Shifting Blame? Reassessing the Tort of Inducing Breach of Contract Following *A.I. Enterprises v. Bram*

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I. INTRODUCTION

The tort of inducing breach of contract has never truly come into its own in Canadian law. Although it has formed a part of our common law for over 150 years, it remains a product of the particular social and economic conditions surrounding its recognition under English law in 1853. To date, its elements have never been conclusively settled in Canada, and the rationale for the tort's existence remains unclear.

Following the Supreme Court of Canada's decision in *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*[1] respecting the related tort of causing loss by unlawful means, it is high time to critically assess the tort of inducing breach of contract, and whether its recognition can be justified by Canadian common law in our modern economy. In particular, the Supreme Court's statements in *A.I. Enterprises* respecting the limited role of the common law in regulating commercial conduct suggest that if the tort is to play any role in Canadian law moving forward, it must be narrowly defined.

Courts have recently explained inducing breach of contract as a tort of "accessory liability", shifting responsibility for a breach of contract from the breaching party to a stranger to the contract who procured the breach. This purported justification leaves something to be desired — it is not only at odds with the doctrine of privity of contract and the theory of corrective justice, but it fails to adequately explain the overlapping yet divergent spheres of liability attributed to each of the breaching party and inducer.

Tort liability for inducing breach of contract appears to be premised on a practical (but misguided) concern to protect an injured plaintiff's purely economic interests in circumstances where he or she suffers a breach of contract but cannot obtain a remedy from the breaching party. Moreover, despite the century-old rejection of imposing tort liability for lawful conduct with malicious

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1 2014 SCC 12 (S.C.C.) [*A.I. Enterprises*].

motivations, decisions on inducing breach of contract maintain an undertone of moral outrage — which is somewhat suspect when a principled legal justification for the tort remains at large.

This paper argues that the recognition of the tort of inducing breach of contract in Canadian law has been insufficiently justified, and warrants re-examination. I propose that a principled, rights-based justificatory theory supporting the tort ought to be articulated, and the tort should be clarified in a manner consistent with the values the Supreme Court highlighted in *A.I. Enterprises* regarding common law reluctance to intervene in commercial affairs.

Part II of this paper will survey the history of the tort of inducing breach of contract, both to provide background and to illustrate how the tort's development has been marked by a lack of clarity as to both the justification for the tort and the required elements of the tort. Part III discusses the Supreme Court of Canada's recent economic torts decision in *A.I. Enterprises*, and how the principles articulated therein can be extended to promote a narrow understanding of inducing breach of contract. Part IV explores the rationales that courts have put forward in support of the inducement tort, and notes the gaps in courts' reasoning justifying the tort's recognition. It proceeds to consider two potential justificatory theories advanced by Canadian legal academics that may provide a principled explanation for imposing liability for inducing breach of contract. In Part V, I seek to tie it all together and propose a way for Canadian courts to move forward. Specifically, I explain my view that the tort can be justified by viewing a contractual right as a "quasi-proprietary", rendering the imposition of liability appropriate in certain circumstances when that right is misappropriated by a third-party inducer. I proceed to explain how the elements of the tort may be defined in a manner consistent with this justification and with the values highlighted in *A.I. Enterprises*.

II. BACKGROUND

1. Origins of the Tort

The tort of inducing breach of contract dates back to early Roman law, which allowed the head of a household to bring an action for insults to or violence committed upon his wife, children, or slaves, so he may be compensated for the deprivation of their services.[2] It was accepted in the common law as an action of a master against a third party who inflicted violence on his servant, and a related action was later created by the Statute of Labourers which allowed a master to sue a third party who enticed or retained the servant.[3] The modern version of the

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2 F. Sayre, "Inducing Breach of Contract" (1923) 36 Harv. L. Rev. 663 at 663-664 [Sayre].

3 *Ibid.* at 665-666. See also *SAR Petroleum Inc. v. Peace Hills Trust Co.*, 2010 NBCA 22 at para. 31 [*SAR*] and J.R. Baker, *An Introduction to English Legal History*, 4th ed. (Oxford: Butterworths, 2002) at 457-458.

tort, however, traces back to a 1853 decision of the English Court of Queen's Bench, *Lumley v. Gye*.[4]

Lumley v. Gye arose as a result of a dispute between rival opera houses. Lumley, the manager of the Queen's Theatre in London, had contracted with opera star Johanna Wagner for an exclusive three-month performance engagement in 1852. Lumley alleged that Gye, the proprietor of Covent Garden (his competitor) had wrongfully procured Wagner to break her contract with Lumley, so she could instead perform at Gye's theatre for more money.[5] The oft-cited case was a demurrer motion by the defendant which, much like a motion to strike, asks the court whether the action can succeed, assuming all the allegations to be true.[6]

A majority of the Court of Queen's Bench decided the demurrer motion in favour of the plaintiff Lumley, holding that an action could lie against Gye for inducing Wagner's breach of contract. Crompton J. considered the aforementioned history of actions for enticing servants to break a contract with their masters; the plaintiff had argued that such actions were an instance of a wider rule against inducing breach of contract, while the defendant argued they were anomalous, contrary to the general principles of contract law, arising from a state of society founded upon serfdom and the Statute of Labourers.[7] Crompton J. proceeded to hold:

> Whatever may have been the origin or foundation of the law as to enticing of servants . . . it must now be considered clear law that *a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation subsisting between master and servant by procuring the servant to depart from the master's service . . . commits a wrongful act for which he is responsible at law*.[8]

Justice Crompton clarified that the action was not confined to servants per se, but in fact included independent contractors, stating: "a person who contracts to do certain work for another is the servant of that other (of course with reference to such an action) until the work be finished. It appears to me that Miss Wagner had contracted to do work for the plaintiff within the meaning of this rule."[9]

Justices Erle and Wightman concurred with Justice Crompton's opinion, but the justices' stated rationales for permitting this cause of action were varied. In addition to the justification stated above, Crompton J. also noted that the

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4 *Lumley v. Gye* (1853) 118 E.R. 749, 2 El. & Bl. 216, [1843-60] All E.R. Rep. 208 (Q.B.) [*Lumley*, cited to All E.R. Rep.].

5 *Ibid.* at 210 and Stephen Waddams, "Johanna Wagner and the Rival Opera Houses" (2001) 117 L.Q.R. 431 [Waddams].

6 Waddams, *supra* note 5 at 447.

7 *Lumley, supra* note 4 at 211, per Crompton J.

8 *Ibid.* [emphasis added].

9 *Ibid.* at 212.

breaching party may be unable to pay for the damage sustained as a result of the breach, and that in such a case it would be unjust not to hold the "wrongdoer", who induced the breach, responsible for the damage.[10]

Erle J. similarly held that the remedy available to the wronged party for breach of contract "may be inadequate, as where the measures of damages is restricted", suggesting that the tort may be justified to permit plaintiffs to obtain a remedy from the inducing party "beyond the liability of the contractor."[11] He went on to premise the tort on accessory liability, holding:

> It is clear 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. *He who procures the wrong is a joint wrongdoer*, and may be sued, either alone or jointly with the agent, in the appropriate action for the wrong complained of.[12]

Erle J. and Wightman J. both further relied on the 18th century case of *Winsmore v. Greenbank*[13] as a basis for their decisions. In *Winsmore*, the plaintiff successfully sued the defendant for persuading the plaintiff's wife to separate from him (which was *prima facie* unlawful at the time, as the breach of a marriage contract). Although one notes that a wife was not then considered a free and separate person from her husband, and was thus not liable to be sued by her husband for breach of contract, *Winsmore* was held to be "an exceedingly strong authority in the plaintiff's favour" in *Lumley v. Gye*.[14]

Coleridge J. authored the lone dissenting opinion in *Lumley*, on the basis of the general rule that remedies in respect of breach of contract must be confined to the contracting parties. He held: "The persuader has not broken and could not break the contract, for he had never entered into any; he cannot be sued upon the contract; and yet it is the breach of the contract only that is the cause of the damage."[15] Coleridge J. also expressed concern about the difficulty of assessing the inducer's level of fault and the amount of influence over the breaching party, holding that "[t]o draw a line between advice, persuasion, enticement and procurement is practically impossible in a court of justice."[16]

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10 *Ibid.* at 213, per Crompton J.
11 *Ibid.* at 214, per Erle J.
12 *Ibid.* at 214, per Erle J. [emphasis added].
13 (1745), 125 E.R. 1330, Willes 577, 1 Digest (Repl.) 26, 202 [*Winsmore*].
14 *Lumley, supra* note 4 at 216, per Wightman J (see also p. 214, per Erle J.).
15 *Ibid.* at p. 219-220, per Coleridge J., in dissent. See also: "in respect of breach of contract the general rule of our law is to confine its remedies by action to the contracting parties, and to damages directly and proximately consequential on the act of him who is sued; that, as between master and servant, there is an admitted exception; that this exception dates from the Statute of Labourers, 23 Edw. 3, and both on principle and according to authority is limited by it."
16 *Ibid.* at 221.

Justice Coleridge concluded that an action should not lie against a stranger to the contract for inducing the breach, because in such a situation "the defendant's act has not been the direct or proximate cause of the damage which the plaintiff has sustained."[17] He expressed concern that the majority was departing from established principle in order to ensure a remedy could be awarded in the case before it, stating:

> ... how far courts of justice may be led if they allow themselves, in the pursuit of perfectly complete remedies for all wrongful acts, to transgress the bounds which our law, in a wise consciousness as I conceive of its limited powers, has imposed on itself, of redressing only the proximate and direct consequences of wrongful acts.[18]

In a fascinating article,[19] Professor Stephen Waddams argues that *Lumley v. Gye* is often misunderstood, and provides detailed context to elucidate the decision. Waddams highlights that, despite his victory on the demurrer motion, Lumley ultimately lost his action for inducing breach of contract at trial, on the basis that Gye believed Wagner had a right to end her contract with Lumley because he had defaulted on their agreed-upon payment schedule.[20]

The sincerity of Gye's belief that Wagner was entitled to terminate her contract with Lumley is questionable. Notably, Gye had agreed to indemnify Wagner against any risk of a lawsuit by Lumley, which suggests Gye was taking a calculated risk in inducing Wagner to end her engagement with Lumley.[21] If so, Gye's actions were likely modelled after a strategy implemented by Lumley himself just a few years earlier. As Waddams explains, a strikingly similar dispute arose in 1847 over Jenny Lind, another famous opera singer who had signed on to perform at a third theatre, Drury Lane, before she breached her contract and performed at Lumley's Her Majesty's Theatre instead. Lumley was alleged to have taken advantage of Lind's breach to compete with Gye's new opera house, Covent Garden. The proprietor of Drury Lane sued Lind for breaching her contract and, in *Bunn v. Lind*, obtained a jury award of £2,500; Lumley indemnified Lind and still made a handsome profit from the transaction.[22]

In the end, neither Lumley nor Gye (nor Wagner) emerged victorious; although he never received damages, Lumley obtained an injunction restraining Wagner from appearing at Gye's theatre during the 1852 season, so she ended up performing at neither.[23] The reasons given by Lord St Leonards in the

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17 *Ibid.* at 219.
18 *Ibid.* at 221.
19 *Supra* note 5.
20 *Ibid.* at 431, 438, 455 & 456 ("the defendant *bona fide* believed the agreement with the plaintiff had ceased to be binding upon Miss Wagner.").
21 *Ibid.* at 439.
22 *Ibid.* at 432-433.
23 *Ibid.* at 440.

injunction decision shed further light on the origins of the tort of inducing breach of contract. Lord St Leonards held that a monetary remedy ordered against Wagner personally would be insufficient to protect Lumley's interests, stating: "men are not suffered by the law of this country to depart from their contracts at their pleasure, and to leave the party with whom they have broken their contract to the mere chance of what a jury may give in point of damages."[24] Waddams summarizes Lord St Leonards' decision as follows:

> He perceived the real dispute as being between the rival opera houses, and the existing state of the law (exemplified by *Bunn v. Lind*) as most inadequate to protect Lumley's interests: if Wagner sang for Gye, irreparable damage would have been done; an award of damages against Wagner by a common law court at some future date would almost certainly be too little and too late; even if a jury were prepared to award adequate damages (which he evidently thought very doubtful), Wagner might be unable to pay, or might very probably be beyond the jurisdiction of the English courts.[25]

Waddams observes that the injunction was issued against Gye personally as well as Wagner even though, as the common law stood at the time the injunction was sought, Gye had committed no legal wrong.[26] In any case, it is the Court of Queen's Bench's subsequent decision on the *Lumley v. Gye* demurrer motion that has formed the foundation of the tort that survives to date.

2. Development of the Tort in the 19th and 20th Centuries

The status of the tort of inducing breach of contract remained uncertain in the years following *Lumley v. Gye*; it was unclear whether the doctrine would actually take hold. Nearly a generation later, however, the English Court of Appeal determined that the tort was an accepted part of English law with its decisions in *Bowen v. Hall* and *Temperton v. Russell*.[27] As the turn of the century approached, the House of Lords released a trilogy of decisions — *Mogul Steamship*,[28] *Allen v. Flood*,[29] and *Quinn v. Leathem*[30] — that marked a turning

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[24] *Ibid.* at 445, citing 19 LT 265. Waddams suggests that the reference to what a jury may give in damages indicates that Lord St Leonards may have had the earlier case of Jenny Lind in mind, which evidently struck him as gravely unjust.

[25] *Ibid.* at 446.

[26] *Ibid.*

[27] Sayre, *supra* note 2 at 669-670. See *Bowen v. Hall* (1881), 6 Q.B.D. 333 (Eng. C.A.); *Temperton v. Russell*, [1893] 1 Q.B. 715 (Eng. C.A.). It is important to note, however, that these decisions were premised on findings of malice, which the House of Lords ruled did not form the basis for a tort in *Allen v. Flood* a few years later.

[28] *Mogul Steamship Co. v. McGregor, Gow & Co.* (1891), [1892] A.C. 25 (U.K. H.L.) [*Mogul Steamship*].

[29] (1897), [1898] A.C. 1 (U.K. H.L.) [*Allen v. Flood*].

[30] [1901] A.C. 495 (U.K. H.L.) [*Quinn v. Leathem*].

point for economic torts, and articulated the principles upon which such claims would be determined through the twentieth century.

In *Mogul Steamship*, the House of Lords rejected an action against a group of shipowners who conspired to lower their prices in order to drive the plaintiff, a competitor, out of business. Although today such behaviour might be contrary to competition law, there was no such law in England at the time, and the shipowners could not be said to have had an unlawful purpose or to have been using unlawful means.

Mogul Steamship stands for the principle that it is not unlawful to advance one's lawful self-interest at the expense of a competitor.[31] Lord Halsbury explained the basis for rejecting tort liability for malicious but otherwise lawful conduct, stating: "What is the wrong done? What legal right is interfered with? ... All are free to trade upon what terms they will, and nothing has been done except in rival trading which can be supposed to interfere with the appellant's interests."[32] Lord Morris concurred, noting both theoretical and practical difficulties with the proposed tort:

> 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.[33]

A few years later, the House of Lords confirmed in *Allen v. Flood* that a defendant who causes economic injury to a plaintiff without harming the plaintiff's legal rights will not be held liable for the plaintiff's damage. The defendant union representative in *Allen v. Flood* had pressured an employer to fire the plaintiff (whose contract was terminable at will) by threatening to organize a lawful strike. It was accepted that the defendant had a malicious motive to cause economic harm to the plaintiff. Even so, the majority of the House of Lords held that the plaintiff's action could not succeed, as the defendant did nothing unlawful, and malice could not convert otherwise lawful conduct into unlawful conduct.[34]

In *Quinn v. Leathem,* however, the House of Lords held that union officials who, motivated by malice, *conspired* to cause economic harm to a plaintiff through lawful labour disruption could be held liable for the plaintiff's loss of business. The Law Lords distinguished *Allen* on the basis that it did not involve

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[31] *Mogul Steamship, supra* note 28 at 36-38, 42, 48-49, 52 and 58-59.

[32] *Ibid.* at 37-38.

[33] *Ibid.* at 51 [emphasis added].

[34] *Allen v. Flood, supra* note 29 at 92, 100-108, 123-124, 127-128, 165, 167-168, and 171-172. A few years later, in *Glamorgan Coal Co. v. South Wales Miners' Federation*, [1905] A.C. 239 (U.K. H.L.), the House of Lords reaffirmed that a malicious motive was not the basis of the inducement tort, stating: "It is settled now that malice in the sense of spite or ill will is not the gist of such an action ..." See Sayre, *supra* note 2 at 673-674.

a conspiracy, noting that "it is a very different thing ... when one man has to defend himself against many combined to do him wrong."[35] Further, the Law Lords in *Quinn* affirmed *Lumley v. Gye*, confirming that the tort of inducing breach of contract survived the trilogy.[36]

Unfortunately, subsequent cases respecting inducing breach of contract only served to muddy the waters. In *D.C. Thomson & Co. v. Deakin*,[37] the English Court of Appeal adopted a unified theory of economic torts, creating one general tort of "actionable interference with contractual rights", which included both *directly* inducing breach of contract and *indirectly* inducing breach of contract through unlawful means. In *Daily Mirror Newspapers Ltd. v. Gardner*,[38] Lord Denning held that it did not matter if a defendant induced a breach of contract directly or by indirect influence through others, only to reverse himself one year later by drawing a distinction between "direct persuasion" and bringing about a breach indirectly in *Torquay Hotel Co. v. Cousins*.[39] The decision in *Torquay Hotel* thus suggested that success in an inducement claim depended in large part on whether and how the defendant had communicated with the breaching party.[40] The courts would not untangle this mess for several years.

Few Canadian cases from the twentieth century are particularly worthy of note. In *Posluns v. Toronto Stock Exchange*,[41] the Ontario High Court of Justice dismissed a claim of inducing breach of contract. Although the defendant stock exchange was found to have knowingly and intentionally interfered with the plaintiff's employment agreement, the Court held that the termination was lawful (in accordance with an implied term in the agreement), and in any event that it was justified in light of the exchange's public interest mandate. A lengthy and complex decision, *Posluns* is illustrative of the uncertainty associated with inducing breach of contract claims. It is worth noting, however, that in arriving

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[35] *Quinn v. Leathem, supra* note 30 at 511, per Lord Macnaghten. Lord Brampton added that a conspiracy for no other purpose than injuring the plaintiff was "from the moment of its formation, unlawful and criminal" (at p. 530). Whether there is a principled theoretical justification for the tort of predominant purpose conspiracy is also questionable, but an issue best left for another day.

[36] *Ibid.* at 510 & 535. For a thorough summary of the 1892-1901 trilogy, see Brandon Kain & Anthony Alexander, "The 'Unlawful Means' Element of the Economic Torts: Does a Coherent Approach Lie Beyond Reach?" in Mr. Justice Todd L. Archibald & Mr. Justice Randall Echlin, eds., *Annual Review of Civil Litigation,* 2010 (Toronto: Carswell, 2010) at 46-56 [Kain & Alexander].

[37] [1952] Ch. 646 (Eng. C.A.) [*Deakin*].

[38] [1968] 2 Q.B. 762 (Eng. C.A.).

[39] (1968), [1969] 2 Ch. 106 (Eng. C.A.) at 138-139.

[40] See the comments of Lord Hoffmann in *OBG Ltd. v. Allan* (2007), [2008] 1 A.C. 1 (U.K. H.L.) at para. 36.

[41] 1964 CarswellOnt 420, 46 D.L.R. (2d) 210, [1964] O.J. No. 792 (H.C.), affirmed 1965 CarswellOnt 217 (C.A.), affirmed 1968 CarswellOnt 68 (S.C.C.) [*Posluns*].

at his decision Gale J. asserted a possible rationale for the tort, holding that intervention into the contracts of others is per se unlawful, regardless of whether the means used are themselves unlawful:

> *While a contract cannot impose the burden of an obligation on one who is not a party to it, a duty is undoubtedly cast upon any person, although extraneous to the obligation, to refrain from interfering with its due performance* unless he has a duty or a right in law to so act. Thus, if a person without lawful justification knowingly and intentionally procures the breach by a party to a contract which is valid and enforceable and thereby causes damage to another party to the contract, the person who has induced the breach commits an actionable wrong. That wrong does not rest upon the fact that the intervenor has acted in order to harm his victim, for a bad motive does not per se convert an otherwise lawful act into an unlawful one, but rather because there has been an unlawful invasion of legal relations existing between others.[42]

The Supreme Court of Canada considered the tort of inducing breach of contract a handful of times in the latter half of the 20th century,[43] often in the labour relations context.[44] Regrettably, however, our highest court did not have the opportunity to critically assess the justification for the tort nor its elements in these cases.[45]

3. Modern Cases on Inducing Breach of Contract

The year 2007 marked a watershed moment for the economic torts. In *OBG Ltd. v. Allan*,[46] the U.K. House of Lords sought to resolve the confusion surrounding the economic torts. *OBG* addressed three appeals that raised various claims in tort for economic loss caused by intentional acts, variously

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[42] *Ibid.* at para. 138 [emphasis added]. As will be discussed further below, although this proposed rationale has not been generally accepted by English or Canadian courts, the principle that persons unrelated to a contract nevertheless owe a duty not to interfere with contractual performance forms part of both the "quasi-proprietary right" and "public right" justifications of the tort; see *infra* Sections IV.5 & IV.6.

[43] See *Fabbi v. Jones*, [1973] S.C.R. 42 (S.C.C.) (upholding liability for inducing breach of contract against dairy operators who pressured milk producers to end their contract with the plaintiff transporter, on the basis of *Deakin*; it is not entirely clear whether the dairy's actions were also unlawful, particularly given the unified theory of economic torts that was relied upon at the time); *H.L. Weiss Forwarding Ltd. v. Omnus*, [1976] 1 S.C.R. 776 (upholding an award of punitive damages for inducing breach of contract; liability was not at issue on appeal).

[44] See *Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580*, (sub nom. R.W.D.S.U. v. Dolphin Delivery Ltd.) [1986] 2 S.C.R. 573; *Pepsi-Cola Canada Beverages (West) Ltd. v. R.W.D.S.U., Local 558*, [2002] 1 S.C.R. 156.

[45] The author notes that, to date, the specific elements of the tort remain uncertain in Canada; see, e.g., *SAR, supra* note 3 at paras. 39-40: "... case law leads one to believe there are anywhere from three to seven essential elements. On reflection and out of an abundance of caution, I have settled on eight elements ..." [citations omitted].

[46] (2007), [2008] 1 A.C. 1 (U.K. H.L.) [*OBG*].

characterized as causing loss by unlawful means, unlawful interference with contractual relations, and inducing breach of contract, among others. *OBG* thus afforded the Law Lords the opportunity to consider and clarify the status of the inducing breach of contract tort, and to articulate the principles upon which it was actionable. Importantly, the Law Lords rejected a unified theory of economic torts, and asserted that inducing breach of contract is distinct from the separate tort of causing loss by unlawful means.[47]

Drawing upon the earlier jurisprudence, the House of Lords laid out the required elements for an action for inducing breach of contract under U.K. law. First, the defendant must *know* his actions will have the effect of breaching a contract.[48] Second, he must *intend* to procure the breach — meaning either that breach of the contract is a desired end in itself, or the means by which he intends to achieve some further end, such as an economic advantage to himself. However, if the breach is merely a foreseeable consequence of the defendant's actions, it will not be held to have been intended. In other words, the plaintiff (whose contract was breached by a third party) must have been "targeted" or "aimed at".[49] Third, the plaintiff must have actually suffered a *breach* of his contract — mere "interference" with his contract is insufficient (although it may be sufficient for a claim for causing loss by unlawful means).[50] The Law Lords also referred to, but did not elaborate on, the availability of a defence of justification for the inducement tort.[51]

The Law Lords' discussion respecting the principles underlying the economic torts is of particular interest. In explaining his preference for a narrow conception of "unlawful means", Lord Hoffmann held, "The common law has traditionally been reluctant to become involved in devising the rules of fair competition, as is vividly illustrated by *Mogul Steamship*... It has largely left such rules to be laid down by Parliament."[52] Lord Nicholls concurred in this view, stating: "English courts have long recognised they are not best equipped to regulate competitive practices at large. Parliament is better placed to decide what interests need protection and by what means."[53]

Lord Nicholls also articulated key principles in describing the motivation for his view of the unlawful means tort:

> ...intent to harm is not enough. *Intentional harm of another's business is not of itself tortious. Competition between businesses regularly involves each business taking steps to promote itself at the expense of the other*. One retail business may reduce its prices to

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47 *Ibid*. at paras. 1 & 8, per Lord Hoffmann.
48 *Ibid*. at paras. 39-40.
49 *Ibid*. at paras. 41-43.
50 *Ibid*. at para. 44.
51 *Ibid*. at para. 193, per Lord Nicholls.
52 *Ibid*. at para. 56, per Lord Hoffmann.
53 *Ibid*. at para. 148, per Lord Nicholls.

> customers with a view to diverting trade to itself and away from a competitor shop. *Far from prohibiting such conduct, the common law seeks to encourage and protect it. The common law recognises the economic advantages of competition.*[54]

A final essential takeaway from *OBG* is the Law Lords' holding that the tort of inducing breach of contract is premised on *accessory liability*. Lord Hoffman explained that liability for the tort is dependent on the primary wrongful act of the breaching party, and requires only the degree of participation in the breach of contract which satisfies the general requirements of accessory liability for the wrongful act of another person.[55] He contrasted this with the tort of causing loss by unlawful means, which relies on an independently unlawful act committed by the defendant, creating *primary* liability.[56] Interestingly, Lord Hoffmann explained the concept of accessory liability as premised upon an understanding of contractual rights as proprietary:

> *Lumley v Gye* was "founded on a different principle of liability than the intentional harm tort". It treats contractual rights as a species of property which deserve special protection, not only by giving a right of action against the party who breaks his contract but by imposing secondary liability on a person who procures him to do so.[57]

In a concurring opinion, Lord Nicholls explained the justification of accessory liability another way:

> With the inducement tort the defendant is responsible for the third party's breach of contract which he procured. In that circumstance this tort provides a claimant with an additional cause of action. The third party who breached his contract is liable for breach of contract. The person who persuaded him to break his contract is also liable, in his case in tort. Hence this tort is an example of civil liability which is secondary in the sense that it is secondary, or supplemental, to that of the third party who committed a breach of his contract. It is a form of accessory liability.[58]

Back in Canada, just one day before the House of Lords released its reasons in *OBG*, the Ontario Court of Appeal released an important decision affirming a successful claim for inducing breach of contract in *Drouillard v. Cogeco*.[59] *Drouillard* was a claim commenced by a former cable installer who had worked for the defendant Cogeco until 1999, and began to work for Mastec Canada, a contractor for Cogeco, in 2001. For reasons that are unclear, Cogeco informed Mastec that it would not allow the plaintiff to work on its projects; Mastec accordingly terminated the plaintiff's employment. The plaintiff sued Mastec for

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[54] *Ibid.* at para. 142, per Lord Nicholls [emphasis added].
[55] *Ibid.* at para. 8, per Lord Hoffmann.
[56] See *ibid.* at paras. 8, 36, 67, 69, 172 & 194.
[57] *Ibid.* at para. 32, citing Philip Sales & Daniel Stilitz, "Intentional Infliction of Harm by Unlawful Means" (1999), 115 L.Q.R. 411.
[58] *Ibid.* at para. 172, per Lord Nicholls.
[59] 86 O.R. (3d) 431 (C.A.), additional reasons 2007 CarswellOnt 4106 (C.A.) [*Drouillard*].

breach of contract and wrongful dismissal (and achieved a settlement with Mastec before trial),[60] and sued Cogeco for inducing Mastec's breach of his employment contract.[61]

In deciding in the plaintiff's favour, the Court of Appeal held that he had demonstrated what it deemed to be the four necessary elements of the tort: (1) he had a valid contract with Mastec; (2) Cogeco was aware of the existence of this contract; (3) Cogeco intended to and did procure Mastec's breach of the contract; and (4) as a result of this breach, the plaintiff suffered damages.[62] The Court further acknowledged the existence of a defence of justification, but noted that "there is little useful modern Canadian authority for this principle", and that in any event the facts did not suggest the defence was open to Cogeco.[63]

Drouillard raises two issues particularly worth highlighting. First, with respect to Cogeco's intention to procure Mastec's breach of the employment contract, the Court of Appeal held that "intention is proven by showing that the defendant acted with the desire to cause a breach of contract, *or with the substantial certainty that a breach of contract would result from the defendant's conduct*."[64] The trial judge had found that Cogeco had advised Mastec that "it was definitely in Mastec's best interest to ensure that Drouillard was not employed there", and that "it is beyond question but that the actions of Cogeco were directed against [Drouillard] personally", and the Court of Appeal held that such findings supported the conclusion that the intention requirement had been met.[65]

Notably, however, the Court acknowledged that there was "no direct evidence that Cogeco wanted Mastec to terminate Drouillard's employment *without reasonable notice*"; nevertheless, it maintained that Cogeco was not concerned about the terms of Drouillard's termination, and acted at least with a substantial certainty that its conduct would result in a breach.[66] *Drouillard* thus illustrates the continued uncertainty that surrounds the intention requirement in Canada.

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60 *Ibid*. at paras. 4-6, 8.

61 As the case was heard before the House of Lords released its decision in *OBG*, it was, at the time, not entirely clear whether inducing breach was a separate tort from unlawful interference with contractual relations; the plaintiff had sued for damages on the basis that Cogeco had "wrongfully and/or tortiously interfered with his employment": see *ibid*. at para. 8. For the purposes of this paper, we will consider only the inducing breach of contract aspect of the claim; in any event, the Court of Appeal held that Cogeco was not liable for the "unlawful means" tort of interference with economic relations.

62 *Drouillard*, *supra* note 59 at para. 26-38.

63 *Ibid*. at paras. 39-40.

64 *Ibid*. at para. 29, citing Lewis N. Klar, *Tort Law* (Toronto: Carswell, 2003) at p. 612 [emphasis added].

65 *Ibid*. at paras. 31-32.

66 *Ibid*. at para. 33 [emphasis added].

The second issue regards damages. Without analysis, the Court of Appeal upheld the trial judge's conclusion that Drouillard suffered damages from Cogeco's inducing Mastec's breach of contract, and thus satisfying the fourth element of the tort.[67] Although the Court separately addressed various grounds of appeal respecting the quantification of damages,[68] the plaintiff's entitlement to damages from Cogeco warrants closer consideration. Specifically, neither the Court of Appeal nor the trial judge[69] considered how the damage award against Cogeco for inducing breach of contract could have resulted in double recovery, in light of the award the plaintiff had obtained through his settlement with Mastec for breach of contract. At both levels, the Court referred to a principle laid out by Lord Hailsham in *Cassell & Co. v. Broome*,[70] which provides that damages for inducing breach of contract are "at large" — not limited to the plaintiff's pecuniary loss or those damages recoverable from the breaching party, but capable of including elements for loss of reputation, injured feelings, or punishment.[71] As stated by the trial judge:

> ... the damages to which Drouillard is entitled in tort are not for the breach of his employment contract with Mastec, but for the wrongful act of procuring its breach and as a consequence he is entitled to be compensated for all the damages that flow from the tortious conduct of Cogeco.[72]

As discussed below, this principle (which is similarly relied upon in other cases) raises doubt with the justification of the tort as one of accessory liability.

The Ontario Court of Appeal released another key decision in 2008. In *Correia v. Canac Kitchens*,[73] the Court expressly adopted *OBG* and its distinction between the torts of inducing breach of contract and causing harm by unlawful means.[74] The Court in *Correia* dismissed a claim for inducing breach of contract, holding that the defendants did not intend to procure a breach.[75] Diverging from the findings respecting the intention requirement applied in *Drouillard*, the Court highlighted in *Correia* that the intention requirement for inducing breach of contract must be strict; it did so on the basis that "[t]he two economic torts are strictly limited in their purpose and effect in

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67 *Ibid*. at para. 38.
68 See *ibid*. at paras. 42-65.
69 See *Drouillard v. Cogeco Cable Inc*., 2005 CarswellOnt 3257, [2005] O.J. No. 3166 (S.C.J.), per R.C. Gates J., reversed in part 2007 CarswellOnt 2624 (C.A.), additional reasons 2007 CarswellOnt 4106 (C.A.) [*Drouillard SCJ*].
70 [1972] A.C. 1027 (U.K. H.L.).
71 *Drouillard, supra* note 59 at paras. 42-43; *Drouillard SCJ, supra* note 69 at paras. 120-124.
72 *Drouillard SCJ*, *supra* note 69 at para. 114 [emphasis added].
73 2008 ONCA 506 (C.A.) [*Correia*].
74 *Ibid*., esp. at para. 99.
75 *Ibid*. at para. 105.

the commercial world, where much competitive activity is not only legal but is encouraged as part of competitive behaviour that benefits the economy".[76]

The Ontario Court of Appeal weighed into inducing breach of contract principles once again a few years later in *Alleslev-Krofchak v. Valcom Ltd.*,[77] where it upheld a finding of liability for the inducing breach of contract tort. The Court in this case adopted the House of Lords' rationale for the inducement tort, holding that it is premised on the principle of accessory liability: "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".[78]

III. *A.I. ENTERPRISES* AND PRINCIPLES OF NON-INTERVENTION IN THE COMMERCIAL SPHERE

The Supreme Court of Canada entered into the fray of economic torts for the first time in years when it released its decision in *A.I. Enterprises Ltd v. Bram Enterprises Ltd.*[79] Although the decision specifically pertains to an allegation of the unlawful means tort (providing long-awaited clarification of the scope of the tort, and the meaning of "unlawful means" in Canada), *A.I. Enterprises* is also significant for accepting much of the reasoning from *OBG* into Canadian law, and for articulating the core principles underlying economic torts and the common law's regulation of competitive behaviour.

A.I. Enterprises concerned a dispute between the owners of an apartment building; when the majority owners sought to sell the property, a dissenting owner stymied the sale by denying potential buyers access to the property and commencing baseless litigation against the property. The dissenting owner eventually purchased the property outright, at less than market value, and the majority owners sued for the tort of causing loss by unlawful means.[80] The Supreme Court unanimously held that the dissenting owner's actions did not satisfy the requirements for the unlawful means tort, which is available only where the defendant commits an actionable, unlawful act against a third party, and that act intentionally causes economic harm to the plaintiff.[81]

Of particular interest in *A.I. Enterprises* are the Court's discussions about the limited place for tort law in managing competitive behaviour, and the

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[76] *Ibid.* at para. 101.
[77] 2010 ONCA 557 (C.A.), leave to appeal refused 2011 CarswellOnt 2149 (S.C.C.).
[78] *Ibid.* at para. 97 [emphasis added].
[79] *Supra* note 1.
[80] *Ibid.* at paras. 10-11, 13.
[81] *Ibid.* at paras. 5-6. The Court ultimately held the dissenting owner liable in any event, on the basis of breach of fiduciary duty.

appropriate rationale upon which the Court could found a principled understanding of the tort.

1. Tort Law Should Play a Limited Role in Regulating Economic Activity

The Court identified four aspects of "tort law's approach to regulating economic and competitive activity" that support a limited role for the economic torts.[82]

First, the common law affords less protection to purely economic interests. The Court held that economic interests such as legitimate business expectations "are at the margins of the traditional concerns of tort law", and reaffirmed the Court's earlier statement that "[t]he law has never recognized a sweeping right to protection from economic harm."[83]

Second, the common law is reluctant to develop rules to enforce economic competition. The Court held: "The common law in general, and tort law in particular, have been astute to assure 'some elbow-room [many would say much elbow-room] for the aggressive pursuit of self-interest'."[84] The Court cited with approval the seminal U.K. decisions in *Mogul Steamship* and *Allen v. Flood*, holding that "there can be no liability for a person who has 'done nothing more against the plaintiffs than pursue to the bitter end a war of competition waged in the interest of their own trade'," [85] and "[t]he right which a man has to pursue his trade or calling is qualified only by the equal right of others to do the same and compete with him. . ."[86] The Court also endorsed the principles articulated by Lord Nicholls in *OBG*:

> Competition between businesses regularly involves each business taking steps to promote itself at the expense of the other ... Far from prohibiting such conduct, the common law seeks to encourage and protect it. The common law recognises the economic advantages of competition.[87]

Third, the common law promotes certainty in commercial affairs. The Court highlighted that tort law should not undermine such commercial certainty, which would be "easily put in jeopardy by adopting vague legal standards based on 'commercial morality' or by imposing liability for malicious conduct

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82 *Ibid.* at para. 29.

83 *Ibid.* at para. 30, citing *Pepsi-Cola Canada Beverages (West) Ltd. v. R.W.D.S.U., Local 558*, (sub nom. R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.) 2002 SCC 8 at para. 72.

84 *Ibid.* at para. 31, citing C. Sappideen & P. Vines, eds., *Fleming's The Law of Torts* (10th ed., 2011) at para. 30.120 [remarks in parentheses in original *A.I. Enterprises* decision].

85 *Ibid.*, citing *Mogul Steamship Co. v. McGregor, Gow & Co.* (1889), 23 Q.B.D. 598 (Eng. C.A.), per Bowen L.J., affirmed (1891), [1892] A.C. 25 (U.K. H.L.).

86 *Ibid.*, citing *Allen v. Flood, supra* note 29 at 173, per Lord Davey.

87 *Ibid.,* citing *OBG, supra* note 46 at para. 142, per Lord Nicholls.

alone".[88] The Court again endorsed *Allen v. Flood*, in which the majority of the House of Lords emphatically rejected the argument that malice was a sufficient basis for liability on the basis that the concept was too vague for the courts to apply, and *Mogul Steamship*, for the proposition that regulating commercial activity should not depend on the "idiosyncrasies of individual judges".[89]

Lastly, the undue expansion of tort law risks undermining fundamental rights. Specifically, the Court held that the economic torts inherently risk interfering with legislated schemes favouring collective action in labour relations, and undermining *Charter* rights of freedom of expression and association. Historically, the Court held, "the common law of tort was ready — and many would say overready — to intervene" against labour action in industrial disputes, before legislative intervention granted greater freedom to unions.[90] Even still, the Court noted, courts sometimes expanded economic tort liability in an effort to outflank the protections provided by statute. On the basis of this history, the Court held the recognition of economic torts risks subverting legislative choices and possibly constitutionally-protected rights.[91]

It was on the basis of these four principles that the Court held that the unlawful means tort must be narrowly confined.

2. Rationale for the Unlawful Means Tort

The Court in *A.I. Enterprises* accepted that the scope of a tort can only be established by understanding its rationale, so to promote a principled role for the tort. However, it noted, there was no consensus on the rationale for an unlawful means tort. As such, the Court proceeded to assess the two categories of rationales that had been put forward as justifying the recognition of the tort.

The Supreme Court rejected the argument that the unlawful means tort can be justified on an "intentional harm" rationale, which argues that tort liability is appropriate to curb clearly excessive and unacceptable intentional conduct.[92] The Court first admitted that the intentional harm rationale is "attractive", because:

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[88] *Ibid.* at para. 33.

[89] *Ibid.*, citing *Allen v. Flood, supra* note 29 at 118-119, per Lord Davey, and *Mogul Steamship, supra* note 28 at 51, per Lord Morris.

[90] *Ibid.* at para. 34. Some commentators have noted the possibility that the House of Lords' decision in *Quinn v. Leathem, supra* note 30, affirming an action for conspiracy where the sole purpose was to injure the plaintiff but no unlawful means were used, was motivated by an anti-labour bent: see Kain & Alexander, *supra* note 36 at footnote 110, citing 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.

[91] *Ibid.*

[92] *Ibid.* at para. 37.

> ... it provides a principled explanation for why liability should be imposed and one that accords with widely held views of commercial morality. While no person has a common law right to trade per se, a person does have a general freedom to participate in the commercial and labour market and a legitimate expectation that the basic rules of the game will be respected. To the extent that the defendant intentionally inflicts economic loss on the plaintiff through unlawful means which are clearly off-side those basic rules, the defendant gains an illegitimate advantage and causes the plaintiff to suffer an unfair disadvantage.[93]

Nevertheless, the Court held that the acceptance of an "intentional harm" rationale would lead to undue uncertainty in commercial affairs; would be inconsistent with the common law's rejection of a *prima facie* tort for malicious interference with economic interests beginning in *Allen v. Flood*; and would be incompatible with the common law's preference for a limited role for economic torts in the modern marketplace.[94]

Instead, the Court held that the unlawful means tort, properly understood, must be premised on a "liability stretching" rationale, which focuses on extending an *existing* right to sue from the immediate victim of an unlawful act to another party who the defendant targeted with his unlawful conduct. On this understanding, the tort does not enlarge the basis for civil liability by creating new actionable wrongs, but simply allows a party targeted by an already-actionable wrong to sue for the resulting harm.[95] The Court held that the tort "thereby closes a perceived liability gap where the wrongdoer's acts in relation to a third party, which are *in breach of established legal obligations to that third party*, intentionally target the injured plaintiff."[96]

In concluding its analysis in *A.I. Enterprises,* the Court acknowledged that some might criticize its narrow definition of the unlawful means tort as unduly limited. Its response to such theoretical criticism was compelling:

> The possibility that immoral or malicious conduct may not be remediable through the economic torts in some cases is simply a consequence of the Anglo-Canadian conception of the limited role of the common law and is a price worth paying for certainty in this area.[97]

3. Applying the Principles from *A.I. Enterprises* to Inducing Breach of Contract

The Supreme Court of Canada's considered decision in *A.I. Enterprises* is well-suited to serve as a springboard for a critical re-evaluation of the tort of inducing breach of contract.

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[93] *Ibid.* at para. 40.
[94] *Ibid.* at para. 42.
[95] *Ibid.* at paras. 37 & 43.
[96] *Ibid.* at para. 43 [emphasis added].
[97] *Ibid.* at para. 75.

The inducing breach of contract tort is inconsistent with the principles stated in *A.I. Enterprises* regarding the role of the courts and the common law in the regulation of economic and competitive behaviour. The Court in *A.I. Enterprises* affirmed that the common law affords less protection to purely economic interests. Historically, however, protecting purely economic interests has been the "bread and butter" of the inducement tort, even though the common law should have limited influence in the area. This principle is of particular interest given the lack of clarity respecting the theoretical underpinnings of the tort (discussed further below). The courts have stretched the usual justificatory principles of private law in recognizing the tort of inducing breach of contract but such strain is inappropriate in light of the purely economic interests the tort protects.

Moreover, the Court in *AI* highlighted that the common law is reluctant to develop rules to enforce economic competition. *A.I. Enterprises* is not the first time in recent memory that the Supreme Court has underscored the limited role for the courts in policing commercial behaviour. In *Bhasin v. Hrynew*,[98] the Court held:

> In commerce, a party may sometimes cause loss to another — even intentionally — in the legitimate pursuit of economic self-interest. Doing so is not necessarily contrary to good faith and in some cases has actually been encouraged by the courts on the basis of economic efficiency.[99]

The issue of economic efficiency was discussed by the Supreme Court in greater detail in *Bank of America Canada v. Mutual Trust Co*.[100] The Court described the possibility of an "efficient breach of contract", where, as a result of his own breach, a defendant profits in excess of the profit he expected had the contract been performed, and this gain is greater than the plaintiff's loss from the breach. In such a case, in spite of his breach, the defendant can fully pay the plaintiff's damages and still retain a surplus.[101] After describing the principle, the Court held in unequivocal terms: "Efficient breach should not be discouraged by the courts."[102]

Reflecting on the facts of *Lumley v. Gye*, it is evident that Johanna Wagner committed an efficient breach — Gye had agreed to indemnify her against any losses resulting from a lawsuit with Lumley, and paid her more than she was to receive from Lumley. Although this will not be true in all cases, the ongoing recognition of the tort of inducing breach of contract may discourage efficient breach — contrary to the Supreme Court's dictum in *Bank of America*.

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[98] 2014 SCC 71 [*Bhasin*].
[99] *Ibid*. at para. 70.
[100] 2002 SCC 43 [*Bank of America*].
[101] *Ibid*. at para. 30.
[102] *Ibid*. at para. 31.

The courts' reluctance to develop rules to enforce economic competition also weighs in favour of a narrowly-confined scope for the inducement tort. As noted by the Court in *A.I. Enterprises*, commercial certainty is "easily put in jeopardy by adopting vague legal standards based on 'commercial morality'."[103] Cases of inducing breach of contract have suggested that a sense of "fair competition" has seeped into the courts' analysis, importing the subjective question of commercial morality into what should be an application of clear legal principles. As stated in *Bhasin*, the courts must be careful "not to veer into a form of *ad hoc* judicial moralism or 'palm tree' justice."[104]

Admittedly, the common law's concern not to undermine certainty in commercial affairs in some ways supports the imposition of liability for inducing breach of contract — after all, parties enter into contracts to bind others to their promises, and one might expect the common law to do what is possible to promote certainty in having those promises performed (including by discouraging third parties from inducing their breach). Even so, in its current form, the tort of inducing breach of contract injects uncertainty into the law due to the lack of clarity in the elements of the tort. First, as described above, the appropriate construction of the intention requirement is unclear, particularly as it has been interpreted in an inconsistent manner by the Ontario Court of Appeal in recent years. Moreover, the line between *inducing* a breach, and merely providing non-actionable advice respecting a possible breach can be difficult to discern. An older Ontario Court of Appeal case, *Brown v. Spamberger*,[105] illustrates this problem; although the decision turned on the Court's finding that the contract at issue was unenforceable, Roach J.A. would have rejected the plaintiff's claim for inducing breach of contract in any event, holding that the alleged inducer did not commit any legal wrong:

> I know of no legal principle that a person acts at his peril in advising another as to the latter's legal rights arising out of an ordinary commercial transaction in order to persuade him to do something to the former's advantage and to the disadvantage of the other party to that transaction.[106]

This difficulty was evident from the very beginning. In his dissent in *Lumley v. Gye*, Justice Coleridge warned: "To draw a line between advice, persuasion, enticement and procurement is practically impossible in a court of justice."[107]

Yet another uncertain element of the tort lies in the possible defence of justification. There remains "little useful Canadian authority for this principle",[108] which, although alluded to repeatedly in the jurisprudence, is

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[103] *A.I. Enterprises, supra* note 1 at para. 33.
[104] *Bhasin*, *supra* note 98 at para. 70.
[105] 1959 CarswellOnt 240, [1959] O.J. No. 41 (C.A.) [*Spamberger*].
[106] *Ibid.* at para. 29.
[107] *Lumley, supra* note 4 at p. 221.

seldom considered and applied. Leading commentators have highlighted the lack of clarity surrounding the defence; after considering the courts' discussions of the defence justification, Professors Peter Burns and Joost Bloom concluded: "It would appear, then, that the matter of justification is left to 'the good sense' or discretion of the trier of fact".[109]

With little consistency respecting the elements of the tort and their application in the jurisprudence, there is a real risk that the recognition of a tort of inducing breach of contract could undermine commercial certainty and possibly chill legitimate commercial conduct. As such, the common law's concern to promote commercial certainty also promotes a restricted role for the inducement tort.

4. Inducement's Incongruence with the Rationale for the Unlawful Means Tort

As noted above, the Supreme Court in *A.I. Enterprises* considered and rejected the "intentional harm" rationale for the tort of causing loss by unlawful means, instead adopting a rationale based on "liability stretching".[110] In so doing, the Court repudiated the creation of "new tort liabilities in order to reach clearly excessive and unacceptable intentional conduct", preferring a motivating principle that focuses "not on enlarging the basis of civil liability, but on allowing those intentionally targeted by already actionable wrongs to sue for the resulting harm."[111]

Applying the principles guiding this approach to inducing breach of contract serves to further illustrate the deficiencies of the inducement tort. Importantly, the tort of causing loss by unlawful means relies on an "already actionable wrong" committed by the defendant. The courts have articulated no such wrong underlying the inducement tort; rather, the inducement tort currently hinges on precisely what *A.I. Enterprises* rejects: creating a new tort liability to curb conduct deemed to be unacceptable.

IV. IS THERE A PRINCIPLED JUSTIFICATION FOR THE TORT OF INDUCING BREACH OF CONTRACT?

The Supreme Court's recent statements in *A.I. Enterprises* respecting the limited role for tort law in regulation of competitive behaviour, as well as its thorough assessment of the possible rationales underlying the unlawful means

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[108] *Drouillard, supra* note 59 at para. 39.
[109] Peter T. Burns & Joost Blom, *Economic Interests in Canadian Tort Law* (Markham, Ont.: LexisNexis Canada Inc., 2009) at 106.
[110] *A.I. Enterprises, supra* note 1 at paras. 37 & 43.
[111] *Ibid.* at para. 37 [emphasis added].

tort, make clear that we are due for a reassessment of the justification for imposing tort liability for inducing breach of contract.

A critical analysis reveals a lack of consensus regarding the rationale grounding the tort's recognition by the common law.

1. The Tort's Questionable Historical Basis

As discussed above, the tort of inducing breach of contract has its roots in serfdom, when a master could bring an action against a third party for the loss of his servant's services. Subsequently, a similar action was recognized whereby a man could sue another man who induced his wife to breach their marriage contract. Notably, in both circumstances, the plaintiff effectively held a property interest *in the breaching party*, and as such the breaching party was not liable to be sued.

Justice Coleridge, dissenting in *Lumley v. Gye*, noted that these were simply exceptions to the general rule of the common law to confine remedies for breach of contract to the contracting parties.[112] The justices in the majority did not accept that the master/servant and husband/wife cases were distinguishable from the dispute of the rival opera houses before it, and instead rendered a general rule that has survived to this day.

Professor Lea S. VanderVelde has argued that the adoption of the rule in *Lumley* is likely a "gendered" phenomenon, stemming from the societal role of women in the 19th century.[113] She notes that all the prominent American cases applying the rule involved the services of women, and that although various women performers were subjected to permanent injunctions against performing elsewhere for the duration of their contracts (as Johanna Wagner was), no male performer ever was.[114] VanderVelde contends that "[t]he fact that suits over women dominate this line of cases appears to be more than a coincidence."[115] She goes on:

> ... unlike male actors, nineteenth-century women performers were less likely to be viewed as free and independent employees. *Nineteenth-century women were generally perceived as relationally bound to men*. In this line of cases, that perception of women manifested itself in the need to bind actresses to their male theater managers. Moreover, in the view of the dominant culture, women performers were more likely to be perceived as subordinate than were their male counterparts ... *This conceptualization of women in the nineteenth century paved the way for the adoption of the Lumley rule* ...[116]

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[112] *Lumley, supra* note 4 at 219.
[113] Lea S. VanderVelde, "The Gendered Origins of the *Lumley* Doctrine: Binding Men's Consciences and Women's Fidelity" (1992) 101 Yale L.J. 775 [VanderVelde].
[114] *Ibid.* at p. 776.
[115] *Ibid.* at p. 777.
[116] *Ibid.* at pp. 778-779 [emphasis added].

Proceeding to the next chapter in the tort's history, VanderVelde notes that the rule in *Lumley* also paved the way for regressive consequences in labour relations, as the rule was extended to other working people, who came to be treated under restrictive conditions.[117] As noted above, the Supreme Court of Canada observed in *A.I. Enterprises* that, historically, the common law was perhaps "overready" to use the economic torts to intervene in labour disputes, at the risk of undermining freedom of association.[118]

Of course, as VanderVelde states, "[t]hat the *Lumley* rule's origins were suspect may not be sufficient grounds to abandon the rule."[119] It does, however, provide a strong basis to critically examine whether there exists legitimate theoretical or practical justifications for the recognition of the tort today.

2. The Tort Appears Incompatible with the Theory of Corrective Justice

As a general proposition, actions available at private law fit into the justificatory framework of corrective justice, a theory that seeks to provide a coherent explanation for the imposition of liability based on plaintiffs' rights and defendants' corresponding duties.[120] A brief summary of the theory is required for present purposes.

Although the theory of corrective justice dates back to Aristotle, it remains a central justificatory theory of private law. As stated by Professor Ernest J. Weinrib: "Corrective justice is the idea that liability rectifies the injustice inflicted by one person on another."[121] Considering liability through the lens of corrective justice promotes fairness and coherence throughout private law doctrines, and rejects imposing liability based on "a hodgepodge of factors".[122]

The central feature of corrective justice is its correlative structure. Private law will find liability and accordingly provide a remedy for a wrong only if there is correlativity between the parties; the defendant and plaintiff in an action must be connected as doer and sufferer of the same injustice.[123] As a result, the only factors relevant to liability are those that apply equally to both parties; a factor relating to only one party — such as the defendant having "deep pockets", or the plaintiff being in need — is inappropriate and insufficient to justify liability.[124]

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[117] *Ibid.* at 850.
[118] *A.I. Enterprises, supra* note 1 at para. 34.
[119] VanderVelde, *supra* note 113 at 850.
[120] See generally Ernest J. Weinrib, "Corrective Justice in a Nutshell" (2002), 52 U. Toronto L.J. 349 [Weinrib, Corrective Justice].
[121] *Ibid.* at 349.
[122] *Ibid.* at 355-356.
[123] *Ibid.* at 350.
[124] *Ibid.*

Importantly, under the theory of corrective justice, a plaintiff's entitlement at private law "exists only in and through the defendant's correlative obligation."[125] Liability is thus determined with reference to the plaintiff's *right* and the defendant's *corresponding duty* not to interfere with that right. Unless a defendant breaches her duty not to interfere with the plaintiff's corresponding right, there can be no liability.

Negligence law is illustrative. In order for a defendant to be held liable for negligence, it is not sufficient for the defendant's negligent act to have resulted in some harm to the plaintiff. The plaintiff must have suffered harm to an interest that has the status of a *right*, and the defendant's negligent act has to be wrongful *with respect to that right*.[126]

With this background, it becomes evident that the tort of inducing breach of contract simply does not fit within a corrective justice framework. The well-established doctrine of privity of contract provides that "no one but the parties to a contract can be bound by it or entitled under it."[127] A contract creates rights and duties, but such rights and duties exist only between the parties to the contract; the parties entering into a contract cannot impose an obligation on a non-party to the contract.

The tort of inducing breach of contract arises after a plaintiff's right to a benefit under a contract is breached *by the counterparty to the contract*, who owed her a correlative duty. The plaintiff is, accordingly, entitled to a remedy under private law through an action for breach of contract. There is no basis in corrective justice for that plaintiff to be entitled to an alternative remedy from a third party who owed no duty to the plaintiff.[128] As the Supreme Court recently affirmed, "the law has never recognized a sweeping right to protection from economic harm."[129]

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[125] *Ibid.* Weinrib adds (at p. 352): "Evil and need are moral categories that may well figure in other contexts, but they are not pertinent to liability."

[126] *Ibid.* at 352.

[127] *Brown v. Belleville (City)*, 2013 ONCA 148 at para. 73 [*Brown*], citing *Greenwood Shopping Plaza Ltd. v. Neil J. Buchanan Ltd.*, (sub nom. Greenwood Shopping Plaza Ltd. v. Beattie) [1980] 2 S.C.R. 228 at 236-237. Admittedly, the doctrine of privity of contract is not ironclad; the Court of Appeal noted in *Brown* that it is of "considerably diminished force" and has been subject to academic and judicial criticism, leading to calls for reform in Canada and elsewhere: para. 79. Nevertheless, the doctrine remains good law and a governing principle of the law of contract to date, subject to "principled exceptions", following *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299: see *Brown* at paras. 95-100. However, these exceptions are typically applied to extend the *benefit* of a contract to a third party, rather than to impose a *duty* on a non-party to the agreement. See also *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108.

[128] Permitting an action for inducing breach of contract in spite of the existing cause of action for breach of contract also runs the risk of enabling double recovery for a plaintiff. See the text accompanying note 69, above.

Ultimately, there is no correlativity between the plaintiff and defendant in an action for inducing breach of contract. The defendant's act of inducement was not the proximate cause of the plaintiff's loss, and in any event it is not clear that the defendant owed any duty affecting the plaintiff's contractual rights. Corrective justice cannot provide a justification for inducing breach of contract.

3. Accessory Liability Provides an Inadequate Explanation

Recent leading cases on inducing breach of contract from both Canada and the U.K. describe the tort as being justified by "accessory liability" or "secondary liability". Lord Nicholls explained the concept in *OBG*:

> With the inducement tort the defendant is responsible for the third party's breach of contract which he procured. In that circumstance this tort provides a claimant with an additional cause of action. The third party who breached his contract is liable for breach of contract. The person who persuaded him to break his contract is also liable, in his case in tort. Hence this tort is an example of civil liability which is secondary in the sense that it is secondary, or supplemental, to that of the third party who committed a breach of his contract. It is a form of accessory liability.[130]

Accessory liability appears to be the generally-accepted justification for recognizing the tort of inducing breach of contract in Anglo-Canadian law. The rationale certainly seems compelling at first blush; it provides a justification premised in a right held by the plaintiff, and appears to align well with the "liability stretching" rationale for the unlawful means tort accepted by the Supreme Court of Canada in *A.I. Enterprises*.[131] However, this purported justification still does not quite fit the bill.

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[129] *A.I. Enterprises, supra* note 1 at para. 30, citing *Pepsi-Cola Canada Beverages (West) Ltd. v. R.W.D.S.U., Local 558*, (sub nom. R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.) 2002 SCC 8 at para. 72.

[130] *OBG*, *supra* note 46 at para. 172, per Lord Nicholls. See also *Alleslev-Krofchak v. Valcom Ltd.*, 2010 ONCA 557 at para. 97, leave to appeal refused 2011 CarswellOnt 2149 (S.C.C.): "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" and *SAR Petroleum Inc. v. Peace Hills Trust Co.*, 2010 NBCA 22 at para. 33, explaining *Lumley v. Gye*: "While "primary" liability rested with Ms. Wagner, Mr. Gye assumed "secondary" liability for the loss suffered as a consequence of his acts of inducing breach of contract." One of the majority justices in *Lumley v. Gye* also suggested accessory liability was an explanation for the tort, stating: "It is clear 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. *He who procures the wrong is a joint wrongdoer, and may be sued, either alone or jointly with the agent,* in the appropriate action for the wrong complained of." *Lumley, supra* note 4 at 214, per Erle J. [emphasis added].

[131] *Supra* note 1. Accessory liability is in some ways the mirror image of the liability stretching rationale. Instead of "stretching" an existing right to sue from the immediate

Professor Jason W. Neyers discusses the flaws with the accessory liability theory of inducing breach of contract in his article, "The economic torts as corrective justice".[132] First, the analogy to joint tortfeasance the theory relies upon is misplaced. Neyers[133] explains that the correct view of joint tortfeasance attributes the *act* of the wrongdoer to the accessory — not the *liability* for the wrong (as inducing breach of contract requires). An example helps to illustrate: if A procures B to trespass on C's land, B's act of trespass may be attributed to A, who could then similarly be held liable for trespass, because C's right to land is *in rem*, and binds us all. The analogy to joint tortfeasance falls apart, however, when applied to breach of contract: if A induces B to breach B's contract with C, and B's *act* (the breach) is attributed to A, A cannot be held liable to C for breach of contract, because right under the contract are *in personem*, binding only the parties thereto;[134] a breached no right of C's, as C's rights conferred under the contract were only in relation to B. Neyers notes a further flaw in the theory, noting that other modes of participation permitted for the attribution of action to a joint tortfeasor (such as authorizing or ratifying) for other causes of action (such as trespass) are not recognized as sufficient for the tort of inducing breach of contract.[135]

Second, the accessory liability view fails because the remedies available against a party who induces a breach of contract (in tort) are different from the remedies available against the breaching party in contract.[136] This suggests the inducer's liability is not actually a "parasitic" form of secondary liability, which would be dependent on and limited to the breaching party's liability.[137] It is difficult to explain why the accessory should be liable to greater damages than the principal.

Professor Neyers' criticisms in this regard are echoed by Professor Pey-Woan Lee in her article "Inducing Breach of Contract, Conversion and Contract as

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victim of an unlawful act to the third party plaintiff who was targeted, accessory liability stretches the scope of *liability* beyond the party who committed a breach to an associated party who counselled the breach. Such a view, however, may be problematic: while the extension of standing to sue does not expand the scope of liability for a wrong, but merely shifts (or expands) the ability to sue for the wrong to another wronged party, "accessory liability" in inducing breach of contract imposes *additional* liability on a party who committed no unlawful act.

[132] J.W. Neyers, "The economic torts as corrective justice" (2009) 17 Torts Law Journal 163 [Neyers].

[133] Citing R. Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007) at 254 [Stevens].

[134] Neyers, *supra* note 132 at 170. See also the comments above respecting the application of corrective justice to inducing breach of contract, at Part IV.2.

[135] *Ibid.* at 170-171.

[136] See the text accompanying footnote 71, *supra*.

[137] *Ibid.* at 171, citing Stevens, *supra* note 133 at 277.

Property".[138] She similarly notes that the analogy to joint tortfeasance is incongruous:

> *When two or more persons are jointly liable in tort, only one tort is committed.* Similarly, if one party procures another to commit a tort, such as trespass, the latter's act is attributed to the former and both are the principal wrongdoers of the same tort. *The act of procurement is not a separate tort.*[139]

Lee also agrees that contractual obligations cannot be breached (by attribution) by a non-contracting party, as such obligations are, by their intrinsic, *in personem* nature, unique to the contracting party. Thus, she concludes, "a 'joint principal' of another's contractual breach is manifestly a conceptual impossibility."[140]

Lee acknowledges that it is possible that the courts did not intend to draw a *strict* analogy between joint tortfeasance and inducing breach of contract, but rather used accessory or secondary liability as a loose description, as there is a nexus between the act of inducement and the contractual breach. If this is so, however, such a "descriptor" is insufficient on its own to justify the tort.[141]

4. Other Stated Justifications and Possible Underlying Motives

Beyond accessory liability, the courts have referred to a few other reasons for imposing liability for inducing breach of contract. Although these ostensible justifications are not rights-based theories supporting recognition of the tort at law, they nonetheless warrant consideration as they may, as a practical matter, be the driving forces behind the continued existence of the tort.

(a) A defendant with deeper pockets

The origins of inducing breach of contract suggest that the tort was likely intended to provide a means to ensure a remedy for a wronged plaintiff — regardless of correlativity or other rights-based justifications.

Notably, the majority justices in *Lumley v. Gye* explicitly acknowledged that an action for inducing breach of contract would permit a plaintiff to nonetheless obtain a remedy when the party who actually breached the contract is unable to pay, or even when the contract includes a limitation of liability clause.[142] Waddams suggests the justices were likely aware of and accounting for the fact

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[138] (2009) 29(3) Oxford J. Legal Stud. 511 [Lee].
[139] *Ibid.* at 521 [emphasis added].
[140] *Ibid.*
[141] Lee, *supra* note 138 at 521-522.
[142] *Lumley, supra* note 4 at 213, per Crompton J. ("The servant or contractor may be utterly unable to pay anything like the amount of damage sustained entirely from the wrongful act ...") & p. 214, per Erle J. ("The remedy on the contract may be inadequate, as where the measure of damages is restricted ... he who procures the damage maliciously might justly be made responsible beyond the liability of the contractor.")

that Johanna Wagner was likely to be outside the jurisdiction of the English courts at the time of any award, and in any event would not have the means to pay a sizable damage award.[143] Indeed, Lord St Leonards' decision upholding the injunction — issued against both Gye and Wagner — to prevent Wagner's performance at Covent Garden was premised, at least in part, on Wagner's presumed inability to pay damages in the event she was eventually held liable for her breach at common law.[144]

Even recent Canadian appellate decisions have articulated that the tort of inducing breach of contract is justified to supplement an inadequate award of damages for breach of contract. In *SAR Petroleum*, the New Brunswick Court of Appeal held that the possibility that "[t]he remedy on the contract may be inadequate, as where the person breaching the contract ... might be unable to pay the damages actually suffered by the plaintiff" provided "the policy reason underscoring the right of a party to a contract, which has been breached, to sue a non-party for inducing the breach."[145]

Imposing liability on a defendant who committed no legal wrong but who can afford a damages award is an unprincipled exemption to our rights-based system of liability. As a practical matter, however, courts hoping to shift a loss borne by an innocent claimant to an arguably morally culpable defendant may see this as a sufficient basis to impose liability for inducing a breach, regardless of whether a principled rights-based justification for the tort exists.

(b) Passing judgment on commercial morality

Judicial characterizations of the intention requirement for the tort of inducing breach of contract suggest that the acceptance of the tort is premised, at least in part, on a sense of moral wrongdoing. When the tort was first recognized in *Lumley v. Gye*, it is clear the majority justices were strongly motivated by their view that Gye acted "with a malicious intention"[146] and should be held responsible for the wrongfulness of his acts.[147]

More recently, in its in-depth discussion of the tort in *SAR Petroleum*, the New Brunswick Court of Appeal explained its approval of the test for intention formulated by Lord Hoffmann in *OBG* by stating:

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[143] Waddams, *supra* note 5 at 447-448.

[144] *Ibid.* at 446.

[145] *SAR*, *supra* note 3 at para. 33. The Court went on to note that the plaintiff may also be able to recover broader damages in tort than those available in contract.

[146] *Lumley*, *supra* note 4 at 210 per Crompton J; see also the statements of Erle J. at 214 ("he who procures the damage maliciously might justly be made responsible ...").

[147] Professor Francis Bowes Sayre wrote that the "rudimentary and somewhat vague doctrine" from *Lumley v. Gye* was premised on the defendant's action being malicious: see Sayre, *supra* note 2 at 669.

> ... those who pursue a course of action designed to bring about a breach of contract with a view to realizing an economic benefit or advantage for themselves or their principals at the expense of others should not be able to escape the grasp of this intentional tort. Such conduct qualifies as unacceptable commercial behaviour, best summed-up in the word "opportunism". On the other hand, defendants who in good faith are pursuing their economic interests in accordance with existing contractual rights will fall outside the intended scope of the tort. Certainly they cannot be accused of acting for an improper purpose.[148]

The Court went on to hold that a court's task in assessing whether the intention element of the tort was made out comes down to "deciding whether the defendant sought a commercial or economic advantage that crossed the Rubicon from acceptable commercial behaviour to unacceptable or opportunistic behaviour".[149]

Such statements are inconsistent with the Supreme Court's more recent statement in *A.I. Enterprises* that vague legal standards based on "commercial morality" are problematic because they put commercial certainty in jeopardy.[150] Further, they hark back to the decisions of the House of Lords in its 1892-1901 trilogy. In particular, one recalls Lord Morris' remarks in *Mogul Steamship*; he rejected the imposition of tort liability based on malicious but lawful behaviour, because otherwise "the question of 'fairness' would be relegated to the idiosyncrasies of individual judges."[151] More than a century later, *SAR Petroleum* illustrates that the tort of inducing breach of contract threatens to permit precisely what Lord Morris feared.

Ultimately, the case law fails to articulate a coherent basis for legal recognition of inducing breach of contract, and courts' practical justifications for the tort are not only insufficient to ground liability, but themselves problematic. Mercifully, additional justificatory theories have emerged in academic commentary.

5. Quasi-proprietary Right Theory

In his work on the basis for excluding liability for pure economic loss in tort law, Professor Peter Benson advanced an alternative theoretical justification for the tort of inducing breach of contract, based on the earlier work of Professor Francis Bowes Sayre.[152] He begins from the widely-accepted premise that the law of contract creates an exclusive right in the promisee to the performance

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[148] *SAR*, *supra* note 3 at para. 53.
[149] *Ibid.* at para. 57.
[150] *A.I. Enterprises, supra* note 1 para. 33.
[151] *Mogul Steamship*, *supra* note 28 at 51.
[152] Peter Benson, "The Basis for Excluding Liability for Economic Loss in Tort Law", in D.G. Owen, ed., *Philosophical Foundations of Tort Law* (Oxford: Clarendon Press, 1997) at 455-457 [Benson]; Sayre, *supra* note 2.

promised by the promisor. He highlights two key components of this premise: first, the promisee's exclusive right is to the *performance* of the promise — not the thing promised itself — and second, this right is *in personem*, as against the person(s) who made the promise — not the world at large.[153]

In cases of negligently-caused economic loss, Benson notes, these limitations to the right conferred by contract have the effect of excluding liability in tort. First, the plaintiff's contractual right is not to the thing promised, the condition or value of which the defendant unintentionally damaged, but to performance of the promise. Moreover, the plaintiff's contractual right is in respect of a third person — the defendant's negligence cannot constitute a wrong to a *right* the plaintiff holds vis-à-vis the defendant.[154] As such, it is justified for the law to not provide recovery to the plaintiff — the defendant did not injure her rights.

When the defendant *intentionally* interferes with a contract, however, this calculation changes. Benson argues that courts allow recovery for inducing breach of contract because the right created by contract is "quasi-proprietary", protected from third-party interference in certain contexts.

The theory of quasi-proprietary right has been criticized for a lack of clarity as to the distinction between proprietary and quasi-proprietary rights,[155] and a circularity in its definition. Considering the proposal that contractual rights were "quasi-proprietary", the High Court of Australia once held:

> [The thesis of contractual rights as "quasi-proprietary"] seeks to answer the question: "Why is a plaintiff's right to performance of a contract protected against third party interference?" It gives the answer: "Because it is quasi-proprietary." But that raises the question: "Why is it quasi-proprietary?" The answer is: "Because it is protected against third party interference".[156]

Professor Benson, however, answers this criticism by analogizing the inducement tort to the assignment of a contractual right. He observes that when a contractual right is assigned, it is treated by the party to whom it is assigned as an asset that can be acquired, with the consent of the right-holder. Viewed in this context, a contractual right functions just like any property right — it is quasi-property, insofar as it may be transferred consensually from the parties in privity to a stranger to the contract.[157] Benson continues to explain that if the contractual right may be a quasi-property interest transferred *voluntarily* by way of assignment, it must also function this way in an *involuntary* transaction, when a defendant stranger to the contract treats the right as an asset he can appropriate, without the right-holder's consent.[158]

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[153] Benson, *supra* note 152 at 455.
[154] *Ibid.* at 456.
[155] See Paul S. Davies, *Accessory Liability* (Portland, OR: Hart Publishing, 2015) at 164.
[156] *Zhu v. Treasurer (NSW)*, [2004] HCA 56 at para. 126 [*Zhu*].
[157] Benson, *supra* note 152 at 456.
[158] *Ibid.* at 456-457.

Accordingly, a plaintiff's contractual right will be protected against third-party interference *only* when the defendant stranger to the contract has demonstrated an intention to treat that right as an asset he can acquire or appropriate (i.e. with his intention to cause a breach of the contract). This attribution of the plaintiff's contractual right as an entitlement against the defendant in a claim for inducing breach of contract, Benson argues, is "a fair and reasonable implication of the defendant's act and of the specific kind of interaction that has taken place."[159]

Neyers submits that Benson's quasi-proprietary rights theory provides "the best interpretive theory currently available".[160] It is undoubtedly compelling, as it appears to explain the various requirements for the tort, in a rights-based manner, without suffering from the conceptual flaws of other justificatory theories put forward.[161]

Despite its coherence, the quasi-proprietary right theory has not been cited in the leading Anglo-Canadian jurisprudence as a rationale for the inducing breach of contract tort. Rather, it appears to provide an *ex post facto* explanation for a tort that, to date, has not been supported in the jurisprudence by a coherent interpretive theory.

6. The Theory of Public Right

A further possible justification for the tort, in some ways analogous to the quasi-proprietary right theory, has been provided by Professor Ernest Weinrib in his article, "Private Law and Public Right".[162] Weinrib draws on Immanuel Kant's philosophy of public right to explain why the tort of inducing breach of contract has the effect of "extend[ing] to the rest of the world the obligation to respect the contract".[163]

Kant's "public right" refers to how public institutions of adjudication and enforcement actualize and guarantee private law rights, such as those to property or contractual performance. Weinrib explains the philosophy as follows: Although private rights can exist in a "state of nature", public

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[159] *Ibid.*

[160] *Ibid.*

[161] Neyers further describes the benefits to this theory as including: a justification for the requirement that the contract be *breached*, and not merely interfered with; an explanation why an *in* per*sonem* right in the law of contract can be treated as an *in rem* right by tort law in limited circumstances created by the actions of the parties; a basis for apparently burdening the defendant with a contract to which he is not privy, as it was his own intention to interfere with it that warrants such burden; and that it helps to explain the dichotomy between non-actionable advice respecting breach of contract, and actionable persuasion (as persuasion rises to the level of appropriation of the plaintiff's contractual right): *Neyers, supra* note 132 at 176-177.

[162] (2011), 61 U. Toronto L.J. 191 [Weinrib].

[163] *Ibid.* at 204.

institutions are necessary to ensure that the free actions of one person can be consistent with the equal freedom of another. A public mechanism of correction prevents a scenario where rights are unilaterally interpreted and enforced by the strongest party.[164]

Weinrib applies this philosophy to justify the tort of inducing breach of contract. He argues that, in a state of nature, a contract binds only the parties to it, but no one can be sure his or her rights will be respected. Public right, however, creates a system of omnilateral assurance to guarantee those rights, through institutions representing the will of all; for instance, courts hold contractual parties to their obligations. Public right ties each person to every other person through a shared system of laws. Accordingly, Weinrib argues:

> When everyone is united under a system of laws that assures the rights of all, *everyone is obligated to respect everyone else's contractual rights. ... [A court] has the public function of making everyone secure in her rights against everyone else. This function would be unfulfilled if parties external to the contract could procure violations of another's contractual rights at their will.* Accordingly, whereas, in the state of nature, the parties to a contract are not secure even against each other, public right makes their rights secure against everyone by attaching liability not only to a breach of contract by the other contracting party but also to the procuring by third parties of such a breach. Thus, *public right makes the contract a juridical object for everyone*, thereby creating a system of reciprocal assurance that relates all to all.[165]

Professor Weinrib posits that the purpose of the inducement tort "is to provide assurance to a contracting party that no one, not even a stranger to the contract, may act inconsistently with the recognition of the contract's juridical significance".[166] He further explains his view that the intention requirement of the tort is justified by the Kantian theory:

> Essential to the Kantian conception of this wrong is that persons who commit it act on the implicit principle that they are free to disrespect contracts to which they are not parties. Liability responds to the wrong in order to provide the assurance that no one, whether a party to the contract or not, can regard another's contractual right as a nullity. Hence, the tort requires knowledge of the contract's existence and an intention to interfere with its performance because one cannot regard as a nullity something that one does not know exists and that one's action does not target.[167]

Professor Weinrib's explanation of the principle underpinning the inducement tort relies on an omnilateral conception of rights that grants a public dimension even to rights *in personem*. Simply put, under this theory, the

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[164] *Ibid.* at 195, citing Immanuel Kant, *The Metaphysics of Morals*, in Mary J Gregor, ed. and trans., *The Cambridge Edition of the Works of Immanuel Kant: Practical Philosophy* (Cambridge: University of Cambridge Press, 1996) at p. 6:256.
[165] *Ibid.* at 205 [emphasis added].
[166] *Ibid.*
[167] *Ibid.* at 205.

tort of inducing breach of contract is justified in imposing liability because everyone must respect others' contractual rights, and those who induce a breach are treating others' contractual rights as a nullity.

Like the quasi-proprietary right theory, Weinrib's explanation of the tort as a breach of a public right offers a convincing rights-based justification for the common law's recognition of the tort of inducing breach of contract. However, it too provides an *ex post facto* theoretical framework to justify a tort that the common law has to date recognized on entirely different grounds.[168]

V. A WAY FORWARD

To establish the scope of the inducement tort, Canadian courts must first clarify its rationale.[169] I would propose that the tort of inducing breach of contract is best justified by the quasi-proprietary right theory, which renders the plaintiff's contractual right enforceable against the defendant as a direct implication of the defendant's unilateral act of appropriation of the plaintiff's right. This theory provides a reasonable basis for apparently burdening the defendant with a contract to which he is not privy, as it was his own intention to interfere with the contract and procurement of the breach that warrants such a burden. A more thorough evaluation of the theory will elucidate.

1. The Quasi-proprietary Right Theory Is the Preferred Justification for the Tort

Professor Benson is not the first to justify the inducement tort on the basis of deeming the contractual right at issue to be quasi-proprietary. The idea dates back to Francis Bowes Sayre's article "Inducing Breach of Contract", published in the *Harvard Law Review* in 1923.[170] Questioning the justification for the tort after the House of Lords had unequivocally ruled out malice as its basis, Sayre

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[168] One exception to this assertion, however, may be seen in *Posluns v. TSE and Gardiner*, *supra* note 41 at para. 138, where Gale J. explained the tort of inducing breach of contract by stating:

> While a contract cannot impose the burden of an obligation on one who is not a party to it, *a duty is undoubtedly cast upon any* per*son, although extraneous to the obligation, to refrain from interfering with its due* per*formance* unless he has a duty or a right in law to so act. Thus, if a person without lawful justification knowingly and intentionally procures the breach by a party to a contract which is valid and enforceable and thereby causes damage to another party to the contract, the person who has induced the breach commits an actionable wrong. That wrong does not rest upon the fact that the intervenor has acted in order to harm his victim, for a bad motive does not per se convert an otherwise lawful act into an unlawful one, but rather because there has been an unlawful invasion of legal relations existing between others. [emphasis added]

Justice Gale's articulation of the rationale has not been adopted in subsequent cases.

[169] Following the approach in *A.I. Enterprises, supra* note 1 at para. 36.

[170] *Sayre*, *supra* note 2.

wrote that "its true basis would seem to lie in the policy of the law to accord to promises the same or similar protection as is accorded to other forms of property".[171] He argued that *Lumley* sought to extend one's interest in "promised advantages" by providing a remedy not only against one who breaks his promise, but also against anyone who seeks to destroy or to appropriate for himself such promised advantages.[172]

In addition, Professor Richard A. Epstein espoused a similar theory in 1987.[173] Epstein analogized the tort to conversion, including the exclusion of liability for conversion in the case of ostensible ownership without notice. Conversion relates to the taking of another's chattels (i.e. personal property), and is a tort of strict liability. A problem arises, however, when ownership and possession of the thing are separate, such as when a bailee sells something that is not his; the third-party purchaser may not have been aware he was converting another's goods. The law of conversion, Epstein explains, treats the third party purchaser differently depending on whether he had notice of the separation of possession and ownership. If the third party had notice, the original owner prevails, as the third party suffered no deception but rather was party to a wrong. If the third party purchaser had no notice of the separation, the ostensible ownership rule makes the owner bear the loss.[174]

From this premise, Professor Epstein extends the principles of ostensible ownership to explain inducing breach of contract. He argues that it is "as convenient and proper to speak of the individual ownership of labor as it is to speak of the individual ownership of land and chattels", asserting that the tort is "available to fill the void that the more traditional notions of property may not reach".[175]

Like conversion, Epstein notes, a contract may raise the issue of ostensible ownership, as the promisee has parted with the rights to the labour or object over which he retains possession.[176] Accordingly, the notice requirement for the tort of inducement acts in a similar manner as with the tort of conversion. Just as a purchaser will be held liable for conversion where she has notice of the ostensible ownership, a third party who knows a right has been conferred by contract will be held liable if she acquires the contractual right for herself with the knowledge it has already been committed to another.

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[171] *Ibid*. at 675.
[172] *Ibid*. at 676.
[173] Richard A. Epstein, "Inducement of Breach of Contract as a Problem of Ostensible Ownership" (1987), 16 J Legal Stud. 1 [Epstein].
[174] *Ibid*. at 9-14.
[175] *Ibid*. at 19-20. Epstein cites the work of John Locke for the principle that "every man has a property in his own person; this nobody has any right to but himself. The labour of his body, and the work of his hands we may say are properly his": John Locke, *Of Civil Government, Second Treatise*, ch. 5, para. 27 (1690).
[176] Epstein, *supra* note 173 at 24.

Epstein analogizes an inducer to a bad faith purchaser of goods or land and submits that there is no justification for the subordination of the original promisee's rights to the third party inducer. He thus strikes at the heart of the problem the inducement tort targets, stating:

> The willingness to proceed with a transaction where there is knowledge that it entails a breach is itself a form of malice, as it indicates a self-interested *willingness to defy the basic system of rights created by the legal system*.[177]

The quasi-proprietary right theory, then, appears to have appreciable support. Interestingly, this justification for the tort aligns with one of Lord Hoffmann's comments in *OBG*, in which he stated that *Lumley v. Gye* was founded on a principle that "treats contractual rights *as a species of property* which deserve special protection".[178] One notes, however, that in the same paragraph Lord Hoffmann also suggested that accessory liability is the principle underlying the tort.

In the wake of *OBG*, Professor Pey-Woan Lee sought to assess the Law Lords' reasoning and re-evaluate the rationale underpinning inducing breach of contract in the U.K.[179] She did so by considering their opinions on a different but related issue: the question of expanding the application of the tort of conversion beyond chattels. Here the Law Lords' views diverged, with a narrow majority ultimately declining to extend the tort of conversion so to apply to intangibles such as contractual rights.[180]

The Law Lords in dissent on this point took issue with the longstanding "legal fiction" that the conversion of intangible rights will be actionable only if the rights are recorded in a document (such as a negotiable instrument or stock certificate), despite the fact that many obligations exist that enjoy all the other characteristics of property, but are not represented by a specific document.[181] Baroness Hale held that, "In a logical world, there would be a proprietary remedy for the usurpation of all forms of property"; the issue would then shift to whether that which was usurped constitutes property.[182] She provided a general definition, stating: "The essential feature of property is that it has an existence

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[177] *Ibid*. at 25 [emphasis added]. In addition to this rights-based perspective, Epstein also considers the tort from a law and economics perspective, noting that the tort encourages an inducer to enter into voluntary market transactions, rather than force involuntary transactions by appropriating another's right: *ibid* at 32 (referring in particular to the damages awarded for the tort). For another law and economics-based assessment of the tort, see Lillian R. BeVier, "Reconsidering Inducement" (1990), 76 Va. L. Rev. 877.

[178] *OBG*, *supra* note 46 at para. 32, per Lord Hoffmann [emphasis added].

[179] Lee, *supra* note 138.

[180] *OBG*, *supra* note 46 at paras. 94-99, per Lord Hoffman.

[181] *Ibid*. at para. 228-232, per Lord Nicholls, and at paras. 309-310, per Baroness Hale.

[182] *Ibid*. at para. 309.

independent of a particular person: it can be bought and sold, given and received, bequeathed and inherited, pledged or seized to secure debts ..."[183]

Professor Lee observed that the various Law Lords' remarks in *OBG* suggest they all endorsed at least some limited conception of contractual rights as "property", but that it was far from clear whether they share a common understanding.[184] Lee assesses numerous legal academics' conception of property, and concludes that property "is a relative rather than an absolute concept".[185] Specifically, she argues that what constitutes "property" is

> . . . moulded in accordance with the social norms and ideology of a particular society. The designation of a resource as 'property' is therefore a conclusion, not a justification, derived from the application of particular normative or policy considerations. ... *In reality, of course, a court creates property each time it accords 'proprietary' protection to a resource*.
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> Once it is recognized that *property is a social construct rather than a transcendental phenomenon*, it must become apparent that the concept is limited in both its content as well as analytical value. Ultimately, *the decision to confer proprietary protection on a particular resource or interest calls for a thorough and explicit examination of the nature of the interest as well as the relevant policy considerations*.[186]

Lee's conception of property is not entirely nebulous; she provides loose boundaries, stating that to qualify as property "a resource must minimally be capable of being excluded from the rest of the world".[187] Notably, on this definition, she too appears prepared to deem contractual rights "quasi-proprietary"; she states that "Except where the same has been delegated or assigned, a contracting party's rights to deal with the contract are, by definition, exclusive to him".[188]

Proceeding from this basis, Lee criticizes the majority of the Law Lords' decision in *OBG* to reject legal protection for the conversion of intangible property, stating that there is "no reason why a party's dominion over his contract rights ought not to be shielded against the obtrusion of strangers".[189] However, Lee endorses the majority Law Lords' concern that expanding the tort of conversion to protect intangible rights would be a drastic change. Not only could such a change require other legal concepts premised on the physical world, such as possession, to be re-examined and possibly re-conceived so to apply to intangibles, but it would be challenging to rationalize the modified tort in the

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[183] *Ibid.*
[184] Lee, *supra* note 179 at 512.
[185] *Ibid.* at 513.
[186] *Ibid.* at 517-518 [emphasis added].
[187] *Ibid.* at 513.
[188] *Ibid.* at 530.
[189] *Ibid.*

general structure of tort liability, which accords different degrees of protection to property and other economic interests.[190]

In his 1923 work, Sayre also analogized the inducement tort to conversion, and similarly expressed doubt that conversion could properly address the interests at stake. He wrote:

> ... this analogy must not be pushed too far; one relates to the conversion of more or less tangible property, the other to the conversion of intangible promises which are of legal value and a form of property only in so far as the courts choose to enforce them and to clothe them with protection similar to that given to other forms of property. The real question is how far shall the analogy of promised advantages to property in the form of tangible chattels be pushed, or, to state the same thought in other words, *how far shall promises be given a protection equivalent to that which the law affords to tangible chattels in the cases when to give it would conflict with other valuable interests which the law seeks to protect*.[191]

I would propose that the tort of inducing breach of contract can serve as a happy medium; it can accord meaningful legal protection against the misappropriation of intangible, quasi-proprietary rights, but its elements can be constrained so as to not unduly protect purely economic interests and so liability is not imposed for acceptable competitive behaviour.

Before proceeding to discuss precisely how the elements of the tort might be constrained so to achieve this balance, I will explain why I prefer the quasi-proprietary right theory to the justificatory theory premised on public right.

Professor Weinrib's explanation of inducing breach of contract on the basis of public right provides an alternatively sound basis for the tort. Although conceptually different from the quasi-proprietary right theory, the public right justification achieves similar results. The public right model, like the quasi-proprietary right theory, requires that the defendant have knowledge of the contract and intend to cause the breach, as both are required for a defendant to have regarded the plaintiff's rights as a nullity. A common thread ties these theories together: both provide that a contract creates rights both *in rem* and *in personem* — the parties are bound by the obligation of performance, but a duty to respect the contractual tie is imposed upon the rest of the world.[192]

Weinrib's explanation of the principle underpinning the inducement tort, however, does not merely attribute proprietary characteristics to a right *in personem* to render it *in rem* under certain circumstances; rather, his public right theory reconceives of our system of laws entirely as one of omnilateral

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[190] *Ibid*.

[191] Sayre, *supra* note 2 at 679, fn 57 [emphasis added].

[192] See Lionel Smith, "Transfers," ch. 5 in P. Birks and A. Pretto, eds., Breach of Trust (Oxford: Hart Publishing, 2002) at 111-138, citing Sir William Anson, *Principles of the English Law of Contract and of Agency in its Relation to Contract*, 8 ed. (London: Stevens & Sons, 1898) at 227.

assurance, granting a public dimension to all rights *in personem*. His theory speaks of "transforming private law into a community of rights", with all rights holders as reciprocally determining participants in the legal system.[193]

The quasi-proprietary right theory is the preferred justification because it is the less expansive of the two; in *A.I. Enterprises*, the Court endorsed a motivating principle that would not enlarge the basis of civil liability or create new tort liabilities.[194] One worries that accepting an overarching framework of public right into our system of private law may result in unintended consequences, and may create a domino effect transforming numerous areas of private law. Moreover, an inducement tort premised on public right may not be sufficiently circumscribed. For instance, it might impose liability on a doctor, lawyer, or friend who, in good faith or in accordance with a legal duty, advises a contracting party to breach her obligation (such an inducer would have notice of the contract and effectively be disrespecting the counterparty's contractual rights).

Like the preferred rationale for the unlawful means tort in *A.I. Enterprises*, the quasi-proprietary right theory provides for liability only where a wrongdoer's acts intentionally target the injured plaintiff, and are in breach of established legal obligations to that plaintiff.[195] Moreover, as in *A.I. Enterprises*, the quasi-proprietary right rationale "provides certainty because it establishes a clear 'control mechanism' on liability in this area of the law, consistent with tort law's reticence to intrude too far into the realm of competitive economic activity."[196]

2. Proposed Constraints on the Elements of the Tort

While the rationale for the inducement tort provided by the House of Lords in *OBG* is found wanting and ought to be reassessed in Canada, Canadian courts would be wise to adopt the *elements* of the tort articulated by the Law Lords in that case. Accordingly, the elements of the tort must include (1) knowledge of a valid contract; (2) intention to cause breach of the contract; and (3) conduct actually causing the breach.[197] I will proceed to briefly discuss how each of these elements may be construed in accordance with the rationale for the tort and the principles stated in *A.I. Enterprises* respecting the common law's limited intervention in the commercial sphere, before adding two notes regarding damages and the possible defence of justification.[198]

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[193] Weinrib, Public Right, *supra* note 120 at 211.
[194] *A.I. Enterprises, supra* note 1 at para. 37.
[195] *Ibid.* at para. 43.
[196] *Ibid.* at para. 44, citing *OBG*, *supra* note 46 at para. 266, per Lord Walker of Gestingthorpe.
[197] See *OBG, supra* note 46 at paras. 39-44, per Lord Hoffmann.
[198] I note that this analysis has benefitted from the discussion of the elements of the tort of

As the inducement tort relies upon intentional appropriation of another's contractual right, the defendant must have knowledge of a valid and enforceable contract between the breaching party and the plaintiff. However, as the Ontario Court of Appeal held in *Posluns*, the defendant need not know the precise terms of the contract. Rather, this element will be satisfied if the defendant has "sufficient knowledge of the terms to realise they were inducing a breach".[199] The rationale for the tort, focused on the appropriation of another's right or treatment of such right as a nullity, does not call for a positive duty to inquire or investigate as to the existence of any contract — such a common law duty would unduly hinder competition in the commercial sphere.

The requirement that the defendant intend to cause a breach was interpreted in an inconsistent manner in two of the leading Canadian appellate cases, *Drouillard* and *Correira*; this inconsistency ought to be resolved. In *Drouillard*, the Court was willing to infer intention to cause a breach from the defendant's suggestion to the breaching party that it was in their best interest that the plaintiff no longer be employed there. This inference was made despite the Court's acknowledgement that there was no evidence that the defendant wanted the breaching party to terminate the contract without reasonable notice.[200] Conversely, in *Correira*, the Court dismissed a claim of inducing breach of contract on the basis that the defendants did not intend the plaintiff's employment contract be breached, but that it be terminated lawfully for cause.[201] The Court of Appeal in *Correira* noted that foreseeability of the inevitable consequences of reckless conduct is *not* sufficient to satisfy the intention requirement, and held that the restrictive intention requirement is justified because "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."[202]

The strict intention requirement articulated in *Correira* is preferable given the rationale for the tort and its role in a competitive economy. The essence of the inducement tort is not about *causing* a breach of contract, but about *procuring* the breach — directly and consciously appropriating a plaintiff's contractual rights for personal benefit, economic or otherwise. A breach that is an incidental and undesired by-product of some unrelated object ought not attract tort liability — even if the breach is foreseeable or even inevitable.[203] Although some

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inducing breach of contract in Peter T. Burns & Joost Blom, *Economic Interests in Canadian Tort Law* (Markham, Ont.: LexisNexis Canada Inc., 2009) 79-120 [Burns & Blom].

[199] *J.T. Stratford & Son Ltd. v. Lindley* (1964), [1965] A.C. 269 (Eng. C.A.) at 332, reversed (1964), [1965] A.C. 307 (U.K. H.L.).

[200] *Drouillard*, *supra* note 59 at paras. 31-33.

[201] *Correira*, *supra* note 73 at para. 105.

[202] *Ibid.* at para. 101.

acts of persuasion to terminate a contract may inadvertently have the effect of causing a breach, such actions are not necessarily an intentional and culpable appropriation of the plaintiff's rights, and should not fall within the scope of liability.

The explanation of the intention element offered in *OBG* provides a helpful framework for its application: if the breach of contract is either the defendant's intended end or the intended means to an end, he can be said to have intended the breach. If, however, the breach is not the intended end or the means to such an end, but merely a foreseeable *consequence*, the defendant cannot be said to have intended the breach.[204] Sayre put it this way: If a defendant was not seeking to appropriate for himself the promised advantages of the plaintiff, but was seeking an object quite foreign to that which the plaintiff sought in the making of the contract, the defendant will not have the requisite intention to attract tort liability.[205] There should be no presumption of intent — it is an essential element upon which the rationale for the tort hinges, and it is not sufficient to argue that one is deemed to have intended the natural consequences of their conduct.

The last element of the tort requires conduct resulting in breach of the contract. First, it is important to note that an actual breach is required — mere interference with the contract that causes some economic loss is not enough. Although the Law Lords in *OBG* highlighted the requirement for an actual breach according to its stated justification of accessory liability,[206] an actual breach is also required for the quasi-proprietary right rationale: it is only where the promisor is in breach that the defendant can be said to have misappropriated the plaintiff's right to performance of the contract.[207]

What sort of conduct is required? Professors Burns and Blom refer to three categories of conduct discussed by the English Court of Appeals in *D.C. Thomson Ltd. v. Deakin*[208] (when it laid out the ill-fated unified theory of economic torts).[209] The most straightforward category of conduct causing breach is "direct intervention": where the defendant's positive acts physically prevent the breaching party from performing the contract. This might include detaining the breaching party, or "removing the only available essential tools" needed to perform the contract.[210] Such incidents are likely to be fairly

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[203] See Sayre, *supra* note 2 at 676-678. Sayre highlights that the law does not undertake to hold parties liable for all the damage they cause, but only for the damage they *culpably* cause.

[204] See *OBG, supra* note 46 at paras. 42-43.

[205] Sayre, *supra* note 2 at 683.

[206] See *ibid.* at para. 44.

[207] Epstein elaborates on this point, discussing the distinction between breach of contract and termination of contract: see *supra* note 173 at 24.

[208] *Deakin*, *supra* note 37.

[209] Burns & Blom, *supra* note 198 at 85ff.

uncommon in conjunction with the other elements of the tort being met (i.e. the defendant must "intervene" intending to force the breach of contract), and may in some cases overlap with the tort of causing loss by unlawful means.

The two remaining categories laid out by the Court in *Deakin* — "direct" and "indirect" inducement — have been the source of much confusion over the past several decades, but can now at long last be simplified. What was formerly known as indirect inducement — intentional interference by indirect methods involving wrongdoing — has been subsumed by the unlawful means tort.[211]

Direct inducement occurs where the defendant persuades the breaching party to breach her contract with the plaintiff. This element raises the thorny issue of what constitutes actionable persuasion as contrasted with non-actionable advice. In general, mere "advisors", such as doctors, lawyers, and friends who propose in good faith that a contracting party terminate a contract for reasons unconnected with the object of the contract, will be excluded from liability for failing to meet the intention requirement — such actors are not seeking to appropriate a plaintiff's contractual right. Where the intention requirement is met, however, this element must be considered on a case-by-case basis, as it is essentially a question of causation;[212] the issue is whether the breach can be attributable to pressure or persuasion on the part of the defendant.

There remain two outstanding issues Canadian courts should address when considering the inducement tort. First, in order to establish damages, it perhaps goes without saying that the plaintiff must demonstrate a causal connection between the defendant's conduct in inducing the breach and the plaintiff's material losses. A remedial issue that appears to have been overlooked in Canada, however, is the prevention of double recovery. As discussed above,[213] in *Drouillard* neither the Court of Appeal nor the trial judge appear to have taken into account the settlement the plaintiff received from the breaching party for breach of contract in assessing the damages owed to the plaintiff for the defendant's inducement. Although the inducement and the breach itself constitute two independent legal wrongs, their consequences overlap significantly. Courts should be alert to this issue and account for other damage awards addressing the same loss to prevent a potential windfall.

Lastly, a defence of justification for inducing breach of contract ought to be permitted to ensure that liability is not imposed in an overbroad manner that impedes beneficial commercial relations. Some further guidance from the courts

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[210] *Ibid.* at 88, citing *Deakin, supra* note 37 at 678 & 702.

[211] *OBG, supra* note 46, esp. at paras. 26-36; the articulation of the unlawful means tort in *OBG* was largely (although not entirely) adopted by the Supreme Court of Canada in *A.I. Enterprises, supra* note 1.

[212] Burns & Blom, *supra* note 198 at 86, citing *Garry v. Sherritt Gordon Mines Ltd.*, 1987 CarswellSask 388, [1987] S.J. No. 645 (C.A.).

[213] See the text accompanying note 69, above.

as to the appropriate scope of the defence is warranted, but the boundaries of such a defence will likely have to be determined on the facts of cases that go before the courts. I would propose the defence of justification be available in cases where the defendant has a legal right superior to the plaintiff's right.[214] This would include, for example, situations where the defendant had entered into a prior contract with the breaching party that is inconsistent with the agreement the breaching party had with the plaintiff, or where the defendant was acting according to rights granted to her by statute. Notably, a defence of justification premised upon "superior legal right" has been accepted in Australia, which similarly grounds the inducement tort on the quasi-proprietary right theory.[215]

VI. CONCLUSION

Over 150 years after its acceptance into the common law, the elements of the tort of inducing breach of contract and the rationale for its existence remain uncertain in Canada. Following the Supreme Court's decision in *A.I. Enterprises*, it is clear that a critical assessment of the tort is long overdue.

As we have seen, while legal academics have articulated principled rationales for the imposition of tort liability for inducing breach of contract, courts in the U.K. and in Canada have not actually premised their acceptance of the tort on such a foundation. Instead, the tort's historical application has been premised on varied and often weak theoretical underpinnings. It is high time for the courts to assess and articulate a justification supporting the tort's recognition, and clarify the elements of the tort. The courts must ensure that the tort of inducing breach of contract does not allow for liability premised on moral judgments, based on the "idiosyncrasies of individual judges".[216]

I have offered one proposal as to how Canadian courts can justify and define the tort of inducing breach of contract in a manner consistent with private law principles, and which respects the values regarding the common law's limited intervention in the commercial sphere recently highlighted by the Supreme Court in *A.I. Enterprises*. Although this approach confines the tort somewhat narrowly, restricting its scope in this manner provides a principled basis for the tort consistent with its rationale. As noted in *A.I. Enterprises*, "The possibility

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[214] See Burns & Blom, *supra* note 198 at 108-114. Burns & Blom also discuss the availability of a justification defence where the defendant has a moral or public duty superior to his or her duty not to induce a breach of the contract. These circumstances appear likely to breed uncertainty in this area; the cases respecting superior moral duty largely relate to archaic concerns of breaching a marriage contract with a person of immoral character, and those regarding public duty do not provide a clear basis for doing so: see *ibid.* at 114-120.

[215] See *Zhu, supra* note 156 at paras. 139-145; 126-135.

[216] *Mogul Steamship*, *supra* note 28 at 51.

that immoral or malicious conduct may not be remediable through the economic torts in some cases ... is a price worth paying for certainty in this area."[217]

[217] *A.I. Enterprises, supra* note 1 at para. 75.