



Contract

Breaking Up is Hard to Do, but it's a Little Easier if You Make the Other Side Pay

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In Canada, it is difficult to get punitive damages for breach of contract. Awards are uncommon and the amount will usually be relatively small. A recent Ontario Court of Appeal case addressed when punitive damages may be awarded for a breach of contract (*Ottawa Community Housing Corporation v. Foustanelas (Argos Carpets)*, 2015 ONCA 276). This case involved a carpet company that overbilled the Ontario government for work done, and also installed lower quality carpet than specified in the agreement. The government was ultimately awarded over \$1.5 million in damages. The punitive damages component was \$250,000 because the court found that a fraudulent scheme was perpetrated against OCHC in carrying out the contract. Specifically, the trial judge found, “continued, intentional and deliberate defrauding of the government. Over 1000 invoices were falsified.” The government also received \$630,000 for its costs of the trial, which was a full indemnity basis. Finally, OCHC received its costs of the trial, on a full indemnity basis, in the amount of \$630,475.47.

The Appeal Court stated that punitive damages are limited to, “misconduct that represents a marked departure from ordinary standards of decent behavior.” Such awards are intended to punish the defendant, rather than compensate a plaintiff. The Appeal Court also approved of the trial judge’s reasoning on the distinction between compensatory and punitive damages. The objectives of punitive damages are punishment, deterrence and denunciation. The trial judge’s approach to assessing proportionality of the punitive damages was line with Supreme Court of Canada precedent [1]. An award of punitive damages must rationally relate to the amount fraudulently taken or the cost of the harm inflicted. It should not be overly punitive, but should not appear to be a mere license fee. General deterrence, as well as specific deterrence, are considered. Other factors also come into play, such as whether the defendant may be subject to civil fines (not applicable to this case).

The sole owner of the company was also found personally liable for the punitive damages. His company was merely the conduit through which the fraudulent activities were channeled.

Early detection of bad conduct by business partners, followed by contract termination, is critical to limit losses. In most cases, damages for losses will be the only resort. In cases of deliberate, egregious misconduct, keep in mind the potential for punitive damages to punish the business partner and deter others from such behaviour in future.

[1] *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 (CanLII), [2002] 1 S.C.R. 595; *Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), [1995] 2 S.C.R. 1130.