Interference with Contractual Relations: Is Torquay Hotel the Law in Canada?

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I. Introduction[1]

It used to be that the ambit and nature of the tort of inducing breach of contract was well-settled. D, knowing of a contract between P and a third party, and intending to procure a breach of that contract to the injury of P, committed an actionable wrong if he induced the third party to breach the contract, thereby causing actual damage to P.[2]

However, a series of decisions beginning in 1965 with *Stratford (J.T.) & Son Ltd.* v. *Lindley,*[3] and continued in *Emerald Construction Co. Ltd.* v. *Lowthian,*[4] and, most importantly, in *Torquay Hotel Co. Ltd.* v. *Cousins,*[5] indicate that such certainty is no longer appropriate. These decisions suggest a broadening of the tort of inducing breach of contract to include interference short of breach, so that the tort might now be better termed "unlawful interference with contractual relations."[6] This development has introduced an element of ambiguity into the area of tort law once marked off by the tort of inducing breach of contract. What does it mean to interfere with contractual relations short of breach? What principle justifies the protection of such relations from interference that falls short of procuring their breach?

In this essay I analyse these questions, as well as the development suggested by the series of decisions that culminated in the *Torquay Hotel* case. It is submitted that the development can be supported by neither authority nor logic. I also consider the Canadian cases that have purportedly applied Lord Denning's judgement in the *Torquay Hotel* case, and suggest that they can be explained by reference to a more traditional analysis than that employed by the Master of the Rolls. Finally, it is submitted that the interests of neither tort law nor social policy can be advanced by pushing the scope of the tort of inducing breach of contract beyond the confines established by the English Court of Appeal in *Thomson (D.C.) & Co. Ltd.* v. *Deakin.*[7]

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1. I would like to thank Janice Sandomirsky for her encouragement.

2. *Thomson (D.C.) & Co. Ltd.* v. *Deaken,* [1952] 1 Ch. 646 (CA).

3. [1965] AC 269 (HL).

4. [1966] 1 WLR 691 (CA).

5. [1969] 2 Ch. 106 (CA).

6. *Salmond on Torts* (17th ed., London, 1977), p. 367; and see Burns, "Tort Injury to Economic Interests: Some Facets of Legal Response" (1980), 58 CBR 103.

7. *Supra* n. 2.

II. Inducing Breach of Contract

1. Rationale

The independent tort of inducing breach of contract was first recognized in the famous case of *Lumley* v. *Gye*.[8] In that case Miss Johanna Wagner, an opera singer, had agreed to perform exclusively in the plaintiff's theatre for three months. The defendant, a rival theatre manager with full knowledge of the plaintiff's contract, induced Miss Wagner to abandon her agreement with the plaintiff, and to sing instead in his theatre. The plaintiff sued for damages. The defendant resisted the claim on demurrer, arguing that the old action of *per quod servitium amisit* did not extend to contracts for services. Three of the four judges[9] who heard the case in the Court of Queen's Bench upheld the claim.

The rationale for maintaining the cause of action lay in the notion that an intentional violation of another's legal right was actionable if damage ensued. Thus Erle, J. stated:[10]

> 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...
>
> This principle is supported by good reason. He who maliciously procures a damage to another by violation of his right ought to be made to indemnify; and that, whether he procures an actionable wrong or a breach of contract.

Wightman, J. noted that it was:

> undoubtedly prima facie an unlawful act on the part of Miss Wagner to break her contract, and therefore a tortious act of the defendant maliciously to procure her to do so; and, if damage to the plaintiff followed in consequence of that tortious act of the defendant...an action on the case is maintainable.[11]

The emphasis was on the existence of a legal right, but one of a particular nature. It was not simply a negative legal right — that is, a right to do something without interference. Rather, it was a positive legal right, one that was already legally enforceable against someone before the defendant intervened. The existence of a contract was thus crucial to the tort, for it was the contract that justified the protection of the plaintiff's expectation interest against the defendant's interference. For as Lopes, L.J. observed in *Temperton* v. *Russell*,[12] the principle grounding the tort is that

> the contract confers certain rights on the person with whom it is made, and not only binds the parties to it by the obligation entered into, but also impresses on all the world the duty of respecting that contractual obligation.[13]

8. (1853), 2 El. & Bl. 216, 118 ER 749; and see *Lumley* v. *Wagner* (1852), 1 De G.M. & G. 604, 42 ER 687.

9. Crompton, Erle, Wightman, JJ.

10. *Supra* n. 8, at 232-33.

11. *Ibid.*, p. 238; and see Crompton, J. at p. 229.

12. [1893] 1 QB 715 (CA).

13. *Ibid.*, at p. 730; and see *Posluns* v. *Toronto Stock Exchange et al.* [1964] 2 OR 547, per Gale, J. at 598; aff'd [1966] 1 OR 285; aff'd [1968] SCR 330.

The point that the tort of inducing breach rests on the existence of an expectation interest secured by contract can be made in another way. If we consider how such cases arise, it quickly becomes apparent that they all arise in situations where to remit the plaintiff to his contract remedies against the breachor would be in effect to deprive him of any remedy. *Lumley* v. *Gyle*[14] itself was such a case, for though Miss Wagner was clearly in breach of her contract with Mr. Lumley, no court would have ordered specific performance against her; and damages would have been difficult to calculate. The problem of an inadequate contractual remedy clearly concerned the court. As Erle, J. remarked,[15]

> The remedy on the contract may be inadequate, as where the measure of damages is restricted... or, in the case of non-delivery of goods, the disappointment may lead to a heavy forfeiture under a contract to complete work within a time, but the measure of damages against the vendor of the goods for non-delivery may be only the difference between the contract price and the market value of the goods in question at the time of the breach. In such cases, he who procures the damage maliciously might justly be made responsible beyond the liability of the contractor.

In short, cases of inducing breach arise only where the breachor (who is almost never a party to the action) is either effectively judgment proof,[16] or has a defence to liability.[17] This is not to suggest, however, that the tort of inducing breach exists as a form of insurance against insolvent contract-breakers. Rather, it is to emphasize the parasitic nature of the tort. The plaintiff complains of damage, but it is not damage in general. It is damage that flows from injury to a particular and specific form of interest — an expectation interest secured by contract. The importance of the contract is that it establishes the interest as one whose injury will sound in damages at law. And it is only when the plaintiff has sustained such damages that he is entitled to maintain an action in tort for inducing breach.

2. Development of the Tort of Inducing Breach

In the half century following the decision of *Lumley* v. *Gye*, there was some initial uncertainty as to the exact rationale of the tort. The decisions of the English Court of Appeal in both *Bowen* v. *Hall*[18] and *Temperton* v. *Russell*[19] tended to emphasize the "malicious" motive of the defendant, rather than the damage to the plaintiff's expectation interest, as the element attracting liability. This tendency was finally and firmly scotched by the House of Lords in *Allen* v. *Flood*[20] and in *Quinn*

14. *Supra* n. 8.

15. *Ibid.*, p. 234; and see Crompton, J. at pp. 229-30.

16. For example, see *Jasperson* v. *Dominion Tobacco Co.*, [1923] AC 709 (PC) (agent induced by defendant to exceed his authority to the damage of principal/plaintiff); *Einhorn* v. *Westmount Investments Ltd. et al.* (1969), 6 DLR (3d) 71 (Sask QB); aff'd (1970), 11 DLR (3d) 509 (Sask CA) (breacher, a corporation, having no assets).

17. As in *National Phonograph Co. Ltd.* v. *Edison-Bell Consolidated Co. Ltd.*, [1908] 1 Ch. 335 (agent fraudulently induced to break contract with principal/plaintiff); *Torquay Hotel*, *supra* n. 5 (*force majeur* clause precludes breacher's liability).

18. (1881), 6 QBD 333.

19. *Supra* n. 12.

20. [1898] AC 1 (HL).

v. *Leathem.*[21] It was in the latter case that Lord Macnaghten provided what has since been taken as the definitive analysis of *Lumley* v. *Gye:*[22]

> [T]he decision was right, not on the ground of malicious intention — that was not, I think, the gist of the action — but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference.

Following this decision there were numerous cases refining the nature and character of the various constituent elements of the tort. But there was no major extension of the scope and ambit of the tort until the decision of the English Court of Appeal in *Thomson (D.C.) & Co. Ltd.* v. *Deakin.*[23] It was this case that first mooted the question of whether the tort of inducing breach was restricted to direct intervention, or whether it could be expanded to cover indirect forms of pressure as well. And because the most often cited judgment of that decision — that of Lord Evershed, M.R. — mentions interference with the *performance* of a contract, it is necessary to consider the case at some length. For while the decision did represent a development of the tort of inducing breach, it did not foreshadow *Torquay Hotel.*

In *Thompson* v. *Deakin* the plaintiffs were printers and publishers whose paper was supplied under contract by Bowaters Sales Ltd. The defendant union (NATSOPA) called a strike of its members who were employees of the plaintiff, and at the same time called on other unions to support them. Bowaters' loaders and drivers, who were members of other unions, thereupon told Bowaters that they might not be prepared to load or deliver the paper supplied under contract to the plaintiff. Bowaters made no attempt to test the resolve of their employees, and simply informed the plaintiff that no more paper could be delivered under the contract because of the union's pressure. No paper was delivered.

The plaintiff applied for an injunction. It was denied, and the decision was affirmed on appeal. The Court of Appeal found no evidence suggesting that the defendant knew of the contract between Bowaters and the plaintiff. Nor did the evidence support any finding of inducement. At most it suggested that the defendants simply stated the facts as they understood them to the other unions.[24] However, in coming to its decision the Court of Appeal did consider in separate judgments the problem of whether, had the evidence been otherwise, the defendant's actions would have fallen within the ambit of the tort. Though strictly speaking *obiter,* the judgments have never been doubted subsequently; and indeed one of them met with some favour in Lord Pearce's judgment in *Stratford (J.T.) & Son Ltd.* v. *Lindley.*[25]

In his judgment Lord Evershed, M.R. stated that the tort of inducing breach of contract could be committed in any one of three ways. A defendant, always

21. [1901] AC 495 (HL).
22. *Ibid.*, at p. 510; for a similar statement, see *Jasperson, supra* n. 16, per Viscount Haldane at 712.
23. *Supra* n. 7.
24. *Ibid.*, per Evershed, M.R. at 685-86.
25. *Supra* n. 3, at 333.

assuming he knew of the contract and acted with the aim of procuring its breach, would be liable

> (1) if he directly intervenes by persuading A *to break* it...
> (2) if he intervenes by the commission of some act wrongful in itself so as to prevent A from in fact *performing* his contract; and also
> (3) if he persuades a third party, for example, a servant of A, to do an act in itself wrongful or not legitimate (as committing a breach of a contract of service with A) so as to render, as was intended, impossible A's *performance* of his contract with B.[26]

To the last example Jenkins, L.J. added the requirement that the breach must result as the "necessary consequence" of the wrongful acts of the third party that were induced by the defendant.[27]

The Master of the Rolls, in outlining the possible ways of committing the tort, refers to the defendant's procurement of a *breach* in the first example, but in the latter two examples refers to the defendant's creation of a situation where A is unable to *perform* his contract with the plaintiff. It is important to note, however, that he is not in the latter cases referring to an interference with contractual relations falling short of breach. For it is clear that in all three examples A is in breach of his contract with the plaintiff. Rather, by differentiating between breach and ability to perform, Evershed, M.R. is adverting to the problem of causation.

Ordinarily, when a party to a contract fails to perform his obligations to the other party, he is in breach. This is so regardless of whether

a) he could have performed, but refused to do so; or

b) he wanted to perform, but was unable to do so.

If the result in the second instance seems particularly hard on the party in default, we can take comfort in the fact that the parties can always bargain expressly to exclude liability if performance is made impossible by a certain event, or to limit it in the event of breach for whatever reason: hence the origin of *force majeur* and exclusionary clauses.

But the fact that the breach can occur in one of two ways raises problems of causation when it is a case of third-party interference. In the tort of inducing breach, damages must always be proved. In the first instance, where the breachor could have performed but refused to, it is beyond doubt that the plaintiff's damage flowed from the breachor's act (or rather, refusal to act) that was induced by the defendant. But in the second instance, where the breachor wants to perform but cannot, the Court must still ask whether he could have performed his contractual obligation, albeit in a manner different from that contemplated prior to the defendant's interference, or whether he is simply using the defendant's interference as an excuse to avoid his contractual obligations to the plaintiff. As in the example given by Jenkins, L.J.,

> A induces B, C's lorry driver, to refuse, in breach of his contract of employment, to carry goods which C is under contract to deliver to D, and does so with a view to causing the breach of C's contract with D. C could, if he chose, engage some other lorry

26. *Supra* n. 7, per Evershed, M.R. at 681-82 (my emphasis).

27. *Ibid.*, at 696-97; Lord Pearce, in the *Stratford* case, *supra* n. 3, said at 333 that he was inclined to agree with Jenkins, L.J. on this matter.

> driver, or arrange alternative means of transport, but does not do so. He fails to deliver the goods, telling D he is prevented from doing so by B's breach of contract. In such circumstances, there has been no direct invasion by A of C's rights under his contract with D, and, although A has committed an actionable wrong against C, designed to bring about the breach of C's contract with D, and a breach has in fact occurred, it cannot be said that the breach has in fact been caused by A's wrongful act, and therefore D cannot, in my view, establish as against A an actionable interference with his rights under his contract with C.[28]

Given these considerations, it is submitted that the element of "necessary consequence" should also be read as extending to the second as well as the third of the examples listed by Lord Evershed. Indeed, it is probable that the Court of Appeal did in fact intend such a requirement for both. It is true that the headnote to the case,[29] on the basis of Jenkins, L.J.'s comments,[30] restricts the requirement to the third example. But Lord Evershed in his second example refers to an unlawful act which "prevent/s/ A from in fact performing;" and in the third to an induced wrongful act that renders "impossible A's performance."[31] There is, it is submitted, little difference between an act which prevents performance in fact, and one that renders performance impossible, particularly when Lord Evershed gives as an example of the former the physical detention of A.[32] Morris, L.J., for his part, seems to collapse the second and third examples into one, stressing the common element of the impossibility of performance:[33]

> Thus if X, with knowledge and intention, forced A to break his contract with B by depriving A of his only possible means of performing the contract (as, for example, by removing the only available essential tools or by kidnapping a necessary or irreplaceable servant or by persuading a necessary and irreplaceable servant to break his contract) then probably in such cases the liability of X could be proved.

The submission that in both the second and the third examples given by Lord Evershed, damages must stem as a necessary consequence of the defendant's act is supported as well by the rationale which underlies the tort. For if, as has been argued, the plaintiff's cause of action rests on the intentional violation of his legal right *causing* damage, then damage in a case where the breachor is willing to perform can only be proved by showing that he could not otherwise have performed his obligations.

III. Interference with Contractual Relations Short of Breach

1. Development of the Doctrine

Stratford (J.T.) & Son Ltd. v. *Lindley*[34] involved (as these cases usually do) a strike. The defendant was a union seeking to negotiate a collective agreement with a

28. *Ibid.*, at 699.
29. *Ibid.*, at 647.
30. *Ibid.*, at 696-97.
31. *Ibid.*, at 681-82.
32. *Ibid.*, at 678.
33. *Ibid.*, at 702.
34. *Supra* n. 3.

wholly controlled subsidiary of the plaintiff company. The plaintiff owned and hired out barges. It did not itself employ any members of the defendant union. When the union's negotiations with the subsidiary proved fruitless, it issued a notice that henceforth none of its members anywhere would handle empty barges owned by the plaintiff. As a result of the boycott, barges out on hire were tied to the nearest mooring; none were returned to the plaintiff by the hirers; and the plaintiff's business came to a standstill. The plaintiffs sued for damages and an injunction. An interlocutory injunction was granted, but discharged by the Court of Appeal. On further appeal to the House of Lords, the interlocutory injunction was restored.

In coming to its decision the House of Lords decided that there was a contract between the hirers and the plaintiff, and that the hirers were in breach of that contract in failing to return the barges. Even though the defendants did not know the exact terms of the contract, the House of Lords was satisfied that they knew the hirers would be in breach if they failed to return the barges. By inducing the hirers' employees to breach their contracts of employment with the hirers (a wrongful act), thus making it impossible for the hirers to return the barges, the defendant union was liable to the plaintiff for indirectly inducing breach of contract.[35]

In writing his judgment in the House of Lords, Lord Reid made the following statement:[36]

> It was argued that there was no evidence that they were sufficiently aware of the terms of these contracts [of hire] to know that their interference would involve breaches of contract. But I think that at this stage it is reasonable to infer that they did know that. So I need not consider whether or how far the principle of *Lumley* v. *Gye* covers *deliberate and direct interference with the execution of a contract without that causing any breach.*

The emphasized passage was subsequently to provide Lord Denning with a starting point for one of his justly famous if not always justified forays into the realm of judicial law-making.

Lord Denning first signalled his intention in *Emerald Construction Co. Ltd.* v. *Lowthian.*[37] The defendant, a union, attempted to procure the termination of a contractor's contract with the plaintiff sub-contractor by engaging in various forms of industrial action. As a result, the plaintiff fell behind in his work. The defendants maintained that they thought the contract could be terminated lawfully on short notice. However, the Court of Appeal found that in fact the contractor could terminate only if the plaintiff failed to maintain reasonable progress.[38] In granting the plaintiff an interlocutory injunction, Lord Denning stated the law as he understood it in such cases:[39]

> For it is unlawful for a third person to procure a breach of contract knowingly, or recklessly, indifferent whether it is a breach or not. Some would go further and hold that it is unlawful for a third person deliberately and directly to interfere with the execution of a contract, even though he does not cause any breach. The point was left open by Lord Reid in *J. T. Stratford & Son Ltd.* v. *Lindley.* It is unnecessary to pursue this today.

35. *Ibid;* see, for example, Lord Reid at 324.
36. *Ibid.*, per Lord Reid at 323-24, emphasis added.
37. *Supra* n. 4.
38. *Ibid.*, at 698.
39. *Ibid.*, at 701.

The above passage was cited with approval by Davies, L.J. in his judgment concurring with that of Lord Denning in *Daily Mirror Newspapers Ltd.* v. *Gardner.*[40] But it was not until the decision in *Torquay Hotel Co. Ltd.* v. *Cousins*[41] that Lord Denning made his move to enlarge on the point "left open" by Lord Reid.

2. The Torquay Hotel Decision

In the *Torquay Hotel* case the plaintiff hotel had a contract for the supply of fuel oil with Esso Petroleum. The contract had a *force majeur* clause which provided that "neither party shall be liable for any failure to fulfil any term of this agreement if fulfilment is delayed, hindered or prevented by...labour disputes of any kind..."[42] The defendant union attempted to open negotiations for a collective agreement with the hotel management, which however, refused on the ground that it was negotiating with another union. The defendant then picketed the hotel. Esso, on being informed by the defendant of the strike, declined to attempt delivery of the fuel. The plaintiff obtained a delivery of fuel at night from another company at a higher price. The defendant then informed the other company that the hotel was "black," and that unless fuel deliveries were stopped, there would be repercussions. The fuel supplies were stopped. The plaintiff sued for damages and an injunction. An interlocutory injunction was granted to restrain the defendants from procuring any more breaches in the contract with Esso and to prohibit picketing of the supply of fuel oil. The injunction was upheld on appeal to the Court of Appeal.

In his judgment in the Court of Appeal, Lord Denning begins with what he takes to be the principle in *Lumley* v. *Gye:* "each of the parties to a contract has a 'right to the performance' of it: and it is wrong for another to procure one of the parties to break it or not to perform it."[43] He then says that this principle was "extended" by Lord Macnaghten in *Quinn* v. *Leathem*[44] to a right to have one's "contractual relations" duly observed. Then comes Lord Denning's contribution:

> The time has come when the principle should be further extended to cover "deliberate and direct interference with the execution of a contract without that causing any breach." That was a point left open by Lord Reid in *Stratford (J.T.) & Son Ltd.* v. *Lindley*... But the common law would be seriously deficient if it did not condemn such interference. It is this very case. The principle can be subdivided into three elements:
>
> First, there must be *interference* in the execution of a contract. The interference is not confined to the procurement of a *breach* of contract. It extends to a case where a third person *prevents* or *hinders* one party from performing his contract, even though it be not a breach.
>
> Second, the interference must be deliberate. The person must know of the contract or, at any rate, turn a blind eye to it and intend to interfere with it....
>
> Third, the interference must be *direct*... *Indirect* interference is only unlawful if unlawful means are used.[45]

40. [1968] 2 QB 762.
41. *Supra* n. 5.
42. *Ibid.*, at 115.
43. *Ibid.*, at 138.
44. *Supra* n. 21.
45. *Supra* n. 5, at 138.

The above passage is the source of the notion that the tort of inducing breach of contract has now been expanded to cover intentional interference with contractual relations that falls short of breach. The passage has been cited favourably in a number of Canadian decisions,[46] but before we turn to them a number of observations should be made.

First, in rendering his judgment, Lord Denning proceeded on the assumption that the *force majeur* clause meant that there had been no breach of Esso's contract with the plaintiff.[47] However, both Russell and Winn, L.JJ. decided that there had in fact been a breach, and that the *force majeur* clause went only to the question of liability. The analysis of the two lords justice is, with respect, preferable to that of the Master of the Rolls. As Russell, L.J. quite rightly observes, the *force majeur* clause

> *assumes* a failure to fulfill a term of the contract — i.e., a breach of contract — and excludes liability — i.e., in damages — for that breach in stated circumstances. It is an exception from liability for non-performance rather than an exception from obligation to perform.[48]

Strictly speaking, then, Lord Denning's analysis is *obiter* and unnecessary to the result in the case.

Second, it is fair to question whether or not Lord Reid really did "leave open" the question of interference short of breach in the *Stratford* case, especially when his comments are placed in the context of all the judgments. All five of the learned law lords who heard the case rested their judgments on the finding that there had been a *breach* of a contract. Of the two who referred to *counsel's* argument that interference short of breach could be actionable, Lord Reid simply said it was unnecessary to consider it. Lord Donovan went further; far enough, one would have supposed, to have foreclosed the argument:[49]

> [S]ome of the propositions advanced on behalf of the appellant I find very far reaching. For example, the argument that there is a tort consisting of some undefinable interference with business contracts, falling short of inducing a breach of contract, I find as novel and surprising as I think the members of this House who decided *Crofter Hand Woven Harris Tweed Co. Ltd.* v. *Veitch* would have done.

Third, Lord Denning's analysis flies in the face of the earlier decision of the Court of Appeal in the *Thomson* v. *Deakin* case. The fact situation fits four-square within the confines of the third example given by Lord Evershed as an instance of indirect inducement of breach. Yet missing is any analysis of whether Esso could have performed its obligation to deliver by, for example, sub-contracting delivery to another firm. Of course, as a practical matter, Esso would have felt no compulsion to do so, since the *force majeur* clause relieved it of any liability. But insofar as the tort is concerned, such an analysis is necessary. It is interesting to note in this regard that in the *Thomson* v. *Deakin* case there was an express finding that there was no *force majeur* clause.[50]

46. The cases are discussed *infra*.
47. *Supra* n. 5, at 137.
48. *Ibid.*, per Russell, L.J. at 143; and see Winn, L.J. at 147.
49. *Supra* n. 3, at 340.
50. *Supra* n. 7, at 658.

Fourth, Lord Denning postulates a disjunction between breach of a contract, and failure to perform a contract. As an example of the proposed difference he uses the example of a singer who is unable to perform because of sickness. Her non-performance, being occasioned by sickness, would not, according to the Master of the Rolls, be a breach of the contract. He then postulates a case where, instead of being the result of sickness, her non-performance was the result of a poison administered to her by an ill-disposed person who knew of the contract and intended to procure its non-performance. While the singer would not be guilty of breach, the person who administered the poison would have done a wrongful act and would be liable to the person with whom the singer had contracted.

This disjunction cannot stand. As was argued above both breach *per se* and failure to perform are breaches of a contract, though the *cause* of the breach may be different. Both involve damage to the injured party, though the liability of the defaulting party for the damages that ensue from his breach may depend on the cause of the breach. Thus in the example used by Lord Denning, the singer's non-performance in either situation was a breach; indeed, it would be a breach going to the root of the contract, such as would justify her employer's repudiation of the contract. Her sickness (natural or caused by poison) would obviate her liability; it would not prevent her failure to perform from being a breach.

Fifth, the initial "extension" Lord Denning purported to discover in Lord Macnaghten's judgment in *Quinn* v. *Leathem*,[51] an extension which helps justify Lord Denning's own extension by making it seem to be merely one step in a series of developments, is hardly an extension at all. Relations that are contractual are relations that are secured by contract. To say contract is to say relationship. If there is a distinction between "contract" and "contractual relationship," it is only the distinction between two sides of the same coin.

Finally, and most importantly, it is impossible to conceptualize an interference with a contract that falls short of breach yet sounds in damages to the innocent party. Suppose that A contracts with B for the delivery of fuel oil, but makes no stipulation as to when the fuel will be delivered, leaving it to B's discretion. B decides to deliver the fuel on Monday, and rents a truck for that end. C, knowing of the contract, and intending to interfere with its performance, obstructs B in such a way as to prevent him from delivering on Monday. He delivers on Tuesday instead. Clearly there was no breach, since time of delivery was not a term of the contract. In such a case, can A then have a cause of action against C for the interference? Remembering that damages must always be proved, what damages has A suffered? Damages at law in contract only arise where there has been an injury to an expectation interest secured by contract. Here, even if A knew B was going to deliver the fuel on Monday, he had no legal right to expect its delivery then. True, *B* has suffered damage, in that C's interference has put him to added expense. And, depending on the nature of C's interference, he might have a cause of action against C. But B is not the party we are ostensibly concerned with in the three-party tort of inducing breach.

The point can be made another way. As was argued in the discussion of the *Thomson* v. *Deakin* case, to speak of a difference between interference with perfor-

51. *Supra* n. 21.

mance and breach is to emphasize not a difference in the nature of the interference, but rather a difference in the cause of the interference. Strictly speaking, one who fails to perform because he is unable to is as much in breach as one who simply refuses to perform. Indeed, the distinction is meaningless at that level. Both are breaches. Interference by a third party that leads to either is actionable. Thus where A and B have a contract, and C interferes with B's performance to such a degree as to prevent B's performance, A has a cause of action against C. But interference that does not prevent performance, or cause breach, cannot give a cause of action to A. In neither case is there a breach; and without a breach there can be no damages; and without damages there can be no tort. However, B may have a cause of action against C, since B's performance may have been made more expensive by C's interference. Indeed, B is the only party that can be concerned with interference short of breach. Why should A be concerned? There has been no breach of his contract; he has suffered no loss in his expectation interest. Thus to speak of interference short of breach is *necessarily* to speak of *B*'s interest, not of A's.

An interesting example of this imperative can be found in *Salmond on Torts*.[52] There the learned author gives as an example of interference short of breach the case of a defendant increasing the plaintiff's cost of performing a contract to keep a highway in repair by dumping rubbish on it.[53] But if this were truly an example applicable to the three-party tort of inducing breach, the cause of action should be given to the third party with whom the plaintiff had the contract. To make this observation is to expose the impossibility of the analysis suggested by Lord Denning.

All of the above is to suggest that Lord Denning's "extension" cannot be sustained. Clearly *obiter*, it takes as its starting point an equally *obiter* comment of Lord Reid in the *Stratford* case. Nor can it withstand a reasoned analysis.

3. The Canadian Decisions

In his article "Tort Injury to Economic Interests: Some Facets of Legal Response,"[54] Professor Peter Burns argues that there can be little doubt that what he calls the *Torquay* principle — the principle that interference with the performance of a contract short of breach is actionable —

> is part of the law in both England and Canada. Those few decisions that have attempted to refute the principle or have questioned its validity are of little weight.[55]

He notes that the *Torquay* principle was applied by the British Columbia Court of Appeal in *Mark Fishing Co. Ltd.* v. *United Fishermen and Allied Workers' Union*,[56] and that the Supreme Court of Canada dismissed an appeal from that decision without comment. Burns concludes that this "passivity may be viewed as approval of the principle."[57]

One might have thought that even in the best of cases the Supreme Court of Canada's "passivity" with respect to a particular point of law was a frail reed on

52. *Supra* n. 6.
53. *Ibid.*, at 369n.
54. *Supra* n. 6.
55. *Ibid.*, at 119.
56. [1972] 3 WWR 641, aff'g (1970), 75 WWR 385; aff'd without reasons [1973] 3 WWR 13 (SCC).
57. *Supra* n. 6, at 120.

which to lean such a conclusion. The conclusion becomes all the more questionable when the principle itself, as was submitted above, finds no support in authority or in reason. Professor Burns' argument is further weakened by his failure to consider first, whether the *Torquay* principle was in fact necessary to the decisions which purported to apply it, and second, whether the principle deserves the enthusiastic reception he assumes is appropriate.

The second point is of some importance. The tort of inducing breach of contract was originally developed to protect a legal right — an expectation interest secured by contract — from the intentional violation by third parties. That role remains today. But superadded to it is another role, one at variance with the tort's rationale. Almost from the beginning of its existence the tort has been used to protect an interest grounded in status rather than in contract: the interest of employers "entitled to have the services of their workmen."[58] The employer's interest is grounded in status rather than contract, because the employment contract itself grants no enforceable expectation in continued service at common law: the employer's right to discharge at whim brought with it the *quid pro quo* of the employee's right to leave at will. The employee's right may, if exercised collectively, have placed the employer at a disadvantage (though some might have considered it more a righting of the balance of power between them). "But to what was this due," asked Lord Herschell in *Allen* v. *Flood*,[59] "if not to the act of the company themselves in employing these men under a contract which either party might any day determine?"

Yet few Courts have heeded Lord Herschell's words, preferring instead to side with employers they persisted in seeing as beleaguered against unions they persisted in viewing as tyrannical. In their struggle, the Courts latched onto the economic torts, especially the tort of inducing breach. It has not escaped the notice of careful commentators that the economic torts have often proved a useful weapon for Courts eager to impress labour relations with their own, sometimes idiosyncratic, view of "proper" conduct.[60] The development of labour relations legislation in North America, on the other hand, represents a recognition (one to which judges sometimes prove blind) that the Courts are not the proper forum to decide questions concerning the social distribution of power, costs, and benefits that are raised by labour relations. Given the elasticity of the economic torts, and given the judiciary's continued interference in an area from which they were excluded by legislation, one is confronted with the necessity to decide whether or not such "extensions" as those suggested by the *Torquay* principle are in fact desirable. If the English judiciary's involvement in labour relations can be explained by England's failure to develop a statutory framework for collective bargaining, no such rationale exists in Canada. And in the commercial arena (the only other area in which torts involving contractual relations arise) such refinements are not really necessary, for in the exceptional cases in which the injured party must look for his

58. *South Wales Miners' Federation et al.* v. *Glamorgan Coal Co. Ltd. et al*, [1905] AC 239 (HL), per Earl Halsbury, LC at 244.

59. *Supra* n. 20, at 130.

60. Tacon, *Tort Liability in a Collective Bargaining Regime* (Toronto, 1980); Christie, *The Liability of Strikers in the Law of Tort* (Kingston, Ont., 1967).

remedy beyond the breachor, the Courts have no problem justifying his suit on the original principles established in *Lumley* v. *Gye*.[61]

The following pages analyse the five Canadian decisions that Burns cites as authority for his conclusion that the *Torquay Hotel* principle has been accepted in Canada. The analysis reveals that the conclusion is unwarranted. It will also reveal some of the logical failings inherent in any attempt to apply the principle.

The first decision considered by Burns is that of *Einhorn* v. *Westmount Investments Ltd. et al.*[62] The plaintiff[63] was a real estate agent. The three individual defendants, the Belzberg brothers, were in complete control of the corporate defendant, Westmount, and of another corporation, Regina Midtown Centre Ltd. ("Midtown"). Einhorn entered into an agreement with Westmount, whereby he was to assist the corporation to purchase some real estate in return for a $20,000 commission. Westmount, with the assistance of the plaintiff, purchased the property, but paid him nothing. The property represented Westmount's sole asset, it being a paper corporation. The Belzbergs then caused Westmount to transfer the property to Midtown. Einhorn brought suit against Westmount and the Belzbergs, alleging that the latter had induced the breach of his commission contract with Westmount.

Mr. Justice Disbery, in ruling that the plaintiff's writ disclosed a reasonable cause of action, purported to apply the *Torquay Hotel* principle, citing the passage of Lord Denning's reproduced above and referring to it as "correctly expressing the law of this jurisdiction."[64]

With all due respect to Disbery, J., in 1969 there was no authority beyond his own decision for the proposition that *Torquay Hotel*, insofar as it stands for the principle that interference short of breach is actionable, was the law in Saskatchewan — or indeed, in Canada. And indeed, the *Torquay Hotel* principle was unnecessary to his judgment, since it is clear on the facts that there was a *breach* of Einhorn's commission contract with Westmount, and that the Belzbergs had knowingly procured it.[65] Even had there not yet been an actual refusal on Westmount's part to pay the commission, it is doubtful that the plaintiff would have brought the action against the defendants if it had appeared that they were willing to honour the contract. The individual defendants' action in transferring Westmount's only asset to another corporation strongly suggests otherwise.

The second decision relied upon by Burns is that of the *Mark Fishing* case.[66] There the defendant union (UFAWU) was the certified bargaining agent for the shoreworkers in most if not all of the westcoast fish-processing plants. One of the terms of the collective agreement with the processing plants provided that

> It shall not be considered a violation of this Agreement for members of the Union covered herein to refuse to handle products or produce coming from a company or an individual involved in a dispute with labour and officially declared unfair to labour by the labour organization concerned.[67]

61. *Supra* n. 8.
62. *Supra* n. 16.
63. Actually, his estate, since the plaintiff had died.
64. *Ibid.*, at 75.
65. *Ibid.*, at 72, 76.
66. *Supra* n. 56.
67. *Ibid.*, at 406 of the BCSC decision.

The union had two locals in each port, one for shoreworkers and one for fishermen. It sought recognition by the owners of fishing vessels as the sole bargaining agent for the fishermen engaged on such vessels. It attempted to force recognition by instructing its shoreworker members to refuse to unload the fish from such vessels, or to load the ice and bait they purchased from the processing plants. The ships were picketed by the union when they put into port. As a result, no fish could be unloaded and no ice and bait taken on. Ships that put into port were thus forced to dump their cargoes of rotting fish; and none were able to go out again, having been deprived of their ice and bait. Some of the shipowners sued for the loss, and at trial and on appeal were awarded damages of $109,795.24.

At trial the defendant union was found liable for inducing breach of contracts between the shipowners and the processing plants. Both the *Stratford* case and the *Torquay Hotel* case were applied, but not, it should be noted, for the *Torquay Hotel* principle. Rather, they were relied upon for the principle that the defendants need not know the exact terms of the contract, so long as it could be said that they "had sufficient knowledge thereof that it may properly be said that they knowingly procured a breach."[68] *Torquay Hotel* was also used to deny to the defendant union the benefit of the "hot products" clause in the collective agreement, which was, in any event, construed as not applying to ice and bait (since they were not "products").[69]

The major difficulty with this decision is that there were in fact no contracts between the shipowners and the processing plants proved in evidence. There was a course of dealing, wherein the ship's catch was purchased by the processing plants, which in turn sold fresh bait and ice to the ships. It is clear that such a course of dealing was incapable of being breached, since either vessel or processing plant was free to buy from or sell to whomever it pleased. The only exception was the processing plant run by the Prince Rupert Fishermen's Co-Operative Association ("the Co-op"). The Co-op entered into contracts with some of the shipowners, whereby the Co-op agreed to purchase all the fish delivered to it by the ship, and the shipowner agreed to sell all the fish caught by him to the Co-op.[70] It should be noted, however, that there were no maximum or minimum catch limits set — there was no obligation to pay, or to deliver, a certain amount. Thus no breach would be occasioned by a failure to supply any fish to the processing plant, nor by the plant's failure to pay for fish not supplied to it.

The British Columbia Court of Appeal reacted to this problem in a somewhat confused fashion. Davey, C.J.B.C. avoided it altogether. He found the union's acts to be in violation of *The Labour Relations Act*,[71] and used that violation to ground the union's liability in what has been known as the *Therien* tort: intentional interference with business by unlawful means.[72]

Maclean, J.A. did locate liability within the area of interference with contract, holding that "evidence of a previous course of dealing between the plants and the fishermen is sufficient to found an assumption that contracts existed."[73] However,

68. *Ibid.*, at 405, per Rae, J.
69. *Ibid.*, at 407-408.
70. *Ibid.*, the BCCA decision, per Robertson, J.A. at 676.
71. RSBC 1960, c.205.
72. *International Brotherhood of Teamsters, Local No. 213* v. *Therien*, [1960] SCR 265; cited by Davey, C.J.B.C. in the BCCA decision, *supra* n. 56, at 654.
73. Maclean, J.A. in the BCCA decision, *supra* n. 56, at 665.

the *basis* of liability is unclear. In his judgment Maclean, J.A. held that the plaintiff was entitled to rely on the *Torquay Hotel* case, "where the law on *unlawful* interference with the contracts of others is extensively reviewed."[74] The use of the word "unlawful" makes the reference to *Torquay Hotel* problematic. Interference with the contracts of others is in and of itself unlawful; the adjective becomes necessary only in the case of indirect interference. This, together with the fact that *Torquay Hotel* stands for *both* the proposition that the tort of inducing breach has been broadened to encompass interference short of breach, *and* the proposition that there is a tort of unlawful interference with business (trade, economic) interests,[75] makes unclear which ratio Maclean, J.A. is relying upon in his judgment. In any event, he also relies on the separate and independent tort of conspiracy to ground the union's liability.[76]

Robertson, J.A. found that the fact situation fell squarely within the authority of *Gagnon et al.* v. *Foundation Maritime Ltd.*,[77] which in turn relied upon the *Therien* tort of interference with business using unlawful means.[78] He did *not* ground the defendant's liability on the *Torquay Hotel* principle. That case was mentioned, but only in the context of the defendant's argument that it was protected by s.3(1) of *The Trades Union Act*,[79] which permitted picketing during the course of legal strikes so long as it was accomplished "without acts that are otherwise unlawful."[80] Robertson, J.A. held that the defendant was not protected by this section, since, *inter alia*, on the basis of the *Torquay Hotel* case, it was "unlawful" for the union to make it "impossible for the Co-op to perform its part of the contract with...[the ship owners]."[81] In short, the *Torquay Hotel* case was relied upon only to deny to the defendant union the immunity that would otherwise have been granted to it by the statute for acts tortious at common law, for which acts it had already been found liable by Robertson, J.A. on the *Therien* ground.

If it is possible to extract any *ratio decidendi* from the three judgments of the British Columbia Court of Appeal, it is that the union's liability was grounded on the *Therien*, not the *Torquay Hotel*, principle. And while it might be possible to elevate Robertson, J.A.'s reference into an indirect approval of the *Torquay Hotel* principle, the principle itself was not, with respect, truly applicable to the facts of the case. There was a contract between Co-op and some of the ship owners. And the union did interfere with the course of conduct that would otherwise have occurred between the Co-op and the ship owners. However, since the Co-op was under no obligation to do anything other than purchase fish delivered to it, it seems doubtful that the union's interference prevented the Co-op from *performing* its contractual obligations. The union's acts prevented the shipowners from delivering the fish to the Co-op; they did not prevent the Co-op from performing its contractual obligation to purchase the fish, since that obligation did not arise until the fish were delivered. In the *Torquay Hotel* case, on the other hand, Esso was under an obliga-

74. *Ibid.*, at 664, emphasis added.
75. *Torquay Hotel*, *supra* n. 5, at 138, 139 respectively.
76. *Supra* n. 73, at 664-66.
77. [1961] SCR 435.
78. *Supra* n. 72; cited in Robertson, J.A. in the BCCA decision, *supra* n. 56, at 671-75.
79. RSBC 1960, c.384.
80. *Ibid.*, s. 3(1).
81. *Supra* n. 78, at 676.

tion to deliver fuel, and it was the performance of that obligation that was hindered by the union.

What the union in the *Mark Fishing* case was really doing, then, was interfering with the plaintiff's right *to enter into* a contract. This interest — that of the expectation interest in future but not existing contracts — has been protected only in limited circumstances, and then not under the tort of inducing breach of contract. Rather, such limited protection as has been afforded this interest has been left to the torts of conspiracy and of interference with business (economic) interests using unlawful means.[82] The fact that this right is the one being protected strengthens the conclusion that the real ratio of the *Mark Fishing* case is the *Therien* tort, not that of inducing breach (or interference) with contract.

The third decision relied upon by Professor Burns is *Celona* v. *Kamloops Centennial (Pacific No.269) Branch of the Royal Canadian Legion et al.*[83] Branch No.269 had entered into a contract with the plaintiff for the sale of land. However, at the instigation of the Pacific Command of the RCL (to which the Branch reported), it broke its contract with the plaintiff. McKay, J. in holding the defendants liable, cited the portion of Lord Denning's judgment in *Torquay Hotel* reproduced above. Nevertheless, this case cannot be taken as authority for the *Torquay Hotel* principle, since there was here a clear breach of contract. As to the fourth decision, *McKenzie* v. *Peel County Board of Education*,[84] Professor Burns himself notes[85] that Dubin, J.A. expressly declined to apply *Torquay Hotel* in order to avoid unnecessary expansion.[86]

The final decision relied upon by Burns is that rendered by Robertson, J.A. for the British Columbia Court of Appeal in *Western Stevedoring Co. Ltd.* v. *Pulp Paper and Woodworkers of Canada.*[87] In that case the plaintiff had signed a collective agreement with its employee stevedores which provided, *inter alia*, that it would not "expect members of the Union to pass a picket line."[88] The defendant union had placed picket lines at a dock which the plaintiff's employees refused to cross. Robertson, J.A. held that this term did not prohibit the plaintiff from enjoining the picketing on the grounds that it prevented or hindered the employees "from performing their contracts to load the ship."[89] He reached this conclusion on the basis of his judgment in *Mark Fishing*, citing his own earlier statement that interference with the performance of a contract is an unlawful act (complete with the reference to *Torquay Hotel*), and concluding that "the picketing interfered with the execution of the contracts, in that it prevented or hindered the...[plaintiff's employees] from entering the place where their work was to be performed."[90]

This, with respect, is scarcely a model of coherent reasoning; nor is the fact situation on all fours with the *Torquay Hotel* case. With respect to the first point,

82. As in the *Therien* tort, *supra* n. 72; and in *Temperton* v. *Russell*, *supra* n. 12, as explained in *Crofter Hand Woven Harris Tweed Co. Ltd.* v. *Veitch*, [1942] AC 435 (HL).
83. [1974] 2 WWR 144 (BCSC).
84. (1975), 5 OR (2d) 549 (CA).
85. *Supra* n. 6, at 123n.
86. *Supra* n. 84, at 561.
87. (1975), 61 DLR (3d) 701 (BCCA).
88. *Ibid.*
89. *Ibid.*, at 708.
90. *Ibid.*, at 709.

the employees' contracts with the plaintiff were not to load the ship in question, but were rather to labour under certain conditions. One of those conditions was that they would not be expected to cross picket lines. (The *Stratford* case itself recognized the right of employees at common law to make such stipulations in their contracts of employment,[91] though they might not be enforceable under a labour relations statute.) Indeed, unlike the *Torquay Hotel* case, where the *force majeur* clause went expressly to liability only (not performance), here the clause in question went to expectation. When the plaintiff agreed that it would not "expect" its employees to cross a picket line, it in effect agreed that there would be no contractual obligation — no duty to perform — in the event that it involved crossing a picket line. The plaintiff made this bargain with its employees with open eyes, and may even have extracted concessions from the union for its inclusion. It ill behooves the Court (though it is in accord with its unjustified desire to discipline the defendant union) to permit the plaintiff to avoid *its own* contractual obligation not to expect performance in the event of picket lines by relying on tort doctrine against the third party.

Secondly, even if the clause of the collective agreement did not cover the refusal to work (thus putting the plaintiff's employees in breach), the picketing did not "prevent" the employees from performing their contracts in the same way that the picketing in *Torquay Hotel* "prevented" Esso from performing its contract with the hotel. In *Western Stevedoring* the employees were *able* to perform their contracts but they refused to. In *Torquay Hotel*, Esso was willing to perform, but was unable to do so because its employees refused to cross the picket lines. In other words, *Western Stevedoring* is, strictly speaking, a simple case of direct inducement of breach of contract, and stands only for that principle; whereas, as noted above, *Torquay Hotel* represents a case of indirect inducement of breach (although it was not analysed as such by Lord Denning).

IV. Conclusion

The *Mark Fishing* and the *Western Stevedoring* cases highlight the conceptual confusion inherent in Lord Denning's breach/performance paradigm. More to the point, however, the five cases discussed have been shown to lend little support to Professor Burn's argument about the acceptance of the *Torquay Hotel* principle in Canada. Their authority is further weakened (if that could be possible) by their failure to deal directly and clearly with the issue of whether the tort of inducing breach of contract can be expanded to cover interference short of breach.

Only one reported judgment, that of O'Sullivan, J.A. in *Mintuk* v. *Valley River Band No.63A*,[92] has dealt squarely with the issue. In his judgment O'Sullivan, J.A. first cites *Clerk and Lindsell on Torts*, 14th ed., para.794, to the effect that "on principle, if no breach eventuates, there should be no tort."[93] He then refers to the "dicta" of Lord Denning in the *Torquay Hotel* case, and acknowledges that it has been "mentioned with apparent approval" in the *Einhorn* and *Mark Fishing* cases.[94]

91. *Supra* n. 3, at 324.
92. (1977), 75 D.L.R. (3d) 589 (Man. CA), at 604ff.
93. *Ibid.*, at 604.
94. *Ibid.*

Nevertheless, he was not prepared to follow Lord Denning without an express statement from the Supreme Court of Canada, believing that the law in Canada is that expressed by Lord Donovan in the *Stratford* case.[95] This judgment, with all respect to Professor Burns, is not, as he would have us believe, "of little weight."[96] Unlike the decisions he relies upon, where the *Torquay Hotel* principle was either unnecessary to the result or applied without comment, that of O'Sullivan, J.A. addresses itself directly to the issue. Its reasoning, though concise, is preferable to those decisions that simply cite undigested chunks of Lord Denning's dicta with little recognition that in doing so they were effecting a marked and unsupportable departure from settled law.

It is submitted, then, that the expansion suggested by Lord Denning in the *Torquay Hotel* case can be supported by neither precedent nor reason. And, in spite of the numerous references in Canadian cases to the dicta of the Master of the Rolls, the expansion has not in fact been established in Canada. While textbook authors and headnote writers may continue to refer to the tort of "interference with contractual relations," the tort in its elements remains the traditional one of inducing breach of contract. Interference short of breach will not sound, *as a three-party tort*, in law or in damages. With no breach, there will be no tort, now as then.

Nor, finally, is there any policy which would in Canada justify the expansion of the tort to cover interference short of breach, since contractual and economic interests are already fully protected. Where there is interference which amounts to breach, the injured party may rely on the three-party tort of inducing breach of contract. And where there is interference with the performance of a contract short of breach, the *true* injured party (that is, the party whose performance is made more expensive by the defendant's interference, *not* the party for whose benefit the contract is performed) has a remedy in any one of a number of *two-party* torts, including that of interference with business (economic) interests by unlawful means.

Indeed, the only interest served by Lord Denning's attempted expansion of the tort of inducing breach is the illegitimate one of the Courts in the field of labour relations. The ambiguity and expansive scope of the *Torquay Hotel* principle would make it easy for Courts to intervene in an area from which, as a matter of social policy, they have been excluded by statute. Such interests should not be encouraged.

95. *Ibid.*, at 605.
96. *Supra* n. 6, at 119.