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Newsletter

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Maritime Workplace Injuries Subject to Provincial Compensation Regimes

On August 2nd, 2013, the Supreme Court of Canada ("SCC") issued the long anticipated decision in *Maritime Services International Ltd. v. Ryan Estate* (*1) with far reaching consequences for Canadian maritime workplace injury claims. The decision, commonly referred to as the "Ryan's Commander" case, should stem the rising tide of maritime workplace injury lawsuits that have been commenced since the decision of the Newfoundland and Labrador Court of Appeal in 2011. That decision held that the province's workers' compensation law did not bar maritime workers' lawsuits because maritime negligence is a federal matter with which the provincial laws may not interfere.

In the "Ryan's Commander", the estates of the two Ryan brothers commenced action against the designer and builder of the vessel "Ryan's Commander", as well as the Attorney General of Canada, alleging negligence in the inspection of the vessel by Transport Canada after the vessel and the Ryan brothers were lost at sea while fishing. The Ryan brothers died when their ship, the *Ryan's Commander*, capsized while returning from a fishing expedition off the coast of Newfoundland and Labrador. The Newfoundland Workplace Health, Safety and Compensation Commission determined that the Ryan brothers were employees for the purposes of the provincial W*orkplace Health, Safety and Compensation Act (WHSCA)*, and as such, their dependents were barred by the *WHSCA* from suing for damages.

Under the Canadian *Constitution Act, 1867* the federal government has legislative authority under section 91 to make laws for the Peace, Order and good Government of Canada in relation to all matters not coming within the exclusive jurisdiction of the legislature of the provinces. In addition, the federal government is given exclusive legislation in relation to enumerated classes of subjects, including in sub paragraph 10, navigation and shipping. The federal *Marine Liability Act*, S.C. 2001, c. 6 provides for dependant's compensation for death in a marine accident.

FIRM AND INDUSTRY NEWS

• **Fernandes Hearn LLP** is pleased to announce that the Firm has been listed for inclusion in Chambers and Partners Global 2013 as one of the best "Shipping" Law Firms in Canada.

• **Rui Fernandes** has been selected by his peers for inclusion in the Eighth Edition of The Best Lawyers in Canada for in the practice areas of: Maritime Law and Transportation Law and **being named the Best Lawyers' 2014 Toronto Transportation Law "Lawyer of the Year".**

• **Gordon Hearn** has been selected by his peers for inclusion in the Eighth Edition of The Best Lawyers in Canada for in the practice areas of: Maritime Law and Transportation Law.

• **Gordon Hearn** will be speaking at a joint meeting of the Canadian Trucking Alliance, Ontario Trucking Association and Verisk Crime Analytics Canada – CargoNet on September 5th. The meeting is the Official Launch of "Project Momentum" to address cargo crime along the Highway 401 Corridor.

• **International Union of Marine Insurers (IUMI)** annual meeting – London England – 15th to 18th of September. **Rui Fernandes** will be representing the firm at the meeting.

• **Kim Stoll** will be speaking at the 2013 Canadian Transport Lawyers Association Annual Conference – Quebec City, Canada- 19th to 21st of September, 2013 on "Trucking Modal Update 2013".

• **International Marine Claims Conference** – Dublin Ireland – 25 to 27 September. **Gordon Hearn** will be representing the firm at the conference.

• **CMI Symposium** - Dublin Ireland – 27 September to 4 October.

• **LQ's 3PL and Logisticians Sustainability Symposium** – 26-27 September at the Toronto Board of Trade, Toronto, Canada. Kim Stoll will be representing the firm at **LQ's Women in Supply Chain Management Breakfast.**

• **Women's International Shipping and Trading Association (WISTA)** 1 to 4 October – Montreal, Quebec, Canada. **Kim Stoll** will be representing the firm at the conference.

FIRM AND INDUSTRY NEWS

• **Gordon Hearn** will be making a presentation to the joint meeting of the Freight Carriers Association of Canada and the North American Transportation Council at Niagara Falls, Ontario on October 2, 2013.

• **Canadian Board of Marine Underwriters** Network Night – October 3 Montreal, Quebec, Canada. **Kim Stoll** and **Martin Abadi** will be representing the firm.

• **Rui Fernandes** will be presenting a paper on general average in Montreal at the meeting of **The Association Mondiale de Dispacheurs / International Association of Average Adjusters** on October 8th.

• **2013 Surface Transportation Summit** 16 October Mississauga, Ontario Canada. **Kim Stoll** and **Martin Abadi** will be representing the firm at the summit.

• **Fort Lauderdale Mariners Club Seminar** – October 29-30, Fort Lauderdale. **Kim Stoll** will be representing the firm at the seminar.

As early as 1986 the Supreme Court of Canada in *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.,* [1986] 1 S.C.R. 752 made it clear that Canadian maritime law is uniform throughout Canada. It is the maritime law of England that has been incorporated into Canadian law and not the law of any province.

In *Ordon Estate v. Grail* [1998] 3 S.C.R. 437 the Court had to consider when provincial statutes of general application apply to maritime negligence claims. Specifically the Court had to consider:

a) Did the provisions of the *Ontario Family Law Act* allowing claims for loss of care, guidance and companionship by dependants (including common law spouses and siblings) apply to vessel accidents?

b) Did the provisions of the *Ontario Trustee Act* allowing the estate of a deceased person to bring an action for damages apply to vessel accidents?

The Supreme Court of Canada held that a provincial statute can be applicable to a maritime negligence action where, through a four part test, the court is satisfied that the provincial laws do not go to the core of the federal jurisdiction. If they do, those provincial laws will be "read down".

The Supreme Court of Canada in 2007 refined the division of power test in a non-transportation case (although it made comments regarding other cases including transportation cases). In *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 at issue was the application of certain licensing provisions of the *Alberta Insurance Act* to federally regulated banks selling insurance products as authorized by the federal *Bank Act*. The Supreme Court detailed the proper approach to and analysis to be applied to division of powers disputes.

The Court began with a brief discussion of the principles of federalism noting that the division of powers in the Constitution was designed to uphold diversity within a single nation. The reconciliation of unity with diversity was said to be the fundamental objective of federalism. This was achieved through the division of powers in the Constitution; however, the Court noted that, as with any constitution, the interpretation of those powers must continually evolve and be tailored "to the changing political and cultural realities of Canadian society." The various constitutional doctrines that have been developed by the courts must be designed to further the "guiding principles of our constitutional order," to reconcile diversity with unity and to facilitate "co-operative federalism."

The Court examined the constitutional doctrines and the interplay between them. These doctrines are pith and substance, inter-jurisdictional immunity and paramountcy.

Pith and Substance

The Court noted that every "division of powers" case must begin with an analysis of the pith and substance of the impugned legislation. It involves "an inquiry into the true nature of the law in question for the purpose of identifying the matter to which it essentially relates". If the pith and substance can be related to a subject matter within the legislative competence of the enacting legislature, then the law is constitutional and valid. However, if the statute relates to a matter over which the other level of government has exclusive jurisdiction, then the statute is unconstitutional and invalid or void in its entirety.

A determination of the pith and substance of a law involves a consideration of both "the purpose of the enacting body and the legal effect of the law." The pith and substance doctrine recognizes and accepts that there may be incidental intrusions into areas within the constitutional jurisdiction of the other legislature. These are acceptable and do not render a law ultra vires provided its dominant purpose is valid. Incidental effects are effects that are collateral and secondary to the

mandate of the enacting legislature. The pith and substance doctrine also recognizes that it is almost impossible to avoid incidentally affecting matters within the jurisdiction of the other legislature. The doctrine accepts that some matters have both provincial and federal aspects, are impossible to categorize under a single head of power, and that both levels of government can legislate in relation to such matters. This is known as the "double" or "dual aspect" doctrine. The double aspect doctrine ensures that the policies of elected legislators of both Parliament and the provincial legislatures can be adopted as valid legislation on a single subject, depending upon the perspective from which the legislation is considered of the various aspects of the matter in question. However, the Court also recognized that the scale of incidental effects could "put a law in a different light so as to put it in another constitutional head of power." In such a case, the statute could be read down. The Court acknowledged that there were circumstances where it was necessary to protect the powers of one level of government from intrusions by the other. For this purpose, the courts have developed the doctrines of "inter-jurisdictional immunity" and "paramountcy".

Inter-jurisdictional Immunity

This doctrine recognizes that the Canadian Constitution is based on an allocation of exclusive powers to both levels of government, not concurrent powers, although these powers are bound to interact. The Court held that it is a doctrine of limited application that should be restricted to its proper limit. This means, in practice, the doctrine will be largely reserved for those heads of power that deal with federal things, persons or undertakings, or where in the past its application has been considered absolutely indispensable or necessary to enable Parliament or a provincial legislature to achieve the purpose for which the exclusive legislative jurisdiction was conferred. The Court referred to the case of *Bell Canada v Quebec*, [1988] 1 S.C.R. 749, the leading case on inter-jurisdictional immunity, and noted that the doctrine is based upon the premise that each of the classes of subjects in sections 91 and 92 of the *Constitution Act, 1867* have a "basic, minimum and unassailable content" that is immune from intrusion by the other level of government.

The Court next proceeded to criticize the inter-jurisdictional immunity doctrine. The Court then developed a more restricted approach to inter-jurisdictional immunity.

> "For all these reasons, although the doctrine of inter-jurisdictional immunity has a proper part to play in appropriate circumstances, we intend now to make it clear that the Court does not favour an intensive reliance on the doctrine, nor should we accept the invitation of the appellants to turn it into a doctrine of first recourse in a division of powers dispute." [paragraph 47]

The limitations imposed by the Court on the doctrine of inter-jurisdictional immunity are:

(1) There must be actual "impairment" (without necessarily "sterilizing" or "paralyzing") of the "core" competence of the other level of government before the doctrine can be applied. The difference between "affects" and "impairs" is that "impairs" implies adverse consequences. Merely "affecting" the core is not sufficient; and

(2) The "core" of a legislative power should not be given too wide a scope. The "core" is what is "vital or essential", something "absolutely indispensable or necessary". It is not co-extensive with every element of an undertaking. The Court then reviewed the jurisprudence to facilitate an understanding of the limited scope of the inter-jurisdictional immunity doctrine. The court then proceeded to review a number of cases including transportation cases.

Paramountcy

The Court then turned to the doctrine of paramountcy, which comes into play when the

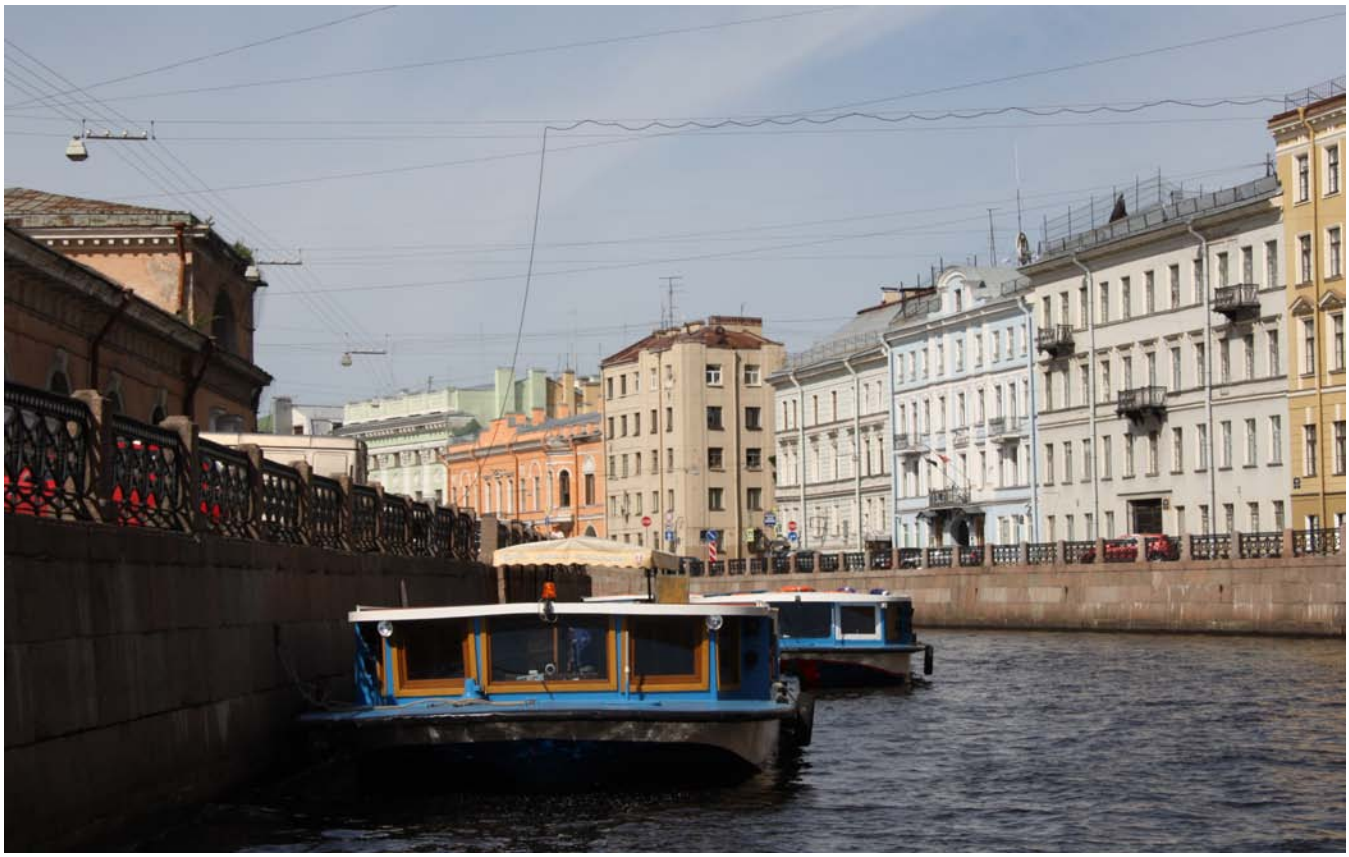
operational effects of provincial legislation are incompatible with federal legislation. Where the paramountcy doctrine applies, the federal law prevails and the provincial law is inoperative to the extent of the incompatibility. This doctrine was said to be "much better suited to contemporary Canadian federalism."

The Court recognized that the degree of incompatibility required to invoke the doctrine of paramountcy has been a source of difficulty. Before this doctrine can be applied, there must be "actual conflict" or "operational conflict" between the provincial and federal law in the sense that one says "yes" and the other "no". This requires more than a "duplication of norms" and recognizes that a provincial law may supplement federal law. In addition, the doctrine will apply where the provincial law frustrates the purpose of a federal law even though there is no direct violation of the federal law. This requires more than that the field be "occupied." There must be an incompatible federal legislative intent and, when looking for this intent,

> "the courts must never lose sight of the fundamental rule of constitutional interpretation that, 'when a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes' " [paragraph 75]

Order of Application of the Doctrines

The Court discussed the proper order of the application of the doctrines. Specifically, the order begins with the "pith and substance" analysis and then proceeds to the "paramountcy" analysis. The inter-jurisdictional



immunity analysis is, in general, reserved for situations already covered by precedent.

> "Although our colleague Bastarache J. takes a different view on this point, we do not think it appropriate to always begin by considering the doctrine of inter-jurisdictional immunity. To do so could mire the Court in a rather abstract discussion of "cores" and "vital and essential" parts to little practical effect. As we have already noted, inter-jurisdictional immunity is of limited application and should in general be reserved for situations already covered by precedent. This means, in practice, that it will be largely reserved for those heads of power that deal with federal things, persons or undertakings, or where in the past its application has been considered absolutely indispensable or necessary to enable Parliament or a provincial legislature to achieve the purpose for which exclusive legislative jurisdiction was conferred, as discerned from the constitutional division of powers as a whole, or what is absolutely indispensable or necessary to enable an undertaking to carry out its mandate in what makes it specifically of federal (or provincial) jurisdiction. If a case can be resolved by the application of a pith and substance analysis, and federal paramountcy where necessary, it would be preferable to take that approach, as this Court did in *Mangat*. In the result, while in theory a consideration of inter-jurisdictional immunity is apt for consideration after the pith and substance analysis, in practice the absence of prior case law favouring its application to the subject matter at hand will generally justify a court proceeding directly to the consideration of federal paramountcy." [paragraphs 77 and 78].

In *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, [2010] 2 S.C.R. 536 added to the case law on the division of powers. At para. 27, Chief Justice McLachlin enunciated a two-pronged test that must be met to trigger the application of the doctrine of interjurisdictional immunity:

> The first step is to determine whether the provincial law — s. 26 of the Act — *trenches on the protected "core" of a federal competence*. If it does, the second step is to determine whether the provincial law's effect on the exercise of the protected federal power is *sufficiently serious* to invoke the doctrine of interjurisdictional immunity. [Emphasis in original.]

In the "Ryan's Commander" the Supreme Court further refined its analysis of the division of powers. The Court started with an analysis of the "pith and substance" of the impugned legislation. The analysis of the pith and substance consists of "an inquiry into the true nature of the law in question for the purpose of identifying the 'matter' to which it essentially relates" (*2). The validity of the *WHSCA* in this case was not contested and the full pith and substance analysis was not required.

The Supreme Court looked at interjurisdictional immunity. It held that interjurisdictional immunity did not apply in the case at bar. The first prong of the test was met that the provincial law "trenched" on the protected cores of a federal competence, but not the second part of the test. The provincial law's effect on the exercise of the protected federal power was not sufficiently serious to invoke the doctrine of interjurisdictional immunity. The Court held that intrusion of the *WHSCA* "is not significant or serious when one considers the breadth of the federal power over navigation and shipping, the absence of an impact on the uniformity of Canadian maritime law, and the historical application of workers' compensation schemes in the maritime context" (*3).

The Supreme Court looked at the third division of powers test, the doctrine of federal paramountcy. It held that (*4):

> Federal paramountcy applies where there is an inconsistency between a valid federal legislative enactment and a valid provincial legislative enactment. The doctrine does not apply to an inconsistency between the common law and a valid legislative enactment. This is unlike interjurisdictional immunity, which protects the core of the "exclusive classes of subject" created by ss. 91 and 92 of the *Constitution Act, 1867* even if the relevant legislative authority has yet to be exercised: *Canadian Western Bank*, at para. 34. The Chief Justice contrasted the two doctrines in *COPA*:
>
>> Unlike interjurisdictional immunity, which is concerned with the *scope* of the federal power, paramountcy deals with the way in which that power is *exercised*. Paramountcy is relevant where there is conflicting federal and provincial legislation. [para. 62; emphasis in original.]

The Court held that federal paramountcy did not apply in this case under a proper interpretation of the *Marine Liability Act.* The Court held that section 6(2) of the *Marine Liability Act* read "in light of the broader statutory context, makes room for the operation of provincial workers' compensation schemes. The *WHSCA* and the *Marine Liability Act* can operate side by side without conflict.

In conclusion, the Supreme Court of Canada held that the provincial statute barring claims for workplace maritime injuries was valid.

Interestingly, the Attorney General of Canada intervened in the "Ryan's Commander" action and submitted that interjurisdictional immunity applied. It took that position that "maritime negligence law, which is part of the federal jurisdiction over navigation and shipping, includes rules relating to who can be compensated for death and injury resulting from a maritime accident. The statutory bar in s. 44 of the *WHSCA* sterilizes the right of dependants to sue for wrongful death pursuant to s. 6(2) of the *MLA.* There is no higher form of impairment. (*5). Given that the interjurisdictional immunity argument did not succeed, will the Federal government pass amendments to s. 6(2) the *Marine Liability Act* to remove the "room for the operation of provincial workers' compensation schemes" and bring paramountcy into play? Only time will tell.

Rui Fernandes

Endnotes:
(*1) 2013 SCC 44
(*2) *Canadian Western Bank v. Alberta* 2007 SCC 22, at para. 26.
(*3) at para. 64.
(*4) at para. 66.
(*5) at para. 21.

2. Commercial Host Liability Update on Apportionment

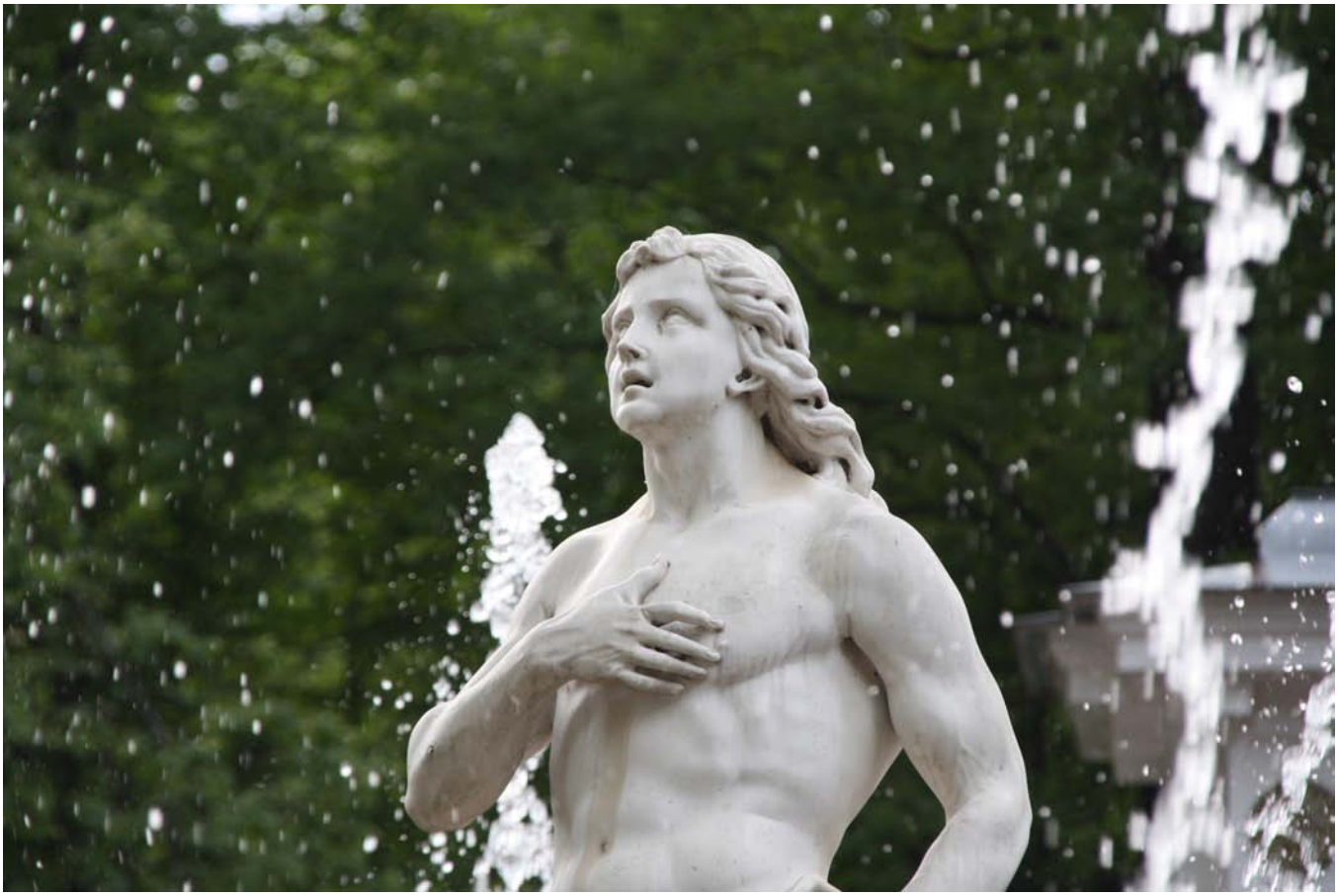
Lisa Hansen v. Danny P. Sulyma et al 2013 BCCA 349 (CanLII)

McLean v. Knox 2013 ONCA 357(CanLII)

Recently, the appellate courts of both Ontario and British Columbia have considered apportionment in two commercial host (tavern owners) responsibility cases.

Commercial host liability was established by *Jordan House Ltd. v. Menow* (*1), a case involving an intoxicated patron of a hotel who, after being ejected, was struck by a car while walking on the highway. The Supreme Court of Canada held that the hotel served the patron to the point of intoxication and, therefore, had a common law duty to see that he got home safely. There was a breach of that duty for which the hotel was responsible, according to the degree of fault found against it.

Hansen v. Sulyma concerns an appeal from a decision of the British Columbia Supreme Court. In November 2008, the plaintiff, Lisa Hansen, was a passenger in a parked motor vehicle that had run out of gas ("the Hansen vehicle") and which had been driven by one Danny Sulyma. While parked, the Hansen vehicle was struck from behind by another motor vehicle driven by one Clifton Leprieur, who had spent the evening drinking in a pub and was highly intoxicated. The



evidence showed that there was little or no effort was made by the pub-owners and/or employees to restrict Mr. Leprieur's drinking. As a result of the accident, Ms. Hansen was rendered quadriplegic. Mr. Sulyma was the only defendant at trial after certain "resolutions" which reached with the other defendants, Mr. Leprieur (who died before the trial), the pub owners and/or employees (*2).

At trial, the court found that Mr. Leprieur was 75% negligent, Mr. Sulyma was 25% negligent. The pub owners and employees (the "pub defendants") were found to be 5% negligent thereby reducing Mr LePreiur's negligence to 70%. Mr. Sulyma appealed on the basis that the court had misapplied the "but for" test of causation regarding his conduct and had applied "too high" a standard of care as well as taking issue with the Court's allocation of liability of only 5% on the pub defendants. Mr. Sulyma also appealed the finding that Ms. Hansen had not failed to take reasonable care for her own safety when she failed to insist a second time that the hazard lights be engaged or when she failed to exit the vehicle when they were not illuminated.

On July 24, 2013, the British Columbia Court of Appeal held, on the appeal of the finding of 5% liability on the pub defendants, that an award which allocated responsibility that was grossly disproportionate to that defendant's comparative blameworthiness constituted a "strong and cogent" reason to interfere with the Trial Judge's assessment. The Court of Appeal also criticized the method used by the Trial Judge in her application of percentage of liability. The proper method of determination of apportionment was also revisited recently in the *McLean v Knox* case reviewed below.

The Court of Appeal dismissed the other grounds of appeal that the Trial Judge had misapplied the "but for" test of causation with respect to the defendant driver's conduct and had applied "too high" a standard of care. The defendant driver's appeal regarding the finding that the plaintiff had failed to take reasonable care for her own safety was also dismissed.

The *McLean v Knox* case is a decision of the Ontario Court of Appeal involving a motor vehicle accident tried before a jury where an intoxicated driver and associated pub defendants were sued for over-service by the injured and intoxicated plaintiff passenger. The pub defendants admitted "at least 1%" liability but also claimed that the plaintiff was contributorily negligent thereby reducing his damages in respect of his willingness to accept a ride with the intoxicated driver. The plaintiff's decision-making ability was affected by his own intoxication, caused in part by the pub defendants' over-service. On appeal, the questions to the jury on liability and damages and the apportionment of liability regarding the pub defendants were at issue, amongst other matters. The court would not order a new trial despite errors in the questions to the jury on the basis of cost and delay, but rather the parties were asked for submissions on apportionment. Any decision in this regard has yet to be rendered.

Hansen v Sulyma and *McLean v Knox are* interesting regarding the apportionment of liability aspects both in the method to be used by the court in arriving at same and also, in the former case, respecting the ultimate liability percentage applied to the pub defendants.

Hansen v Sulyma: Facts

The plaintiff, Lisa Hansen, was the owner of and passenger in a motor vehicle driven by one Danny Sulyma. Their vehicle ran out of gas and Mr. Sulyma was forced to manouevre his vehicle onto the shoulder of the two-lane paved road, which had a yellow painted centre line and no fog lines. The parties agreed that the vehicle was entirely on the shoulder and not on the roadway at the time of the accident. The parties further agreed that the road was a "winding rural road with no artificial illumination." As they waited for the assistance promised by Mr. Sulyma's sister, Ms. Hansen asked Mr. Sulyma to

engage the hazard lights. Mr. Sulyma did not comply and the hazard lights were left off and no there was no further request or discussion about it.

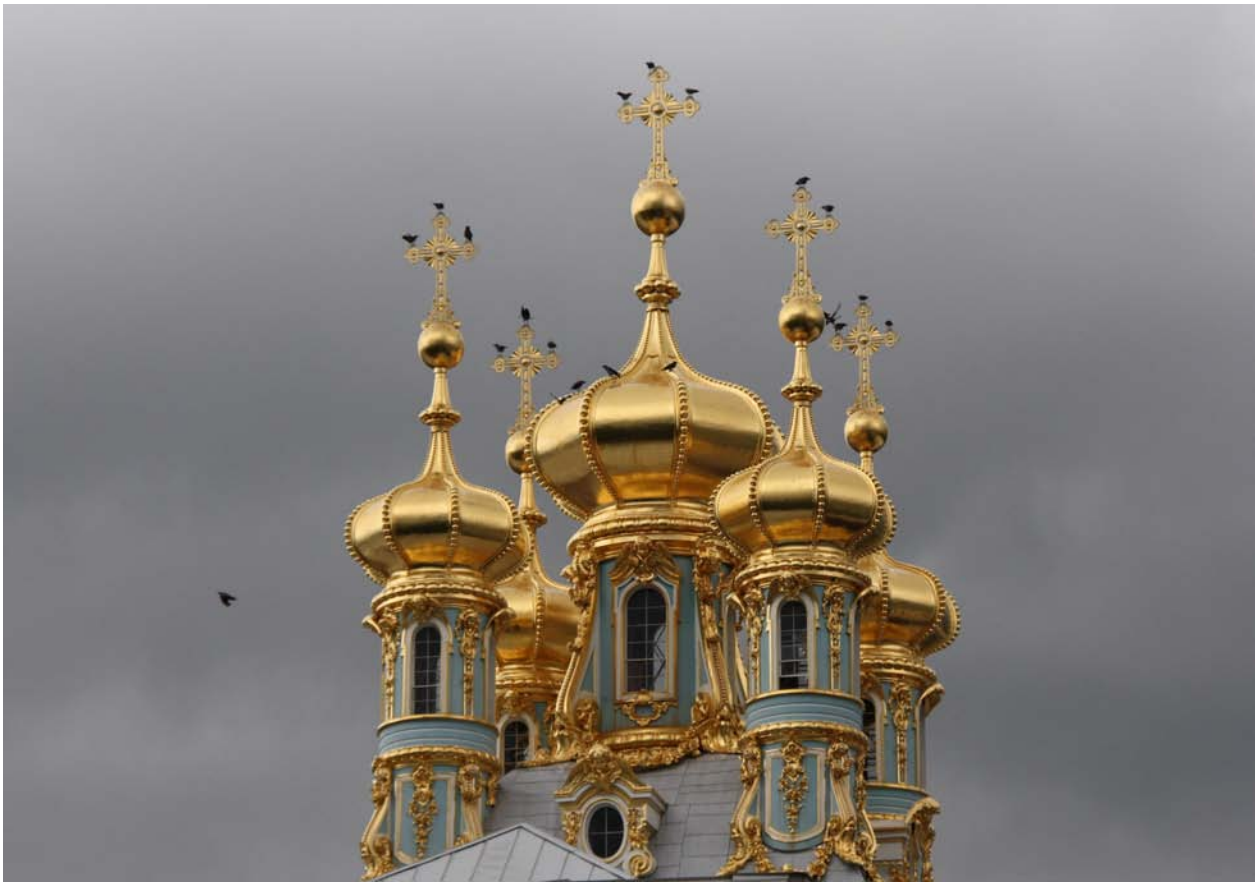
After about fifteen minutes, the vehicle driven by Clifton Leprieur approached from behind, swung wide on the curve coming and rear-ended the Hansen vehicle.

Mr. Leprieur was highly intoxicated at the time of the loss. He had spent the evening as a customer at the pub in the Texada Island Inn. He had arrived before 5 p.m. and stayed until about 9:45 p.m. He had consumed a least six (6) double rye whiskey and water drinks (each having not less than 2 ounces of alcohol).

There were two bartenders serving Mr. Leprieur that evening and, upon the change in the shift, the two bartenders did not discuss Mr. Leprieur, how long he had been drinking or his condition though three double ryes already purchased were clear on the tab, which eventually reached $100. The pub was busy and there was no attempt to "cut off" the flow of alcohol. Mr. Leprieur did not consume any food.

The first bartender testified that she had noted that Mr. Leprieur was "fine" though he was "catching a little buzz on". The second bartender testified that he did not show signs of being "an extremely drunk person, such as falling down or slurring his words". This seemed directly contrary to the offer by another pub patron to pay for a room at the Texada Inn for Mr. Leprieur and from which the court inferred that he exhibited signs of intoxication. Further, the police recorded that Mr. Leprieur had glassy eyes, was unsteady and smelled of alcohol.

As Mr. Leprieur had left little time to make the intended return ferry trip at 10 p.m., the court also concluded, based partly on Ms Hansen's testimony about the sounds from his approaching vehicle and the damage to the Hansen vehicle, that Mr. Leprieur was also travelling at a high rate of speed.



The issues at trial were whether the Mr. Leprieur, Ms Hansen, Mr. Sulyma and/or the pub defendants were negligent and how that liability should be apportioned.

Liability

The Trial Judge found that the pub and its employees had not met the standard of care applicable to commercial hosts in failing to stop serving alcohol to him, failing to evict him from the premises and failing to ascertain whether he would be driving when he left the bar and to stop him from driving.

The Trial Judge stated:

> Ms. Morris was aware from her knowledge of Mr. Leprieur's bar tab that he had already consumed three or four two-ounce drinks of whiskey. She failed to meet the standard of care required when she continued to serve alcohol to Mr. Leprieur and did not evict him from the bar or inform him that he would not be allowed to consume any more liquor in the bar. She also took no action to ascertain whether Mr. Leprieur would be driving when he left the bar, although I infer that she would have realized that that was likely, and she took no steps to stop him from driving.
>
> The actions of Ms. James and Ms. Morris contributed to Mr. Leprieur's state of intoxication and are causally related to the collision that occurred very shortly after Mr. Leprieur left the Texada Island Inn. [At paras. 64-5.]

The Trial Judge went on to find Mr. Leprieur negligent in that he was likely exceeding the posted speed limit and driving his vehicle in dark, wet conditions when his ability to do so was significantly impaired by excessive consumption of alcohol. Further, he was likely partially off the paved roadway whereas, if he had not been, he would not have impacted the Hansen vehicle.

Mr. Sulyma was found negligent for failing to meet the applicable standard of care by failing to activate the hazard lights on the Hansen vehicle or otherwise illuminating lights that would have made it more easily noticeable to drivers. As for causation, the Court found this failure by Mr. Sulyma "caused or contributed to the collision" and that, had the lights been on, Mr. Leprieur would likely have been alerted to the presence of the Hansen vehicle earlier than he was.

Ms. Hansen was not found to be negligent for failing to engage the hazard lights of her car herself or failing to insist that they be activated. Mr. Sulyma, the court said, was in control of the vehicle at all times and it was his duty as the driver to take all reasonable steps to ensure his own safety and that of his passenger. Ms. Hansen had already asked Mr. Sulyma to turn on the lights and, the Trial Judge found, she reasonably believed a second request would also be met with a dismissal.

In connection with the question of apportionment, the Trial Judge stated, if only Mr. Leprieur and Mr. Sulyma were found liable, then she would have allocated liability 75% to Mr. Leprieur and 25% to Mr. Sulyma, as it was his duty to "keep his passenger safe" which could be said to be "greater than the general duty owed by drivers to other users of the road in general."

The Court characterized Mr. Sulyma's failure to activate the hazard lights when asked by Ms. Hansen to do so as "deliberate conduct" that created a risk of harm to Ms. Hansen and other users of the road. The Trial Judge concluded:

> In my view, as Mr. Leprieur's act of driving while impaired was the most significant of his negligent acts, <u>the five percent liability apportioned to the pub defendants for over serving Mr. Leprieur should be applied to</u>

> reduce the blame attributed to him.
>
> In conclusion, I find that the defendants Leprieur, Sulyma, Morris, and James were all negligent, and that liability for the accident and for Ms. Hansen's injuries should be apportioned five percent jointly to the defendants Morris and James and any party vicariously liable for their negligence, 25 percent to Mr. Sulyma, and the balance to Mr. Leprieur, so that is 70 percent. [At paras. 89-90; emphasis added in appeal reasons.]

The Appeal

Mr. Sulyma appealed on the bases that the Trial Judge had erred in three ways: (1) in finding that he "caused or contributed" to the accident and breached the appropriate standard of care; (2) in failing to find that Ms. Hansen did not take reasonable care for her own safety (contributory negligence); and (3) in apportioning only "minimal fault" to the pub defendants. The appeal failed on the first two grounds.

Regarding the first ground, the Court of Appeal found that it was a reasonable conclusion that if Mr. Sulyma had activated his hazard lights, Mr. Leprieur would likely have been alerted to the presence of the Hansen vehicle and would have had adequate, or more, reaction time in which to decelerate. Even if deceleration would not have totally avoided the impact but would only have reduced Ms. Hansen's injuries, the "but for" test was still met.

As to whether the standard of care applied was correct, the Court of Appeal stated that the trial judge found, as a finding of *fact*, that Mr. Sulyma had failed to activate his hazard lights and was negligent for failing to take reasonable care in all the circumstances. There was no inappropriate application of a rule of *law* to the effect that "any driver who parks his car off the road may rest assured that he or she need not activate the vehicle's hazard lights". The Court of Appeal noted that "It all depends on the circumstances" and found that the trial judge, accordingly, reasonably concluded that it was reasonably foreseeable that a driver coming around the curve might swing wide. There was no requirement that Mr. Sulyma should have foreseen that an intoxicated driver would drive around a curve such as in this case.

As the second ground that Ms. Hanson was contributorily negligent in failing to insist that the hazard lights be activated or failing to exit the vehicle and step away from the roadway when they were not, there was no palpable error on the part of the trial judge, who accepted Ms. Hansen's evidence that she had asked Mr. Sulyma to do so and had been rebuffed. Her failure to exit the vehicle and distance herself from the roadway was not argued at trial but also ignored the fact that Ms. Hansen was on a dark roadway near bush and forest.

Apportionment of Liability – The Successful Ground of Appeal

The trial judge had found Mr. Sulyma 25% liable and Mr. Leprieur 70% liable having applied 5% less to him to account for the negligence of the pub defendants.

Mr. Sulyma argued that the degree of blameworthiness of the pub defendants' conduct was far greater than 5%, especially given the statutory duty imposed on commercial hosts by the *Liquor Control and Licensing Act,* R.S.B.C. 1996, c. 267. (*3) Mr. Leprieur had consumed 12 ounces of whiskey and no food, and, when he left the pub, another patron was concerned enough to offer to rent a room over night for him at the Texada Inn. Mr. Leprieur declined and presumably went outside to his car and drove away. The trial judge inferred at para. 64 that the pub defendant bartender "would have realized" it was likely he would be driving, and yet took no steps to stop him from doing so.

The Court of Appeal stated that an appellate court may not interfere with a trial judge's apportionment of liability unless there are "very strong and cogent reasons" for doing so (*4).

The Madam Justice Newbury for the Court of Appeal stated at paragraph 36:

> Even given this stringent standard, however, I am persuaded that the allocation of minimal responsibility to the pub defendants was grossly disproportionate to their comparative blameworthiness, including their disregard of their statutory obligations.

The Court of Appeal took issue with the trial judge's use of reduction of Mr. Leprieur's percentage of liability by the amount of the pub defendants' percentage of negligence. Instead, the apportionment should have been determined simply as between the Mr. Sulyma, Mr. Leprieur and the pub defendants regarding the liability for the accident.

At paragraph 37, the court stated,

> The proper course was for the trial judge to consider the relative fault of all three parties (assuming, as counsel agreed, that the pub defendants could be treated as one for the purposes of this determination) and to determine the relative blameworthiness of each in comparison to the others.

The Court of Appeal allowed the appeal on this point and re-apportioned applying 20% of the liability to the pub defendants, 70% to Mr. Leprieur, and 10% to Mr. Sulyma.

McLean v Knox: Apportionment Review

In *McLean v Knox*, the Ontario Court of Appeal reviewed the apportionment assessment process. As stated above, the intoxicated passenger had sued the intoxicated driver and pub defendants for over-service. Both the driver and passenger had been over-served at the same pub. The passenger was injured and sued the driver but faced a reduction to his damages as a result of his contributory negligence.

The Court of Appeal found that the plaintiff passenger was also intoxicated when he made the decision to willingly accept a ride with a drunk driver. His contributory negligence percentage regarding reduction in his damages was lowered in light of the over-service by the pub defendants. Typically, the court stated that this would be the same percentage as assessed against the pub defendants regarding their liability for the accident, though not necessarily given that each aspect would have to be considered regarding that particular person's experience. The "over-service" would have to be reconsidered in each person's case.

Gillese J.A. for the court stated at paragraph 58,

> Apportionment of liability is a difficult area of the law. For the jury to properly discharge its task of apportioning liability, the jurors need to clearly understand the differences between liability for the accident and liability for the plaintiff's damages. This clarity begins by having the jury approach the two matters sequentially and in that order: (1) apportionment of liability for the accident, and then (2) apportionment of liability for the plaintiff's damages.
>
> [59] In apportioning liability for the accident, the jury had to consider only two parties: Knox, as the driver of the car, and Finnigan's, for having over-served him. On the facts of this case, only those two parties caused or contributed to the accident. Accordingly, no fault could be attributed to the plaintiff for the accident.
>
> [60] In apportioning liability for

> the damages that McLean suffered as a result of the accident, however, the jury had to decide what degree of fault to attribute to each of Knox, the plaintiff, and Finnigan's.
>
> [61] Knox's liability for McLean's damages flows from his role as driver of the car.
>
> [62] The plaintiff's liability (contributory negligence) for his damages flows from having "willingly" accepted a ride with Knox when he knew, or reasonably ought to have known, that Knox was impaired and that he might suffer injury as a result of being a passenger in a car driven by an impaired driver. In determining the plaintiff's liability, the jury must consider the plaintiff's appreciation of the risk he took in becoming a passenger in the car. But, a passenger's "willingness" to accept a ride with an impaired driver may arise in part because he or she was drunk. If that drunkenness was caused in part by the commercial host, the commercial host could be found to share responsibility for the passenger's actions…
>
> [63] Thus, Finnigan's liability for McLean's damages flows from two separate things: over-serving Knox and over-serving the plaintiff.

Therefore, when considering *Hansen v Sulyma* above, the reader should note that reduction of a percentage of liability in light of the pub defendants' role is only applied when considering damages and contributory negligence on the part of the plaintiff. The assessment of liability was simply to be considered between those who caused the accident. Therefore, there should have been no consideration of reduction of liability on Mr. Leprieur's part in respect of the pub defendants' liability for over-service. Similarly, in Ms. Hansen's case, she had not been drinking at the pub defendants' premises and her judgment was not, therefore, impaired at the time she decided not to exit the vehicle or insist further on the illumination of the hazard light. Therefore, her contributory negligence, if any, would not have been reduced by the pub defendants' percentage of liability in this case.

Commercial Host Liability Percentage of Liability

It should also be noted that each case is fact driven, but the "rule of thumb" maximum in respect of commercial hosts' liability continues to be a maximum of 20% for situations where the host takes no steps whatsoever to restrict consumption of alcohol by its patrons. The decision in *McLean v Knox* regarding apportionment has not yet been rendered as the court decided in the appeal not to require a new trial even though the questions to the jury were erroneous. In the interests of justice, the court will render the decision on apportionment itself and has instructed the parties to provide submissions in that regard.

Kim E. Stoll

Endnotes

(*1) 1973 CanLII 16 (SCC), [1974] S.C.R. 239.
(*2) at paragraph 2
(*3) In Ontario, *The Liquor Licence Act* R.S.O 1990 c L.19 as amended
(*4) *Moses v. Kim* 2009 BCCA 82 (CanLII) (British Columbia Court of Appeal) and also referring to *Swyrd v Tulloch* [1954] SCR 199 (Supreme Court of Canada)

3. Summary Judgment in the Federal Court: When is E NUFF not Enough?

The plaintiff, Lakeland Bank, (the "Bank") is an American bank. It claimed the rights to a vessel, the "NEVER E NUFF". It brought an *in rem* action in the Federal Court of Canada (*1) to execute its rights over the NEVER E NUFF and to dispose of the vessel (*2). The action also named as "*in personam*" (*3) defendants Patrick Salvail Saint-Germain ("Saint-Germain") and Location Holland (1955) Ltee. ("Holland").

Summary Judgment in the Federal Court of Canada

Past Fernandes Hearn newsletter articles have addressed aspects of the summary judgment mechanism in the Ontario Superior Court of Justice (*4). This article is intended to provide a look into the workings of the summary judgment rules of the Federal Court of Canada (*5).

Regardless of the court venue, the benefits to resolving a dispute by way of summary judgment are obvious in terms of timely resolution and the management of costs and resources – if the case is an appropriate one for summary judgment, and, as we will see in the discussion below, if properly presented for consideration.

The Lakeland Bank sought a declaration that it could enforce its rights over the NEVER E NUFF by way of summary judgment. The key rules pertaining to summary judgment in the Federal Court are as follows:

> 213. (1) A party may bring a motion for summary judgment … on all or some of the issues raised in the pleadings at any time after the defendant has filed a defence but before the time and place for trial have been fixed.
>
> 214. A response to a motion for summary judgment shall not rely on what might be adduced as evidence at a later stage in the proceedings. It must set out specific facts and adduce the evidence showing that there is a genuine issue for trial.
>
> 215. (1) If on a motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.
>
> (2) If the Court is satisfied that the only genuine issue is
>
> (*a*) the amount to which the moving party is entitled, the Court may order a trial of that issue or grant summary judgment with a reference under rule 153 to determine the amount; or
>
> (*b*) a question of law, the Court may determine the question and grant summary judgment accordingly.
>
> (3) If the Court is satisfied that there is a genuine issue of fact or law for trial with respect to a claim or a defence, the Court may
>
> (*a*) nevertheless determine that issue by way of summary trial and make any order necessary for the conduct of the summary trial; or
>
> (*b*) dismiss the motion in whole or in part and order that the action, or the issues in the action not disposed of by summary judgment, proceed to trial or that the action be conducted as a specially managed proceeding.

The Proceedings in the Federal Court

The Bank brought its action in the Federal Court seeking the recognition and enforcement of a judgment awarded to it by an American Court. The plaintiff filed the affidavit of a Bank vice-

president deposing the relevant history in support of its application for a declaration that it could dispose of the NEVER E NUFF:

a) The Bank had entered into an agreement with a Breen McMahon ("McMahon") of New York State to finance his purchase of the vessel in January, 2007;

b) McMahon accordingly provided a First Preferred Ship's Mortgage to the Bank;

c) McMahon sold the vessel later in April, 2007 to the defendant Location Holland;

d) Holland at some point came to lease the vessel to St. Germain, who in due course purchased it from the Holland;

e) In March, 2008 McMahon ceased making the loan payments to the Bank;

f) The Bank accordingly sued McMahon. It obtained a "default" judgment (*6) on August 24, 2010 against McMahon in the United States District Court, Northern District of New York for the amount of $190,000. This judgment permitted the Bank to take possession of the vessel and to dispose of it to realize the judgment;

g) The vessel had however *already* by disposed of by that time, having been sold by McMahon to Saint-Germain, who at all material times was a resident of the province of Quebec. As such, the vessel came to be within the Canadian jurisdiction, and

h) The Bank accordingly commenced this Federal Court of Canada Action and arrested the vessel on June 11, 2012 in the province of Quebec while in the possession of St. Germain (*7)

Not surprisingly, the defendants opposed the Bank's motion for summary judgment.

Analysis

The Court identified the key test as that set forth at Rule 215 above. The Bank had the onus of demonstrating that there was no genuine issue for trial with respect to its claim for the exclusive right to the vessel. The Court noted that the foundation of the Bank's claim to the vessel was a judgment rendered under the laws of a "foreign jurisdiction" (i.e. the State of New York) arising from the "foreign" contract with McMahon. Citing section 23 of the *Canada Evidence Act* (*8) there is a degree of proof that must be achieved for the admissibility of and in turn reliance of the pronouncement of a foreign court in our Federal Court. Section 23 provides as follows:

> 23. (1) *Evidence of any proceeding or record whatever of,* in or before any court in Great Britain, the Supreme Court, the Federal Court of Appeal, the Federal Court or the Tax Court of Canada, any court in a province, any court in a British colony or possession *or any court of record of the United States,* of a state of the United States or of any other foreign country, or before any justice of the peace or coroner in a province, *may be given in any action or proceeding by an exemplification or certified copy of the proceeding or record*, purporting to be under the seal of the court or under the hand or seal of the justice, coroner or court stenographer, as the case may be, without any proof of the authenticity of the seal or of the signature of the justice, coroner or court stenographer or other proof whatever. [emphasis added]

The operative requirement here is the tender of the relevant foreign court record as *"exemplified"* or as *certified* by the pertinent foreign court authority.

The Bank ran afoul of this requirement, in not tendering an exemplified or a certified copy of the United States District Court judgment into evidence. Rather, it sought the more casual introduction of the same by way of a copy of the

judgment being appended to the affidavit filed from its vice-president. That the document provided by way of this affidavit was not "certified" was clear: there was no original, 'sealed' copy from the United States District Court tendered in evidence. The Federal Court judge did not articulate what might constitute an 'exemplified' document, but one can infer that this involves the tender of some of explanation from or by the United States District Court explaining the nature of that judgment and how it came into existence.

The Court accordingly considered itself obliged to refuse the admission into evidence of the United States District Court judgment and accordingly the Bank's application for summary judgment failed.

While the Court accordingly could not grant summary judgment – the key evidence in question not being admissible – it also expressed a reservation on the notion of it being asked to enforce an American default judgment against an American citizen. Our courts necessarily cast a careful, if not wary eye on requests for the enforcement of default judgments – the question of 'due process' in the initial notice of the claim to the defendant coming under scrutiny. That such examination here would concern the rules for the notice of and/or service of a claim on a defendant in a *foreign* jurisdiction might be cause for yet further pause before enforcing such a judgment. Perhaps this would especially when it means that Saint Germain (a Canadian) may "go without his boat" (located in Canada) (*9). Citing these concerns, the Court ruled that a full hearing, with evidence property presented and tested together with related legal argument would need to take place. In this regard, Holland argued that the Bank had not registered its security interest in the Province of Quebec and that there might be an argument as to the applicability of the Quebec Civil Code on matters of security interests in terms of the Bank's right to enforce its United States judgment in this case. The Court also noted that there might be an issue as to whether the Quebec Civil Code might be subject on point to an overarching application of Canadian Maritime Law, presenting further need for the dispute to be resolved in a conventional trial setting with full legal argument.

In light of the foregoing the Federal Court ruled that this case was "unfit" for summary judgment and would have to proceed to trial.

Conclusion

This case reiterates an important reminder that while there is legitimate interest in the timely and efficient disposition of legal disputes by way of summary judgment, that it is not always the appropriate or cost efficient approach, and that when one applies for (or responds to) summary judgment that there is a high expectation on the submission of admissible and cogent evidence.

Gordon Hearn

Endnotes

(*1) 2013 FC 864
(*2) "*In rem*", (Latin, power about or against "the thing") is a legal term describing the power a court may exercise over property.
(*3) "*In personam*" (Latin, meaning directed against a particular person)
(*4) See, for example, March 2012 ("*Motions for Summary Judgment: What's Up?")* and September 2012 ("*Arguing About Whether to Argue Now or Argue At Trial: Can Summary Judgment Make Litigation More Accessible and Affordable?)*
(*5) The *Federal Court Rules* are set forth in Regulation SOR/98-106
(*6) Mr. McMahon deciding not to appear in, and defend that action…
(*7) A prime motivation in the commencement of an *in rem* action is the 'arrest' remedy available to a plaintiff: in certain circumstances as prescribed in the *Federal Courts Act* R.S.C. 1985 c. F-7 and in the *Federal Court Rules*, a plaintiff may arrest certain maritime property such as a vessel as security for a claim before obtaining judgment.
(*8) R.S.C. 1985 c. C-5
(*9) The evidence in the case had of course not been fully developed as the parties were only at the "summary judgment" stage. It may well be, and perhaps it could even could be presumed, that Saint Germain was a "bona fide purchaser for value" from Holland, fully believing that for the full and ample consideration paid by him that he was purchasing a boat with a clear and unencumbered title.

4. Supreme Court Will Hear Air Canada Language Rights Debate

On May 2, 2013, The Supreme Court of Canada (*1) granted leave to appeal to Michel Thibodeau, his wife, and the Commissioner of the Official Languages of Canada against a 2012 decision of the Federal Court of Appeal which reversed the lion's den of a decision at the trial level which awarded the Thibodeau couple damages for violation of their rights under the *Official Languages Act* (*2). The bench, composed of Justices LeBel, Wagner and Karakatsanis found that the appeal warranted a plenary hearing by the Supreme Court.

The case arises from a simple scenario, which appears at first glance to be a relatively innocuous customer service issue concerning the flag bearing airline's staff's capacity to communicate in French. However, owing to the uncompromising militarism of Mr. Thibodeau, who had previously brought suit against Air Canada on the same grounds (*3), joined with the plain frustration of the Commissioner of the Official Languages of Canada with the national carrier, the case will reach the highest court in Canada. Arguments will, as before the lower courts, raise issues of constitutional law, international law and the hierarchy of legal norms in Canada.

Air Canada has a unique duty amongst Canadian airlines to provide service in English and French across its network. While other airlines typically do this to a greater or lesser extent as a customer servicing issue, bilingual service is incumbent upon Air Canada, by virtue of having been a Crown corporation at the time of the enactment of the *Official Languages Act* in 1969 and thus therefore subjected to its provisions, and pursuant to the terms of the *Air Canada Public Participation Act* (*4) of 1988 which at s. 10 (1) made clear that the Official Languages Act would continue to apply to Air Canada after its privatization.

Litigation stemmed from two flights that Michel Thibodeau and his wife took with Air Canada in 2009. One the earlier occasion, their itinerary originated in Ottawa and transited Toronto to reach Atlanta, all with Air Canada. On the second occasion, the Thibodeaus flew roundtrip Toronto to St Maarten with their first leg on the outbound being an Air Canada flight to Philadelphia, and on the return, the last leg was an Air Canada flight from Charlotte. The flights from the respective US hubs to St Maarten were operated by US Airways. The Thibodeaus complained of eight points of contact over the course of these itineraries at which Air Canada failed to meet its obligations of providing service in English and French.

Over the course of litigation, Air Canada made certain admissions, which led to certain complaints being withdrawn. The court ultimately found four instances where had Air Canada violated the Official Languages Act. Three of these violations pertained to service aboard flights between Toronto and points in the United States, while one instance pertained to announcements at Toronto Pearson Airport at the baggage carousels.

Bédard J. for the Federal Court, at the trial level, had awarded the applicants $1,500 each per violation, for a total of $6,000. Bédard J. held that there was a conflict between s. 77(4) of the *Official Languages Act* which grants the court discretion with respect to a remedy for breach of the Act, and the *Montreal Convention* (*5) which governs Air Canada's liability for incidents aboard international flights including transborder flights (*6). The *Montreal Convention* provides that it is an exclusive mechanism to compensate passengers for incidents aboard flights within its scope of application (*7), and to trigger the application of the Convention there must be an « accident » (*8), which even under the broad interpetation given to accident by the caselaw (*9), could not be argued to cover failure to provide service in French.

Given that the trial judge was unable to reconcile the two instruments, she elected to give primacy to the *Official Languages Act* on the

basis of its quasi-constitutional status and the argument that by so doing, the integrity of the Montreal Convention and its *raison d'être* of ensuring uniform liability globally were not significantly compromised given that the *Official Languages Act* applies exclusively to Air Canada.

The trial judge went on to make institutional orders against Air Canada, on the basis that the failures of the airline to meet its duties pursuant to the *Official Languages Act* were systemic. The orders require Air Canada to meet its obligations under the *Official Languages Act* and to create a monitoring process to identify and document the occasions on which its regional affiliated airline, Jazz, which operates under the Air Canada banner and thus is subject to the legislation, fails to assign a bilingual cabin crew to a flight where this is mandatory under the formulae established by the Official Language Regulations (*10).

The decision was reversed on all points at issue by the Federal Court of Appeal. Trudel J.A. for the higher court firstly ruled that the award of damages for violations of the Thibodeaus' language rights on flights between Canada and the United States was an error of law. The appeal court held that the *prima facie* conflict between the *Convention* and the *Official Languages Act* should be reconciled by harmonizing the two legislative instruments, rather than the trial judge's insistence on electing one norm to prevail.

The Federal Court of Appeal relied on unanimous international jurisprudence in finding that the *Montreal Convention* represents an exclusive code for liability of air carriers with respect to international air transportation (*11), and insisted that the integrity of the Convention was reliant on such uniform interpretation, stating that "Even the slightest "bending" of Article 29 of the *Montreal Convention* will impair the objectives of the Convention". Trudel J.A. reasoned that the payment of damages to the passengers by the courts was not the sole mechanism to punish Air Canada for its failure to respect its linguistic duties on international flights. Other sanctions could be conceived which would not encroach on the exclusivity of the *Montreal Convention*.

The court went on to strike down the institutional orders made against Air Canada. The application of these had previously been suspended pending the outcome of the appeal (*12).

Firstly, with respect to the requirement that Air Canada make "reasonable efforts" to respect it duties under the *Official Languages Act*, the court held that this injunction was too vague. Trudel J.A. reasoned that a future court would have to interpret the order in order for it to pass judgment in contempt proceedings, and the lack of specificity was thus fatal to the injunction.

The court went on to find that the trial court had erred in its finding that Air Canada's failings with respect to its linguistic duties were systemic and that a structural order requiring active monitoring was warranted. The appeal court found that a structural order required very substantial evidence of the systemic nature of the problem. The trial judge should not have relied on statistics emanating from complaints to the Languages Commissioner, given that Air Canada does not have any opportunity to respond to complaints lodged with the Commissioner. The court also found that the trial judge had failed to allot sufficient weight to corrective efforts that had been made by Air Canada since the filing of the application (*13).

The case thus permits the Supreme Court of Canada a rare opportunity to weigh in on key issues relating to the *Montreal Convention*, adding its voice to case law which is dominated by Anglo-American jurisprudence. It would, however, be surprising if the Supreme Court of Canada were to overturn the Federal Court of Appeal and prefer the reasoning of the trial judge, thereby undermining the principle of exclusivity of the *Montreal Convention*, and thus deviating from the international standard in interpreting the international treaty.

While language rights may seem far beyond the scope of the agreement, and it may be argued that it was never the intention of the drafters of the *Montreal Convention* to usurp and preempt remedies in domestic law for violations of quasi-constitutional legislation regarding mandatory official languages standards, and that the *Official Languages Act* be undermined by its reading in a manner consistent with the *Montreal Convention*, foreign courts have grappled with equally controversial competing interests and found in favour of exclusivity of the Convention.

In the US, a passenger was denied compensation for racial discrimination on the basis that it did not constitute an accident and thus compensation therefore was not provided for under the *Montreal Convention* (*14). In the UK (*15), the High Court denied damages despite the violation of rights under the EU Regulation concerning the rights of disabled persons and persons with reduced mobility when travelling by air, as implemented in the UK by the Access to Air Travel by Disabled Persons and Persons with Reduced Mobility Regulations (*16).

Although pending appeal, the Federal Court of Appeal's decision is already embedded in the case law. It was relied upon by the Ontario Superior Court in another piece of ongoing and fascinating litigation involving Air Canada.

O'Mara v. Air Canada (*17) is a case in its nascent stages, and is a class action proceeding seeking compensation for passengers aboard flight AC8778 between Toronto and Zurich on January 4, 2011. Passengers on this flight were subjected to a "terrifying episode" (*18) when the First Officer veered the aeroplane into the path of a United States Air Force aircraft after mistaking the planet Venus for an aircraft. The captain had to intervene by way of an emergency manoeuvre to restore the aircraft to straight and level at its assigned altitude.

Air Canada issued a Statement that the "Terrifying Episode" occurred as a result of unexpected turbulence, thus covering up that the veritable cause was error on the part of the First Officer. Air Canada proceeded to compensate three passengers and obtained a waiver and release from these persons.

After the Transportation Safety Board (*19) made public the true cause of the incident, Ms. O'Mara filed a claim on behalf of all passengers, including those who had signed waiver and release on the basis that consent to these was vitiated by the misrepresentations by Air Canada. Damages sought in the action total $100,000,000.

Before even defending the claim of Ms. O'Mara, Air Canada aggressively moved for an order to strike out claims for punitive, aggravated and exemplary damages, as well as to remove claims for damages for "purely psychological injuries" caused by the incident.

Least controversial in the Superior Court decision was the striking out of the claims for purely psychological harm. The court was able to rely on uninterrupted global case law, including extensive Canadian precedents to hold that the Convention excludes the award of damages for mental injury where this is not accompanied by physical injury (*20).

The court proceeded to consider whether aggravated and punitive damages were available under the *Montreal Convention*. The court held that the convention does not exclude a *bona fide* claim for aggravated damages, however went on to iterate that aggravating circumstances are merely a factor in assessing general damages, rather than being an independent head of damage. The court found that in this instance, the claim for aggravated damages was employed is this case as a subterfuge for what was in fact a claim for punitive damages.

The court then held, uncontroversially, that the Montreal Convention insulates air carriers from an award of punitive damages. Article 29 of the Convention specifically excludes such awards.

More polemical was the question of whether Ms. O'Mara could make a common law claim for punitive damages with respect to Air Canada's conduct *ex post facto*. Ms. O'Mara pleaded that she was entitled to claim punitive damages for the cover up initiated by Air Canada in concealing the cause of the "terrifying episode" and deliberately misrepresenting this to the public. Ms O'Mara stated that these allegedly tortious actions of the airline were outside of the temporal scope of the *Montreal Convention* and thus her common law claims were not preempted thereby.

The court however relied, amongst others, on the Federal Court of Appeal's position in the Thibodeau case, and insisted on the exclusivity of the regime in place under the Montreal Convention. Perell J. for the Ontario Superior Court, applied this strict principle of exclusivity in order to exclude the common law claim for punitive damages.

The judge held that the punitive damages claim for the cover up was causally related to the incident aboard AC878, and thus common law remedies were not available to Ms. O'Mara since the *Montreal Convention* applied and denied punitive damages and excluded common law remedies. In so reasoning, Perell J. relied strongly on the chain of causation analysis developed in Israel (*21) and since applied in the US (*22) and previously by the Ontario Superior Court in *Gontcharov v. Canjet* (*23). In Gontcharov, a plaintiff was denied punitive damages for false imprisonment by police authorities at the airport after he was detained by police at the carrier's request. The court found that the detention was causally inked to events on board the aircraft within the temporal scope of application of the Convention, and similarly in O'Mara, the false statements were held to be causally linked to the events on the aircraft.

In case of any doubt, Perell J. concluded his analysis by stating that even if the chain of causation analysis were improper, his conclusion striking Ms. O'Mara's pleading for punitive damages would have remained. The alternative reasoning was that if the Convention did not apply, then Ms. O'Mara was seeking compensation from an airline for damages related to an accident on a flight for which the Convention applied but did not provide a right of action but did provide an exclusive code of liability and thus preempted Ms. O'Mara's right to an independent action under common law.

Mark Glynn

(*1) *Michel Thibodeau et al v. Air Canada et al*, Docket 3500, 2013 CarswellNat 1235, appealing 2012 FCA 246 which had reversed 2011 FC 876
(*2) R.S.C., 1985, c.31
(*3) *Thibodeau v. Air Canada*, 2005 FC 1156 upheld by 2007 FCA 115 finding liability of Air Canada in respect of failure to provide service in French on domestic flights in which this is mandated
(*4) R.S.C., 1985 c.34
(*5) *Convention for the Unification of Certain Rues for International Carriage by Air* (Montreal, May 28, 1999).
(*6) The Convention applies whenever the State of origin and the State of destination of an itinerary is a party to the Convention. For cargo which typically travels in one direction, that requires two States to have ratified the Convention, whereas for passengers, the analysis is on an itinerary basis, thus since much international travel is bought on a round trip basis, anyone flying out of Canada with a round trip ticket coming back to Canada falls within the scope of the Convention. See *Montreal Convention* Art. 1.
(*7) *Montreal Convention* Art. 29.
(*8) *Montreal Convention* Art. 17.
(*9) The preeminent decision on this point is *Saks v. Air France* 470 U.S. 392 in which the US Supreme Court defined an accident as "an unusual or unexpected happening".
(*10) SOR/92-48
(*11) The Court relied, amongst others, on decisions from the English House of Lords in *Sidhu v. British Airways* [1997] All E.R. 193 and

the US Supreme Court in *El Al Israel Airlines v. Tsui Yuan Tseng* 525 U.S. 155.

(*12) 2012 FCA 14

(*13) Relying on the reasons in *Desrochers v. Canada (Industry)* 2009 SCC 8

(*14) *King v. American Airlines* 284 F. 3d 252

(*15) *Stott v. Thomas Cook Tour Operators Ltd. and other* [2012] E.W.C.A. Civ 66

(*16) REGULATION (EC) 1107/2006 implemented in the U.K. by S.I. 2007/1895

(*17) 2013 ONSC 2931

(*18) Employing the terminology of the Statement of Claim as cited by Perell J. in his reasons

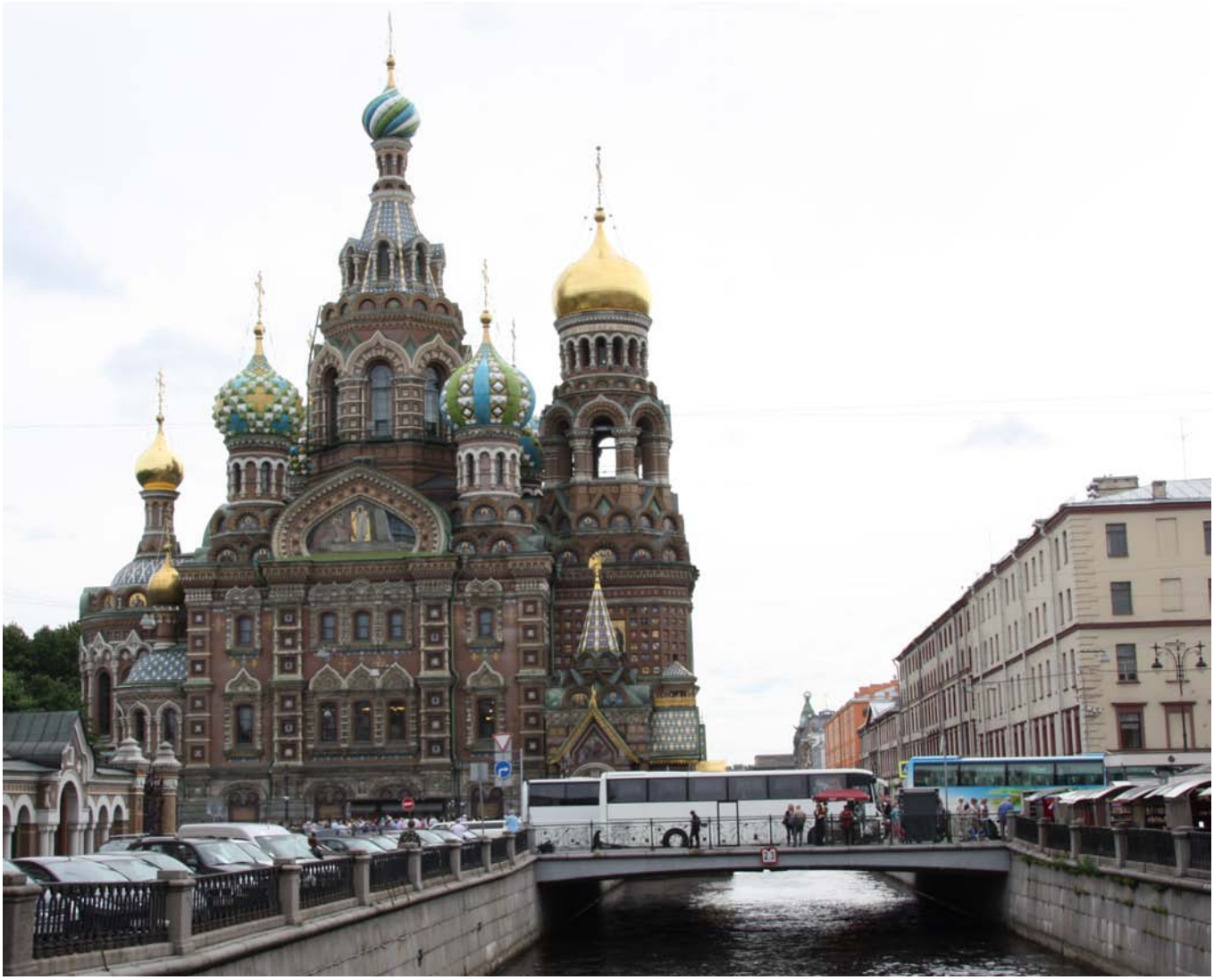
(*19) Transportation Safety Board of Canada, Aviation Investigation Report A11F0012

(*20) The leading international case relied upon is form the U.S. Supreme Court in *Eastern Airlines Inc. v. Floyd* 499 U.S. 530, Canadian precedents to the same effect include *Walton v. MyTravel Canada Holdings Inc.* 2006 SKQB 231 and *Plourde v. Sérvice Aérien F.B.O. Inc.* 2007 QCCA 739

(*21) *Zikry v. Air Canada*, Civil File No. 1715/05 (Haifa Magistrates Court, 2006)

(*22) *Eid v. Alaska Airlines* 621 F. 3d 858 (9th Circuit, 2010)

(*23) 2012 ONSC 2279



5. Obtaining Default Judgment: Reasonable Notice Must Be Provided to Opposing Counsel

The *Male v. The Business Solutions Group,* 2013 ONCA 382 decision involved former business partners and a dispute under a partnership agreement. The plaintiff (and responding party on appeal) Stephen Male issued a Statement of Claim against the defendants (and appellants) Business Solutions Group, Sam Ibrahim, Shaemin Ukani, Mark Zielinski and Gabriel Fanous for damages resulting from his expulsion from the partnership premises on October 28, 2011.

Shortly after the claim was instituted against them, and before serving any Statement of Defence, the defendants moved to transfer Mr. Male's action from the Ontario Superior Court of Justice to the Small Claims Court, and for a stay so that they could proceed to arbitration (as the defendants argued was required by the terms of the partnership agreement). On December 14, 2011, the defendants' motion was heard and dismissed by Justice Ramsay. At the same time, Justice Ramsay dismissed Mr. Male's motion to require the defendants to make ongoing payments under the partnership agreement.

"Mere hours" after Justice Ramsay rendered his decision, and without any notice to the defendants, Mr. Male's lawyer noted the defendants in default. The defendants' lawyer was notified of the noting in default two days later, on December 16, 2011.

The defendants decided to appeal Justice Ramsay's decision and served the appeal notice on December 22, 2011. Meanwhile, on January 10, 2012, Justice Crane signed default judgment against the defendants. Mr. Male's lawyer did not notify the defendants' lawyer that he was seeking default judgment, despite service of the defendants' appeal notice on him. The defendants moved to set aside the default judgment on January 13, 2012.

Justice Whitten Refuses to Set Aside the Default Judgment

The defendants' motions for leave to appeal the decision of Justice Ramsay and to set aside the default judgment were heard on February 9, 2012. Justice Whitten refused to grant leave to appeal, and refused to set aside the default judgment.

In refusing to set aside the default judgment, Justice Whitten found that the defendants did not intend to defend the action on the merits, in particular referencing the defendants' lawyer's statement to Mr. Male's lawyer after the motion that he would not be filing a Statement of Defence. Justice Whitten further held that the defendants did not have a defence, and that their reliance on the arbitration clause in the partnership agreement was "an example of technical approach without substance".

The defendants appealed to the Court of Appeal.

The Court of Appeal Sets Aside the Default Judgment

In granting the defendants' appeal, the Court of Appeal held that "the default judgment ought to have been set aside as a matter of justice without an inquiry into the merits of the defence" and further that the defendants ought to have an opportunity to file a Statement of Defence.

In so concluding, the Court of Appeal noted that Justice Whitten erred by "failing to take into account the fact that the defendants were actively defending" when Mr. Male's lawyer noted them in default and obtained default judgment. The Court referenced the "well-accepted" notion that bringing a motion to obtain a stay of the proceeding constitutes "a step in the defence of the proceeding".

Secondly, and notably, the Court held that it was unreasonable for Mr. Male's lawyer to note the defendants in default and obtain default judgment without providing any notice to the defendants' lawyer, when he was "actively

engaged" with the defendants' lawyer and knew that the defendants were defending the action.

The Court cited with approval the *Principles of Civility for Advocates* as promulgated by the Advocates' Society (a private organization of litigators whose purpose is to promote excellence in advocacy through education, networking, and providing *pro bono* legal services):

> *19. Subject to the Rules of Practice, advocates should not cause any default or dismissal to be entered without first notifying opposing counsel, assuming the identity of opposing counsel is known.*

The Court also referenced an in-court statement by Mr. Male's lawyer to Justice Ramsay, just hours before noting the defendants in default:

> *I have told him [the defendants' lawyer] that I intended to sign, note them in default and move for judgment, but in the meantime, like, I expect he is going to defend on – at some point, on some basis. And I don't want to take advantage of the defendants' lawyer's mistake.*

Mr. Male argued on appeal that counsel was released from the boundaries of the statement made to Justice Ramsay after the defendants' lawyer advised counsel that the defendants would not be filing a Statement of Defence. The Court of Appeal disagreed with this argument, stating that the defendants' position was that Mr. Male was required to arbitrate under the partnership agreement, and that filing a defence would constitute attornment (*i.e.* an implicit acknowledgment constituting binding acceptance of the court's jurisdiction) to the Superior Court action. The question of whether Mr. Male was required to arbitrate was a "plausible avenue for the resolution of the substantive partnership issues" and that it was unfair to suggest that the defendants were accordingly not willing to engage these issues.

The Court accordingly set aside the default judgment and awarded costs to the defendants.

Conclusion

This decision serves as a reminder that, while a party may be within its strict procedural rights under the *Rules of Civil Procedure* (in this instance, Mr. Male was strictly entitled to note the defendants in default as they had not filed a Statement of Defence within the requisite time period), such strict procedural requirements cannot be the only consideration for counsel. Counsel must not act to take advantage of another party when they know that other party is represented and responding to the lawsuit (here, while not defending on the merits *per se,* the defendants were actively engaged in the defence of the lawsuit by bringing their motions to have the matter be dealt with through arbitration). Here, Mr. Male's counsel's failure to notify the defendants' counsel that he was seeking to note the defendants in default and proceed to default judgment resulted in a trip to the Court of Appeal and award of $15,000 in costs against him.

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