

# Frustrated contracts in pandemic times: Takeaways for financial institutions

April 28, 2022

The COVID-19 pandemic has resulted in much uncertainty around how rarely invoked legal doctrines, legislation and contractual provisions are interpreted by the courts. Among these, the 1990 [Frustrated Contracts Act, RSO 1990, c F.34](#), which has only been litigated a few dozen times, has become a common tool for litigants facing a **breach of contract claim**.

For financial institutions, cases interpreting this legislation will be of great interest. While the jury is still out, the first reported decision involving standard loan and security agreements, [Bank of Montreal v. 2643612 Ontario Ltd., 2021 ONSC 4401](#), seems to confirm it will be difficult for a debtor to fall back on the Frustrated Contracts Act as a result of the pandemic.

## The decision

In 2018, the Bank of Montreal (the Bank) granted the defendant, a company operating a restaurant (the Company) a small business loan. The co-defendant, and president of the company, signed various security agreements, including a guarantee, in her personal capacity. The loan and security instruments contained the standard obligations including that in the event of a default, the balance of the loan became due and payable at the discretion of the Bank.

In April 2020, the Company experienced financial difficulties and the Bank agreed to defer payments for 6 months. In November of 2020, approximately 8 months later, the Bank demanded repayment of the loan from the Company and the guarantor, and ultimately commenced proceedings when the debtors failed to pay back the loan, and a **summary judgment motion was advanced by the Bank**.

To be successful, the Bank had to demonstrate there was no genuine issue for trial with **respect to the defendants' obligation to repay the loan**. The Company and the guarantor relied, among other arguments, on the doctrine of frustrated contracts in support of its position.

## What is frustration of contract?

As outlined in the decision, in Ontario, the Frustrated Contracts Act applies to:

any contract that is governed by the law of Ontario and that has become impossible of performance or been otherwise frustrated and to the parties which for that reason have been discharged. R.S.O. 1990, c. F.34, s. 2 (1); 1993, c. 27, Sched.

The “law of frustration” applies “when a situation has arisen for which the parties made no provision in the contract and performance of the contract becomes “a thing radically different from that which was undertaken by the contract””.<sup>1</sup> Where a party’s obligations are extinguished as a result of frustration, the obligations of each party under the contract are terminated.

Importantly, the party seeking to invoke the doctrine of frustrated contracts must demonstrate that the disruption is a permanent one, and that performance of contractual obligations is impossible - not simply impractical, not profitable, or difficult.<sup>2</sup>

## The outcome

In *Bank of Montreal v. 2643612 Ontario Ltd.*, the Court determined that the loan and security agreements had not been frustrated, given that “the pandemic and the ensuing lockdowns did not render the Loan Agreement and the related agreements substantially different from the agreements that the parties executed”.<sup>3</sup> The Company’s obligations to re-pay the loan were not contingent on the Company operating its restaurant. That is, the agreements did not specify how (i.e from what funds) the loan had to be repaid, but simply that they had to be paid per the specified terms of the agreement. The pandemic did not change the nature of these obligations, nor was the pandemic a permanent disruption.

Accordingly, summary judgement was granted in favour of the Bank.

## Key takeaways

The Court’s decision reaffirms that debtors who want to rely on such doctrines to excuse non-performance of their obligations under standard loan and security agreements will have a steep hill to climb.

A note of caution: as always, it will be important to consider the specific provisions in any contract in order to assess the strengths and weaknesses of this argument in any given circumstance, and whether it is possible to invoke this piece of legislation. Indeed, where the contract has anticipated the circumstances, such as by the inclusion of a force majeure clause, the Frustrated Contracts Act cannot apply, as confirmed by the Court in [Braebury Development Corporation v. Gap \(Canada\) Inc., 2021 ONSC 6210](#).

<sup>1</sup> 2021 ONSC 4401, citing Divisional Court in *Cowie v. Great Blue Heron Charity Casino*, [2011] O.J. No. 5573, citing *Naylor Group Inc. v. Ellis-Don Construction Ltd*, 2001 SCC 58 (CanLII), [2001] 2 S.C.R. 943 at paras 5.

<sup>2</sup> 2021 ONSC 4401 citing *The Law of Contract in Canada*, 4th ed. (Scarborough: Carswell, 1999) at 679-680.

<sup>3</sup> 2021 ONSC 4401, at para 17.

By

Geneviève Fauteux

Expertise

Banking & Financial Services, Construction Disputes, Commercial Litigation, Banking

---

**BLG | Canada's Law Firm**

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 725 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

[blg.com](http://blg.com)

**BLG Offices**

**Calgary**

Centennial Place, East Tower  
520 3rd Avenue S.W.  
Calgary, AB, Canada  
T2P 0R3

T 403.232.9500  
F 403.266.1395

**Ottawa**

World Exchange Plaza  
100 Queen Street  
Ottawa, ON, Canada  
K1P 1J9

T 613.237.5160  
F 613.230.8842

**Vancouver**

1200 Waterfront Centre  
200 Burrard Street  
Vancouver, BC, Canada  
V7X 1T2

T 604.687.5744  
F 604.687.1415

**Montréal**

1000 De La Gauchetière Street West  
Suite 900  
Montréal, QC, Canada  
H3B 5H4

T 514.954.2555  
F 514.879.9015

**Toronto**

Bay Adelaide Centre, East Tower  
22 Adelaide Street West  
Toronto, ON, Canada  
M5H 4E3

T 416.367.6000  
F 416.367.6749

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing [unsubscribe@blg.com](mailto:unsubscribe@blg.com) or manage your subscription preferences at [blg.com/MyPreferences](http://blg.com/MyPreferences). If you feel you have received this message in error please contact [communications@blg.com](mailto:communications@blg.com). BLG's privacy policy for publications may be found at [blg.com/en/privacy](http://blg.com/en/privacy).

© 2024 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.