FRUSTRATION OF CONTRACT IN THE ERA OF COVID-19

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1. Introduction

Contract law has long served an integral role in facilitating economic activity. In particular, the law has long recognized the foundational nature of commercial obligations and the largely unqualified policy basis for holding parties strictly to their bargained-for positions. A significant exception to the "absolute" nature of contractual obligations arises from the doctrine of frustration of contract. The doctrine recognizes a supervening event beyond the contemplation of parties to an agreement and results in the discharge of outstanding contractual obligations, subject to the applicability of frustrated contracts legislation. Recently, the doctrine of frustration has seen a renewed significance upon the outbreak of COVID-19. This paper offers an overview of the state of the doctrine of frustration in Canadian common law jurisdictions, the doctrine's relationship with *force majeure* clauses, and the legal effect of frustration under the common law as modified by frustrated contracts legislation in effect in most Canadian jurisdictions. This paper also offers some observations with respect to the manner in which the doctrine may be applied to future cases arising from the circumstances of COVID-19.

2. An Overview of the Doctrine of Frustration

While the law of frustration is now generally consistent across Canadian common law jurisdictions, the doctrine has been subject to

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considerable disagreement over the course of its development within the English and Canadian jurisprudence. Frustration has been approached in a number of ways throughout its evolution, principally in accordance with what are commonly known as the "total failure of consideration", "implied term" and "radical change" approaches.

The total failure of consideration approach essentially requires a supervening event to interrupt an agreement to such an extent that one party does not receive any part of their bargain. In contrast, the implied term and radical change approaches require the happening of supervening events beyond the contemplation of the parties. The implied term approach views such supervening events as triggering an implied term for the discharge of the contract on the happening of the unexpected event. In contrast, the radical change approach permits the discharge of an agreement only where a supervening event results in the performance of obligations being "radically different" from that originally bargained for by the parties.[1]

The total failure of consideration approach has largely fallen out of favour beyond its adoption in the seminal English case of *Krell v. Henry* (*Krell*).[2] Dubbed the most consequential of the "coronation cases", *Krell* involved the hiring of a room from which to view the procession of the coronation of Edward VII. Upon the cancellation of the procession on the grounds of the King's illness, Krell brought a claim for the payment of monies under the contract. The English Court of Appeal found that the defendant had specifically hired "rooms to view the procession" and, in this way, construed the contract to fundamentally respect the viewing of the procession, rather than treating the procession as an ancillary aspect of the agreement. The court concluded that the doctrine of frustration applied on the basis that the cancellation of the procession created a total failure of consideration.

The total failure of consideration approach appears to have originated in the earlier case of *Taylor v. Caldwell*,[3] where frustration of contract was considered to have occurred at the instance that the music hall for hire had "perished" in a fire. Nevertheless, in light of the court's construction of the contract in *Krell*, both the implied term and radical change approaches would have served as adequate bases for frustration. In contrast, the English Court of Appeal in *Albert D. Gaon & Co. v. Societe Interprofessionale des Oleagineux Fluides Alimentaires*[4] relied upon the radical change approach. In

1. GHL Fridman, *The Law of Contract in Canada*, 5th ed. (Toronto: Carswell).
2. [1903] 2 K.B. 740 (C.A.).
3. (1863), 3 B. & S. 826, 122 E.R. 309, 2 New Rep. 198 (Eng. Q.B.).

that case, the court held that the closure of the delivery route through the Suez Canal and the consequent extra time and expense required for delivery of goods had not rendered performance under the contract to be so radically different from that contemplated by the agreement to amount to frustration. The UK House of Lords came to a similar conclusion in the latter Suez Canal case, *Tsakiroglou & Co. v. Noblee & Thorl GmbH*.[5] In this way the court seems to conceive of a very narrow scope for the doctrine, according with the ancient rule that parties to an agreement are to be held strictly to their bargains unless expressly provided for within the contract.[6]

The high-water mark of judicial disagreement with respect to the proper approach to the doctrine of frustration appears to be found in the decision of the UK House of Lords in *National Carriers Ltd v. Panalpina (Northern) Ltd.* (*Panalpina*).[7] The case involved a lease agreement for the demise of a warehouse for commercial purposes. Upon the closure of the street serving as the only access point to the property as a consequence of a nearby planned demolition, the plaintiff brought a claim for unpaid rent. Although the court was largely in agreement that the proper approach to frustration is the radical change approach, Lord Wilberforce appeared to regard the doctrine of frustration as entirely equitable in nature and thus incapable of constraint into a rigid legal framework. The appropriate formulation, in his opinion, is that which accords with the dictates of justice. In the case at bar, he preferred the implied term approach, noting with respect to the total set of potential approaches that it was "not necessary to attempt selection of any one of these as the true basis", that "they shade into one another" and that "a choice between them is a choice of what is most appropriate to the particular contract under consideration".[8]

Significantly, Lord Wilberforce seems to allocate a narrow construction to *force majeure* clauses, holding that the doctrine of frustration is capable of supplanting the express terms of agreements. Additionally, although the contract in *Panalpina* included a *force majeure* provision, the decisions of Lords Hailsham, Simon, Russell and Roskill do not consider the

4. [1959] 2 Lloyd's Rep. 30 (EWCA).
5. (1961), [1962] A.C. 93, [1961] 2 All E.R. 179, [1961] 2 W.L.R. 633 (U.K. H.L.).
6. See *Paradine v. Jane* (1647), 82 E.R. 897, Aleyn 26, [1647] EWHC KB J5, where the court expressed the view that contracts are "absolute" in the sense that impossibility is never an excuse unless expressly provided for in the contract.
7. (1980), [1981] A.C. 675, [1981] 1 All E.R. 161 (U.K. H.L.) (*Panalpina*).
8. *Ibid.* at 8.

presence of such language as a bar to frustration. In other words, there seems to exist a consensus among the quorum that the doctrine of frustration can apply to a contract even in the presence of an express provision which specifies the contractual outcome upon the happening of a supervening event. Furthermore, the court in *Panalpina* was reluctant to apply the doctrine of frustration to a supervening event which caused only a brief and temporary interruption. The circumstances of that case involved a street closure lasting for a duration of two years of the ten years provided in the lease agreement. Such an interruption was held not to result in frustration of contract based on either the implied term or radical change approaches to the doctrine.

In contrast, the Canadian jurisprudence is largely in agreement that the radical change approach is the proper approach to the doctrine of frustration. While the 1922 decision of the Supreme Court of Canada in *Canadian Government Merchant Marine v. Canadian Trading Co*.[9] seems to adopt the implied term approach, this was supplanted almost 80 years later by the decision of the court in *Naylor Group Inc v. Ellis-Don Construction Ltd.*,[10] which adopted the radical change approach to frustration. The latter case involved a claim for breach of contract stemming from the award of a construction contract to a subcontractor in breach of the bidding agreement. The appellant argued that the supervening event was a decision of the Ontario Labour Relations Board (OLRB) precluding it from considering the bids of subcontractors not affiliated with a certain union. Mr. Justice Binnie, writing for the court, held that supervening events will not result in frustration unless they were unforeseeable and beyond the control of the parties. In particular, what the doctrine requires is a supervening event that alters the nature of the party's obligation to contract to such an extent that to compel performance despite the changed circumstances would be to order the party to do something radically different from what they had agreed to under the contract. In the case at bar, the court considered the decision of the OLRB to be a retroactive affirmation of the pre-existing collective bargaining agreement, rather than a novel statement of the obligations of the parties. The decision of the OLRB was not considered to create any new obligations, and so there was no radical change and no basis to apply the doctrine of frustration.

Similarly, the Ontario Court of Appeal in *Capital Quality Homes Ltd. v. Colwyn Construction Ltd.* considered the radical change

9. (1922), 64 S.C.R. 106, 68 D.L.R. 544, [1922] 3 W.W.R. 197 (S.C.C.).
10. 2001 SCC 58, [2001] 2 S.C.R. 943, 204 D.L.R. (4th) 513 (S.C.C.).

theory as the proper approach to the doctrine of frustration. In reviving the doctrine of frustration within the realm of real property transactions, the court rejected the implied term approach, instead characterising the supervening event as an instance of "frustration of the common venture" encroaching upon the fundamental identity of the bargain.[11] Similarly, in the more recent case of *Perkins v. Sheikhtavi*, the Ontario Court of Appeal held that the Ontario government's announcement of a new tax on non-resident home buyers did not "frustrate" a contract for the purchase and sale of real estate between the buyer and a seller. The court, applying the radical change approach, held that the event did not alter the nature of the parties' obligations to such an extent that "to compel performance despite the new and changed circumstances would be to order the appellant to do something radically different from what the parties agreed to under their contract".[12] In reaching this conclusion, the court relied largely on the fact that the buyer, who was seeking to rely on the doctrine of frustration, had deliberately chosen to make an unconditional offer in order to make it more attractive to the seller in a competitive bidding situation. Because the offer was not subject to any conditions, the new tax did not compel the parties to do something different than agreed, even if the tax hindered the buyer's ability to sell her existing property in order to facilitate the new purchase.

The Alberta Court of Appeal has taken a similar approach to the doctrine of frustration. For example, in *Fishman v. Wilderness Ridge at Stewart Creek Inc.*[13] the parties entered into a pre-sale contract for the purchase of a condominium which was anticipated to be completed in three years. However, approximately two years later, the construction project was destroyed by fire. The builder advised that it would rebuild the property, but that it would not be completed until a year later than originally contracted. The buyer took issue with the delay and claimed that the fire had frustrated the contract. The court held that the doctrine of frustration "involves an unforeseen change to the circumstances underlying the contract, through no fault of the parties, that renders the contract incapable of performance" and that "[t]he change of circumstances must be fundamental in nature, such that it goes to the root of the contract". Applying this standard, the court held that a one-year delay to a

11. *Capital Quality Homes Ltd. v. Colwyn Construction Ltd.* (1975), 61 D.L.R. (3d) 385, 9 O.R. (2d) 617, 1975 CarswellOnt 852 (Ont. C.A.) at 17.
12. *Perkins v. Sheikhtavi*, 2019 ONCA 925, 312 A.C.W.S. (3d) 661, 16 R.P.R. (6th) 42 (Ont. C.A.) at para. 15.
13. 2010 ABCA 345, 517 W.A.C. 10, 44 Alta. L.R. (5th) 370 (Alta. C.A.).

three-year construction contract did not go to the root of the contract, particularly since the property could be rebuilt.

The radical change approach was also applied by the British Columbia Court of Appeal in both *KBK No. 138 Ventures Ltd v. Canada Safeway Ltd.*[14] and *Rickards (Estate of) v. Diebold Election Systems Inc.*, the latter being one of the more recent statements on the law of frustration in British Columbia. In that case, the court viewed the radical change theory as requiring something akin to the deprivation of "a substantial part of the consideration for which [a party] had bargained".[15] In this way the court seems to have somewhat revived the "failure of consideration" perspective of frustration, albeit within the confines of the accepted radical change approach.

In general, the cases across Canada emphasize that frustration will not apply where the change in circumstances makes a party's performance more expensive or onerous but does not prevent the party from performing the agreement.[16] Nor will the fact that changed circumstances make the contract non-advantageous or uneconomic for a party, provided that the contract can still be performed in accordance with its terms.[17] In such cases, it cannot be said that compelling performance despite the changed circumstances would be to order the parties to do something radically different from what had been agreed. Parties to a contract are understood to accept that the bargains they strike may become more or less economically advantageous, and performance more or less onerous, depending on the many external local, national and global events which continually impact the interests of parties. The law is understandably reluctant to excuse parties from bargains that are no longer valuable in hindsight, and it is only upon the happening of "black swan" events that the doctrine of frustration is realistically available.

In the same vein, courts have drawn a distinction between changes which are temporary or transient as opposed to permanent.[18] Where a change is temporary, it may temporarily interrupt performance or make it less economically viable, but it will not give rise to frustration unless it renders a complete change to the nature of the obligations.

14. 2000 BCCA 295, 185 D.L.R. (4th) 650, 5 B.L.R. (3d) 167 (B.C. C.A.).
15. 2007 BCCA 246, 57 C.C.E.L. (3d) 1, 69 B.C.L.R. (4th) 75 (B.C. C.A.) at para. 39.
16. See e.g. *Delta Food Processors Ltd. v. East Pacific Enterprises Ltd.* (1979), 16 B.C.L.R. 13, [1979] 3 A.C.W.S. 329, 1979 CarswellBC 326 (B.C. S.C.).
17. *Supra*, footnote 1.
18. See e.g. *Folia v. Trelinski* (1997), 36 B.L.R. (2d) 108, 32 R.F.L. (4th) 209, 14 R.P.R. (3d) 5 (B.C. S.C.).

For instance, the court in *Panalpina* was reluctant to recognize the street closure in that case as a true supervening event in consideration of the fact that the closure had not entirely abrogated the party's remaining rights under the lease agreement, and was comparatively brief in relation to the entire term of the lease. In that case, it was decided that an interruption of one year in a contract conferring rights over a period of ten years was not sufficient to meet the radical change standard. The Alberta Court of Appeal reached a similar conclusion in *Fishman*, where a delay of one year in a three-year development did not strike sufficiently at the root of the contract to trigger application of the doctrine of frustration.

In addition, the doctrine of frustration will generally not apply where the party seeking to rely on it has brought about or contributed to the supervening event in the sense that the frustration is "self-induced".[19] This principle arises from the requirement that the supervening event be beyond the control of the parties as well as the ancient principle that a party cannot rely on their own blameworthy conduct to escape liability.[20] In some cases, frustration may be partially self-inflicted in that the unexpected event exacerbates some pre-existing frailty, such as undercapitalization, poor management or existing supply chain issues.[21] In such cases, parties are much less likely to obtain the protection of the doctrine of frustration.[22]

19. See e.g. *Maritime National Fish Ltd. v. Ocean Trawlers Ltd.*, [1935] 3 D.L.R. 12, [1935] 2 W.W.R. 606, [1935] A.C. 524 (Jud. Com. of Privy Coun.).
20. See e.g. *Ontario (Commissioner of Agricultural Loans) v. Irwin*, [1942] S.C.R. 196, [1942] 2 D.L.R. 81, 1942 CarswellOnt 109 (S.C.C.).
21. See e.g. *Atlantic Paper Stock Ltd. v. St. Anne-Nackawic Pulp & Paper Co.* (1975), [1976] 1 S.C.R. 580, 56 D.L.R. (3d) 409, [1975] S.C.J. No. 46 (S.C.C.) (*Atlantic Paper*), which involved a 10-year supply contract for the supply of waste paper utilized in the production of corrugation. Approximately one year into performance of the contract, the customer advised the supplier that it would no longer accept delivery of the waste paper. The court held that the primary cause of the customer's failure to perform its obligations was its lack of an effective marketing plan for its product. Although the case is a *force majeure* case rather than a frustration case, the same reasoning would presumably apply if there were no *force majeure* clause and the party had pled frustration instead.
22. This overview of the doctrine of frustration has been necessarily broad rather than focused on any specific practice area. For an excellent discussion of the doctrine of frustration in the realm of employment contracts, see Frank Cesario, Elisha Jamieson-Davies and Dianne Jozefacki, "Frustration of Contract in the Employment Law Context" (2016), Ann. Rev. Civil L. 379 at 395. As those authors observe, although originating in equity, the doctrine of frustration when applied to employment contracts involves a more rigorous public policy inquiry, preventing employers from taking advantage of changed circumstances to unfairly end employment relationships.

3. Frustration's Relationship With Force Majeure

As discussed above, the doctrine of frustration typically applies only where a supervening event arises such that compelling performance despite the changed circumstances would be to order the parties to do something radically different from what had been agreed. Because of this, the doctrine of frustration should not apply where the parties have put their mind to the possibility of the "black swan" and made express provision for its arrival in their contract. In such cases, it cannot be said that the event was unforeseen.

It is for this reason that the doctrine of frustration generally has no applicability in cases where the contract contains a *force majeure* or other clause which makes provision for the contractual outcome in the event of the occurrence of the supervening event.[23] In such cases, if the *force majeure* clause is triggered and thereby ends the contract it is not because the contract is frustrated but, rather, because the parties agreed to that outcome.[24]

The applicability and effect of any given *force majeure* clause depends on its language and the interpretation given to the language. Such clauses tend to be construed strictly and narrowly.[25] In some cases, the interpretation of a *force majeure* clause may impact the issue of whether the doctrine of frustration is available. For example, where a *force majeure* clause expressly makes provision for certain possibilities but excludes the one that did occur, this may provide a strong basis to conclude that the doctrine of frustration applies.

4. The Effect of Frustration at Common Law and Statute Law

The common law doctrine of frustration provides that upon the happening of a frustrating event the contract comes to an immediate end. The result is that neither party has any future obligations under the contract, although the contract is treated as having been valid and effective until the time of frustration. With respect to the situation after the moment of frustration, the common law essentially treats any losses as laying where they fall. While this

23. Considerable disagreement exists as to whether the doctrine of frustration may apply in the presence of *force majeure* clauses not triggered by an interrupting event. See *Panalpina* and the recent decision of *Hengyun International Investment Commerce Inc. v. 9368-7614 Québec inc.*, 2020 QCCS 2251, 321 A.C.W.S. (3d) 555, 19 R.P.R. (6th) 109 (C.S. Que.).
24. *Ottawa Electric Co. v. Ottawa (City)* (1903), 2 O.W.R. 596, [1903] O.J. No. 520, 1903 CarswellOnt 425 (Ont. C.A.); *Dover Corp. (Canada) Ltd. v. Maison Holdings Ltd.* (1976), [1977] 5 W.W.R. 190, 1976 CarswellAlta 150, [1976] A.J. No. 607 (Alta. C.A.).
25. *Supra*, footnote 18.

may achieve a just result in some cases, it will create unfair outcomes in others.

For example, a supply agreement which is frustrated by some unexpected event after the date of supply but prior to the due date for payment may result in the purchaser becoming relieved of its obligation to make payment, thereby conferring on them an unfair windfall. While some courts found ways to avoid such unfair outcomes, such as by finding a total failure of consideration and thereby unravelling the entire bargain,[26] or considering some contractual obligations to have been severed from the contract prior to the time of frustration,[27] these were often uneasy fits.[28] For example, the total failure of consideration approach was limited in that the failure had to be "total", meaning that the escape hatch was inaccessible where at least some consideration had passed.[29]

In response, legislatures attempted to equip courts with scalpels where the common law of frustration provided only blunt instruments. In the words of one Canadian appellate court judge, frustrated contracts legislation "allows a court to step in and to alleviate against some of the common law harshness with respect to frustration".[30]

There is now frustrated contracts legislation in all Canadian common law jurisdictions, with the exception of Nova Scotia.[31] The Canadian legislation follows one of two models. The first model is reflected in Ontario's *Frustrated Contracts Act* (the "Ontario Model"),[32] which also applies in most other provinces and

26. *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.* (1942), [1943] A.C. 32, [1942] 2 All E.R. 122, 111 L.J.K.B. 433 (U.K. H.L.).
27. *Appleby v. Myers* (1867), [1861-73] All E.R. Rep. 452, L.R. 2 C.P. 651 (Eng. Exch.) (*Appleby*).
28. *Ibid.*; *St. Catharines (City) v. Ontario (Hydro-Electric Power Commission)* (1927), [1928] 1 D.L.R. 598, 61 O.L.R. 465, [1927] O.J. No. 139 (Ont. H.C.), affirmed [1928] 3 D.L.R. 200, 62 O.L.R. 301, [1928] O.J. No. 39 (Ont. C.A.), affirmed (1929), [1930] 1 D.L.R. 409, 1929 CarswellOnt 102 (Jud. Com. of Privy Coun.).
29. *Supra*, footnote 21.
30. *Witwicki v. Midgley* (1979), 101 D.L.R. (3d) 430, [1979] 5 W.W.R. 242, 1979 CarswellMan 100 (Man. C.A.) at para. 10, affirming [1976] 6 W.W.R. 471, 1976 CarswellMan 63 (Man. Q.B.).
31. Note also that certain legislation has been enacted specifically in response to COVID-19, which may have an effect on the applicability of the doctrine of frustration in certain contexts. For example, in Alberta the *Commercial Tenancies Protection Act*, S.A. 2020, c. C-19.5 provides, at s. 3, that a landlord may not, among other things, terminate a tenancy agreement in relation to, among other things, "frustration of contract caused by the COVID-19 pandemic".
32. *Frustrated Contracts Act*, R.S.O. 1990, c. F.34; C.C.S.M. c. F190; R.S.N.B.

territories. The second model is reflected in British Columbia's *Frustrated Contract Act* (the "BC Model"),[33] which also applies in Saskatchewan.[34] While the two models are broadly similar, there are important differences between them. The following section canvasses both models and discusses their similarities and differences.

5. The Ontario Model

The Ontario Model does not purport to modify the common law as it pertains to determining whether a contract has been frustrated. Rather, s. 2 of the legislation provides that it applies to contracts that have "become impossible of performance or been otherwise frustrated and to the parties which for that reason have been discharged". The reference to the concept of a contract having become "impossible of performance" as distinct from having been "otherwise frustrated" gives rise to the prospect that the section could be interpreted to apply to contracts with *force majeure* clauses that are triggered upon the happening of supervening events that render performance impossible. However, s. 3(6) of the legislation provides that where the contract contains a provision in the nature of a *force majeure* clause courts shall give effect to that provision and apply the legislation "only to such extent, if any, as appears to the court to be consistent with the provision". As one lower court judge has observed, s. 3(6) "provides a defence to the application of the *Act*" which "is identical to the defence of 'no juristic reason' regarding a claim for restitution".[35] Accordingly, the extent to which the legislation applies to a contract containing a *force majeure* clause would appear dependent largely on the specific language of the contract and the extent to which it provides justification for the enrichment and deprivation wrought by the discharge of the parties by reason of the supervening event.

If the legislation applies, s. 3(7) permits the severance of those parts of the contract that were wholly performed or wholly performed except for payment at the time of the frustrating event.

2011, c. 164; R.S.N.L. 1990 c. F-26; R.S.N.W.T. 1988, c. F-12; R.S.N.W.T. (Nu.) 1988, c. F-12; R.S.O. 1990, c. F.34; R.S.A. 2000, c. F-27; R.S.P.E.I. 1988, c. F-16; S.S. 1994, c. F-22.2; R.S.Y. 2002, c. 96.

33. R.S.B.C. 1996, c. 166.

34. S.S. 1994, c. F-22.2.

35. *Aronovitch & Leipsic Ltd. v. Berney*, 2005 MBQB 180, [2006] 7 W.W.R. 720, 196 Man. R. (2d) 31 (Man. Q.B.) at para. 74, reversed 2006 MBCA 131, [2007] 1 W.W.R. 195, 383 W.A.C. 231 (Man. C.A.), leave to appeal refused (2007), 427 W.A.C. 221n, 228 Man. R. (2d) 221n, 370 N.R. 393n (S.C.C.).

Significantly, the legislation may also allow parties to recover sums paid, expenses incurred or benefits accrued prior to the supervening event. In particular, s. 3(1) provides that a party may recover sums paid to another party in pursuance of a contract before the parties were discharged. In addition, s. 3(2) provides that a party to whom sums were paid prior to discharge may retain the whole or any part of the sums paid on account of expenses it has incurred in connection with the performance of the contract if the court "considers it just to do so having regarding to all the circumstances", and provided that the amount awarded does not exceed the amount of the expenses incurred. Lastly, s. 3(3) provides that a party may recover "the whole or any part of the value of the benefit" that it conferred on the other party in connection with the performance of the contract if the court "considers it just to do so having regard to all the circumstances".

There remains uncertainty regarding the precise nature of the remedy afforded by the legislation, which is itself modelled on the former *Law Reform (Frustrated Contracts) Act 1943* (the "*UK Legislation*"). The UK legislation was enacted in response to the decision of the House of Lords one year earlier in *Fibrosa Societe Anonyme v. Fairbairn Lawson Combe Barbour Ltd* (*Fibrosa*),[36] which decision set out the principles governing when restitution could be awarded due to failure of consideration resulting from frustration of contract. However, since the enactment of the UK legislation there has been disagreement on the nature of the relief afforded under the statute. The court in the seminal case of *Government of Gibraltar v. Kenney*[37] construed the statute as providing for relief on a *quantum meruit* basis, being principally different from an award of restitution. In particular, Justice Sellers held that the UK legislation "operates to restore the parties to their original position so far as can be and to award what is in the nature of a bare statutory *quantum meruit*". In contrast, the House of Lords in the latter case of *BP Exploration Co. (Libya) v. Hunt (No. 2)* (*Hunt*)[38] took a different approach, holding that the UK Legislation provides a remedy "fundamentally different from a claim on quantum meruit", noting that "[w]here there is a quantum meruit for work done there is also a plea indebitatus in relation to the value of the work".

There is little Canadian jurisprudence on the subject of the nature of the statutory relief. Although the BC Model is unequivocal in its

36. [1942] UKHL 4 (UKHL).
37. [1956] 2 QB 410 (EWHC).
38. (1982), [1983] 2 A.C. 352, [1982] 1 All E.R. 925 (U.K. H.L.), affirmed [1982] 1 All E.R. 925 at 978 (U.K. H.L.), affirmed [1982] 1 All E.R. 925 at 986 (U.K. H.L.).

use of the language of restitution (as will be discussed further below), the UK jurisprudence indicates that the Ontario Model may instead dictate an award on the basis of *quantum meruit*. In this sense, Canadian legislatures seem to have responded to the ruling in *Fibrosa* in different ways.

While there is limited jurisprudence in respect of the Ontario Model, the Ontario Court of Appeal has offered guidance on the manner in which to apply s. 3. In particular, the court in *Can-Truck Transportation Ltd. v. Fenton's Auto Paint Shop Ltd.*[39] held, albeit in *obiter*, that the "ordinary task arising under s. 3(3)" is "first, to identify and evaluate the benefit bestowed on one part as a result of another's work, to be valued at the date of frustration; second, to assess what sum it considers just in the circumstances to award the party who has conferred the benefit". However, as the court went on to observe, "the court can still exercise its discretion under s. 3(2) and award the respondent an amount which does not exceed the expenses it incurred prior to the frustrating event; one which is fair and just in the circumstances", reflecting that "[t]he underlying rationale of this provision is to prevent undue hardship".

The equitable discretion conferred by the legislation to award sums considered to be just "in all the circumstances of the case" can make it difficult to predict the outcome of cases. With respect to the similar discretion provided to courts under the UK legislation, the court in *Hunt* held that "[t]he legislation did not provide that the value of the benefit should be paid to the plaintiffs but that a just sum should be paid to them, so this is not simply a case where the court must assess the value of the benefit". Rather, "[t]here is to be awarded such sum as the court considers just".

The case of *Witwicki v. Midgley* provides an example of the difficulty of predicting the outcome of this exercise of discretion. In that case, parents transferred the family property to their son on his undertaking to allow them to continue to live on it and to provide them with the necessities of life. The son survived his father, but predeceased his mother. There then arose litigation concerning whether the agreement had been frustrated and, if so, whether the legislation applied and justified reconveying the land to the mother. The majority of the Manitoba Court of Appeal held that the doctrine of frustration did not apply, with the result that the legislation was also inapplicable. However, the majority held that, even if the legislation was applicable, there was no justification to make an "equitable adjustment" in favour of the mother given that the son

39. (1993), 101 D.L.R. (4th) 562, 62 O.A.C. 376, 1993 CarswellOnt 724 (Ont. C.A.) at para. 11.

had provided for the father's needs during his lifetime and had substantially performed his obligations towards the mother. Monnin J.A. strongly dissented, holding that the agreement had been frustrated and that the legislation should apply to give equitable relief to the mother. Mr. Justice Monnin's decision appears to have been driven in large part by the unfortunate position of the mother, who had very limited means. The property in question was badly in need of necessary repairs, but the son's estate lacked the funds needed to make those repairs, leaving the mother in an untenable living situation.

6. The BC Model

Like the Ontario Model, the BC Model permits the severance of parts of a contract that were wholly performed or wholly performed except for payment at the time of the frustrating event, requiring that those severed aspects be treated as separate contracts that have not been frustrated. The BC Model also provides parties with the ability to claim restitution for any benefits they conferred on their counterparties prior to the time of frustration.

The legislation sets out a formula for calculating the value of benefits conferred, although it is limited to reasonable expenditures and excludes profit. In addition, where the frustrating event has created a loss in the value of a benefit conferred, the legislation requires that the parties equally bear that loss. The restitutionary relief afforded by the legislation is equitable in nature and likely requires of courts a somewhat similar inquiry to that under the Ontario Model.

The legislation has similar limitations to the Ontario Model. For instance, s. 1 of the legislation provides that it applies to contracts "from which the parties to it are discharged by reason of the application of the doctrine of frustration". Further, s. 2 of the legislation expressly provides that it only applies to contracts which "contain no provision for the consequences of frustration". The language of s. 2 is uncertain. In particular, it is not clear to what the legislation refers when it speaks to a provision "for the consequences of frustration". Viewed through a common law lens, the reference should not include a *force majeure* clause because in the presence of such a clause there can be no frustration. However, the alternative is that the section refers to a clause which specifies the outcome in cases where the contract has been frustrated. Such clauses are rare, and it would be an unusual contract that contains no *force majeure* clause but does contain a provision which dictates the consequences of

frustration. Nevertheless, in a recent decision the British Columbia Supreme Court stated in *obiter* that the legislation applies "[i]f frustration is established and the contract provides no guidance on what to do in the event of frustration", which suggests that s. 2 of the legislation contemplates the existence of a clause which specifically provides for the consequences of frustration.[40]

In addition, s. 6 of the legislation provides that a party that has partly performed a contractual obligation is not entitled to restitution if there is "(a) a course of dealing between the parties to the contract", "(b) a custom or a common understanding in the trade, business or profession of the party so performing", or "(c) an implied term of the contract" to the "effect that the party performing should bear the risk of the loss in value". The first two of these factors might be considered in determining whether a term should be implied into a contract,[41] which makes them an odd fit with the third factor which is arguably more in the nature of a legal conclusion to be reached based on the first two factors.

Moreover, there appears to be a fundamental inconsistency between s. 6 and the other aspects of the legislation. In particular, s. 6(c) provides that restitution is not available where there is an "implied term" that one party is to bear the loss caused by the supervening event. However, in cases where there is such an implied term, that term could arguably be characterized either as a *force majeure* clause or as a "provision for the consequences of frustration", which is the language used in s. 2. However, contracts that contain *force majeure* clauses cannot be frustrated, and, if the implied term constitutes a "provision for the consequences of frustration" within the meaning of s. 2, then the legislation does not apply by virtue of s. 2. Accordingly, if a contract has an implied term then the legislation may well not become engaged in the first place.[42]

It is also not clear why parties are precluded from claiming restitution under the BC Model where an exception in s. 6 applies. Given that the legislation appears intended to provide courts with the flexibility to do justice in all cases, it would arguably better support the object of the legislation to permit courts the latitude to determine, unrestricted by s. 6 of the legislation, whether restitution

40. *Pure v. BC-Alta*, 2019 BCSC 390, 90 C.L.R. (4th) 121, 304 A.C.W.S. (3d) 537 (B.C. S.C.) at paras. 81-84.
41. *Moulton Contracting Ltd. v. British Columbia*, 2015 BCCA 89, 381 D.L.R. (4th) 263, 37 B.L.R. (5th) 175 (B.C. C.A.) at para. 53, leave to appeal refused 2015 CarswellBC 3021, [2015] S.C.C.A. No. 163 (S.C.C.).
42. See e.g. *Carlson v. Sopow*, 2004 BCSC 956, 47 B.L.R. (3d) 29, 132 A.C.W.S. (3d) 1178 (B.C. S.C.) at paras. 36-39.

is appropriate. It is also not clear whether restitution in unjust enrichment is available where restitution under the legislation is not.[43] The legislation does not appear to preclude such a claim, so this avenue may remain open.

There is also uncertainty with respect to when performance of a contract will constitute a "benefit" sufficient to trigger restitution. Section 5(1) of the legislation provides that "every party to a contract to which this Act applies is entitled to restitution from the other party or parties to the contract for benefits created by his performance or part performance of the contract". The term "benefit" is broadly defined in s. 5(4) of the legislation to mean "something done in the fulfilment of contractual obligations, whether or not the person for whose benefit it was done received the benefit". In one case, *Cassidy v. Canada Publishing Corp.*, the British Columbia Supreme Court found that a plaintiff who had agreed to write some chapters of a proposed school textbook had provided a "benefit" to the defendant within the meaning of the legislation, notwithstanding that the contract had been frustrated by a change in the curriculum which rendered the plaintiff's work superfluous to the defendant.[44] Yet, in the subsequent case of *British Columbia v. Cressey Development Corp.*, the court found that no "benefit" within the meaning of the legislation was created by a purchaser who had expended time, effort and funds to obtain subdivision approval in respect of a property which was the subject of a frustrated contract of purchase and sale because that work had not benefited the seller.[45]

These different approaches to the concept of "benefit" under the legislation indicate a tension between the plain language of the legislation and the idea that no restitution should be available unless the benefit is a tangible one that survives the frustrating event and actually enriches the other party. This is a sensible approach, given that the underlying rationale of the legislation appears to be to

43. Prior to the enactment of the BC *Act*, the common law permitted recovery on the basis of a total failure of consideration, which is a quasi-contractual concept more grounded in restitutionary principles. See e.g. the decision of the House of Lords in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.* (1942), [1943] A.C. 32, [1942] 2 All E.R. 122, 111 L.J.K.B. 433 (U.K. H.L.), which held that in situations involving a total failure of consideration there could be recovery essentially on the basis of restitutionary principles.

44. *Cassidy v. Canada Publishing Corp.* (1989), 41 B.L.R. 223, 14 A.C.W.S. (3d) 11, 1989 CarswellBC 302 (B.C. S.C.) (*Cassidy*).

45. *British Columbia (Minister of Crown Lands) v. Cressey Development Corp.* (1992), 97 D.L.R. (4th) 380, 36 A.C.W.S. (3d) 355, 1992 CarswellBC 1133 (B.C. S.C.) at paras. 9-13.

prevent the unjust enrichment of one party at the expense of the other.[46]

The case law also demonstrates the difficulty of assessing the amount of "benefit" received by a party. In *Cassidy v. Canada Publishing Corp*., the British Columbia Supreme Court found that there was "no doubt that the defendant received a benefit from the work performed by the plaintiff", but that the benefit was "somewhat difficult to quantify" in the circumstances.[47] In the absence of evidence which would fix the value of the benefit, the court concluded that *quantum meruit* was the appropriate measure of damages.

7. COVID-19 as a Supervening Event

COVID-19 will undoubtedly generate litigation which prominently features the law of frustration. In this section, we offer some observations on the manner in which the legal framework may apply in COVID-19-related frustration cases.

Notwithstanding the magnitude and unprecedented nature of COVID-19, it is unlikely to provide parties with an automatic "free pass" in respect of their failure to meet their contractual obligations. The pandemic is not an automatic frustrating event, but it may have consequences which impact certain contractual relations in a way that results in frustration.[48] For example, a supply contract does not become frustrated merely by the happening of COVID-19; it becomes frustrated, for example, by the decision of a jurisdiction to close its borders in a way that makes it impossible for the supplying party to deliver its goods. Accordingly, the analysis should

46. To date, the BC Model has received very limited judicial attention. For the more notable of the reported decisions, see e.g. *Pure v. BC-Alta*, 2019 BCSC 390, 90 C.L.R. (4th) 121, 304 A.C.W.S. (3d) 537 (B.C. S.C.) at paras. 81-84; *Fort St. John Aircraft Maintenance Ltd. v. Canadian Indemnity Co*. (1983), 20 A.C.W.S. (2d) 312, 1983 CarswellBC 1366 (B.C. S.C.) at paras. 10-12; and *British Columbia (Minister of Crown Lands) v. Cressey Development Corp*. (1992), 97 D.L.R. (4th) 380, 36 A.C.W.S. (3d) 355, 1992 CarswellBC 1133 (B.C. S.C.) at paras. 9-13.
47. *Cassidy*, *supra*, footnote 44.
48. There is some support for this concept in the comments of Kerans J.A. of the Alberta Court of Appeal in *Atcor Ltd. v. Continental Energy Marketing Ltd*. (1996), 25 B.L.R. (2d) 1, [1996] 6 W.W.R. 274, 110 W.A.C. 372 (Alta. C.A.) where a distinction was drawn between the alleged supervening event and the "proximate cause" of the interruption of the supply arrangement, which was the supplier's decision to cut off supply to the buyer. Kearns J.A. emphasized that a *force majeure* clause is not just about the occurrence of an event, but about the effect of that event on the party seeking its protection. Arguably the same analysis ought to apply in frustration cases.

be focused on the specific impacts of the pandemic on the parties, the extent to which the impacts were unforeseen, and exactly how those impacts have brought a radical change to their contractual relations, if at all. Hardship and inconvenience will be insufficient, and, given the pandemic's wide impact, one might expect courts to be cautious in applying the doctrine, reserving it for only the most compelling cases. In addition, where an impact was itself not unforeseen (such as a change in market conditions which are commonplace in a cyclical economy), the mere fact that it was caused by an unforeseen event such as a pandemic should not make it sufficient to engage the doctrine of frustration.

This observation appears consistent with the early reported decisions. For example, in *FSC (Annex) Limited Partnership v. Adi 64 Prince Arthur L.P.*,[49] the Ontario Superior Court of Justice considered whether the applicant's obligation to purchase a condominium development project pursuant to a shotgun buy/sell clause had been frustrated by COVID-19 on the basis that the applicant's ability to borrow money had become more limited than prior to the pandemic. The court concluded that the obligation to purchase under the shotgun clause had not been frustrated because limitations on financial liquidity "are regular events that occur during each economic cycle" and "[i]f decreased liquidity was tantamount to frustration, it would mean that a large number of contracts for which parties required financing would be frustrated in every recession".[50] In addition, the court was careful to distinguish the unforeseeability of COVID-19 from the foreseeability of one of its potential results, namely increased restrictions on the availability of credit. As the court held, "[w]hile it may be that we have not experienced a pandemic of this proportion in our lifetimes, restrictions on the availability of credit are not uncommon" and "occur regularly as part of the ebb and flow of economic cycles".[51]

Similarly, in *New City | Safety Mortgage Fund Inc. v. Pacific Point Holdings Ltd.*,[52] the British Columbia Supreme Court, in the context of a foreclosure proceeding and an application for an order nisi, considered an argument by the mortgagors and guarantors that the mortgage contract had been frustrated by the outbreak of COVID-19 and emergency measures taken by the government to contain the outbreak.[53] In particular, it was argued that but for the outbreak of

49. 2020 ONSC 5055, 152 O.R. (3d) 568, 324 A.C.W.S. (3d) 437 (Ont. S.C.J. [Commercial List]) at paras. 9-13 (*FSC*).
50. *FSC*, *supra*, at para. 3.
51. *FSC*, *supra*, at paras. 25-28.
52. 2020 BCSC 1792, 2020 CarswellBC 2967 (B.C. S.C.).

COVID-19 the foreclosure proceeding would have been avoided because a refinancing would have been achievable. The court rejected this argument, noting that "[w]hile the outbreak of COVID-19 may have been an unforeseen event for which there was no provision in the security agreements, it did not fundamentally alter the nature of the parties' contractual obligations".[54]

In conducting the necessary analysis in cases that are a closer call, courts may face challenges distinguishing between the uncontrollable impacts of COVID-19 and the impacts of related or intermingled matters that were arguably within a party's control. Where a government decision clearly has the effect of suspending certain non-essential business activity (and thereby making performance illegal), the result on application of the doctrine of frustration should not be hard to predict.[55] However, where a party has voluntarily adopted policies or measures in accordance with public health directives intended to limit the spread of COVID-19, and it is those voluntary actions which impose a radical change on the contractual relationship, will the doctrine of frustration be

53. *Supra*, footnote 52 at para. 21.

54. *Supra* footnote 52 at para. 47. There have also been a number of recent decisions from British Columbia's Civil Resolution Tribunal almost all of which have dismissed claims of frustration in cases largely involving refusals on the part of service providers to refund deposits and other amounts paid in connection with events, such as weddings and vacation tours, which were cancelled or otherwise affected in response to COVID-19: see e.g. *Bal v. Infinite Entertainment Sound and Lighting Inc.*, 2020 BCCRT 865 (B.C. C.R.T.) at paras. 18-19; *Brahim Jounh (dba Gateway2Morocco) v. Rozenshteyn*, 2020 BCCRT 1175 (B.C. C.R.T.) at para. 18; *Reelie v. Chilliwack Golf and Country Club Holdings Ltd.*, 2020 BCCRT 1178 (B.C. C.R.T.) at para. 20; *Rudichuk v. Newlands Golf & Country Club Ltd.*, 2020 BCCRT 1350 (B.C. C.R.T.) at para. 25; *Hertzman v. West Coast Retail Enterprises Ltd.*, 2020 BCCRT 1250 (B.C. C.R.T.) at paras. 20-25; *McElheran v. MacPherson*, 2020 BCCRT 1182 (B.C. C.R.T.) at paras. 19-24; *Sequeira v. Riverside Banquet Hall Ltd.*, 2020 BCCRT 1346 (B.C. C.R.T.) at paras. 19-24; *Renke v. Noisy Acres Garden Estates*, 2020 BCCRT 1340 (B.C. C.R.T.) at para. 25; *Van Hoepen v. Chilliwack Golf and Country Club Holdings Ltd.*, 2020 BCCRT 1048 (B.C. C.R.T.) at paras. 18-23; and *Centra Lawyers LLP v. Kong*, 2020 BCCRT 1345 (B.C. C.R.T.) at para. 34. For a case where the doctrine of frustration was applied, see *Ward v. S.R.F. Holdings Ltd. dba Academy of Dance*, 2020 BCCRT 1446 (B.C. C.R.T.) at paras. 32-33 (agreement to register dancers in a dance competition became impossible when the organizers of the competition cancelled it due to COVID-19).

55. One interesting question is whether governments may obtain the benefit of the doctrine of frustration where it was in fact their decisions which resulted in the supervening event. Previous case law suggests that the doctrine will not be available in such circumstances: see e.g. *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, 177 D.L.R. (4th) 73, 15 Admin. L.R. (3d) 268 (S.C.C.).

unavailable because the true supervening event was not beyond its control? Or, where a party had pre-existing frailties that were exacerbated by the circumstances of COVID-19, but without which there would not have been any supervening event, will the doctrine be unavailable because the frustration was partially self-inflicted?[56] In the former, more sympathetic scenario, one might argue that the doctrine of frustration ought to evolve to protect parties that have taken prudent steps to protect the wellbeing of others. Nevertheless, courts are likely to consider the nature and practicality of the discretion exercised by parties in the first scenario and the particular influence of COVID-19 as well as the nature of the frailties in the second scenario. The solution in such cases may be to incorporate a rule excusing a party where they acted in good faith and in a commercially reasonable manner. By evolving the common law in such a manner, courts can also make available the remedial features of frustrated contracts legislation, thereby helping achieve a more just allocation of losses.

As noted in passing above, frustration of contract may arise as a consequence of legislative and public health measures taken by local and federal governments in response to the pandemic. Such frustration on account of supervening illegality exists more as a matter of public policy than it does as a construction of the contract. In this way, the performance of contractual obligations being interrupted by a supervening illegality will generally always be considered to satisfy the radical change standard for the doctrine, subject to particular exceptions existing generally in the realm of real property transactions.[57]

Furthermore, the availability of frustration to contracts interrupted by the circumstances of COVID-19 may depend on the length of the interruptions relative to the total terms of the contracts. For instance, the court in *Panalpina* was reluctant to recognize the street closure in that case as a true supervening event in consideration of the fact that the closure had not entirely abrogated the party's remaining rights under the lease agreement, and was comparatively brief in relation to the entire term of the lease. In that case, it was decided that an interruption of one year in a contract conferring rights over a period of ten years was not sufficient to meet the radical

56. See e.g. *FSC*, *supra*, footnote 49 at paras. 18-24. In this case, the court essentially concluded that the applicant's difficulty in obtaining financing was largely if not entirely self-inflicted and the result of "deliberate choices", namely the applicant's "relaxed" and limited efforts to obtain financing.

57. See e.g. *Victoria Wood Development Corp v. Ondrey* (1978), 22 O.R. (2d) 1, 92 D.L.R. (3d) 229, [1978] O.J. No. 3613 (Ont. C.A.).

change standard. However, it remains unclear how courts will draw distinctions between interruptions of different lengths in respect of COVID-19, and whether, and, if so where, such a fine line will be drawn in relation to the contemporary radical change approach. The decisions of the Alberta and British Columbia appellate courts in *Fishman* and *Rickards*, respectively, suggest that such an interruption will be required to be quite significant in order to bring about the discharge of a contract under the doctrine of frustration.[58]

Additionally, it may be that many COVID-19 frustration cases will involve extensive discovery processes in an effort to distinguish the uncontrollable impacts of COVID-19 from the impacts of related or intermingled matters that were within the party's control. For example, while a party may plead frustration on the basis that COVID-19 made it impossible for the party to source sufficient labour to meet its contractual obligations, discovery processes may uncover that the party's management chose to allocate the party's remaining available labour to the performance of other contracts, with the result that frustration was arguably self-inflicted. In more complex cases, expert evidence may be required for courts to make findings as to the manner in which the consequences of COVID-19 impacted the parties and their economic relations.

For contracts entered into after COVID-19 was declared a pandemic, parties are unlikely to obtain the benefit of the doctrine of frustration given that the circumstances were or should have been known to them such that they are not unforeseeable. In addition, given that COVID-19 represents only one of a number of pandemics that have arisen over past decades, it may become more difficult for parties to rely on the doctrine of frustration in the event of future pandemics, especially ones of a shorter duration. Rather, courts may for some time into the future treat pandemics as events that, while perhaps unlikely, should have been foreseeable by parties given their lived experience with COVID-19. As a result, parties should consider including well-drafted *force majeure* clauses in their contracts which specify the outcome in the event that a future pandemic impacts the contractual relationship. By doing so, parties may achieve greater contractual certainty and avoid a potentially frustrating experience.

58. One might also justify the differing treatment of long-term contracts on the basis that they are implicitly intended to survive the inevitable changes that will occur in the world and marketplace over the long term. Where a contract has a short term, there is a stronger argument that deviations from the status quo were unforeseen.