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• CANADA'S DEVELOPING LAW ON THE ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS •

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INTRODUCTION

The first step in determining where to enforce an international arbitral award is to determine where the award debtor has assets. With complex corporate structures, it can be difficult both to locate assets and to determine, from a legal perspective, who owns what and where. Luckily, there is a growing body of case law in Canada that addresses when Canadian courts have jurisdiction over parties and assets for the purpose of facilitating such enforcement. *IATA v Instrubel* ("***Instrubel***")[1] is the most recent example of Supreme Court of Canada ("**SCC**") case law addressing what assets may be available to an arbitral award creditor seeking to enforce an award in Canada. It provides instructive insight on what types of assets may be available for such enforcement.

In *Instrubel*, the main issue before the SCC was whether a Québec court could order a seizure before judgment by order of garnishment where the garnishee was located in Québec but where the funds at issue were allegedly located outside of Québec. This article discusses the *Instrubel* case, explains the significance

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of the SCC's decision for international arbitral award creditors and debtors, and sets out key takeaways.

THE INSTRUBEL CASE

In the 1980s and 1990s, Instrubel entered into five contracts with various public Iraqi entities, including the Iraqi Civil Aviation Authority ("**ICAA**"), for the supply of military equipment. In 1992, after the Iraqi buyers defaulted on payment, Instrubel submitted a claim for breach of contract to the International Court of Arbitration of the International Chamber of Commerce (the "**ICC**"). The resulting two arbitral awards, in 1996 and 2003, collectively ordered the Republic of Iraq ("**Iraq**"), jointly with the other public Iraqi entities, to pay approximately CAD $32 million to Instrubel, plus interest. Instrubel then took steps to enforce upon the awards.

Before the Superior Court of Québec: Where are the assets located?

In March 2013, Instrubel filed an application for the homologation (recognition and enforcement) of the arbitral awards before the Superior Court of Québec ("**Superior Court**").[2] Shortly thereafter, Instrubel sought and obtained from the Superior Court a writ of seizure before judgment by garnishment (the "**Writ**"). Specifically, Instrubel obtained judicial permission to seize the air navigation and aerodrome charges billed, collected and/or otherwise held by the International Air Transport Association ("**IATA**"), headquartered in Montréal, on behalf of the ICAA, the public agency responsible for the regulation of airspace in Iraq.

Iraq brought an application to quash the Writ with evidence from the IATA that it was not holding any sums "belonging to" the ICAA and, instead, held approximately US $166 million in funds "in trust for the benefit of" the ICAA, which it alleged were not subject to seizure. When Iraq's application to quash was first heard, its initial arguments were dismissed. The IATA subsequently transferred $90 million to its counsel's trust account in respect of the Writ.[3]

In September 2015, Iraq raised a new challenge to the Writ after becoming aware that the funds

held by the IATA were, prior to transfer, located in a bank account in Switzerland (not Québec). This challenge is what ultimately made its way to the SCC. The issue was whether the Superior Court could order the seizure of this property. Iraq argued such was not within the court's jurisdiction as the property seized comprised "funds in a bank account in Switzerland."[4]

In 2016, the Superior Court granted Iraq's amended application to quash the Writ on the basis that the court lacked jurisdiction to authorize the seizure of a property located in Switzerland.[5] The Superior Court held that under the mandate relationship (agency agreement) between the IATA and the ICAA, the funds collected and held by the IATA on behalf of the ICAA belonged to the ICAA. There was a clear obligation on the part of the IATA to remit these funds to the ICAA. In other words, the funds belonged to Iraq "as opposed to the funds belonging to the IATA and IATA having a debt to Iraq."[6] The Superior Court also concluded that despite the comingling of funds in the IATA's bank account, the sums belonging to the ICAA were readily identifiable. This supported the position that the funds were the ICAA's property[7] and was critical to the court's decision.

As the IATA did not owe a debt to Iraq, the Superior Court had to consider whether it had jurisdiction with respect to property in Switzerland (and if it did, whether such jurisdiction was limited to freezing assets or if it could execute against the assets).[8] It held that allowing the seizure of property held in Switzerland would amount to placing such property under the judicial control of Québec authorities, which would contravene the rule that the primary jurisdiction with respect to assets lies with the courts of the place where they are located.[9]

Before the Court of Appeal of Québec: Is this a case of enforcement against foreign assets?

Instrubel appealed to the Court of Appeal of Québec ("**Court of Appeal**"). It challenged the findings that the IATA was not a debtor of the ICAA, and that the Superior Court lacked jurisdiction to permit the seizure before judgment of the ICAA's property situated outside Québec.[10]

The Court of Appeal disagreed with the Superior Court's characterization of the relationship between the IATA and the ICAA: it was clearly a creditor/debtor relationship. Regardless of the characterization of the contract, the IATA was obligated to pay a sum of money to the ICAA. There was no evidence regarding segregation of sums other than through accounting calculation, or that once deposited sums due to the ICAA could be identified. The Court of Appeal contrasted this finding with an obligation to provide or give specific dollar bills received from third parties or another type of tangible asset.[11]

The issue of the court's jurisdiction therefore turned on the treatment of personal rights under Québec private international law – and its first finding: that there was a creditor/debtor relationship. The three-judge panel concluded that the IATA held a debt in favour of the ICAA and such debt was located where it was collectible, namely Montréal (i.e. the domicile of the debtor), as provided by Québec law.[12]

Finally, the Court of Appeal determined that the *situs* of the bank account (i.e. Switzerland) did not change the *situs* of the debt, which was in Québec. Ultimately, the Court of Appeal did not consider the Instrubel case to be a case of enforcement against foreign assets.[13]

Before the SCC: A complete endorsement of the Court of Appeal's ruling

In 2019, the IATA sought and was granted leave to appeal the Instrubel case before the SCC. After hearing oral arguments on December 11, 2019, a majority of the SCC issued reasons from the bench, dismissing the appeal "substantially for the reasons of the Court of Appeal save for the matters addressed in *obiter*."[14]

Justice Côté provided her dissenting reasons on May 1, 2020.[15] These substantially align with the reasons of the Superior Court. Justice Côté found that the contract between the IATA and Iraq established a relation of mandate (agency) because, in her view, the

IATA never became the owner of the funds and always had to remit them to Iraq, the true owner. Justice Côté thus concluded that the action should proceed as an *in rem* action and that because the location of the property in dispute was Switzerland, the action fell outside of the jurisdictional reach of the Québec courts.

INSTRUBEL'S IMPLICATIONS

The SCC's Decision

The SCC and the Court of Appeal's decisions in *Instrubel* illustrate how Canadian courts can facilitate the enforcement of arbitral awards. Shrager J. of the Court of Appeal made a noticeable reference to the importance of facilitating international arbitration by applying the law in a way that it produces workable results:

> "it seems that the Appellant and others in similar positions which seek to execute an unsatisfied claim would be forced into an international "shell game" of somehow discovering (or guessing) where the mandatary/garnishee (IATA), deposited the moneyx– a virtually impossible task. The law, correctly applied, should not lead, in my view, to such unworkable results."[16]

While this might have been an opportunity for the SCC to comment on this and other issues of enforcement of international arbitral awards, including the broader policy objective highlighted by the Court of Appeal, lawyers will need to make do with the Court of Appeal's reasons and the inferences that can be drawn. For now, the SCC majority's decision may be interpreted as adopting the entirety of the Court of Appeal's analysis absent comments in *obiter*. This suggests, that like the Court of Appeal, it was comfortable facilitating the enforcement of the arbitral award in these circumstances.

Judicial Treatment of Foreign Judgments and Foreign Arbitral Awards in Enforcement Proceedings

One issue that the SCC might have addressed (but did not), and which the Superior Court addressed, was the difference between the recognition and enforcement of foreign judgments and that of foreign arbitral awards. In *Chevron Corp. v Yaiguaje*[17] ("**Chevron**"), the SCC was asked to determine whether a judgment rendered by an Ecuadorian Court against an American Company (i.e. Chevron Corporation) ought to be enforced in Canada on the assets of its Canadian indirect subsidiary (i.e. Chevron Canada Limited). The SCC confirmed that in actions to recognize and enforce foreign judgments, it is the act of service on the basis of the foreign judgment that grants the authorities of a province jurisdiction over the defendant.[18] The SCC reminded litigants that:

> "in today's globalized world and electronic age, to require that a judgment creditor wait until the foreign debtor is present or has assets in the province before a court can find that it has jurisdiction in recognition and enforcement of proceedings would be to turn a blind eye to current economic reality."[19]

In *Instrubel*, the Superior Court noted the decision in *Chevron* and emphasized (perhaps in contrast) that "[e]nforcement is limited to the seizable assets found within the province."[20] It held that if Instrubel could not execute the ICC award on funds or a debt in Québec, there was no value in seeking the enforcement of the award before the Québec courts.[21] The Superior Court seemed to suggest that it should only exercise jurisdiction to recognize an international arbitral award when it can actually assist in the enforcement of arbitral awards. The Superior Court also commented in *obiter* that the Quebec court had no connection to the dispute because the funds were in Switzerland and implied it ought not be involved in the matter.[22] This seems to be in conflict with the decision in *Chevron*, which stands for the proposition that the location of assets does not affect the court's jurisdiction to recognize (in that case) a foreign judgment.

These comments were not addressed by the Court of Appeal because it found the IATA owed a debt due to the ICAA, which was sited in Montreal.[23] As the SCC substantially adopted these reasons, the issue as to whether the decision in *Chevron* – that no separate real and substantial connection to a province

is required in the context of enforcing a foreign judgment – applied in the context of enforcement of foreign arbitral awards is potentially outstanding.

The Remedies Available to the Party Seeking the Enforcement of an Arbitral Award

While *Instrubel* concerned a writ of seizure before judgment by garnishment, the Superior Court also addressed Instrubel's attempt to compare a *Mareva* injunction (and its international reach in some cases) to the garnishment sought. This was to justify the argument that since the court had jurisdiction to issue a *Mareva* injunction against a defendant domiciled in Québec but for property located outside Québec, it could also authorize the enforcement of the ICC award on extraterritorial assets.[24] The Superior Court rejected this analogy and concluded that it did not have jurisdiction to authorize a writ of seizure by garnishment that extended to assets held outside Québec because such type of order was not merely a personal order affecting the defendant, such as a *Mareva* injunction, but also one affecting property directly.[25]

The Court of Appeal and the SCC did not address this argument. However, in her dissenting reasons, Côté J. commented on how "the criteria for granting a *Mareva* injunction are significantly more onerous than the criteria for issuing a writ of seizure before judgment by garnishment,"[26] as highlighted by the first-instance court. As emphasized by Côté J., a party who seeks to enforce an international arbitral award in Canada should be aware that seizures by garnishment and injunctive relief are different procedures and types of relief, which explains why there exists a clear jurisprudential trend: *Mareva* injunctions can have extraterritorial effect but writs of seizure by garnishment must relate to local assets. One or both may be available depending on the circumstances.

The writ of seizure by garnishment has features of both a seizure, which requires *in rem* jurisdiction, and a personal order, which requires *in personam* jurisdiction. It is both a means of asset preservation, when requested before judgment (similar to a *Mareva* injunction), and award execution.[27] A writ of seizure by garnishment places the property belonging to the debtor under judicial control through the garnishee[28] and makes the garnishee responsible for the custody and the eventual remittance of the property seized.[29]

In comparison, a *Mareva* injunction is of a personal and preservatory nature and thus requires only *in personam* jurisdiction. More specifically, a *Mareva* injunction addresses the conduct of a person. Recent cases have demonstrated Canadian courts' openness to grant *Mareva* injunctions to aid in the execution of international arbitral awards, whether to prevent the move or loss of assets.[30] Indeed, the test for a *Mareva* injunction is strenuous – it requires a party establish not only a strong *prima facie* case, but also that there are assets within the jurisdiction and a real risk of dissipation of assets. These are not required for writs or garnishment notices. However, in advance of a determination on the merits, a *Mareva* injunction can be a powerful tool to attach assets worldwide because the court only requires jurisdiction over the entity that holds those assets and not the assets themselves.

In *Instrubel*, this distinction did not ultimately matter. The courts were only addressing a writ of seizure and garnishment, and "[a]s the *in personam* debtor of ICAA, it matters not whether IATA deposited the money it collected and giving rise to such indebtedness in a bank account in Geneva, New York or Montreal. The *situs* of its bank account does not change the *situs* of the debt IATA owes to its creditor. As such, that funds were initially collected in Montreal or at an IATA branch office in another country is inconsequential."[31] The discussion is, however, an important consideration for arbitral award creditors considering how to enforce their awards before the courts in Canada.

CONCLUSION

The *Instrubel* case did not answer all of the arbitration community's questions regarding the recognition and enforcement of international arbitral awards in Canada, but it is certainly an important decision for creditors of arbitral awards. It emphasizes the

jurisdictional analysis to be undertaken in determining the location of assets, and whether they can be subject to writs and garnishment, and distinguishes between these and other remedies.

The SCC also appears to have recognized the implications of not upholding the Court of Appeal's decision, in particular in an increasingly globalized environment where a bank account does not need to be physically located in the same jurisdiction as the account holder. It remains incumbent upon those on both sides of enforcement proceedings to be aware of the nuances in the law with respect to different types of assets.

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1 *International Air Transport Association* v *Instrubel*, N.V., 2019 SCC 61. [*Instrubel SCC*]

2 *Instrubel, n.v.* v *Ministry of Industry of The Republic of Iraq*, 2016 QCCS 1184. [*Instrubel QCCS*]

3 *Ibid*, paras 5-13. The decision does not specify if this was CAD or USD.

4 *Ibid*, para 15.

5 *Ibid*, para 15.

6 *Ibid*, para 57.

7 *Ibid*, para 59.

8 *Ibid*, para 61.

9 *Ibid*, para 76.

10 *Instrubel c Republic of Iraq*, 2019 QCCA 78, para 21. [*Instrubel QCCA*]

11 *Ibid*, para 43.

12 Civil Code of Québec, article 1566.

13 *Instrubel QCCA*, para 50.

14 *Instrubel SCC*, para 1 and 2.

15 *Ibid*, para 3 *et seq*.

16 *Instrubel QCCA*, para 50.

17 *Chevron Corp. v Yaiguaje*, 2015 SCC 42.

18 *Ibid*, para 57.

19 *Ibid*, para 57.

20 *Instrubel QCCS*, para 46.

21 *Ibid*, para 48.

22 *Ibid*, para 78.

23 *Instrubel QCCA* 78, para 42.

24 *Instrubel QCCS*, para 64 et seq.

25 *Ibid*, para 74.

26 *Instrubel SCC*, para 29.

27 *ICI Chèque* c *Travel Currency Inc.*, 2005 QCCS 7020, para 24-25.

28 *Code of Civil Procedure*, article 702; *Kuwait Airways Corporation* c *Iraqi Airways Company*, 2010 QCCS 53, para 20.

29 *Code of Civil Procedure*, article 712; *Instrubel QCCS*, para 74.

30 For example, see : *Belokon et al. v The Kyrgyz Republic*, 2016 ONSC 4506; *CE International Resources Holdings LLC v Yeap Soon Sit*, 2013 BCSC 186; *China CITIC Bank Corp*. v *Yan,* 2017 BCSC 596*; Sociedade-de-Fomento Industrial Private Ltd.* v *Pakistan Steel Mills Corp. (Private) Ltd.,* 2014 BCCA 205.

31 *Instrubel* QCCA, para 50.

• HAS THE CONTRACT LAW DOCTRINE OF FRESH CONSIDERATION GONE STALE? •

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Michael A. Currie

INTRODUCTION

Congratulations, you have signed a contract to supply aglets[1] to an international shoelace conglomerate. The demand is insatiable. Unexpectedly, your factory shuts down for weeks, disrupting your production and increasing prices. You approach the conglomerate, which agrees to pay you more for each aglet. You have emails showing the agreement for the adjusted price but you do not execute a new agreement.

Historically, courts would have found such a variation unenforceable on the technical argument that fresh consideration was not exchanged. The partie s would have needed to exchange something new of value to make the variation enforceable because consideration determined who was privy to a contract. If there was no fresh consideration, then there was no privity and the agreement could not be enforced. Consideration also served to reduce surprises and to delineate between binding agreements, gifts, and a mere promise.[2]

Some authors have commented that the law surrounding these "going-transaction adjustments" or variations (i.e. where parties have an existing contractual relationship) to be "needlessly confused and complicated".[3] Identifying these variations as new contracts is to misunderstand their function. Academics have also expressed concern that the doctrine of fresh consideration results in a "hunt and peck" approach, meaning it is applied inconsistently to reach whatever outcome the judge believes is fair.[4] Canadian courts have recognized these issues. But we have not yet seen a watershed change in the law.

One of the frequently cited cases dealing with fresh consideration is the Ontario Court of Appeal's decision, *Gilbert Steel Ltd. v University Construction Ltd.*[5] In that case, Wilson J.A. ruled that a subsequent oral agreement to pay higher prices for steel was unenforceable for "want of consideration".[6] True to the hunt and peck approach, within three years of *Gilbert*, the ONCA, with Wilson J.A. on the panel, decided a similar case and found a variation, without consideration, to be enforceable.[7] The Court did not refer to *Gilbert.* Even with these inconsistent decisions, courts have cited to *Gilbert* as the leading case.[8]

To add to the confusion, developments in the law make certain variations binding without fresh consideration. One example is promissory estoppel, where courts find reliance is enough to enforce agreements lacking consideration.[9] Insurance statutes

also permit an unnamed insured to recover indemnity and "shall be deemed to be a party to the contract and to have given consideration therefor".[10]

A survey of Canadian reported decisions highlights the doctrine's inconsistent application and that counsel have frequently failed to argue to reform it. It is time for counsel to go beyond the tight confines of the fresh consideration doctrine. Counsel should advance arguments to get rid of it all together. As Professor Waddams, Professor Reiter, Angela Swan, and Karl Llewellyn have proposed, courts should presume variations to a contract, without consideration, are enforceable save for economic duress or unconscionability.

HISTORICALLY, COMMON LAW COURTS STRICTLY APPLIED THE DOCTRINE OF FRESH CONSIDERATION

A binding contract traditionally requires an offer, acceptance, and consideration. Consideration requires each party to exchange something of value.[11] A party's act or promise must be bought or bargained for by another party's act or promise.[12] The consideration can be minimal. The classic example is a peppercorn for a castle.

Once the contract has been established, the parties will have a pre-existing duty to fulfill its terms. The common law doctrine of pre-existing duty was developed in the English courts approximately 400 years ago. Courts generally denied enforcing a promise to do something in addition to what a party was already bound to do.[13] They sought a true bargain, requiring an exchange, to find a variation enforceable.[14]

Courts continue to cite and apply (inconsistently) one of the seminal English decisions on pre-existing duty, *Stilk v Myrick.* [15] Stilk worked on Myrick's ship and promised to do anything needed during the voyage. Myrick's ship docked for an evening. Two men deserted. The captain promised to pay the remaining crewmembers the deserters' wages if they fulfilled the missing crewmembers' duties. Once they arrived at home port, the captain refused to pay the extra wages. Stilk sued Myrick. The court ruled in Myrick's favour, finding that the crew had a pre-existing duty to fulfill their roles even under an emergency. The court determined that no fresh consideration was exchanged to make the gratuitous promise to pay extra wages binding.

While *Myrick* has been referred to as a leading case on the doctrine of pre-existing duty, the decision is distinguishable today. It was reached out of fear that a crew could hold their captain to ransom on the high seas.[16] Many have questioned its relevance but courts continue to cite the decision.[17]

COURTS OF ENGLAND AND WALES MODIFY THE DOCTRINE OF FRESH CONSIDERATION

In 1989, the English and Wales Court of Appeal, in *Williams v Roffey Brothers & Nicholls (Contractors) Ltd*, reformed the need for fresh consideration when the contracting parties receive "practical benefits" from the variation.[18] In *Williams*, a building association hired a contractor to refurbish a block of flats. The contractor hired carpenters for the refurbishment. The carpenters fell behind schedule. The building contractor agreed to pay the carpenters more money to expedite the refurbishment. After they refurbished the flats, the contractor refused to pay the extra funds.

The Court determined that the variation was enforceable because it was mutually beneficial. The carpenters would receive the further payment and the contractor would avoid delay penalties. Glidewell L.J. acknowledged that some would object to the ruling because it conflicted with *Myrick*:

> It is not in my view surprising that a principle enunciated in relation to the rigours of seafaring life during the Napoleonic wars should be subjected during the succeeding 180 years to a process of refinement and limitation in its application in the present day.[19]

Russell L.J. and Purchas L.J. concurred. Russell L.J. wrote, "the variation was supported by consideration which a pragmatic approach to the true relationship

between the parties readily demonstrate." He emphasized that the parties' intention was clear based on the practical benefits received by each. Purchas L.J. observed, "the modern approach to the question of consideration would be that where there were benefits derived by each party to a contract of variation even though one party did not suffer a detriment this would not be fatal to the establishing of sufficient consideration to support the agreement."

COURTS IN NEW BRUNSWICK AND BRITISH COLUMBIA ADOPT WILLIAMS

New Brunswick

In 2008, the New Brunswick Court of Appeal ("**NBCA**") became the first Canadian appellate court to approve and build on the reasoning from *Williams* in *NAV Canada v. Greater Fredericton Airport Authority Inc.*[20] It ruled that, in the particular case, it would find a variation to an agreement enforceable, without fresh consideration. *NAV Canada* created the pathway for post-contractual modifications, unsupported by consideration, to be enforceable subject to economic duress.

NAV Canada ("**NAV**") was responsible to provide equipment to the Greater Fredericton Airport Authority Inc. ("**GFAA**"). GFAA was lengthening a runway and relocating its Instrument Landing System ("**ILS**"). NAV wanted to replace one of the ILS's existing components. The parties disagreed on who should pay for it.

NAV wrote to GFAA and advised that if GFAA did not agree to reimburse it, NAV would not order the component. GFAA agreed under protest to pay. After NAV purchased the component, GFAA refused to pay. Litigation ensued.

Robertson J.A. held that "a post-contractual modification, unsupported by consideration, may be enforceable so long as it is established that the variation was not procured under economic duress."[21] The onus is on the party seeking to enforce the modified term that: (i) economic duress did not occur; or (ii) the coerced party affirmed the modification.[22]

Economic duress is "dependent *initially* on two conditions precedent":[23] (1) the contractual variation must be extracted from pressure, such as a demand or threat; and (2) the coerced party had no practical alternative but to agree to the demand or threat. If these two conditions precedent are satisfied, the court considers whether the coerced party consented to the variation.[24]

Robertson J.A established that the NBCA will consider three factors in assessing consent:

1. Was the promise supported by consideration;
2. Did the coerced party promise under protest or without prejudice; and
3. If not, did the coerced party take reasonable steps to disaffirm the promise as soon as practicable.[25]

In applying the facts to the established test, the Court found that GFAA was a victim of economic duress. Among other things, NAV procured the contractual variation by threatening not to purchase the component unless GFAA paid for it and GFAA agreed to pay under protest.

To complicate matters and consistent with the hunt and peck approach, within a year of *NAV Canada*, the NBCA faced another contract variation case in *Harrity and Northeast Yachts 1998 Ltd. v Kennedy*.[26] In contrast to *NAV Canada,* the Court held a subsequent variation to an agreement was unenforceable for lack of consideration.

In *Harrity,* the plaintiff bought a yacht and signed an agreement of purchase and sale on the representation that the yacht's engine was new. After the sale finalized, the parties executed a bill of sale with an attached disclaimer of liability for misrepresentations. The purchaser soon realized that the yacht's engine was not new. She commenced an action. The defendants relied on *NAV Canada* to argue that the liability disclaimer was enforceable. The Court disagreed because the parties did not exchange fresh consideration.

The Court likely found the variation unenforceable because: (i) the purchaser was an unsophisticated party; (ii) the parties did not negotiate the variation in the contract; and (iii) the purchaser appeared to have been unaware of the variation.[27]

British Columbia

Ten years after the NBCA's decision in *NAV Canada,* the British Columbia Court of Appeal ("**BCCA**") did away with the requirement for fresh consideration, absent duress, unconscionability, or other public policy concerns in *Rosas v Toca*.[28] *Rosas* has since been described as a "significant" change in the common law.[29]

Ms. Rosas won over $4 million in a lottery. She loaned $600,000.00 to Ms. Toca to purchase a home. Each year, Ms. Toca stated that she would pay Ms. Rosas next year. Ms. Rosas, described as patient and generous, agreed to the extensions. The parties did not exchange fresh consideration. Seven years later, Ms. Rosas sued Ms. Toca for the loan. Ms. Toca successfully argued at trial that Ms. Rosas should have sued any time after the first anniversary of the loan. She argued that since they did not exchange fresh consideration for the extensions, Ms. Rosas was statute barred to advance her claim.

Bauman C.J.B.C., for the Court, foreshadowed what was coming on the first page of the decision:

> The time has come to reform the doctrine of consideration as it applies in this context, and modify the pre-existing duty rule, as so many commentators and several courts have suggested. When parties to a contract agree to vary its terms, the variation should be enforceable without fresh consideration, absent duress, unconscionability, or other public policy concerns, which would render an otherwise valid term unenforceable.[30]

Bauman C.J.B.C. wrote a thorough, extensive decision. He canvassed the legal landscape across Canada and commonwealth jurisdictions to observe that, "reforms to the doctrine of consideration appear to focus on the seriousness of the parties' intentions and the legitimate expectations of business parties."[31]

Citing with approval Professor Waddams, he wrote: "there is a strong case for assuming *prima facie* enforceability of such promises and for concentrating attention on what Professor Reiter called the only substantive issue, namely unconscionability."[32] He also cited Ms. Swan's commentary on *Williams*: "If the result of this development were that, as has been suggested, all modifying arrangements or undertakings made in the context of a commercial relation were to be enforced (absent some real reason not to) that would be a significant improvement over the existing situation."[33] Bauman C.J.B.C. also referred to Professor Reiter for the proposition that the pre-existing duty rule should be abolished.[34]

The Court ruled that the annual, gratuitous extensions were binding. No evidence of duress was tendered. The Court determined that Ms. Toca was liable for the loan.

Interestingly, the BCCA put the doctrine of fresh consideration in play – counsel did not advance the arguments. In light of this, it did not award costs for the appeal.[35]

ONTARIO HAS OPENED THE DOOR TO REFORMING THE DOCTRINE

The ONCA has expressed an openness to reform the doctrine but has not yet adopted *NAV Canada* or *Rosas*. In 2016, in one of its latest reported decisions to deal with a contractual variation, *Richcraft Homes Ltd v Urbandale Corp.*,[36] the Court held that the variation clarified an unclear term in the contract, constituting valid consideration.[37]

Two property development companies, Richcraft and Urbandale, entered into an agreement governing sales of lots to build homes. Under the original agreement, Richcraft had the right to purchase residential lots from the development. The agreement did not specify how many lots Richcraft could purchase. The parties entered into a subsequent agreement that clarified how the lots would be shared. A dispute arose.

Urbandale argued that the new agreement was unenforceable because the parties did not exchange fresh consideration. Richcraft countered that the rule in *Gilbert* should be abandoned following developments in *Williams* and *NAV Canada*. Citing a New Zealand case, Richcraft argued, "*Williams* has been taken to mean that where variations to a contract have been agreed to, so long as there is no extortion

or duress, '...the court will be willing to enforce the new promise even if that involves a rather artificial 'manufacturing' of consideration.'"[38]

Lauwers J.A., for the Court, observed that "the developing case law outside Ontario suggests that the time might be ripe for this court to reconsider the role that consideration plays in the enforceability of contractual variations"[39] but it distinguished *Gilbert*. The Court held that the new agreement clarified a term, creating certainty and a mutual benefit, which constituted "a functional form of consideration".[40] It did not overturn *Gilbert*.

Consistent with the hunt and peck approach, within a year, the Ontario Superior Court cited *Gilbert* and noted that "past consideration is not good consideration".[41] Charney J., however, acknowledged *Richcraft* and observed that the holding in *Gilbert* "has been the subject of some controversy and commentary in the ensuing years."[42]

THE OTHER ATLANTIC CANADIAN PROVINCES APPLY THE DOCTRINE OF FRESH CONSIDERATION INCONSISTENTLY

The Prince Edward Island Court of Appeal last addressed the issue of fresh consideration in 2012.[43] The dispute was over collecting on a debt. The Court cited with approval a passage from G.H.L. Fridman's textbook that "past consideration is no consideration" and that some form of different consideration, like the giving of security, would be necessary to make a variation binding.[44]

In 2009, the Nova Scotia Court of Appeal determined that an extension of time to commence construction of a building was sufficient fresh consideration to vary an agreement.[45] In 2019, in a case involving contract formation (not a variation), the Supreme Court of Nova Scotia ruled that a mutual benefit of one party transferring a derelict building and the land to another party at no cost amounted to sufficient consideration.[46]

In 2010, the Newfoundland and Labrador Court of Appeal determined that the absence of consideration was a factor to find a variation to a contract unenforceable based on economic duress.[47] In 2014, it similarly found that the lack of consideration and an agreement under protest resulted in the variation being unenforceable.[48]

None of the Atlantic Canadian courts have cited *Rosas*.

THE PRAIRIE PROVINCES ALSO APPLY THE DOCTRINE OF FRESH CONSIDERATION INCONSISTENTLY

In 2011, the Court of Queen's Bench of Manitoba (the "**MBQB**") ruled that a variation to a contract that only benefited one party was unenforceable for lack of consideration.[49] In 2020, the MBQB ruled that the re-offering of the same service when the original agreement expired amounted to sufficient consideration.[50]

In 2008, the Saskatchewan Provincial Court ruled that the defendant's promise to fix a mistake at no cost was fresh consideration. The Court found that the plaintiff had provided consideration by offering a forbearance if the defendant fixed the problem.[51] In 2017, the Court of Queen's Bench for Saskatchewan held that a promise to pay a debt later amounted to an unenforceable gratuitous promise.[52]

The reported decisions from the courts of Manitoba and Saskatchewan have not cited *Rosas*.

A few months after the decision in *Rosas* was released, the Court of Queen's Bench of Alberta cited the decision with approval.[53] This is the first and only instance an Alberta court cited *Rosas* with approval. Topolniski J. did not cite *NAV Canada*.

THE TAX COURT OF CANADA ADOPTS ROSAS

In 2018, the Tax Court of Canada (General Procedure) applied the decision in *Rosas* and found that fresh consideration was not necessary for a contractual variation to be binding.[54] In *De Vries,* the taxpayer claimed that the unpaid taxes, in part, related to whether a debt had been forgiven. The CRA claimed that the debt could not be forgiven because the taxpayer did not produce evidence of consideration.

On appeal, the Tax Court held that *Rosas* "should be applied in the case before me."[55] Paris J. determined that the parties' intentions were clear; they intended the debt relief to be binding and there was no evidence of economic duress.

FRESH CONSIDERATION REQUIRED IN CANADIAN EMPLOYMENT LAW

With employment contracts, Canadian courts are more stringent in requiring fresh consideration for a variation to be enforceable, especially if the adjustment is less favourable to the employee.

In early 2020, the BCCA ruled that a second employment agreement was unenforceable without fresh consideration.[56] Saunders J., for the Court, acknowledging *Rosas,* noted the "nuanced world of employer and employee contractual relationships."[57] She determined because the new agreement contemplated fresh consideration, but none was provided, it was unenforceable.

In Ontario, the ONCA has recognized that an imbalance in power exists between employers and employees, making fresh consideration in employment law especially important.[58] In 2015, the ONCA found a subsequent agreement, which was less favourable to the employee, unenforceable out of "simple fairness".[59] Strathy J. observed that "it is well-settled that a promise to perform an existing contract is not consideration. Fresh consideration was required."[60] However, in 2000, citing *Williams,* Mandel J. held that where an employee signs a contract that includes mutual benefits for the employer and employee, then "new or additional consideration" has been exchanged to make it enforceable.[61]

IN SUM: UNCERTAINTY PREVAILS

In Canada, the default common law position remains that fresh consideration is relevant. Despite this, the exceptions to this rule,[62] and the unevenness with which those exceptions have been applied, result in immense unpredictability in judgments.

In the employment law context, courts are concerned with the outcome – *i.e.*, whether the agreement is less favourable to the employee. The employer will almost certainly lose unless it provides obvious consideration that proves the employee accepted the variation. Employers need to be wary of duress based on the power imbalance.

Outside of the employment law context, in the United Kingdom and Nova Scotia, courts have looked for proof of at least some benefit to enforce the variation. In British Columbia, New Brunswick, Alberta, and the Tax Court, courts have approached some cases assuming a *prima facie* strong case of enforcing such variations, except for economic duress or unconscionability. Courts in Ontario, Newfoundland and Labrador, Prince Edward Island, Manitoba, and Saskatchewan seem to still look for fresh consideration and have not explicitly overruled *Gilbert* or the holding in *Myrick*.

In sum, the hunt and peck approach to fresh consideration is alive and well. Each court has its unique approach. Many times, it appears a judge will go to great lengths to find a variation binding (or not) for the sympathetic party, irrespective of consideration.

A SUGGESTION: ARGUE THAT FRESH CONSIDERATION HAS GONE STALE

To avoid these unpredictable outcomes, the onus is on Canadian counsel to argue that the doctrine of fresh consideration is stale. If given the opportunity, more Canadian courts might finally rid themselves of the hunt and peck approach and presume that a variation is binding, subject to duress or unconscionability. Indeed, the BCCA, on its own accord, took the initiative to dispel the fresh consideration doctrine. It should not be the Court's onus alone.

Therefore, if your aglet factory shuts down and costs are going through the roof, you have three options to improve your chances that a court will enforce the adjusted price: (i) exchange fresh consideration or show how the new agreement is mutually beneficial; (ii) operate your factory in British Columbia, which has effectively abandoned the doctrine of fresh consideration outside of the employment law context;

and/or (iii) retain persuasive counsel to convince your local judge that fresh consideration is stale and that the court should presume that the adjusted price is binding.

If you lose at first instance, request the Chief Justice of your appeal court to convene a five judge panel to determine the doctrine's faith for once and for all.

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1 Aglets are the metal or plastic tube fixed tightly around each end of a shoelace.

2 Angela Swan and Jakub Adamski, *Canadian Contract Law*, 3rd ed (Toronto: LexisNexis, 2012) at §2.24 to §2.28.

3 *E.g.,* Bauman C.J.B.C. cites to comments of Angela Swan and Karl Llewellyn about going-transaction adjustments in *Rosas v Toca*, 2018 BCCA 191 at para 118: "A third and hugely important class [of problems with the doctrine of consideration] is that of either additional or modifying business promises made after an original deal has been agreed upon. Law and logic go astray whenever such dealings are regarded as truly comparable to new agreements. They are not. No business man regards them so. They are going-transaction adjustments, as different from agreement-formation as are corporate organization and corporate management; and the line of legal dealing with them which runs over waiver and estoppel is based on sound intuition."

4 *NAV Canada v Greater Fredericton Airport Authority Inc*, 2008 NBCA 28, at para 29. Robertson J.A. cites to Professor Waddams' textbook and observed that: "We should not be seduced into adhering to a hunt and peck theory in an effort to find consideration where none exists, nor should we manipulate the consideration doctrine in such a way that it is no longer recognizable."

5 (1976) 12 OR (2d) 19 (CA) ("*Gilbert*").

6 *Ibid* at para 14.

7 *Owen Sound Public Library Board v Mial Development Ltd.,* (1979) 26 OR (2d) 459, 102 DLR (3d) 685, 1979 CarswellOnt 643 (CA). See the annotation by John Swan at 1979 CarswellOnt 643 that discusses *Gilbert*.

8 *E.g. NAV Canada v Greater Fredericton Airport Authority Inc.*, 2008 NBCA 28 at para 20.

9 *E.g.*, *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130; [1956] 1 All ER 256. See also the Australian decision, *Waltons Stores (Interstate) Ltd. v Maher* [1988] HCA 7.

10 *E.g. Insurance Act*, RSO 1990, c I.8, s 244 (emphasis added).

11 The terms of transaction can also be recorded in a "deed", a document "under seal", which obviates the need for consideration.

12 *Spruce Grove (Town) v Yellowhead Regional Library*, 1982 ABCA 369 at para 7.

13 S.M. Waddams, *The Law of Contracts*, 7th ed (Toronto: Thomson Reuters, 2017) at ¶135.

14 *Ibid* at ¶132.

15 [1809] EWHC KB J58; (1809) 170 ER 1168 ("*Myrick*").

16 See Purchas L.J.'s decision in *Williams v Roffey Brothers & Nicholls (Contractors) Ltd.* (discussed below).

17 *Ibid*. Also, *e.g.,* G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed (Toronto: Carswell, 2011) at 98-100.

18 *Williams v Roffey Brothers & Nicholls (Contractors) Ltd* [1989] EWCA Civ 5.

19 *Ibid*.

20 2008 NBCA 28 ("*NAV Canada"*). See also, *Rosas v Toca*, 2018 BCCA 191 at para 104.

21 *Ibid* at para 31.

22 *Ibid* at para 33.

23 *Ibid* at para 53 (emphasis in original).

24 *Ibid*.

25 *Ibid*.

26 2009 NBCA 60.

27 *E.g. Rosas v Toca*, 2018 BCCA 191 at para 112.

28 *Rosas v Toca*, 2018 BCCA 191 ("***Rosas***").

29 Thomas A. Posyniak, "The Welcome Demise of The Fresh Consideration Rule in British Columbia" (2019) 77:2 The Advocate (Vancouver) at 183-190.

30 *Rosas v Toca*, 2018 BCCA 191 at para 4.

31 *Ibid.* at para 165.

32 *Ibid.*, at paras 134 and 176.

33 *Rosas v Toca*, 2018 BCCA 191 at para 138.

34 *Ibid* at paras 135 and 176.

35 *Rosas v Toca,* 2018 BCCA 306 at para 2.

[36] 2016 ONCA 622.

[37] *Ibid* at para 47.

[38] *Antons Trawling v Smith*, [2003] 2 NZLR 23 at para. 90, cited at paragraph 71 of Richcraft's factum.

[39] *Ibid* at para 43.

[40] *Ibid* at para 47.

[41] *King Road Paving and Landscaping Inc v Plati*, 2017 ONSC 557 at para 65.

[42] *Ibid* at para 66.

[43] *Lewis v Central Credit Union Limited*, 2012 PECA 9.

[44] *Ibid* at para 22.

[45] *Gillis v New Glasgow (Town)*, 2009 NSCA 66 at para 12.

[46] *Corbin v Murchy,* 2019 NSSC 12 at paras 46 and 53.

[47] *Burin Peninsula Community Business Development Corporation v Grandy*, 2010 NLCA 69 at paras 37-38.

[48] *Hickey's Building Supplies Ltd v Sheppard*, 2014 NLCA 43 at paras 35-37. One of the latest decisions of Newfoundland and Labrador's first instance court dealing with fresh consideration focused on the mutual benefit of the parties relating to a variation to find it enforceable (*Michael Rossy Ltée v RioCan Holdings Inc*, 2017 CanLII 83638 (NLSC) at para 61).

[49] *Wilson v Hodson,* 2011 MBQB 187 at para 26. In 2012, the Manitoba Court of Appeal cited *NAV Canada* but did not endorse the findings as it determined it did not apply to the facts of the case *Heymanns' Construction (1998) Ltd v Sunrise School Division,* 2012 MBCA 45 at para 36.

[50] *Caisse Populaire Group Financier Ltée v 390 Assiniboine Ave Inc*, 2020 MBQB 31 at paras 64-66.

[51] *Newman v Heron Drilling (1987) Ltd.,* 2008 SKPC 122 at para 18.

[52] *Katsiris v Katsiris,* 2017 SKQB 292 at paras 22-25. This case has similarities to *Rosas* but the SKQB came to the opposite result. It concluded that the gratuitous promise to pay later was unenforceable for lack of consideration.

[53] *Servus Credit Union v Sulyok*, 2018 ABQB 860 at paras 83-84.

[54] *De Vries v The Queen,* 2018 TCC 166.

[55] *Ibid* at para 62.

[56] *Quach v Mitrux Services Ltd.,* 2020 BCCA 25 at para 13.

[57] *Ibid*.

[58] *Braiden v La-Z-Boy Canada Ltd, 2008 ONCA 464* at paras 49-50. See also *Holland v Hostopia.Com Inc.*, 2015 ONCA 762, at paras. 51-55.

[59] *Ibid* at paras 53-55.

[60] *Ibid* at para 52.

[61] *Chahal v Khalsa Community School*, 2000 CanLII 22602 at paras 76-78.

[62] *E.g.,* promissory estoppel or third party beneficiaries in insurance law.