

Lost Profits Are Not Always Consequential Losses

Improving Standard Clauses for
Limitation of Liability

Today's Topics

- 1. Welcome and Introduction**
- 2. *Dow Chemical Canada v. Nova Chemicals***
- 3. Review of Precedent Clauses and Customizing Exclusions of Liability post-*Dow***
- 4. Expected Legal Trends**
- 5. Wrap-up and Q&A**

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Welcome and Introductory Remarks

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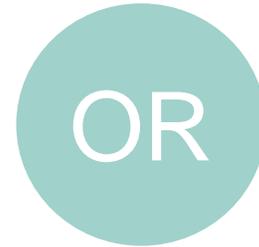
Ben Hudy (Stikeman Elliott – moderator)

Dow Chemical Canada v. Nova Chemicals

Lorne O'Reilly (Senior Counsel, Dow Canada)
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State of the Law prior to *Dow*

1. Does the clause exclude recovery for *all* loss of profit, loss of revenue, economic loss etc.?



2. Does the clause exclude recovery for *indirect* loss of profit, loss of revenue, economic loss etc.?

Prior to Dow

- Case law was mixed but trended towards the first category: excluding recovery for all loss of profit.
- Often, there was no analysis on direct versus indirect and any/all loss of profit was excluded.

CanLin Ltd. v Thiokol Fibres Canada Ltd., 1983 (ON):

Damages for loss of future profits may, in proper cases, be awarded if the “loss directly and naturally result[s] in the ordinary course of events from a breach of warranty”.

TransCanada Pipelines Ltd. v Solar Turbines Inc., 1998 (AB):

Action for lost revenues was dismissed on basis of clause excluding liability for consequential damages. No distinction made between indirect or direct loss.

Agfaphoto Canada Inc. v Overwaitea Food Group Ltd., 2008 (BC):

Despite the plaintiff arguing that there was a distinction between direct and indirect loss, the court determined that the intent of the clause was to exclude all claims for “loss of profit, etc.” Thus, most of the plaintiff’s claims were barred.

Horizon Management Ltd. v Blaze Energy Ltd., 2011 (AB):

Brooker J. determined that an exclusion clause applied to limit liability, including a limit on the recovery of any “loss of profits” or “loss of business”.

Haliburton Forest & Wildlife Reserve Ltd. v Toromont Industries Ltd., 2017 (ON):

Gilmore J. granted the defendants summary judgment dismissing the plaintiff’s claim on the basis of a limitation of liability clause.

Facts giving rise to the claim in Dow

- 2018, Alberta decision
- Claim was in respect of Dow's lost profits as a result of Nova taking ethylene and running the E3 facility at lower operating rates
- Clause provided the Operator (Nova) shall not be liable for *Excluded Damages*, which was defined as
 - i. "indirect or consequential damages (including without limitation loss of profits and damages arising from loss of production) ... and
 - ii. "loss of or damage to the Plant or the Products".
- Nova argued that the "plain meaning" of the definition of Excluded Damages was that lost profits and lost production are to be classified as indirect or consequential damages and barred from recovery.

Facts giving rise to the claim in Dow

- Alternate interpretation was that the reference to “loss profits and damages arising from loss of production” is an example of a particular kind of indirect or consequential damage, and loss profits and damages arising from loss of production that are direct damages are not excluded.
- The Court followed and adopted the comments from the UK Court of Appeal:
 - In some contexts, such as a contract for the construction of a project, loss of profits may be consequential. In others involving the provision of a saleable product, a loss of profit is a direct result of a breach of a contractual duty to provide the product.
 - The parties, being in the same business, would be well-aware of the potential damage arising from a failure to deliver or an under-delivery. As such, the loss of profit and loss of production damages claimed by Dow with respect to the claims arose naturally from Nova’s breach of contract, were direct damages, and were recoverable.

State of the Law following *Dow*

Trend towards consideration/analysis of the difference between indirect and direct loss of profits. Although inconsistency remains, expect trend to continue towards consideration of the difference between the two:

MediaLinx Printing v United Parcel Service Canada Ltd., 2018 (ON)

Summary judgment granted on the basis that exclusion clause limiting liability in respect of indirect, consequential damages, or lost profits applied to the plaintiff's claim for lost profits.

Atos IT Solutions v Sapient Canada Inc., 2018 (ONCA)

Limitation of liability clause did not apply to damages for loss of profits on the subcontract and limitation of liability clauses only excluded indirect loss of profits.

- Consequential or indirect lost profits included profit lost from other work forgone as result of breach but didn't include profits under the subcontract itself

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Review of Precedent Clauses and Customizing Exclusions of Liability post-*Dow*

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Example 1

GASEDI

Except to the extent provided in this contract as an express measure of damages, neither Party shall be liable for consequential, incidental, punitive, exemplary or indirect damages, including, without limitation, lost profits or other business interruption damages, arising by statute, in tort or contract, under any indemnity provision or otherwise.

Example 1

GASEDI

Excluded

- Consequential
- Indirect
- Punitive
- Exemplary
- Incidental
- Including Lost Profits that are Indirect
- Including Business Interruption that is Indirect

Not Excluded

- Direct Damages
- Lost Profits that are Direct
- Business Interruption that is Direct

Punitive/Exemplary Damages

- Designed to punish, rather than compensate.
- Awarded where a party engages in conduct that is particularly high-handed, reprehensible or outrageous for the purposes of achieving deterrence and denunciation. Conduct must exceed the outer boundaries of a rational and measured response.

Punitive/Exemplary Damages

To award:

1. An independent actionable wrong must be pleaded (expansive). Torts, breach of contract, the duty of good faith, or fiduciary duties may qualify.
2. The conduct of the blameworthy party must be sufficiently egregious.
3. Compensatory damages alone would be insufficient to fully express the Court's repugnance at the impugned conduct.

The quantum of punitive damages must be proportionate to the conduct and limited to the lowest award that would deter and denounce the conduct.

Incidental Damages

- Largely an American Concept – *Uniform Commercial Code*
 - Awarded to compensate for costs arising from the repair and/or return of rejected items, or to avoid other direct and consequential losses.
-

May include:

- Inspection, receipt, transportation and care of custody costs for goods rightfully rejected
- Commercially reasonable charges thereby entailed
- Expenses or commissions connected with effecting cover
- Reasonable expenses incident to the delay or breach

Lost Profits

- May be either direct or consequential, depending on the form of breach, type of damage, and interpretation of the contract.
- In *Dow*, recently characterized as a naturally occurring direct loss.
- May be more frequently awarded where breaching party had knowledge of the extent of profits that may be lost by the breach.
- In construction contracts, loss of profits more likely to be consequential.
- In sale of goods agreements, loss of profits more likely to be direct.
- Post *Sattva*, the parties' intentions in drafting the contract will be considered.

Example 2

Purchase and Sale Agreement

Notwithstanding anything herein to the contrary, Purchaser shall not be entitled to recover from any Vendor, and no Vendor shall be entitled to recover from Purchaser, any indirect, consequential, punitive or exemplary damages or damages for lost profits, business loss of income tax liabilities of any kind arising under or in connection with this Agreement or the Transaction, regardless of fault (and, as to punitive or exemplary damages, even if caused by the gross negligence or willful misconduct of the released person).

Example 2

Purchase and Sale Agreement

Excluded

- Consequential
- Indirect
- Punitive
- Exemplary
- Incidental
- Lost Profits
- Business Loss of Income Tax Liabilities

Not Excluded

- Direct Damages

What happens if a party walks away from the transaction between signing and closing?

Example Of Damages Clause Now Used by Dow

Contractor will not be liable for breach-of-contract damages that the parties could not reasonably have foreseen on entry into this agreement.

DOW'S NEXT STAGE RESPONSE

Contractor shall not be liable to the other for indirect, special, consequential, incidental, punitive or exemplary losses or damages [in excess of \$●,000,000 per claim]. This limitation of liability is not intended to apply to (i) any insurance or recoveries made or recovered by the Contractor under the insurance policies limited in value as set out in this agreement, (ii) Contractor's liquidated damages, if any, specified in this agreement, (iii) any amounts owed under the performance bond or warranty bond, (iv) any indemnification obligations or any indemnitor under this agreement; (v) any losses or damages of any Party caused by the fraud or dishonesty of the other party, (vi) any third party damages, (vii) any claims arising out of the Contractor's confidentiality obligations within this agreement, (viii) any losses or damages caused by intellectual property breaches and violations, or (ix) any loss or damage suffered by Dow due to the gross negligence or intentional misconduct of the Contractor.

Expected Legal Trends

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Expected Legal Trends

1 *Dow* and *Atos* provide authority for plaintiff to claim loss of profits, even in the face of an exclusion clause

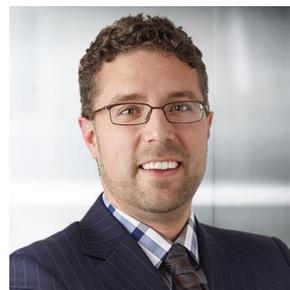
2 Less likely that a court will decide (without analysis) that *all* loss of profit, loss of revenue, etc. is excluded simply because there is an exclusion clause

3 Court more likely to consider whether these losses are direct or indirect

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Wrap-up and Q&A

For more
information



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