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Viewing the Supreme Court of Canada's Decision in *Callow* Through a Compliance Lens

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The Supreme Court of Canada released its decision in *C.M. Callow Inc. v. Zollinger*[2] on December 18, 2020. This ground-breaking decision is can have far-reaching repercussions for contracting parties that act outside of their duty of honest performance as formulated in *Bhasin v. Hrynew*.[3] Prior to the decision in *Callow*, corporate compliance programs have focused on government regulation. Now, after the decision, corporate advisors looking to enhance their companies' compliance programs would be wise to focus also on the distinction between actively misleading conduct and innocent non-disclosure in contractual performance.

Factual Background

The Appellant, C.M. Callow Inc. ("Callow") signed a two-winter maintenance agreement with the Respondents, a group of 10 condominium corporations that were joined together through a Joint Use Committee ("Baycrest"). The term of the original contract ran from 2010 to 2012, and was subsequently renewed for the period of November 1, 2012 until April 30, 2014. Callow had a separate two-summer contract with Baycrest as well.

The winter contract included a unilateral termination clause ("Clause 9"), which allowed for unilateral termination of the contract by Baycrest if (1) Callow's services were unsatisfactory, or (2) if Callow's services were no longer required. Baycrest need only provide 10 days' notice to Callow when invoking Clause 9.

During the winter of 2012, there were several complaints regarding Callow's snow removal service from occupants of the condominiums. Mr. Callow, on behalf of Callow, attended a meeting with Baycrest on January 3, 2013 where the service issues were discussed and explained. The meeting was generally positive and the then-property manager wrote that there was "nothing outstanding to report".[4]

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[2] *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45 ("*Callow*").

[3] *Bhasin v. Hrynew*, 2014 SCC 71.

[4] *Callow*, *supra* note 2, at para 9.

Several weeks later, a new property manager took over for Baycrest, Tammy Zollinger ("Zollinger"). Zollinger decided that the contract with Callow should be terminated due to poor workmanship. Baycrest voted and passed the decision to terminate the contract with Callow in either March or April of 2013, but did not inform Callow of this decision.

Throughout the summer of 2013, Callow continued to perform the summer contract work, even performing additional work that Mr. Callow described as "freebie" work in hopes of securing a renewal of the winter contract. Mr. Callow was under the impression that Baycrest was happy with his work and that a renewal was likely. A board member of Baycrest, Mr. Peixoto, was well aware of this based on multiple dealings with Mr. Callow during that time. He even stated in an email that "he is under the impression we're keeping him for winter again. I didn't say a word to him."[5]

Baycrest did not inform Callow of their decision to terminate the winter contract until September 12, 2013 in an email from Zollinger, whereby she notified Callow that Baycrest would invoke Clause 9.

Callow brought a claim against Baycrest for breach of contract based on acting in bad faith; loss of opportunity stemming from not bidding on other winter contracts due to Baycrest's conduct; and claiming that Baycrest was unjustly enriched by the freebie work provided by Callow.

Lower Court Decisions

Ontario Superior Court of Justice (O'Bonsawin J.)

Justice O'Bonsawin held that the principle of good faith performance and the duty of honest performance of contracts were engaged. She found that Baycrest actively deceived Callow between when the decision to terminate the winter contract was made and when the contract was actually terminated, some five months or so. She found that Baycrest "acted in bad faith by (1) withholding the information to ensure Callow performed the summer maintenance services contract; and (2) continuing to represent that the contract was not in danger despite Baycrest's knowledge that Callow was taking on extra tasks to bolster the chances of renewing the winter maintenance services contract".[6] The existence of active communication throughout the summer months between Baycrest and Callow without disclosure of any alleged performance issues or Baycrest's decision to terminate the winter contract evidenced deliberate deception by Baycrest, which was a breach of contract by reason of the duty of honest performance. O'Bonsawin J. awarded damages to Callow in order to put it in the same position it would have been had the breach not occurred, with an additional amount

[5] *Ibid.*, at para. 13.
[6] *Ibid.*, at para. 21.

representing a one-year rental of equipment that would not have been leased had Callow known the contract was to be terminated.

O'Bonsawin J. further found that Baycrest was unjustly enriched by the freebie work performed by Callow. However, no damages were awarded because Callow did not properly show the expenses incurred for this work.

Ontario Court of Appeal (Lauwers, Huscroft and Trotter JJ.A.)

The Court of Appeal unanimously overturned the trial judge's decision. The Court of Appeal had two lines of reasoning. First, Baycrest had no contractual obligation to disclose the decision to terminate the contract prior to the notice period. Second, Callow itself acknowledged that failure to disclose was not in and of itself evidence of bad faith. The trial judge had based her decision on what amounted to a "failure to act honourably";[7] however, that failure did not rise to the level of being a breach of the duty to perform honestly.

The Court of Appeal further noted that any deception was in relation to a potential renewal of the contract, and could not be linked to the existing contract.

Supreme Court of Canada: Decision by Kasirer J. (Wagner C.J. and Abella, Karakatsanis and Martin JJ. concurring)

Kasirer J., writing for the majority, began by offering a comprehensive analysis of the duty of honest performance as set out in *Bhasin*. This analysis has two main components, below.

1. The dishonesty must be directly linked to the performance of the contract.

Kasirer J. is very deliberate in his discussion of this point. There was no dispute that Baycrest was at perfect liberty to exercise Clause 9. However, the manner of the exercising of a contractual right is the main issue:

> Stated simply, no contractual right can be exercised in a dishonest manner because, pursuant to *Bhasin*, that would be contrary to an imperative requirement of good faith, i.e. not to lie or knowingly deceive one's counterparty in a matter directly linked to the performance of the contract.[8]

Kasirer J. utilizes a comparison from Quebec civil law's theory of the abuse of contractual rights in service of determining when dishonesty will be considered to be directly linked to a contract.

> Dishonesty is directly linked to the performance of a given contract where it can be said that the exercise of a right or the

[7] *Ibid.*, at para. 27.
[8] *Ibid.*, at para. 54.

> performance of an obligation under that contract has been dishonest.[9]

It should be pointed out that Brown, Moldaver and Rowe JJ., who concur with the majority's decision, did not agree with the comparison with Quebec law's abuse of rights. Brown J., writing for the concurring justices, states that while they object to utilizing Quebec law in this instance, they use the reasoning from *Bhasin* to reach a similar position.

The Court disagreed with the Court of Appeal in suggesting that the dishonesty was related to a future contract. Baycrest's decision was to exercise a right in terminating an existing contract through Clause 9. By leading Callow to believe that there was no danger to the existing contract, Baycrest's actions were linked to the performance of an existing contract.

2. Whether Baycrest's conduct constitutes dishonesty.

Kasirer J. states that outright lies and half-truths to knowingly mislead are dishonest practices that could constitute breach of contract. He also notes that the duty of honest performance does not reach the level of acting as a fiduciary in disclosing information where there is no contractual obligation.

The main point of contention is what actually constitutes knowingly misleading another party where lies and half-truths are not involved, as in the circumstances at issue. Baycrest for the most part remained silent. In *Bhasin*, the duty of honesty is recognized as a negative obligation not to lie rather than a positive obligation to act in good faith. With that in mind, Kasirer J. defines what can constitute knowingly misleading another party in light of the case at hand:

> At the end of the day, whether or not a party has "knowingly misled" its counterparty is a highly fact-specific determination, and can include lies, half-truths, omissions, and even silence, depending on the circumstances. I stress that this list is not closed; it merely exemplifies that dishonesty or misleading conduct is not confined to direct lies.[10]

Using this rather broad spectrum, Kasirer J. concurs with the findings of the trial judge that Baycrest knowingly misled Callow. Baycrest remained silent about its decision to terminate the contract with Callow despite active communications between Callow and Baycrest after the decision had been made. Board member Mr. Peixoto led Mr. Callow to believe that the services of Callow were to Baycrest's satisfaction and that the winter contract was likely to be renewed. In emails, Mr. Peixoto even admitted that he understood Mr. Callow's attempts to curry good favour with freebies and believed that a contract extension was likely, yet Mr. Peixoto had remained silent. Baycrest knew that Callow was under the false impression that the contract

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[9] *Ibid.*, at para. 73.
[10] *Ibid.*, at para. 91.

was in good standing and would likely be renewed, despite Baycrest's having already decided to terminate the contract, and having accepted the freebies willingly. To satisfy the duty to perform honestly, Baycrest ought to have corrected Mr. Callow's false beliefs. By not doing so Baycrest's conduct misled Callow.

Damages

Kasirer J. concludes with a discussion about the appropriate quantum of damages for the breach of the duty to perform honestly. He notes that the correct analysis for damages would be expectation interest, the amount that would put Callow into the position it would have been in had the duty been performed. Had Baycrest been upfront with Callow and made Callow aware of its intention to cancel the contract, Callow would have been able to seek contracts out for at least an equivalent amount for the upcoming winter. By breaching the duty, Baycrest deprived Callow of the lost profits associated with a one-year winter contract.

Further, Kasirer J. agreed with the trial judge's award representing the rental of a piece of machinery for the next winter. As he explains, the damages award was for lost profit, not lost revenue. Callow was rightly entitled to recover its expenses as well.

Once again, the concurring justices reach the same conclusion through a different approach. While Kasirer J. uses an expectation measure of damages, Brown J. notes that a reliance measure would be more appropriate. "In short, the plaintiff's complaint is not lost value of performance, but detrimental reliance on dishonest misrepresentations."[11]

A Strong Dissent

Arguably, a party should not accept "freebie" work provided by another party who may be operating under an unachievable expectation of compensation. However, the law of restitution or unjust enrichment already protects the interests of parties in such circumstances. A person claiming unjust enrichment for providing services must show that the recipient freely accepted the services and that the provider may have reasonably expected to be paid for providing them: *e.g. Sharwood & Co. v. Municipal Financial Corporation*.[12] In the case at hand, however, the parties had an existing contract. Its terms arguably ought to have framed Callow's expectations for compensation and the right of renewal (or lack thereof). Whether Baycrest was unjustly enriched as a result of freebie work provided by Callow is a matter of restitution rather than breach of contract, and Callow had failed to provide evidence of the value of the freebie work conferred upon Baycrest.

In a potent dissenting opinion, Côté J. framed the pertinent questions as follows:

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[11] *Ibid.*, at para. 142.
[12] 2001 CanLII 24066 (ONCA).

> What constitutes actively misleading conduct in the context of a contractual right to terminate without cause? Where should the line be drawn between active dishonesty and permissible non-disclosure of information relevant to termination? Does a party to a contract have an obligation to dissuade his counterparty from entertaining hopes regarding the duration of their business relationship?[13]

Côté J. agreed that there was a duty of honest performance of contractual obligations, pursuant to *Bhasin*. But she disagreed with the conclusion that Baycrest had a freestanding obligation to provide notice to Callow of its intention to exercise the termination provision in the contract.

Baycrest had a contractual right to terminate Callow's services "at any time" and "for any other reason than unsatisfactory services" upon 10 days' notice. The litigation arose from Baycrest's decision to wait before sending the notice of termination to Callow. Had Baycrest advised Callow immediately of the 10 days' notice there would not have been any issue. But why did Baycrest wait? Baycrest did not want to jeopardize the performance of other ongoing work being done by Callow and so Baycrest did not discourage Callow's unachievable hopes.

For Côté J., the issue came down to a single question: did Baycrest lie or otherwise knowingly mislead Callow into thinking that there was no risk Baycrest would exercise its right to terminate the winter agreement for any other reason than unsatisfactory services? Côté J. disagreed about the evidence as to whether Baycrest had specifically represented to Callow that the contract would be renewed.

The majority's driving concern was that Baycrest knew that Callow was hoping to renew the contract (even though Baycrest did not specifically do or say anything to contribute to such hope), and then accepted and implicitly encouraged Callow's continued services with no actual chance of renewing the contract. During this time, Callow conferred benefits onto Baycrest in the form of extra freebie services. Such services may have amounted to "incontrovertible benefits" under the law of unjust enrichment. But Callow had not adduced evidence for the expenses incurred in relation to such work and so the court did not address whether such a claim could succeed.

Baycrest had bargained for the right to terminate for any reason and at any time upon giving 10 days' notice. Nothing in the contract extended the 10 days' notice. However, that is the consequence of imputing a "good faith" obligation into the relationship. Going forward, if a party decides to exercise a termination option in a contract, then they will have to carefully assess whether they have an immediate obligation to give notice of the intention to terminate.

The questions posed by Côté J. will need to be carefully assessed in any situations where two parties are in an ongoing contractual relationship. What constitutes actively misleading conduct

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[13] *Ibid.*, at para. 183.

in such a context? Where should the line be drawn between active dishonesty and permissible non-disclosure of information relevant to termination? If decisions are made about the potential termination of a relationship, must this be conveyed immediately? The failure to dissuade a counterparty from entertaining hopes regarding the duration of their business relationship may indeed amount to "bad faith."

Regardless of size or bargaining power, compliance and truth are now important aspects of contract law. Although the Court does not explicitly refer to inequality of bargaining power, there is an underlying David versus Goliath theme in *Callow*. Perhaps this leads the way to a prescription. A right to terminate with only 10 days' notice might appear harsh and Courts may be tempted to offer relief to the smaller and less experienced party. Commercial actors would be well-advised to draft termination clauses that are more flexible and reasonable.

Callow and Moral Incrementalism

The reference in *Callow* to the spectrum of lies, half-truths, omissions, and even silence, depending on the circumstances, raises the issue of moral incrementalism.[14] A simple example is the "white lie" that escalates. The common perception of the white lie is that no one really gets hurt by it and it may save embarrassment. If a person gets away with a white lie, they are more likely to do it again, but the lie may be slightly more serious the next time. There are several problems caused by moral incrementalism, as illustrated by the white lie example. First, sometimes people do get hurt when they discover that they have been lied to, even though the intent may have been to save embarrassment. Secondly, the hard line between truth and falsehood has been crossed by the white lie. According to Immanuel Kant, lying is "the greatest violation of a human being's duty to himself regarded merely as a moral being."[15] Once a person has crossed this line, it is easier to do so the next time when the consequences are more serious.

Harvard Business Professor Eugene Soltes, has written a wonderful book entitled, *Why They Do It: Inside the Mind of the White Collar Criminal*,[16] Soltes gives the following example of grey areas in the haggling that often occurs when one is buying a car:

> When the dealer says "I'm giving you the best price I can," however, we don't normally think that it's literally the lowest price he could possibly offer. Few would think the seller acted wrongly if he had the authority to lower the price even further—we'd just say that they buyer should have negotiated more aggressively.

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[14] See Richard A. Epstein, *Skepticism and Freedom: A Modern Case for Classical Liberalism* (Chicago and London: University of Chicago Press, 2003), Chapter 4: Moral Incrementalism.

[15] Kant, Immanuel. 1996 [1797]. *The Metaphysics of Morals.*, ed. Mary J. Gregor (Cambridge: Cambridge University Press, 1996).

[16] (New York: PublicAffairs 2016).

> Few would accuse the dealer of outright fraud since what he said is understood as simply part of the negotiation process.[17]

Soltes gives several real life examples to illustrate his point:

> PEOPLE MISSTATE, MISREPRESENT, and exaggerate all the time in business. Sometimes these practices are tolerated as acceptable—as in negotiations for a new car—and sometimes they are fraudulent and possibly constitute crimes—as in the bond market. The legal ramifications are radically different, but the distinction between these different kinds of deception isn't always so clear.[18]

The recognition by the Court in *Callow* that "knowingly misled" can include lies, half-truths, omissions, and even silence, depending on the circumstances, requires that a new compliance lens be used in dealing with common business practices. Compliance training in organizations should include discussion of the philosophical reasons underlying truth telling and the dangers of moral incrementalism.

Although the Court in *Callow* did not refer to behavioral research, we believe that it is essential as part of compliance training. Of interest during the COVID-19 pandemic, studies have shown that dishonesty increases with social distance.[19] It is easier to lie over the internet than it is to lie to a person's face. The dangers of moral incrementalism become more acute with increasing distance and the resulting temptation to relax moral stances.

A recent 2020 study in the financial industry showed evidence of widespread dishonesty with the statistic that over 92% of subjects lie at least once.[20] Research has found that men are more likely than women to tell lies.[21]

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[17] Soltes at p. 165, in Chapter 9, "You can't make the argument that the public was harmed by anything I did: Misleading Disclosure".

[18] Soltes, *ibid*. at p. 167, in Chapter 9 above. See Chapter 10, "Unfortunately, the world is not black and white: Financial Reporting Fraud."

[19] Daniel Hermann and Andreas Ostermaier, "Be Close To Me and I Will Be Honest. How Social Distance Influences Honesty" (February 28, 2018). Available at SSRN: https://ssrn.com/abstract=3131732 or http://dx.doi.org/10.2139/ssrn.3131732. The authors observe: "The influence of social distance on honesty is interesting because it relates to most interactions that involve honesty. For example, public authorities usually appear as a distant and impersonal interaction partner to people, and honesty is indeed a major concern in tax collection. In this and other areas, people often interact through intermediaries, who increase social distance between the interaction partners. More generally speaking, the wide use of the internet has profoundly simplified but also depersonalized communication." (p. 4). Participants were less willing to lie at the expense of fellow students than at the expense of the experimenter (p. 14).

[20] Chloe Tergiman and Marie Claire Villeval, "The Way People Lie in Markets" WP 1927 – September 2019, revised June 2020. Electronic copy available at: https://ssrn.com/abstract=3635302. Regarding the nature of lies, absent reputation, up to 97% of subjects who lie make lies that can lead to detection. However, the introduction of reputation leads to a major change: detectable lies become infrequent, and project managers shift towards a "Deniable Lie Strategy" so as to not be detected as liars by the investors with whom they are in fixed relationships.

[21] Valerio Capraro, "Gender differences in lying in sender-receiver games: A meta-analysis" in Judgment and Decision Making, Vol. 13, No. 4, July 2018, pp. 345–55.

Group dynamics may also enhance lying. There is a stronger inclination to behave immorally in groups than individually if the culture promotes that immorality.[22] The reason for this is that communication exposes group members frequently to arguments in favor of violating the norm. Group think or behavior reinforces the danger of moral incrementalism. By way of contrast, group dynamics may work the other way and promote morality within the group if the culture of the group supports the values of truth telling. In 2021, organizations must consider that gender and racial diversity may counteract groupthink and the "old ways of doing things".[23]

These behavioral observations just scratch the surface of the vast amount of research that has been done on ethical conduct within organizations and which can be incorporated into training modules.

From the perspective of the person being told a half-truth, such as Mr. Callow, it is a fair assumption that strangers are being truthful. It is what Malcolm Gladwell describes as the "default to truth" that permitted fraudsters such as financier Bernie Madoff to go undetected.[24] Compliance systems should contain mechanisms to stress test the default to truth and make the necessary adjustments.[25]

Techniques such as encouraging peer review and dissonance within a workplace will assist in promoting truth in commercial dealings and good faith.[26] Soltes gives the example of an executive who questioned a stock options back-dating method authorized by his own firm, by getting a second opinion from his general counsel. The result was a decision to not implement the plan, which the general counsel warned was not strictly legal. The executive saved his company from being ensnared in the options back-dating scandal that caught many companies. This type of regular peer review is important.

Conclusion

Callow presents a unique challenge to those who design corporate compliance programs. These programs have traditionally been an important element in maintaining compliance with government rules and regulations. *Callow* changes this. Now these programs must also focus

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[22] Martin G. Kocher, Simeon Schudy and Lisa Spantig, "I Lie? We Lie! Why? Experimental Evidence on a Dishonesty Shift in Groups" CESIFO Working Paper No. 6008, Category 13: Behavioural Economics July 2016 (p. 4). The exchange of arguments and talking to people that argue in favor of violating the norm also changes the norm perception. The authors show that the expectation that other people (out-of-sample) lie increases significantly after the group interaction. A detailed analysis of the protocols from the group interaction suggests that groups lie more because communication enables them to justify dishonest behavior in a different way than individuals. Further, the authors find that the dishonesty shift in groups is very strong such that the group composition (in terms of the number of initially dishonest group members) only weakly affects the extent of dishonesty in a group.

[23] Todd L. Archibald and Kenneth E. Jull, *Profiting from Risk Management and Compliance* § 1:20. Gender, Diversity, Risk Management and Compliance, and see Aaron Dhir "Towards a Race and Gender-Conscious Conception of the Firm: Canadian Corporate Governance, Law and Diversity" (2010), 35 Queen's L.J. 569.

[24] Malcolm Gladwell, *Talking to Strangers* (New York: Little Brown and Company, 2019).

[25] Todd L. Archibald and Kenneth E. Jull, *Profiting from Risk Management and Compliance* (Toronto: Thomson Reuters, 2020 updated periodically) § 27:29. Step 16: Monitoring, Verification and Reporting Mechanisms—Verification and Stress Testing.

[26] Archibald and Jull, *ibid.*, , Chapter 21, Compliance Systems and Operational Change.

specifically on contractual relationships, with performance and dealing with counterparties. The extremely broad definition of what can constitute "knowingly misleading" a party to a contract can create confusion and difficulty for representatives of a corporation, especially given Côté J.'s particularly resonant dissent. The spectrum of "lies, half-truths, omissions, and even silence"[27] and the fact that "this list is not closed"[28] is begging for years of litigation, which may one day assist corporate advisors understand just what corporations can and cannot do. In the meantime, corporate advisors should be aware of the potential pitfalls and repercussions of "knowingly misleading" contractual partners is of the utmost importance.

[27] *Callow*, *supra* note 2, Kasirer J. for majority, at para 91.
[28] *Ibid*. This statement also appears in *Bhasin* at para 66.

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H.M.B. Holdings: Clarifying the Limits of Reciprocal Enforcement of Judgments in Canada

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Enforcing foreign judgments in Canada remains a nuanced subject and the Supreme Court of Canada will revisit the question in 2021. Back in 2015, in *Chevron Corp v. Yaiguaje*, 2015 SCC 42 ("*Chevron*"), the Supreme Court of Canada reiterated that recognizing foreign judgments is important in our modern economy where international transactions are prevalent. However, a 2020 decision by the Ontario Court of Appeal highlighted that judgment creditors still face legal and practical challenges when enforcing foreign judgements in Canada.

In *H.M.B. Holdings Limited v. Antigua and Barbuda*, 2020 ONCA 12, the Court of Appeal for Ontario considered an application for an order pursuant to the *Reciprocal Enforcement of Judgments Act*, R.S.O. 1990 c. R.5 ("*REJA*") to register a judgment from the Privy Council in respect of a matter in Antigua that had already been recognized by the Supreme Court of British Columbia. This fact pattern — one province being asked to recognize another province's recognition of a foreign judgment — is a "ricochet judgment". The question was when should the second province register the first province's recognition of the foreign judgment.

A majority of the Court of Appeal decided the case on a threshold question, concluding that the requirement in the *REJA* that Antigua was carrying on a business in B.C. at the time H.M.B. commenced its action in B.C. was not met. The decision did not address the question of whether a party was permitted under the *REJA* to register a "ricochet judgment" in Ontario.

The Supreme Court of Canada recently granted leave in *H.M.B Holdings*. We anticipate that our top Court will aim to clarify the extent of recognition of foreign judgments among provinces' statutory regimes.

What led to the request for a ricochet judgment?

H.M.B. Holdings Limited ("H.M.B.") owned a 108-acre beachfront resort in Antigua. In 1995, a Category-5 hurricane destroyed the resort. H.M.B. sought to redevelop the land, whereas the Antiguan government wanted to expropriate and sell the property.

In 2002, the House of Representatives and Senate of Antigua and Barbuda approved the compulsory acquisition of the resort property pursuant to the country's *Land Acquisition Act*. H.M.B. unsuccessfully judicially reviewed Antigua's decision.

In 2007, Antigua and Barbuda took possession of the property. H.M.B. sued over the expropriation and for compensation for the forced taking.

While the dispute between H.M.B. Holdings and the Antiguan Government was still before the courts, in October 2013, the Antiguan Government introduced the Citizenship by Investment Program ("CIP"). The purpose of the CIP was to encourage investment in Antigua and Barbuda by granting investors (and their families) citizenship.

In 2014, the expropriation litigation was settled by a judgment of the Privy Council. The Privy Council fixed the compensation at approximately $26.6 million (USD) plus interest. Between 2015 and 2017, the Antiguan Government paid approximately $23.8 million (USD) to H.M.B. Holdings, but there is a dispute between the parties about the balance remaining to be paid.

In October 2016, H.M.B. Holdings commenced an action in B.C. to enforce the Privy Council's judgment against the Antiguan Government for the remaining balance. B.C. has a ten-year limitation period.

At the time of H.M.B.'s action in B.C., Antigua had contracts with four authorized representatives, each of which had businesses, premises, and employees in B.C. These authorized representatives were paid a finder's fee for directing applicants to apply for citizenship under the CIP. However, Antigua's office administering the CIP had no physical presence in B.C.

H.M.B. obtained a default judgment against Antigua as Antigua did not attorn to the jurisdiction of the B.C. courts.

H.M.B. then applied, pursuant to the *REJA*, to register the B.C. judgment in Ontario. The Antiguan government had assets in Ontario, but Ontario's general limitation period of two years meant that H.M.B. was barred from seeking recognition and enforcement of the Privy Council's decision in Ontario directly.

Under subsection 2(1) of the *REJA*, a creditor with a judgment from another province or territory (except Quebec) can enforce such a judgment in Ontario by way of an application.

The Superior Court refuses to recognize the ricochet judgment

The Ontario Superior Court dismissed the application.

Justice Perell based his decision on subsection 3(b) of the *REJA*, which requires that for registration of the B.C. judgment in Ontario Antigua had to be carrying on business in B.C. at the time of the B.C. lawsuit.

Justice Perell referred to *Chevron* where the Supreme Court stated that "for a party to be carrying on business within a province, he or she must have a meaningful presence in the province and that presence must be accompanied by a degree of business activity over a sustained period of time." He also referred to *Club Resorts Ltd v Van Breda*, 2012 SCC 17, para.

87, where the Supreme Court stated that "carrying on business requires some form of actual, not only virtual, presence in the jurisdiction." He found that Antigua, through its CIP, was not carrying on a business.

Justice Perell also considered subsection 3(g) of the *REJA*, which bars registration of the judgment if "a judgment debtor would have a good defence if an action were brought on the original judgment."

H.M.B. argued that the words "original judgment" refer to the judgment from the Supreme Court of British Columbia: the jurisdiction that has a reciprocal connection with Ontario in enforcing each other's judgments.

Antigua argued that the "original judgment" is a "ricochet judgment" (a derivative of a judgment of a non-reciprocating jurisdiction), and this is an anomaly that the *REJA* did not contemplate.

Perell agreed with Antigua and found that it would circumvent the *REJA's* purposes to permit registration in Ontario of a "ricochet judgment":

> [70] The problem with including a ricochet judgment within the meaning of an "original judgment" is that, practically speaking, it allows a judgment of a non-reciprocating jurisdiction to be registered in Ontario, which circumvents the general policy of the Ontario law about foreign judgments that would normally apply when a party seeks to enforce a foreign judgment in Ontario from a non-reciprocating jurisdiction.

Since Antigua would have had a good defence under Ontario's *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B, had a common law action to enforce the Privy Council judgment been brought in Ontario, the Court found that registration should not be permitted.

The majority of the Court of Appeal also refuses to recognize the ricochet judgment

A majority of the Court of Appeal affirmed Justice Perell's decision and found no error in the finding that Antigua was not carrying on a business in B.C. through its CIP. The majority found that the *REJA* provides a more convenient and expedited way to recognize and enforce judgments, but imposes a threshold requiring that the defendant had been carrying on business in the jurisdiction from which the judgment sought to be registered was obtained.

The majority noted that notwithstanding Justice Perell's findings, H.M.B. would not have been deprived of a remedy in Ontario if they brought the action within the two-year limitation period. In that time-frame there would have been no jurisdictional hurdle. Pointing to *Chevron*, the only prerequisite is that the foreign court had a real and substantial connection with the litigants or with the subject matter of the dispute (at paras. 32-33, citing *Chevron* at paras. 3, 27, 77).

Because the majority found that Antigua had not been carrying on a business in B.C., it did not address whether registering a "ricochet judgment" would run counter to the *REJA's* legislative objectives.

The dissenting Judge concludes that Antigua was carrying on business in B.C.

In a strongly worded dissent, Justice Nordheimer argued that Antigua was carrying on business in B.C., and that Justice Perell erred by applying a restrictive interpretation as to what constitutes carrying on business in the context of the principles underlying the reciprocal enforcement of foreign judgements.

Justice Nordheimer found that the Court failed to apply the principles from *Chevron*, which directs courts to apply a generous and liberal approach to the recognition and enforcement of foreign judgments. When a capacious approach is applied to the facts, Antigua was carrying on a business in B.C. and that it was not necessary for Antigua to have maintained a physical presence in B.C.

With respect to the meaning of the "original judgment" under subsection 3(g) of the *REJA*, Justice Nordheimer concluded that it refers to the B.C. judgment and not the Privy Council judgment. He pointed to the meaning of "original court" as "the court by which the judgment was given" in the *REJA's* interpretation section. Because "original court" was the B.C. court, the "original judgment" was the judgment from B.C. as well: "[t]o conclude otherwise would be to yield a result where the word 'original' is given a different meaning in s. 3(g) than it clearly bears in the definition section of the legislation" (para. 51).

Justice Nordheimer held that Antigua would not have had a good defence to the action commenced in B.C. to enforce the Privy Council Judgment given that H.M.B. would not be out of time.

Significance of the case

The Supreme Court of Canada recently granted leave to appeal, and will hear the case likely in late 2021 or early 2022. The Supreme Court will resolve the strong split between the majority and the dissent at the Court of Appeal. To do so, the top Court may have to refine its analysis in *Chevron* to consider whether to extend its analysis in that case to a case involving the reciprocal enforcement and registration of foreign judgments pursuant to the *REJA*.

In *Chevron*, the Supreme Court emphasized Canada's generous and liberal approach to recognition and enforcement proceedings and stressed the importance of comity. The Court also confirmed that there is no requirement for a connection between the substance of the dispute and the new jurisdiction where enforcement is sought. The enforcing court only needs proof that the judgment was issued by a court of competent jurisdiction, proof that it is final, and proof of its amount. There is no requirement for a debtor to have assets in Canada at the time enforcement is sought. The Court pointed out that in the global and electronic age, such

a requirement would impede a creditor's right to access assets that may eventually flow into Canada. The majority of the Court of Appeal's narrow reading of subsection 3(b) of the *REJA* may be at odds with the more generous approach set out in *Chevron* or it may be the proper interpretation of the statute. We look forward to more guidance from the top Court on this nuanced and difficult question.

Toronto Law Journal

Subrogated Claims and Bankrupt Insureds: *Douglas v. Stan Fergusson Fuels Ltd.*, 2018 ONCA 192

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Is an insurer entitled to commence a subrogated claim in the name of its bankrupt insured? Short answer — no.

Background

Art Douglas (“**Art**”) and Wendy Douglas (“**Wendy**”, together with Art, the “**Douglases**”) owned a home in Kingston, Ontario (“**Property**”). They used an external oil tank to heat their home (“**Oil Tank**”). On January 9, 2008, Stan Fergusson Fuel Ltd. (“**Fergusson Fuel**”) delivered fuel oil to the Douglases’ Oil Tank. The fuel oil leaked and contaminated the Property. The Douglases’ Homeowners Policy (“**Policy**”) with State Farm Fire and Casualty Company (“**State Farm**”) provided coverage for the losses associated with contamination. Pursuant to the Policy, State Farm was subrogated to the rights of the Douglases’ to recover against Fergusson Fuel.

A few months before loss, on November 14, 2007, Wendy was discharged from bankruptcy on the condition that her proprietary interest in the Property remain vested in her trustee in bankruptcy (“**Trustee**”). Accordingly, the Trustee and Art remained on title to the Property.

On June 4, 2009, Art filed an assignment into bankruptcy. The Trustee also became Art’s trustee in bankruptcy and replaced him on title to the Property. State Farm was put on notice of Art’s assignment on June 5, 2009.

The Trustee informed State Farm by way of the Trustee’s Limited Disclaimer, that the Trustee intended to sell the Property once it was remediated, and that the Trustee disclaimed interest in any insurance claims by the Douglases “*for loss or damage in the oil spill to matrimonial household contents not affixed or enjoyed with the residential property or proceeds of personal property except under the Execution Act (Ontario) which would not vest in their Trustee in Bankruptcy*”.

In October 2009, the Trustee sold the remediated Property.

In November 2009, State Farm made its final payments, pursuant to the Policy, spending over $800,000 to remediate the Property.

On January 7, 2010, State Farm commenced a legal proceeding, in the Douglases’ names, against Fergusson Fuel. Art was absolutely discharged from bankruptcy on March 5, 2010, and the Trustee was discharged on August 24, 2012.

Fergusson Fuel brought a motion for summary judgment arguing that the Douglases do not have capacity to commence the action because of their bankruptcies, and that State Farm's subrogated action in their names was void. State Farm cross-motioned seeking, *inter alia*, a declaration that it is the *dominus litis* and therefore had the right to continue and control the lawsuit.

Motion Judge's Reasons

The Motion Judge agreed with State Farm and dismissed Ferguson Fuel's summary judgment motion. The court held that the right of subrogation is a "contingent right" that vested at the time the Policy was entered into. The motion judge was not persuaded that the *Bankruptcy and Insolvency Act* ("**BIA**") extinguished State Farm's subrogation rights.

Ontario Divisional Court's Reasons

The Divisional Court emphasized that subrogated claims are derivative in nature. Accordingly, an insurer of an undischarged bankrupt who is unable to bring an action to enforce property rights is barred from commencing a derivative subrogated claim. Nevertheless, the Divisional Court dismissed Fergusson Fuel's appeal holding that State Farm had a "vested contingent right to assume [Art's] right to recover and to bring an action [which] crystalized before [Art's] assignment into bankruptcy."

With respect to Wendy, the Divisional Court reasoned that she had no right to recover for damages to the Property as she had made her assignment in bankruptcy prior to the effective commencement date of the Policy. In addition, after Wendy's discharge, the Property remained vested in the Trustee.

The Divisional Court held that State Farm was within its right to commence the action in Art's name.

Ontario Court of Appeal's Reasons

State Farm did not dispute that Wendy had no right to recovery for damages. Accordingly, the central issue on the appeal was whether State Farm was entitled to commence the subrogated claim in Art's name.

The Court of Appeal provided a useful overview of the doctrine of subrogation, specifically:

1. the objectives of subrogation are to ensure that the insured is fully indemnified, and the loss is borne by the person who is legally responsible for causing it;
2. at common law, the right of subrogation arises only on full indemnification of the insured;

3. at common law, once the insured is fully indemnified, the insurer becomes the *dominus litis*;
4. the right of subrogation is derivative;
5. any recovery in excess of the indemnified loss is paid to the insured; and
6. recovered indemnified losses by the insured are held in trust for the insurer.

State Farm argued that the cause of action vested in State Farm prior to Art's assignment into bankruptcy. The Court of Appeal disagreed. Although an insurer's subrogated claim is brought in the name of the insured, the claim remains that of the insured and is subject to the insured having the capacity to advance the same. The doctrine of subrogation does not assign the rights of the insured to the insurer; despite having assignment like qualities, subrogation is not the equivalent of assignment.

State Farm further argued that Art's cause of action was assigned to State Farm by way of the Policy. Again, the Court of Appeal disagreed. There are differences between an assignment and subrogation. One such difference is, on assignment, the insurer is able to recover and keep damages suffered by the insured in excess of the insurance proceeds. Accordingly, subrogation and assignment are different and if State Farm wished to include an assignment clause in the Policy, it ought to have done so.

Having found that State Farm was not assigned Art's cause of action by way of the doctrine of subrogation, or by way of the Policy, the Court of Appeal held that Art's cause of action vested in the Trustee at the time of Art's assignment into bankruptcy. In this regard, State Farm was entitled to commence a subrogated claim only in the Trustee's name, as Trustee of the Estate of Art, a bankrupt.

Accordingly, an insurer is not able to commence a subrogated claim in the name of its bankrupt insured, as the insured, pursuant to the BIA, ceases to have any capacity to deal with their property upon an assignment into bankruptcy. Consequently, the capacity to deal with Art's Property, which includes his cause of action, vested in the Trustee; as such, the court held that State Farm ought to have commenced its subrogated claim in the name of the Trustee.

The decision in *Douglas* was recently applied by the Ontario Court of Appeal in *Thistle v. Schumilas*, 2020 ONCA 88.[1] In about December 2012, approximately one and one half years after being discharged from bankruptcy, Jason Michael Thistle (**"Thistle"**) commenced an action against his spouse's insurance agent (**"Agent"**). The Agent brought a motion for summary judgment arguing that Thistle did not have standing to bring the action, as the cause of action arose while Thistle was an undischarged bankrupt. Thistle cross-motioned seeking an order *nunc*

[1] *Jason Michael Thistle v. James Schumilas, Jr.*, 2020 CanLII 50444 (SCC), leave to appeal to the Supreme Court was denied.

pro tunc granting him standing to bring the action in his own name, despite his assignment in bankruptcy, and subsequent discharge.

The Court of Appeal emphasized the following:

1. upon an assignment into bankruptcy being filed, the bankrupt ceases to have any capacity to deal with their property, and the bankrupt's property immediately passes to and vests in their trustee in bankruptcy;
2. a 'cause of action' is captured by the definition of 'property' under the BIA; and
3. there is no automatic re-vesting of the property of the bankrupt in the bankrupt either on their discharge or on the discharge of their trustee; accordingly, the trustee is obligated to return the property pursuant to the BIA.

The Court of Appeal found the *Thistle* case analogous to the *Douglas* case, except that in the former case, Thistle commenced his action after being discharged from bankruptcy, while in *Douglas*, State Farm commenced its subrogated action prior to Art's discharge from bankruptcy.

Importantly, it was held in *Thistle* that if a cause of action arose during the time in which a person is an undischarged bankrupt, that cause of action vests in that person's trustee in bankruptcy. In other words, even if the cause of action was discovered, and an action commenced, after a person's discharge from bankruptcy, the cause of action nevertheless vests in the person's trustee in bankruptcy because the cause of action arose while the person was an undischarged bankrupt.

Consequently, despite Thistle being a discharged bankrupt at the time of commencing the action, the cause of action arose while Thistle was an undischarged bankrupt, and in that regard, Thistle had no standing to bring the action as the cause of action still vested in his trustee in bankruptcy.

The *Thistle* decision sets out the following key principles:

1. a cause of action will vest in an undischarged bankrupt's trustee in bankruptcy if it arose during an assignment into bankruptcy, or prior to discharge from bankruptcy; and
2. the cause of action will remain vested in an undischarged bankrupt's trustee in bankruptcy until the undischarged bankrupt is absolutely discharged, and the trustee returns the cause of action, pursuant to the BIA, to the discharged bankrupt.

In summary, when dealing with a bankrupt insured, if a cause of action arose during the bankrupt insured's assignment into bankruptcy, and it still remains vested in the trustee, a subrogation clause must be read as if it is the trustee's name in place of the bankrupt insured. Therefore, an insurer's subrogated claim must be brought in the name of the trustee, not in the name of the bankrupt insured.

Toronto Law Journal

Come See the Many Sides of "CERS" (Canada Emergency Rent Subsidy): New Targeted Government Support Program to Help Businesses Through the Pandemic

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Introduction

On November 2, 2020, the Government of Canada introduced Bill C-9, which sets out details of the new rent support program called the Canada Emergency Rent Subsidy ("**CERS**"), which was previously announced on October 9, 2020. Bill C-9 would serve to amend the *Income Tax Act* (Canada). As of the date of this article, the legislation has yet to receive royal assent and remains subject to change.

The new rent subsidy provides support to qualifying businesses, charities, and non-profits that have suffered a revenue drop as a result of the COVID-19 pandemic. CERS effectively replaces the Canada Emergency Commercial Rent Assistance ("**CECRA**") program and provides more flexibility and accessibility to both commercial tenants and property owners.

Eligibility

CERS will be available to tenants and property owners (to a lesser degree), including individuals, partnerships, corporations, registered charities and other organizations that meet certain eligibility requirements.

To qualify as eligible for CERS, an entity must meet one of the following requirements:

- Have a payroll account as of March 15, 2020 or have been using a payroll service provider; or
- Have a business number as of September 27, 2020 (and satisfy the CRA that it is a *bona fide* rent subsidy claim); or
- meet other conditions that may be prescribed in the future.

Note, to qualify as a property owner, the entity must satisfy one of the following conditions:

- It does not use the "qualifying property" (generally, being real property in Canada used by the entity in its ordinary course) primarily to earn rental income; or
- If it does use the qualifying property primarily to earn rental income from a non-arm's length person or partnership, the qualifying property is not used by such other person or partnership to earn rental income.

Claims Generally

- Operated through the Canada Revenue Agency, CERS is to continue until June 2021 for qualifying entities affected by COVID-19;

- Support under CERS will be provided on the basis of qualifying periods. For example,
    - the period that begins on September 27, 2020 and ends on October 24, 2020;
    - the period that begins on October 25, 2020 and ends on November 21, 2020;
    - the period that begins on November 22, 2020 and ends on December 19, 2020; or
    - a prescribed period that ends no later than June 30, 2021.
- Entities are able to make claims retroactively to cover the gap that followed the expiry of the CECRA program, being the qualifying period from September 27, 2020 to October 24, 2020;
- If an entity meets the qualification requirements for one month, it automatically is qualified for the month immediately after. However, for the following month, it would again have to demonstrate that it meets the revenue decline requirements;
- Up to $75,000 per period for a single property (cap at $300,000 for all qualifying properties, including properties of affiliates) in rent, mortgage interest, insurance and property taxes paid by commercial property owners may be partially subsidized per qualifying period;
- CERS will be available to organizations with more than $20 million in annual revenue and paying in excess of $50,000 in monthly gross rent. Organizations with revenue or rent obligations beyond these thresholds were previously ineligible for support under CECRA.

Base Rent Subsidy

- As its base rent subsidy, CERS supports eligible entities that have suffered a revenue drop, by subsidizing a percentage of their rent expenses, on a sliding scale, up to a maximum of 65% of eligible expenses.
- Rent expenses include rent or mortgage interest expenses in respect of a qualifying property, net of any amounts received or receivable by the entity from non-arm's length parties.
- For **commercial tenants, rent expenses** per qualifying property would include amounts up to $75,000 for each qualifying period paid under a written agreement entered into prior to October 9, 2020, **including items such as** (a) gross, net or percentage rent, (b) amounts paid under net leases such as operating costs, insurance, utilities and property taxes, and (c) amounts received by the property owner under the CECRA program that were applied during a qualifying period, if those amounts would otherwise be required to be refunded to the tenant.

- **Exclusions include:** (i) sales taxes, (ii) amounts paid in lieu of or in satisfaction of damages, (iii) amounts paid under a guarantee, security, or similar indemnity or covenant, (iv) payments arising due to default, (v) interest and penalties on unpaid amounts, (v) fees payable for discrete items or special services, and (vi) reconciliation adjustment payments.

- For **commercial property owners**, rent expenses per qualifying property would include amounts up to $75,000 for each qualifying period paid under a written agreement entered into prior to October 9, 2020, including items such as mortgage interest, insurance costs paid in respect of the qualifying property and property and similar taxes.
- For example, CERS will fund up to 65% of rent expenses for entities that have had a revenue decline of at least 70%. Entities that have had a revenue fall of less than 70% are to receive a gradually decreasing level of support in line with their revenue (calculations as described below).

Lockdown Support

- In addition to the base rent subsidy, CERS also offers new Lockdown Support, which would provide an additional top-up of 25% to qualifying entities that were forced to temporarily shut down or to significantly limit their main activities (at least 25% of revenues must be derived from the restricted activity) for more than one week due to a mandatory public health order issued in response to the COVID-19 pandemic under the laws of Canada, a province, or territory (including orders made by a municipality or regional health authority under one of those).
- Lockdown Support is limited to $75,000.00 per qualifying property, but there is no overall cap.
- Combined, this means qualified businesses subject to a lockdown could receive rent support of up to 90% of their qualifying rent expenses.
- Some common circumstances where an entity may be eligible for the Lockdown Support would be restaurants with restrictions on indoor dining with low demand for take-out, the closure of bars, fitness centres and retail stores.

Application Process

- CERS is applied for and provides support directly to tenants, in contrast to the former CECRA program that needed to be applied for by property owners.
- Applications for CERS are due by the later of January 31, 2021, and 180 days after the end of the qualifying period and applicants may revoke or amend their elections on or before the date that the application is due for the first qualifying period of which the election is made.
- The above parameters apply until December 19, 2020, subject to change as needed by the federal government thereafter.

Important Calculations and Formulas Explained

(a) **Revenue Reduction Percentage:** To determine the amount of support it may receive, an entity must calculate its revenue reduction percentage by using the following formula:

[1 – A / B]

where

A = qualifying revenue (such as the inflow of cash, receivables, or other consideration from ordinary activities of an entity in Canada) for the current reference period for the qualifying period;

B = qualifying revenue (as described above, which includes revenue generated from the sale of goods, rendering of services, and the use of the entity's resources by others) for the prior reference period for the qualifying period, or, the qualifying entity may elect to compare revenues to the *prior reference period* of January and February 2020 and use the following formula:

[0.5 x C x (D / E)]

where

C = qualifying revenues for the prior reference period;

D = number of days in the prior reference period; and

E = number of days in the prior reference period during which the entity was carrying on business.

Note: The qualifying entity must use the same approach for all qualifying periods. Please see the table below.

Prior reference period:

- for the qualifying period that begins on September 27, 2020 and ends on October 24, 2020, the prior reference period is October, 2019;
- for the qualifying period that begins on October 25, 2020 and ends on November 21, 2020, the prior reference period is November, 2019;
- for the qualifying period that begins on November 22, 2020 and ends on December 19, 2020, the prior reference period is December, 2019.

Current reference period:

- for the qualifying period that begins on September 27, 2020 and ends on October 24, 2020, the current reference period is October, 2020;
- for the qualifying period that begins on October 25, 2020 and ends on November 21, 2020, the current reference period is November, 2020;
- for the qualifying period that begins on November 22, 2020 and ends on December 19, 2020, the current reference period is December, 2020.

	Qualifying Period	General Approach	Alternative Approach
Period 8	September 27 to October 24, 2020	October 2020 over October 2019	October 2020 or September 2020 over average of January and February 2020
Period 9	October 25 to November 21, 2020	November 2020 over November 2019 or October 2020 over October 2019	November 2020 or October 2020 over average of January and February 2020
Period 10	November 22 to December 19, 2020	December 2020 over December 2019 or November 2020 over November 2019	December 2020 or November 2020 over average of January and February 2020

As an illustration, consider the following example:

- Entity XYZ wants to apply for the CERS program for the qualifying period that begins on November 22, 2020 and ends on December 19, 2020.
- In November 2020 (current reference period), XYZ made $100,000 in revenue from the sale of goods (qualifying revenue).
- In November 2019 (prior reference period), it made $500,000 in revenue from the sale of goods. XYZ's revenue reduction percentage would be calculated as follows:
  - Step 1: [1 — A / B]
  - Step 2: [1 — $100,000 / $500,000]
  - Step 3: [1 — 0.2]
  - Result: 0.8 or 80% (0.8 x 100)
- Therefore, XYZ had a revenue reduction of 80% in November 2020 and if approved for CERS, may receive a rent subsidy of up to 65%.

(b) **Base Subsidy Rate**: In order to determine how much rent subsidy an entity may receive under the CERS program, an entity must follow these steps:

- **Step 1**: If the qualifying period the entity is applying for is any of the following, then proceed to:
  - the period that begins on September 27, 2020 and ends on October 24, 2020;
  - the period that begins on October 25, 2020 and ends on November 21, 2020; or
  - the period that begins on November 22, 2020 and ends on December 19, 2020. If the qualifying period is a prescribed period that ends no later than June 30, 2021, then the percentage is determined by regulation and the same must be consulted.
- **Step 2**: Calculate the entity's revenue reduction percentage, as explained above.
  - **Note**: For any qualifying period, if the qualifying entity's revenue decline was higher in the immediately preceding qualifying period, their base subsidy rate will be determined based on the higher revenue decline experienced during such prior qualifying period.
- **Step 3**: If the entity's revenue reduction percentage ("**RRP**") is:
  - **70% or higher**, then the entity's rent subsidy percentage is 65%;
  - **between 50 to 69%**, then the rent subsidy percentage is determined by the formula:

    [40% + (RRP — 50%) x 1.25]
  - **less than 50%**, then the rent subsidy percentage is determined by the formula:

    [0.8 x RRP]

For example, if entity XYZ is applying for the qualifying period that begins from November 22, 2020 and ends on December 19, 2020 and it has a revenue reduction percentage of 65%, then the base subsidy rate is calculated as follows:

- Step 1: [0.4 + (RRP — 0.5) x 1.25]
- Step 2: [0.4 + (0.65 — 0.5) x 1.25]
- Step 3: [0.4 + (0.15) x 1.25]
- Step 4: [0.4 + 0.188]
- Result: 0.59 or 59%

Therefore, XYZ would likely receive approximately 59% subsidy on eligible expenses under CERS for that qualifying period.

(c) **Lockdown Support:** For a qualifying period, an entity may receive a top-up percentage of 25%, pro-rated to the number of days the entity was shut down or limited in its main activities in the qualifying period due to a mandatory public health order. The formula is as follows:

[H x EE x (I / J)]

where

H = 25% or a prescribed percentage;

EE = eligible expenses;

I = number of days in the qualifying period throughout which the qualifying property is subject to a public health restriction;

J = the number of days in the qualifying period.

For example:

- Entity XYZ has received a mandatory public health order that runs from December 9, 2020 to December 19, 2020 (11 days);
- XYZ is applying for the qualifying period that begins on November 22, 2020 and ends on December 19, 2020 (28 days) and has $100,000.00 in eligible expenses to apply for.
- XYZ's top-up support would be calculated as follows:
    - **Step 1**: [0.25 x EE x (I / J)]
    - **Step 2**: [0.25 x $100,000 x (11/28)]
    - **Step 3**: [0.25 x $100,000 x (0.39)]
    - **Result**: $9,750
    - Therefore, XYZ can expect to receive $9,750.00 as a top-up subsidy in addition to its basic entitlements under CERS.

Outstanding Issues

- It appears as though qualifying entities will have to make their expense payments prior to receiving funds through CERS. Naturally, this has the potential to be quite difficult for already struggling commercial property owners and tenants.
- It also appears that rent deferral or abatement agreements in place during qualifying periods may limit the level of expenses that may be claimed by qualifying entities. In some cases, it may make sense for commercial property owners and tenants to abstain from entering into rent deferral or abatement agreements all together during the duration of the CERS program in order to maximize recovery under CERS.

The CEWS and CEBA Program

- In conjunction with the new CERS program, the Government of Canada also has extended the Canada Emergency Wage Subsidy ("**CEWS**") until June 2021, which would continue to protect jobs by helping businesses keep their employees and even re-hire workers that may have been laid-off due to the pandemic. CEWS is retroactive to March 15 and would remain at the current rate of up to a maximum of 65% of eligible wages until December 19, 2020.
- In addition to the announcements above, the Federal Government is now providing an additional Canada Emergency Business Account ("**CEBA**") loan. CEBA is intended to support small businesses that have experienced diminished revenues due to the pandemic but who still face ongoing rent, utilities, insurance, taxes, and employment pay obligations. This additional CEBA loan is a zero-interest, partially forgivable loan of up to $20,000 in addition to the original $40,000 CEBA loan. Precisely, if the balance of the loan is repaid by December 31, 2022, half of this additional loan may be forgiven.

Associated links:

Bill C-9: https://parl.ca/DocumentViewer/en/43-2/bill/C-9/first-reading

Government's November 2, 2020 news release: https://www.canada.ca/en/department-finance/news/2020/11/government-introduces-legislation-for-new-targeted-support-to-help-businesses-through-pandemic.html

New Lockdown Support - Government Information: https://www.canada.ca/en/department-finance/news/2020/11/lockdown-support-for-businesses-facing-significant-public-health-restrictions.html