. Merrill Lynch Canada Inc.* (2009), 13 Alta. L.R. (5th) 286, ¶148–151 (Q.B.); aff'd 2010 ABCA 251, ¶43; and *Murray v. Sherman*, 2010 ONSC 3146, ¶12. There are some exceptions to this trend, however. See *Genesis Land Development Corp. v. Alberta* (2009), 10 Alta. L.R. (5th) 156, ¶115 (Q.B.); aff'd [2010] 6 W.W.R. 77 (Alta. C.A.), citing pre-2007 authority in support of the narrow rather than the broad view of unlawful means. Note also *WP (33 Sheppard) Gourmet Express Restaurant Corp. v. WP Canada Bistro & Express Co.*, 2010 ONSC 2644 ¶74, where the Court refused to decide which of the "narrow" or "broad" views of unlawful means was the correct view in the context of a pleadings motion.

522 [2008] O.J. No. 2692, ¶7 and 16 (S.C.J.); leave to appeal to Ont. Div. Ct. refused (2008), 241 O.A.C. 123 (Div. Ct.).

523 *Ibid.* ¶7.

First Choice Outfitters Ltd. v. Neilly,[524] Rothery J. held (in the context of a motion to strike) that the defendants engaged in unlawful means when one of them renewed a valuable licence, solely in the names of the defendants, after it had originally been issued in the names of all the parties. Such an act was "without legal justification and one the defendants were not at liberty to commit".[525]

Conversely, there are relatively few decisions that have even acknowledged the impact of *Drouillard* and/or *Correia* on the continued viability of the broad view of the unlawful means element. Some cases have identified one or both of these latter rulings as the key authorities articulating the general elements of the tort, but without focusing on the scope or substance of the unlawful means element more specifically.[526] Other courts have accepted that *Drouillard* circumscribes,[527] but still leaves in place,[528] the broad view of unlawful means. Indeed, some courts have even accepted that — despite the admittedly unsettled ambit of the tort following *OBG* and *Correia* ruling — the broad approach continues to be applicable.[529]

Most interesting in this regard are three recent lower court rulings, from three different jurisdictions, which have substantively assessed the impact of *Drouillard*, *Correia* and/or *OBG* on Canadian law. It appears that, to varying degrees, each of these rulings supports the conclusion that the broad view of unlawful means continues to exist as a vital governing principle.

In *Westcoast*, the British Columbia Supreme Court acknowledged and described the "narrow" approach to the unlawful means element endorsed by Lord Hoffmann in *OBG*.[530] Shabbits J. appeared to conclude that the Court in *Correia* had left in place the broad view of unlawful means (but also noted that *Correia* "did not decide the unlawfulness issue but decided the case on other grounds"[531]). In this regard, it appears that Shabbits J. was influenced by recent British Columbia

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524 (2008), 322 Sask. R. 200, ¶22-23 (Q.B.).

525 *Ibid.* ¶23.

526 See: *Carney Timber Co. v. Pabeninskas*, [2008] O.J. No. 4818, ¶36 (S.C.J); *Zuckerman-Honickman Inc. v. MPI Packaging Inc.*, [2009] O.J. No. 2209, ¶64-65 (S.C.J.); leave to appeal to Ont. Div. Ct. refused [2009] O.J. No. 4110; and *Schumm v. A-1 Storage Space Ltd.*, 2010 ONSC 4088, ¶59.

527 See, *e.g. Soost v. Merrill Lynch Canada Inc. Soost v. Merrill Lynch Canada Inc.* (2009), 13 Alta. L.R. (5th) 286, ¶150 (Q.B.); aff'd 2010 ABCA 251 ¶43 (where Brooker J. described the Court of Appeal in *Drouillard* as not being "prepared . . . to extend the concept of unlawful [means]", as established in *Reach*); and *Cherubini Metal Works Ltd. v. Nova Scotia* (2009), 285 N.S.R. (2d) 255, ¶315 (S.C.) (where Duncan J. spoke of "[t]he 'outer limits' of 'unlawful means' [having been] considered by the Ontario Court of Appeal in *Drouillard* . . .").

528 See: *Tireco Inc. v. YHI Canada Inc.* (2009), 53 E.T.R. (3d) 12, ¶25 (Ont. S.C.J.); leave to appeal to Ont. Div. Ct. refused [2009] O.J. No. 4245 (Div. Ct.); and *Soost v. Merrill Lynch Canada Inc.* (2009), 13 Alta. L.R. (5th) 286, ¶150-151 (Q.B.); aff'd 2010 ABCA 251, ¶43.

529 See, *e.g. Tireco Inc. v. YHI Canada Inc.*, [2009] O.J. No. 4245, ¶6–8 (Div. Ct.); and *595799 Ontario Ltd. v. Galpin*, 2010 ONSC 2083, ¶10–14.

530 *Westcoast*, *supra* note 494, ¶379–382.

531 *Ibid.* ¶383.

authority which had endorsed and applied the broad view of unlawful means (i.e., conduct that the defendant was "not at liberty to commit", that was "not authorized by law" or that was "without lawful justification") in applying that flexible approach to the facts before the court.[532]

In *Cherubini Metal Works Ltd. v. Nova Scotia (A.G.)*,[533] the Nova Scotia Supreme Court considered the development of the law — starting with the seminal enunciation of the broad view in cases such as *Torquay* and *Reach*, through the refinement of this approach in *Drouillard*, and culminating in *Correia*. Justice Duncan noted the admission of the Ontario Court of Appeal in *Correia* that the scope of the unlawful means component of the tort had not yet been "fully define[d]."[534] Despite this acknowledgment of the unsettled scope of this concept, it is notable that Duncan J. was nevertheless prepared to apply the broad view of unlawful means (although, similar to *Drouillard*, Duncan J. refused to find unlawful means where the defendant had merely breached an internal policy).[535]

Lastly, in *Hunt Oil Co. of Canada, Inc. v. Galleon Energy Inc.*,[536] the Alberta Court of Queen's Bench appeared to affirm the continuing vitality of the broad view of unlawful means as part of the law in that province. Stevens J. referred to the description of the elements of the tort in *Reach*, and noted that the Ontario Court of Appeal had subsequently "narrowed" this formulation, when it "adopted" the ruling in *OBG*.[537] Stevens J. then indicated that, although *Correia* had distinguished *Reach* and limited its scope, previous Alberta authority had accepted the broad view of unlawful means.[538] In the result, Stevens J. appeared to endorse the *Reach* test (although he found that this test was not satisfied on the basis of the pleadings).[539]

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532 *Ibid.* ¶379–384. See also ¶408 and 483. The earlier B.C. ruling cited by Shabbits J. (¶384) was *Reid v. British Columbia*, 2007 BCSC 155, ¶151.

533 (2009), 285 N.S.R. (2d) 255 (S.C.).

534 *Ibid.* ¶313–316.

535 *Ibid.* ¶328–336. At the end of the day, the court ruled that the defendant government authority had not used "unlawful means," despite the authority's apparent breach of its own internal policies. The court refused to find that the defendant was "not at liberty" to follow these policies, as they were merely "internal documents . . ., created by the defendant for the defendant's use. They were, in effect, guidelines that did not have the force of limiting or otherwise qualifying the [defendant's] statutory responsibility" (see ¶328, *ibid.*). Likewise, the fact that the defendant government body continued to investigate a complaint against the plaintiff — despite the fact that the complaint had been filed by third parties in a manner inconsistent with the governing statute — did not render the defendant's conduct unlawful, since there was nothing in the legislation which forbade the government from undertaking or continuing an investigation in such circumstances.

536 2010 ABQB 212.

537 *Ibid.* ¶43.

538 *Ibid.* ¶45-46.

539 *Ibid.* ¶48-49. The unlawful means alleged in this case included not only the torts of negligent misrepresentation and abuse of process (which were held to be without foundation), but also the taking of certain actions (primarily, objections to a regulatory application by the plaintiff) "without legal justification". In rejecting this latter allegation,

Although the foregoing trilogy of cases supports the continued vitality of the "broad view" in provinces outside Ontario, its validity within Ontario is somewhat unclear in light of recent appellate decisions. The explicit rejection of Lord Nicholls' approach in *Alleslev-Krofchak*, which had earlier been equated with the *Reach* approach in *Correia*, appears fundamentally inconsistent with the broad view, whereas the ruling in *Barber* appears to embrace the broad view without question.

(b) Conspiracy

With the revolutionary changes to the tort of unlawful interference effected by the House of Lords in *OBG*, it followed almost inevitably that the concept of unlawful means in England must be given an entirely different meaning in the context of other torts, such as conspiracy. This conclusion was expressly affirmed by the House of Lords in its subsequent ruling in *Total Network*.

In contrast, four recent Canadian cases suggest that domestic law is continuing to follow a markedly different path. In each of these four conspiracy rulings, the courts have accepted that the classic broad view of unlawful means (as enunciated in *Reach*) should be adopted directly into the context of the separate tort of conspiracy. Significantly, however, only the last of these cases referred to any of the decisions within the 2007-2008 Jurisprudence.

In *Ontario Realty Corp. v. P. Gabriele & Sons Ltd.*,[540] Newbould J. acknowledged *Reach*, and saw "no reason" why the broad view of unlawful means articulated in that case should not apply with equal force to the tort of conspiracy. It is interesting to note that, although the *Reach* approach to unlawful means has, since 2003, been cited and applied in dozens of unlawful interference cases, the *Ontario Realty Corp.* ruling appears to have been only the second conspiracy case to do so. (In an earlier ruling in British Columbia, *Pro-Sys Consultants Ltd. v. Microsoft Corp.*,[541] Tysoe J. appeared to accept, without comment, that the broad view of unlawful means endorsed in *Reach* could apply equally to claims for both conspiracy and unlawful interference.)

In the subsequent Ontario conspiracy ruling in *Agribrands Purina Canada Inc. v. Kasamekas*,[542] Quigley J. adopted an equally expansive approach to unlawful means, drawing specifically on *Torquay* and *Reach*. The Court relied upon these rulings to support its conclusion that this element of conspiracy was met by conduct which a co-conspirator was "not at liberty" or was "not authorized" to engage in, "whether as a result of law, a contract, a convention or an understanding."[543] With

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Stevens J. found at ¶48 that "there is no claim that [the defendant] was doing anything other than following the statutory processes and rules".

540 [2009] O.J. No. 286, ¶187-188 (S.C.J.) [*Ontario Realty Corp.*].

541 [2007] 1 W.W.R. 541, ¶14–25 (B.C.S.C.). The lower court in *Reach* also contemplated the application of the broad view of unlawful means to the tort of conspiracy: see *Reach M.D. Inc. v. Pharmaceutical Manufacturers' Assn. of Canada* (1999), 1 C.P.R. (4th) 533, ¶47 and 55-56 (Ont. S.C.J.); rev'd on other grounds (2003), 65 O.R. (3d) 30 (C.A.).

542 2010 ONSC 166, ¶127–142.

543 *Ibid.* ¶127-128

particular reference to *Ontario Realty Corp.*, Quigley J. stated that he could "find no reason in principle why this broader meaning should not be used in this case in determining whether the conduct of [the defendants] meets the prescribed test for illegality".[544]

In *DataNet Information Systems Inc. v. Belzil*,[545] an Alberta court considered the approach to unlawful means applied by Canadian courts in the context of both conspiracy and unlawful interference. Particular emphasis was placed on the broad view of unlawful means (as endorsed in *Reach* and other cases) as sufficient to ground a finding of liability for conspiracy.[546]

Finally, in *Harris v. GlaxoSmithKline Inc.*,[547] Perell J. cited both *Ontario Realty Corp.*, and *Total Network*, in concluding that the *Reach* definition of unlawful means applied to unlawful means conspiracy. He noted that "for the purposes of the tort of conspiracy, an unlawful act is broader that an act prohibited by law or statute and unlawfulness includes an act that a person is not at liberty to commit".[548] Accordingly, consistent with *Total Network*, Perell J. found that "[u]nlawful means are not limited to a tort claim actionable by the plaintiff".[549]

In understanding the significance of these recent conspiracy cases, three observations should be made. First, these rulings are notable for the courts' willingness to enlarge the analysis applicable to conspiracy claims by "importing" the *Reach* approach to unlawful means, as originally developed in the context of the entirely separate tort of unlawful interference. (Although modern rulings utilizing this approach are uncommon, it should be noted that the overlap between the unlawful means element of the two torts had been acknowledged by the Supreme Court of Canada decades earlier, in *Gagnon*.) The second observation focuses on the (per-

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544 *Ibid.* ¶130. In the context of this dealership dispute, the court found that the defendants had conspired to injure the plaintiff (a dealer) through a variety of unlawful means, including through (i) the conduct of the first defendant (a manufacturer) in breaching the letter and spirit of its dealership agreement with the plaintiff, (ii) the conduct of a second defendant (a competing dealer) which violated the terms of its dealership agreement with the first defendant (the manufacturer), and (iii) the conduct of a third defendant (a former dealer, and now a sub-dealer) in participating in the two foregoing forms of unlawful activity (see ¶131–134, 140–143, 145-146 and 232–234).

545 2010 ABQB 72 ¶77–91 (and, especially, ¶85–91).

546 *Ibid.* ¶91. In addition to *Reach*, Jeffrey J. cited and relied upon *Torquay*, the recent Ontario trial ruling in *Alleslev-Krofchak*, and the Supreme Court of Canada's decision in *Gagnon*. The specific unlawful means identified in deciding the case were (i) the solicitor's misuse of her client's confidential information and (ii) her conduct in acting in a manner conflicting with her client's interests (both of which were found to also justify the Alberta Law Society's finding of professional misconduct).

547 2010 ONSC 2326, ¶79 and 93–95.

548 *Ibid.* ¶79.

549 *Ibid.*. The specific unlawful means alleged in this case were the tort of abuse of process, and bringing abusive "notice of compliance" proceedings under the *Patented Medicine (Notice of Compliance) Regulations*, S.O.R./93-133, enacted under the *Patent Act*, R.S.C. 1985, c. P-4. Perell J. ultimately found that the unlawful means were not made out, since the plaintiff could not establish the tort of abuse of process, and the defendant was acting within its rights in bringing the NOC proceedings.

haps ironic) fact that, in adopting the *Reach* approach to unlawful means, these 2009 and 2010 conspiracy cases are applying an approach which has already been limited to some degree by intervening domestic developments arising under the unlawful interference rubric (see, e.g., *Drouillard*, *Correia* and *Alleslev-Krofchak*). Ironically, of course, this very approach was recently reaffirmed in *Barber*. In other words, the *Reach* approach to unlawful means is gaining a foothold in the law of conspiracy, even as it (arguably) recedes in importance as part of the tort of unlawful interference. Third, it is no longer clear, in light of cases such as *Total Network* and *Alleslev-Krofchak*, whether the unlawful means element in the "three-party" tort of unlawful interference is even capable of transposition to the "two-party" (and possibly also "three-party") tort of conspiracy.

5. The Mental Sub-Elements for Unlawful Means

(a) The primary mental element vs. the mental sub-elements

Both unlawful interference,[550] and unlawful means conspiracy,[551] are intentional torts. Accordingly, as discussed above, each tort contains a mental element that requires some level of intent to injure the plaintiff by the defendant. These mental elements may be referred to as the "primary" mental elements of the torts.

In the wake of *Correia*, the better view is that the primary mental element of the unlawful interference tort requires an *actual specific intent* to harm the plaintiff.[552] Neither recklessness as to the likelihood of such harm, nor mere foreseeability that such harm is the inevitable consequence of the defendant's acts, should suffice[553] (although *Alleslev-Krofchak* indicates that the requisite intention may be

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550 See: *Lineal Group Inc. (c.o.b. Samsonite Furniture) v. Atlantis Canadian Distributors Inc.* (1998), 42 O.R. (3d) 157 at 160 (C.A.); leave to appeal to S.C.C. refused [1998] S.C.C.A. No. 608; *Cheticamp Fisheries Co-op Ltd. v. Canada* (1995), 123 D.L.R. (4th) 121 at 132 (N.S.C.A.); leave to appeal to S.C.C. refused [1995] S.C.C.A. No. 202; and *Correia*, *supra* note 19, ¶98, 100-101 and 106.

551 See *Canada Cement LaFarge*, *supra* note 167, at 468–473 (although, as noted by the Court in that case, the intention required for unlawful means conspiracy can be constructive rather than real). See further *Golden Capital Securities Ltd. v. Holmes*, [2005] 1 W.W.R. 631, ¶53–58 (B.C.C.A.).

552 The intention of the defendant should not, however, be confused with the defendant's *motive* (e.g., the presence of "malice") which is not relevant to liability for unlawful interference (save, perhaps, in connection with the defence of justification): *Cheticamp Fisheries Co-op Ltd. v. Canada* (1995), 123 D.L.R. (4th) 121 at 127 (N.S.C.A.); leave to appeal to S.C.C. refused [1995] S.C.C.A. No. 202. As indicated by both *OBG* and *Correia*, the intentionality required for the unlawful means tort must also be distinguished from the intentionality required for inducing breach of contract.

553 See *Correia*, *supra* note 19, ¶100-101 and 106. Thus, while recklessness (or wilful blindness) may suffice to establish knowledge, it should not suffice to establish intent. This aspect of the ruling in *Correia* is consistent with *Northern Territory of Australia v. Mengel* (1995), 185 C.L.R. 307 at 344-345 (H.C.A.), and with *Cheticamp Fisheries Co-op Ltd. v. Canada* (1995), 123 D.L.R. (4th) 121 at 127–136 (N.S.C.A.); leave to

inferred, based on the principle that a defendant intends the natural consequences which they know will arise from their acts).[554] On the other hand, it must be acknowledged that there remains some uncertainty on this issue, since that the Court in *Barber* appeared to (inexplicably) apply a test of mere foreseeability and acquiescence.

In contrast to unlawful interference (and lawful means conspiracy), the primary mental element for unlawful means conspiracy does not (at least in Canada) require an actual intent to injure the plaintiff.[555] Instead, the element will be satis-

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appeal to S.C.C. refused [1995] S.C.C.A. No. 202 (and the many subsequent cases in which *Cheticamp* has been applied). Interestingly, however, it appears to represent a departure from *Reach*, *supra* note 20, ¶46-47. There, Laskin J.A. indicated that the primary mental element did not require that the defendant's predominant purpose be to injure the plaintiff, but only that the defendant's conduct be "in some measure directed against" the plaintiff. On the facts of *Reach*, he found that this test was met because the defendant was "aware" that its conduct would cause injury to the plaintiff. Given *Correia*, it is would seem that *Reach* no longer represents the law insofar as it permits the primary mental element of unlawful interference to be satisfied on the basis of a mere "awareness" of harm to the plaintiff (although the ruling in *Barber* indicates a continuing uncertainty on this point in Ontario). See also the discussion of this issue in: *Cherubini Metal Works Ltd. v. Nova Scotia (A.G.)* (2009), 285 N.S.R. (2d) 255, ¶299–312 (S.C.); *595799 Ontario Ltd. v. Galpin*, 2010 ONSC 2083, ¶10–13; and *Soost v. Merrill Lynch Canada Inc.* (2009), 13 Alta. L.R. (5th) 286, ¶143–147 (Q.B.); aff'd 2010 ABCA 251, ¶43. See also *Piresferreira v. Ayotte*, 2010 ONCA 384, ¶75. However, it is less clear whether *Correia* also overrules the principle from *Reach* that the primary mental element for unlawful interference does not require that the *predominant* purpose of the defendant's conduct be to injure the plaintiff (such that an ancillary intent to injure the plaintiff may still suffice, provided that it is an actual rather than a merely constructive intent). This principle is also found in *Therien*, supra note 148 at 280, where Locke J. (drawing from Lord Dunedin in *Sorrell v. Smith*, [1925] A.C. 700 at 718-719 (H.L.)) stated that "*even though the dominating motive in a certain course of action may be the furtherance of your own business or your own interests*, you are not entitled to interfere with another man's method of gaining his living by illegal means". [emphasis added] Presumably, the Court in *Correia* did not intend to reject this principle, since *OBG* (whose reasoning on the primary mental element appeared to be unreservedly applied in *Correia*) recognizes that a defendant may satisfy the primary mental element where its ultimate end is to enrich itself, and the infliction of injury upon the plaintiff is only a means thereto (or even where these two results are just "inevitably linked"): see *OBG*, *supra* note 15, ¶42, 62–64, 134-135 and 164–167. This proposition was also adopted in *Alleslev-Krofchak*, *supra* note 21, ¶50 (although there remains some uncertainty regarding the precise test for adopted in *OBG*: see Hazel Carty, "The Economic Torts in the 21st Century" (2008) 124 L.Q.R. 641 at 654-655 and 659). In this respect, it appears that the primary mental element for unlawful interference occupies something of a "middle ground" between the primary mental element for lawful means conspiracy (where a defence of predominant legitimate motive, including self-interest, exists), and unlawful means conspiracy (where the defendant need only possess the secondary purpose of injuring the plaintiff on a constructive level).

554 *Alleslev-Krofchak*, *supra* note 21, ¶42.

555 In England, it would appear that an *actual* but *not predominant* intent to injure is required for unlawful means conspiracy: see *Total Network*, *supra* note 16, ¶40, 44, 56,

fied if the defendant's conduct is directed towards the plaintiff, and the defendant possesses a *constructive* intent to cause the plaintiff injury (which will be inferred where the defendant did or should know that injury to the plaintiff would result).[556] Nevertheless, this element cannot be satisfied through mere negligence, nor even the awareness that there is a greater than 50 per cent chance that the plaintiff will be injured. Instead, it requires a *clear expectation* that the particular unlawful acts will result in injury to the particular plaintiff.[557]

In addition to the primary mental element required for each of the torts, a growing body of case law suggests the existence of two further mental "sub-elements", which are specific to the unlawful means element. These mental sub-elements do not focus upon the defendant's actual or constructive intent to *injure* the plaintiff, but upon the defendant's intent to commit an *unlawful* act.

The nature of these sub-elements is perhaps best illustrated with reference to the tort of abuse of public office. In *Odhavji Estate v. Woodhouse*,[558] the Supreme Court of Canada held that abuse of public office requires proof of the following elements (in addition to damages and causation):

> First, the public officer must have engaged in *deliberate* and *unlawful* conduct in his or her capacity as a public officer. Second, the public officer must have been *aware both* that his or her conduct was *unlawful* and that it was *likely to harm* the plaintiff.[559]

Thus, the Court drew a distinction between *three* different mental states in connection with the tort. First, the defendant's unlawful conduct must have been

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93, 95, 100, 115, 117 and 120. Thus, the primary mental element in the unlawful interference tort is the same as in unlawful means conspiracy: see *Meretz Investments NV v. ACP Ltd.*, [2008] Ch. 244, ¶146 (C.A.), per Arden L.J.; *Pell Frischmann Engineering Ltd. v. Bow Valley Iron Ltd.*, [2009] UKPC 45, ¶60; *Bank of Tokyo-Mitsubishi UFJ, Ltd. v Baskan Gida Sanayi VE Pazarlama A.S.*, [2009] EWHC 1276, ¶825–833 (Ch. D.); *Digicel (St Lucia) Ltd. v Cable & Wireless Plc*, [2010] EWHC 774 (Ch. D.), Annex I, ¶83; *Pirtek (UK) Ltd. v. Joinplace Ltd. (t/a Pirtek Darlington)*, [2010] EWHC 1641, ¶85 (Ch. D.); and *Aerostar Maintenance International Ltd. v. Wilson*, [2010] EWHC 2032, ¶174 (Ch. D.).

556 *Canada Cement LaFarge*, *supra* note 167, at 471-472; *Hunt*, *supra* note 170, at 984–986. See also *Cheticamp Fisheries Co-op Ltd. v. Canada* (1995), 123 D.L.R. (4th) 121 at 132 (N.S.C.A.); leave to appeal to S.C.C. refused [1995] S.C.C.A. No. 202.

557 *Golden Capital Securities Ltd. v. Holmes*, [2005] 1 W.W.R. 631, ¶54–58 (B.C.C.A.).

558 [2003] 3 S.C.R. 263 [*Odhavji*].

559 *Ibid.* ¶23, emphasis added. See also ¶32. At ¶22-23, the Court noted that these requirements could be established in two ways. The first would be by proving them separately. The second would be by proving that the public body acted with the specific intent of harming the plaintiff. Since any actions taken by a public body with the specific intent of harming a member of the public is, by definition, unlawful, the proof of such an act would itself meet the two requirements. Interestingly, this latter form of abuse of public office would appear to resemble lawful means conspiracy, insofar as it permits the defendant's intent to create an exception to the requirement from *Allen* for an independently unlawful act or violation of the plaintiff's legal rights in cases of pure economic loss.

"deliberate" (or "intentional").[560] Second, the defendant must have been "aware" of (or subjectively reckless or wilfully blind as to)[561] the unlawfulness of the conduct. Third, the defendant must have been "aware" of (or subjectively reckless or wilfully blind as to)[562] the likelihood that the conduct would result in harm to the plaintiff.

It is submitted that, as with abuse of public office, the first two of these mental states (or "sub-elements") are required in relation to unlawful means conspiracy, and unlawful interference with economic interests, and that they are distinct from the "primary" mental element specific to each of these causes of action.[563]

(b) The first sub-element: deliberate conduct

With respect to the first sub-element, that of deliberateness, courts have distinguished between an unlawful act that is "intentional" in the sense that it is deliberate (e.g., an assault on a third party), and an unlawful act that is "intentional" in the sense that it is directed toward injuring the plaintiff (e.g., an assault upon the plaintiff's customers for the purposes of discrediting it).[564] Accordingly, it seems possible for deliberateness to operate alongside the primary mental element as a discrete sub-element of the unlawful means requirement.

Further, there is judicial support for the view that the unlawful means employed in the tort of unlawful interference must be "deliberate" (i.e., a "wilful and knowing perpetration of unlawful acts").[565] Such a position is consistent with the

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560 *Ibid.* ¶25.

561 *Ibid.* ¶25 and 38.

562 *Ibid.*

563 As has been recently observed, it is these three mental elements that make abuse of public office an "intentional" tort: *St. Elizabeth Home Society v. Hamilton (City)* (2010), 319 D.L.R. (4th) 74, ¶20 and 23-24 (Ont. C.A.). It is therefore not unreasonable to assert that these elements must also inhere in the unlawful means torts, which are similarly "intentional". At the same time, it should be noted that the third and "primary" mental element for abuse of public office (a subjective awareness of the likelihood of harm to the plaintiff) is not sufficient for unlawful interference with economic interests (since, as discussed above, the defendant must actually *intend* to harm the plaintiff in order to satisfy the primary mental element). It may also be different than the primary mental element required for unlawful means conspiracy (which requires a constructive intention flowing from the defendant's clear expectation that its unlawful conduct will result in injury to the plaintiff, as opposed only to the defendant's awareness that an injury is likely to result).

564 See: *Northern Territory of Australia v. Mengel* (1995), 185 C.L.R. 307, ¶339–341 (H.C.A.); and *Three Rivers District Council v. Governor and Co. of the Bank of England (No. 3)*, [2003] 2 A.C. 1 at 190 (H.L.).

565 See *Kotch v. Casino St.Albert Inc.*, 2005 ABQB 649, ¶135. See also *Allen*, *supra* note 7, at 142, per Lord Herschell, suggesting that a misrepresentation would only qualify as unlawful means where it was "wilful and intentional". "Deliberateness" in the sense employed in this paper does not mean that the plaintiff commits an act which it knows to be unlawful (the subject of the second mental sub-element, discussed below). Instead, it means that the plaintiff knowingly engages in all of the conduct that is neces-

approach taken in *Correia*, where the Court found that unlawful means predicated upon a "negligent" act could not satisfy the primary mental element of the tort.[566] Admittedly, the Court's reasoning in *Correia* appears to ultimately be *based* upon the primary mental element (i.e., the necessity for an intent to injure). Rosenberg and Feldman JJ.A. did not clearly reject the possibility of negligence as unlawful means on the ground of a discrete deliberateness requirement, but rather on the ground that the defendant cannot logically "intend" to injure the plaintiff through a negligent act. However, the *consequence* of the Court's decision is that deliberateness is a necessary sub-element of unlawful means for the purposes of the unlawful interference tort.[567]

It is notable that several cases decided subsequent to *Correia* have also affirmed that unlawful interference cannot be founded upon a merely negligent act (although it is often unclear whether this assertion is based upon the primary mental element of the tort, or upon the existence of a discrete sub-element of deliberateness in connection with the unlawful means element).[568] Thus, under Canadian

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sary to make an act unlawful (whether the plaintiff is aware of the unlawfulness or not). Thus, a defendant who commits a negligent act cannot satisfy the deliberateness sub-element, even though the negligent act may itself take the form of "deliberate" conduct (e.g., the making of a representation). This is because the negligent defendant cannot, by definition, know that the representation falls below the standard of care (and hence cannot know that they have engaged in a critical aspect of the conduct that is necessary to make the representation unlawful). If this is not the case, the defendant's conduct will no longer be negligent, but intentional (although *cf. Fiorillo v. Krispy Kreme Doughnuts, Inc.* (2009), 98 O.R. (3d) 103, ¶111 (S.C.J.); and Anthony M. Dugdale *et al*, eds., *Clerk & Lindsell on Torts*, 19th ed. (London: Sweet & Maxwell, 2006) at 382). Similarly, an act whose unlawfulness is predicated entirely upon absolute or strict liability should not meet the deliberateness requirement.

566 *Correia*, *supra* note 19, at ¶98 and 106. The Court noted at ¶106, that "[n]either Kohler nor Aston *intended to cause harm* to the appellant by conducting a *negligent* investigation. *Their conduct was not intentional — at most it was negligent.* To the extent that they were *reckless* as to the *consequences* of their *negligent conduct*, recklessness does not amount to an to cause harm sufficient to make out the tort". [emphasis added] See also *Lineal Group Inc. (c.o.b. Samsonite Furniture) v. Atlantis Canadian Distributors Inc.* (1998), 42 O.R. (3d) 157, ¶7 (C.A.); leave to appeal to S.C.C. refused [1998] S.C.C.A. No. 608; and *Clean-Mark Canada Inc. v. Home Depot of Canada Inc.* (2005), 7 B.L.R. (4th) 159, ¶50 (Ont. S.C.J.); aff'd [2005] O.J. No. 5450 (C.A.).

567 See, in this respect, the statement at ¶98 of *Correia* that in *OBG*, Lord Nicholls decided that "*[w]here the impugned conduct is merely negligent, then it must be actionable using negligence principles*, and if it is not, it cannot be made actionable by recharacterizing it as wrongful commercial interference." [emphasis added] Interestingly, Lord Nicholls only expressly held that the primary mental element for unlawful interference cannot be satisfied through the negligent infliction of harm (see ¶141 of *OBG*, *supra* note 15). Thus, the Court in *Correia* appeared to view the unsuitability of negligence as a form of unlawful means as a proposition that followed from Lord Nicholls' rejection of negligence in the context of the primary mental element.

568 See, *e.g. Westcoast Landfill Diversion Corp. v. Cowichan Valley (Regional District)* (2009), 55 M.P.L.R. (4th) 208, ¶373 (B.C.S.C.); *Soost v. Merrill Lynch Canada Inc.* (2009), 13 Alta. L.R. (5th) 286, ¶146 (Q.B.); aff'd 2010 ABCA 251, ¶43; *Cherubini*

law, it seems that the unlawful means necessary to ground the tort of interference with economic interests must be more than simple negligence (and certainly must involve more than the type of conduct that can only give rise to absolute or strict liability). The defendant's unlawful conduct must be committed deliberately.[569]

The situation is less clear in the case of conspiracy. In *Hunt*, the Supreme Court of Canada declined to strike out a claim for unlawful means conspiracy, despite the fact that one of the unlawful means alleged was negligence.[570] This may suggest that, at least at the pleadings stage, deliberateness does not function as a mental sub-element of unlawful means in the context of conspiracy.

On the other hand, it is worth emphasizing that the Court in *Hunt* did not directly consider whether the negligence allegations were capable of satisfying the unlawful means element of the tort. Further, there is support for the proposition that unlawful means conspiracy requires "intentional unlawful conduct", and that the tort "cannot be committed accidentally or negligently.[571]

There are also at least two principled reasons why negligent, non-deliberate conduct should be precluded from satisfying the unlawful means element of conspiracy. First, while the tort of unlawful means conspiracy does not require that the defendants possess the actual (as opposed to the constructive) intent to injure the plaintiff, it does require that the defendants *agree* to pursue a common design (which results in damage to the plaintiff) by doing acts which constitute *unlawful*

Metal Works Ltd. v. Nova Scotia (A.G.) (2009), 285 N.S.R. (2d) 255, ¶316 (S.C.); and *Banville & Jones Wine Co. Inc. v. Manitoba (Liquor Control Commission)* (2010), 250 Man. R. (2d) 1, ¶107 (Q.B.). See, however, *Paulin v. P.C.M. Collections Ltd. (c.o.b. Professional Collection Management)*, [2007] O.J. No. 4619, ¶36 (S.C.J.) (suggesting that negligently injuring the plaintiff can ground liability for the unlawful interference tort).

569 As a consequence of this principle, it is possible that certain forms of conduct, which may be independently unlawful regardless of whether they are engaged in intentionally, negligently or even non-negligently (e.g., breach of contract or certain forms of statutory breach), will not always be capable of satisfying the unlawful means element, but only be capable of doing so where they are engaged in intentionally. In this respect, see the interesting comment in *Drouillard v. Cogeco Cable Inc.* (2007), 86 O.R. (3d) 431, ¶19 (C.A.), where the Court stated that "[a]lthough 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." [emphasis added]

570 *Hunt*, *supra* note 170, at 964-965 and 992.

571 See: *Accord Business Credit Inc. v. Bank of Nova Scotia*, [1997] O.J. No. 2562, ¶35 (Gen. Div.); and G.H.L. Fridman, *The Law of Torts in Canada*, 2nd ed. (Toronto: Carswell, 2002) at 767. See also the interesting observation in *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97, ¶27 (C.A.), noting that in *Hunt*, "[t]he unlawful means to carry out the conspiracy alleged were different from the facts said to constitute negligence". While the authority on this point is surprisingly sparse, at least one ruling has explicitly noted that, as conspiracy is an intentional tort, "[i]t defies logic to suggest that people can agree to be negligent": see *Xtra Lease Inc. v. Wheels International Freight Systems Inc.*, [1998] O.J. No. 4213, ¶32 (Master).

means.[572] It is logically incoherent to assert that the defendants can possess a common "intention" to commit a "negligent" act (any such act then being, by definition, a form of intentional rather than negligent conduct).[573] Accordingly, it is logically incoherent to assert that negligence can serve as the unlawful means for the tort of unlawful means conspiracy.

Second, it is submitted that allowing negligence to serve as the unlawful means element of conspiracy (or unlawful interference) would be inconsistent with the restriction on recovery for relational (and other forms of pure) economic loss in negligence.[574] Relational economic loss, which is loss resulting from the plaintiff's contractual or other economic relationship with a third party,[575] is given a unique treatment in the law of negligence. Recovery for such loss is presumptively ex-

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572 Peter T. Burns and Joost Blom, *Economic Interests in Canadian Tort Law* (Markham, Ont.: LexisNexis Canada Inc., 2009) at 162. See also: *Jacobson Brothers v. Anderson* (1962), 35 D.L.R. (2d) 746 at 753 (N.S.C.A.), per Ilsley C.J.; *Maguire v. Calgary (City)* (1983), 146 D.L.R. (3d) 350 at 358 (Alta. C.A.); *Golden Capital Securities Ltd. v. Holmes*, [2005] 1 W.W.R. 631, ¶47 and 58 (B.C.C.A.); and *Ascent Financial Services Ltd. v. Blythman*, [2008] 5 W.W.R. 638, ¶31–33 (Sask. C.A.). As indicated at footnote 232 above, there are some cases which indicate that the defendant need not actually commit the unlawful act where the act is instigated by the co-conspirator, so long as the defendant knew or should have known that such acts were a probable consequence of carrying out the common objective. However, the mere fact that the defendant need not be subjectively aware of the precise *nature* of the unlawful acts committed by the co-conspirator does not obviate the requirement that the defendant must still *agree* (and hence *intend*) that the common design be carried out by way of unlawful acts (whatever they are). For a contrary view, see Hazel Carty, *An Analysis of the Economic Torts* (Oxford: Oxford University Press, 2001) at 18.

573 See, in this respect, *R. v. Déry*, [2006] 2 S.C.R. 669 ¶35 (in the context of criminal conspiracy), stating that "in Canada that there must be actual agreement for a conspiracy to be formed. *And actual agreement requires genuine intention.*" [emphasis added]

574 As noted by Lambert J.A. (dissenting) in *No. 1 Collision Repair & Painting (1982) Ltd. v. Insurance Corp. of British Columbia* (2000), 80 B.C.L.R. (3d) 62, ¶18 (C.A.), "a general of liability for economic torts . . . must be reconcilable with the theory underlying the negligent infliction of economic loss". See also ¶112. The connection between these concepts is illustrated by the fact that the treatment of relational economic loss in negligence is sometimes referred to as "negligent interference with contractual relations": see *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021 at 1048, 1055, 1074 and 1078, per La Forest J. (dissenting on other grounds). Interestingly, similar to unlawful interference, Canadian courts have largely rejected the actionability of "negligently" inducing breach of contract (albeit in the sense that the defendant lacked the requisite intent, not in the sense that the defendant indirectly induced a breach of contract through the unlawful means of negligence): see *Yellow Submarine Dell Inc. v. AGF Hospitality Associates Inc.*, [1998] 2 W.W.R. 701 at 704 (Man. C.A.); *Kanematsu GmbH v. Acadia Shipbrokers Ltd.* (2000), 259 N.R. 201, ¶19 (F.C.A.); and *SAR Petroleum*, *supra* note 449, ¶5, 51,73 and 78 (but *cf. Nicholls v. Richmond (Township)* (1983), 145 D.L.R. (3d) 362 at 366–368 (B.C.C.A.)). See also *OBG*, *supra* note 15, ¶41 and 191.

575 *Design Services Ltd. v. Canada*, [2008] 1 S.C.R. 737, ¶33.

cluded,[576] and is generally permitted only where the defendant negligently causes personal injury or property damage to the third party (barring the recognition of a new category of recovery based upon the *Anns* test).[577] The rule exists because "physical damage tends 'to ensure a reassuringly proximate nexus between tortious act and recoverable damage'".[578] Thus, recovery for relational economic loss in negligence is not permitted where the loss results from the defendant's breach of contract with a third party.[579]

To hold that non-deliberate conduct may satisfy the unlawful means element of conspiracy (or unlawful interference) would wreak havoc with the established limits on relational economic loss. It would enable plaintiffs to recover for the loss resulting from their economic relationship with a third party, as a result of the defendant's negligence, even though the defendant has not caused any personal or property damage to the third party. It would also enable such recovery in the context of a tort that has not internalized the numerous policy restrictions associated with the development of the law of negligence. Given the jurisprudential complexities associated with the recovery of pure economic loss in negligence, it would seem highly desirable for courts to refrain from extending such loss into new areas on the strength of another tort (particularly one as "anomalous" as conspiracy).[580]

(c) The second sub-element: a lack of honest belief in legality

Traditionally, the Anglo-Canadian courts rejected the view that the defendant must be aware of the unlawfulness of its conduct in order to be made liable under the tort of conspiracy.[581] A similar rule was often applied to inducing breach of

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576 *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860, ¶42–44.

577 *Design Services Ltd. v. Canada*, [2008] 1 S.C.R. 737, ¶33–40. See also *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, ¶42–70 and 112-113.

578 *Design Services Ltd. v. Canada*, [2008] 1 S.C.R. 737, ¶35.

579 *Ibid.* ¶39-40. In this case, a subcontractor's claim against the government, for awarding a contract to a non-compliant bidder in breach of its "Contract A" with the contractor, was rejected on this basis. See also *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210 ¶51, per McLachlin J. (dissenting in part on other grounds).

580 This position finds support in the secondary literature. See, e.g., Lewis N. Klar, *Tort Law*, 4th ed. (Toronto: Carswell, 2008) at 683. Note also the observation by Anthony M. Dugdale *et al*, eds., *Clerk & Lindsell on Torts*, 19th ed. (London: Sweet & Maxwell, 2006) at 382, that "there are interests which do not merit protection by negligence and are protected only by intentional torts. Thus, whilst there is liability for intentional interference with a person's trading relationships under the so-called economic torts, there is no liability for negligent interference with such interests. *Negligence liability would impose too great a restriction on free competition.*" [emphasis added]

581 See: *Southam Co. v. Gouthro*, [1948] 3 D.L.R. 178 at 188 (B.C.S.C.); *Jacobson Brothers v. Anderson* (1962), 35 D.L.R. (2d) 746 at 751 (N.S.C.A.), per Ilsley C.J.; *Belmont Finance Corp. v. Williams Furniture Ltd. (No. 2)*, [1980] 1 All E.R. 393 (C.A.), per Buckley L.J.; and *Pizza Pizza Ltd. v. 528635 Ontario Inc.* (1987), 23 C.P.R. (3d) 307 at 310 (Ont. H.C.J.). See also *Churchill v. Walton*, [1967] 2 A.C. 224 at

contract[582] and intimidation[583] (and, presumably by extension, unlawful interference). This position was linked to the more basic principle that "ignorance of the law is no excuse".[584]

However, a series of developments suggests that the defendant's knowledge of the unlawfulness of the conduct in question (or, at least, a lack of an honest belief in its lawfulness) is gaining an increasing level of acceptance as a mental sub-element of the unlawful means torts.[585]

First, the Supreme Court of Canada abandoned the distinction between mistake of fact and mistake of law in the context of unjust enrichment.[586] The Court did not, of course, address whether this distinction should also be abandoned in the context of the economic torts. Nevertheless, insofar as a mistake of law can (similar

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235–237 (H.L.) (holding that ignorance of the unlawfulness of the agreement is not a defence to the crime of conspiracy).

582 See: *Greg v. Insole*, [1978] 1 W.L.R. 302 at 332 (Ch. D.); and *Unilux Manufacturing Co. v. Prime Boilers Inc.* (1990), 74 O.R. (2d) 270 at 286-287 (H.C.J.).

583 *Spira v. Commonwealth Bank of Australia*, [2003] N.S.W.C.A. 180, ¶73.

584 See generally *Lévis (City) v. Tétreault*, [2006] 1 S.C.R. 420, ¶21-22. The rule was distinguished from the principle that ignorance of *facts* may serve as a defence, where such misapprehended facts make unlawful that which the defendant believed was lawful: see *Belmont Finance Corp. v. Williams Furniture Ltd. (No. 2)*, [1980] 1 All E.R. 393 (C.A.), per Buckley L.J.

585 To a certain extent, this mental sub-element shares characteristics with the defence of justification, at least insofar as the mental state of the defendant is relevant to the latter doctrine. Indeed, it has been acknowledged that the defence of justification and the mental elements of the economic torts overlap: *SAR Petroleum*, *supra* note 449, ¶73. However, the defence of justification is not limited to the question of whether the defendant *believes* it is entitled to engage in the impugned conduct; it is also (and is primarily) concerned with whether the defendant is *actually* entitled to engage in the impugned conduct. For this reason, it is submitted that the defendant's awareness of the unlawfulness of its conduct is properly treated as a discrete mental sub-element of the unlawful means requirement, not as an aspect of justification. For an inducing breach of contract case in which this distinction was respected, see *369413 Alberta Ltd. v. Pocklington* (2000), 194 D.L.R. (4th) 109, ¶43, 51 and 57–69 (Alta. C.A.). The proposition that awareness of unlawfulness should be treated as a sub-element, rather than a defence, to the unlawful means torts, is also consistent with the rationale for the unlawful means torts proposed later in this paper (i.e., as a form of liability for "cheating"), and with the treatment of the same requirement in *Odhavji* in relation to the tort of abuse of public office. See, however, *HM Revenue & Customs v. Begum*, [2010] EWHC 1799, ¶46–51 (Ch. D.), where the Court preferred the view that the defendant's lack of knowledge of the unlawfulness of its conduct was a defence rather than an element of unlawful means conspiracy. Ultimately, it may not matter whether the defendant's awareness of its unlawfulness is treated as a defence to the unlawful means torts, or a sub-element of the unlawful means element (save in relation to matters such as onus), so long as it is taken into account by the courts.

586 *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, [2007] 1 S.C.R. 3, ¶39. See also *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161 at 1199, per La Forest J. ("the distinction between a mistake of fact and mistake of law can best be described as a fluttering, shadowy will-o'-the-wisp").

to a mistake of fact) now render an enrichment at the plaintiff's expense "unjust",[587] it is logical to conclude that such a mistake can serve to render the imposition of liability upon a defendant equally unjust.[588]

Second, in *OBG*, the House of Lords held that a defendant's honest but mistaken belief that its conduct is lawful (i.e., that such conduct will not violate the plaintiff's contractual rights) precludes liability for inducing breach of contract.[589] This position has been accepted by Canadian appellate courts.[590] The Law Lords' reasoning was not directed specifically towards the torts of conspiracy or unlawful interference. However, the justification for this principle (i.e., that "[a]n honest belief by the defendant that the outcome sought by him will not involve a breach of contract is inconsistent with him intending to induce a breach of contract"[591]) appears equally applicable to the latter torts (insofar as an honest belief in the *legality* of one's conduct is inconsistent with an actual or constructive intention to injure the plaintiff through *unlawful* means).

Third, in *Meretz Investments NV v. ACP Ltd.*,[592] the English Court of Appeal (in a judgment released after *OBG*) appeared to hold that mistake of law served as a defence not only to an action for inducing breach of contract, but also to an action for unlawful means conspiracy. This ruling finds support in the Canadian jurisprudence. Admittedly, some recent cases have continued to hold that the defendant's ignorance of the unlawfulness of its conduct will not shield it from liability under

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587 *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161 at 1201, per La Forest J.

588 A similar development in England was emphasized by the Court of Appeal in the *Mainstream* Appeal, *supra* note 315, ¶84-85, as a reason for accepting mistake of law as a defence to inducing breach of contract. See also *Meretz Investments NV v. ACP Ltd.*, [2008] Ch. 244, ¶118 (C.A.).

589 *OBG*, *supra* note 15, ¶69 and 202.

590 See: *Brae Centre Ltd. v. 1044807 Alberta Ltd.* (2008), 302 D.L.R. (4th) 252, ¶27–32 (Alta. C.A.); and *SAR Petroleum*, *supra* note 449, ¶6, 47, 61–65 and 74–78.

591 *OBG*, *supra* note 15, ¶202, per Lord Nicholls.

592 [2008] Ch. 244, ¶90, 118, 122–127, 146, 174 and 180 (C.A.) [*Meretz*]. This was clearly the opinion of Toulson L.J. While it is less clear whether Arden L.J. accepted this proposition (or whether her analysis of mistake of law was restricted to inducing breach of contract), it does seem supported by her comments ¶146. The remaining justice, Pill L.J., did not clearly address this issue (see ¶182). In the wake of *Meretz*, the English courts have concluded that there is a requirement in the tort of unlawful means conspiracy that the defendant know (or be wilfully blind as to the fact that) the claimant's loss will be caused by the use of unlawful means: see *Bank of Tokyo-Mitsubishi UFJ, Ltd. v Baskan Gida Sanayi VE Pazarlama A.S.*, [2009] EWHC 1276, ¶836–848 (Ch. D.); *Digicel (St Lucia) Ltd. v Cable & Wireless Plc*, [2010] EWHC 774 (Ch. D.), Annex I, ¶86–119; and *Pirtek (UK) Ltd. v. Joinplace Ltd. (t/a Pirtek Darlington)*, [2010] EWHC 1641, ¶82 (Ch. D.) (although see Michael A. Jones *et al*, eds., *Clerk & Lindsell on Torts*, 4th Supp. to the 19th ed. (London: Sweet & Maxwell, 2009) at 315, suggesting that in *Meretz* itself the principle was only clearly adopted by Toulson L.J.). For a decision which suggested that this "requirement" (which was categorized as a defence rather than an element of unlawful means conspiracy) could not apply where the unlawful means took the form of criminal activity, see *HM Revenue & Customs v. Begum*, [2010] EWHC 1799, ¶46–51 (Ch. D.).

the tort of unlawful means conspiracy.[593] However, those cases are based upon earlier English authority that predated the abandonment of the distinction between mistake of fact and law in restitution, and that appears to have been overruled in *Meretz*. Moreover, several other Canadian cases have found that the defendant must possess an intention to act unlawfully in order to be liable for unlawful means conspiracy[594] (such that, even where the co-conspirator intentionally commits an unlawful act, the defendant will not be liable if it possessed an honest belief in the legality of the co-conspirator's actions).[595]

The preceding jurisprudence does not address the question of whether a lack of honest belief in the lawfulness of one's actions is also a mental sub-element of the unlawful interference tort. Nevertheless, it is submitted that support for this conclusion may also be found at the highest levels.[596] In *Central Canada Potash*, the respondent government warned the appellant potash producer that its mineral lease would be cancelled, for non-compliance with provincial regulations, unless it reduced its amount of production. The regulations were subsequently held to be *ultra vires*. However, at the time when the warning was issued, the regulations had not been challenged, and the government had reasonable grounds for believing that the warning was valid. The Supreme Court of Canada, in rejecting the appellant's

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593 See: *Golden Capital Securities Ltd. v. Holmes* (2002), 9 B.C.L.R. (4th) 83, ¶239 (S.C.); rev'd [2005] 1 W.W.R. 631 (B.C.C.A.); and *Tracy (Representative ad litem of) v. Instaloans Financial Solution Centres (B.C.) Ltd.* (2008), 293 D.L.R. (4th) 60, ¶78 and 84 (B.C.S.C.); aff'd (2009), 309 D.L.R. (4th) 236, ¶21 (B.C.C.A.); leave to appeal to S.C.C. refused [2009] S.C.C.A. No. 194.

594 See: *Duca Community Credit Union Ltd. v. Giovannoli*, [2000] O.J. No. 1199, ¶64 (S.C.J.); aff'd [2003] O.J. No. 1914 (C.A.); and *Brains II Inc. v. Craig*, 2004 ABQB 376, ¶24-25 and 34. See also Peter T. Burns and Joost Blom, *Economic Interests in Canadian Tort Law* (Markham, Ont.: LexisNexis Canada Inc., 2009) at 162, stating that "the alleged conspirators must be aware that what they are agreeing to is unlawful".

595 See: *Duca Community Credit Union Ltd. v. Giovannoli*, [2000] O.J. No. 1199, ¶64 (S.C.J.); aff'd [2003] O.J. No. 1914 (C.A.); and *Lombardo v. Caiazzo* (2003), 30 C.L.R. (3d) 128, ¶59, 62, 74–76, 85–87 and 125-126 (Ont. S.C.J.); aff'd (2006), 211 O.A.C. 270 (C.A.). See also *Keeton v. Bank of Nova Scotia* (2009), 254 O.A.C. 251, ¶¶80 (C.A.), discussed above at footnote 512.

596 See, in addition to *Central Canada Potash*, *supra* note 161, the ruling in *Concord Trust v. The Law Debenture Trust Corp. Plc.*, [2005] 1 W.L.R. 1591 (H.L.). There, an issue arose as to whether the provision by an indenture trustee of an invalid notice of acceleration to the bond issuer could qualify as "unlawful means", for the torts of both conspiracy *and* unlawful interference with economic interests, even if the trustee possessed a *bona fide* belief in the notice's validity. Lord Scott of Foscote, writing for a unanimous House of Lords, dismissed this suggestion as "fanciful". He analogized this to the situation where a landlord provides a tenant with an invalid forfeiture notice, in the *bona fide* belief that the tenant had breached the lease. In such a case, while the tenant could successfully challenge the forfeiture case, there was no ground for believing "that the *bona fide* giving of the invalid notice could, without more, found a cause of action against the landlord for one of the economic torts". (¶39) Accordingly, "[t]he giving by the trustee of a notice of acceleration believed by the trustee to be valid could not . . . constitute unlawful means". (¶40)

intimidation claim against the respondent,[597] emphasized the government's mental state in regard to the legality of its actions. Martland J. held that:

> In the present case, the threat by the Deputy Minister was the possible exercise by the Minister of *powers which he had reasonable grounds for believing the Minister possessed.* In the *Rookes* case the threat was to pursue a course of action *which the defendants knew would be a breach* of the collective agreement between the union and B.O.A.C. . . . What, then, is the position if, subsequently, it is found that the Regulations were *ultra vires*? Does that finding then mean that there has been intimidation? In my opinion it does not. *The conduct of the Deputy Minister in relation to the tort of intimidation must be considered in relation to the circumstances existing at the time the alleged threat was made* . . . At the time the threat was made, the legislation stood unchallenged . . . *[T]he Minister was properly entitled to seek to enforce the Regulations unless and until they were found to be ultra vires.* This being his duty, it cannot constitute intimidation to seek to enforce them. In my opinion it would be unfortunate, in a federal state such as Canada, if it were to be held that a government official, charged with the enforcement of legislation, could be held to be guilty of intimidation because of his enforcement of the statute whenever a statute whose provisions he is under a duty to enforce is subsequently held to be *ultra vires.*[598]

The principle in *Central Canada Potash* has been applied to the unlawful means element of other economic torts.[599] While it is arguable that *Central Canada Potash* only establishes a form of qualified immunity for public authorities acting in good faith,[600] the Court's reasoning appears to reflect a broader rationale, which rests upon the defendant's reasonable belief in the legality of its actions. Accordingly, it lends credence to the view that the unlawful interference tort is not actionable where the defendant is acting under a mistake of law.

Given the preceding jurisprudence, it seems that Anglo-Canadian law is moving toward the recognition of a second mental sub-element for the unlawful means torts, one that is founded upon the defendant's awareness of the unlawfulness of its conduct.[601] As with the tort of abuse of public office, it appears that this sub-element will be satisfied where the defendant either *knows* that its conduct is unlawful,

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597 Although *Central Canada Potash* involved an action for intimidation rather than unlawful interference, there is no reason to believe that the Court's reasoning is inapplicable to the latter tort. Indeed, intimidation has often been viewed as a mere species of unlawful interference (a position recently reasserted by Lord Hoffmann in *OBG*, *supra* note 15, ¶7 and 25), and is associated with the earliest manifestations of the latter tort (as evidenced by cases such as *Garrett* and *Tarleton*).

598 *Central Canada Potash*, *supra* note 161, at 86, 88 and 90, emphasis added.

599 See *Gallant v. Fenety* (2000), 226 N.B.R. (2d) 1, ¶14 (Q.B.), where it was applied to conspiracy.

600 See: *Guimond v. Quebec (A.G.)*, [1996] 3 S.C.R. 347, ¶13-14; and *Maclin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, ¶78.

601 In light of this mental sub-element, and similar to the first mental sub-element, there may be certain forms of conduct that the defendant participates in, which, while capable of being independently unlawful where it fails to satisfy the second mental sub-element, are not then capable of grounding the unlawful means torts. A significant example is criminal conduct, which is not excused by a person's ignorance of the law: see

or where it is reckless (or, presumably, wilfully blind) as to this fact.[602] Like the primary mental element for the tort of deceit (which is subject to a similar taxonomy), this mental sub-element may be summarized by the proposition that the defendant must lack an *honest belief* in the legality of its conduct.[603]

Moreover, as with the first mental sub-element (i.e., deliberateness), this second mental sub-element is also distinct from the primary mental element for unlawful interference and unlawful means conspiracy. The case law supports the view that a party who is aware of or reckless as to the unlawfulness of its actions (and who thereby satisfies the second mental sub-element), may still fail to possess the requisite intent to injure the plaintiff (and thereby fail to satisfy the primary mental element).[604] Accordingly, it is appropriate to treat the requirement as an independent sub-element of the unlawful means element, rather than as an aspect of the primary mental element.

VII. CONCLUSION — A COHERENT APPROACH TO UNLAWFUL MEANS IN CANADA

1. Introduction

It is clear that the past three years have witnessed a period of significant upheaval in the economic torts. In England, the House of Lords effectively revolutionized this area of the law.[605] It rejected the existence of a "genus" tort of unlawful interference, and drew a firm distinction between the "secondary liability" tort of inducing breach of contract, and the "primary liability" tort of unlawful interference with economic interests. In addition, it adopted entirely different approaches to the unlawful means element in the torts of "three-party" unlawful interference and "two-party" (but possibly not "three-party") unlawful means conspiracy.

In Canada, there are some indications that the courts are on the verge of their own revolution. The rejection of the "genus" tort, and the distinction between inducing breach of contract and unlawful interference, have now been accepted by appellate courts in two different provinces.[606] Further, the Ontario Court of Appeal

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s. 19 of the *Criminal Code*, R.S.C. 1985, c. C-46. For a contrary view, see *HM Revenue & Customs v. Begum*, [2010] EWHC 1799, ¶46–51 (Ch. D.).

602 See *Cheticamp Fisheries Co-op Ltd. v. Canada* (1995), 123 D.L.R. (4th) 121 at 127, 131-132, 136 and 140-141 (N.S.C.A.); leave to appeal to S.C.C. refused [1995] S.C.C.A. No. 202.

603 See *Derry v. Peek* (1888), 14 App. Cas. 337 at 374–376 (H.L.).

604 *Cheticamp Fisheries Co-op Ltd. v. Canada* (1995), 123 D.L.R. (4th) 121 at 131-132 (N.S.C.A.); leave to appeal to S.C.C. refused [1995] S.C.C.A. No. 202.

605 Some commentators (writing prior to *Total Network*) have even suggested that *OBG* "will serve as the *Donoghue v. Stevenson* of intentional torts": Ken Cooper-Stevenson, "Justice in Saskatchewan Robes: The Bayda Tort Legacy" (2007) 70 Sask. L. Rev. 269 at 308.

606 See: *Correia*, *supra* note 19; *SAR Petroleum*, *supra* note 449; and *Alleslev-Krofchak*, *supra* note 21.

has issued three rulings which suggest at least partial agreement with the House of Lords' new approach to unlawful means in the context of three-party unlawful interference.[607]

In general, however, the influence of this new learning has been fitful and sporadic, more along the lines of a guerrilla campaign than a full-scale "British invasion". The vast majority of Canadian courts have simply ignored *OBG* (to say nothing of *Total Network*), and have failed to broadly acknowledge the partial adoption of the former ruling in *Correia* and *O'Dwyer*. Further, many of these courts continue to apply the *Reach* variant of the broad view of unlawful means, and have even extended it beyond the tort of unlawful interference into the tort of unlawful means conspiracy. Although the decision in *Alleslev-Krofchak* should make it more difficult to ignore the revolution effected by the 2007-2008 Jurisprudence (at least within Ontario), it remains to be seen how courts will respond to this new development. Further confusion has, of course, been ensured by the Ontario Court of Appeal with its ruling in *Barber*.

The continued reliance of the Canadian courts upon *Reach* is troubling. That case articulated a test for unlawful means which requires only the absence of a "legal justification" for the defendant's conduct. This is virtually the same test rejected a century earlier in *Allen*, and accepted in the United States under the rubric of the *prima facie* tort doctrine. It has been antithetical to our judicial worldview for over a hundred years. Applying this test in the context of unlawful interference threatens to do away with that tort entirely.[608] Extending it to conspiracy threatens to collapse the boundaries between the tort's lawful and unlawful means branches.[609]

Conversely, it is equally troubling that the Ontario Court of Appeal, in

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607 See: *O'Dwyer*, *supra* note 18; *Correia*, *supra* note 19; and *Alleslev-Krofchak*, *supra* note 21.

608 Given the rejection a century ago of the *prima facie* tort as part of Anglo-Canadian jurisprudence, the risk presented by the *Reach* approach to unlawful means is the inevitable devolution of interference with economic interests until it becomes indistinguishable from the discredited *prima facie* tort. Such a process must place at grave risk the continuing viability of the former cause of action.

609 The defining element of the lawful means branch of conspiracy is, of course, the requirement that the defendants' predominant purpose be to cause injury to the plaintiff (with or without the use of unlawful means to achieve this end). In contrast, the defining attribute of the unlawful means branch of the tort is the defendants' use of unlawful means (coupled with a constructive intention to thereby cause the plaintiff harm). The main difference between these two branches is that the unlawful means variant lacks the defence of "predominant legitimate motive", in contrast to the lawful means variant: *Canada Cement LaFarge*, *supra* note 167, at 469. The risk of extending to conspiracy the open-ended *Reach* approach to unlawful means conspiracy is that some conduct may be defined as lawful or unlawful (i.e., as possessing or lacking a "legal justification") based on whether the defendant has acted with or without a predominant legitimate motive. This could lead to an eventual degradation of the two forms of the tort. In addition, it would appear to be inconsistent with the Supreme Court of Canada's rejection of the "predominant legitimate motive" defence in the context of unlawful means conspiracy.

O'Dwyer, Correia and *Alleslev-Krofchak* proved itself so willing to adopt (however opaquely and incompletely) the constrained approach to unlawful means espoused by the majority in *OBG*, without first subjecting the Law Lords' approach to a critical analysis (as the Supreme Court of Canada did to *Lonrho 1* in *Canada Cement LaFarge*). While Lord Hoffmann is among the greatest common law jurists in the world today, there are several aspects of his judgement in *OBG* that are open to question (as discussed below). This is not only because these aspects seem inconsistent with prior English case law, but also (and more importantly) because they are inconsistent with the decisions of the Supreme Court of Canada in *Therien* and *Gagnon*. Reference to these two decisions is noticeably absent from the reasoning found in most modern Canadian cases addressing the unlawful means torts. It nevertheless goes without saying that, until the Supreme Court delivers judgment in another economic tort case, *Therien* and *Gagnon* remain the controlling authorities on the scope of the unlawful means element in Canada.

Finally, what is perhaps most troubling is the level of uncertainty that now prevails in relation to the unlawful means element of the intentional economic torts. This lack of clarity is not limited to the question of whether Canadian courts have actually adopted the new approach to unlawfulness found in *OBG* in preference to the approach popularized by *Reach* (although it is certainly amplified as a result). More fundamentally, this uncertainty extends to *OBG* and *Total Network* themselves, which confuse the law in several ways:

> (1) They introduce a further layer of complication into the unlawful means element, holding that the scope of unlawful means fundamentally differs depending upon whether the tort in question is two-party or three party.[610]
>
> (2) They fail to articulate how this distinction between two and three-party situations operates (with *OBG* noting cryptically that two-party intimidation may raise different concerns than three-party unlawful interference, and *Total Network* discussing only two-party but not three-party conspiracy).
>
> (3) They do not address whether the unlawful means element should be given the same scope throughout two-party unlawful interference, intimidation and conspiracy (on the one hand), and three-party unlawful interference, intimidation and conspiracy (on the other).
>
> (4) They do not make clear whether unlawful interference (as opposed to intimidation) is solely a three-party tort, nor even whether unlawful means conspiracy is solely a two-party tort.

It is no wonder, then, that a recent English commentator observed that "[a]fter *Total*, the one certainty about the future development of the economic torts is that it

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610 Although it had previously been recognized, in cases such as *Central Canada Potash*, that the distinction between two and three-party intimidation could affect the scope of the unlawful means element, it had never been suggested that the nature of the element was fundamentally linked to this distinction.

is uncertain".[611]

In light of the foregoing, it is vital that Canadian courts engage in a critical reappraisal of the intentional economic torts, which considers whether a coherent approach to the unlawful means element lies "beyond *Reach*". In the discussion below, we seek to formulate such an approach, and to articulate a working definition of unlawful means that is consistent with it. We acknowledge that this endeavour may be a Sisyphean one, which is unlikely to provide the final word in this area (as Lord Walker admitted of *OBG* itself). However, it has also been repeatedly observed that the unlawful means element is the principal source of confusion in the economic torts,[612] and that theorists in this area must "dig deeper".[613] What follows is one such attempt.

2. The Rationales for the Unlawful Means Element

Perhaps the most striking aspect of the unlawful interference tort (and of the unlawful means element more generally) is that "there has been no adequate judicial or academic examination of the theory underlying its existence".[614] Indeed, although the tort was at the heart of *Allen*, one of the most significant Commonwealth cases ever decided, it remains "radically under-theorised".[615] This lack of a theoretical foundation is significant. As recognized by Lord Nicholls in *OBG*, the divergent views of unlawful means may ultimately be attributed to a disagreement over the tort's rationale.[616] The same observation logically applies to unlawful

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611 Hazel Carty, "The Economic Torts in the 21st Century" (2008) 124 L.Q.R. 641 at 666. For further recognition of the uncertainty brought about by *OBG* and *Total Network* in relation to the unlawful means element, see: Burton Ong, "Two Tripartite Economic Torts" (2008) 8 J.B.L. 723 at 745–747; and Michael A. Jones *et al*, eds., *Clerk & Lindsell on Torts*, 4th Supp. to the 19th ed. (London: Sweet & Maxwell, 2009) at 303.

612 See, e.g., W.V.H. Rogers, *Winfield & Jolowicz on Tort*, 17th ed. (London: Sweet & Maxwell, 2006) at 826. See also Hazel Carty, *An Analysis of the Economic Torts* (Oxford: Oxford University Press, 2001) at 122 and 128; and Peter T. Burns and Joost Blom, *Economic Interests in Canadian Tort Law* (Markham, Ont.: LexisNexis Canada Inc., 2009) at 177 (noting that the unlawful means element is the principal cause of the uncertainty surrounding the unlawful interference tort, and is the key to providing the tort with order and coherence).

613 M. Arden, "Economic Torts in the Twenty-First Century" (2006) 40 Law Teacher 1 at 20.

614 J.W. Neyers, "Rights-Based Justifications for the Tort of Unlawful Interference with Economic Interests" (2008) 28 Legal Stud. 215 at 218. It has sometimes been questioned whether a principled rationale even exists. See, for instance, *Total Network*, *supra* note 16, ¶56, where Lord Scott suggested that unlawful means conspiracy was simply "the result of a stage by stage development by judges of the action on the case".

615 *Ibid.* at 233. At 217, Neyers observes that "[m]ost treatments of the tort, including the leading specialised monograph on the subject, will acknowledge that it has a special character not shared by other torts and then quickly launch into the doctrinal requirements of the cause of action and its history".

616 *OBG*, *supra* note 15, ¶152–155. See also Hazel Carty, *An Analysis of the Economic Torts* (Oxford: Oxford University Press, 2001) at 122, n188.

means conspiracy.

What, then, is the rationale behind imposing liability for the intentional infliction of economic harm (whether alone or in combination) through *unlawful means* (or the threat thereof)? It is submitted that, in order for such a rationale to be convincing, it should explain at least the following:

> (1) What is it about the *presence* of unlawful means that renders the intentional infliction of economic harm actionable by the injured party?
>
> (2) What is it about the *absence* of unlawful means that renders the intentional infliction of economic harm non-actionable by the injured party (at least in the absence of some other violation of a legal right, or the anomalous exception of lawful means conspiracy)?
>
> (3) Why is unlawful means without an intention to injure an insufficient basis for liability (as established by *Queen v. Saskatchewan Wheat Pool*),[617] such that there must there be a *confluence* of unlawful means, and an actual or constructive intent to economically injure the plaintiff?[618]
>
> (4) Are the answers to these questions the *same* in relation to each of the unlawful means torts, and if not, why?

In evaluating the rationale's answer to these questions, the following additional factors would seem relevant: (a) How consistent is the rationale with economic tort jurisprudence? (b) How consistent is the rationale with the orthodox "corrective" focus of tort law upon requiring defendants to compensate plaintiffs for violations of their rights? (c) Does the rationale respect the boundaries between tort, contract and other forms of liability? (d) How consistent is the rationale with other basic principles of Canadian law? (e) Does the rationale afford an appropriate institutional role to the courts in regulating economic competition? (f) What are the pragmatic consequences of the rationale likely to be? (g) How internally coherent is the rationale?[619]

In a recent article, J.W. Neyers explores the principal rationales that have been offered to justify the tort of unlawful interference.[620] These rationales, and

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617 [1983] 1 S.C.R. 205. This case held that a breach of statute does not itself give rise to a nominate tort. See also *Holland v. Saskatchewan*, [2008] 2 S.C.R. 551, ¶7–9. While the English courts have recognized the tort of breach of statutory duty, they have also appeared to recognize that unlawful means in the absence of an intent to injure is not sufficient to create liability, given the rejection of *Beaudesert* in *Lonrho 1*.

618 See Simon Deakin *et al*, *Markesinis and Deakin's Tort Law*, 6th ed. (Oxford: Clarendon Press, 2008) at 571.

619 See also J.W. Neyers, "Rights-Based Justifications for the Tort of Unlawful Interference with Economic Interests" (2008) 28 Legal Stud. 215 at 218.

620 *Ibid.* Neyers does not explore non- "rights-based" rationales, such as the one offered by Lord Nicholls in *OBG*. Another issue not explored by Neyers is the possibility that the unlawful means torts represent a violation of the plaintiff's "reasonable expectation" that the defendant will not injure it through unlawful means. A similar rationale underscores the tort of abuse of public office: *Odhavji*, *supra* note 558, ¶30. However, it is submitted that a justification based only upon reasonable expectations would be inconsistent with the recognition in *Allen* that tort law does not protect mere contractual

Neyers's response to them, may be summarized as follows:

> (1) The "right to trade" theory: This rationale, based upon the *dictum* of Lord Lindley in *Quinn* (accepted by Lord Hoffmann in *OBG*), is that the defendant interferes with the plaintiff's "liberty to deal" with third persons. The rationale is insufficient because the plaintiff's liberty to deal with a third party does not impose a correlative duty upon the defendant to refrain from interfering with it. Such a duty would be impossible in a capitalist society since it would be tantamount to a duty not to compete.[621]
>
> (2) The "remoteness" theory: This rationale, also based upon the *dictum* of Lord Lindley in *Quinn* (and also accepted by Lord Hoffmann in *OBG*), is that the defendant violates a third party's right, and this wrong is not too remote to "reach" the plaintiff given the defendant's intention to injure the plaintiff as a result of it. The rationale is insufficient because it does not adequately explain why the plaintiff is entitled to sue when the plaintiff's own rights have not been violated, nor why it is necessary that the defendant use unlawful (as opposed to merely "wrongful") means, nor why the intention to injure the plaintiff (as opposed to the mere foreseeability of such injury) is required.[622]
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> (3) The "abuse of right" theory: This rationale, which draws upon the thinking of German philosopher Immanuel Kant (and is reflected in the *prima facie* tort doctrine), is that by intentionally harming the plaintiff, the defendant is abusing its own rights. This rationale is insufficient because it is inconsistent with *Allen*. In addition, it does not adequately explain why unlawful means is necessary for liability, why a mental state less rigorous than that required for lawful means conspiracy can ground liability, nor even why the defendant should be obligated to pay a damages award to the plaintiff.[623]
>
> (4) The "public right" theory: This rationale, based upon case law decided primarily outside the economic tort context, is that the plaintiff is not suing for a violation of his or her own private rights but rather to vindicate public rights created by criminal law. This rationale is insufficient because the case law is not clear on whether criminal law does cre-

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expectancies, even when they are interfered with intentionally, in the absence of unlawful means. In other words, the plaintiff's expectations cannot serve as a free-standing justification for imposing tort liability in this area. To recognize liability based solely on a violation of the plaintiff's expectations would also be inconsistent with several well-established legal principles (including the axiom that non-proprietary estoppel cannot be used as a sword).

621 *Ibid.* at 221-222. Another problem with the "right to trade" theory is that the plaintiff's liberty to deal with a third person is not a *right*, but merely a *privilege*. Accordingly, the violation of that liberty should not give rise to liability in tort, since the law of torts is concerned with the vindication of rights, not privileges.

622 *Ibid.* at 222–225. See also footnote 104, above.

623 *Ibid.* at 225–227.

> ate public rights. Nor does it explain why unlawful means have been held to include conduct other than crimes, nor why an intention to injure the plaintiff is necessary.[624]
>
> (5) The "justified exception" theory: This rationale, also based principally upon case law decided outside the economic tort context, is that the law will permit a claim by the plaintiff where the person who has been wronged (the third party) has suffered no loss, and the person who has suffered the loss (the plaintiff) has not been wronged. This rationale is insufficient because it depends on an idea that may be uncompelling as a free-standing concept, and also because it cannot explain why the plaintiff may recover where the third party against whom the unlawful means are directed and who is thereby wronged itself suffers a loss.[625]

As can be seen from Neyers's survey, the current rights-based rationales for the unlawful interference tort (and, by extension, the unlawful means element of that tort) are lacking in both explanatory and normative force.[626] The rationale with the most judicial support is the combination of the "right to trade" and "remoteness" theories originating in the *dictum* of Lord Lindley in *Quinn*,[627] and accepted in Lord Hoffmann's majority opinion in *OBG* (i.e., that a wrong against a third party will reach the plaintiff where it restricts the third party's liberty to deal with

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624 *Ibid.* at 227–231.

625 *Ibid.* at 231–233.

626 Commentators have often experienced difficulties in seeking to explain the unlawful interference tort on the basis of a rights-oriented theory of tort law. See, e.g., John Murphy, "Rights, Reductionism and Tort law" (2008) 28 O.L.J.S. 393 at 401–403. In a subsequent article, Neyers has taken the view that unlawful interference (similar to lawful means conspiracy) is best rationalized on the basis of the abuse of right or public right theories, and that unlawful means conspiracy is best rationalized on the basis of joint tortfeasor principles: see J.W. Neyers, "The Economic Torts as Corrective Justice" (2009) 17 Torts L.J. 162. However, it is submitted that none of these theories affords a satisfactory explanation of the unlawful torts. As regards the unlawful interference tort, the abuse of right theory does not require that the defendant commit an unlawful act, and is therefore inconsistent with the clear direction of Anglo-Canadian tort law since *Allen*. Similarly, the public right theory cannot explain why unlawful means have been held to include non-criminal acts (e.g., torts and breaches of contract), as affirmed in cases like *Rookes* and *OBG* (and see also *Drouillard*, *supra* note 17 ¶19, where the Court stated that "[a]lthough 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." [emphasis added]) Finally, as regards unlawful means conspiracy, the joint tortfeasor rationale cannot explain why unlawful means have been held to include non-tortious acts (e.g., crimes and breaches of statute), as affirmed in cases like *Gagnon*, *Canada Cement LaFarge* and *Total Network*. While Neyers attempts to justify these theories by arguing that the facts (as opposed to the reasoning) of the foundational cases did not require the courts to arrive at conclusions opposite to the theories themselves (e.g., by holding that a crime that is not also a tort can ground unlawful means conspiracy), there are ultimately too many inconsistencies between the theories and the cases to conclude that these theories drive or can explain this area of the law.

627 See the text accompanying footnote 115 above.

the plaintiff, and, correlatively, the plaintiff's liberty to deal with the third party). The same rationale was cited with approval (but without analysis) by the Court in *O'Dwyer*[628] and *Alleslev-Krofchak.*[629] However, as noted by Neyers, this explanation seems deficient.

In addition to the criticisms made by Neyers, the Lindley/Hoffmann rationale can only explain (if at all) the unlawful means torts in the *three-party* context (despite the fact that the existence of two-party intimidation and conspiracy, at least, are well-established in both Canada and England).[630] It therefore precludes the unlawful interference tort from being invoked in a two-party context, even though there is Canadian jurisprudence in which this has occurred, and even though there may be situations in which justice requires it.[631] Additionally, the principle that the

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628 *O'Dwyer, supra* note 18, ¶58.

629 *Alleslev-Krofchak, supra* note 21, ¶52 and 57.

630 The rationale accepted by Lord Hoffmann in OBG had earlier been put forward by Hazel Carty, *An Analysis of the Economic Torts* (Oxford: Oxford University Press, 2001). She explains it this way:

> *In the three-party scenario, the rationale of the tort would appear to be that where tort law or contract law is prepared to impose liability, that can be extended to the intended victim of such unlawfulness.* If so, then this policy choice limits the scope of the tort by reference to unlawful means, capable of being actionable wrongs at common law. *The tort involves the '. . . magic of transfer of liability', no more, no less.* This is a policy that would lead to greater certainty and ensure that the inner logic of other areas of tort law would not be 'casually cast to one side'. Moreover, private wrongs would not be created out of public wrongs and the courts would have to consider the division of the law of obligations as a whole, rather than tampering with it in an indirect way (by holding breach of equitable obligation or fiduciary duty to be unlawful means). *The tort would simply transfer private liability, rather than readjust the scope of tort law. The adoption of such a policy would indicate that there is no reason to have a two-party version of the tort.* [emphasis added]

631 Consider if the facts of *Gagnon* or *Total Network* had not involved a conspiracy. It is also possible to think of other hypotheticals. For instance, a defendant who is competing with the plaintiff to secure a major contract with a third party may engage in a deliberate and knowingly unlawful breach of a material regulatory requirement, which allows it to offer the same quality product to the third party as the plaintiff, but at a lower price. Assume that the plaintiff can establish that the defendant's unlawful act was the sole cause of the plaintiff's loss of the contract with the third party (such that the causation/damages element of the tort is clearly satisfied). Assume further that the defendant engaged in the unlawful behaviour not because it desired to obtain the contract for itself, but because the contract was uniquely important to the long-term growth strategy of the plaintiff, and the defendant wished to impair the plaintiff's competitiveness by depriving it of the contract (such that the intentionality element of the tort is clearly satisfied). The law would arguably be deficient if it refused the plaintiff a remedy simply because the unlawful means employed by the defendant (the breach of the regulatory requirement) were not directed at nor actionable by the third party (particularly given that those unlawful means would not also be independently actionable by

tort must be restricted to the three-party context can lead to judicial confusion over the requirement that the conduct be "directed" at the plaintiff (for the purposes of the intentionality element of the tort), and that it be "directed" at a third party (for the purposes of the unlawful means element), as evidenced most recently by *Alleslev-Krofchak.*

The rationale also offers no clue as to the justification for the torts of two-party intimidation and two-party unlawful means conspiracy, nor why the justifications as between these causes of action and the unlawful interference tort should be so radically different when all involve the presence of unlawful means (or the threat thereof) coupled with an (actual or constructive) intent to injure. The pragmatic consequences of this are serious, for they require drawing a distinction between the types of conduct that may qualify as unlawful means for the purposes of unlawful interference, and those which may qualify as such for unlawful means conspiracy. This distinction will only "give rise to a degree of obscurity in the law which serves no useful purpose",[632] and create further anomalies in the economic torts.[633] Indeed, additional distinctions may be required between the types of conduct that qualify as unlawful means for the purposes of two-party versus three-party intimidation, or two-party versus three-party conspiracy.

The Lindley/Hoffmann rationale is also not found in either *Mogul* or *Allen* (where the unlawful means element was first articulated as such), nor clearly supported by the other judges in *Quinn* (where Lord Lindley also appeared to advocate the adoption of the *prima facie* tort).[634] Nor its it wholly consistent with the jurisprudence after the 1892–1901 Trilogy. Indeed, in *Ware & De Freville Ltd. v. Motor*

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the plaintiff itself), since they still have the effect of unlawfully interfering in the plaintiff's relationship with that third party. In the final analysis, the mere fact that the situations involved in the 1892–1901 Trilogy and other leading unlawful interference cases have involved three-party fact-patterns should not be itself a sufficient basis for concluding that the tort is impermissible in two-party claims: *Golden Capital Securities Ltd. v. Holmes*, [2005] 1 W.W.R. 631, ¶44 (B.C.C.A.). Instead, it only justifies the conclusion that most two-party cases involved conduct that was independently actionable by the plaintiff, such that the invocation of the unlawful means torts was unnecessary. To limit the torts to the three-party context owing simply to the facts in cases like *Garrett*, *Tarleton* and *Allen* would be inconsistent with the Supreme Court of Canada's recognition that the economic torts may grow and be adapted to current needs: *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156, ¶73.

632 *Michaels v. Taylor Woodrow Developments Ltd.*, [2001] Ch. 493 at 502 (Ch. D.). See also: Hazel Carty, *An Analysis of the Economic Torts* (Oxford: Oxford University Press, 2001) at 92; and Anthony M. Dugdale *et al*, eds., *Clerk & Lindsell on Torts*, 19th ed. (London: Sweet & Maxwell, 2006) at 1587.

633 Anthony M. Dugdale *et al*, eds., *Clerk & Lindsell on Torts*, 19th ed. (London: Sweet & Maxwell, 2006) at 1587.

634 Indeed, in *Quinn*, *supra* note 34, at 535, Lord Lindley, in support of his rationale, referenced the portions of Bowen L.J.'s judgment from the Court of Appeal's judgment in *Mogul* (at 613-614) where Bowen L.J. articulated the *prima facie* tort doctrine.

Trade Assn.,[635] Atkin L.J. expressed the view that liability for unlawful interference does not rest upon the *effect* of the defendant's act upon the plaintiff (i.e., its transference to the plaintiff by restricting the third party's liberty to deal with the plaintiff), but rather upon the *quality* of the defendant's act itself. The rationale also appears to "freeze" the understanding of the tort as it existed in 1901, even though "[t]he state of the law needs to be justified by reference to the contemporary environment in which it is to operate".[636] Finally, it draws heavily upon the rather metaphysical device of a "transmigration of liability" between the third party and the plaintiff. This resembles a legal fiction more closely than a principled rationale for the tort. In addition, it requires that the defendant be civilly liable to the third party, and therefore engage in independently actionable conduct. Such a position is inconsistent with the approach taken in Canada under *Therien* and *Gagnon*.

Another rationale that has some support in the economic tort jurisprudence is the one offered by Lord Nicholls in *OBG*.[637] In contrast to the rationales explored by Neyers, Lord Nicholls's rationale is not rights-based at all. Instead, it is instrumentalist. According to Lord Nicholls, the purpose of the unlawful interference tort is simply "to curb clearly excessive conduct. The law seeks to provide a remedy for intentional economic harm caused by unacceptable means".[638] On this view, the tort does not operate in order to redress a violation of rights as between the plaintiff and the defendant. Instead, it serves as a check upon socially undesirable behaviour which threatens the stability of the marketplace.

This explanation, however, is also lacking in persuasive force. For one thing, it fails to explain why unlawful means, but *only* unlawful means, represent the type of "unacceptable" conduct that gives rise to liability in tort, and why intentionality is required at all. Moreover, it fails to explain why the plaintiff should be given a civil remedy to redress the defendant's behaviour, when none of its rights have been violated. It also skirts the boundaries between the legislative and judicial functions, arrogating to the courts a questionable jurisdiction to police unacceptable market conduct (without at the same time explaining why such a broad jurisdiction was refused in *Mogul* and *Allen*). Finally, as a pragmatic matter, it offers little insight into how, or why, liability for unlawfulness may be circumscribed in order to prevent courts from stifling competition (with the guiding principle being merely the prevention of "unacceptable" behaviour, ironically similar to the *prima facie* tort doctrine).

Accordingly, it seems clear that neither the 2007-2008 Jurisprudence nor the 2010 Jurisprudence have resolved the debate over the rationale behind the unlawful means torts. Instead, there is still room for new rationales to be advanced, and ex-

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635 [1921] 3 K.B. 40 at 79 (C.A.): "[t]he true question is, was the power interrupted by an act which the law deems wrongful? With the practical result that to determine liability *one has to concentrate, not upon the effect on the plaintiff, but upon the quality of the act of the defendant.*" [emphasis added]

636 Bob Simpson, "Economic Tort Liability in Labour Disputes: The Potential Impact of the House of Lords' Decision in OBG v. Allan" (2007) 36 I.L.J. 468 at 474.

637 For a similar approach, see Simon Deakin and John Randall, "Rethinking the Economic Torts" (2009) 72 M.L.R. 519.

638 *OBG*, *supra* note 15, ¶153.

plored by the Canadian judiciary.

In formulating such a rationale, it is helpful to begin from the proposition that Anglo-Canadian law, following *Allen*, does not recognize a general *right* to the protection of one's economic interests.[639] Instead, the courts have long rejected the proposition that competition itself is tortious *per se*.[640] Consistent with this principle, and with the *laissez-faire* philosophy of the nineteenth century during which the core economic torts were forged, the leading cases drew their inspiration from the ethic of free competition (whether the competition was between traders, as in *Mogul*, or labour groups, as in *Allen*).[641] The plaintiff's freedom to pursue its own

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639 As stated in *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156 ¶72, "[t]he law has never recognized a sweeping right to protection from economic harm". See also Peter T. Burns and Joost Blom, *Economic Interests in Canadian Tort Law* (Markham, Ont.: LexisNexis Canada Inc., 2009) at 31-32: "[t]he starting point is that competition should be permitted unless there is a good reason for the common law to interfere".

640 *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, ¶64. See also Hazel Carty, *An Analysis of the Economic Torts* (Oxford: Oxford University Press, 2001) at 1. As noted by Bruce Feldthusen, *Economic Negligence: The Recovery of Pure Economic Loss*, 5th ed. (Toronto: Thomson Reuters Canada Limited, 2008) at 37, "[o]ur competitive economic system is premised upon practices that entail besting others in a financial sense by planned intentional conduct". The rejection of tortious liability for inflicting economic injury upon another through lawful means, in the name of competition, is often traced to *The Schoolmasters of Gloucester Case* (1410), Y.B. 11, Hen. IV., f. 47, pl. 21 (see *Associated Newspapers Group Plc v. Insert Media Ltd.*, [1988] 1 W.L.R. 509 at 511 (Ch. D.)). See also *Swedac Ltd. v. Magnet & Southerns Plc*, [1989] 1 F.S.R. 243 at 249 (Ch. D.):

> Finally, there is the tort called "fraudulent interference with trade." In my view, there is no such tort . . . It is an absolutely fundamental proposition, in my view, which Mr. Hobbs was right to emphasise, that this alleged tort really amounts to saying that there has been competition, and adding the old nursery cry "It's unfair!" *To that I would only cite my nanny's great nursery proposition: "The world is a very unfair place and the sooner you get to know it the better."* [emphasis added]

In the United States, some courts have developed a tort of unfair competition: see Peter T. Burns and Joost Blom, *Economic Interests in Canadian Tort Law* (Markham, Ont.: LexisNexis Canada Inc., 2009) at 206-207. However, such a tort would appear fundamentally at odds with the numerous cases (in numerous contexts) within which the Supreme Court of Canada has emphasized the importance of free and open competition. See, *e.g.*: *Elsley v. J.G. Collins Ins. Agencies*, [1978] 2 S.C.R. 916 at 923; *Consumers Distributing Co. v. Seiko*, [1984] 1 S.C.R. 583 at 595–597; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425 at 510, 564-565 and 596; and *Ciba-Geigy Canada Ltd. v. Apotex Inc.*, [1992] 3 S.C.R. 120 at 135. As Idington J. observed, in *Weidman v. Shragge* (1912), 46 S.C.R. 1 at 28, "*[d]estroy competition and you remove the force by which humanity has reached so far*". [emphasis added]

641 Indeed, in *Allen*, *supra* note 7, at 164, Lord Shand recognized that cases involving competition in labour were analogous to those involving competition in trade. This is

economic goals was viewed as being qualified by the similar equal freedom enjoyed by its competitors.[642]

It was against this backdrop that the Law Lords rejected the *prima facie* tort doctrine in *Allen*, and required the commission of an *unlawful* act in order to ground liability where there was no ulterior violation of the plaintiff's legal rights, nor a predominant purpose conspiracy. As the decision in *Allen* indicates, the Law Lords viewed the requirement of unlawfulness as bridging the "chasm" between cases where the defendant induced a violation of the plaintiff's *legal rights* (via inducing breach of contract), and merely induced a violation of the plaintiff's *expectancies* (via inducing a third party to refrain from entering into a contract with the plaintiff). The presence of unlawful means therefore fulfilled not simply an instrumentalist function (as contemplated by Lord Nicholls), but a rights-based function (as contemplated by Lords Lindley and Hoffmann, a century apart).

However, the nature of this rights-based function was not articulated in *Allen*. Indeed, it appears from the speeches in *Allen* that many of the Law Lords viewed it as *self-evident* that the presence of unlawful means would give rise to liability when joined together with an intention to injure the plaintiff. It is submitted that this attitude towards the element cannot be explained on the basis of the abstract, sophisticated and *ex post* "transmigration of liability" theory favoured by both Lords Lindley and Hoffmann.[643] Rather, it can only be explained when it is viewed from within the *competitive* context that underlay the specific facts in *Allen* and *Mogul*.[644]

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not to say that the two contexts are identical, but only that both centre around the notion of competition. It has been suggested that courts are more likely to impose economic tort liability in the labour context than in the trade context: Simon Deakin *et al*, *Markesinis and Deakin's Tort Law*, 6th ed. (Oxford: Clarendon Press, 2008) at 602. However, the presence of competition is still essential: see Hazel Carty, *An Analysis of the Economic Torts* (Oxford: Oxford University Press, 2001) at 3-4.

642 *Allen*, *supra* note 7, at 173, per Lord Davey. See also *Ware & De Freville Ltd. v. Motor Trade Assn.*, [1921] 3 K.B. 40 at 79 (C.A.), per Atkin L.J.:

> The truth is that *the right of the individual to carry on his trade or profession or execute his own activities, whatever they may be, without interruption*, so long as he refrains from committing tort or crime, *affords an unsatisfactory basis for determining what is actionable, inasmuch as such right is conditioned by precisely similar right in the rest of his fellow men.* Such co-existing rights do in a world of competition necessarily impinge upon one another, and *it appears to me illogical to start with the assumption that an interruption of the power of a man to do as he pleases within the law is prima facie a legal wrong, which in every case needs to be justified.* [emphasis added]

643 It is similarly submitted that this attitude cannot be explained on the basis of the other prevailing accounts of the economic torts, such as the abuse of right or public right theories.

644 The centrality of competition to the rationale for the economic torts has been frequently observed: see, e.g., J.D. Heydon, *Economic Torts*, 2nd ed. (London: Sweet & Maxwell, 1978) at 123; and Hazel Carty, *An Analysis of the Economic Torts* (Oxford: Oxford University Press, 2001) at 3-4.

Within that context, an unlawful act committed by a competitor, with the intent of economically injuring another competitor, assumes a unique character that it does not otherwise possess.[645] It represents an intentional perversion of the rules that govern the framework of the parties' competition (or "game"), in order to diminish the other's position therein and improve one's own position.[646]

In essence, such conduct represents a form of *cheating*. This act of cheating is unacceptable market conduct in its most basic form, since it subverts the preconditions of fair competition.[647] More than that, however, such cheating is a wrong (or "tort")[648] that may be committed directly against, and suffered directly by, the

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645 As stated by Tony Weir, *Economic Torts* (Oxford: Clarendon Press, 1997) at 70: "competitors are indeed in a special relationship: much is permitted to spectators in Wimbledon which would be intolerable in a competitor; contrariwise, competitors in many games may strike each other in a manner that would be criminal as against a spectator." See also David G. Owen, "Philosophical Foundations of Fault in Tort Law", in David G. Owen, ed., *Philosophical Foundations of Tort Law* (Oxford: Clarendon Press, 1995) 201 at 208, n25 (suggesting that it is arguably the special fact of competition which justifies the intentional (but fair) infliction of harm upon a competitor).

646 See, in this respect, *Ciba-Geigy Canada Ltd. v. Apotex Inc.*, [1992] 3 S.C.R. 120 at 136, stating (in relation to the tort of passing off) that:

> *The purpose of the passing-off action is thus also to prevent unfair competition.* One does not have to be a fanatical moralist to understand how appropriating another person's work, as that is certainly what is involved, is a breach of good faith. Finally, another more apparent, more palpable aspect, a consequence of the preceding one, must also be mentioned. The "pirated" manufacturer is very likely to experience a reduction in sales volume and therefore in his turnover because of the breaking up of his market. *When such a situation occurs in the ordinary course of business between rival manufacturers that is what one might call one of the rules of the game, but when the rivalry involves the use of dishonest practices, the law must intervene.* [emphasis added]

647 The rationale thus coheres with Lord Wright's statement in *Crofter Hand Woven Harris Tweed Co Ltd v Veitch*, [1942] A.C. 435 at 472 (H.L.), that:

> . . . we live *in a competitive or acquisitive society*, and *the English common law may have felt that it was beyond its power to fix by any but the crudest distinctions the metes and bounds which divide the rightful from the wrongful use of the actor's own freedom*, leaving the precise application in any particular case to the jury or judge of fact. If further principles of regulation or control are to be introduced, that is matter for the legislature. [emphasis added]

See also Lord Hoffmann's statement ¶56 of *OBG*, *supra* note 15, that the tort is "*designed only to enforce basic standards of civilised behaviour in economic competition*, between traders or between employers and labour". [emphasis added]

648 The term "tort" is, of course, derived from the French, where tort means "wrong". The French term is, itself, derived from the Latin word *tortus*, which means "twisted". Recognizing liability for the "wrong" of "twisting" legal rules to obtain an advantage is therefore remarkably consistent with the etymology of the word "tort".

plaintiff.[649] As such, it fulfills the same role performed, in other contexts, by a violation of the plaintiff's traditional legal rights.

While this position is novel,[650] it is consistent with basic Canadian legal principles (and is also consistent with leading cases like *Therien* and *Gagnon*, in that liability for cheating does not require conduct which is independently actionable by a third party, but merely conduct that is in breach of a binding legal rule). Indeed, as in the context of commercial competition, there is appellate authority for the proposition that if one participant intentionally injures another in a sporting match, then "only *a deliberate violation of the rules calculated to do injury* will give rise to civil liability".[651]

This approach also accords with the corrective mentality of tort law, and explains why the plaintiff is entitled to a civil remedy in damages. When one party deliberately and dishonestly violates the rules of a game or other competitive process with a view to intentionally disadvantaging a specific party, it is common to view the violating party as a "cheater", who has directly "wronged" the disadvantaged party. Indeed, the disadvantaged party may even assert that it has been "*cheated*". Accordingly, the cheating rationale justifies the unlawful means torts in a manner that is consistent with the corrective focus of tort law upon compensating plaintiffs who have been personally wronged by the fault of the defendants.[652] Such a view is intuitively satisfying, and is similar to the position that underlies the other main category of intentional economic torts, i.e., the misrepresentation torts such as deceit, which impose liability for "lying".

In fact, in creating a right of recovery where the defendant causes economic

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649 An act of "cheating" may also be committed against the participants in the marketplace as a whole rather than a single participant (as, e.g., in the case of a student who cheats on an exam). However, similar to a misrepresentation (which may also be committed against all the participants in the marketplace as a whole), that does not deprive it of the character of a tortious "wrong" when it is targeted at a specific plaintiff.

650 So far as the authors are able to determine, this is the first time that the unlawful means element has sought to be rationalized as a form of cheating.

651 *Temple v. Hallem* (1989), 58 D.L.R. (4th) 541 at 543-544 (Man. C.A.); leave to appeal to S.C.C. refused [1989] S.C.C.A. No. 450, emphasis added. The analogy between the competition and the sporting context cannot be pushed too far, since the harm in the sporting context is physical rather than economic, and therefore involves an injury that would be actionable even in the absence of a deliberate violation of the rules were it not for the sporting participants' implied consent. In contrast, the economic harm inflicted in the competition context does not appear to be presumptively actionable, in the absence of unlawfulness, where it occurs outside the competition context (although perhaps the courts should consider whether to adopt the *prima facie* tort in non-competitive settings). However, the analogy is still useful in demonstrating that the act of cheating may justify the imposition of liability in a competitive context.

652 See, e.g.: *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549, ¶20; *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5, ¶59-60; and *Vancouver (City) v. Ward*, 2010 SCC 27, ¶48, 51 and 55. As explained by Ernest J. Weinrib, "Corrective Justice in a Nutshell" (2002) 52 U Toronto L.J. 349, in a system of corrective justice: "[w]hat the defendant has done and what the plaintiff has suffered are not independent events. Rather, they are the active and passive poles of the same injustice, so that what the defendant has done counts as an injustice only because of what the [plaintiff] has suffered, and *vice versa*."

harm by cheating, the economic torts may be seen to protect a *legal right* that is personal to the plaintiff (even if not articulated in the 1892–1901 Trilogy, and even if different from the other rights that have been traditionally protected by tort law, i.e., rights of property, physical autonomy, and reputation). This is the right to compete with others on an equal footing, wherein the defendant may not act to the detriment of the plaintiff through conduct which the law itself forbids the plaintiff from pursuing against the defendant (or that it would forbid were the positions of the plaintiff and the defendant reversed). Viewed in this way, the unlawful means torts are a tool of corrective justice which address the defendant's violation of the plaintiff's right to *equality before the law* within the context of economic competition.[653]

This position also explains what it is about *unlawful* means, and *only* unlawful means, that permits them to ground liability. Only "unlawful" means can involve a

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653 Of course, the law of torts has not always protected the equality of plaintiffs, a fact that is witnessed by the rejection of a separate tort of discrimination: see *Seneca College v. Bhadauria*, [1981] 2 S.C.R. 181 at 188-189; and *Honda Canada Inc. v. Keays*, [2008] 2 S.C.R. 262, ¶65–67. However, there can be no doubt that an individual's right to equality under the law is an essential part of a liberal democracy: see s. 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11: "*Every individual is equal* before and *under the law* and has the right to the equal protection and equal benefit of the law without discrimination". [emphasis added] There is accordingly no reason why the violation of this right should not attract liability in tort in certain contexts. Indeed, the same rationale can explain the tort of lawful means conspiracy. A conspiracy for the predominant purpose of injuring the plaintiff is actionable, not only because of the fact that such a conspiracy was historically a criminal offence, but also because it involves an *advantage* (the "magic of combination") that is added to an improper intent, thereby violating the plaintiff's right to equality in competition. However, unlike cheating in the unlawful means torts, the nature of this advantage has lost much of its force in modern times, given the fact that individual persons and corporations are now often far more powerful than combinations of persons or corporations. See *Lonrho 1*, *supra* note 165, at 189 ("... to suggest today that acts done by one street-corner grocer in concert with a second are more oppressive and dangerous to a competitor than the same acts done by a string of supermarkets under a single ownership or that a multinational conglomerate such as Lonrho or oil company such as Shell or B.P. does not exercise greater economic power than any combination of small businesses, is to shut one's eyes to what has been happening in the business and industrial world since the turn of the century and, in particular, since the end of World War II"). Additionally, the growth of non-arm's length entities (e.g., interlocking corporate groups, and their directors and officers) has permitted plaintiffs to escape the rule in *Allen* by pleading lawful means conspiracy against a group of related entities, which do not represent a true "combination" in the sense contemplated by the early conspiracy jurisprudence. Finally, the advantage of combination involved in a conspiracy is not an advantage that is otherwise prohibited by the law (since lawful means conspiracy is no longer a criminal offence in Canada), and therefore requires courts to police the inherent "fairness" of competition. For these reasons, the continued viability of the lawful means conspiracy tort is open to question (and, at the very least, should arguably be restricted to conspiracies between arm's length entities: see, e.g., *Normart Management Ltd. v. West Hall Redevelopment Co.* (1998), 37 O.R. (3d) 97 (C.A.)).

breach of the applicable legal rules, and therefore the wrong of "cheating" (as opposed to some more amorphous wrong brought about by "unfair" means). Further, it explains why there must be a *confluence* of unlawful means and intent. A player who violates a rule, but does so inadvertently, unknowingly, or without the purpose of obtaining an advantage, may still be penalized. However, they would not generally be referred to as someone who has "*cheated*" and "*wronged*" another player, unless the violation is deliberate, dishonest, and designed to secure them an advantage (to the inevitable disadvantage of an opposing player).

Moreover, the rationale is capable of serving as a common justification for all three of the remaining unlawful means torts (unlawful interference, unlawful means conspiracy and intimidation), since it is not limited to the two-party or three-party context. One is capable of cheating both directly (as where a runner pushes another runner) and indirectly (as where a runner pushes another runner in order to induce a third runner's fall). It should not matter against whom the unlawful conduct is targeted if the actual or constructive intention behind it is to cause injury to the plaintiff, at least where the law does not otherwise vindicate the plaintiff's right to legal equality within the context of economic competition (by, i.e., permitting the plaintiff to redress this right simultaneously with a different legal right through an independent cause of action).

Finally, the position contemplates an appropriate institutional role for the courts. Under this rationale, the courts are not seeking merely to prevent "unfair" competition and preserve the integrity of the broader market (although this may be part of their function in preventing cheating). Instead, their principal focus is to redress a wrong by the defendant against the plaintiff (i.e., the violation, through cheating, of the plaintiff's right to compete on a footing that is equal under the law). And in doing so, the courts are not guided by an amorphous concept of conduct that is "unacceptable", but a more restricted concept of "cheating", with all that this entails (e.g., the mental sub-elements of a *deliberate* and *dishonest* violation of the rules). Moreover, the rationale is intimately tied to the competitive context in which the unlawful means torts were formed. It would make little sense if the torts were extended outside this context, since the notion of cheating requires a wrong as between *participants* in a competitive process.[654] Thus, the rationale would keep the torts "strictly limited in their purpose and effect in the commercial world".[655] This can be seen in the definition of unlawful means which follows from the rationale.

3. A Suggested Definition of Unlawful Means

The jurisprudence discloses at least six different definitions of the unlawful means element (putting aside the related question of whether the conduct must be aimed at a third party or at the plaintiff):

(1) Conduct that is not "justified" (along the lines of the *prima facie* tort

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654 A similar view is taken by Peter Cane, *Tort Law and Economic Interests* (Oxford: Clarendon Press, 1996) at 155. For a contrary position, see John Murphy, *Street on Torts*, 12th ed. (Oxford: Oxford University Press, 2007) at 358 and 378-379.

655 *Correia*, *supra* note 19, ¶101. See also *Alleslev-Krofchak*, *supra* note 21, ¶98.

doctrine, and possibly also *Reach*). This definition would extend not only to acts which are actionable, or positively forbidden by the law, or *ultra vires*, but also to acts which are so egregious that they are tantamount to unlawful conduct.

(2) Conduct that the defendant is "not at liberty to commit" (along the lines of *Torquay Hotel*, *Drouillard*, *Barber* and the dissent of Lambert J.A. in *No. 1 Collision*). This definition would extend to acts which are actionable, or positively forbidden by the law, or *ultra vires* (or which cause a loss of jurisdiction, such as a breach of natural justice or procedural fairness).

(3) Conduct that is "forbidden" (along the lines of *Therien*, *Gagnon* and *Dunlop*). This definition would extend to acts which are positively forbidden by the law (whether by legislation, the common law or equity), regardless of whether the conduct is independently actionable, but not merely to conduct that is *ultra vires*.

(4) Conduct that is "forbidden" by the "criminal law" or independently "actionable" (along the lines of *Digicel*, and possibly also *Total Network* and the dissent of Lord Nicholls in *OBG*). This definition would extend to acts which are positively forbidden by the criminal law even if not independently actionable, together with any conduct that is independently actionable. However, it would not extend to acts which are forbidden by non-criminal statutes but which are not independently actionable, nor to acts which are merely *ultra vires*. (It would, perhaps, also not extend to other acts forbidden by the common law but which are not independently actionable, such as civil contempt.)

(5) Conduct that is independently "actionable" (along the lines of *Lonrho 1* and the majority ruling of Lord Hoffmann in *OBG*). This definition would extend to all conduct that is actionable by the directly affected party, whether the actionability arises from legislation, the common law or equity, but not to conduct that is positively forbidden or *ultra vires* without also being actionable.

(6) Conduct that is independently "actionable", but solely as a result of the "common law" (a position taken by some commentators,).[656] and referenced by Lord Nicholls in *OBG*[657]This definition would extend to conduct that is either a tort, or a breach of contract, but not to conduct that fails to fall under one of these headings, even if actionable by statute, positively forbidden by common law or statute, or *ultra vires*.[658]

The third definition is the one that is most consistent with the cheating ratio-

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656 See Hazel Carty, *An Analysis of the Economic Torts* (Oxford: Oxford University Press, 2001) at 127-128, 274 and 282.

657 *OBG*, *supra* note 15, ¶151.

658 The first, second, fifth and sixth of these possible definitions are explored in Hazel Carty, *An Analysis of the Economic Torts* (Oxford: Oxford University Press, 2001) at 123–128.

nale. To the extent that the unlawful means torts exist to provide redress for the wrong of cheating, it is the *fact* that a binding legal rule has been violated, not the form that the legal rule assumes, which supplies the wrong. Further, the third definition is also the one that is most consistent with *Therien* and *Gagnon* (the governing Canadian authorities), and it carries the most pragmatic appeal.

The first definition is foreclosed unless the Supreme Court of Canada takes the extreme step of overruling *Allen*. Moreover, although *Allen* has often been criticized,[659] there is much to be said for its approach.[660] The recognition of liability based upon "unjustified" conduct would be contrary to the value which our courts (and legislatures) have traditionally placed upon free competition.[661] Further, it is beyond the institutional role of the courts to decide matters of "fair" versus "unfair" competition. A requirement that the conduct be actually "unlawful" provides an objective criterion that (however "formal" and "arbitrary") offers some measure of certainty, and is within the proper limits of the judicial function. To reverse *Allen* "would put the legality of trade competition and industrial action completely into

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659 See the literature compiled by Anthony M. Dugdale *et al*, eds., *Clerk & Lindsell on Torts*, 19th ed. (London: Sweet & Maxwell, 2006) at 1494-1495, n16. A significant basis for criticizing *Allen*, which is not referred to in *OBG*, is that many years after the 1892–1901 Trilogy, the Courts recognized that the infliction of economic injury can be actionable under negligence principles: *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, [1964] A.C. 465 (H.L.). This development calls into question the need for an unlawful means requirement in the context of intentional economic injury, since there is no similar requirement in the context of negligent economic injury (at least formally). However, it is arguable that the absence of an unlawful means requirement in the negligence jurisprudence relating to pure economic loss can be explained on the basis that the rationale for such recovery (e.g., a breach of the duty to take care) is fundamentally different than the rationale for the recovery of intentionally inflicted economic injury, and does not require that liability be premised upon cheating. In addition, the mere recognition of liability for pure economic loss in negligence does not justify abandoning the elements of the intentional torts which permit such liability. Were it otherwise, there is no reason why the tort of deceit would have survived *Hedley Byrne*: see, in this respect, the observations of Cardozo J. in *Ultramares Corp. v. Touche*, 255 N.Y. 170 , 186-187 (App. 1931). Finally, although the law of negligence does not formally require that the defendant use unlawful means in order to be liable for pure economic loss, it is noteworthy that the five categories of pure economic loss in negligence (recognized in cases such as *Design Services Ltd. v. Canada*, [2008] 1 S.C.R. 737, ¶31) all depend upon conduct which involves, or would involve if committed intentionally, some form of two-party or three-party unlawful means: i.e., the independent liability of statutory public authorities (abuse of public office), negligent misrepresentation (deceit), negligent performance of a service (breach of contract), negligent supply of shoddy goods or structures (breach of contract), and relational economic loss (trespass or battery).

660 See *OBG*, *supra* note 15, ¶14, per Lord Hoffmann, where he notes the uncertainty brought about by the *prima facie* tort doctrine in the jurisdictions that have adopted it.

661 See Hazel Carty, *An Analysis of the Economic Torts* (Oxford: Oxford University Press, 2001) at 263–266.

the discretion of the judiciary".[662]

The second definition, based upon the *Torquay Hotel* test, is also subject to criticism. Such a test is imprecise, open to manipulation, and ultimately blurs the boundaries between *Allen* and the *prima facie* tort (as witnessed by *Reach*).[663] It also lacks clear authority (*Torquay Hotel* and *Reach* notwithstanding), having never been endorsed by the Supreme Court of Canada, and having been rejected by the House of Lords, the Privy Council and the High Court of Australia in cases like *Mogul*, *Dunlop* and *Sanders*. Further, it would cause the unlawful means torts to encroach upon the tort of abuse of public office, and possibly also upon the law of restitution (by permitting recovery where the defendant enters into transactions which are void because of, e.g., duress or restraint of trade).

The fourth definition draws an arbitrary distinction between conduct that is forbidden by the criminal law, and conduct that is forbidden by non-criminal statutes. Such a distinction would have bizarre consequences in Canada, where only federal legislation can be truly criminal. Further, it is inconsistent with *Therien* and *Gagnon*, cases where breaches of non-criminal legislation were found to satisfy the unlawful means element.

The fifth definition, based upon the test put forward by Lord Hoffmann in *OBG*, has been criticized on the grounds that it is unsupported by authority, and is an improper basis upon which to develop the tort.[664] These criticisms have particular weight in Canada given *Therien*, *Gagnon* and *Canada Cement LaFarge*. However, even in England the requirement of independent actionability has been rejected for conspiracy cases in *Total Network*. It also necessitated an exception in *OBG* itself, insofar as Lord Hoffmann held that it does not require the conduct to actually result in loss to the third party against whom such conduct is "actionable", even though Lord Lindley's rationale for restricting unlawful means to three-party situations is nonsensical without damage to the third party, and even though loss is the very gist of most torts.[665] Further, as a policy matter, the actionability requirement is deficient. As one commentator has noted, "[s]o long as the breach of statute is wilfully aimed at injuring the plaintiff's economic interests, it is difficult to understand the policy of excluding a legal remedy".[666]

The sixth definition, requiring conduct that is tortious or in breach of contract, is based upon another arbitrary distinction. It would mean that conduct falling

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662 Anthony M. Dugdale *et al*, eds., *Clerk & Lindsell on Torts*, 19th ed. (London: Sweet & Maxwell, 2006) at 1585.

663 See Hazel Carty, *An Analysis of the Economic Torts* (Oxford: Oxford University Press, 2001) at 124-125. The same point is made by J.W. Neyers, "The Economic Torts as Corrective Justice" (2009) 17 Torts L.J. 162. In addition, the definition could blur the boundaries between tort and judicial review, and lead to a greater number of actions which amount to an abuse of process: see *Cimaco International Sales, Inc. v. British Columbia (A.G.)*, 2010 BCCA 342, ¶41–44 and 58–62.

664 Simon Deakin and John Randall, "Rethinking the Economic Torts" (2009) 72 M.L.R. 519 at 544–548.

665 *Canada Cement LaFarge*, *supra* note 167, at 465.

666 Peter T. Burns and Joost Blom, *Economic Interests in Canadian Tort Law* (Markham, Ont.: LexisNexis Canada Inc., 2009) at 189-190.

under, e.g., the oppression remedy could not qualify, but conduct meeting the test for negligence could. Such an approach lacks coherence, and is, in any event, inconsistent with *Therien*, *Gagnon* and *Canada Cement LaFarge* (in addition to a host of other Canadian decisions).

Accordingly, it is suggested that the definition of unlawful means adopted by the Canadian courts should extend to all conduct that is *forbidden at law* whatever its source, regardless of whether it is actionable or not. Further, it is suggested that this definition should be satisfied regardless of whether the forbidden conduct takes the form of an *action or an omission*. This follows from *Odhavji*, in which the Supreme Court of Canada held that a failure to act, in circumstances where the defendant was under a legal duty to do so, could amount to an "unlawful" act under the tort of abuse of public office.[667] There seems to be little reason why this principle should not apply with equal force to the unlawful means torts. A legal obligation may be breached just as surely by omission as by positive action.

It is possible that the foregoing definition will be criticized on the ground that it is overly broad. One could argue that it would involve the courts too deeply in the regulation of competition. However, the best way to ensure that the unlawful means torts do not exceed the boundaries of permissible judicial intervention is not to adopt an unduly restrictive definition of the unlawful means element, based upon the artificial rationale for the torts suggested by Lord Lindley. Rather it is to recognize the unlawful means torts for what they are — a method of providing redress where the plaintiff is cheated by a competitor — and to define the ambit of the unlawful means element accordingly. Indeed, a definition that is premised upon cheating (rather than restricting the third party's liberty to deal with the plaintiff) is itself subject to several features which will ensure that its ambit remains limited.

First, in order to be "forbidden", the conduct must be contrary to a *binding* legal obligation (unlike the situation in *Drouillard*). Further, the conduct must amount to the *breach* of a legal obligation, not simply an act that is *ultra vires* (as in *Reach*). The conduct should also involve the *material* breach of a legal obligation, since a non-material breach would be *de minimis*,[668] and therefore an inappropriate basis upon which to impose liability (and to brand someone a "cheater"). Accordingly, the element would not encompass a minor violation of traffic laws, or a merely technical breach of contract.[669]

Second, the definition would require that the unlawful conduct *not be other-*

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667 *Odhavji*, *supra* note 558, ¶24 and 34.

668 See *Athey v. Leonati*, [1996] 3 S.C.R. 458 ¶15: "[a] contributing factor is *material if it falls outside the de minimis range*". [emphasis added]

669 There is case law in support of the view that unlawful means do not include technical breaches of contract and statute. See footnotes 219-220, 225 and 363 above. Some commentators have also suggested that the defence of justification should be used to excuse minor or technical breaches of a legal obligation: see Peter Cane, *Tort Law and Economic Interests* (Oxford: Clarendon Press, 1996) at 261; and Tony Weir, *Economic Torts* (Oxford: Clarendon Press, 1997) at 75-76. However, it is submitted that concerns over the magnitude of the unlawfulness are properly addressed under the unlawful means element itself, through the mechanism of the *de minimis* principle. This view also appears to be taken by Peter Edmundson, "Conspiracy by Unlawful Mean: Keeping the Tort Untangled" (2008) 16 Torts L.J. 20.

wise prohibited from giving rise to liability. This would exclude conduct that is unlawful but that is exempt from civil liability owing to policy reasons (e.g., perjury) or a unique defence (e.g., absolute immunity), or that is in breach of statute where the statute itself confers an immunity.[670] Such a limitation is necessary to ensure that the unlawful means torts remain consistent with other areas of the law. It is also necessary to address the concern of Lord Hoffmann in *OBG* that the torts not trespass upon the legislative intention to preclude or limit liability for violations of certain statutes (at least where that intention is explicit or necessarily implied). Finally, it is consistent with the cheating rationale, since a defendant who commits an unlawful act in order to economically injure the plaintiff is justified in viewing that conduct as permissible under the "rules" of competition where it is independently prohibited from giving rise to liability.

Third, as discussed above, both the jurisprudence and the cheating rationale support the existence of two mental sub-elements, *deliberateness* and *the lack of an honest belief in the legality of the conduct* (in addition to the primary mental element specific to each of the unlawful means torts). The first sub-element, deliberateness, will exclude any conduct forbidden by law that may only give rise to liability based on principles of absolute or strict liability, or negligence. This means that an unintentional breach of contract, for example, or a negligent violation of a regulation, cannot fall within the scope of the element.[671] In addition, the second element, a lack of an honest belief in legality, will exclude any conduct that is forbidden by law despite the defendant's good faith belief in its lawfulness. This means that some criminal conduct (which is not excused by a person's ignorance), or conduct taken in good faith reliance upon legal advice, will not suffice.[672]

Finally, while the definition would not restrict the scope of unlawful means to conduct that is directed at a third party (as would *OBG*, *O'Dwyer*, *Correia* and *Alleslev-Krofchak*), the cheating rationale still permits the definition to be formulated in a manner that responds to the key concern in these cases. This concern is that two-party unlawful interference claims involve conduct that is independently actionable by the plaintiff.[673] However, while this concern may exist in the general run of cases, there may also be two-party situations where the defendant's unlawful conduct is not independently actionable by the plaintiff (as in *Total Network*). In order to preserve the possibility of liability in the latter cases, but to protect against the duplication of liability in the former, the definition of unlawful means should only include conduct *for which the plaintiff could not obtain an adequate remedy against the defendant(s) under any independent head of liability that is alleged to make the conduct unlawful.* This is consistent with cases like *Central Canada Potash*, *Correia* and *Alleslev-Krofchak*.

This final requirement involves four important sub-features. First, in order to be excluded, the conduct must not simply be "actionable directly by the plaintiff" (as baldly asserted in *Alleslev-Krofchak*). In addition, it must be directly actionable

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670 See the cases cited in support of this proposition at footnotes 207, 220 and 255 above.

671 See footnote 565 and 567 above.

672 See footnote 601 above.

673 See, e.g., John Murphy, *Street on Torts*, 12th ed. (Oxford: Oxford University Press, 2007) at 383.

because of the independent head of liability that is put forward as the reason for characterizing the conduct as "unlawful" vis-à-vis the unlawful means tort. It is only where conduct is independently actionable by the plaintiff, and that actionability is put forward as the reason for the conduct being "unlawful" in the context of the unlawful means element, that the law simultaneously vindicates the plaintiff's right to compete with the defendant on a legally equal footing through the independent cause of action, such that the unlawful means tort is rendered superfluous. This is because it is only in that case that the law chastises the defendant for the *unlawfulness* of the particular conduct which it sought to use as an instrument of cheating against the plaintiff. In a situation such as the one at issue in *Alleslev-Krofchak*, where the defendant's unlawful conduct (i.e., breach of the defendant's contract with a third party) renders it independently liable to the plaintiff for a *different reason* (i.e., inducing breach of the plaintiff's contract with a third party), the independent head of liability does not respond to the unlawful means that were used as the instrument for cheating the plaintiff (i.e., the breach of contract between the defendant and the third party), but responds only to the violation of the plaintiff's ulterior legal right that is peculiar to the independent head of liability itself (i.e., the plaintiff's contractual right vis-à-vis the third party). In other words, the independent head of liability treats the unlawfulness of the conduct as being purely *incidental* to what the defendant has done.

Second, and in furtherance of this point, in order to be excluded from the scope of unlawful means, the conduct must be such that the plaintiff could obtain an *adequate* remedy under the independent head of liability. Were the position otherwise, then the plaintiff's right to legal equality in the context of competition would not be simultaneously vindicated. This is not to suggest that the plaintiff must necessarily be able to obtain a damages award under the independent claim that is measured on the same principles as those which would apply to the relevant unlawful means tort. However, it is to suggest that certain types of remedies (e.g., nominal damages, or declaratory relief) would not suffice. Further, there may be some types of "unlawful" conduct that are "actionable" by the plaintiff only in the sense that they give rise to public law remedies (e.g., *certiorari* in judicial review proceedings). In that case, the remedy may be inadequate because the type of legal proceeding through which the plaintiff obtains redress is not designed, as a form of corrective justice, to compensate the plaintiff for the "personal" wrong that is done to it through the defendant's cheating, but to address broader interests instead. Ultimately, the question of whether a given remedy is "adequate" in this sense should be left to the discretion of the courts.

Third, in order to be excluded, the conduct need only be such that the plaintiff *could* have succeeded in obtaining an adequate remedy against the defendant based upon the relevant head of independent liability, had it elected to bring such a claim (as was the case in *Alleslev-Krofchak*). The plaintiff need not *actually* bring a claim against the defendant based on the independent head of actionability, as is currently required under the merger doctrine. This follows from the residual role that was envisioned for the unlawful means torts in *Mogul* and *Allen*, as a type of liability appropriate to situations where there is no independent breach of the plaintiff's traditional legal rights. In circumstances where the plaintiff *can* seek redress for the unlawful means under an independent head of liability, there is simply no need for the unlawful interference torts (regardless of whether the plaintiff *does* choose to

pursue that redress). Indeed, it would be dangerous to free competition if the torts were permitted to serve as auxiliary causes of action that may be pleaded concurrently with any other claim. It would also threaten the integrity of private law more generally if plaintiffs could simply "tortify" other causes of action (e.g., contractual or equitable ones) at their election.[674]

Fourth, in order to be excluded, the conduct must be such that the plaintiff could have succeeded in obtaining a remedy based upon the independent head of liability *against the defendant(s)*. This is meant to address the situation where an unlawful means conspiracy involves independently actionable conduct but it is only committed by *one* of the co-conspirators. In such a case, the plaintiff's right to legal equality in the context of competition would not be simultaneously vindicated by the independent head of liability vis-à-vis the remaining co-conspirator, since that co-conspirator would not be liable on an independent basis[675] (except, perhaps, where it would be liable even in the absence of the conspiracy claim as a joint tortfeasor). Thus, the proposed definition of unlawful means would only preclude independently actionable conduct from serving as the unlawful means for a conspiracy where it is independently actionable against both of the co-conspirators.

It will be observed that this definition does not incorporate the requirement from *OBG* that the unlawful means interfere with a third party's liberty to deal with the plaintiff. This requirement has been criticized by some commentators,[676] and does not appear to have ever been applied to the tort of conspiracy (particularly given its rejection in England by *Total Network*). In the context of the tort of unlawful interference, where the requirement has been applied, it is submitted that the same concern which prompted Lord Hoffmann to articulate the requirement (i.e., that, in its absence, the unlawful interference tort will "make liability depend upon whether the defendant has done something which is wrongful for reasons which have nothing to do with the damage inflicted on the claimant")[677] should not be addressed through the unlawful means element itself. Instead, it should be addressed through a combination of the intentionality and the causation/damage elements of the tort.[678] With respect to the intentionality element, provided that the

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674 This restriction is not inconsistent with the concurrency principle recognized in *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 (S.C.C.). That principle enables a plaintiff to sue under two different causes of action (e.g., negligence and breach of contract) where the same conduct by the defendant satisfies the prerequisites of each. It does not permit the plaintiff to use one cause of action in order to satisfy a discrete element of the other cause of action, in circumstances where the defendant's conduct would not otherwise meet the prerequisites of the latter cause of action.

675 This is consistent with the doctrine of merger. See the discussion on this point at footnote 175 above.

676 Simon Deakin and John Randall, "Rethinking the Economic Torts" (2009) 72 M.L.R. 519 at 549.

677 *OBG*, *supra* note 15, ¶59.

678 At ¶58 (*ibid.*) Lord Hoffmann stated that:

> *It is not, I think, sufficient to say that there must be a causal connection between the wrongful nature of the conduct and the loss which has been caused.* If a trader secures a competitive advantage over an-

defendant actually and specifically intends to injure the plaintiff through the instrumentality of unlawful means (whether as an end in itself, or as a means to an end), instead of simply foreseeing or being reckless as to that injury being the consequence of the unlawful means, the defendant will have necessarily "done something which is wrongful for reasons which have. . . to do with the damage inflicted on the claimant". Further, because many Canadian articulations of the causation/damages element of unlawful interference already demand, as a condition of liability separate from the unlawful means element, that the unlawful conduct interfere with a "relationship or expectancy" between the plaintiff and "another party", the unlawful means can *only* become actionable by interfering with the liberty rights as between the plaintiff and a third party (regardless of whether this occurs through unlawful means directed at the plaintiff, a third party, a fourth party, or no party at all).[679] There accordingly seems no need to further burden the unlawful means element with the requirement that the unlawful means interfere with the third party's liberty to deal with the plaintiff, by exerting a coercive influence upon the third party itself. If the defendant truly intends to injure the plaintiff through unlawful means, and the unlawful means are the proximate cause of injury to the plaintiff's economic relationship with a third party, they may just as easily achieve this result by restricting the *plaintiff's* liberty to deal with the third party, as by restricting the third party's liberty to deal with the plaintiff. Indeed, these were precisely the facts in *Gagnon*.

In light of all the foregoing, we would propose that unlawful means, in the torts of unlawful interference, conspiracy and intimidation, be given a common def-

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> other trader by marketing a product which infringes someone else's patent, there is a causal relationship between the wrongful act and the loss which the rival has suffered. But there is surely no doubt that such conduct is actionable only by the patentee. [emphasis added]

However, in the example given by Lord Hoffmann, the trader's liability would be defensible if the trader's infringement of the third party's patent caused loss to the rival trader in its relationship with a fourth party, *and* the reason for the defendant's infringement of the third party's patent was the actual and specific intent to injure the plaintiff's relationship with that fourth party. Although, as Lord Hoffmann notes, the causation/damage element *alone* may not be sufficient to achieve this result, the *combined operation* of the intentionality and causation/damage elements permits the unlawful interference tort to remain limited in its scope, and yet still extend to situations where the defendant injures the plaintiff through unlawful means that are not committed against a third party in a way which restricts that third party's liberty to deal with the plaintiff.

679 See the text accompanying footnotes 237-239, above. Note also that, in the torts of both unlawful interference and conspiracy, it is the unlawful means themselves, and not the defendant's conduct more generally, that must be the proximate cause of the plaintiff's loss: *Canada Cement LaFarge*, *supra* note 167, at 475; *Alleslev-Krofchak*, *supra* note 21, ¶ 50. This requirement further reduces the risk of remoteness in circumstances where the unlawful means do not restrict a third party's liberty to deal with the plaintiff.

inition (provided that these torts are applied only within the competitive context). This definition reflects much of the current Canadian law with respect to the unlawful means element, although it admittedly departs from certain principles that have been adopted by courts in the wake of the 2007-2008 Jurisprudence (most notably, the requirement that the unlawful conduct directly victimize a third party rather than the plaintiff). Our proposed global definition is as follows:

> *"Unlawful Means" consist of the deliberate and material breach of a binding legal obligation whatever its source, and whether by action or omission, which is not otherwise prohibited from giving rise to liability, in which the defendant lacks an honest belief as to the legality of its conduct, and for which the plaintiff could not obtain an adequate remedy against the defendant(s) under any independent head of liability that is alleged to make the conduct unlawful.*