Reconsideration of the Doctrine of Consideration

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It has been famously said that "hard cases make bad law"; sometimes, however, hard cases make new law. Or, at least, they very much encourage the court to do so lest we give credence to Mr. Bumble's lament in Oliver Twist: "If the law supposes that … the law is an ass".

With these words, Chief Justice Robert Bauman of the B.C. Court of Appeal recently delivered the unanimous judgment of the Court in *Rosas* v. *Toca*, 2018 BCCA 191 and called for a reconsideration of the doctrine of consideration and adoption of a new approach to the law around contract modification.

This is significant for employers. They are continually vexed by the legal need for consideration. They have been prevented historically from modifying an existing employment contract without providing their employees something tangible in return. The promise of continued employment is simply not viewed by the courts as sufficient consideration.

The issue before the Court of Appeal was a relatively straightforward one: did a loan made by a lottery winner to her friend have to be repaid?

Enone Rosas worked as a nanny and, in January 2007, won $4.163 million dollars in the lottery. She loaned $600,000 free of interest to her friend, Hermenisabel Toca, so that Ms. Toca and her husband could purchase a home. The loan was originally for a one-year term.

For most of 2007, Ms. Rosas and Ms. Toca did not see one another because of Ms. Rosas' travel schedule. They rekindled their friendship in early 2008 but that only lasted until 2013, when they stopped seeing one another socially.

In July 2014, Ms. Rosas filed a civil action in which she sought repayment of the loan she had made Ms. Toca more than seven years earlier.

One of the key issues before the trial judge was whether the action was time-barred for falling outside the six-year limitation period applicable to an action in debt under the former B.C. *Limitation Act*. If the loan had been repayable within a year,

the statutory limitation period would have started to run in January 2008 and expired in January 2014, more than half a year before Ms. Rosas commenced her action.

In answer to the limitation defence, Ms. Rosas argued that she and Ms. Toca had entered into multiple forbearance agreements to extend the time for her friend to repay the loan. She gave evidence that every year until 2013, Ms. Toca would come to her and say words to the effect of "I will pay you back next year". Because Ms. Rosas had no real need for the money, she would always agree to extend the term of the loan.

There was never any negotiation around the forbearance. It was simply the requests each year from one friend to which the other friend agreed. Importantly, Ms. Rosas did not receive any payment on the loan – or, for that matter, anything tangible at all from Ms. Toca – in exchange for extending the time for repayment.

The trial judge considered this to be fatal to Ms. Rosas' case. Without the necessary consideration, any forbearance agreement was invalid. Ms. Rosas had "voluntarily abstained", the judge held, from exercising her rights and, in the absence of a valid forbearance agreement, the action for repayment of the loan was filed outside the applicable limitation period and time-barred.

On appeal, the Court of Appeal had to consider whether Ms. Rosas was precluded from recovering her money by operation of the statutory limitation period.

Writing for the Court, Chief Justice Bauman viewed the traditional rigidity around the doctrine of consideration to be an unsatisfactory, and even unjust, way of approaching the enforceability of modern "post-contractual modifications". He made clear that the law has to adapt to present day reality and existing contracts often must be modified to respond to situations not contemplated by the contracting parties at the time of their original agreement. The Chief Justice held that a modification of an existing contract, unsupported by consideration, should be enforceable if the modification is not procured in circumstances of duress, unconscionability or the like:

When parties to a contract agree to vary its terms, the variation should be enforceable without fresh consideration, absent duress, unconscionability, or other public policy concerns, which would render an otherwise valid term unenforceable. A variation supported by valid consideration may continue to be enforceable for that reason, but a lack of fresh consideration will no longer be determinative. In this way, the legitimate expectations of the parties can be protected. To do otherwise would be to let the doctrine of consideration work an injustice.

Rosas v. *Toca* is a groundbreaking case and has the potential to change how contracting parties, including employers and employees, interact with one another. Indeed, in the 4.5 months or so since the decision was released, it has already been considered or applied in more than half a dozen other cases.

While the full ramifications of the B.C. Court of Appeal's decision remain to be seen, employers and their advisors may wish to consider there is still a need to offer employees something concrete in return for the modification of an existing employment contract.

It would be advisable to proceed cautiously because the approach in *Rosas* v. *Toca* assumes the absence of conditions like duress and unconscionability. The relationship between employer and employee is of course recognized as a relationship where there is an inherent imbalance of power and the contracting parties generally occupy unequal bargaining positions.

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