

RETAIL CLOSURE LAY-OFFS: FRUSTRATING BUT NOT FRUSTRATION OF CONTRACT

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In *Aldergrove Duty Free Shop Ltd. v. MacCallum*,^[1] the British Columbia Court of Appeal reinforced that frustration of contract requires extraordinary circumstances. Even the closure of the Canada-US border to non-essential travellers during the COVID-19 pandemic did not frustrate the employment contract of an employee working at a duty-free shop with a customer-base of cross-border travellers.

Background

The Court of Appeal's decision upholds a trial court finding that an employee of the Aldergrove Duty Free Shop (the "Company") was wrongfully dismissed after being laid off and not paid severance. In March of 2020, the border between Canada and the United States was closed to all non-essential travellers due to the COVID-19 pandemic. As the Company relied mainly on border travel for business, the shop was shuttered. The plaintiff employee, who was 78 years old at the time and had worked as a retail salesclerk for the shop since 2010, was laid off and not paid severance.

Frustration as a Defence to the Wrongful Dismissal Claim

The employee sought damages for wrongful dismissal. In response, the Company argued that the employment contract had been frustrated as a result of the border closure, doing away with the Company's obligation to provide the employee with reasonable notice of termination or payment in lieu of notice. The summary trial judge found that the defence of frustration was not available, and that the employee had been wrongfully dismissed. The employee was awarded the equivalent of 10 months' salary.

Court of Appeal Decision

At the Court of Appeal, the Company appealed the finding that the defence of frustration was not available in the circumstances.

A party asserting frustration must establish each of the following elements:

- a qualifying supervening event that was not contemplated by the parties when they entered the

contract;

- the supervening event is not the fault of either party; and
- the supervening event renders the performance of the contract something radically different from what the parties had undertaken to do.

The key issue before the Court of Appeal was the last element – whether the closure of the Canada-United States border due to the COVID-19 pandemic rendered the performance of the employment contract radically different from what the parties had agreed to under the contract.

The conclusion of the summary trial judge that the legal test for frustration was not met was upheld on appeal. The Company's main obligation under the employment contract was to provide an hourly wage in exchange for the employee performing retail sales and janitorial work as required at the duty-free shop. While the border closure negatively impacted the Company's ability to hold up its end of the bargain, it did not impact the nature of the obligations between the parties under the contract. The Court of Appeal observed that retail stores undoubtedly see ebbs and flows in traffic and sales. Prior to the pandemic, the employee would have been expected to perform her duties no matter how busy the duty-free shop was. Furthermore, essential travellers were still permitted to cross during the border closure. Thus, the closure of the duty-free shop because of reduced business due to the pandemic was found not to radically alter the nature of the obligations under the employment contract.

Key Takeaways

This case highlights that frustration of contract is a very high bar to meet – one not met by even a border-side duty-free shop confronted with a global pandemic and international border closure. Although one might expect that such unprecedented circumstances would be sufficient to invoke the defence of frustration, the Court of Appeal emphasized that the stringent threshold for frustration of contract is particularly applicable to employment contracts. Employees will not be deprived of their entitlements through circumstances entirely outside of their control.

In denying the appeal, the Court of Appeal was unpersuaded that the pandemic and border closure was enough to radically change the obligations of the employee from what the parties contemplated when the employee was hired. Instead, the Court of Appeal reasoned that there could be a slippery slope in the retail context, suggesting that allowing the defence of frustration to succeed in a pandemic might allow retailers to argue frustration each time a store experiences a reduction in sales or customers, resulting in employees with little to nothing to do at no fault of their own.

Any employer seeking to rely on frustration of contract to justify a lay-off without notice or severance should proceed cautiously in light of the Court of Appeal's determination that a global pandemic and international

border closure were still insufficient to shift risk from the employer to the employee.

[1] *Aldergrove Duty Free Shop Ltd., v. MacCallum*, [2024 BCCA 28](#).

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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