

[3] In late 2023, Canadian Tire Corporation, Limited (CTC) discovered that Mr. McCarthy had processed the sale of 4,998 air fryers to a single customer, at a price of almost \$1 million. After investigating CTC determined that Mr. McCarthy knowingly engaged in unethical business practices in relation to the sale of the air fryers. This was considered a non-curable event of default under the CTC Dealer Contract.

[4] In June of 2024, CTC terminated Mr. McCarthy's dealer contract. Mr. McCarthy challenged the termination by way of an arbitration before the Honourable Gloria Epstein. The arbitration took place over nine days and included evidence from eight witnesses, six of whom were called by Mr. McCarthy.

[5] The Arbitrator dismissed Mr. McCarthy's claim.

[6] Mr. McCarthy now appeals and alleges that the Arbitrator applied the wrong test for wilful blindness; that it was procedurally unfair for the Arbitrator to permit CTC to argue all six grounds for termination given Mr. McCarthy's argument that CTC had withdrawn three of them; and the Arbitrator upheld CTC's termination in the absence of any evidence that CTC was harmed by the unethical acts.

[7] CTC argues that the Arbitrator articulated and applied the correct test for wilful blindness, and her factual finding that Mr. McCarthy had chosen not to make the enquiries he was obligated to make is immune from review. They argue that Mr. McCarthy is out of time to make the procedural fairness argument because that motion was brought mid-hearing, dismissed and Mr. McCarthy did not challenge the decision within the requisite 30 days.

[8] The issues for me to decide in this appeal are as follows:

- a. Did the Arbitrator apply the correct test for wilful blindness?
- b. Was Mr. McCarthy denied procedural fairness?

- c. Did the Arbitrator wrongly uphold the termination of the contract in the absence of evidence that CTC was harmed by unethical acts?

[9] For the following reasons, the appeal is dismissed.

B. Background Facts

[10] Mr. McCarthy has been a Canadian Tire dealer for over 28 years. He has operated several different stores during that time. In October 2021, Mr. McCarthy moved to Store #30 at Eglinton Town Centre, which is the store he was operating at all times material to this dispute.

[11] CTC employs a Dealer Mobility System which determines when a dealer can acquire a Canadian Tire Store. Interested dealers are ranked according to their Mobility Sales Volume (MSV), which is a measurement of gross sales. The dealer with the highest MSV is offered the store. Dealers have an incentive to boost their gross sales and obtain a higher MSV, so that they can move to stores with higher revenues and profits.

[12] Each of CTC's dealers sign a Dealer Contract, which governs the relationship between CTC and the dealer. CTC is entitled to terminate the Dealer Contract if the dealer commits a Non-Curable Event of Default. The Non-Curable Event of Default provision reads as follows:

20.1 Non-Curable event of Default

The following events of default by the Dealer shall be deemed to be Non-Curable Events of Default:

...

- (q) if the Dealer knowingly engages in any fraudulent or unethical business practice or activity or if the Dealer is finally adjudicated to have committed an offence which is detrimental or harmful to the name, goodwill, or

reputation of the Corporation, the business of the Corporation or other Associate Stores or any of the Merchandise or Service.

[13] Canadian Tire dealers are generally not permitted to sell merchandise to resellers, as resellers may compete with or undercut CTC. Selling to resellers can also damage CTC's relations with the manufacturers of the merchandise it sells, some of whom have contractual provisions that preclude sales to resellers.

[14] Mr. McCarthy had a customer BSC Canada ("BSC") to whom he sold merchandise in bulk. After CTC implemented a policy prohibiting these type of bulk sales, Mr. McCarthy sought and was granted an exemption.

[15] This was based on Mr. McCarthy's assurance that BSC was purchasing the merchandise for a corporate gifting and rewards program, rather than for resale. Thulasi Jegatheeswaran, who Mr. McCarthy had put in charge of all bulk sales for the store, then asked BSC to write an email stating that it was not reselling merchandise. Mr. McCarthy provided the email from BSC confirming that it would not sell the product to any business that would resell it on competing platforms. No further steps were taken to confirm the truth of BSC's assertions.

[16] Subsequently in October 2023, Mr. McCarthy's store processed a sale of 4,998 Ninja brand air fryers to BSC. Mr. McCarthy did not have 4,998 air fryers in inventory at the time and did not order any more inventory to fulfil the sale.

[17] CTC began looking into the transaction. On October 31, Mr. Grady, an employee of CTC, asked Mr. McCarthy to reverse the transaction, meaning the transaction would be cancelled and payment refunded. Mr. McCarthy agreed to do so.

[18] Mr. McCarthy did not reverse or refund the sale, but instead "substituted" a variety of other products in lieu of the air fryers. Mr. McCarthy did not keep any proper records of this "substitution." It did not go through the store's systems and thus was entirely

invisible to CTC. Despite implementing this substitution, Mr. McCarthy claimed to have reversed the transaction when he spoke again with Mr. Grady on November 30, 2023.

[19] It was not until December 5, 2023, that Mr. McCarthy disclosed to CTC that he had “substituted” products for the air fryers. By this time, the products had been delivered to BSC, and it was too late to unwind the transaction, which is what CTC had wanted.

[20] On December 18, 2023, CTC formally began an investigation and audit of the transaction.

[21] In June 2024, CTC terminated Mr. McCarthy’s Dealer Contract on the basis that he had knowingly engaged in several unethical business practices. Mr. McCarthy challenged the termination by way of an arbitration, in which he also alleged that CTC had acted in bad faith.

[22] At the conclusion of the arbitration, the Arbitrator concluded that Mr. McCarthy had knowingly engaged in three unethical business practices:

- (a) selling merchandise to a reseller while assuring CTC that the customer was not reselling the merchandise, without any foundation for that assurance;
- (b) promising to reverse the air fryer transaction after CTC requested him to do so, only to breach that promise and fail to reverse the transaction; and
- (c) taking steps to conceal the substitution of alternate merchandise for the air fryers, such that CTC only learned about the substitutions once it was too late to prevent them from happening.

C. Standard of Review

[23] The parties are agreed that the appeal is limited to questions of law alone, pursuant to both the Dealer Contract and the *Arbitration Act*.

[24] Questions of law are “questions about what the correct legal test is”: *Sattva Capital Corp. v Creston Moly Corp*, 2014 SCC 53 at para. 49.

[25] It may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law, but Courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation: *Sattva* at paras. 53 and 54.

[26] This Court has found that “the admonition not to strain to find extricable questions of law on an appeal is equally, if not more, applicable in the appeal of arbitration decisions, where the deference to be afforded to the factual findings of the parties’ chosen decision-maker is heightened”: see *Ontario Minister of Transportation v. Link 427 General Partnership*, 2025 ONSC 2375 at para. 18.

[27] A decision-maker’s failure to construe a contract as a whole can constitute an error of law when there has been a failure to give meaning to the terms of the contract and arriving at conclusions inconsistent with the whole of the agreement. *Link 427* at para. 21.

Issue 1: Did the Arbitrator Apply the Correct Test for Wilful Blindness?

[28] Mr. McCarthy argues that the Arbitrator conflated wilful blindness with recklessness and/or negligence, which cannot be relied on to impute knowledge, and in doing so made an extricable error of law. I am not persuaded by this submission.

[29] The arbitration in this case revolved around the factual question of whether Mr. McCarthy knowingly engaged in any unethical business practice or activity contrary to section 20.1(q) of the Dealer Contract.

[30] The Arbitrator correctly found that knowledge does not have to mean actual knowledge but could be satisfied in one of two other ways, i) wilful blindness, and ii) corporate knowledge of the Dealer.

[31] The Arbitrator articulated the correct test for wilful blindness in the following passage:

“In civil proceedings, wilful blindness occurs where somebody has good reason to make inquiries but chooses not to do so. In such cases knowledge is imputed. The reason behind this imputation is logical – the law will not protect a party who takes steps to avoid knowing the truth from avoiding responsibility. The law is clear. The definition of wilful blindness in the civil context (as it is in the criminal context) consists of two components: circumstances sufficient to lead a reasonable and honest person to make inquiries and a decision to remain deliberately ignorant to the knowledge that an inquiry could disclose.”

[32] Mr. McCarthy then argues that the Arbitrator applied the test incorrectly when she found that Mr. McCarthy was obligated to make inquiries of BSC as to what they were using the merchandise for. Counsel argued that the Arbitrator erred in imputing knowledge to Mr. McCarthy based on his failure to make inquiries regarding the use that was being made of the merchandise. This, however, is an argument of mixed fact and law and is not the proper basis for an appeal to this court from the Arbitration decision.

[33] The Arbitrator made factual findings concerning Mr. McCarthy’s knowledge and actions. These findings are immune from review. The Arbitrator found that Mr. McCarthy spoke to CTC about an exemption for continued bulk sales and specifically discussed whether BSC was engaged in reselling. Mr. McCarthy assured CTC that he was “confident” that BSC was buying merchandise for a corporate gifting and rewards program. Mr. McCarthy was aware that CTC was concerned about whether BSC was

reselling the products. No inquiries were made by Mr. McCarthy at the time this assurance was given.

[34] It is after this that Mr. Jegatheeswaran asked BSC to provide an email to confirm they were not reselling the products. No inquiries were made to determine if the contents of BSC's email were true, and they turned out not to be.

[35] The Arbitrator concluded that "Mr. McCarthy passed the baseless assurance that BSC was not a reseller on to Mr. Grady without communicating directly with BSC or making inquiries of Mr. Jegatheeswaran as to its accuracy." It is from these factual findings that the Arbitrator concluded that Mr. McCarthy knew he had to make inquiries and chose not to do so.

[36] Counsel for Mr. McCarthy takes exception to the language used by the Arbitrator that Mr. McCarthy had an "obligation" to make inquiries, suggesting that the Arbitrator applied a negligence standard. Counsel argues that this is an extricable error of law in the context of contractual interpretation of the Dealer Contract. I do not agree. The Arbitrator was clearly referring to the factual obligation that Mr. McCarthy was aware of, based on his conversation with Mr. Grady about CTC's concern that BSC was reselling the product.

[37] The Arbitrator found that Mr. McCarthy knew he had to make inquiries and chose not to do so. This is not a question of suspicion – it was the very reason the permission to engage in bulk selling was granted in the first place. Mr. McCarthy knew that CTC had an issue with bulk selling, was aware that CTC specifically wanted to know if BSC was bulk selling, chose to not make any inquiries and instead provided an assurance for which he had no basis to do so.

[38] The Arbitrator correctly found that Mr. McCarthy "refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge." *Sansregret*

v. The Queen, 1985 CanLII 79 (SCC) at para. 22. See also *R. v. Farmer*, 2014 ONCA 823 at para. 26.

[39] In my view, this argument is simply a rehashing of the factual findings of the Arbitrator. The Arbitrator did not conflate wilful blindness with negligence and/or recklessness, and there is no extricable error of law. The Arbitrator correctly articulated and applied the test for wilful blindness.

[40] Given this finding, I decline to address the argument that without a finding that the Dealer was wilfully blind, there is no basis for a finding of detriment or harm to CTC's reputation.

Issue 2: Was Mr. McCarthy Denied Procedural Fairness?

[41] Mr. McCarthy argues that he was denied procedural fairness when he was not given an opportunity to respond or adequately prepare to respond to three of the contested grounds for termination that they alleged had been withdrawn during discoveries.

[42] I do not accept this argument for several reasons. First, Mr. McCarthy is out of time to raise this argument. Section 46(1)(6) of the *Arbitration Act* gives the Court the power to set aside an arbitration award on the grounds of procedural fairness. The section reads as follows:

The Applicant was not treated equally and fairly, was not given an opportunity to present a case or to respond to another party's case or was not given proper notice of the arbitration or of the appointment of an arbitrator.

[43] Section 47(1) of the Act provides that any appeal under section 45 or 46 must be brought within 30 days after the decision was made. In this case the Arbitrator released

her reasons on Mr. McCarthy's motion on December 19, 2024. Mr. McCarthy is out of time, and this ground of appeal fails on this basis alone.

[44] Second, there was no breach of procedural fairness because in fact Mr. McCarthy was given the right to be heard on this issue. When Mr. McCarthy brought the motion to prevent CTC from relying on these three grounds on the basis that they had been withdrawn during discoveries, the Arbitrator adjourned closing arguments to permit this issue to be argued. Counsel was permitted and did provide extensive submissions both in writing and orally. The Arbitrator released a comprehensive 20-page decision on the issue on December 19, 2024.

[45] I am satisfied that there was no procedural unfairness in the hearing of the issue as it was raised.

[46] Mr. McCarthy argued that a fair hearing requires that an Arbitrator must ensure that the parties know the case they have to meet. Counsel argued that had Mr. McCarthy known the case to meet, he would have led evidence on issues surrounding the "substitution of goods" issue for example.

[47] The Arbitrator made factual findings on this issue and found that the three grounds for termination were never "taken off the table". The Arbitrator squarely addressed the question of the 'case to meet' when she found that i) CTC had pleaded all six grounds, ii) had never withdrawn any of them; and iii) had expressly referred to them in their opening statement. The Arbitrator also found that Mr. McCarthy led evidence on all six grounds for termination as part of his case.

[48] In my view, Mr. McCarthy is attempting to reargue the motion. There was no procedural unfairness, and the Award will not be set aside on this basis.

Issue 3: Did the Arbitrator Wrongly Uphold the Termination of the Contract in the Absence of Evidence that CTC was Harmed by Unethical Acts?

[49] Mr. McCarthy argues that actual detriment and/or harm must be proven by CTC in order to trigger the section 20.1(q) termination provision. Allied to this is a procedural fairness argument that the Arbitrator failed to provide reasons why detriment or harm could be presumed in the absence of evidence.

[50] This ground fails at the outset because Mr. McCarthy never advanced the argument that CTC had to show it had suffered harm in order for termination to be available: *Whitby (Town) v. G&G 8789996 LM Ltd.*, 2020 ONCA 654 at para. 9.

[51] The issue before the Arbitrator was the challenge by Mr. McCarthy of his termination, focused on whether he knowingly engaged in any unethical conduct. There was no onus on CTC to establish harm. If Mr. McCarthy was arguing that CTC breached the terms of the contract because there was no harm, it was his onus to raise that issue.

[52] On a reading of the plain language of the provision, Section 20.1(q) provides two different means by which there could be a finding of a non-curable default. The first is “if the dealer knowingly engages in any fraudulent or unethical business practice or activity”. The second reads, “**or** if the Dealer is finally adjudicated to have committed an offence which is detrimental or harmful to the name, goodwill, or reputation of the Corporation...”.

[53] The detrimental or harmful language modifies the second component of the provision, which makes sense. If a dealer acts fraudulently or engages in an unethical business practice, it is hardly surprising that would be sufficient to ground termination. On the other hand, if having been adjudicated to have committed an offence—any offence—it may not undermine the trustworthiness of the dealer thus the additional requirement of detriment or harm. On the plain language of the provision, the harm component is connected to having committed an offence and was not relevant to the Arbitration.

[54] Mr. McCarthy relies on *Intact v. Joaquim*, 2023 ONSC 5120 and the “last antecedent rule” to suggest that the detrimental/harm language is antecedent to everything that goes before it because there is no comma after “offence”. I am not

persuaded by this submission and note that the Court in *Intact* at para. 23 relied on *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC) at para. 21 which found that “words are to be read in their entire context and in their grammatical and ordinary sense”. This is consistent with how we approach the interpretation of contracts based on the plain and ordinary meaning of the language used.

[55] Finally, Mr. McCarthy acknowledges the Arbitrator made “incidental” findings of harm. The Arbitrator found that selling merchandise to resellers allows resellers to compete with and undercut CTC. She found that reselling can damage CTC’s relationship with the manufacturers of its merchandise, and that it is important for CTC to be able to trust its dealers. When Mr. McCarthy concealed the substitution of merchandise, the Arbitrator found this prevented CTC from being able to undo the bulk sale. These are more than “incidental” findings of harm, but actual harm caused by Mr. McCarthy’s unethical business activity.

[56] The Arbitrator did not err in upholding the termination of the contract and the Award will not be set aside on this basis.

[57] Mr. McCarthy’s appeal is dismissed.

D. Costs

[58] I would encourage the parties to try to settle costs of the appeal. If they cannot, the Applicants may serve and file written cost submissions within 20 days of the release of these Reasons for Judgment, followed by the respondent’s written cost submissions within a further 15 days. The costs submissions shall not exceed three pages in length, excluding the Bill of Costs.

J.K. PENMAN J.

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

STEPHEN McCARTHY and McCARTHY-ELLIS
MERCANTILE LTD.

Applicants

– and –

CANADIAN TIRE CORPORATION, LIMITED

Respondent

REASONS FOR JUDGMENT

J.K. Penman J.

Released: July 9, 2025