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Newsletter

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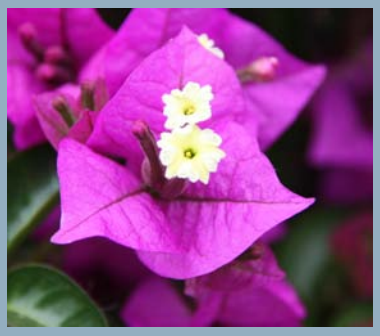


OBSTRUCTIVE SLEEP APNEA IN TRANSPORTATION: PART 3 OF 3

United States Regulatory Regime

Currently, sleep apnea in the Commercial Motor Vehicle ("CMV") context is addressed in the United States in the same manner as Canada: by being read into general legislation pertaining to CMV(s). This section will first provide an overview of the ***(****a) legislation*, and then *(b) the case-law.*

(a) Legislation

Specific Obstructive Sleep Apnea ("OSA") legislation is yet to be enacted therefore it is covered under general regulations in the United States.

Eric Zivitz, a partner with the Butler Pappas law firm in Miami, provides a great overview of the current state of legislation in the United States on OSA and trucking. (*1) Zivitz highlights that OSA can fall under a variety of federal regulations which deal with items such as pre-employment drug testing for CMV drivers, post-accident drug testing, administering a road test prior to hiring commercial motor vehicle drivers, limiting hours drivers can operate commercial motor vehicles, as well as addressing driver fatigue. (*2)

The Federal Motor Carrier Safety Administration ("FMCSA") provides certain directives for CMV drivers in regards to sleep apnea.(*3) Once a CMV driver learns they have OSA they must contact a medical qualifying examiner to determine the driver's fitness to operative a CMV.

Each state sets its own medical standards for CMV driving for intrastate commerce. However, at the federal level and even at the intrastate level, many states have adopted the medical regulations found under *49 Code of Federal Regulations ("CFR") 391.41(b)(5)* of the Federal Motor Carrier Safety Regulations ("FMCSR").

49 CFR 391.41(b)(5) holds that OSA can be a disqualifying condition for a driver's licence.(*4) Each state has the jurisdictional authority to suspend a CMV licence if a person has OSA. Because the

FIRM AND INDUSTRY NEWS

- **Rui Fernandes** will be giving a presentation to industry at the Toronto Rehab Foundation on “Sleep Apnea & Transportation” on the 12th February 2014 in Toronto.

- **Gordon Hearn** will be giving a presentation to the Delta Nu Alpha Transportation Network on February 27, 2014 on the topic of "The Perils of Contracts"

- **Gordon Hearn** will be giving a presentation at the Transportation & Logistics Council
Annual Meeting in Nashville, Tennessee on March 17, 2014 on “International Carriage of Goods Regimes and Related Risks and Liabilities”.

- **Rui Fernandes** will be giving a presentation to the Canadian Trucking Alliance meeting in Scottsdale Arizona on March 24th 2014 on “Shipper-Carrier Contracts- Tracking Trends & Deciphering the Fine Print”

- **Tara Cassidy**, a 2012 call to the Ontario bar will be joining the firm as an associate.

Kim Stoll with Federal Transportation Minister Lisa Raitt at the WISTA Conference

thresholds are decentralized, FMCSA advises interested parties to check with State Department of Motor Vehicles for more exacting medical standards.

However, FMCSA says that only moderate to severe OSA disqualifies a driver and it is individual medical examiners that make this determination of the driver's OSA level. In *The Instructions to The Medical Examiner on the Medical Examination Report*, under 49 CFR 391.43, (*5) respiratory dysfunctions are listed as a consideration, and FMCSA states that OSA is read into this provision under "respiratory dysfunctions that may be detrimental to safe driving as this condition may interfere with driver alertness and may cause gradual or sudden incapacitation."(*6)

At the carrier level, the FMCSA states "a carrier may not require or permit a driver to operate a CMV if the driver has a condition, including sleep apnea, that would affect his or her ability to safely operate the vehicle." (*7) However, there does not appear to be a legislative foundation to this obligation, though some case-law has elaborated upon it.

Zivitz highlights that medical examination reports for commercial driver fitness determinations require drivers to disclose whether they suffer from sleep disorders. Nevertheless, certifying medical examiner are not yet required to verify the drivers physical qualifications to an exacting degree. The proposed FMCSA regulations which may come into affect are likely to address this deficiency in the regulations (as explained in the following section).

(b) Case-law

Angela Cash a partner at the Scopelitis, Garvin, Light, Hanson and Feary law firm in Indianapolis notes "[o]nly a handful of decisions addressing liability of driver or motor carrier for accident caused by sleep apnea – but they are noteworthy." (*8) Cash states further that these cases are more likely to settle and rarely go to trial.

In *Martinez v. CO2 Services, Inc.,* 12 Fed. 689; 2001 U.S. App. LEXIS 6195 (10th Cir 2001) a semi- tractor trailer was involved in an accident resulting in the death of both drivers. The plaintiff's spouse argued that the truck driver suffered from OSA and as a result of the fatigue the defendant driver fell asleep and lost control while driving, causing the vehicle to swerve and kill the plaintiff's spouse. The court noted that a sudden and unforeseeable loss of physical capacity or consciousness is a complete defence to a claim of negligence. Summary judgment was granted in favour of the defendant.

The plaintiff had alleged she had established a clear case of negligence based upon the opinions of her medical experts that the accident may have been caused by the driver's falling asleep at the wheel. The court found that plaintiff's experts had only established a possibility that the accident was caused by the driver falling asleep, and that was insufficient to defeat defendant's motion for summary judgment. Additionally, that evidence was not sufficient to establish the requisite "prima facie" (or presumptive) case of causation to support plaintiff's negligent hiring and entrustment claims either.

The court defined OSA as "a disorder in which breathing during sleep stops for ten seconds or longer, usually more than twenty times an hour, causing measurable blood deoxygenation." (*9) The decision established a fairly high threshold for claims based on OSA against carriers.

In *Dunlap v. W.L. Logan Trucking Company,* 161 Ohio App. 3d 51 (Ohio App. 2006) the court did not allow the truck driver's negligence defence, in which he claimed he had lapsed into an unconscious state and was unaware that he had suffered from OSA. The court found the driver failed to sustain his burden of proof that he was suddenly stricken by a period of unconsciousness, which rendered it impossible for him to control his vehicle. The court analyzed

the factual evidence presented, claiming that the driver had no reason to anticipate his sudden loss of consciousness. The court remarked that the driver slept poorly, slept an average of three hours a night, and on at least one occasion had fallen asleep while driving. The court therefore found the truck driver equally negligent with the Department of Transportation ("ODOT") in causing the accident, and rejected his sudden and unforeseeable loss of consciousness defense.

The Court of Appeal found that the trial court had properly found that the driver failed to prove a sudden medical emergency defence as he knew that he had a health problem that could interfere with his safe operation of a truck. As the driver was responsible for his conduct, the trial court was held to have properly ruled the company responsible for the driver's acts while in the scope of his employment.

It is interesting that there was no formal diagnosis of sleep apnea, but the driver had notice of a health problem causing "excessive fatigue" and falling asleep at inopportune moments, so he had reason to foresee his sudden loss of consciousness. Vicarious liability was imposed upon the carrier due to the driver's negligence, even though the company had no notice of the driver's health problem.

In *U.S. Express, Inc. v. Am. Field Service Corp*., 2008 U.S. Dist. LEXIS 57940 (N.D. Miss. 2008), a tractor-trailer driver hauling pesticides was killed as a result of an accident on the road.

The District Court determined that the deceased tractor-trailer driver's prior medical records warranted a medical expert's opinion as to the general facts of the deceased's medical condition, but not the cause of accident. The medical expert attempted to opine that the deceased driver suffered from OSA, and that his symptoms of fatigue and sleepiness would have placed him at high risk for motor vehicle accidents due to the fact that his OSA was untreated. The fact that the deceased's wife was in the cab during the accident and testified that the decedent was alert and talkative, weighed heavily in the court's exclusion of the medical expert's speculative opinion. Notwithstanding this ruling, the expert was permitted to give general opinions on the effects of the deceased's medical condition, based on her knowledge and review of the decedent's medical records.

Interestingly, the court ruled against the admission of evidence that the driver may or may not have misrepresented his prior medical history in order to obtain his CMV license. The court ruled it would not look behind an agency's determination of fitness for a driver's license. The court, therefore, excluded the evidence of an FMCSA official, who testified that the driver should not have been issued a CMV licence by the carrier.

In *Royal & Sun Alliance Insurance PLC v. UPS Supply Chain Solutions Inc.,* 2011 U.S. Dist. LEXIS 97715 (S.D.N.Y. 2011), the issue was whether an accident was unavoidable or due to the driver's medical condition. The driver died two weeks after a crash and the plaintiffs claimed that he suffered from OSA, a condition that might have affected his driving on the night of the accident.

The plaintiffs sought the admission of opinions from a physician and expert on sleep disorders. The expert wanted to testify that the driver had OSA, which was not recognized by either his employer or the examining physician who certified him as able to continue driving. The expert testified the untreated OSA placed the driver at greater risk of falling asleep at the wheel. The expert testified that based upon the driver's physical characteristics the doctor should have suspected the driver might have OSA and evaluated him more thoroughly before allowing him to drive. The expert concluded the physician had failed to exercise reasonable care in testing the driver to determine his safety.

The court found that the expert was highly qualified to render opinions about sleep disorders and that his opinions were relevant to the cause of the accident. The court rejected the

defendant's assertion that the expert's diagnosis was speculative. In rejecting the defence's proposition, the court stated that the expert reviewed the driver's medical records, as well as numerous medical studies and articles, which provided the undisputed data that he used to evaluate the possibility that the driver had OSA. Even without more definitive sleep study results, the expert's diagnosis was found by the court to rest "on good grounds".

In *Achey v. Crete Carrier Corp.,* 2009 U.S. Dist. LEXIS 44353 (E.D. Pa. Mar. 30, 2009) an action arose out of a tractor trailer accident that occurred between defendant Gallman and plaintiff Achey. At the time of the accident, Gallman was driving a tractor-trailer that was owned and operated by his employer, the defendant Crete Carrier Corporation ("Crete"). Tricia Achey and Courtney Achey (collectively, "decedents") died in the accident. Achey ("Plaintiff") brought the action on behalf of the decedents as administrator of their estates. The plaintiff made claims on behalf of the decedents for wrongful death against both defendants, survival against both defendants, and negligent and reckless hiring, retention, and entrustment against Crete.

A first motion by Crete was advanced that it could not be held liable for punitive damages under plaintiff's negligent/reckless entrustment causes of action. Crete's second motion contended that, because the punitive damages claims failed, the other counts must also be dismissed in their entirety on the ground that they "do not add anything to this case." The first motion was granted.

The second motion that Gallman claimed he could not be held liable for punitive damages under the plaintiff's survival causes of action was denied.

It was noted that the driver signed a statement that he was fatigued from insufficient sleep and planned to stop in New Jersey to rest. The driver also had an OSA diagnosis, but had surgical

treatment. The court denied the plaintiff's claim for punitive damages because the plaintiff did not offer any medical expert testimony to show a causal connection between the driver's drowsiness and his OSA.

In *DeBaugh v. Greyhound Lines, Inc.* , 2009 U.S. Dist. LEXIS 125352 (D. Or. 2009) the plaintiff DeBaugh brought a negligence and negligent entrustment action against defendant Greyhound Lines, Inc., for injuries sustained when a bus driven by the defendant's employee collided with the plaintiff who was on a motorcycle.

The defendant moved for a summary judgment only as to the negligent entrustment claim. The defendant also moved to strike the declaration of the plaintiff's expert submitted by the plaintiff in opposition to the summary judgment motion.

The court analyzed the *Achey* decision and applied its test for a reasonable evidentiary threshold linking the driver's OSA to the carrier's liability.

The court held that in *Achey*, a key issue was the notice to the defendant of a problem caused by the driver's documented OSA. The court noted that the driver had been involved in several accidents. But, the court explained, all of the incidents appeared to be minor and involved negligent driving while the driver was fully alert. The court concluded the incidents could not provide the defendant with sufficient notice that the driver had a predisposition to falling asleep at the wheel. No other incident involved driver fatigue.

In *Achey*, the court dismissed the plaintiff's expert's testimony linking a prior citation for weaving to a problem of driver alertness, as speculation. There was no other evidence linking any prior citations to fatigue.

The court in this case came to the same result as *Achey*: that the plaintiff failed to create an issue of fact regarding medical and/or fatigue issues through expert opinions which were deemed to be just speculation.

The Court granted the summary judgment motion.

Recent Developments

Proposed legislation in the United States is set to have a significant impact upon CMV drivers and carriers who operate on both sides of the Canada-United States border.

The proposed legislation is likely to set guidelines for medical examiners, as well as carriers, in terms of how to specifically address OSA. This section will first provide an overview of the developments in the United States and secondly highlight initiatives in Canada.

(a) United States

The catalyst for legislative reform in the United States was the January 2008 Expert Panel Recommendations on Obstructive Sleep Apnea and Commercial Motor Vehicle Driver Safety ("Expert Panel Recommendations"). (*10)

In 2008, the Expert Panel Recommendations examined the FMCSA's current guidelines for medical examiners pertaining to OSA.(*11) The panel then made a series of 13 recommendations on examining OSA and how it should impact CMV licencing.

In February 2012 the joint Motor Carrier Safety Advisory Committee and Medical Review Board on Obstructive Sleep Apnea finalized its OSA recommendations on medical certification of CMV drivers, and subsequently made a call for public comments on these recommendations. (*12) The guidelines included following items:

- 35 BMI as a reliable indicator of sleep apnea and an effective benchmark for medical examiners making an initial screening
- General standards for diagnosing untreated OSA
- Dealing with driver misinformation during screening
- How to prioritize drivers who need immediate treatment, treating drivers

with mild OSA, minimal acceptable compliance standards.
- Conditions for immediate disqualification or certification denial in the event of a fatigue related crash as well as conditional certifications
- Methods of diagnosis and severity
- Treatment using various methods such as Positive Airway Pressure (PAP) devices as well as other treatments including various surgeries

In April 2012, the FMCSA circulated these recommendations but quickly retracted them. (*13) Then in September 2012, FMCSA's administrator Anne Ferro, stated that FMCSA was still working on OSA guidelines which were supposed to be issued by the end of 2012.(*14) Ferro confirmed that the guidelines were likely to be similar to those issued above in April 2012. However, these regulations have yet to be brought in.

(b) Canada

There does not appear to be a similar move in Canada to implement legislation. Nevertheless, because any proposed legislation in the United States will impact most Canadian CMV carriers, several pro-active initiatives have been launched by organizations across Canada.

(i) Canadian Trucking Alliance Initiative

The Canadian Trucking Alliance ("CTA") brought attention to a study done in Europe, and reported in Fleet Owner magazine, that the study found "commercial drivers downplayed their sleepiness compared to other patients."(*15) This has led the CTA, in partnership with OSA Canada Inc., to launch a one-year pilot in Canada to deliver a full service sleep apnea program. (*16)

The CTA website states that wherever a commercial truck driver is located in Canada "OSA Canada will visit your terminal to screen, test and diagnose drivers as well as equip and train identified drivers with sleep apnea to use their CPAP (Continuous Positive Airway Pressure) treatment machine and mask -- all within 72 hours or less."(*17)

CTA's website also states that they will provide ongoing monitoring of the CPAP equipment to ensure driver comfort and compliance. The program requires a monthly fee.

(ii) Toronto Trucking Association Seminar

On 6 March 2012, the Toronto Trucking Association held a seminar with registered Respiratory Therapist Tammy Draper on the identification and management of OSA for commercial carriers.(*18)

Concluding Remarks

OSA is a condition in which a person stops breathing at least 10-15 times an hour during sleep. There is a vital connection between being sleepy during the daytime and OSA. The consequences of sleep apnea can be serious: there is an increased risk of high blood pressure and strokes, heart attacks and heart failure, loss of concentration, mood disorders and depression, as well as motor vehicle and industrial accidents. There is a higher prevalence of OSA among men, especially those with sedentary lifestyles.

OSA is recognized as a serious health issue, and affects approximately eight per cent of adult population. Unfortunately, only one in 10 people with OSA has been diagnosed with the condition. The high ratio of undiagnosed cases is a result of the high cost, inconvenience and poor accessibility of diagnosis using the standard method in a sleep clinic.

This estimated eight per cent of North Americans with OSA translates into 18 million affected. This is a serious problem both from a health, safety and an economic perspective.

The transportation industry is becoming more aware of this emerging issue. Trucking in Canada is a $65-billion industry that employs over 260,000 drivers. Trucks move 90 per cent of all consumer products and almost 2/3 of our trade with the U.S., Canada's largest trading partner, affects the industry and its insurers. There is

evidence suggesting that a company with a very effective sleep apnea management program enjoys numerous benefits that include: a reduction in turnover rate (industry average turnover is 139 per cent in the U.S.; in Canada this is 50 per cent), a reduction in accident rate and an increase in productivity and team morale. These results could translate into economic benefits for the trucking companies and their insurers.

Governments are likely to bring in more legislation to deal with this emerging problem.

Endnotes

(*1) Eric M. Zivitz, "Defending Sleep Apnea Claims in Trucking Litigation," In-House Defense Quarterly Winter 2012, online: http://www.butlerpappas.com/files/Zivitz.pdf

(*2) Zivitz at 46.

(*3) Driving When You have Sleep Apnea, http://www.fmcsa.dot.gov/safety-security/sleep-apnea/tools/Driving-with-Sleep-Apnea.aspx

(*4) *49 Code of Federal Regulations 391.41: Physical Qualifications for Drivers*, online: http://www.fmcsa.dot.gov/rulesregulations/administration/fmcsr/fmcsrruletext.aspx?reg=391.41

(*5) *49 Code of Federal Regulations 391.43: Medical Examination; certificate of physical examination*, online: http://www.fmcsa.dot.gov/rules-regulations/administration/fmcsr/fmcsrruletext.aspx?reg=391.43

(*6) Federal Motor Carrier Safety Administration, "Proposed Recommendations on Obstructive Sleep Apnea," 20 April 2012, online: http://federalregisterwatch.com/a/2012/4/2012-9555/FMCSA-proposed-recommendations-obstructive-sleep-apnea

(*7) Sleep Apnea and Commercial Drivers, online: http://www.fmcsa.dot.gov/safety-security/sleep-apnea/industry/commercial-drivers.aspx

(*8) Liability Concerns for Companies with Commercial Vehicle Fleets: Avoiding Multi-Million Dollar Verdicts and Government Scrutiny", http://www.compli.com/sites/default/files/compli_scopelitis_liability_webinar.pdf

(*9) At 693.

(*10) Federal Motor Carrier Safety Administration Medical Expert Panel, "Expert Panel Recommendations Obstructive Sleep Apnea and Commercial Motor Vehicle Driver Safety", 14 January 2008, online: http://www.fmcsa.dot.gov/rules-regulations/TOPICS/mep/report/Sleep-MEP-Panel-Recommendations-508.pdf

(*11) Ibid at 1.

(*12) Federal Motor Carrier Safety Administration, "Proposed Recommendations on Obstructive Sleep Apnea", 20 April 2012, online: https://www.federalregister.gov/articles/2012/04/20/2012-9555/proposed-recommendations-on-obstructive-sleep-apnea

(*13) Trucking Info, "FMCSA Withdraws Sleep Apnea Proposal", 22 April 2012, online: http://www.truckinginfo.com/channel/fuel-smarts/news/story/2012/04/fmcsa-withdraws-sleep-apnea-proposal.aspx

(*14) Ontario Trucking Association, "FMCSA Nears New Guidelines on Sleep Apnea Testing", 18 September 2012, online: http://www.ontruck.org/imispublic/Home/AM/ContentManagerNet/ContentDisplay.aspx?Section=Home&ContentID=11665

(*15) "Study: Truckers understating sleep apnea symptoms?", online: http://www.cantruck.ca/imispublic/Home2/AM/ContentManagerNet/ContentDisplay.aspx?Section=Home2&ContentID=11643

(*16) CTA, OSA Canada Launch Sleep Apnea Screening & Treatment Pilot Unique, full service program provides fleet solutions and better quality of life to drivers", 28 May 2012 online: http://www.cantruck.ca/imispublic/News_Releases1/AM/ContentManagerNet/ContentDisplay.aspx?Section=News_Releases1&ContentID=11269

(*17) Ibid.

(*18) Toronto Trucking Association, "Asleep at the wheel, can you imagine!", online: http://torontotrucking.org/mar_06_2012_event.htm

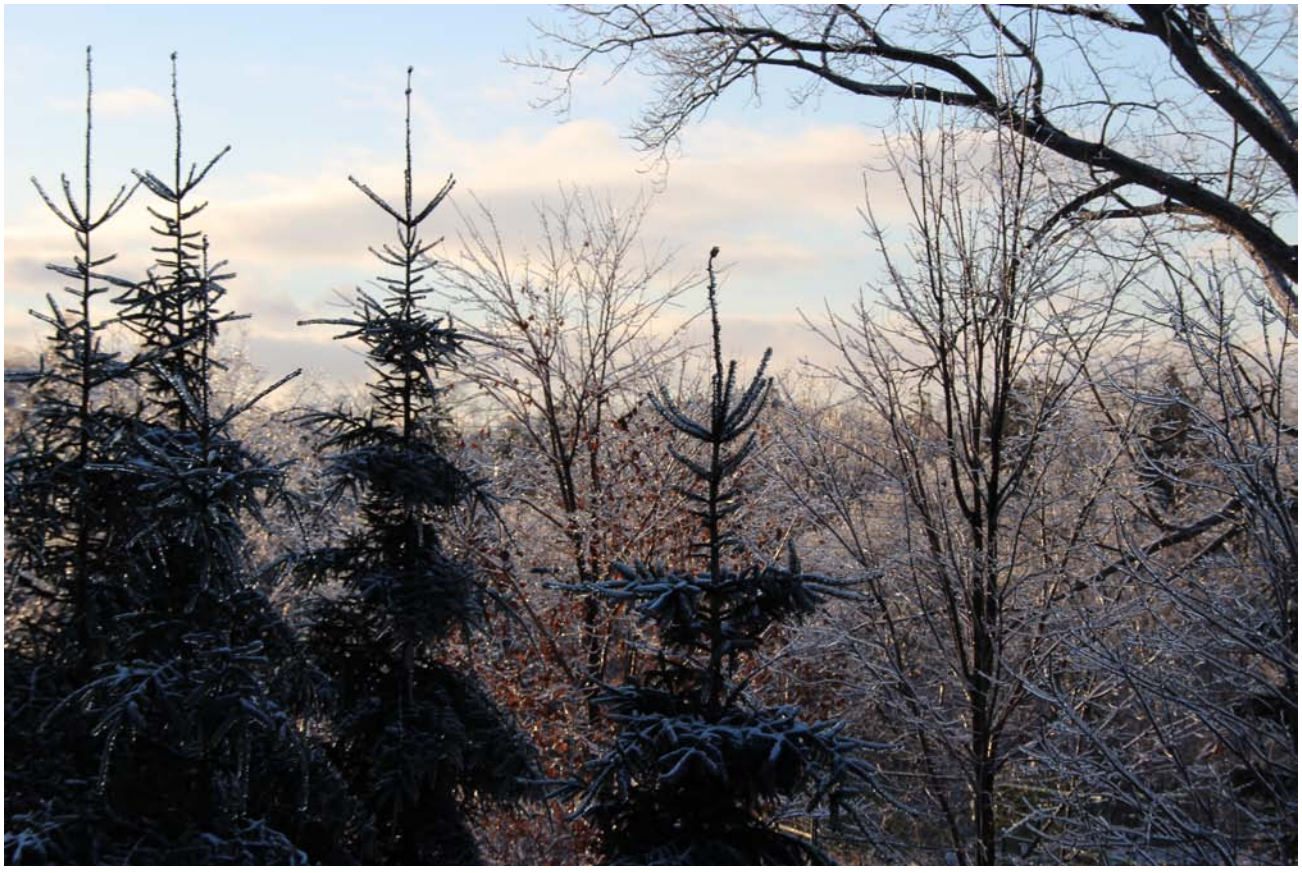
2. You Wouldn't Expect a Jury Trial Over a Contested Parking Ticket, Now Would You? (… Introducing A New Era in Summary Judgment Applications)

On January 23, 2014, the Supreme Court of Canada issued a landmark decision in the case of *Hryniak v. Mauldin ("Hyrniak")* (*1). This case represents a radical development in civil litigation, with the Supreme Court of Canada weighing in on how trial level courts should now deal with motions for "summary judgment". This decision places an enhanced emphasis on the disposition of appropriate cases by way of a summary judgment instead of 'wasting away' on a court docket waiting for a distant trial date.

Not all cases will be primed for "summary judgment". However, as detailed below, counsel will be increasingly expected to canvass whether this procedure might be an appropriate step in the resolution of all of or a part of a law suit – with the judiciary now being expected to be more accommodating in the consideration of such applications as they come forward.

With the exception of the province of Quebec, the various provinces provide in their rules of court a "summary judgment" mechanism. With "summary judgment", a litigant petitions the court for judgment on an issue (or on the whole of a claim) prior to trial. Conventionally, this involves the preparation of affidavits of witnesses, frequent cross-examinations on the same, and oral argument by counsel before a judge. The party seeking summary judgment tries to satisfy the court that "there is no genuine issue for trial", that there exists a sufficient "record" for the court to make a ruling. "*Why wait for a trial?"* The responding party will usually be in opposition to such a step: "*we need witnesses at a conventional trial to sort things out*" being a common refrain.

Without trying to put a cynical gloss on things, the Bar and Judiciary have historically tended, as a general rule, to be steeped in conservatism in



their approach to and response to motions for summary judgment. Lawyers were (understandably) afraid of being denied in their bid for summary judgment and, in the result, exposing their clients to adverse costs awards in favour of the responding party. Judges tended to hold out for the 'clearest cases' of there being liability (or none, as the case might be) before disposing of matters by way of summary judgment. The legitimate goal of 'each party having their day in court' took hold. As the Supreme Court now admonishes, perhaps a bit too firmly. There was little institutional incentive for a party to consider summary judgment except for the clearest issue capable of being resolved – perhaps involving only a documentary based dispute. For its part the judiciary exercised by and large deference to the trial process - instead of disposing of matters half way through the normal course of the law suit, matters much more often than not were reserved for a trial.

However along the way the system started getting more and more expensive. The collective awareness of the 'rule makers' came to be that trials are expensive and drawn out affairs often taking place late in the day of a law suit, and that all matters need not necessarily go to trial for justice to be achieved.

In 2010, there were significant amendments to the summary judgment rules in Ontario. The policy intent was that judges be given extra tools to determine issues of credibility, to give weight to evidence and, if need be, to actually hear oral evidences of witnesses - hallmarks conventionally reserved for trial. These changes to the rules gave way to the present "Rule 20" summary judgment regime in Ontario and frame the context for the Supreme Court's ruling in *Hyrniak*.

A brief review of the relevant rules of court is in order to understand the context and likely effect of the *Hyrniak* decision.

The Ontario Summary Judgment Rules

RULE 20 SUMMARY JUDGMENT

WHERE AVAILABLE

To Plaintiff

20.01 (1) A plaintiff may, after the defendant has delivered a statement of defence or served a notice of motion, move with supporting affidavit material or other evidence for summary judgment on all or part of the claim in the statement of claim.

…

To Defendant

(3) A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim.

DISPOSITION OF MOTION

20.04 (2) The court shall grant summary judgment if,

(a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or

(b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

Powers

(2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.

2. Evaluating the credibility of a deponent.

3. Drawing any reasonable inference from the evidence.

Oral Evidence (Mini-Trial)

(2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation. O. Reg. 438/08, s. 13 (3).

WHERE TRIAL IS NECESSARY

Powers of Court

20.05 (1) Where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried, and order that the action proceed to trial expeditiously.

The Rule 20 Rules for Summary Judgment, and their Pre-Hyrniak Treatment by the Courts

As reported in our March, 2012 newsletter, the Ontario Court of Appeal considered the above rules and how they should be applied in its decision in *Combined Air Mechanical Services Inc. v. Flesch* (*2). Of particular note in that case was the ruling that, in deciding whether the new powers under 20.04 (2.1) should be employed to "weed out" a claim as having no chance of success or be used to resolve all or part of an action, the judge (being asked to hear the motion for summary judgment) must ask the following critical question: can a *full appreciation* of the evidence and the issues be achieved by way of summary judgment, or can this full appreciation *only* be achieved by way of a trial? The point emphasized by the Court of Appeal was that such a "motions judge" was required to assess whether the attributes of the trial process were necessary to allow him or her to fully appreciate the evidence in the issues posed by the case. In making this determination, the Court of Appeal stated that the motion judge was to consider, for example, whether he or she would accurately weigh and draw inferences from the evidence without the benefit of the trial "narrative", without the ability to hear the witnesses speak in their own words, and without the assistance of counsel as the judge examines the record in chambers.

The Hryniak Decision

In *Hryniak*, the Supreme Court of Canada calls for a radically different approach than that indicated by the Ontario Court of Appeal in the *Combined Air* decision, which one might argued channeled conventional judicial conservatism. In *Hryniak* the Supreme Court mandates that summary judgment motions *must* be granted whenever there *is no genuine issue requiring a trial*. There will be *no genuine issue requiring a trial* when the judge is able to reach a fair and just determination on the merits of a motion for summary judgment. This will be the case when the process:

1) allows the judge to make the necessary findings of fact;

2) allows the judge to apply the law to the facts, and

3) is a proportionate, more expeditious and less expensive means (than a conventional trial) to achieve a just result.

In essence, the motions judge *must* use the new "fact finding powers" available by virtue of the 2010 changes to the Rules (see Rule 20.04 (2.1) and (2.2) above) – including the calling of witnesses, hearing oral evidence and weighing and evaluating the credibility of evidence presented by witnesses and/or affidavits *without* feeling the need of having to justify why that exercise can be done short of an actual trial. In fact, it now appears that judges are now expected to be unapologetically

staunch in their application of these new 'credibility and evidence assessment tools' as long as that in the process a fair and just determination on the merits of the case can be realized.

The Facts

The *Hryniak decision* is of such critical importance to the civil litigation bar and to the judiciary that the particular facts of the case almost pale in the analysis. With this said, a brief review of the facts will assist in laying the context for further discussion of the ramifications of this decision.

In June, 2001, two representatives of a group of American investors met with the defendant Hryniak and others to discuss an investment opportunity. The group of investors wired money to Hryniak which monies were pooled with other funds and transferred to a company controlled by Hryniak. The money eventually disappeared. The investors brought an action for civil fraud against Hryniak and others and they ultimately brought a motion for summary judgment. The motion judge used his powers under Rule 20.04 (2.1) to weigh the evidence, evaluate credibility and to draw inferences. He concluded that a trial was not in fact required against Hryniak. In short, there was no "genuine issue for trial" that Hryniak was liable for civil fraud. Hryniak appealed. The Court of Appeal was satisfied that the record supporting the finding that Hryniak had committed the tort of civil fraud against the investors was ample and should not be disturbed, giving due deference to the motion judge's assessment of the evidence. The Court of Appeal accordingly dismissed Hryniak's appeal on the summary judgment ruling against him. Hryniak appealed to the Supreme Court of Canada, providing the present context for that court's review of the new summary judgment regime and the resulting pronouncement of principles intended to bind the Bar and the Judiciary in the common law courts of Canada.

The Supreme Court of Canada's Statement of Principles Concerning Access to Justice

The first few paragraphs of the decision capture the essence of the discussion:

> [1] Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to a trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.
>
> [2] Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures in moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to effect modern reality and recognize that new models of adjudication can be fair and just.
>
> [3] Summary judgment motions provide one such opportunity….
>
> [4] In interpreting these provisions, the Ontario Court of Appeal placed too high a premium on "full appreciation" of evidence that can be gained at a conventional trial, given that such a trial was not a realistic alternative for most litigants. In my view, a trial is not required if a Summary Judgment motion can achieve a fair and just adjudication, if it provides a process that allows the

> judge to make the necessary findings of fact, apply law to those facts, in as a proportionate, more expeditious and less expensive means to achieve a just result in going to trial.
>
> [5] To that end, I can conclude that Summary Judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims.

The Court also noted that private arbitration is not a global answer from a societal point of view:

> [26] In some circles, private arbitration is increasingly seen as an alternative to a slow judicial process. Private arbitration is not the solution since, without an accessible public forum for the adjudication of disputes, the rule of law is threatened and the development of the common law underlines.

The Court notes that there is, of course, always tension between the concern of "accessibility" to the courts and the "truth seeking function":

> [29] There is, of course, always some tension between accessibility and the truth seeking function, but as much as one would not expect a jury trial over a contested parking ticket, the procedures used to adjudicate civil disputes must fit the nature of the claim. If the process is disproportionate of the nature of the dispute in the interests involved, then it will not achieve a fair and just result.

In articulating new principles concerning the use of the summary judgment mechanism, the Supreme Court noted that the Court of Appeal might have been somewhat too technical in its *Combined Air* decision in the suggestion from that case that *"… summary judgment would most often be appropriate when cases were document driven, with few witnesses and limited contentious factual issues, or when a record can be supplemented by oral evidence on discrete points*". As noted by the Supreme Court, such an observation, while helpful, should not be taken as forming firm categories of cases where summary judgment either is or is not appropriate.

It's Time to "Roll Up the Sleeves"

In *Hyrniak*, the Supreme Court lays down the following new cardinal rules and principles:

1. There will be no genuine issue requiring trial when the judge is able to reach a fair and just determination on the merits of a case on summary judgment.

2. An action might be complex, calling for evidence for proper adjudication, however this will not in and of itself frustrate the viability of the summary judgment mechanism. The question will simply be whether the process 1) allows the judge to make the necessary findings of fact, 2) allows the judge to apply the law of the facts and 3) is a proportionately more expeditious and less expensive means to achieve a just result.

3. While the Ontario Court of Appeal in *Combined Air* required a motion judge to focus on a "full appreciation of the evidence" test the Supreme Court seemingly 'lowers the bar' to whether a "*fair and just determination on the merits of the case can be achieved*".

4. In *Combined Air* the Court of Appeal suggested that the motion judge should only exercise power under Rule 20.04 (2.2) to hear oral evidence when:

    1) Oral evidence could be obtained from a small number of witnesses and

gathered in a manageable period of time;

2) The issue to be dealt with by presenting oral evidence was likely to have a significant impact on whether the Summary Judgment motion is granted, or where
3) Any such issue is narrow and discrete i.e. the issue could be separately decided and is not enmeshed with other issues on the motion [at paragraph 103].

The Supreme Court noted that that there should be no such "absolute rule" – that there could in fact be cases when extensive oral evidence can be heard on the motion for summary judgment, avoiding the need for a longer, more complex trial and without compromising the fairness of the procedure.

5. The Supreme Court ruled [paragraph 64] that where a party seeks to lead oral evidence on a motion for summary judgment, that it should be prepared to demonstrate why such evidence would assist the motion judge in weighing the evidence, assessing credibility, or drawing inferences and to provide a "will say" statement or other description of the proposed evidence so that the judge will have a basis for setting the scope of the oral evidence.

6. On a motion for summary judgment, the judge should *first* determine if there is a genuine issue requiring trial based only on the evidence before him/her, *without* using the new fact finding powers e.g. Rule 20.04 (2.1) or (2.2). There will be no genuine issue requiring a trial if the Summary Judgment process provides him/her with the evidence required to fairly and justly adjudicate the matter in a timely, affordable and proportionate procedure.

7. *If* there appears to be a genuine issue requiring a trial, he/she should *then* determine if the need for trial can be avoided by using the new powers under the Rule 20.04 (2.1) and (2.2). The judge may then at his/her discretion use those powers, provided that there use is not against the "interest of justice".

8. The rules of court permit a motions judge to be involved early in the life of a motion in order to control the size of the motion record and to remain active in the event that the motion does not resolve the entire action. While not all motions for summary judgment will require a motion for "directions" (e.g. counsel getting the judges views on how to structure and actually implement the motion hearing), the failure to bring such a motion for directions where it is evident that the record would be complex or voluminous may be considered when the court ultimately deals with cost consequences at the end of the motion. In line with the principle of proportionality, the judge hearing a motion for directions should ensure that he is "seized" [e.g. will remain as the judge] for the summary judgment motion itself, ensuring that the knowledge that he/she has developed about the case does not go to waste.

9. A failed, or only partially successful motion for summary judgment would not be for "naught". The hearing could actually be used to streamline the further conduct of the action. In short, it might be a "helpful start" to the remainder of the lawsuit. In this regard Rule 20.05 (cited above) provides that where

summary judgment is refused or is granted only in part, that a court may make an order specifying what facts are not in dispute, and defining the issues to be tried such that the matter could still proceed to trial expeditiously. The Supreme Court has given a list of examples of items to be addressed even if the matter cannot be totally disposed of on summary judgment:

a. A schedule might be set,
b. a restrictive discovery plan might be set,
c. a trial date might be set,
d. the court might order that the parties deliver a concise summary of their opening statement at trial,
e. the court might order that the parties deliver a witness summary of the anticipated evidence of a witness,
f. the court might order that oral examinations of a witness{es) at trial might be subjected to a time limit
g. or the evidence of a witness might be given whole or in part by affidavit at trial.

In a rather bold development, the Supreme Court [paragraph 78] suggests that *"where a motion judge dismisses a motion for Summary Judgment, in the absence of compelling reasons to the contrary, he or she should also seize himself or herself as the trial judge!"* It remains to be seen how the courts of the provinces may be able to actually give effect to such an idea. Presently there is no procedural or scheduling connection between the judge who hears a motion for summary judgment and the judge presiding at a trial.

The Standard of Review on Appeal From A Motion For Summary Judgment

The Supreme Court has also ruled on the essential need to give a motion judge hearing a matter for summary judgment proper deference in any appeal taken from such a ruling:

1. Absent an "error of law", the exercise of powers by a judge under the new summary judgment rule attracts deference. When the motion judge exercised his/her act finding powers under Rule 20.04 (2.1) and determines whether there is a genuine issue requiring trial, this is a question of mixed fact and law. Where there is no clear error in principle, findings of mixed fact in law should not be overturned on appeal absent an "palpable in overriding error".

2. Similarly, the question of whether it is in the interest of justice for the motion judge to exercise the new fact finding powers provided by Rule 20.04 (2.1) depends on the relative evidence available at the summary judgment motion and at trial, the nature, size, complexity and cost of the dispute and other contextual factors. Such a decision is also a question of mixed fact of law which attracts deference.

Conclusion

Interesting times lie ahead for the Bar and the judiciary in terms of accommodating what one can predict may be a spate of summary judgment applications. The conservatism inherent in the past should dissipate to some degree however careful study, an attuned awareness of the individual case at hand and a good sense of strategy remains critical in the effective and efficient conduct of any law suit.

Gordon Hearn

Endnotes
(*1) 2014 SCC 7
(*2) (2011) O.J. N05431 (Ont. C.A)

3. Application for Stay of Proceedings dismissed: Update Byatt International SA v. Canworld Shipping Company et al (2013) BCCA 558

The *Byatt* case, as heard by the British Columbia Court of Appeal, was the first to adopt English law that, where it is a party to a bill of lading, a ship owner has the right to "intercept" freight where it is a party to a bill of lading and where the shipper has not yet paid that freight to a third party. The full case was reviewed by the author in the Fernandes Hearn LLP October 2013 newsletter.

The defendant, MUR Shipping BV ("MUR"), unsuccessful at the British Columbia Court of Appeal at the interpleader application by Prism Sulphur Corporation ("Prism") for directions regarding payment owed by it, has filed its application for leave to appeal to the Supreme Court of Canada. It also brought an application for a stay of proceedings, including execution of the underlying relief awarded by the courts to date, pending the hearing of that application for leave to appeal (*1).

This case comment will review the test for a stay of proceedings and procedural issues now unfolding in this complicated case specifically as a result of the stay application including the Court's own "unofficial" solution to the problem.

Facts Revisited

Byatt International SA ("Byatt") was the owner the *M.V. Loyalty* ("the vessel"). Byatt granted a time charter of the vessel to Korea Line Corporation ("KLC") who in turn granted a time charter to MUR Shipping BV ("MUR"). MUR then granted a trip charter to Canworld Shipping Company Limited ("Canworld") who, in turn, agreed to carry sulphur (the "cargo") from Vancouver to Australia, for Prism Sulphur Corporation ("Prism") pursuant to a bill of lading. The said bill of lading was signed by the master of the vessel, naming Prism as the shipper and BHP Billiton Olympic Dam Corporation as the consignee of the cargo (the "Bill of Lading").

KLC declared bankruptcy in Korea and by the time it defaulted on its payment to Byatt under their time charter, Canworld had not yet paid MUR but MUR had already paid the monies it owed to KLC. The freight payable by Prism to Canworld had also not yet been paid when Byatt served notice of lien under its charter party on Prism and "intercepted" the freight; that is, directed that freight to be paid to itself on the basis of the Bill of Lading.

Byatt and KLC entered into a settlement agreement in the insolvency proceedings in South Korea. Byatt's initial claim of US $16,360,079.41 was approved in a settlement agreement at US $10,741,166.91. The settlement agreement contained this term (Byatt is the "1st Owner"):

> (2) To the extent that the 1st and/or the 2nd Owners receive any net cash payment from their exercise of their contractual right of lien over sub-hires and/or sub-freights due to the Company, the 1st and the 2nd Owners agree that the cash payment *as per the final repayment schedule in the rehabilitation plan* for their Respective Settlement Sum shall be reduced *pro tanto*. (*2) [Emphasis in original.]

Prism, not knowing to whom it should make payment, paid the monies it owed (over $300,000 USD) into its solicitor's account and made an interpleader application.

At First Instance

The Chambers (or motions) judge held that the monies should be paid to MUR and that Byatt failed in its claim on the basis of equitable principles and, essentially, that it would be unfair to allow Byatt to successfully impose its lien in light of the financial settlement agreement with KLC. Such agreement had resolved Byatt's claims against KLC and any payments made to Byatt then, according to the judge, would be to the credit of KLC leaving MUR

considerably out of pocket. The judge was satisfied that Byatt had received the terms of the financial settlement agreement. The monies were ordered to be paid to MUR, being the funds that would normally have satisfied Canworld's obligations to it and in light of the fact that MUR had paid in full the contract price agreed upon with KLC.

Byatt appealed.

Court of Appeal For British Columbia

The British Columbia Court of Appeal reversed. The British Columbia Court of Appeal held that Chambers Judge had not determined whether Byatt was legally entitled to the funds but rather found that such a result would be contrary to equitable principles.

The Court of Appeal went on to find that whatever arrangements that Byatt and KLC had between them was irrelevant to Byatt's contractual entitlements as against other parties. The Court of Appeal cited English case law including *Dry Bulk Handy Holding Inc. v. Fayette International Holdings Limited,* [2012] EWHC 2107 (Comm), aff'd [2013] EWCA Civ 184, which also dealt with a default by KLC and a settlement reached in the process of insolvency proceedings in South Korea. In that case, the English High Court determined that payment within those proceedings was irrelevant to a claim under a bill of lading for freight or a lien on freight.

The Court of Appeal stated that Byatt's charter party gave it the right to direct the freight before it has been paid per established case law (*Wehner v. Dene Steam Shipping Company,* [1905] 2 K.B. 92 at 98 ("Wehner"); *The "Cebu",* [1983] 1 Lloyd's L.R. 302 at 302 (Q.B.)

MUR argued that the notice of direction of payment given by Byatt was ineffective and the money was paid prior to a proper notice having been given. MUR contended that the initial notice did not direct the funds to Byatt but was a demand to Prism to hold the money. After payment into trust, Byatt only then issued a notice for specific payment to itself. MUR argued that this transfer constituted payment that rendered ineffective the later notice for payment. The Court of Appeal did not agree and characterized the payment into trust as a transfer in contemplation of interpleader proceedings with a proposal that the solicitor's account serve as the depository of the money until court determination of entitlement. At paragraph 31, the Court of Appeal stated:

> The money simply went from principal to agent and the principal never lost control of the funds. This, in my opinion, did not constitute a payment in the sense of a complete alienation of the funds. The notice, as supplemented, was effective and establishes Byatt's entitlement.

Further the Court of Appeal, relying of the *Wehner* decision *supra*, found that, as Byatt had not been paid by KLC for the associated time charter via the settlement agreement or otherwise, MUR could not argue that Byatt, as owner, must account to those lower in the chain for any overpayment obtained on the interception of freight and pay all monies to MUR.

The Stay Application by MUR

MUR brought an application for a stay of the judgment of the Court of Appeal pending the hearing of the leave to appeal application. If successful, Prism's payment would not be released to Byatt.

The test for a stay pending leave to appeal to the Supreme Court of Canada is (*3):

1) there must be some merit to the appeal; that is, there is a serious question to be determined;

2) the applicant would suffer irreparable if the stay was refused; and

3) if the stay is refused, on balance, the inconvenience to the applicant would be greater

than the inconvenience to the respondent if the stay was granted.

The merits, when examined, include whether the matter is of public importance in addition to whether there is an error at the Court of Appeal level. In considering whether to grant a stay, the threshold test also involves the likelihood of whether leave to be appeal will ultimately be granted.

Byatt, responding to the stay application brought by MUR, argued that the appeal is not of public importance in that the matter involves the application of well-settled law. Further, the parties are innocent parties in an insolvency and there are no equitable principle engaged that would disrupt or displace the priorities that follow the law. (*4)

Conversely, MUR argued that the proposed appeal raises issues of national and international importance being the first case in Canada to consider the issue of compromises made in insolvency proceedings on contractual rights governed by maritime law. The case was described by MUR as the only Canadian decision considering whether a ship owner's legal right to recover freight owed by a charterer from innocent third parties, is affected or extinguished by a settlement agreement between the ship owner and the defaulting charterer.

MUR argued that significant, novel and unresolved questions of maritime law, concerning competing legal rights of ship owners, charterers, and shippers are at issue including whether a ship owner's legal right to recover freight owed by a charterer from innocent third parties, is affected or extinguished by a settlement agreement between the ship owner and the defaulting charterer.

MUR also specifically argued that there is an error in the Court of Appeal's judgment that would ensure that leave would be granted to the Supreme Court of Canada and such argument is supported by a caveat in the English Case, *Dry Bulk Handy Holding Inc., v. Fayette,* noted above, wherein the English Court of Appeal stated at para 28,

> However it is to my mind arguable that a time charterer who is not in default of his obligation to pay hire, and other amounts, under the head charter could restrain a shipowner from demanding payment of bill of lading freight to be made directly to himself, on the simple ground that until such time was the charterer is in default the shipowner has, by reason of clause 8 of the NYPE Form, or a similar employment clause, agreed to delegate collection of freight to the charterer. Whether such an argument would succeed must await decision on another occasion when it arises.

The Result of the Stay Application

The British Columbia Court of Appeal did not agree with MUR, noting that there was no conflicting provincial appellate authority that would increase the likelihood that leave would be granted.

The Court stated that the issue raised in the case does not involve a conflict between different regimes of law that might govern the facts. Further the court could not see the case as involving international or jurisdictional conflicts or conflicting results that might arise from the application of maritime law principles in different jurisdictions. It is not apparent, the Court said, for example, that the outcome of this case would have been decided any differently if it had been decided elsewhere.

The Court went on to say that, while international trade and the law that regulates that trade are important as is the rising incidence of insolvency cases within the maritime world, such facts alone do not raise the issues in the case to national or international importance. Rather, the court found, the case

involves the application of well settled legal principles, even if such principles might have been applied incorrectly and even if there is a possible argument as raised in the *Dry Bulk* case, above. Standing alone, a possible argument that the case, essentially involving contractual interpretation which happens to arise in an insolvency situation, might have been wrongly decided, is not a factor establishing that the case is one of national importance.

As a result, the Court found that it was unlikely that the leave to appeal application would be granted as no issue of national or international importance had been identified and, therefore, the threshold test for the stay was not met. The stay was refused.

The Court did indicate that, had the threshold been met, then the Court would have been "minded" to grant the stay.

Interestingly, it is noted that the Court purposely referred to the filed affidavit sworn by the managing director of Cosmoship Management SA, commercial and technical managers for ship owning companies, including Byatt the owners of the vessel in question. The affidavit contained a personal undertaking by Cosmship Management SA to the Court to return the Prism funds to the trust fund of their lawyers as well as a further undertaking not to sell the subject ship while the application for leave to appeal or the subsequent appeal are pending. As the undertakings were matters of record, the Court ordered them to be published on its website.

Therefore, while the stay was not granted, the undertaking to repay was published essentially achieving, for MUR, the same result as a stay - an inspired solution.

The application for leave to appeal has not yet been heard.

Kim E. Stoll

Endnotes

(*1) A decision by the Court of Appeal of any province does not have an automatic right of appeal. There must first be an application for leave to appeal to determine whether the Supreme Court of Canada will hear the matter.

(*2) *Pro tanto* means a partial payment on a claim.

(*3) See *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311

(*4) *Byatt International SA v. Canworld Shipping Company et al* (2013) BCCA 558, at paragraph 14

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