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Fraud: Where to Begin – Part II

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Fraud: The Related Causes of Action

In our introductory bulletin, we explored the tort of civil fraud and examined its constituent elements. We also considered the doctrine of equitable fraud which “does not necessarily connote dishonesty” and is, therefore, “less odious than common law fraud.”¹

The objective of this second bulletin is to explore some of the other causes of action that can be (and often are) pled in conjunction with a claim for civil fraud, including conversion, conspiracy and bribery. The appropriateness of each cause of action depends on the specific facts and circumstances of the particular case.

Although they are often interrelated, the various causes of action associated with a fraud claim require separate findings in accordance with the law that governs each of them. It is an error for a court to lump them together and treat them as one.²

Conversion

The tort of conversion involves the wrongful interference with the goods of another, such as taking, using or destroying those goods in a manner inconsistent with the owner’s right of possession.³ The crux of the tort is the wrongful interference by one person with the goods of another.⁴ Evidence must show or permit an inference to be drawn that the defendant acted in such a way as to deny the plaintiff’s title or possessory rights.⁵

The constituent elements of the tort of conversion include: (1) a wrongful act by one party involving the goods of the other; (2) the act consisted of handling, disposing of, or destroying the goods; and (3) the wrongful party’s actions had

¹ *Holley v. Northern Trust Co. Canada*, 2014 ONSC 889, at [para. 127](#).

² *Tar Heel Investments Inc. v. H.L. Staebler Company Limited.*, 2022 ONCA 842, at [paras. 23-26](#).

³ *DaimlerChrysler Canada Inc. v. Associated Bailiffs & Co.*, [2005 CanLII 24234](#).

⁴ *Teva Canada Ltd. v. TD Canada Trust*, 2017 SCC 51 at [para. 3](#).

⁵ *Simpson v. Gowers*, [1981 CanLII 1884](#), (1981), 32 O.R. (2d) 385 at 387.

the effect or intention of interfering with the other party's right to the goods.⁶

The tort is one of strict liability.⁷ Even an innocent third-party recipient of stolen goods may be found liable for engaging in conversion.⁸ It is no defence to say that the wrongful act was committed innocently or, even, without negligence.⁹ The intent element of the tort is “concerned not with the intention to steal or commit fraud but, rather, to assert authority or dominion over goods in a manner that is inconsistent with the rights of the true owner”.¹⁰

Conspiracy

In *Agribrands Purina Canada Inc. v. Kasamekas*, the Court of Appeal for Ontario set out the five elements required to ground an unlawful act conspiracy. They are: (1) the defendants acted in combination, that is, in concert, by agreement or with a common design; (2) the defendants' conduct was unlawful; (3) the defendants' conduct was directed towards the plaintiff; (4) the defendants should have known that, in the circumstances, injury to the plaintiff was likely to result; and (5) the defendants did, in fact, cause injury to the plaintiff.¹¹

The predominant focus of a conspiracy claim is the agreement to conspire. The plaintiff must show that the defendants acted in unison – that is, that each of the alleged co-conspirators were aware of the relevant facts and *intended* to participate in the fraudulent scheme.¹²

Although the agreement to conspire does not have to be in any specific form to ground a claim, more than mere knowledge that a conspiracy exists is required.¹³ An intention to be part of the agreement must be established, including an intention to participate with a view to “furthering the common design and purpose of the conspiracy”.¹⁴

Conspiracy claims are often built on inference.¹⁵ Direct evidence of the agreement is rarely available, particularly in circumstances of sophisticated and elaborate frauds which include numerous participants, span multiple

⁶ *Ast v. Mikolas*, 2010 BCSC 127, at [para. 126](#).

⁷ *Teva Canada Ltd.*, at [para. 3](#).

⁸ *Pang v. Zhang*, 2021 BCSC 591, at [para. 41](#), citing: *Ast v. Mikolas* 2010 BCSC 127, at paras. 125—127

⁹ *Teva Canada Ltd.*, at [para. 3](#).

¹⁰ *Pang v. Zhang*, 2021 BCSC 591, [para. 44](#).

¹¹ *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460, at [para. 26](#).

¹² *Maguire v. Calgary (City)* (1983), 146 D.L.R. (3d) 350, 43 A.R. 268, at [para 12](#); *Mraiche Investment*

Corp. v. Paul, 2012 ABCA 95, 524 A.R. 151, at [para 43](#).

¹³ *Leitch v. Novac*, 2017 ONSC 6888, at [para. 43](#), citing: *D'Agnone v. D'Agnone*, 2017 ABCA 35, 48 Alta. L.R. (6th) 8, at [paras. 19-25](#).

¹⁴ *Steinhards v. Whaley et al.* [2022 ONSC 7065](#), citing *D'Agnone v. D'Agnone*, 2017 ABCA 35, 48 Alta LR (6th) 8, at [para 22](#).

¹⁵ *Canadian Community Reading Plan Inc. v. Quality Service Programs Inc.* (2001), 141 OAC 289 (CA) at [para. 27](#).

jurisdictions, and take place over extended periods of time. As such, resort will generally be had to circumstantial evidence in the prosecution of a conspiracy claim.¹⁶

Bribery

The tort of bribery has been described as the “payment of a secret commission”.¹⁷

A bribe typically occurs whenever a person (the briber):

1. secretly pays money or provides goods or services (the bribe) to the agent (the bribee) of another person with whom he is dealing (the victim of the bribe);
2. makes the bribe to the bribee knowing that the bribee is acting as the agent of the victim of the bribe; and
3. fails to disclose to the victim of the bribe that he has made the bribe to the bribee (whom he knows to be the victim’s agent).¹⁸

Bribery is subject to an irrebuttable presumption once the constituent elements have been proven.¹⁹ The motive of the briber is irrelevant.²⁰ The essential element is the secrecy. If the bribe is secret (i.e., made without the knowledge of the victim of the bribe), “then a corrupt motive and the success of the inducement will be assumed”.²¹

¹⁶ *Capital Estate Planning Corp. v. Lynch*, 2011 ABCA 224, 510 A.R. 244 (Alta. C.A.) at [para 81](#).

¹⁷ *Enbridge Gas Distribution Inc. v. Marinaccio*, [2012 ONCA 650](#).

¹⁸ *Optech Inc. v. Sharma*, 2011 ONSC 680, at [para 23](#).

¹⁹ *Enbridge Gas Distribution Inc. v. Marinaccio*, [2012 ONCA 650](#).

²⁰ *Enbridge*, at [para. 34](#).

²¹ *Enbridge*, at [para. 41](#), citing: “Remedies for the Victims of a Bribe” (1999-2000) 22 *Advoc. Q.* 198, at para. 198, Paul M. Perell.