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PRODUCT LIABILITY

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IN THIS ISSUE

The Supreme Court of Canada's recent "Maple Leafs Foods" decision hits two birds with one stone. The SCC clarified Canadian law on the issue of whether a duty of care in the tort of negligence is owed among non-contracting entities in a product supply chain, as well as the issue of claims in negligence for pure economic loss in respect of defective, dangerous products.

A Claim Too Far:
Supreme Court of Canada Refuses to Recognize New Tort Duty for Pure Economic Loss Claims Against Manufacturers

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Summary

The Supreme Court of Canada's recent decision in *1688782 Ontario Inc. v. Maple Leaf Foods, Inc.*,[1] clarifies the law of negligence for manufacturers, distributors, suppliers and sellers of products in Canada. The decision addresses two main issues: (1) what tort duties are owed between supply chain parties where no direct contract exists; and (2) can claims for pure economic loss arising from the supply of defective goods be advanced between supply chain parties in the absence of physical injury or property damage?

In 2008, Maple Leaf Foods ("Maple Leaf") supplied meat products contaminated by listeria to Mr. Sub franchisees. While no Mr. Sub customers were harmed, the supply chain for Maple Leaf products was disrupted, causing Mr. Sub franchisees financial loss. The franchisees sued Maple Leaf alleging that it owed them a duty of care in tort to prevent financial and reputational loss arising from the supply of dangerous food products.

The Supreme Court held that Maple Leaf did not owe Mr. Sub franchisees a duty of care in tort to prevent pure economic losses arising from Maple Leaf's manufacture and supply of contaminated meats because there was insufficient proximity in the relationship between Maple Leaf and the franchisees. The Court held the franchisees' economic interests were more fairly protected by contract and insurance.

The Court's decision is notable because: (1) it is a refinement of the analysis to be applied when evaluating whether a duty of care for pure economic loss is owed, which now requires a focus on the substance of the relationship between the parties rather than the category of the relationship or the foreseeability of the loss claimed; (2) it re-considers, and significantly limits, the ability of a plaintiff to claim pure economic loss arising from the negligent supply of shoddy but dangerous goods; and (3) it indicates a continued resistance by the Supreme Court to expanding the recognized categories of proximity giving rise to a duty of care in tort in situations where there is an indirect relationship between the plaintiff and the defendant.

From a business and practical perspective, supply chain parties will need to protect themselves from the risk of reputational and financial losses caused by supply chain disruption through existing supply chain contracts and insurance.

Facts

Maple Leaf is a well-known manufacturer of meat products. Maple Leaf entered into an agreement with Mr. Sub whereby Maple Leaf would be the sole supplier of meat products to Mr. Sub franchises in Canada. Mr. Sub's franchise agreement with its franchisees required them to exclusively purchase Maple Leaf products from a system of distributors.

There was no direct contract between Maple Leaf and the franchisees.

[1] 2020 SCC 35.

In August 2008, Maple Leaf determined that certain of its meat products had tested positive for listeria. Shortly thereafter Maple Leaf issued a nationwide recall of the affected products and shut down one of its factories. A number of people became sick and several died due to the listeria contamination.

As a result of the recall and factory shutdown, there was no available meat supply from Maple Leaf to Mr. Sub franchisees for a period of time. The franchisees found a new supplier after about six weeks and by October 2008, Maple Leaf was again supplying meat products for Mr. Sub franchisees. The total period in which Mr. Sub franchisees were without meats was about 6-8 weeks, depending on the franchise. No Mr. Sub customers or franchisee employees were harmed by contaminated meats.

A class action was commenced in Ontario on behalf of Mr. Sub franchisees against Maple Leaf for economic damages arising from the disruption in the supply of Maple Leaf products to the franchisees due to the recall and plant shutdown. The claim alleged that Maple Leaf owed Mr. Sub franchisees a duty of care to take reasonable care in supplying its products and that Maple Leaf breached the duty by negligently manufacturing and supplying contaminated products and negligently representing to the franchisees that Maple Leaf products were fit for human consumption. The franchisees claimed that they had suffered economic losses arising from the reputational harm being associated with contaminated Maple Leaf products. The class plaintiffs claimed damages for loss of past and future sales, past and future profits, and loss of capital value and goodwill, as well as other damages relating to the cost of the disposal and replacement of the contaminated meats.

Lower Court Decisions

The action was certified as a class proceeding in 2016. Maple Leaf then brought a summary judgment motion seeking to dismiss certain claims on the basis that Maple Leaf owed no duty of care to the class plaintiffs. The motions judge found that the franchisees' claims were analogous to previously recognized tort duties and concluded that Maple Leaf owed a duty of care to the franchisees for the claims advanced.

The Ontario Court of Appeal granted the appeal, finding that Maple Leaf did not owe the plaintiffs a duty of care *1688782 Ontario Inc. v. Maple Leaf Foods Inc*.[2] The Court of Appeal held that the motions judge erred in finding the plaintiffs' claims to be analogous to previously recognized duties and failed to properly analyze whether a novel duty of care ought to be recognized by applying the refined duty of care analysis articulated by the Supreme Court of Canada in *Deloitte & Touche v. Livent Inc.*.[3] The Court of Appeal analyzed the substance of the relationship between Maple Leaf and the franchisees and determined that there was insufficient proximity to ground the duty of care asserted. In the Court of Appeal's view, any "undertaking" by Maple Leaf to supply safe products was made to Mr. Sub customers,

[2] 2018 ONCA 407.

[3] 2017 SCC 63.

not Mr. Sub franchisees. As a result, there was insufficient proximity and foreseeability.

The Supreme Court of Canada

The Supreme Court's decision was split 5-4 with Brown and Martin J.J. writing for the majority (Moldaver, Cote and Rowe J.J. concurring) and Karakatsanis J. dissenting (Wagner C.J. and Abella and Kasirer J.J. concurring). The majority of the Court dismissed the appeal, finding that Maple Leaf did not owe the franchisees any duty of care.

The majority further refined the test for recognizing a novel duty of care that it had set out in its 2017 *Livent* decision. The Court emphasized that the proximity (closeness) of the relationship between the plaintiff and the defendant - and not the category of the alleged wrong or the type of loss claimed - is always the "controlling concept" in determining whether a duty ought to be recognized. While it is permissible for the court to consider whether the nature of the relationship falls within, or is analogous to, previously recognized categories of proximate relationships, the analysis should not be categorical. Put another way, simply because the claim advanced is similar to the type of claim where a duty has previously been recognized is not determinative. The court must still be satisfied that the substance of the relationship has sufficient closeness to ground a duty of care.

Further, where the asserted duty is not analogous to previously recognized duties, the court must undertake a full proximity analysis to evaluate whether the evidence establishes a sufficiently "close and direct relationship". This requires the court to investigate and weigh the factors present in the relationship including the nature of the relationship, the parties' respective expectations, the defendant's "undertaking" (essentially, what the defendant has represented or assumed responsibility to do), the plaintiff's reliance on the representation or undertaking, and the parties' respective rights and obligations flowing from their relationship.

In the context of a negligent misrepresentation claim, expanding on its reasoning in *Livent*, the Supreme Court held that where the loss or harm claimed by the plaintiff reasonably flows from the defendant's failure to uphold its undertaking, and is within the scope of the undertaking, a duty of care may exist. Where the plaintiff's loss falls outside the nature and scope of the defendant's undertaking, there is insufficient proximity to ground a duty because it is unfair to impose a duty on the defendant for consequences that exceed, and do not flow from, the assumed responsibility. The scope of the proximate relationship may also limit the extent of any recoverable damages flowing from the relationship.

In the context of claims for the negligent supply of dangerous goods or structures, the Supreme Court revisited, restated and significantly limited, the scope and application of the principles first articulated in *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*[4], which

[4] [1995] 1 SCR 85.

recognized a duty of manufacturers, suppliers and builders to plaintiffs suffering pure economic loss from remediating dangerous defects in buildings and products. The Supreme Court clarified that in light of its refinement of the duty analysis in *Livent*, the court must always conduct a proximity analysis in evaluating whether a duty of care is owed under the principles in *Winnipeg Condominium*.

The Court's treatment of *Winnipeg Condominium* is a significant evolution of the law as it appears to increase the legal threshold required before a duty of care for the negligent supply of dangerous goods or structures may be found. For many years, lower courts in Canada have found a duty of care to exist based on *Winnipeg Condominium* using a fairly superficial categorical approach without conducting any controlling proximity analysis. The SCC made clear that a duty under *Winnipeg Condominium* only arises where there is an imminent risk of physical harm to the plaintiff or their property which would "unquestionably" cause serious injury or damage if unremediated. This is a much stricter standard than has generally been applied by lower courts.

The Supreme Court also settled a long outstanding question in Canadian product liability law by expressly rejecting the idea that manufacturers owe a duty of care in tort for pure economic loss caused by merely shoddy, as opposed to dangerous, goods. In the Court's view, claims relating to non-dangerous goods are more properly addressed through contract and sale of goods law. The Supreme Court also held that the *Winnipeg Condominium* principle applies generally to structures and will apply to products only where: (1) the product poses an imminent, real and substantial danger, and (2) that danger cannot be averted by simply abandoning the product, which the Court stated "is a high threshold that we do not anticipate will be regularly met." Further, even where such a duty is found to have been breached, the damages for pure economic loss are limited solely to the cost of averting the danger, not other consequential losses such as loss of profit or the purchase of replacement products. This may well be the most far-reaching aspect of the decision.

Applying its extensive review of the law respecting the duties of care arising from negligent misrepresentation and negligent supply of dangerous goods, the Court found that the plaintiffs' relationship with Maple Leaf was not analogous to previously recognized proximate relationships giving rise to a duty of care based on either negligent misrepresentation or the negligent supply of dangerous goods pursuant to *Winnipeg Condominium*. As a result, a full proximity analysis to determine whether a novel duty of care ought to be recognized was required. In applying the full proximity analysis, the Supreme Court found that no duty of care existed because Maple Leaf's "undertaking" was limited to supplying safe products to Mr. Sub customers and did not extend to protect the economic and reputational interests of franchisees. In the majority's view, the relationship between Maple Leaf and the franchises in the supply chain was not sufficiently direct or close to fairly impose on Maple Leaf the asserted tort duties. Rather, the relevant factors suggested that potential harm to the

reputational and commercial interests of the franchisees flowing from a supply chain disruption were risks better mitigated though the existing franchise agreements with Mr. Sub and insurance.

Looking Forward

The Supreme Court's reasoning in *Maple Leaf Foods* suggests a continuing trend by the Court to resist the expansion of tort duties. It also makes clear that the concept of proximity, and not foreseeability, will be the controlling factor in determining whether a new duty of care for pure economic loss claims ought to be recognized. The Court's discussion and application of the proximity analysis in this case indicates that plaintiffs seeking to advance new or expanded tort duties for claims of pure economic loss will need to have a compelling theory of proximity based on facts establishing how the relationship between the plaintiff and the defendant—and the rights, obligations, undertakings, expectations and reliance flowing from that relationship—creates the close and direct proximity necessary to ground a duty of care.

From its reasoning, the Supreme Court appears to be cognizant of the complex and interrelated nature of the modern commercial supply chain and, as a result, shows legitimate concern for the potential far reaching consequences of unpredictable and indeterminate tort liability cascading through the supply chain if tort duties grounding claims of pure economic loss between non-contracting parties are expanded. The Court's decision suggests that it views contract, and not tort, to be the more appropriate legal mechanism for indirectly related commercial parties to define and protect their commercial interests.

In light of this seeming trend of the Supreme Court to limit tort (and particularly pure economic loss) claims to previously recognized categories of proximate relationships found to give rise to a duty of care, it is recommended that parties in complex supply chain relationships carefully evaluate their risk exposure arising from foreseeable supply chain disruptions (e.g., the supply of defective goods or materials) and protect against the anticipated economic losses arising from such disruptions through contractual protections (e.g., indemnities from suppliers) and first party business interruption or business income loss insurance. While the Supreme Court has not foreclosed the recognition of novel tort duties allowing claims for pure economic loss, the current state of the law indicates that it will be very challenging for supply chain parties to expand the currently recognized tort duties. Canadian supply chain parties should adjust their contractual and insurance protections to reflect this reality.

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