FERNANDES HEARN LLP AUGUST 2016

Newsletter

IN THIS ISSUE

The Duty of Good Faith in the Performance of Contractual Obligations: *Does This Mean That You Have To Be Flexible With the Other Party?*

The recent decision of the Ontario Superior of Justice in *2336574 Ontario Inc. v. 1559586 Ontario Inc*. (*1) addressed two potentially conflicting questions that may arise in a contractual relationship between two parties:

a) Does the obligation of contracting in "good faith" require one party to offer flexibility to the other in the latter's performance of a contract?

b) In turn, does the obligation of contracting in "good faith" require one party, who has certain obligations, to specifically conform with them?

The Duty of "Good Faith"

On July 12, 2013, 2336574 Ontario Inc. (the "Purchaser") entered into an agreement of purchase and sale with 1559586 Ontario Inc. (the "Vendor") for a condominium unit (the "Agreement"). The Vendor was the builder of the building in question.

The sale never closed. The Purchaser, maintaining that it was "in the right", sued for a ruling that the Vendor had to go through with the closing under the Agreement, and for a declaration that it did not forfeit the deposit monies it had advanced to the Vendor. The Vendor in turn claimed that the Agreement was at an end and that the Purchaser had forfeited the deposits paid by it.

FIRM AND INDUSTRY NEWS

- **Rui Fernandes** and **Jaclyne Reive** will be hosting a seminar on food transportation for the *Ontario Greenhouse Vegetable Growers Association* on September 9th in Leamington, Ontario.

- **Rui Fernandes** will be speaking on "Limitation of Liability of Shipowners" at the *Canadian Transport Lawyers Association* annual conference being held in Toronto September 22-25, 2016. **Kim Stoll** is the program chair. **Louis Amato-Gauci,** will also be attending.

- **Gordon Hearn** will be speaking on "Freight Broker Regulation and Liability Exposure" in a *Canadian International Freight Forwarders Association* (CIFFA) "M2M" Webinar presentation on September 27, 2016.

- **Fernandes Hearn LLP** has been named a "Top Listed" Firm in the areas of Maritime Law and Transportation Law in the 2017 Edition (11th Edition) of the *Best Lawyers in Canada*. In this edition, as selected by their peers, **Rui Fernandes**, **Gordon Hearn** and **Kim Stoll** are individually recognized in the area of Maritime Law. **Rui Fernandes**, **Gordon Hearn** and **Louis Amato-Gauci** are also individually recognized in the area of Transportation Law and **Louis-Amato-Gauci** is recognized in Aviation Law – Finance.

- The *Canadian International Freight Forwarders Association* (CIFFA) and the *Transportation Intermediaries Association* (TIA) have announced their joint publication in Canada and the United States of "*Doing Business as a Freight Broker in Canada*". This white paper was written by **Gordon Hearn** and provides insight on freight brokerage regulation and practice in Canada.

In the course of blaming each other for the Agreement not closing, each side relied on the Supreme Court of Canada's judgment in *Bhasin v. Hyrnew* ("*Bhasin*") (*2) in asserting that the other failed to act in good faith. The Vendor alleged that the Purchaser was cavalier in its attitude toward the Agreement and failed to close for no good reason, despite having the funds available to it. The Purchaser alleged that the Vendor was unreasonable in unilaterally setting a closing date without consulting it and then refusing to grant even the shortest of extensions for closing.

In the *Bhasin* decision the Supreme Court of Canada ruled that parties to a contract had a duty of "honest performance", requiring them to be honest with each other in relation to the performance of their contractual obligations. The Supreme Court in *Bhasin* noted that "*commercial parties reasonably expect a basic level of honesty and good faith in contractual dealings. While they remain at arm's length and are not subject to the duties of a fiduciary, a basic level of honest conduct is necessary to the proper functioning of a contract*".

Since the decision in *Bhasin* there has been much discussion as to how the notion of "good faith" in the performance of contractual obligations might actually translate into commercial dealings. The present case, pitting the Purchaser against the Vendor, is informative in the context of the former asserting the latter was being "too stringent and not being flexible", while the latter was asserting that the former was being "too casual and not meeting its clear obligations."

The Facts

The purchase price under the Agreement called for certain deposits before the final closing. Specific deposit payments were due upon the initial signing of the Agreement. Further deposits were required in stages over time including on the "interim occupancy closing" (*3). The balance of the purchase price was due on the final closing.

The Agreement provided that, in the event of a monetary default by the Purchaser, or a non-monetary default which is not remedied within five days of being notified of that default, the deposit monies would be forfeited to the Vendor as "liquidated damages".

The Agreement set the "outside" final occupancy date at June 8, 2015, and the "outside" closing date at 30 days later, on July 8, 2015. The precise final closing date was left to the Vendor to set.

On September 11, 2014, the municipality in question issued an occupancy certificate, permitting interim occupancy to take place. The lawyer for the Vendor then advised the lawyer for the Purchaser that the interim occupancy date was set for October 25, 2014. On October 24, 2014, the Purchaser's lawyer requested an extension of the interim closing date to November 7, 2014, which was granted by the Vendor. The parties agreed that the interim occupancy date would be set for November 12, 2014.

On November 6, 2014, the Purchaser's lawyer sought another extension of the interim occupancy date to November 19, 2014 and again the Vendor granted that request. Interim occupancy in fact took place on November 19, 2014. The Purchaser then delivered the prescribed deposit payment due with that event.

Upon interim occupancy, the Purchaser took possession of the condominium. The Purchaser began paying the utility bills and monthly occupancy rent and in turn sub-leased the unit to a tenant – and then things unraveled.

On June 1, 2015, the lawyer for the Vendor wrote to the lawyer for the Purchaser advising that the condominium project had been registered on May 21, 2015, and that the date for the final closing of the transaction was set for June 26, 2015. This date was set without consultation with the Purchaser's lawyer, but

was within the time frame contemplated under the Agreement.

The Purchaser's lawyer replied the next day, requesting an extension of the closing date to September 1, 2015. No explanation was provided for the request of what amounted to a two-month extension. The following day, the lawyer for the Vendor e-mailed the lawyer for the Purchaser, advising that the Vendor was not in a position to extend the final closing date, and accordingly the Purchaser was expected to complete the closing on June 26, 2015. As the Purchaser's lawyer had provided no explanation for the request of an extension of the closing date, the Vendor's lawyer provided no explanation for the refusal of the request.

A week later the Purchaser wrote to the Vendor, offering to pay an extra $10,000 to extend the closing date by two weeks to July 10, 2015. A week later the lawyer for the Vendor wrote to the lawyer for the Purchaser stating that the transaction was still required to close on June 26, 2015. Shortly thereafter, the two lawyers discussed the matter at which time the lawyer for the Purchaser advised the lawyer for the Vendor that the Purchaser would not be able to close on the set date of June 26, 2015. In view of this, the lawyer for the Vendor decided that it would be prudent to tender on the Purchaser, and accordingly he sent a "closing package" to the office of the Purchaser's lawyer on June 26, 2015. This package contained various closing documents, but did not contain a deed to the condominium, which presumably would have been provided to the Purchaser in exchange for the balance of the closing funds.

In the late afternoon of June 26, 2015, the lawyer for the Vendor wrote to the lawyer for the Purchaser advising that he had waited until 4:30 pm to complete the closing, and that, when he called the Purchaser's lawyer's office he was told that he had "gone home for the day." The Vendor's lawyer then wrote a letter stating that, in view of this, the Purchaser had failed to close the transaction and was considered to be in breach of the same.

The next business day, the Purchaser's lawyer wrote indicating that the Purchaser would "have the funds the next morning and will be ready to close". The Purchaser's lawyer asked for the Vendor's lawyer's direct deposit information as soon as possible. In this regard, the principal for the plaintiff explained in his evidence at the trial that he had the funds available and had intended to fund the purchaser out of his own personal money. The Vendor's lawyer never responded to this e-mail.

The Court's Analysis and the Duty of Good Faith in Contracting

The Vendor took the position that once the Purchaser failed to close on June 26, 2015 that the deal was dead. The Purchaser took the position that it had acted reasonably in asking for a short extension and that the Purchaser had done all that it could to get the closing funds on time and had literally "missed by a day".

The lawyer for the Purchaser asked, rhetorically, whether it was reasonable not to give an extension for one or two days if a purchaser misses the closing date by just a little bit. In turn, the lawyer for the Vendor asked, equally rhetorically, whether it is reasonable to miss the closing date when the Agreement was clear and the date was squarely within its terms. Counsel for the Purchaser argued that it was unreasonable to set the closing date unilaterally; with counsel for the Vendor in turn citing the fact that the Agreement specifically provided for the Vendor to choose the final closing date. The Purchaser argued that the Vendor was acting in a high-handed fashion and out of proportion to the plaintiff's breach, while the Vendor viewed the Purchaser as having chosen, of its own volition, to miss the closing date, when it had the money in hand and could easily have attended to the closing.

As noted by the trial judge, at para. 21, "*it does not lie with either side to accuse the other of failing to act in good faith. Both sides played*

their moves carefully and showed each other only their game face".

The Court noted that:

> A duty of good faith is required in contract law, but it is measured by the specific relationship between the parties.(*4) It very much depends on whether, in the particular context, the conduct would be regarded as commercially unacceptable by reasonable and honest people. (*5).
>
> In other words, while the Supreme Court's decision in *Bhasin* puts a new focus on the reciprocal contractual duties owed by contracting parties, its contribution is to "consolidate existing doctrinal approaches and provide a more precise remedial vocabulary" (*6).
>
> Where the parties have a long-term, ongoing relationship, a level of good faith may be expected that imposes flexibility and obligations beyond the letter of the contract; where they are commercially experienced buyers and sellers in a discrete, one-off transaction, the level of contract adherence would not be expected to vary from the strict contractual terms. (*7)

The Court ruled in favour of the Vendor, finding that the Agreement was at an end on account of the Purchaser's failure to attend to and complete the "closing".

The Court noted that the Vendor's obligation was to have the condominium ready to transfer to the Purchaser and to set the final closing date. The Purchaser's obligation was to have the closing funds ready on the closing date and to pay them to the Vendor. The Purchaser did not have the obligation to take less than full title or to get title a day or two late; likewise, the Vendor did not have an obligation to take a few less dollars or to take the closing money a few days late. Given the relationship of vendor and purchaser in a discrete real estate deal, good faith meant sticking to the contract, not bending the contract – even just a little bit – to one side's will.

The failure to close the transaction was not seen to be a minor technical breach: the purchaser missed the closing date by a day, being enough to put an end to the contract. His failure to come up with the funds for the closing on the date set for closing "effectively terminated the agreement at a time when the [Purchaser] was not ready, willing and able to close". (*8)

Pursuant to the default provision of the Agreement, the Court ruled that the Vendor was able to retain the deposit monies as liquidated damages. Counsel for the Purchaser sought "relief from forfeiture" in respect of the deposit monies paid, submitting that the deposit monies paid were out of proportion to any damages suffered by the Vendor, it being unconscionable for the Vendor to retain the money (*9). Counsel for the Vendor replied to this submission that, as a matter of law, relief from forfeiture is not available where the failure was "apparently deliberate" (*10).

The Vendor also asserted that the purpose of a deposit is to act as compensation for the property being off the market pending closing, and that since the Agreement was properly brought to an end, it was entitled to keep the deposits. In this regard, the Court noted that deposits can be forfeited to a vendor upon a purchaser's non-closing. Reviewing the factual history and the payments made by the Purchaser, the Court found that certain payments made by the Purchaser were in fact true deposits while others were "payments on account towards the transaction". Those funds being actual deposits were forfeited where as other "on account" monies were ordered to be returned by the Vendor to the Purchaser. It is interesting to note that the total of the forfeited deposits – being $40,000 – were considered by the Court not to be out of proportion to the $640,000 purchase price in terms of being legitimate "liquidated damages".

Accordingly, the Purchaser forfeited the $40,000 paid in deposit monies and the Agreement was confirmed to be at an end.

The Take Away

The result in this case was no doubt driven in part by the discrete "one-off" contracting framework that we see in such real estate transactions. Recall the finding that in such a case "good faith" requires the parties sticking to the terms of the contract and not bending the contract – *even just a little bit*.

While noting that contracting parties having a long-term, ongoing relationship might be expected to provide certain flexibility in terms of obligations beyond the letter of the contract, this must be read with a degree of caution. The parties (or for that matter, applicable legislation) may provide that time is to be of the essence for a particular step or event, informing the specific detail and scope of a duty, or for that matter an interpretation of the contract might indicate a mutual objective intention that a contract term is to be specifically complied with.

This all points to the benefit of parties being deliberate in their contract drafting, in terms of setting out expectations and requirements. Further, this case also reveals that unintended results may follow situations of parties not openly communicating and being transparent during the performance of a contract. When in doubt, discussion and communication may go a long way as opposed to the parties only ever showing their "game face".

Gordon Hearn

Endnotes

(*1) 2016 ONSC 2467

(*2) [2014] 3 S.C.R. 494

(*3) An "interim occupancy closing" is achieved upon the substantial completion of the units such that the relevant municipal authority will issue occupancy permits. This event precedes the actual "closing date" when the ownership of the condominium unit is registered and transferred over to the purchaser.

(*4) *Yam Seng Pte Ltd. v. International Trade Corp. Ltd*. [2013] 1 All E.R. (Comm.) 1321

(*5) *Mid Essex Hospital Services NHS Trust v. Compass Group UK and Ireland Ltd.* [2013] EWCA Civ. 200 (C.A.)

(*6) Edward Belobaba, "*Good Faith in Canadian Contract Law*", in *Commercial Law: Recent Developments and Emerging Trends* (Law Society of Upper Canada, 1985) at p 80.

(*7) See endnote (*4) above, at para. 142

(*8) *Via Doro Development Inc. v Infusino* [2001] O.J. No. 4481 (S.C.J.) at para. 14.

(*9) *Edwards-Decoito v. Maple View Building Corp*. [2005] O.J. No. 5486 at para. 28.

(*10) *Terry v. Law Society of Upper Canada* [1992] O.J. No. 1678 (Gen. Div.) at para. 12.

2. U.S.A. News Alert: From Our Friends at Dysart Taylor Cotter McMonigle & Montemore, P.C.

Major Changes to the Uniform Straight Bill of Lading Effective Aug. 13, 2016

The National Motor Freight Traffic Association has just made substantial changes to the terms and conditions of the Uniform Straight Bill of Lading to be effective on August 13, 2016. On July 14, 2016 the NMFTA issued Supplement 2 to the National Motor Freight Classification NMFC 100-AP. The key changes directly affect claims against trucking companies for lost or damaged cargo.

The following changes to the Terms and Conditions are particularly significant:

Section 1.(a) – changes the responsibility for cargo loss and damage from the "carrier or party in possession" of the cargo to the "carrier shown as transporting the property."

Section 1.(b) – changes the burden of proof to require the shipper to prove the carrier or party in possession of the cargo was negligent rather than the carrier being required to prove that it was not negligent.

Section 1.(b) -- adds "riots or strikes" to the list of carrier defenses to a cargo claim, and adds "or any related causes" in reference to the entire list of defenses.

Section 2. – eliminates the "reasonable dispatch" standard relating to delay claims against carriers, and simply says the carrier "will transport the shipment in the regular course of its providing transportation services."

Section 3.(b) – changes the requirement that claims for failure to make delivery (i.e., claims for loss of cargo) must be filed "within nine months after a reasonable time for delivery has elapsed," and substitutes a shorter time period of "not more than nine (9) months from the date of the bill of lading."

The impact of these changes will be widespread, because the NMFC Uniform Straight Bill of Lading applies to virtually all shipments transported by all carriers that are participants in the NMFC except shipments that are subject to a prior written contract between the carrier and the shipper. The major less-than-truckload carriers and many truckload carriers are participants in the NMFC. Several hundred smaller carriers are also participants.

Both the Transportation and Logistics Council, Inc. (TLC) and NASSTRAC, Inc. (NASSTRAC) [also known as the National Shippers Transportation Council] requested the Surface Transportation Board (STB) to suspend and investigate the changes. TLC and NASSTRAC challenge the changes to the terms, conditions, and rules of the USBOL on several grounds, including:

1. NMFTA provided no advance notice to the public and no opportunity for shippers or other interested parties to comment on or object to the changes.
2. They violate long-standing laws and court decisions governing carrier defenses and burden of proof relating to motor carrier liability for cargo loss and damage.
3. They violate long-standing laws and court decisions governing the establishment and enforceability of released rates.
4. They shorten the time limit for filing claims for undelivered (i.e., lost) cargo.
5. They eliminate the "reasonable dispatch" standard for delay in delivery of cargo.

On August 5, 2016, the NMFTA filed a response to the TLC and NASSTRAC requests for suspension and investigation. That response is based on 2 basic arguments:

1. The STB does not have jurisdiction or power to suspend and investigate this matter, because it does not involve an agreement among carriers that has been approved by the Board.
2. The USBOL changes are consistent with applicable law.

On August 12, 2016, the STB denied the request to suspend the effectiveness of the changes to

the USBOL and Item 360-B based on the current record. That allowed the changes to take effect on August 13. However, the STB deferred ruling on the request to investigate. The Board requested the parties to file supplemental pleadings to address:

1. Whether the STB has authority to investigate this matter.
2. What, if any, effect or impact the Board's decision in 20017 terminating approval of all rate bureau agreements has on whether the Board should investigate the changes made to the USBOL.

The parties must supplement their pleadings by September 12, 2016. Replies may be filed by October 3, 2016. In the meantime, the new USBOL terms, conditions, and rules are in effect.

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3. Protective Direction 38 – Rail Tank Cars

The Minister of Transport, in accordance with the *Transportation of Dangerous Goods Act, 1992*, issued Protective Direction (PD) 38 on July 13, 2016.

This Protective Direction further accelerates the phase-out of both jacketed and unjacketed legacy DOT-111 tank cars from being used for crude oil service in Canada as of November 1, 2016.

DOT-111 tank cars were involved in the July 2013 train derailment in Lac-Megantic, Quebec in which a number of people were killed and most of the town destroyed.

DOT-111 tank cars are still being used in crude oil service. They are the least crash resistant rail cars. They are being replaced by TC-117. Below is a graphic from Transport Canada of the enhanced safety features of the TC-117 car.

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4. Autonomous Vehicles Cybersecurity Best Practices

Elon Musk, the founder of Tesla Cars, predicts that in two years there will be fully autonomous vehicles on the roads. What does "fully autonomous" actually mean? Are some aspects of car operation already autonomous?

The National Highway Traffic Safety Administration ("NHTSA") of the U.S.A. published a *Preliminary Statement of Policy Concerning Automated Vehicles* on May 30 2013. The NHTSA defines vehicle automation as having five levels:

> *No-Automation (Level 0):* The driver is in complete and sole control of the primary vehicle controls – brake, steering, throttle, and motive power – at all times.
>
> *Function-specific Automation (Level 1):* Automation at this level involves one or more specific control functions. Examples include electronic stability control or pre-charged brakes, where the vehicle automatically assists with braking to enable the driver to regain control of the vehicle or stop faster than possible by acting alone.
>
> *Combined Function Automation (Level 2):* This level involves automation of at least two primary control functions designed to work in unison to relieve the driver of control of those functions. An example of combined functions enabling a Level 2 system is adaptive cruise control in combination with lane centering.
>
> *Limited Self-Driving Automation (Level 3*): Vehicles at this level of automation enable the driver to cede full control of all safety-critical functions under certain traffic or environmental conditions and in those conditions to rely heavily on the vehicle to monitor for changes in those conditions requiring transition back to driver control. The driver is expected to be available for occasional control, but with sufficiently comfortable transition time. The Google car is an example of limited self-driving automation.
>
> *Full Self-Driving Automation (Level 4):* The vehicle is designed to perform all safety-critical driving functions and monitor roadway conditions for an entire trip. Such a design anticipates that the driver will provide destination or navigation input, but is not expected to be available for control at any time during the trip. This includes both occupied and unoccupied vehicles.

A joint policy update to the *Preliminary Statement* noted above was issued by the Department of Transportation and the NHTSA in 2016. (*1) The key aspect of the update was the following:

> DOT and NHTSA policy is to facilitate and encourage wherever possible the development and deployment of technologies with the potential to save lives. To that end, NHTSA will use all available tools to determine the safety potential of new technologies; to eliminate obstacles that would prevent or delay technology innovations from realizing that safety potential; and to work with industry, governmental partners at all levels, and other stakeholders to develop or encourage new technologies and accelerate their adoption where appropriate.
>
> The rapid development of emerging automation technologies means that partially and fully automated vehicles are nearing the point at which widespread deployment is feasible. Essential to the safe deployment of such vehicles is a rigorous testing regime that provides sufficient data to determine safety performance and help policymakers at all levels make informed decisions about deployment. Industry plays a key role in this process by both conducting such testing and in providing data that establish the safety benefits of automation technologies that exceed the current level of roadway safety. Within six months, NHTSA will propose best-practice guidance to industry on establishing

principles of safe operation for fully autonomous vehicles (vehicles at Level 4 on the scale established in NHTSA's 2013 preliminary policy statement).

Some of the most significant concerns with autonomous vehicles are cybersecurity and privacy Protection. In July of 2014, a group of U.S. automakers created Auto Information Sharing and Analysis Centre ("AISAC"). The aim is for its members to identify and share information about threats and vulnerabilities regarding connected vehicles and to analyze those threats and vulnerabilities and come up with solutions. Connected vehicles already exist today in some form of level 2 on the scale established in NHTSA's 2013 preliminary policy statement. And researchers recently have demonstrated how cyber security is already a primary concern in some of today's vehicles. In 2015 researchers demonstrated "how attackers could take complete remote control of a 2014 Jeep Cherokee's braking, steering, and other critical systems from 10 miles away while the vehicle was traveling at 70 miles per hour. The exploit resulted in Chrysler recalling some 1.4 million vehicles so it could mitigate the vulnerability exploited by the researchers for the demo." (*2)

On July 21, 2016 AISAC published its executive summary *Automotive Cybersecurity Best Practices.* It is an update on its *Framework for Automotive Cybersecurity Best Practices* published in January 2016 the Alliance of Automobile Manufacturers and the Association of Global Automakers. The following topics are covered:

Governance

- Define executive oversight for product security.
- Functionally align the organization to address vehicle cybersecurity, with defined roles and responsibilities across the organization.
-Communicate oversight responsibility to all appropriate internal stakeholders.
- Dedicate appropriate resources to cybersecurity activities across the enterprise.
- Establish governance processes to ensure compliance with regulations, internal policies, and external commitments.

Risk Assessment and Management

- Establish standardized processes to identify, measure, and prioritize sources of cybersecurity risk.

- Establish a decision process to manage identified risks.
- Document a process for reporting and communicating risks to appropriate stakeholders.
- Monitor and evaluate changes in identified risks as part of a risk assessment feedback loop.
- Include the supply chain in risk assessments.
- Establish a process to confirm compliance by critical suppliers to verify security requirements, guidelines, and trainings.
- Include a risk assessment in the initial vehicle development stage, and reevaluate at each stage of the vehicle lifecycle.

Security by Design

- Consider commensurate security risks early on and at key stages in the design process.
- Identify and address potential threats and attack targets in the design process.
- Consider and understand appropriate methods of attack surface reduction.
- Layer cybersecurity defenses to achieve defense-in-depth.
- Identify trust boundaries and protect them using security controls.
- Include security design reviews in the development process.
- Emphasize secure connections to, from, and within the vehicle.
- Limit network interactions and help ensure appropriate separation of environments.
- Test hardware and software to evaluate product integrity and security as part of component testing.
- Perform software-level vulnerability testing, including software unit and integration testing.
- Test and validate security systems at the vehicle level.
- Authenticate and validate all software updates, regardless of the update method.
- Consider data privacy risks and requirements in accordance with the Consumer Privacy Protection Principles for Vehicle Technologies and Services.

Threat Detection and Protection

- Assess risk and disposition of identified threats and vulnerabilities using a defined process consistent with overall risk management procedures.
- Inform risk-based decisions with threat monitoring to reduce enterprise risk by understanding and anticipating current and emerging threats.
- Identify threats and vulnerabilities through various means, including routine scanning and testing of the highest risk areas.
- Support anomaly detection for vehicle operations systems, vehicle services, and other connected functions, with considerations for privacy.
- Outline how the organization manages vulnerability disclosure from external parties.
- Report threats and vulnerabilities to appropriate third parties based on internal processes.

Incidence Response and Recovery

- Document the incident response lifecycle, from identification and containment through remediation and recovery.
- Ensure an incident response team is in place to coordinate an enterprise-wide response to a vehicle cyber incident.
- Perform periodic testing and incident simulations to promote incident response team preparation.
- Identify and validate where in the vehicle an incident originated.
- Determine actual and potential fleet wide impact of a vehicle cyber incident.
- Contain an incident to eliminate or lessen its severity.
- Promote timely and appropriate action to remediate a vehicle cyber incident.
- Restore standard vehicle functionality and enterprise operations; address long-term implications of a vehicle cyber incident.
- Notify appropriate internal and external stakeholders of a vehicle cyber incident.

Improve incident response plans over time based on lessons learned.

Training and Awareness

- Establish training programs for internal stakeholders across the motor vehicle ecosystem.
- Include IT, mobile, and vehicle-specific cybersecurity awareness.
- Educate employees on security awareness, roles, and responsibilities.

- Tailor training and awareness programs to roles.

Collaboration and Engagement with Appropriate Third Parties

- Review information and data using a standardized classification process before release to third parties.
- Engage with industry bodies, such as the Auto-ISAC, Auto Alliance, Global Automakers, and others.
- Engage with governmental bodies, including the National Highway Traffic Safety Administration, NIST, Department of Homeland Security, United States Computer Emergency Readiness Team, Federal Bureau of Investigation, and others.
- Engage with academic institutions and cybersecurity researchers, who serve as an additional resource on threat identification and mitigation.
- Form partnerships and collaborative agreements to enhance vehicle cybersecurity.

A number of issues and questions arise from these best practices guide:

1. The practices are not mandatory and there is no mechanism for enforceability.
2. What is the cost of implementing the best practices and will the auto makers voluntarily incur these costs?
3. There is no timeline for implementation.
4. If the best practices are implemented in the U.S., will auto makers voluntarily implement the practices in Canada and comply with existing Canadian laws?
5. Will foreign automobile manufacturers follow suit?

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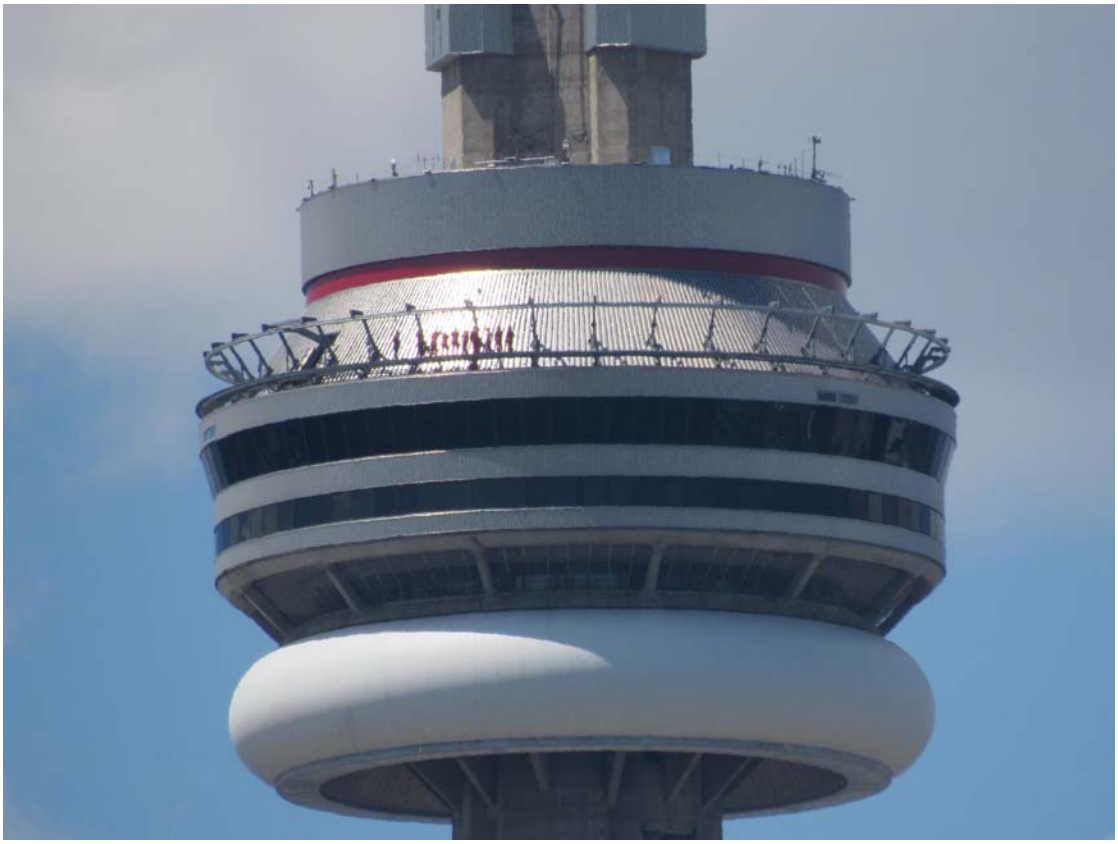
Follow Rui M. Fernandes on Twitter @RuiMFernandes and on Linkedin. See also his blog at http://transportlaw.blogspot.ca

Endnotes

(*1) www.nhtsa.gov/staticfiles/rulemaking/pdf/Autonomous-Vehicles-Policy-Update-2016.pdf

(*2) http://www.darkreading.com/vulnerabilities---threats/auto-industry-isac-releases-best-practices-for-connected-vehicle-cybersecurity/d/d-id/1326347



5. Flying to Canada? New Entry Requirement in Effect for Certain Foreign Nationals

The Canadian Government has implemented new entry requirements for visa-exempt foreign nationals who fly or transit through Canada. (*1) A "visa-exempt foreign national" is a person who is not a Canadian citizen or permanent resident and who does not normally need a visa to enter the country. These individuals will now need an electronic travel authorization (eTA) to enter Canada.

The eTA is electronically linked to your passport and is valid for a five year period or until your passport expires, whichever is shorter. Accordingly, individuals must travel with the passport that they used to apply for the eTA. Entry requirements for other methods of travel (i.e. land and sea) have not changed.

The new entry requirement has been in effect since March 15, 2016; however, there is currently a "leniency period" until September 29, 2016. Until that date, travellers can board their flight without an eTA as long as they have appropriate travel documentation, such as a valid passport.

Citizens of other countries who, until now, have not needed a visa to enter Canada will need to apply for an eTA. The requirements do not apply to citizens of the United States and individuals travelling with a valid Canadian visa. Canadian permanent residents do not need an eTA but will still need their permanent resident card when travelling. U.S. permanent residents will need an eTA as well as their U.S. Green Card. Students and temporary workers from countries requiring an eTA will also need to apply if they intend to travel to and from Canada by air if they received their student or work permit prior to August 1, 2015.

The following individuals are also exempt from the eTA requirement: Foreign nationals who seek to enter and remain in Canada solely (i) as a crew member of a means of transportation that may be used for transportation by air or who seek to enter to become a member of such a crew or (ii) who seek to enter to transit through Canada after working or to work as a crew member, if they possess a ticket for departure from Canada within 24 hours of their arrival.

Travellers must apply for an eTA before they book their flight to Canada using the online application on the Government of Canada's website. The eTA costs $7 and a passport, credit card and email address are needed to apply. According to the Government of Canada's website, it only takes a few minutes to apply and receive your eTA so last minute applications can be done on any device with an internet connection, if needed.

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Endnotes
(*1) "Electronic Travel Authorization (eTA)" Government of Canada, online: <http://www.cic.gc.ca/english/visit/eta.asp>

6. Extending Limitation Periods: New Developments Regarding the Doctrines of "Discoverability" and "Special Circumstances"

Statutes of limitations exist in most jurisdictions, requiring claims to be made within set, reasonable periods of time.

One of the policy rationales in support of limitation periods is to promote "certainty" in the law. In reality, though, the case law interpreting Canada's limitations periods can be something of a conundrum.

The recently reported Ontario decision of *Elaiathamby v. State Farm* is a case in point. (*1) It surprisingly opens up questions about: (i) the day to begin counting a limitation period, and (ii) the ability of courts to address unfairness in the application of a limitation period.

Limitations Background

Ontario's *Limitations Act, 2002* ("Act") came into force on January 1, 2004, with a view to simplifying the limitations system in Ontario. (*2) Like similar legislation in a number of other provinces, the new Act was enacted to provide a basic two-year limitation period for most causes of action, running from the day that a claim occurs or the day that it is "discovered".

By its own language, the Act does not apply to certain types of proceedings. For example, it does not apply to real estate matters that are addressed by the *Real Property Limitations Act* or to pseudo-criminal matters that are governed by the *Provincial Offences Act*. (*3) The Act also contains a schedule setting out a list of other legislation that is not subject to its application. (*4) For example, the schedule provides that certain sections of the *Insurance Act* take precedence to it.(*5)

Section 19(5) extends certain provisions of the new Act to all claims, even those covered by legislation that is set out in the Schedule. For example, it prevents time running against children and incapable persons, and during alternative dispute resolution processes, such as arbitrations.

Section 5 of the new Act codifies the "discoverability" principle. Briefly, this principle provides that the counting of time is postponed until the date the aggrieved party knew about the relevant facts, or the date it ought to have known. In effect, time is tolled until a cause of action is "discovered" or "discoverable". Thus, the date of "discoverability" is a tool that changes the day that the counting starts.

A parallel common law principle that was not enshrined in the *Limitations Act, 2002*, was "special circumstances". In short, the doctrine had given common law courts the discretion to extend a limitation period after its expiration, if the circumstances warranted it. A common example was a "slip" at a law office, so that a claim was accidentally filed out of time. Since it would have been inequitable to the plaintiff to bar its claim, the courts would regularly correct the problem. Sometimes, it was also used to add new parties to ongoing litigation, when they should have been added in the first place.

The "old" law was turned on its head by the Ontario Court of Appeal in 2008 in a case called *Joseph v. Paramount Canada's Wonderland* ("*Canada's Wonderland*").(*6) In that case, the plaintiff had been injured at an amusement park and the park had actual warning of the likely litigation almost from the start. However, the lawyer's "tickler" (reminder) system failed due to a vacation at his office and the claim was issued out of time. It was a classic circumstance for the application of the doctrine. However, the Court of Appeal did away with judges' discretion to cure such an unfortunate mistake on grounds that one of the purposes of the new legislation was to promote certainty. Two years really meant two years.

Since *Canada's Wonderland*, it is commonly understood by the legal community that two years is a hard-and-fast rule for claims covered by the new Act, subject to discoverability; and that a

slip could not be cured by the "special circumstances" doctrine.

Discoverability And Special Circumstances Outside Of The Act

The facts in *Elaiathamby v. State Farm* ("*Elaiathamby*"), are slightly more complicated than the *Canada's Wonderland* facts, although it was also a personal injury matter. In *Elaiathamby*, the plaintiff arbitrated a statutory accident benefits claim with his insurer, State Farm, arising from a motor vehicle accident. The issue was whether Mr. Elaiathamby was actually involved in the accident. He later commenced a tort claim for damages that he allegedly sustained in the accident, which proceeded in the Ontario Superior Court of Justice.

The case became procedurally interesting, when Mr. Elaiathamby amended his Statement of Claim to allege that State Farm ought to pay him damages, including punitive damages, for the way that it had handled his accident benefits claim. He also made a claim that the insurer had breached the *Human Rights Code*. Mr. Elaiathamby alleged that he only "discovered" sufficient facts to ground the new claims during the Examination for Discovery process in the tort action.

The Honourable Mr. Justice Faieta found that the new claims were statute-barred, including because the "discoverability" principle no longer applied to the relevant part of the *Insurance Act*. In this regard, His Honour first reasoned that the drafters of the *Insurance Act* gave no indication that the statutory period ought to be subject to "discoverability". Secondly, he considered that section 19(5) of the *Limitations Act, 2002* was limited in scope, for example to protect against the running of time for minors. Since section 19(5) did not explicitly extend the discoverability principle (now codified in section 5) to the legislation listed in the schedule, the omission must have been purposeful. In other words, His Honour reasoned that the legislature intended for the *Insurance Act* to be free from "discoverability".

Unfortunately, there was no discussion in His Honour's reasons regarding the fact that the "discoverability" principle existed at common law prior to the enactment of the *Act* It is unclear why the *Insurance Act* ought to be interpreted differently today than it would have been interpreted prior to 2004.

In any event, on the facts, His Honour also disbelieved the plaintiff generally. Mr. Elaiathamby could not satisfy that Court that he had only been able to "discover" the necessary facts at the Examinations for Discovery.

With respect to the "special circumstances" doctrine, His Honour's ruling was similarly dramatic. He found that the lack of any reference to it in the new Act was sufficient to do away with it.

In dealing with "special circumstances", the Court noted that section 20 of the *Act* explicitly provides that the new legislation "does not affect the extension, suspension or other variation of a limitation period or other time limit by or under another Act". However, His Honour concluded that the doctrine of "special circumstances" arose in equity and not "by or under" the *Insurance Act*. In any event, the Court also found that there was nothing special or peculiar about the facts at issue. Thus, Mr. Elaiathamby would have lost even if the doctrine remained applicable.

His Honour did not explicitly apply section 20 to the "discoverability" issue, but presumably would have come to the same conclusion. After all, the word "discoverability" is not found in the *Insurance Act*.

In the result, the Court found that:

> (i.) the principle of "discoverability" does NOT apply to actions governed by legislation listed in the schedule to the *Limitations Act, 2002* (such as the *Insurance Act*), unless the other legislation specifically contemplates it, and

(ii.) the doctrine of "special circumstances" does NOT apply to actions governed by such legislation, for similar reasons.

The Court also went on to make other conclusions that were damning to the Mr. Elaiathamby's case, including a finding that the human rights complaint was not a reasonable cause of action, and ought to be struck. Thus, the limitations issues will not be addressed on appeal to a higher court, as there would be no practical benefit to Mr. Elaiathamby to pursue it. Rather, the issues will have to await further resolution in other cases.

An Open Question

Interestingly, The Honourable Mr. Justice Faieta acknowledged in his reasons for judgment that the Supreme Court of Canada had recently discussed the bounds of the doctrine of "special circumstances" in an Ontario context in a case called *CIBC v. Green* ("*CIBC*").(*7) His Honour said that the Supreme Court of Canada had "acknowledged" that the continuing application of the doctrine was "not settled in Ontario".

In the *CIBC* case, the Supreme Court of Canada simply found that the doctrine was of no use for the plaintiffs on the facts of their case because their claims were subject to a requirement under the Ontario *Securities Act* to obtain leave of the court. Since the plaintiffs had not obtained leave, the question of "special circumstances" was moot. As a result, the Supreme Court of Canada did not address the absence of any reference to the doctrine in the new *Act* and it did not suggest that the common law had been altered.

Thus, it is open to a future plaintiff to argue that *Elaiathamby v. State Farm* was wrongly decided. There is some likelihood that both "discoverability" and "special circumstances" will be applied to actions governed by other Acts, unless that other legislation specifically ousts their application.

In the interim, the law is as muddied as ever. The only way to stay safe is to have a claim issued as quickly as possible.

Alan S. Cofman

Endnotes

(*1) 2016 ONSC 2258.
(*2) S.O. 2002, c. 25, Sched. B
(*3) *supra* note 1, section 2(1).
(*4) also see section 19(1).
(*5) sections 148, statutory condition 14, section 259.1 and section 281.1. Section 281.1 (now repealed) provided a two-year limitation period for an arbitration or other proceeding to address an insurer's refusal to pay (such as for the arbitration of Mr. Elaiathamby's accident benefits claim).
(*6) 2008 ONCA 469.
(*7) 2015 SCC 60.

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