Newsletter

IN THIS ISSUE

DECLARATION OF VALUE ON BILLS OF LADING: CLARIFICATION BY ONTARIO COURT OF APPEAL

The Ontario Court of Appeal released its decision in *National Refrigerator & Air Conditioning Canada Corp. v. Celadon Group Inc.*, 2016 ONCA 339 and clarified how a shipper must declare the value of cargo in order to receive the full value of the cargo if the cargo is lost or damaged.

The trial had been heard before Justice Chapnick. The following evidence was established. National Refrigeration & Air Conditioning Canada Corp. was a manufacturer of commercial refrigeration products. In October and November 2011, National hired Celadon Group Inc., Celadon Canada Inc., and Celadon Trucking Services Inc. (collectively "Celadon") to transport two shipments of copper tubing from Mexico to Ontario. Both shipments were hijacked in Mexico and never recovered. National submitted a claim for loss and damage for US$122,228.46 and US$98,700.52 respectively. Celadon denied both claims relying on exclusion of liability clauses contained in Celadon's Rules and Regulations and posted on Celadon's website. National commenced an action to recover damages.

After a three-day trial, the trial judge found that Celadon could not rely on the exclusionary terms, not having notified National of those terms, and that, in any event, the exclusionary terms were unconscionable. She also found that the value of the goods had been declared on the commercial invoice contained in the shipping documents and that those documents formed part of the contract of carriage. Consequently, Celadon could not rely on the statutory limitation of liability to $4.41 per kilogram pursuant to *Carriage of Goods*, O. Reg. 643/05 under the *Highway Traffic Act*, R.S.O. 1990, c. H.8.

The trial judge also found that, independent of the carriage agreement, Celadon was liable in negligence. This was because Celadon had specific knowledge about the enhanced risk of hijacking in Mexico that gave rise

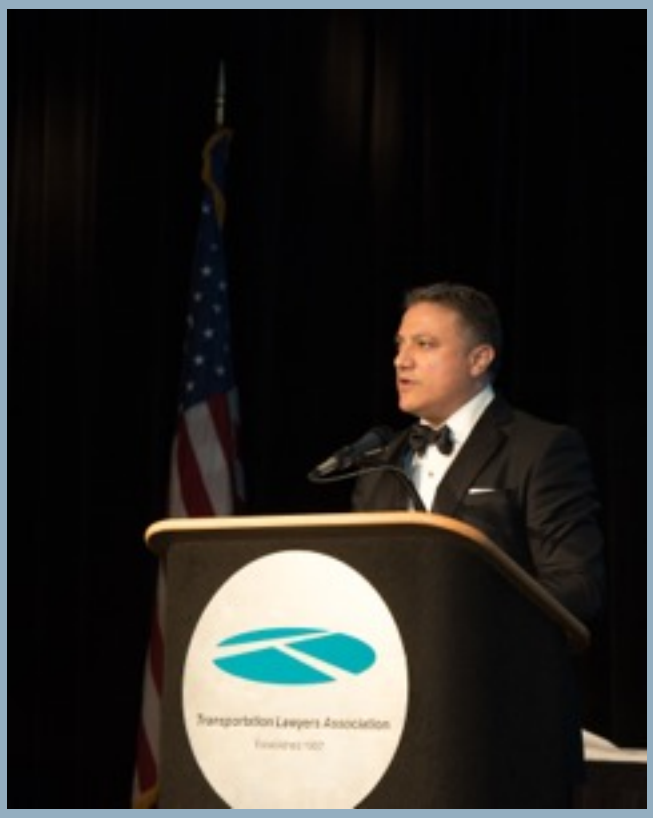
FIRM AND INDUSTRY NEWS

- **Rui Fernandes, Kim Stoll and Alan Cofman** will be representing the firm at the *Canadian Board of Marine Underwriters* spring conference being held May 25th and 26th in Ottawa.

- **Gordon Hearn** will be representing the firm at the meeting of the *Conference of Freight Counsel* being held June 5 - 6 in Toronto.

- **Kim Stoll** will be representing the firm at the *International Cargo Insurance Conference* being held June 6th to 8th in Oxford England.

- **Rui Fernandes** and **Alan Cofman** will be representing the firm at the *Canadian Maritime Law Association* annual meeting and seminar being held June 16 and 17 in Halifax.



Louis Amato-Gauci Awarded TLA Distinguished Service Award

LOUIS AMATO-GAUCI RECEIVES TLA'S DISTINGUISHED SERVICE AWARD

Fernandes Hearn LLP is pleased to announce that Louis Amato-Gauci has received the Transportation Lawyers Association (TLA) Distinguished Service Award. Mr. Amato-Gauci was recognized during the 2016 TLA Annual Conference, held April 27-30 in Destin, Florida.

The Distinguished Service Award is given to a TLA member who makes significant contributions to the activities and goals of the Association. Mr. Amato-Gauci was recognized for his extensive involvement in organizational and educational programming for TLA. He has been an active member of TLA throughout his legal career. He was co-editor of *The Transportation Lawyer* in 2006-2007; served on the TLA's Executive Committee for several years, initially as representative of the Canadian Transport Lawyers Association (CTLA) and subsequently, as representative-at-large; co-chaired the TLA International Trade and Transportation Committee; frequently participated as a moderator or speaker in panel discussions at TLA's annual conferences and at the Transportation Law Institute; contributed many articles for publication in *The Transportation Lawyer*; and chaired the committee that developed the continuing legal education program for the 2016 TLA Annual Conference.

Mr. Amato-Gauci is a graduate of the University of Toronto Faculty of Law and was called to the bar of the Province of Ontario in 2000. He is a partner at Fernandes Hearn LLP, where he leads the firm's corporate/commercial and M&A practices. He frequently advises carriers, shippers, manufacturers, distributors and freight intermediaries on a broad range of commercial contracts including carriage of goods, joint venture, warehousing, load brokerage, logistics, owner-operator, broker-carrier, broker-shipper, franchise, supply and distribution agreements, as well as carrier safety and other regulatory matters, Customs and international trade. He is a past-President of the CTLA, and is an active member of the Association of Transportation Law Professionals and several transport industry organizations. Since 2009, Mr. Amato-Gauci has been listed in *The Best Lawyers in Canada* - Transportation Law and Aviation (Financing), and was ranked Most Frequently Recommended for Transportation (Road and Rail) in *The Canadian Legal Lexpert™ Directory*, following an extensive peer survey process.

About the Transportation Lawyers Association

The TLA is an independent, international bar association whose members assist providers and commercial users of logistics and all modes of transportation services. TLA has been in the forefront of educating transportation attorneys for more than 75 years, and is dedicated to keeping its members ahead of the constant changes in all aspects of the specialized legal environment affecting the transportation community.

to a duty to warn National of the increased danger and it failed to do so.

At trial, the trial judge found that Celadon could not rely on the exclusionary terms, not having notified National of those terms. This despite the fact that the parties had prior dealings with each other where Celadon had specifically brought those terms to National's attention. The terms were also on Celadon's website. The logistics manager for National testified that there was no discussion, either in writing or orally, about limiting liability when transporting goods from Mexico (other than references to the tariffs and website in an email). The Court of Appeal refused to overturn Justice Chapnick's ruling that the terms and conditions applied. The trial judge had specifically held that:

> [T]he clauses in question were not brought to [National's] attention at the time that the agreement for shipment was reached with respect to the October or November shipments. [National] cannot be said to have assented to the inclusion of the exclusion of liability clause in the parties' contract.

The Court of Appeal held that that finding was not tainted by legal error and was clearly supported by the record. They saw no basis for appellate intervention. Surprisingly, this is in contrast to other court decisions that reference to terms and conditions on a website are sufficient for incorporation by reference into a contact. Warning to carriers: terms and conditions on a website and reference to a website are not sufficient to incorporate those terms into a contract of carriage unless notorious and clear proof is provided to the court that the terms were clearly brought to the attention of the shipper/customer at the time of the making of the contract. To be safe, carriers should send a copy of the tariff to the customer and have them sign off on the terms.

With regards to the statutory limitation of liability, Celadon submitted on appeal that, even if the exclusion of liability clause did not apply, liability was limited by s. 9 of Schedule 1 of Ontario Regulation 643/05 because the contract was governed by Ontario law. Section 9 provides that carrier liability is limited to $4.41 per kilogram unless s. 10 is satisfied. Section 10 provides the following:

> If the consignor has declared a value of the goods on the face of the contract of carriage, the amount of any loss or damage for which the carrier is liable shall not exceed the declared value.

There was no declared value on the bill of lading. The trial judge found that, as a copy of the commercial invoice issued by the Mexican consignor was provided to the carrier, s. 10 was satisfied.

The Court of Appeal found that the trial judge erred in law in so finding stating:

> [20] The terms of s. 10 are clear. The consignee must declare the value of the goods on the face of the contract of carriage. Section 4(1) of the regulation specifies what a contract of carriage must contain and that specification includes "(i) a space to show the declared valuation of the shipment, if any".
>
> [21] The bill of lading used for these shipments met the specifications of s. 4 and included a space to show the declared value of the shipment. That space was not completed for these shipments. The invoice issued to National by the consignor had nothing to do with the contract of carriage and providing a copy of the invoice to the carrier was not declaring the value of the goods on the face of the contract of carriage within the meaning of the regulation.

The Appeal Court concluded that the trial judge erred by failing to limit National's claim to the value permitted by the regulation, namely, $110,830 (Canadian).

With respect to the trial judge's finding that the exclusion term in the tariff was unconscionable, the Court of Appeal incidentally implied that the trial judge was wrong, stating "As we have concluded that the trial judge did not err in

holding that the exclusion of liability clause did not apply, it is not necessary for us to deal with her finding of unconscionability. Our silence, however, should not be taken as agreeing with that finding."

Lastly, the Court of Appeal considered the trial judge's finding that Celadon was independently negligent (and could not limit liability) for its failure to adequately warn National about the enhanced risk of hijacking in Mexico. The Court found that the trial judge erred on this issue as well. The Court agreed with Celadon that the trial judge erred in law by holding that Celadon could be liable in tort in the circumstances of this case. Any failure or neglect on the part of Celadon with regard to the shipments arose directly out of the duties associated with performance of the contract of carriage and, as such, did not give rise to an independent duty in tort.

Accordingly, Celadon was entitled to limit its liability to the $4.41 per kilogram ($2 per pound) Ontario statutory limitation of liability.

Rui M. Fernandes

Follow Rui M. Fernandes on Twitter @RuiMFernandes and on Linkedin. See also his blog at http://transportlaw.blogspot.ca

[Rui M. Fernandes and David Huard of Fernandes Hearn LLP were counsel for Celadon in this matter]

2. Global Transportation and Insurance Updates

A. SOLAS UPDATE

The IMO (International Maritime Organization) has amended the SOLAS (Safety of Life at Sea) Convention to require a packed container's gross weight to be verified before the container can be loaded on board a vessel. This new rule will come into effect on July 1st, 2016. A container without a verified gross mass (VGM) cannot be loaded on a vessel. Shippers have to submit the VGM to the shipping line who must transmit the information to the terminal operator. The IMO places responsibility on all parties involved for compliance. The IMO Guidelines provide:

> 13.1 Notwithstanding that the shipper is responsible for obtaining and documenting the verified gross mass of a packed container, situations may occur where a packed container is delivered to a port terminal facility without the shipper having provided the required verified gross mass of the container. Such a container should not be loaded onto the ship until its verified gross mass has been obtained. In order to allow the continued efficient onward movement of such containers, the master or his representative and the terminal representative may obtain the verified gross mass of the packed container on behalf of the shipper. This may be done by weighing the packed container in the terminal or elsewhere. The verified gross mass so obtained should be used in the preparation of the ship loading plan. Whether and how to do this should be agreed between the commercial parties, including the apportionment of the costs involved.

The SOLAS amendment will apply globally. Like other SOLAS provisions, the enforcement of the SOLAS requirements regarding the verified gross mass of packed containers falls within the competence and is the responsibility of the SOLAS Contracting Governments. Contracting Governments acting as port States are to verify compliance with these SOLAS requirements. Any incidence of non-compliance with the SOLAS requirements is enforceable according to national legislation.

B. UK Supreme Court – "*Global Santosh*" Decision Handed Down

The Supreme Court handed down its decision on May 11th, 2016 in *NYK Bulkship (Atlantic) NV (Respondent) v Cargill International SA (Appellant)* [2016] UKSC 20. By a time charter dated 11 September 2008, on an amended NYPE form, the owners NYK Bulkship ("NYK") chartered the vessel *Global Santosh* to charterers Cargill International ("Cargill") for a one time charter trip ("the charter"). Cargill sub-chartered the vessel to Sigma Shipping. The vessel carried a cargo of cement from Slite, Sweden to Port Harcourt, Nigeria, pursuant to a contract of sale between Transclear SA (as sellers) and IBG Investments Ltd, which had the ultimate obligation to discharge the cargo. Transclear had probably sub-chartered the vessel, but whether this was from Sigma or by a more indirect link was not clear. Under that sale contract, IBG was to pay demurrage to Transclear in the event of delay in discharge beyond the agreed laytime in the contract. If that demurrage was unpaid, Transclear was purportedly granted a lien over the cargo.

The vessel arrived at Port Harcourt on 15 October 2008 and tendered notice of readiness. She was instructed to remain at anchorage because of port congestion (caused, at least in part, by the breakdown of IBG's off-loader). She proceeded to berth on 18 December 2008, but was ordered back to anchorage and arrested on the basis of a Nigerian court order arising from a claim by Transclear to secure a demurrage claim against IBG. This was an obvious mistake, because the order should have directed the arrest of the cargo, not the vessel. Following an agreement between Transclear and IBG, the vessel finally began discharging on 15 January 2009 and completed discharge on 26 January 2009.

Cargill withheld hire for the period of the arrest.

It relied on an off-hire clause in the charter, clause 49, which stated that the vessel should be off-hire during any period of detention or arrest by any authority or legal process during the charter, with the proviso "*unless such capture or seizure or detention is occasioned by any personal act or omission or default of the Charterers or their agents*". Cargill commenced London arbitration claiming hire, but the arbitrators determined that the proviso in clause 49 did not apply during the period of the arrest. On an appeal, the Commercial Court allowed the appeal, holding that IBG's failure to discharge within the laydays under its contract of sale with Transclear and to pay demurrage were omissions in the course of discharging, and remitted the question of causation back to the arbitrators. The Court of Appeal dismissed the appeal, on the basis that the delay to the vessel fell within the charterer's "sphere of responsibility". Cargill appealed to the Supreme Court.

The Supreme Court allowed Cargill's appeal by a majority of four to one, holding that the vessel was off hire throughout the period of arrest and that the proviso in clause 49 was not engaged. Lord Sumption gave the lead judgment, with which Lord Neuberger, Lord Mance and Lord Toulson agreed. Lord Clarke wrote a dissenting judgment, and would have dismissed the appeal and held that the vessel was on hire.

C. UK Supreme Court – "*Res Cogitans*" Decision Handed Down

The Supreme Court handed down its decision on May 11th, 2016 in *PST Energy 7 Shipping LLC and another v O W Bunker Malta Limited and another* [2016] UKSC 23. In October 2014, PST Energy 7 Shipping LLC and Product Shipping and Trading S.A., the owners and managers of the vessel *Res Cogitans,* (collectively, the "Owners") ordered a quantity of marine fuel, (the "bunkers") from OW Bunker Malta Ltd ("OWB"). The contract between OWB and the Owners provided for payment 60 days after delivery and included a clause under which property was not to pass to the Owners until payment for the bunkers had been made. It also entitled the Owners to use the bunkers for the propulsion of *Res Cogitans* from the moment of delivery.

OWB obtained the bunkers from its parent company, OW Bunker & Trading A/S ("OWBAS"). OWBAS obtained the bunkers from Rosneft Marines (UK) Ltd ("RMUK"), which obtained them from RN-Bunker Ltd ("RNB"). In November 2014 OWBAS announced that it was applying to the Danish courts for restructuring and subsequently became insolvent. ING Bank NV ("ING") became the assignee of OWB's rights against the Owners.

The Owners consumed all of the bunkers in the vessel's propulsion, without making payment to OWB, which did not make payment to OWBAS, which in turn did not make payment to RMUK. RMUK paid RNB and demanded payment from the Owners, asserting that it remained the owner of the bunkers. The Owners commenced arbitration against OWB and ING, seeking a declaration that they were not bound to pay for the bunkers, or damages for breach of contract, on the grounds that OWB had been unable to pass title to them, owing to the application of s. 2(1) and s.49 of the Sale of Goods Act 1979 ("SoGA"). The arbitrators determined that OWB did not undertake to transfer property in the bunkers to the Owners under the Contract and that the Owners therefore remained liable to pay OWB/ING. Males J agreed and the Court of Appeal dismissed a further appeal by the Owners.

The Supreme Court unanimously dismissed the appeal by the Owners, PST Energy. Lord Mance gave the only judgment, with which the other Justices agreed.

D. Tokyo District Court Approves Rehabilitation Plan for DCKK

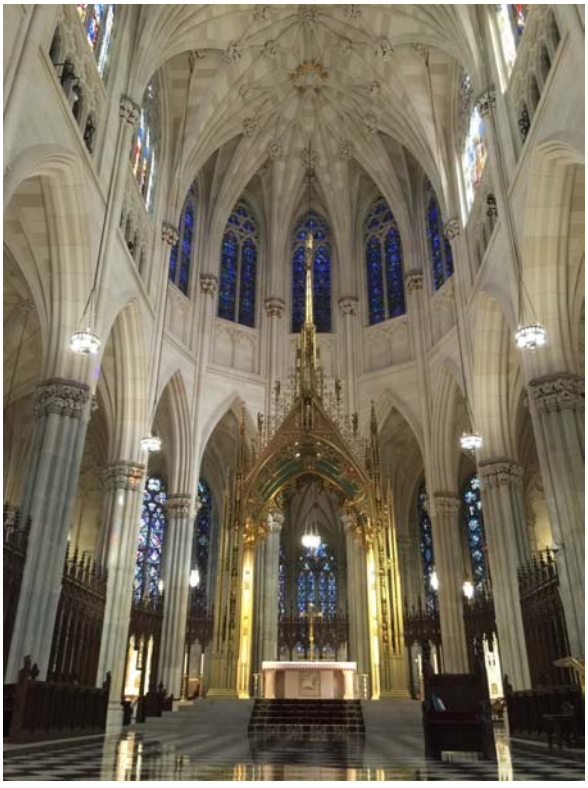
The Tokyo District Court has approved the rehabilitation plan for Japanese bulk-shipper Daiichi Chuo Kisen Kaisha (DCKK). The rehabilitation plan of Star Bulk Carriers, Daiichi Chuo's wholly owned subsidiary, has also been

approved and confirmed by the court. Under the rehabilitation plan, Daiichi Chuo would buy all of the company's existing shares without consideration. Following the confirmation of the plan, the company would acquire and cancel the shares and issue new shares through which fourteen maritime cluster members would become Daiichi Chuo's new shareholders.

E. Greece - Piraeus Court of Appeal - Manager of Vessel Not Liable for Insurance Premium

The management company of a number of vessels arranged insurance cover for them. Premium being due, the insurers sued the managers claiming the premium. The managers contended they were not party to the insurance contract; they were acting on behalf of their principals, who were the shipowners; they alleged this was also clear to the underwriters, who were issuing the payment receipts in the name of the manager, "on behalf of" the owner. Based on this evidence, the court rejected the claim against the manager, considering it was the owners who were party to the insurance contract and it was them *(sic)* who had to pay the insurance company. Piraeus One Membered Court of Appeal Judgment no 110/2014, Judge: I. Apostolopoulos, Attorneys at law: X. Adamandidis, Al. Konnidas, Maritime Law Review vol. 42, p. 360. NOTE: The manager can assume technical management (maintenance equipment, crewing of vessel) or commercial and technical management (also including chartering, expenses settlement, and any other job related to the vessel). The manager acting within these duties, binds the owner. For the manager to become liable, it should either not declare it acts for the principal – and under circumstances that cannot be inferred – or it should act beyond the scope of its powers.
[*This legal column was written by Manolis Eglezos, Attorney at law, Manolis Eglezos & Associates Law Firm Attorneys at Law and Consultants, www.eglezoslaw.gr*]

Follow Rui M. Fernandes on Twitter @RuiMFernandes and on Linkedin. See also his blog at http://transportlaw.blogspot.ca



3. It's How You Perform a Contract that Matters, Not the Outcome: *An Update on the Duty of Good Faith Between Contracting Parties*

Introduction

The Supreme Court of Canada caused a stir in legal circles with its 2014 ruling in the case of *Bhasin v. Hyrnew* (*1). In this decision, the Supreme Court ruled that parties to a contract had a duty of "honest performance", requiring them to be honest with each other in relation to the performance of their contractual obligations. This decision also reiterated the priority in the interpretation and enforcement of contracts of giving effect to the mutual and objective intentions of the parties. This may be as expressed in the words of the contract, or, where the contract language not draw the entire picture of the intention, to the surrounding circumstances at the time of the making of the contract (*2). The Supreme Court in *Bhasin* noted that "*commercial parties reasonably expect a basic level of honesty and good faith in contractual dealings. While they remain at arm's length and are not subject to the duties of a fiduciary, a basic level of honest conduct is necessary to the proper functioning of a contract*" (*3).

In principle, this line of judicial reasoning makes sense. However, there remains concern as to how, over time, this reasoning might be put into practice: what exactly does this mean in the context of a contractual relationship? Invariably, what may seem to be lofty, if not abstract judicial pronouncements, gain practical traction over time as they are applied to specific facts of cases as they come forward. The recent case decided by the Ontario Superior Court of Justice of *Mayotte v. Her Majesty the Queen in Right of Ontario* (*4) provides some guidance and practical application of this new "duty of good faith" principle. Citing the words of the trial judge, Mr. Justice Gans, this good faith obligation "*is not tethered to outcome as opposed to process or performance*". In other words: a party to a contract who is disappointed with their compensation or who perceives a bad bargain cannot seek to rewrite a contract simply by labeling the other as being "unreasonable" or not being in good faith when setting or adjusting compensation during the life of the contract. In short, if the *process* contemplated by the contract for use of discretion by a party (in setting compensation for the other, or otherwise) is *performed* reasonably in the circumstances then the recipient (other party) cannot try to label the former as being in bad faith simply because it is not content with the contract.

This ruling is consistent with another time honoured principle of contract law, that the courts will not interfere with the adequacy of contract consideration (i.e. "*is a party being paid enough*") as long as there is some legal consideration (i.e. "*there is a contract as long as both parties are each both giving and getting benefits*").

The facts of the *Mayotte* case provide an illustration of the difference between what a party might say is an unreasonable or an unjust *outcome* (which the court will not relieve) and what is unreasonable or unjust *performance* of a contract (in respect of which, in light of *Bhasin*, a court may now intervene).

The Facts

In Ontario, certain government services are provided through automated kiosks. For example, one may renew a driver's license 'tag' at such a kiosk. They are located throughout the province. Most such "ServiceOntario stores" are owned and operated by an array of business enterprises, composed of sole proprietorships, corporations and every manner of organization in between, including chambers of commerce, boards of trade and even sporting goods stores.

Approximately 381 of these operators and former operators, otherwise known as "Private Issuers", globally referred to as members of the private issuers network ("PIN"), were certified as a Class Action Proceeding class by Mr. Justice

Perell in 2010. In the trial recently heard by Mr. Justice Gans, the Private Issuers argued through Mr. Mayotte (the representative plaintiff for the purposes of the class proceeding) that Ontario was in breach of one or more contracts signed by members of the PIN from and after 2003. In particular, the plaintiff argued that the remuneration that the PIN received for the services they performed for and on behalf of the Ministry of Transportation (MTO) and the Ministry of Health (MOH) (to name but two branches of the Ontario government) from 2003 were woefully inadequate and constituted a breach of the PIN agreements with Ontario in that the government failed to act reasonably and in good faith when setting the issuer (operator) compensation from time to time, as contemplated under the agreements.

The plaintiff's position was that, because Ontario had a unilateral discretion to set issuer compensation from time to time over the life of the contract, it had a duty to exercise that right in a fair and reasonable manner.

Ontario dictates the nature and type of the transactions and services delivered by members of the PIN, and the manner in which such are to be performed. For example, the government directs and implements issuer and issuer staff training, determines the hours of outlet operation, signage, municipal location, the number of outlets, and approves all manner of forms utilized in the process. Putting it otherwise, while an issuer is entitled to conduct or 'partner' with another business at a Service Ontario outlet so long as it does not compete or conflict with its function as a 'licensing' bureau, Ontario dictates everything from soup to nuts in respect of the day-to-day functioning of the outlet.

In addition, in what was the root of this action, all charges and fees levied on vehicle permits and driver's licence holders are fixed by the Province without input from the PIN. All funds collected are thereafter remitted to the Treasurer of Ontario, after the deduction by the PIN members of the prescribed "commission", the rate in respect of which is set by the Province.

There was little doubt on the evidence that members of the PIN complained to and at all levels of the MTO, up to the then Ministers, who were seemingly changed on an annual basis, that the level of compensation was inadequate. The parties were also in agreement in the lawsuit that from and after 2003 the PIN additionally asserted the position that Ontario was not "*acting in good faith"* and that "*…the nature of the PIN members' assigned duties has substantially changed and that their compensation has not kept pace with their increased expenses or with increases in the cost of living*".

The Issue

In framing the issue, the judge noted that Ontario both had and exercised a discretion in the fixing of Private Issuer compensation during the relevant time frame. Accordingly the judge addressed the following issue: "Did the Province breach the compensation provisions of the Contracts by running afoul of a duty to perform its contractual obligations in good faith or by otherwise exercising Ministerial discretion improperly"?

Analysis and Discussion

The judge reviewed the essential principles laid down by the *Bhasin* decision (*5).

> "In *Bhasin*, the Supreme Court of Canada brought clarity to the often confounding debate as to when and under what circumstances a court could import a contractual duty of good faith or a duty of honest performance even in the face of an entire agreement clause. Cromwell J., speaking for a unanimous court, summarized in some 60 pages, a survey of the Anglo-Canadian jurisprudential discourse on the aforesaid duty, which included its history and development. Without descending into the details of the contractual instances and relationships in which a duty has or has not been imposed, Cromwell J. summarized his review as follows:
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> (1) There is a general organizing principle of

> good faith that underlies many facets of contract law.
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> (2) In general, the particular implications of the broad principle for particular cases are determined by resorting to the body of doctrine that has developed which gives effect to aspects of that principle in particular types of situations and relationships.
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> (3) It is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations.

I am mindful of the further 'explanatory' notes contained in Cromwell J.'s judgment, which I reproduce below, rather than doing a disservice to the parties by attempting to paraphrase the same:

> [60] *Commercial parties reasonably expect a basic level of honesty and good faith in contractual dealings.* While they remain at arm's length and are not subject to the duties of a fiduciary, a basic level of honest conduct is necessary to the proper functioning of commerce. The growth of longer term, relational contracts that depend on an element of trust and cooperation clearly call for a basic element of honesty in performance, but, even in transactional exchanges, misleading or deceitful conduct will fly in the face of the expectations of the parties…
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> …
>
> [65] The organizing principle of good faith exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner. *While "appropriate regard" for the other party's interests will vary depending on the context of the contractual relationship, it does not require acting to serve those interests in all cases. It merely requires that a party not seek to undermine those interests in bad faith*. This general principle has strong conceptual differences from the much higher obligations of a fiduciary. Unlike fiduciary duties, good faith performance does not engage duties of loyalty to the other contracting party or a duty to put the interests of the other contracting party first.
>
> [66] This organizing principle of good faith manifests itself through the existing doctrines about the types of situations and relationships in which the law requires, in certain respects, honest, candid, forthright or reasonable contractual performance. Generally, claims of good faith will not succeed if they do not fall within these existing doctrines. But we should also recognize that this list is not closed. The application of the organizing principle of good faith to particular situations should be developed where the existing law is found to be wanting and where the development may occur incrementally in a way that is consistent with the structure of the common law of contract and gives due weight to the importance of private ordering and certainty in commercial affairs.
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> …
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> [70] *The principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest. In commerce, a party may sometimes cause loss to another – even intentionally – in the legitimate pursuit of economic self-interest...* Doing so is not necessarily contrary to good faith and in some cases has actually been encouraged by the courts on the basis of economic efficiency... The development of the principle of good faith must be clear not to veer into a form of *ad hoc* judicial moralism or "palm tree" justice. *In particular, the organizing principle of good*

> *faith should not be used as a pretext for scrutinizing the motives of contracting parties.*
> …
>
> [74] There is a longstanding debate about whether the duty of good faith arises as a term implied as a matter of fact or a term implied by law... I do not have to resolve this debate fully, which, as I reviewed earlier, casts a shadow of uncertainty over a good deal of the jurisprudence. *I am at this point concerned only with a new duty of honest performance and, as I see it, this should not be thought of as an implied term, but a general doctrine of contract law that imposes as a contractual duty a minimum standard of honest contractual performance. It operates irrespective of the intentions of the parties, and is to this extent analogous to equitable doctrines which impose limits on the freedom of contract, such as the doctrine of unconscionability.*
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> …
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> [86] The duty of honest performance that I propose should not be confused with a duty of disclosure or of fiduciary loyalty. A party to a contract has no general duty to subordinate his or her interest to that of the other party. However, contracting parties must be able to rely on a minimum standard of honesty from their contracting partner in relation to performing the contract as a reassurance that if the contract does not work out, they will have a fair opportunity to protect their interests.
> …
>
> [Emphasis added.]

Justice Gans relied on the above excerpted paragraphs to inform his task of considering whether or not Ontario discharged its duty of good faith in the manner and fashion in which it considered and ultimately approved compensation increases, or not, as the case may be, to the members of the PIN during the relevant time frame.

In what would prove to be a decisive factor in this case, Justice Gans noted that the plaintiff was not arguing that Ontario acted dishonestly in any respect or was in breach of any specific term of the operative agreements. The judge noted that in any event there was *"not a shred of evidence that supported either proposition*".

The plaintiff advanced the position that the duties of reasonableness and good faith applied to outcome and not to process. In other words, reasonableness was to be assessed on the basis of the objectively determined adequacy of the amount of compensation received by the members of the PIN during the class period. However, as stated by the judge, "… *when push came to shove … plaintiff's counsel was unable to direct me to a case where the "reasonableness" obligation was tethered to the outcome as opposed to process or performance".*

Further, while it was not a finding essential to the exercise, Mr. Justice Gans was not even persuaded that the amounts paid to the members of the PIN during the relevant time frame were commercially unreasonable.

Justice Gans considered the remaining key issue, relating to whether Ontario's discretion in fixing compensation from time to time was exercised reasonably in the particular commercial context with reference to the intention of the parties. Justice Gans noted that the PIN members were parties to adhesion contracts, which the plaintiff argued they had not negotiated and which concurrently provided Ontario with discretion to mete out compensation – which led to the plaintiff's argument that Ontario had an obligation to "*…set compensation reasonably and to do so from time to time*".

In addition, the plaintiff asserted that Ontario never undertook a wholesale review of the original time and motion analysis put in place after the original PIN "1988 Compensation Model" was introduced. This absence of review, the plaintiff suggested, was but another example of the unfairness in the process since it is indicative of the fact that Ontario was not being

responsive to the complaints of the PIN in a fundamental job-related way.

Finally, while not amounting to bad faith, *per se,* the plaintiff argued that the compensation review prescribed in the relevant contract language and which was mandated to be undertaken was never properly undertaken or not undertaken reasonably if not in good faith.

The judge framed the plaintiff's burden of proof as follows: the plaintiff must have shown that Ontario acted unreasonably or in bad faith when exercising its discretion in fixing the PIN compensation during the relevant period of time.

The judge ruled against the plaintiff, finding that the members of the PIN knew or ought to have known the levels of compensation that each was or would be receiving for the outlets being bid upon or operated at all relevant times. The judge was not persuaded that any PIN member had a reasonable expectation that compensation would be increased on a more regular basis than experienced during the relevant time frame.

This analysis also shows how critical the context is as concerns the initial contract negotiations in the judge finding "*that the members of the PIN would have known from discussions with representatives of the Ministry that budgeting for "asks", (a process where bureaucrats attempt to obtain extra money for projects or operations within their divisions) was most difficult and was beset with obstacles. In other words, in the budgeting process, balancing scarce resources and competing public policy demands is no mean feat…"* (*6).

Accordingly, Mr. Justice Gans found that Ontario did not act unreasonably or in bad faith as a matter of substance or as a matter of the proper exercise of discretion in not providing remuneration at the levels that the PIN members wanted over the relevant time frame.

Conclusion

The foregoing underscores that, generally speaking, a party to a contract will not be able to rewrite the contract on account of "buyer's remorse" by going to court to seek a better outcome. Parties to contracts have the obligation to not act unreasonably and to act in good faith in the performance of and process contemplated in a contract (for example, the use of discretionary rights and obligations). No doubt the *Bhasin* line of thought will be employed as an argument in future cases for unhappy contracting parties to seek relief. For the time being, *Mayotte* serves as a comforting example of how the courts balance judicial development and restraint in giving effect to the reasonable commercial intentions of contracting parties.

Gordon Hearn

Endnotes

(*1) [2014] 3 S.C.R. 494
(*2) See: *Sattva Capital Corp. v. Creston Moly Corp*. [2014] 2 S.C.R. 633 paras. 47-61
(*3) *Sattva*, at para 60.
(*4) 2016 ONSC 1233 (CanLII)
(*5) at paras. 38-40
(*6) at para. 70

4. New French Language Obligations regarding Commercial Signage for Companies that Carry on Business in Quebec

On May 4, 2016, the Quebec government published a draft regulation to amend the *Regulation respecting the language of commerce and business* (the "Regulation"). (*1) According to the draft published in the *Gazette Officielle du Québec*, the purpose of the amendments is to ensure the presence of French when a trademark in a language other than French is displayed outside. The draft regulation provides terms for implementing the new requirement and existing signs and posters have a transition period of 3 years to conform.

State of the Law regarding French Signage Requirements

Under Québec law, there is a general rule that commercial signage must be in French pursuant to the *Charter of the French Language.* However, until the draft regulation becomes law, there continues to be an exemption to this general rule that allows commercial signage to include words or names in English or other "foreign" languages, provided that the words or names are registered trade-marks under the Federal *Trade-Marks Act.* It is this exemption that the draft regulation seeks to address.

This exemption was challenged by the Office québecois de la langue française in *Magasins Best Buy ltée c. Québec (Procureur général)* (*2) but was upheld by the Superior Court and subsequently by the Québec Court of Appeal in Québec *(Procureure générale) v. Magasins Best Buy ltée*. (*3) These decisions were rendered in April 2014 and April 2015, respectively. The draft regulation is in response to these decisions.

Legislation

The relevant sections of the *Charter of the French Language* (the "Charter") that require all commercial signage to be in French read as follows:

> *58. **Public signs and posters and commercial advertising must be in French.***
>
> *They may also be both in French and in another language provided that French is markedly predominant.*
>
> ***However, the Government may determine, by regulation,** the places, cases, conditions or circumstances where public signs and posters and commercial advertising must be in French only, where French need not be predominant or **where such signs, posters and advertising may be in another language only.***
>
> *63. The name of an enterprise must be in French.*
>
> *68. The name of an enterprise may be accompanied with a version in a language other than French provided that, when it is used, the French version of the name appears at least as prominently.*
>
> ***However, in public signs and posters and commercial advertising, the use of a version of a name in a language other than French is permitted to the extent that the other language may be used in such signs and posters or in such advertising pursuant to section 58 and the regulations enacted under that section.***
>
> *In addition, in texts or documents drafted only in a language other than French, a name may appear in the other language only.* [emphasis added].

The relevant sections of the Regulation read as follows:

> *25. **On public signs and posters and in commercial advertising, the following may appear exclusively in a language other than French:***
>
> *(1) the firm name of a firm established exclusively outside Québec;*
>
> *(2) a name of origin, the denomination of an exotic product or foreign specialty, a heraldic motto or any other non-commercial*

motto;

(3) a place name designating a place situated outside Québec or a place name in such other language as officialized by the Commission de toponymie du Québec, a family name, a given name or the name of a personality or character or a distinctive name of a cultural nature; and

(4) a recognized trade mark within the meaning of the Trade Marks Act (R.S.C. 1985, c. T-13), unless a French version has been registered.

27. An expression taken from a language other than French may appear in a firm name to specify it provided that the expression is used with a generic term in the French language. [emphasis added].

Changes Pursuant to the Draft Regulation

If the draft regulation becomes law, the Regulation will be amended by adding the following after section 25 to specifically address the trademark exemption:

> *25.1. Where a trade mark is displayed outside an immovable only in a language other than French under paragraph 4 of section 25, a sufficient presence of French must also be ensured on the site, in accordance with this Regulation.*

"Immovable" is defined in the draft regulation to mean a building and any structure intended to receive at least one person for the carrying on of activities, regardless of the materials used, excluding a temporary or seasonal facility. "Premises" means a space, closed or not, devoted to an activity, in particular a stand or counter intended for the sale of products in a mall, excluding a temporary or seasonal facility.

The draft regulation indicates that "outside an immovable" means the signs or posters related or attached to an immovable including its roof, regardless of the materials or method of attachment used. The signs or posters include projecting or perpendicular signs, and signs or posters on a bollard or other independent structure. The draft regulation provides further clarification by stating that:

> *The following signs and posters are considered to be outside an immovable:*
>
> *(a) signs or posters outside premises situated in an immovable or a larger property complex. Signs or posters outside premises situated in a mall or a shopping centre, underground or not, are included;*
>
> *(b) signs or posters inside an immovable or premises, if their installation or characteristics are intended to be seen from the outside.* ***Trade mark signs or posters appearing on a bollard or other independent structure, including a totem type structure, near an immovable or premises are concerned only if there is no other outside sign or poster on which the trade mark appears.***

Therefore, if the name of the company accompanied by a French description is located on a sign on the building, an independent structure nearby may have only the trademark displayed.

The draft regulation explains that the "presence of French" refers to signs or posters with (1) a generic term or a description of the products or services concerned; (2) a slogan; (3) any other term or indication, favouring the display of information pertaining to the products or services to the benefit of consumers or persons frequenting the site.

For example, the name SECOND CUP, which is registered as a trade-mark under number TMA667044 becomes LES CAFÉS SECOND CUP® in Québec, where "LES CAFÉS" would be considered a generic term or description of the products concerned.

Under proposed section 25.3, the "presence of French" is "sufficient" when signs or posters have qualities which:

(1) give French permanent visibility, similar to

that of the trade mark displayed; and
(2) ensure its legibility in the same visual field as that mainly covered by the trade mark signs or posters.

The draft regulation goes on to provide requirements concerning lighting as well as where one must be situated in connection with the sign in order to evaluate is legibility. It also provides some exclusions where these rules do not apply; for example, signs showing business hours, addresses, numbers and percentages, *etc.*

Conclusion

Companies who carry on business in Quebec and have premises in the province should be aware that if the draft regulation becomes law, they will be required to add, within three years, a French description to any signs or posters appearing on their premises which currently show only a registered trademark that is not in French. Companies who have registered the name of their business as a trademark and use that trademark as their sign or poster in Québec should be particularly aware of the proposed amendment.

A comment period is open to the public until June 18, 2016. Written comments can be sent to the Minister of Culture and Communications and the Minister responsible for the Protection and Promotion of the French Language, 225, Grande Allée Est, 1er étage, Québec, QC, G1R 5G5.

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Endnotes
(*1) Regulation: Chapter C-11, r. 9; draft regulation published in: GAZETTE OFFICIELLE DU QUÉBEC, May 4, 2016, Vol. 148, No. 18, Pg. 1967.
(*2) 2014 QCCS 1427
(*3) 2015 QCCA 747

5. Vessel Mortgagee Not Required to Arrest and Sell Boat

The Court's reasons for judgment in *National Bank v. Rogers et al.* sing like a sad maritime ballad (*1). They tell the tale of hard-done-by yacht owners who were called upon to fully repay a vessel-mortgage lender, even though the boat never worked and it had to be returned to the dealer, who subsequently went bankrupt. The Court found that the lender could sue the poor couple instead of enforcing its debt through a sale of the boat.

In legal terms, we say that the mortgagee (lender) could enforce its right *in personam* (against the buyers) and that it had no obligation to enforce upon the vessel *in rem* (*i.e.* to have the boat arrested and sold).

In the summer of 2010, Donald and Janice Rogers bought a yacht that had caught their eyes at the Toronto Boat Show the previous winter. The Rogers paid $924,914.97, of which $675,180.20 was financed through a facility that the vendor, Crate Marine Sales ("Crate Marine"), had with the National Bank (the "Bank"). The sale was reported to the Bank, which approved the transaction and had the buyers execute a standard bank form. In so doing, the Bank took an assignment of the sales contract from Crate Marine, which included a covenant from the Rogers that the Bank would not be liable for any warranties or defects.

For five years, the Rogers made blended payments of principal and interest. As far as the Bank knew, everything was fine.

Unfortunately, however, everything was not fine. The boat turned out to be a dud. The evidence at trial was that it was "grossly deficient" from the beginning. Thus, about half a year after the Rogers took possession, Crate Marine agreed to replace it with a new boat at no additional charge. The Rogers returned their lemon in October 2010, on the understanding that they would get a replacement vessel the following spring.

Shortly after the return, in November 2010, the Bank registered its vessel mortgage. The Rogers provided photos of the boat for registration purposes in November 2010, weeks after having relinquished possession. At this time, the Rogers aptly named her the KICK AFT.

In October 2011, Crate Marine resold the KICK AFT for $520,000 to another buyer. However, the second sale was never registered. The Bank's original mortgage registration remained on the books. The Bank was never advised of the return of the vessel or the purported sale to a second buyer. In fact, the Bank was never advised of the KICK AFT's defects. None the proceeds were forwarded to the Rogers. Rather, Crate Marine pocketed it all.

The relationship between Crate Marine and the Rogers deteriorated. The Rogers never did get their replacement boat, but they were compensated for the mortgage payments by monthly contributions from Steve Crate, Crate Marine's proprietor.

In 2015, Crate Marine went bankrupt, Steve Crate stopped funneling compensation money into the Rogers account, and the mortgage went into arrears. The Bank sued the Rogers, also naming the KICK AFT as a Defendant *in rem*.

Normally, the purpose of suing a boat *in rem* is to arrest it and to have it sold if need be. However, rather than going to the trouble of having the boat arrested, the Bank in this case simply made a motion for summary judgment against the Rogers.

The Rogers argued that the Bank should have enforced upon the vessel. In this regard, they relied on the law of mortgages relating to real estate, which requires a vender-in-possession to sell at the best price possible. However, the Honourable Mr. Justice Harrington of the Federal Court found that a vessel was not analogous to real property. He clarified that there is never an obligation to have a vessel arrested and, in any event, an arrest does not technically put a

mortgage lender in possession. In such circumstances, it is the Court that conducts the sale and distributes any proceeds, not the litigants.

Reading between the lines, the Court was likely displeased that the Rogers tacitly allowed the vessel to be sold to a new owner without notifying the Bank. Of course, both the new buyer and the bank were entirely innocent.

His Honour also found that the Rogers were not entitled to raise ordinary defences that might have arisen under Ontario's *Sale of Goods Act* or Canadian Maritime Law (which incorporates sales of goods provisions) because they had contracted out of those protections in the agreement that assigned the sales contract from Crate Marine to the Bank. Interestingly, the Court's reasons for judgment do not touch upon the Ontario *Consumer Protection Act, 2002*, whose provisions cannot be contracted away. Perhaps the Rogers felt that the claim was time-barred or that the Bank could not be liable as a "supplier", even though it was an assignee of the sales agreement.

Finally, the Court also dismissed arguments that Crate Marine and Mr. Crate had acted as agents of the Bank, including when they took back the KICK AFT for an exchange. To the contrary, His Honour found that the Rogers would not have cooperated in the mortgage registration process in November 2010 if they had truly believed their obligations to the Bank had ended with the return of the KICK AFT to Crate Marine.

In the end, the Rogers got quite a kick to the aft. Judgment was granted in favour of the Bank for $603,406.26, including interest, plus costs to be assessed later (*2).

The main legal take-away from *National Bank v. Rogers et al.* is that a vessel mortgagee is not required to arrest a vessel. Rather, it is entitled to maintain a court action, *in personam*, against any personal Defendants that it can point to.

This case turned on unusual facts because a change in ownership was not registered or reported to the lender, who was thereby put at risk and unable to protect its interest. Thus, one of its lessons is that the Court's sympathies may lie with an innocent lender, rather than a passive owner who was better placed to do something.

More generally, the decision places an onus on boat owners to protect their own interests. First, they ought to be live to the dangers of contracting out of the *Sale of Goods Act* or other consumer protection legislation; and they ought not rely on informal remedies such as Mr. Crate's monthly contributions. Secondly, they ought to ensure clarity in their contractual relationships, so that other parties, such as the National Bank in this case, are not left in the dark or prejudiced by fundamental changes to the *status quo*. Finally, just as it is important for mortgage lenders to register their interests in the vessel registry and under the appropriate provincial personal property registration system, it is equally prudent for boat owners to ensure that they are relieved of all obligations when relinquishing possession. In short, they ought to get paperwork to provide for the outcome that they want.

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Endnotes
(*1) 2015 FC 1207.
(*2) See additional reasons as to costs, 2015 FC 1390.

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CONTEST

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