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Chapter 6

CANADA

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I OVERVIEW

In Canada, the general measure of damages is the amount of money that would put the plaintiff in the position it would have been in but-for the defendant's wrongdoing.[2] In contract, that position is the position that the plaintiff would have occupied had the contract been performed. In tort, it is the position that the plaintiff would have been in had the wrong never occurred. A successful plaintiff may be awarded common law damages for both compensatory and non-compensatory loss. Depending on the circumstances, equitable damages may also be available in substitution for, or in some cases in addition to, common law damages.[3]

A loss or injury for which compensatory damages may be awarded can be classified as either pecuniary or non-pecuniary. A pecuniary loss is a loss suffered by the plaintiff 'concerning of or consisting of money'. Non-pecuniary loss, in contrast, is 'a broad category that covers elements such as "loss of enjoyment of life, esthetic prejudice, physical and psychological pain and suffering, inconvenience, loss of amenities and sexual prejudice"'.[4] There is no objective yardstick for translating non-pecuniary loss into monetary terms.

In contrast, non-compensatory damages are awarded to:

a punish or deter reprehensible conduct by defendants (punitive damages);
b express the court's disapproval of the winning party's conduct (contemptuous damages);
c give effect to a contractual agreement (liquidated damages); or
d strip a defendant of improper gains (disgorgement).

II QUANTIFICATION OF FINANCIAL LOSS

i Introduction

The quantification of financial loss is a factual exercise. Ultimately, the court must assess damages based on what is fair and reasonable in the circumstances. If calculated properly, the plaintiff will be 'made whole' by the award but will not receive a 'windfall'.

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2 S M Waddams, *The Law of Damages* (Toronto: Thompson Reuters, 2021) (loose-leaf, online version) at § 14:21. (*Law of Damages*).

3 Most common-law provinces have enacted a counterpart to Lord Cairns' Act: see, e.g., in Alberta, Judicature Act, RSA 2000, c J-2, s. 16.

4 *Cinar Corporation v. Robinson*, 2013 SCC 73 at paragraph 95 citing *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, (1996) 3 S.C.R. 211, at paragraph 63.

ii Evidence

Once liability is established, the onus rests on the plaintiff to prove its damages 'on a reasonable preponderance of credible evidence'.[5] The general rule is that damages that are uncertain, contingent and speculative in their nature cannot be made a basis of recovery. However, if damages claimed are proven on a balance of probabilities, the court is then obligated to do its best to assess the quantum based on the available evidence, even if mathematical exactitude is difficult or impossible. The inherent difficulty in assessing damages cannot relieve a wrongdoer from liability. The above principles are summarised by the Ontario Court of Appeal in *TMS Lighting Ltd v. KJS Transport Inc*:

> *(I)t is a well established principle that where damages in a particular case are by their inherent nature difficult to assess, the court must do the best it can in the circumstances. That is not to say however, that a litigant is relieved of his or her duty to prove the facts upon which the damages are estimated. The distinction drawn in the various authorities, as I see it, is that where the assessment is difficult because of the nature of the damage proved, the difficulty of assessment is no ground for refusing substantial damages even to the point of resorting to guess work. However, where the absence of evidence makes it impossible to assess damages, the litigant is entitled to nominal damages at best.*[6]

iii Date of assessment

Selecting the date of assessment upon which to calculate compensatory damages is a context-specific exercise driven by what is fair in the circumstances. The presumptive rule in Canadian law is that, absent cases where specific performance is made out, damages are generally assessed as at the date of the wrongdoing.[7]

The 'breach date rule' rests on the assumption that, were a plaintiff given the value of the goods or property lost on the date of the wrongdoing, the plaintiff could instantly mitigate its losses by purchasing substitute goods or property. Early crystallisation of the plaintiff's loss is seen to promote efficient behaviour and avoids the plaintiff speculating 'at the defendant's expense by reaping the benefits of an increase in the value of the goods in question without bearing any risk of loss'.[8]

The court may depart from the breach date rule in circumstances where assessment as at the date of the wrong would 'give rise to an injustice'.[9] These special circumstances include where the plaintiff would not have been able to mitigate its losses when the wrong occurred. In this case, damages are not said to have crystallised until the date on which the plaintiff first had the opportunity to mitigate its loss.[10]

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5 *TMS Lighting Ltd v. KJS Transport Inc*, 2014 ONCA 1 at paragraph 61 citing *Martin v. Goldfarb*, (1998) OJ No. 3403 (ONCA) at paragraph 75, leave to appeal (1998) SCCA No. 516, 1998 CanLII 4150 (ONCA) (TMS).

6 *TMS*, ibid. at paragraph 61.

7 *Rougemount Capital Inc v. Computer Associates International Inc*, 2016 ONCA 847 at paragraph 45.

8 *Kinbauri Gold Corp v. Iamgold International African Mining Gold Corp*, (2004) 246 DLR (4th) 595 at paragraph 125, 2004 Canlii 36051 (ONCA) (*Kinbauri*).

9 *Harle v. 101090442 Saskatchewan Ltd*, 2016 SKCA 66 at paragraph 39 citing *Semelhago v. Paramadevan*, (1996) 2 SCR 415 at paragraph 13, 1996 CanLII 209 (SCC).

10 H Pitch and R Synder, *Damages for Breach of Contract* (Toronto: Thompson Reuters, 2022) (loose-leaf online version) at § 13:4.

One such departure occurred in *Kinbauri Gold Corp v. Iamgold International African Mining Gold Corp*. In *Kinbauri*, the Ontario Court of Appeal was assessing damages for failure to deliver shares in accordance with a share purchase agreement. At the time of breach, there was no reasonable substitute in the market. The Court determined that Kinbauri's losses would not be crystallised until the plaintiff had a 'reasonable opportunity to go to into the market and replace the shares promised to it'.[11]

iv Financial projections

In Canada, damages are awarded on a 'once and for all' basis at the date of trial. In many circumstances, such as personal injury cases, losses are expected to continue into the future. Therefore, for the court to adequately assess damages, it must 'peer into the future' and fix damage the best it can.[12] Courts will often use financial projections, developed by experts, to aid in the assessment of future losses.

The method chosen for developing a financial projection is highly fact-dependant. For instance, where the loss is suffered by a corporation, a financial expert may determine the appropriate methodology by reviewing a corporation's financials and corporate documents, interviewing key employees, researching industry-specific factors and risks, applying factual and legal assumptions he or she has been asked to assume, and considering any practice standards put in place by organisations under which he or she is certified.

v Assumptions

Quantifying a but-for position necessarily requires assumptions. An expert opinion may include two kinds of assumptions.

The first type of assumption is a factual or legal assumption that is provided to the expert by counsel. Factual assumptions upon which an expert opinion is based must be proven 'before any weight at all can be given to an expert's opinion'.[13]

The second type of assumption is imposed by the expert to simplify or clarify the basis of the report. The degree to which this type of assumption can be made depends on the scope of the expert's report. Because a different set of assumptions could lead to an entirely different opinion, the assumptions used by an expert form a common topic for cross-examination.

vi Discount rates

In breach of contract cases, it is typical to apply a discount rate to future losses to reflect the time value of money.[14] The discount rate is typically regarded as a matter for expert evidence, and thus the setting of a discount rate is a question that is largely factual.

Canadian courts also apply discount rates to tort law damage awards for future cost of care and pecuniary losses to account for interest that successful plaintiffs will earn on the lump sum that they receive that they otherwise would not have earned.[15] This discount

11 *Kinbauri*, footnote 8 at paragraph 127.

12 *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at paragraph 21.

13 *R v. J-LJ*, 2000 SCC 51 at paragraph 59 (J-LJ).

14 *Trico Developments Corporation v. El Condor Developments Ltd*, 2020 ABCA 132, at paragraph 43.

15 *Law of Damages* at §3:18.

rate reflects the time value of money – the fact that a given sum of money is worth more now than in the future, based on the effects of interest, inflation and income taxes on the damage award.

Whether the tort discount rate is legislated or is determined by the court based on the evidence before it varies by jurisdiction. In some jurisdictions evidence may be led to rebut discount rates imposed by statute or regulation.[16] The table below sets out the legislated discount rates for tort damage awards (where they exist) in each province and territory.

Jurisdiction	Type of pecuniary loss	Statute or regulation	Discount rate
Alberta	N/A	N/A	No mandatory discount rate
British Columbia	Future cost of care	Law and Equity Regulation, BC Reg 352/81 Section 1(b)	2%
	Future wage loss	Law and Equity Regulation, BC Reg 352/81 Section 1(a)	1.5%
Manitoba	Future costs of care and wage loss	The Court of Queen's Bench Act CCSM c C280, Section 83(2)	3%
New Brunswick	Future pecuniary loss	Rules of Court, NB Reg. 83-72, Section 54.10(2)	2.5%
Newfoundland & Labrador	N/A	N/A	No mandatory discount rate
Northwest Territories	Future pecuniary loss	Judicature Act, RSNWT 1988, c J-1, Section 57(1)	2.5%
Nova Scotia	Future pecuniary loss other than future loss of business income	Nova Scotia Civil Procedure Rules, Royal Gaz 19 November 2008 Section 70.06(1)	2.5%
	Future loss of business income	Nova Scotia Civil Procedure Rules, Royal Gaz 19 November 2008 Section 70.06(2)	A party may prove a discount rate to be used in calculating the difference between estimated investment and price inflation rates for calculating the value of damages for future loss of business income
Nunavut	Future pecuniary loss	Judicature Act, CSNu, c J-10 Section 56(1)	2.5%
Ontario	Future pecuniary loss	Rules of Civil Procedure, RRO 1990 Reg 194 Section 53.09	For first 15 years (post-trial) the greater of the average of the value for the last Wednesday in each month of the real rate of interest on long-term Government of Canada real return bonds, monthly series, as published in the Bank of Canada's Weekly Financial Statistics for the period commencing on 1 March and ending on 31 August of the year before the year in which the trial begins, less 0.5% and rounded to the nearest 0.1%; and zero 2.5% for any period thereafter

16 For example, compare The Queen's Bench Rules, Sask Gaz 27 December 2013, 2684 s 9-21(1) (SK QB Rules) with The Court of Queen's Bench Act CCSM c C280, s 83(2) (COQBA).

Jurisdiction	Type of pecuniary loss	Statute or regulation	Discount rate
Prince Edward Island	Future pecuniary loss	Rules of Civil Procedure s. 53.09	2.5%
Quebec	Future loss of wages and earning capacity	Reg 1(1) under Civil Code of Quebec Article 1614	2%
	Other loss resulting from inflation	Reg 1(2) under Civil Code of Quebec Article 1614	3.25%
Saskatchewan	Future pecuniary loss	The Queen's Bench Rules, Sask Gaz 27 December 2013, 2684 Section 9-21(1)(b)	For first 15 years (post-trial) the greater of the average of the value for the last Wednesday in each month of the real rate of interest on long-term Government of Canada real return bonds, monthly series, as published in the Bank of Canada's Weekly Financial Statistics for the period commencing on 1 March and ending on 31 August of the year before the year in which the trial begins, less 0.5% and rounded to the nearest 0.1%; and zero 2.5% for any period thereafter
Yukon	N/A	N/A	No mandatory discount rate

vii Discount factors

Where a plaintiff has established wrongdoing, and has proven that the plaintiff would have had a reasonable chance or opportunity to achieve a benefit or avoid a loss had it not been for the defendant's wrongdoing, the plaintiff is entitled to damages for that lost opportunity. Because the probability of the plaintiff achieving a benefit is uncertain, the court can choose to apply a discount factor (as distinct from a discount rate) to the damages award relative to the probability that the benefit would have been earned or the loss successfully avoided.

The determination of an appropriate discount factor is an imprecise exercise based on the facts and circumstances of each case.[17] While the court is required to consider the risks that affect the probability that a benefit will be realised, a mechanistic or cumulative approach to the assessment of those risks has been rejected in favour of a holistic approach.[18] Generally, as the likelihood of the lost opportunity materialising decreases, the discount factor applied increases.

In cases where the court does not have sufficient evidence to evaluate the risks associated with obtaining the benefit, it may choose not to apply a discount factor.[19] The burden of providing that evidence rests on the defendant.

For example, in *Performance Industries Ltd v. Sylvan Lake Golf & Tennis Club Ltd*, the plaintiff claimed damages for lost profits for a planned residential development that was prevented by the defendant's breach of a land sale contract. The plaintiff led expert evidence

17 *Trillium Motor World Ltd v. General Motors of Canada Limited*, 2015 ONSC 3824, at paragraph 610 rev'd in part on other grounds, 2017 ONCA 544.

18 *Trillium Motor World Ltd v. Cassels Brock and Blackwell LLP*, 2017 ONCA 544 at paragraphs 263, 265 and 271.

19 *Performance Industries Ltd v. Sylvan Lake Golf & Tennis Club Ltd*, 2002 SCC 19 at paragraphs 74–76 (*Performance Industries*); *The Rosseau Group Inc v. 2528061 Ontario Inc*, 2022 ONSC 486 at paragraphs 340–341 (*Rosseau*).

regarding the scale of likely development and the cost and time required to complete it. The trial judge awarded damages for loss of profit without applying a discount factor. On appeal, the defendant argued that the trial judge ought to have applied a discount factor given the risks that the development may never have proceeded, including that the plaintiff lacked the financial resources to complete the project or could not have completed the project in the time required. The Supreme Court of Canada rejected this argument, citing the defendant's failure to provide any rebuttal evidence at trial to substantiate these risks.[20]

The recent decision of the British Columbia Court of Appeal in *Cellular Baby Cell Phones Accessories Specialist Ltd v. Fido Solutions Inc* underscores that the burden is on the defendant to prove, with evidence, that there are risks that should result in application of a discount factor:

> *In assessing quantum, the court is trying to determine a past hypothetical, not historical, situation. The situation is hypothetical and fraught with difficulties of proof because the conduct of the defendants have made it so. Therefore, once it has been proven on a balance of probabilities that it was the defendants' conduct which caused the plaintiffs' loss, any doubt should result in favour of the plaintiffs.*[21]

viii Currency conversion

The Federal Currency Act requires damage awards to be made in Canadian currency.[22] Disputes involving foreign currency can raise issues relating to fluctuations in relative currency values between the date of the breach, the commencement of the action, the date of judgment and the date of payment.

Currency conversion is treated differently across Canadian jurisdictions. In British Columbia, for example, statute stipulates that the last day before the day on which a payment on a judgment is made is the date for currency conversion.[23] However, courts have said that date only applies if the plaintiff would be 'most truly and exactly compensated if all or part of the money payable under the order is measured' in a foreign currency 'and converted to Canadian currency on the day before the payment of the judgment'.[24] Under the Ontario statute, the court is granted discretion to specify a different date if the judgment date would be inequitable to any party.[25]

Historically, Canadian courts held that the date of the breach was the correct date of assessment for currency conversion.[26] In the late 1970s, influenced by similar legal developments in England, the assessment date was changed to the date of payment.[27] Recent

20 *Performance Industries*, ibid., at paragraphs 74-76.

21 *Cellular Baby Cell Phones Accessories Specialist Ltd v. Fido Solutions Inc*, 2017 BCCA 50 at paragraph 68 citing *REC Holdings Co Ltd v. Thorne*, (1997) BCJ No. 1640 (BCSC) at paragraph 120, 1997 CanLII 4367 (BC SC).

22 Currency Act, RSC, 1985, c C-52, s 12.

23 Foreign Money Claims Act, RSBC 1996 (FMCA), c 155; Courts of Justice Act, RSO 1990, c C.43 s 121 (CJA).

24 *Han v. Cho*, 2009 BCSC 458 at paragraph 96, citing FMCA ibid. at s 1(1).

25 CJA, footnote 23 at s 121(3).

26 *Gatineau Power Co v. Crown Life Insurance Co*, (1945) SCR 655 at 658-659, 1945 CanLII 33 (SCC).

27 *Batavia Times Publishing Co v. Davis* (1978), 20 OR (2d) 437, 1978 CanLII 1721; see also *Zucchetti Rubinetteria SPA v. Natphil Inc*, 2011 ONSC 3845 at paragraph 11 and references therein; *Stevenson Estate v. Siewert*, 2000 ABCA 222 at paragraphs. 62-75 and references therein.

jurisprudence has tended to be more flexible in determining the assessment date to ensure that the successful plaintiff is not made to bear the risk of currency fluctuations, and that the defendant does not receive a windfall.[28] The British Columbia court has also considered the conduct of the defendant in determining whether to have the currency conversion date set on the date the judgment is issued, as opposed to the day before payment is due, as outlined in the BC statute. In *Wei v. Mei*, because of the defendant's dishonest conduct throughout the trial, the court concluded that the defendant was likely to attempt to delay payment of the judgment to a time when exchange rates were favourable to its position. To prevent this, the court fixed the currency conversion date as the date the judgment was issued, rather than a future date prior to payment.[29]

Naturex Inc v. United Naturals Inc provides an example of the courts shifting the assessment date to prevent the defendant from receiving a windfall. Between commencement of the action and the date of judgment, the Canadian dollar had declined relative to the US dollar, meaning the defendant would benefit, as fewer US dollars would be needed to pay the judgment.[30] To prevent this windfall for the defendant, the court chose the date of the commencement of the action as the most equitable date to set the exchange rate.[31]

In *Dow Chemical Canada ULC v. NOVA Chemicals Corporation*, a case of breach of contract and conversion that arose out of a joint venture to operate an ethylene plant, both parties agreed that the experts would present their damages calculations in US dollars.[32] Because a portion of the damages (the allocation damages) resulted from periodic breaches of the contract over 12 years, it was difficult for the court to fix a single conversion date for the damages that would be equitable.[33] To resolve this, the Alberta Court of Appeal chose to award damages based on a monthly or periodic update of the exchange rate over the period in which the allocation damages were incurred, and to convert the balance of the damages to Canadian currency as of the date of judgment.[34] This case exemplifies Canadian courts' broad discretion to set currency conversion dates in any way that achieves justice.

ix Interest on damages

Plaintiffs are awarded pre-judgment interest on damages in recognition of the time value of money. Because the plaintiff does not receive the award until long after the wrongdoing, it has been deprived of the use of that money in the interim. In all Canadian jurisdictions, a

28 *Kellogg Brown & Root Inc v. Aerotech Herman Nelson Inc et al*, 2004 MBCA 63 at paragraph 106; *Stevenson Estate v. Siewert*, 2001 ABCA 180 at paragraph 13; see Han, footnote 24 at paragraph 96.

29 *Wei v. Mei*, 2018 BCSC 1057 at paragraph 56, aff'd 2019 BCCA 114, leave to appeal refused 2019 CanLII 106996 (SCC).

30 *Naturex Inc v. United Naturals Inc*, 2016 BCSC 1502 at paragraph 21.

31 ibid.

32 *Dow Chemical Canada ULC v. NOVA Chemicals Corporation*, 2020 ABCA 320.

33 ibid. at paragraph 108.

34 ibid. at paragraph 110.

simple pre-judgment interest rate is set by statute.[35] However, many provincial statutes allow judicial discretion to vary the statutory rate, or to decline to award pre-judgment interest altogether, depending on what is fair in the circumstances.[36]

For example, in cases where the plaintiff is forced to borrow funds to replace money that has been wrongfully withheld, the court can award the rate at which the funds were borrowed even if that is higher than the statutory rate.[37]

In addition to statutory interest, Canadian courts have a common law discretion to award interest as a measure of damages. In *Bank of America Canada v. Mutual Trust Co*, the Supreme Court of Canada viewed this discretion as an important aspect of fully compensating successful plaintiffs, recognising that the value of a damage award depreciates over time.[38]

A court may also award compound interest on damages, as opposed to simple interest, pursuant to equitable principles or under common law. *Bank of America* provides that pre and post-judgment compound interest 'will generally be limited to breach of contract cases where there is evidence that the parties agreed, knew, or should have known, that the money which is the subject of the dispute would bear compound interest'.[39]

x Costs

In Canadian civil litigation the successful party is typically awarded at least a portion of its legal costs incurred in pursuing its claim.[40] As with many things, Canadian practice in this regard is sometimes viewed as a halfway point between English and American practice. Canadian courts seek to balance compensating the successful party for having to bear the costs of litigation when its conduct has not been wrongful against the potential chilling effect of deterring meritorious claims by making the consequences of losing too high. An apt description of this balancing act was provided in *Reese et al v. Alberta (Minister of Forestry and Wildlife) et al*,[41] and repeated in *McAllister v. Calgary (City)*:[42]

> *The Canadian practice [of awarding party and party costs] reflects an attempt to balance two conflicting interests. On the one hand, it is argued that if a party is successful and there are no circumstances constituting blameworthiness in the conduct of the litigation by that party, it is unfair to require the successful party to bear any costs incurred by his counsel in prosecuting or defending the action. On the other hand, it is argued that if the unsuccessful party is required to bear all the costs of*

35 (CAN) Federal Courts Act, RSC 1985, c F-7 (FCA); (BC) Court Order Interest Act, R.S.B.C. 1996, c. 79 (COIA); (AB) Judgment Interest Act, RSA 2000, c J-1 (JIA); (SK) Pre-judgment Interest Act, S.S. 1984-85-86, c. P-22.2 (PIA); (MB) COQBA, see footnote 16; (ON) Courts of Justice Act, R.S.O. 1990, c. C.43 (COJA); (NB) Judicature Act, R.S.N.B 1973, c J-2 (JA NB); (NS) Judicature Act, R.S.N.S. 1989, c.240 (JA NS); (PE) Judicature Act, R.S.P.E.I , 1988, cJ-2.1 (JA PE); (NL) Judgment Interest Act, R.S.N, 1990, c J-2 (JIA NL); (NT) Judicature Act, R.S.N.W.T. 1988, c J-1 (JA NT); (YK) Judicature Act, R.S.Y. 2002, c 128 (JA YK).

36 FCA at s. 36(2); COIA at s. 8; JIA at s. 2(3); PIA at s. 5(3);COQBA at s.81; COJA at s. 130; JA NB at s. 46; JA NS at s. 41(i) & (k); JA PE at s. 57 & 59; JIA NL at s. 3(3); JA NT at s.56.2; JA YK at s. 35(7).

37 *Clarke v. Bean*, 2009 ABQB 755 aff'd 2010 ABCA 201.

38 *Bank of America Canada v. Mutual Trust Co*, 2002 SCC 43 (Bank of America).

39 ibid. at paragraph 55.

40 Mark M Orkin, Robert G Schipper, *Orkin on the Law of Costs*, (Toronto: Thompson Reuters, 2022) (release 2022-4), at § 1:1. History (*Orkin*).

41 1992 CanLII 2825 (AB KB).

42 2021 ABCA 25 at paragraph 38.

the successful party, citizens will be unduly hesitant to sue to assert their rights (even valid ones) or to defend their rights when sued. The partial indemnity practice as it exists in Canada is a compromise intended to give some scope in practice for each of the conflicting policy considerations.

In all Canadian jurisdictions, costs are awarded at the discretion of the courts.[43] Most jurisdictions also have cost and tariff grids for the courts to use as a guideline for determining cost awards.[44] However, because cost awards must be fair and reasonable in the circumstances, and because in some jurisdictions the cost grids are updated infrequently, courts have very broad discretion to depart from the grid.[45]

Costs are typically awarded on a partial indemnity scale, in the range of 55 to 66 per cent of the full costs.[46] Courts may award substantial indemnity costs, which are higher than partial indemnity costs, as a way of censuring a party for engaging in conduct that has wasted time and court resources.[47] Most courts have, either by formal rule or in principles developed through the common law, a series of criteria for increased costs to chastise a litigant for reprehensible behaviour, such as making unfounded allegations of fraud or dishonesty, or pursuing a meritless claim while being reckless with regard to the truth.[48] Full indemnity

43 (CAN) FCA, footnote 35; (CAN) Supreme Court Act, R.S.C. 1985, c. S-26, s 47; (AB) Court of Queen's Bench Act, R.S.A. 2000, c. C-31, s 21; (BC) Supreme Court Act, R.S.B.C. 1996, c. 443 s 3; (MB) COQBA, footnote 16 at s 96(1); (NB) JA NB, footnote 35 at s 26(3); (NL) Judicature Act, R.S.N.L. 1990, c. J-4, s 53(1); (NS) JA NS, footnote 35 s 4; (ON) COJA, footnote 35 at s 131(1); (PE) JA PE, footnote 35 s 60(1); (SK) Queen's Bench Act, 1998, S.S. 1998, c. Q-1.01, s.81(1); (NT) JA NT, footnote 35 at ss 2, 9; (NU) Judicature Act, S.N.W.T. (Nu.) 1998, c. 34 s 1, ss 2, 15; (YT) JA YK, footnote 35 at s 12.

44 (CAN) Federal Courts Rules, SOR/98-106, Tariff B (FC Rules); (AB) Alberta Rules of Court, Alta. Reg. 124/2010, Schedule C (AB Rules); (BC) Supreme Court Civil Rules, BC Reg 168/2009, Appendix B (BC SC Rules); (MB) Court of Queen's Bench Rules, Man Reg 553/88, Tariff A (MB QB Rules) (NB) Rules of Court, N.B. Reg. 82-73, Tariffs A-D (NB Rules); (NL) Rules of the Supreme Court, 1986, S.N.L. 1986, c. 42, Sch. D, R. 55 Appendix - Scale of Costs (Rule 55) (NL SC Rules); (NT/NU) ; (NT) Rules of the Supreme Court of the Northwest Territories, N.W.T. Reg. 010-96, Schedule A (NT SC Rules; (NS) Nova Scotia Civil Procedure Rules, Royal Gaz. 19 November 2008, Tariffs A-F (NS Rules); (NU) Rules of the Supreme Court of the Northwest Territories, NWT Reg (Nu) 010-96, Schedule A (NU Rules) - note, despite the name these are the rules of the Nunavut Court of Justice, although they are derived from the NT SC Rules; (ON) Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Tariff A (ON Rules); (SK) SK QB, footnote 16 at Tariff Schedule I; Rules of Court, YOIC 2022/168, Appendix B (YT Rules). Prince Edward Island does not have a strict costs grid. Rule 57 of the *Prince Edward Island Rules of Civil Procedure* (PE Rules), which are based on the ON Rules, sets out factors for the court to consider in determining costs. However, the fundamental factor in determining a costs award is the reasonable expectations of the parties, as set out in *Jay v. DHL*, 2009 PECA 11 at paragraph 8.

45 *Boucher v. Public Accountants Council for the Province of Ontario*, 2004 CanLII 145793, 71 OR (3d) 291 (ONCA) at paragraphs 24, 26 citing ON Rules, ibid. at s 57.01 (1).

46 *Inter-Leasing, Inc v. The Minister of Revenue*, 2014 ONCA 683, at paragraph 5, leave to appeal refused 2015 CanLII 10580 (SCC); *James v. Chedli*, 2020 ONSC 4199 at paragraphs 8–14.

47 See, *Banihashem-Bakhtiari v. Axes Investments Inc*, (2004) OJ No. 302 (ONCA), 2004 CanLII 59969 (ON CA), leave to appeal to SCC refused, [2004] SCCA No 145.

48 *Mayer v. Osborne Contracting Ltd*, 2011 BCSC 914 at paragraphs 8–11.

costs may be awarded when the parties have agreed to them (typically in a contract), or in situations where the court wishes to sanction truly egregious behaviour that is 'reprehensible, scandalous or outrageous'.[49]

There are also cost rules to encourage parties to reach a settlement.[50] Where one party has made an offer to settle that has been rejected, and the court ultimately awards damages of an amount equal to or less than the settlement offer, the offering party is entitled to an enhanced award of costs.[51] For example, in Alberta, the offering party is entitled to double its costs for all actions taken subsequent to service of the offer (the defendant is also entitled to double costs if the action is dismissed after service of the offer), whereas in Ontario the offering party receives partial indemnity costs up to the date of the offer, and substantial indemnity costs from the offer date onward.[52] How far in advance of the trial date an offer must be made for these rules to apply and how long such an offer must be left open for acceptance vary by jurisdiction.[53]

In exceptional cases, the court can award advance costs – in substance, an order requiring the defendant to fund the plaintiff's claim.[54] Such orders are rare and exceptional, and typically would only be justified where there is some fiduciary or other special relationship between the parties.

Canadian courts also typically permit lawyers to take claims on a contingency basis, where the lawyer's fee is charged as a percentage of the ultimate recovery. Such agreements must be fair and reasonable to the client and are typically subject to judicial oversight and, sometimes, to judicial revision. In addition, Canadian courts have recently begun to view third-party litigation funding more favourably. A recent Supreme Court of Canada decision, while not deciding the question directly, is widely regarded as putting to rest the courts' former scepticism (or sometimes prohibition) of such arrangements.[55]

49 *Rompsen Investment Corp v. 6711162 Canada Inc,* 2014 ONSC 3480; *Hamilton v. Open Window Bakery Ltd*, 2004 SCC 9 at paragraph 26.

50 FC Rules, footnote 42 at r. 420; (AB) AB Rules, footnote 42 at r. 4.29; (BC) BC SC Rules, footnote 42 at r. 9-1(5) ; (MB) MB QB Rules, footnote 42 at r. 49.10; (NB) NB Rules, footnote 42 at r. 49.09; (NL) NL SC Rules, footnote 42 at r. 20A.08; (NT) NT SC Rules, footnote 42 at r. 201; (NS) NS Rules, footnote 42 at r. 10.09; (NU) NU Rules, footnote 42 at r. 201; (ON) ON Rules, footnote 42 at r. 49.10; (PE) PE Rules, footnote 42, r. 49.10; (SK) SK QB Rules, footnote 16, r. 4-31; YT Rules, footnote 42 at r.39(24-28).

51 *Orkin*, footnote 40 at §2:100. Failure to Accept Offer.

52 AB Rules, footnote 42 at r. 4.29(1)(3); ON Rules, footnote 42 at r. 49.10(1), 49.10(2).

53 For example, in Alberta the double costs rule does not apply to formal offers to settle made less than 10 days before the scheduled start of the trial (AB Rules, footnote 42 at r. 4.29(4)(c)), whereas in Ontario the date is at least seven days before the commencement of the hearing (ON Rules, footnote 42 at r. 49.10(1)(a)).

54 *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, (2003) 3 SCR 371.

55 9354-9186 *Quebec Inc v. Callidus Capital Corp* 2020 SCC 10.

xi Taxation issues

Quantification of the damages award

Canadian courts are deferential to Parliament and the provincial legislatures on the question of how to tax damage awards.[56] As such, in Canadian law there are no deductions for income tax from the quantum of awards that are compensation for lost taxable income, earnings or profits.[57] The judgment-debtor must pay the full pre-tax amount to the judgment-creditor, who is then responsible for any tax liability on the award under the Income Tax Act.[58]

Tax benefits may reduce damage awards in certain limited circumstances where the plaintiff receives a tax benefit only as a result of the defendant's breach.[59] These tax benefits must be quantifiable, and not merely speculative or hypothetical, in order to reduce a damage award.[60]

In *Lilly v. Apotex Inc*, a patent infringement case, the Federal Court declined to adjust the damage award for income tax even though the Court accepted that the plaintiff would have paid tax had it been able to earn the foregone profits.[61] The Court found that any tax adjustment would be based on speculation, as no evidence had been adduced by either side regarding the plaintiff's tax rates or potential rebates.[62] The defendant bore the burden of proving what the tax consequences would have been, and had failed to do so.[63]

Taxation of the damages award

Once a damages award has been paid out to the successful plaintiff, how it will be taxed will generally depend on what the award is meant to compensate for.[64] If the award is in compensation for lost office, employment, business or property income, it will likely give rise to tax liability.[65] Compensation awards for lost profits, finder's fees, and arrears on disability insurance benefits have also all been held to be taxable as income.[66] Awards for damaged or destroyed property will be treated on account of capital as if the property had been sold, and may give rise to a taxable capital gain.[67]

Personal injury damage awards are not taxable as income.[68] Even where the amount has been quantified with reference to loss of earning capacity on the part of the injured plaintiff,

56 *The Queen in Right of Ontario v. Jennings*, (1966) SCR 532 at 545–546, 996 CarswellOnt 61; *Cunningham v. Wheeler*, (1994) l SCR 359 at 417-18, 1994 CanLII 120 (*Cunningham*).

57 ibid.

58 Income Tax Act, RSC 1985, c 1 (5th Supp) (ITA).

59 *Hodgkinson v. Simms*, (1994) 3 SCR 377, at pp. 442, 443.

60 ibid.

61 *Lilly v. Apotex Inc*, 2019 FC 1463, aff'd 2021 FCA 149, leave to appeal to SCC refused, 39851 (10 March 2022).

62 ibid. at paragraph 77.

63 ibid. at paragraph 79.

64 ITA, footnote 56 at s 3; *Schwartz v. Canada*. (1996) 1 SCR 254 at paragraph 50-52, 1996 CanLII 217.

65 Canada Revenue Agency, Interpretation Bulletin IT-365R2, 'Damages, Settlements and Similar Receipts': https://www.canada.ca/ en/ revenue-agency/ services/forms-publications/publications/it365r2/ archived-damages-settlements-similar-receipts.html (Bulletin IT-365R2).

66 *Charles R Bell Ltd v. R*, (1992) 2 CTC 260 (FCA); leave to appeal refused (1993), 156 NR 239n (SCC); *Manley v. R*, (1985) 1 CTC 186 (FCA); leave to appeal refused (1986), 67 NR 400 (note) (SCC); *Tsiaprailis v. Canada*, 2005 SCC 8.

67 ibid.

68 Bulletin IT-365R2, footnote 63.

all awards under the head of pecuniary special or general damages will not be taxed.[69] Punitive damage awards are also considered as non-taxable windfalls.[70] From the perspective of the party paying the damage award, fines and penalties are not tax-deductible.[71] Other amounts might be deductible depending on their nature.

xii Damages elections

The manner in which a plaintiff frames its damage claim can have a profound effect on recovery. One example is in the recovery of damages for breach of contract. Recovery of contract damages is generally limited to reasonably foreseeable consequences of the breach, which includes damage arising from special circumstances known to both parties at the time of contracting. This is sometimes thought of as limiting damage to the four corners of the contract. An arguable exception to this rule arises when, after part performance, the innocent party accepts the other party's anticipatory breach as a repudiation of the contract, bringing the contract to an end and crystallising the right to sue for damages. Some cases accept the idea that in this scenario, the contract ceases to exist, entitling the plaintiff to elect between general contract damages and *quantum meruit* damages.[72] (A claim for *quantum meruit* damages is a restitutionary claim, made on the basis that there is no contract at all.[73]) While such a claim seems consistent with the notion that the contract falls away when the innocent party accepts the other's repudiation, it can give rise to damage awards that are fundamentally inconsistent with long-accepted principles of contract damages.

When the market value of the work performed up to the date of termination is greater than what would be owing under the contract, it is beneficial for an innocent party to elect *quantum meruit* damages as opposed to traditional contract damages. This could have the effect of putting the innocent party in a better position by virtue of the breach than it would have been in had the contract been performed, which is inconsistent with the general goal of contract damage awards.

Although not yet explicitly accepted in Canadian jurisprudence, the concept of a contractual ceiling, under which *quantum meruit* damages cannot exceed the contract price, is gaining support. It has been recognised in the United Kingdom[74] and in the American Law Institute's *Restatement of the (Third) Law, Restitution and Unjust Enrichment* (2010), which states that '(p)erformance based damages are measured by . . . (b) the market value of the plaintiff's uncompensated contractual performance, not exceeding the price of such performance as determined by reference to the parties' agreement'.[75] The idea of a contractual ceiling was also discussed in a 2019 High Court of Australia decision, *Mann v. Paterson Constructions Pty Ltd*.[76] Here, the majority of the High Court held that the value of a *quantum meruit* award should generally not exceed the portion of the overall contract price that is

69 ibid.

70 *Bellingham v. R*, (1996) 1 CTC 187 at paragraphs 2, 42, 1995 CarswellNat 881 (FCA).

71 ITA, footnote 56 at s 67.6.

72 See e.g., *Morrison-Knudsen Company Inc v. British Columbia Hydro and Power Authority* (1978), 85 DLR (3d) 186 at 224 and 227 (BC CA).

73 S Furst and V Ramsey, *Keating on Construction Contracts*, 11th ed (Toronto: Thomson Reuters, 2021) at 4-031.

74 *Taylor v. Motability Finance Ltd* (2004) EWHC 2619 (Comm); *Beneditti v. Sawiris*, (2013) UKSC 50.

75 *Restatement of the Law Third, Restitution and Unjust Enrichment*, (St Paul, Minn: American Law Institute Publishers, 2011) at § 38.

76 *Mann v. Paterson Constructions Pty Ltd*, (2019) HCA 32.

attributable to the work.[77] However, the Court left open the possibility that the innocent party could recover *quantum meruit* compensation in excess of the contract price in cases where it would be 'unconscionable to confine the plaintiff to the contractual measure'. It remains to be seen whether Canadian courts will apply these principles to similarly limit *quantum meruit* claims that exceed contract damages.

III EXPERT EVIDENCE

i Introduction

As a general rule, witnesses appearing before a court can only testify to facts as perceived and not to inferences or opinions drawn from those facts. There are exceptions to this general rule, including the admissibility of opinion evidence from an expert witness who has been shown to possess a 'special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify'.[78]

ii The role of expert evidence in calculation of damages

The purpose of expert evidence is to 'assist the trier of fact by providing special knowledge that the ordinary person would not know'.[79] In cases where visualising the but-for scenario requires financial modelling, parties to the litigation are likely to retain their own experts to model that scenario. Although most provinces and territories give the court the power to appoint its own expert, the court rarely exercises this power.[80]

iii The court's role in excluding and managing expert evidence

The test for admissibility of expert evidence is rooted in the Supreme Court of Canada's decision in *R v. Mohan*, as modified by *White Burgess* and *R v. Abbey*.[81] At the first stage, the court must consider the four Mohan criteria:

a relevance;
b necessity in assisting the trier of fact;
c absence of any exclusionary rule; and
d a properly qualified expert.[82]

77 ibid. at paragraphs 91, 101-102, 105 (Gageler J) and 176, 179, 215 (Nettle et al).

78 *R v. Mohan*, (1994) 2 SCR 9 (*Mohan*).

79 *J-LJ*, footnote 13 at paragraph 56.

80 (CAN) FC Rules, footnote 42 at r. 52; (AB) AB Rules, footnote 42 at r. 6.40; (BC) BC SC Rules, footnote 42 at r. 11-5(1); (MB) MB QB Rules, footnote 42 at r. 52.03(1); (NB) NB Rules, footnote 42 at r. 54.03; (NL) NL SC Rules, footnote 42 at r. 35.01; (NT) NT SC Rules, footnote 42 at r. 278.12(2) (note: in the NT the Court can chose an expert if the parties have agreed to appoint a single joint expert to provide evidence on a particular issue, but cannot agree who to select. The Court does not have a general power to call its own experts); (NS) NS Rules, footnote 42 at r. 55.12; (NU) NU Rules footnote 42 at r. 278.12(2); see note above on NT SC Rules; (ON) ON Rules, footnote 42 at r. 52.03(1); (PE) PE Rules, footnote 42 at r. 52.03; (QU) Que., Code of Civil Procedure, art. 234; (YT) YT Rules, footnote 42 at r. 33. Sask. has no explicit rule, but r. 6-29(1)(a) (SK QB Rules, footnote 16) permits the court to call any witness 'if the Court considers it necessary for the purposes of justice'.

81 *Mohan*, footnote 76; *White Burgess Langille Inman v. Abbott and Haliburton Co*, 2015 SCC 23 (*White Burgess*); *R v. Abbey*, 2017 ONCA 640 (*Abbey*).

82 *Mohan*, ibid. at p. 20.

If all four criteria are not met, the evidence is inadmissible.

At the second stage, the court exercises its gatekeeper role by balancing the probative value of the evidence against its potential prejudicial effects considering such factors as legal relevance, necessity, reliability and absence of bias.[83]

iv Independence of experts

Expert witnesses have a duty to the court to provide fair, objective and non-partisan evidence. The independence of an expert is tested at the threshold stage, at the admissibility stage and as a matter of weight. Many provinces and territories have instituted additional requirements in relation to the independence of expert witnesses.[84]

At the threshold stage, the court asks 'whether the expert's lack of independence renders him or her incapable of giving an impartial opinion in the specific circumstances of the case'.[85] If an expert recognises his or her duty to the court, independence will be assumed at this stage, unless the opposing party shows 'a realistic concern that the expert's evidence should not be received because the expert is unable and/or unwilling to comply with (the) duty'.[86] Anything less than clear unwillingness or inability to provide the court with a fair and objective opinion will not lead to exclusion, but will be taken into account at the gatekeeper stage.

At the gatekeeper stage, the court must consider whether the probative value of the expert's evidence outweighs the prejudicial effect of its admission. An expert can be excluded where the proposed expert:

a has a direct financial interest in the outcome of the litigation;
b has a close familial relationship with one of the parties;
c will probably incur professional liability if his or her opinion is not accepted by the court; or
d has assumed the role of advocate for a party.[87]

The apprehension of bias is not a sufficient reason to disqualify an expert from testifying although it may considered at the weight stage.

Once an expert is admitted, independence is further considered as a matter of weight. The fact that experts are retained, instructed and paid by counsel does not, in itself, 'undermine the expert's independence, impartiality and freedom of bias'.[88]

v Challenging experts' credentials

For a party to adduce opinion evidence, the party must show that the person offering the opinion has acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify.[89]

83 *Abbey*, footnote 79 at paragraph 48.
84 BC SC Rules, footnote 42 at r 11-2(1); ON Rules, footnote 42 at r 4.1.01(1); NS Rules, footnote 42 at r 55.04(1) (a), (b) and (c); PE Rules, footnote 42 at r. 4.1.01(1), 53.03(3)(g); SK QB Rules, footnote 16 at r 5-37; YT Rules, footnote 42 at r 33(3), 34(23).
85 *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 at paragraph 106.
86 *White Burgess*, footnote 79 at paragraph 48.
87 ibid. at paragraph 49.
88 ibid. at paragraph 32.
89 *Mohan*, footnote 76 at 25.

In practice, the assessment of an expert's credentials is largely addressed as a matter of weight, rather than admissibility. In assessing weight, the court will consider an expert's accomplishments, experience and peer recognition, the focus of study within a particular field, and the manner of presenting his or her evidence.[90] The fact that another person may have been more qualified to testify on a particular topic may also be considered as a matter of weight.[91]

While it is the trial judge's duty to monitor and enforce the proper scope of the testimony, if the expert provides evidence that goes beyond what he or she is qualified to speak on, or speaks on a subject matter that goes beyond his or her expertise, opposing counsel should object.[92]

vi Novel science and methods

Expert opinions based on novel scientific techniques and evidence are subject to the same admissibility criteria as other expert evidence. However, novel scientific methods are also subject to additional scrutiny to ensure that they are reliable enough to guide the court's decision-making.[93] Canadian courts have adopted a number of the factors outlined in *Daubert v. Merrell Dow Pharmaceuticals Inc*, a United States Supreme Court case, to guide their evaluation of the soundness and reliability of novel scientific methods.[94] The relevant factors are:

a whether the theory or technique can be and has been tested;
b whether the theory or technique has been subjected to peer review and publication;
c the known or potential rate of error or the existence of standards; and
d whether the theory or technique used has been generally accepted.[95]

This last factor in particular must strike an important balance – as science is constantly advancing, there will inevitably be some lag time between the development of new methods and their widespread application, and courts need not wait for a technique to become widely established before relying on it.[96] However, where a technique is known to the scientific community but has attracted only minimal support, it 'may properly be viewed with skepticism'.[97] Nonetheless, broad acceptance is only one of several criteria to be applied flexibly on a case-by-case basis.[98]

90 Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 6th ed, (Toronto: LexisNexis Canada Inc, 2022) at ¶12.102 (Sopinka).

91 *McLean (Litigation Guardian of) v. Seisel*, 2004 CarswellOnt 200 (ONCA) at paragraph 110 citing *R v. Wade*, (1994) OJ No. 543 (ONCA).

92 Sopinka, footnote 88 at ¶12.107.

93 ibid. at paragraph 28.

94 *J-LJ*, footnote 13 at paragraphs 33-34, citing *Daubert v. Merrell Dow Pharmaceuticals Inc*, (1993) 509 US 579 at 593–594.

95 ibid.

96 ibid.

97 ibid.

98 ibid.

vii Oral and written submissions

As a matter of procedural fairness, Canadian litigants are entitled to make submissions or argument to the court before it renders a decision. This includes argument on the methodology to determine damages and their quantum. The timing and form of such submissions are in the discretion of the court. In significant cases, it is common for the court to receive both oral and written submissions after the conclusion of the trial evidence. The parties are also commonly permitted to make opening statements before the evidence begins. The defendant typically can elect to make either an opening statement immediately after the plaintiff or to defer the opening statement to the beginning of the defendant's presentation of its evidence.

IV RECENT CASE LAW

i Maple Leaf Foods Inc v. Ryanview Farms, 2022 ONCA 532

In July 2022, the Ontario Court of Appeal, in an appeal from a retrial on damages, reaffirmed that fairness is at the core of setting the damages assessment date and hindsight evidence could be used to determine 'the estimated loss directly and naturally resulting in the ordinary course of events from the breach of warranty' under the Sale of Goods Act.

The facts of the case

In 2004 and 2005, Ryanview Farms contracted with Maple Leaf Foods Inc to breed pigs (gilts) and boars for Ryanview based on Maple Leaf's representation that the gilts would produce healthy segregated early weaners (SEWs).

In anticipation of the SEWs that would be produced from the Maple Leaf pigs, Ryanview entered into a new contract with a third party to sell them 550 SEWs per week. However, Maple Leaf delivered the gilts late and they were infected with a respiratory illness that infected the entire herd and rendered Ryanview incapable of fulfilling the third party contract.

Maple Leaf delivered replacement animals in November 2006 (some of which arrived infected), and between April and July 2007. In November 2007, an unrelated outbreak of porcine reproductive and respiratory syndrome virus (PRRSV) occurred, which affected many of Ryanview's gilts. At this time the market for SEWs was also declining, as piglets became more expensive to raise than they could be sold for.

At some point, disagreement developed between Ryanview and Maple Leaf over the number of, and terms on which, replacement animals were to be provided to Ryanview. Maple Leaf delivered invoices that Ryanview did not pay. As a result, Maple Leaf sued Ryanview for unpaid invoices, and Ryanview counterclaimed for damages for lost production due to the unsatisfactory quality of the Maple Leaf gilts.

At trial, the trial judge accepted that Maple Leaf agreed to provide the replacement gilts for free and dismissed the claim. Regarding the counter-claim, the trial judge found that although Maple Leaf breached the implied warranty of fitness under Section 15 of the Sale of Goods Act[99] by delivering diseased animals, Ryanview had failed to prove that it suffered damages as a result of the breach.

99 R.S.O 1990, c. S.1.

On appeal, a new trial was ordered to address:

a the assessment of damages for Maple Leaf's breach of implied warranty; and

b the number of replacement animals promised to Ryanview, and the impact, if any, of that determination on any amount owing to Ryanview (and potentially on the calculation of damages).

The new trial judge assessed damages as at the date of trial and used hindsight evidence to conclude that the 2007 onset of PRRSV was a negative factor that made it impossible for Ryanview to continue SEW production past a certain point. Ryanview was awarded C$564,324.42 in damages on this basis.

Ryanview appealed, arguing, inter alia, that the trial judge erred by:

a failing to assess damages as of the date of the breach;

b erroneously considering hindsight evidence of PRRSV outbreaks; and

c wrongly assessing the loss period between 1 January 2007 and 30 November 2007.

The decision

The Ontario Court of Appeal considered the first and second arguments together. While acknowledging the presumptive date for assessment of damages in contract law is the date of the breach, the Court held that this presumption could be displaced, in special circumstances, where an assessment of damages at the date of breach would not fairly reflect the party's loss.

In this case, damages were being awarded pursuant to the Sale of Goods Act, and Section 51(2) of the Act explicitly prescribes that the measure of damages for breach of warranty is 'the estimated loss directly and naturally resulting in the ordinary course of events from the breach of warranty'. After reviewing the date of assessment jurisprudence and Section 51(2), the Court held that to determine which of Ryanview's losses were direct and natural consequences, it was necessary to consider the events that followed the breach.

There were significant post-breach circumstances, including outbreaks of PRRSV unrelated to the infections that the gilts were suffering from when delivered and a significant decline in the market for SEWs. The Court of Appeal held that failure to consider these intervening events 'would not be just in the circumstances and risks burdening the respondent with more than its fair share of liability'. As a result, the Court dismissed these grounds of appeal.

However, the Court found the trial judge had misapprehended an expert report and incorrectly subtracted C$139,859 from the total lost profits of C$283,678 on the mistaken understanding that the former figure was the actual revenue earned and that the latter was projected revenue. However, in fact, the C$283,678 figure was the calculated difference between projected revenue (of C$363,204) and estimated revenue earned (of C$143,442), plus excess feed and veterinary expenses flowing from the breach (of C$63,916). The C$139,859 figure was simply the portion of the lost profits attributable to selling at below market price. As such, it was an error for the trial judge to reduce the lost profits award by C$139,859.

The significance of the decision

Maple Leaf Foods highlights the importance of contextual factors and the interplay between common law principles and statutes in determining the assessment date for a damages award. The case reaffirms the principle laid out in *Rougemount* and *Kinbauri* that fairness is at the core of setting the assessment date. It also highlights the need to carefully consider what the

parties might have contemplated as reasonably foreseeable consequences of a breach in light of the actual events when assessing damages for breach of warranty, particularly given the wording of Section 51(2) of the Ontario Sale of Goods Act. Finally, the case highlights the importance of clear expert witness reports to avoid confusion in assessing damages.

ii Luminary Holding Corp v. Fyfe, 2022 BCCA 185

In May 2022, the British Columbia Court of Appeal affirmed a controversial lower court decision awarding both damages for lost profits and wasted costs incurred in pursuit of those profits.

The facts of the case

The plaintiffs purchased a property on which they planned to build a single building to act as an executive retreat and a residence (Plan A).

At the time of purchase, the listing real estate agent was aware that the Agricultural Land Commission was conducting an agricultural land reserve (ALR) boundary review that proposed to add the property to the ALR. (The Agricultural Land Reserve is a statutory area in which development is restricted.) The realtor did not disclose the boundary review to the Plaintiffs. Had they been aware of the boundary review, the plaintiffs could have opted out of the property's inclusion in the ALR.

Shortly after the plaintiffs bought the property, the entire property was added to the ALR. The new ALR designation prevented the respondents from developing the property without obtaining an exemption. Owing to restrictions on land use in the ALR, the respondents were unable to obtain the permits necessary to complete Plan A and had to divide the development project into two smaller buildings (Plan B), which lowered the projected profits of the development.

The respondents sued the listing agent and a related real estate corporation and brokerage in negligence, claiming damages for out of pocket expenses for developing Plan A, increased capital costs as a result of having to shift from Plan A to Plan B and lost profits, all totalling more than C$2.6 million.

The trial judge found that the listing agent breached his duties by not telling the plaintiffs about the boundary review and the ability to opt out, and found that had the agent not breached his duties, they would have been able to pursue Plan A for the property by having the seller of the property opt out of the ALR inclusion or by exercising that option themselves after the purchase closed.

As a result of the breach, the trial judge awarded the following damages:

a C$572,240 in thrown away expenses for the failed development of Plan A;

b C$279,014 in added capital costs incurred as a result of having to shift from Plan A to Plan B;

c C$675,277 in lost profits; and

d C$9,649 in consultant fees.

The defendants appealed the trial court decision on several grounds, including that the trial judge had erroneously awarded expenses thrown away on Plan A and lost profits, which they said resulted in double recovery.

The decision

The British Columbia Court of Appeal affirmed the trial judge's decision to award expenses thrown away in addition to damages for lost profits from developing Plan A chiefly because:

a the defendants did not argue at the trial that if the judge awarded Plan A expenses and lost profits, it would result in double recovery;

b the damage award attracted 'significant deference', which could not be altered unless there was 'no evidence in support of the judge's conclusion, the judge assessed damages applying a mistaken or wrong principle, or the result reached was wholly erroneous'; and

c the trial judge's factual findings and analytical approach were found to accord with the legal principles that a plaintiff is entitled to reliance damages to 'put the injured party in the position it would have been in had the tort not been committed' but is entitled to recover 'only those expenses that are truly wasted'.

The trial judge found as a fact that the plaintiffs incurred C$572,240 in design, engineering and planning costs in respect of Plan A. The Court of Appeal found that there was no room for overlap between expenses thrown away and damages for lost profitability, the implicit premise being that the plaintiffs would not have incurred these costs if they had known of the property's inclusion in the ALR.

The significance of the decision

The *Luminary Holding Group* decision has been criticised as antithetical to the governing principle of damages assessment: to place the innocent party in as good a position as he or she would have been in if the contract had been performed.[100] However, for the appellants' breach, the respondents would have developed the property in accordance with Plan A and would have incurred the costs of doing so. Therefore, by awarding the costs of Plan A in addition to lost profits, the Court put the plaintiffs in a better position than they would have been had the tort not been committed.

Luminary Holding Group highlights the complexity of assessing damages in a hypothetical but-for world and the significant deference afforded by appellate courts to a trial judge's damages findings.

100 James Parker & Allison McMahon, *Luminary Decision Muddies the Law on Damages in Tort for Lost Profits* (13 July 2023), online (Lexpert): Business of Law <https://www.lexpert.ca/legal-insights/luminary-decision-muddies-the-law-on-damages-in-tort-for-lost-profits/377539>.

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