Newsletter

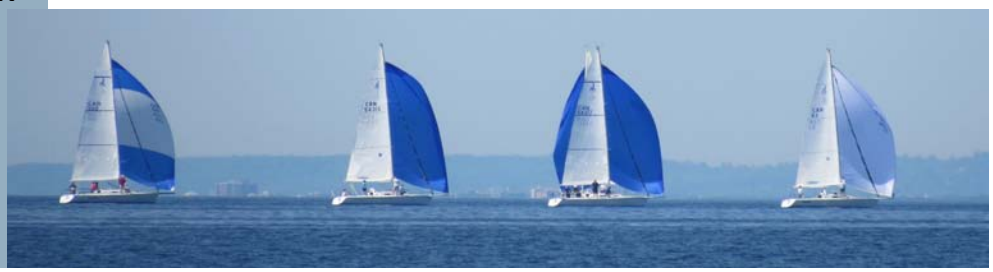
IN THIS ISSUE

Supreme Court of Canada: Federally Regulated Employees - Termination For Just Cause Only

In an important decision the Supreme Court of Canada recently held that non-unionized employees cannot be terminated absent just cause and that adequate severance pay is not a sufficient substitute. (*1) The Court reversed a decision of the Federal Court of Appeal and found that the "unjust dismissal" provisions of the *Canada Labour Code* that apply to unionized employees also apply to non-unionized employees. Otherwise, employees who are not expressly hired for a fixed term are now entitled to job security for life unless the employer can meet a very high threshold test of "just cause" for their dismissal. The decision affects half a million non-unionized employees working in banks, telecommunications, marine shipping, interprovincial trucking companies, interprovincial railways, airlines and other federal businesses.

Overview

In labour and employment law, some general principles developed at common law are: (1) unionized employees cannot be terminated absent just cause and (2) non-unionized employees may be terminated at any time without any right to reasons for termination so long as the employer gives reasonable notice of termination or reasonable compensation in lieu of notice. Provincially regulated employers have for decades enjoyed the right to dismiss employees on a without-cause basis to efficiently manage their human resource compliment, which could include terminating employees who simply proved, for one reason or another, to no longer be a good fit. The only requirement under provincial employment standards legislation is that the employer must provide the terminated employee with reasonable notice of dismissal, or pay in lieu thereof, plus severance pay under certain circumstances.



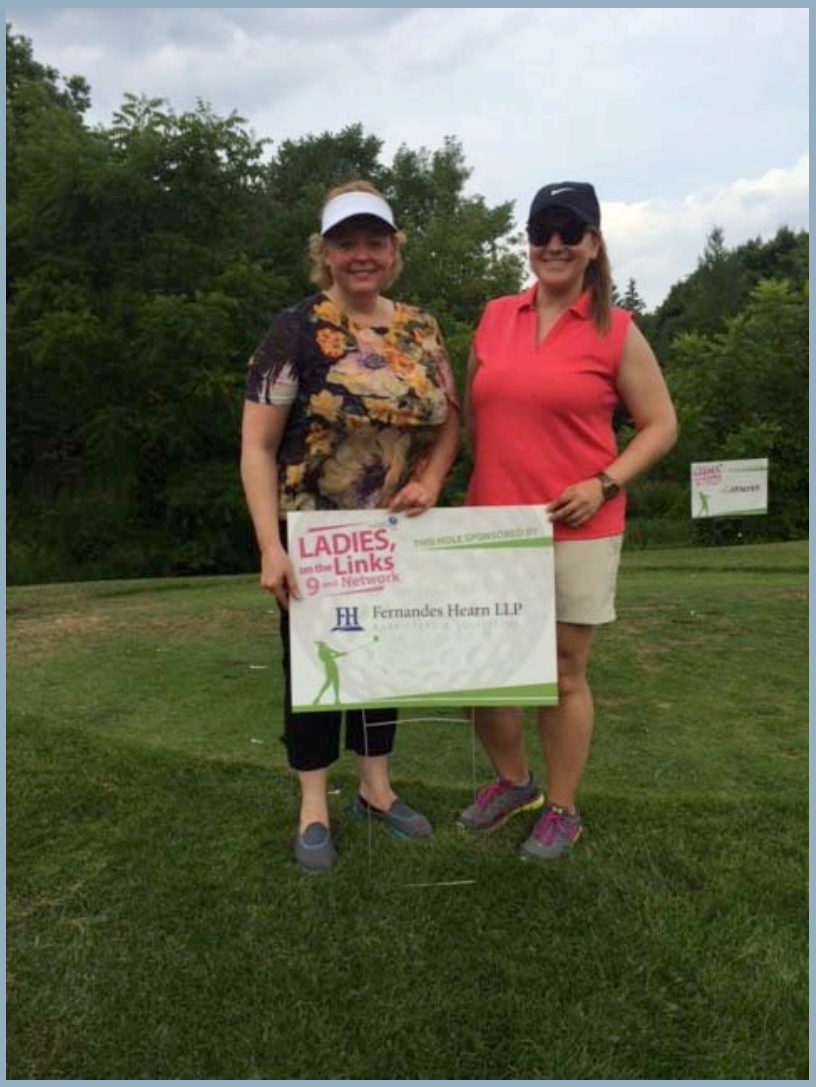
FIRM AND INDUSTRY NEWS

- **Louis Amato-Gauci** attended the 87th Annual Meeting of the *Association of Transportation Law Professionals*, in New Orleans, June 19-21, 2016.

- **Gordon Hearn** attended the *Transportation Lawyers Association* Executive Committee Retreat in Chicago, Illinois on July 15-16. Gordon is a Past President of the *Transportation Lawyers Association*.

- **Kim Stoll** and **Jaclyne Reive** attended the *Toronto Transportation Club's Ladies on the Links* event at the Country Club in Woodbridge on July 21, 2016. See below.

- **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, Jaclyne Reive** and **Gordon Hearn** will also be attending.



Unionized employees who are terminated have the ability to seek reinstatement with back pay or other forms of compensation before independent labour arbitrators. This right has now been given to non-unionized federally regulated employees. Federally regulated employers will now have to expend significant time, money and resources in the hopes of building a case of just cause against the employee.

There are some exceptions that should be noted. The *Canada Labour Code* limits application of the unjust dismissal regime in the following manner:

1. The affected employee must have at lease twelve months of service with the employer.
2. The regime does not apply to managers; however this term is interpreted very narrowly. Supervisors, for example, may not be considered managers.
3. The regime does not apply to terminations for lack of work.
4. The regime does not apply to terminations for discontinuance of a function.

The Decision

The Supreme Court of Canada decision involved the dismissal without cause of Joseph Wilson. Mr. Wilson was employed with a federally regulated employer, Atomic Energy of Canada Ltd. (AECL) for four and a half years. Mr. Wilson did not have a disciplinary record and there was no serious misconduct leading to his termination. AECL admitted that he was not terminated for cause, but it had provided Mr. Wilson with a generous dismissal package that included six months' pay in lieu of notice. Mr. Wilson could have sued in court for wrongful dismissal. Instead, he availed himself of the *Canada Labour Code* regime and made a complaint to an inspector under the *Code,* whose mandate was to try to settle the matter within a reasonable time, failing which the employee can apply for an adjudicator. In this case a labour adjudicator was appointed. The employer sought a preliminary ruling on whether a dismissal without cause together with a sizeable severance package meant that the dismissal was a just one.

The Adjudicator concluded that an employer could not resort to severance payments, however generous, to avoid a determination under the *Code* about whether the dismissal was unjust. Because the employer did not rely on any cause to fire him, Mr. Wilson's complaint was allowed. The Application Judge found this decision to be unreasonable because, in his view, nothing in Part III of the *Code* precluded employers from dismissing non-unionized employees on a without-cause basis. The Federal Court of Appeal agreed, but reviewed the issue on a standard of correctness. The Supreme Court of Canada reversed the Federal Court of Appeal and applied the standard of review as reasonableness not correctness. It emphasized that the decisions of labour adjudicators or arbitrators interpreting statutes or agreements within their expertise attracts a reasonableness standard. It found that the Adjudicator's decision was reasonable. Three of the nine judges of the Supreme Court of Canada disagreed with the majority and separate cogent reasons were provided. Their view was that (*2):

> In our view, this case exposes a serious concern for the rule of law posed by presumptively deferential review of a decision-maker's interpretation of its home statute. In the specific context of this case, correctness review is justified. To conclude otherwise would abandon rule of law values in favour of indiscriminate deference to the administrative state.

The minority of the Court also relied on the interpretation of sections 230 and 235 of the *Canada Labour Code.* Those sections provide minimum notice and severance requirements to employees. The minority interpreted those sections as applying to all employees under Part III of the *Code,* stating:

> Our interpretation is supported by the wording of ss. 230 and 235 of the *Code*. Because ss. 230 and 235 of the *Code* do not apply to dismissals for just cause (ss. 230(1) and 235(1)), they must necessarily apply to dismissals without cause. Otherwise they would be substantially redundant. By prescribing minimum notice periods and severance pay that are owed to employees who are terminated (including dismissed) without cause, Parliament clearly intended to permit federally regulated employers to dismiss non-unionized employees without cause.

The decision means that Mr. Wilson can now proceed with the remedy portion of his hearing before the Adjudicator. The Adjudicator can order AECL to reinstate him, with back pay.

Consequences of the Decision and Take Aways

1. The decision has wide application in the transportation field, in trucking, aviation and rail. Trucking companies that operate outside the borders of one province are subject to the *Canada Labour Code* and this decision.

In the trucking area the use of independent contractors is common. In fact the Workplace Safety & Insurance Board has indicated that "Hiring subcontractors and/or owner-operators is a common practice in the transportation industry."(*3) However, if an owner-operator is in an exclusive, or quasi-exclusive relationship with the transport company, a court may conclude that the owner-operator is a *dependent* contractor. Fernandes Hearn LLP has commented on the dangers of such a relationship in its November 2015 and February 2016 newsletters. Simply using the term "independent contractor" in an agreement may not be sufficient for the determination of the status of the individual.

This point was recently illustrated in the decision in the Ontario Superior Court in *Keenan v. Canac Kitchens* 2015 ONSC 1055, affirmed 2016 ONCA 79. In *Canac Kitchens* the claimants, a husband and wife, both worked for Canac for over twenty years. They began their relationship with Canac as employees. Lawrence Keenan worked for Canac from 1979 to 2009. Marilyn Keenan began working for Canac in 1983. In October 1987, both were summoned to a meeting with Canac management at which time they were told they would no longer be employees, but instead would carry out their work for Canac as independent contractors. They were also told that they should incorporate.

The Keenans were informed that, under the new arrangement, they would be responsible for paying installers. The installers would provide their own trucks and would pick up kitchens from Canac and deliver them to job sites for installation. Canac would set the rates to be paid to the installers and pay the Keenans, who, in turn, would pay the installers. The Keenans, as Delivery and Installation Leaders, would, as before, also be paid on a piecework basis for each box or unit installed; however, the amount paid would be increased to reflect the fact that the Delivery and Installation Leaders were being paid gross, without deductions for *Unemployment Insurance*, *Canada Pension Plan*, or *Income Tax*. Delivery and Installation Leaders would now be responsible for damage to cabinets while in transit, and were expected to obtain insurance to cover such liability.

The Keenans signed a contract with Canac, which described them as independent contractors. They never incorporated. They did register the business name "*Keenan Cabinetry*". They obtained the insurance required by their agreement with *Canac*, and they registered with what was then known as The Workers' Compensation Board. Although they were responsible for cutting cheques to the installers they supervised, the installers were not their employees. *Keenan Cabinetry* never registered as an employer with the Canada Revenue Agency for the purposes of withholding taxes and other source deductions.

As far as the plaintiffs were concerned, the 1987 agreement notwithstanding, they continued to consider themselves as loyal employees of

Canac. They enjoyed employee discounts. They wore shirts with company logos. They had *Canac* business cards. Mr. Keenan received a signet ring for 20 years of loyal service. To the outside world, and in particular, to *Canac*'s customers, the plaintiffs were *Canac*'s representatives.

In March 2009, the plaintiffs were called to a meeting and were told that *Canac* was closing its operations and their services would no longer be required. The *Canac* work quickly dried up.
The Keenans sued for wrongful dismissal.

Justice Mew commented that the law in Ontario relating to dependent contractors is well established, stating (*4):

> Employment relationships exist on a continuum; with the employer/employee relationship, at one end of the continuum, and independent contractors at the other end. Between those two points, lies a third intermediate category of relationship, now termed dependant contractors …Like employees, dependant *[sic]* contractors are owed reasonable notice on termination.

Justice Mew then reviewed the case law on the principles used to distinguish independent contractors from employees. He looked at a 2004 decision (*5) involving commissioned agents, setting out the principles:

> 1. Whether or not the agent was limited exclusively to the service of the principal.
> 2. Whether or not the agent is subject to the control of the principal not only as to the product sold, but also as to when, where, and how it is sold.
> 3. Whether or not the agent has an investment or interest in what are characterized as the tools relating to his service.
> 4. Whether or not the agent has undertaken any risks in the business sense, or, alternatively, has any expectation of profit associated with the delivery of his service as distinct from a fixed commission.
> 5. Whether or not the activity of the agent is part of the business organization of the principal for which he works. In other words, whose business is it?

Justice Mew concluded that the Keenans were entitled to 26 months of notice after they were found to be dependent, rather than independent, contractors of the employer.

If the Keenans had worked for an interprovincial trucking company, the *Wilson v. AECL* decision of the Supreme Court of Canada would apply and simply providing adequate notice would not be sufficient. The employer could be faced with reinstatement and back pay.

Trucking companies that operate outside the borders of one province should review and ensure that all their contracts with owner-operators establish a relationship that is truly independent. The consequences are now more severe if the contractor is found to be a dependent contractor. Trucking companies are also advised, where possible, to hire independent contractors that are corporations rather than individuals, with full authority to hire their own drivers, and the ability to haul loads for multiple carriers.

2. Federally regulated employers should conduct a performance review on each employee prior to the completion of his or her first 12 months of service, and not just after three or six months. If an employer has any concerns about the fit or regarding performance they should terminate the employee within that 12-month period. Upon completion of a full 12 months of employment, a federally-regulated employee will acquire the added protection of the *Code's* unjust dismissal regime.

3. Employees can be hired on a fixed term basis, however it is important that their contract not include an automatic renewal or "evergreen" clause, as this could bring into play the added protection of the *Code's* unjust dismissal regime.

4. Employers should diligently document performance issues or issues of misconduct to establish just cause. It is extremely difficult to prove just cause without addressing issues in a

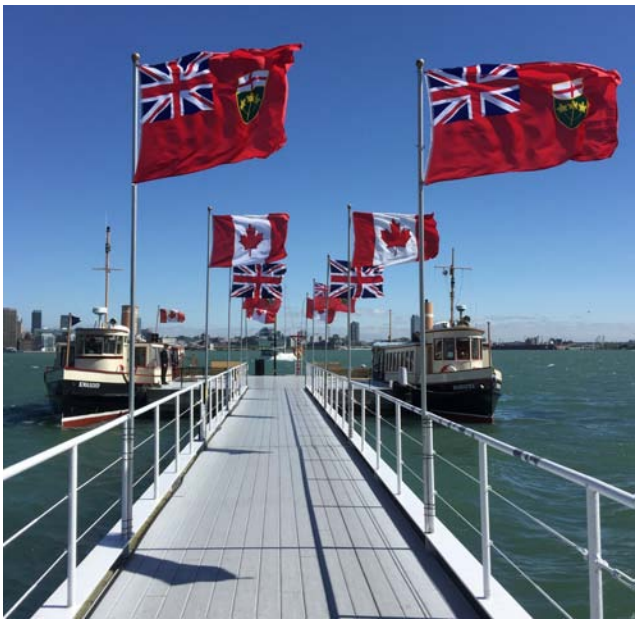
timely way, and in documenting same. The onus is on the employer to show just cause. Employers who terminate an employee for just cause must be able to prove that the employee's conduct or behaviour was so serious in its nature or extent, that it broke the employment agreement. What is just cause? The following is from the Manitoba government guide:

> *What are some examples of possible just cause?*
> The circumstances and specific facts of each case must be considered to determine if there is just cause. Just cause can vary depending on the employee's conduct, the type of business, the employee's position, and the employer's policies or practices, among many other factors. The following are some examples that may constitute just cause:
> - Theft
> - Dishonesty
> - Violence
> - Wilful misconduct
> - Habitual neglect of duty
> - Disobedience
> - Conflict of interest
>
> *What do employers need to consider before deciding there is just cause?*
> *Serious Circumstances*
> Each situation must be looked at on a case by case basis. Very serious acts, such as those involving wilful misconduct or violence, might happen once and be sufficient to show just cause. This type of behaviour can damage the employment relationship to the point it cannot reasonably continue.
>
> *Other Circumstances*
> Other behaviour, such as being late, missing work, and poor performance are not necessarily serious enough to terminate without notice. For just cause to apply in these cases, the employer must be able to show appropriate steps were taken to correct the behaviour, including:
> - Making the employee aware of the expectation
> - Providing the employee with reasonable time and resources (where appropriate) to achieve the necessary standard, and
> -Warning the employee about the specific consequences for continuing the unacceptable behavior

In short, employees should not be surprised by a termination for just cause in these types of circumstances.

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

Endnotes
(*1) Wilson *v.* Atomic Energy of Canada Ltd., 2016 SCC 29
(*2) *ibid,* para. 79.
(*3) So You're Thinking of Using Independent Operators in Your Transportation Business – Brochure
(*4) 2015 ONSC 1055, para. 17
(*5) *Ibid*, para. 18



2. Maritime Liens and S. 139 of *Marine Liability Act*

A maritime lien is a proprietary lien or security for a claim over maritime property including a vessel, its cargo, its freight or proceeds of sale (the "res"). (*1) A maritime lien has been dubbed a "secret lien" because it is not registered and its lien claims are protected and enforced regardless of where the claim originated. Maritime liens are attached to the maritime property until they are released. The liens are extinguished upon payment and acceptance of the amount of the claim. Professor Tetley defined a maritime lien in his text *Maritime Liens and Claims* at p 59-60,

> A traditional maritime lien is a secured right peculiar to maritime law (the *lex maritime).* It is a privileged against property (a ship) which attaches and gains priority without any court action or any deed or any registration. It passes with the ship when the ship is sold to another owner, who may not know of the existence of the lien. In this sense the maritime lien is a secret lien which has no equivalent in the common law; rather it fulfills the concept of a "privilege" under the civil law and the *lex mercatoria.* (*2)

Maritime liens developed as a way of protecting those providing fundamental services to ships for their fees and those victims of negligent vessels regarding their compensation. The wrongdoer is the vessel not the owner. The lien protection was necessary since vessels moved freely between jurisdictions and could more easily escape creditors.

Prior to the amendments to the *Marine Liability Act*, S.C. 2001, c.6, in 2009, Canadian ship suppliers had only a statutory right *in rem* (property) as opposed to a maritime lien, which had greater priority. (*3) This was a problem in that American ship suppliers could assert maritime liens in Canadian legal proceedings because the Canadian Courts would apply American law, giving them greater priority (to the extent that such suppliers had contracts invoking American law, they could cite and rely on that law which affords ship suppliers maritime lien status as distinct from mere statutory lien status). On the other hand, Canadian law did not allow for Canadian suppliers to assert a maritime lien but only a statutory right *in rem,* which enjoyed a lesser priority. This was seen as unjust because the same exact service was treated differently and so Bill C-7 was passed to amend the *Marine Liability Act* in 2009. S. 139 of the *Marine Liability Act* now confers the benefit of a maritime lien to those providing "goods, materials and services" (with no identified limitation as to what this might include) in Canada to foreign vessels in respect of "operation and maintenance". American and Canadian ship suppliers are now treated equally. (* 4)

Ranking of liens in Canadian Maritime law is left in the discretion of the court where there may be an unjust result, but otherwise is:

> (1)Costs of selling the ship, including sheriff's disbursements;
> (2)Possessory liens arising earlier in time than maritime liens;
> Maritime liens (including special statutory liens);
> Possessory liens arising later in time than maritime liens;
> (3)Mortgages, in the order of their registration; and
> (4)Statutory *in rem* claims.

Canpotex Shipping Services Limited v Marine Petrobulk Ltd. ("*Canpotex*") (*5) is a recent case highlighting the Court's process regarding the assertion of maritime liens under S. 139 of the *Marine Liability Act.*

Facts

The plaintiff, Canpotex Shipping Services Limited ("Canpotex"), entered into a contract with the defendant, O.W. Supply & Trading A/S ("OW Trading"), for the purchase of marine bunkers

for vessels that Canpotex chartered. Canpotex chartered two foreign vessels (the "Vessels") and the associated contracts provided that Canpotex would pay for all fuel and would not allow any liens against the vessels. Canpotex ordered marine bunkers from as subsidiary of OW Trading, O.W. Bunkers (U.K.) Limited ("OW UK"). The actual supplier of the bunkers was Marine Petrobulk Ltd. ("MP"), a Canadian bunkers supplier, which then invoiced OW UK for the amount owing of over $650,000 USD. OW UK in turn invoiced Canpotex.

Before payment was made, OW UK became insolvent and declared bankruptcy. ING Bank N.V. ("ING") was specifically assigned all of OW UK's receivables and appointed Receivers, who were also defendants.

MP then demanded payment from Canpotex, which had ordered and received the bunkers. MP claimed a maritime lien pursuant to S. 139 of the *Marine Liability Act* and threatened to arrest the Vessels (*6), if it was not paid.

OW UK/ING's Receivers also demanded payment from Canpotex and also threatened to exercise all powers available to them including the arrest of the Vessels if payment was not made.

Canpotex did not pay either the ING Receivers or MP given the competing demands and brought interpleader proceedings (*7) in the Federal Court of Canada. To avoid the assertion of liens or ship arrest, Canpotex obtained an order of the Federal Court (on consent) directing it to pay the principal amount plus interest of $661,050.63 USD (the "Funds") into its solicitors' trust account. Canpotex then brought proceedings asking for, amongst other things, (1) a declaration regarding the entitlement of the defendants or any one of them to any or all of the Funds; (2) orders for payment out to the appropriate party; and (3) a declaration as to whether, upon such payment out or payment into trust, all liability of Canpotex and the Vessels and all liens asserted were extinguished. All of the defendants brought their own motions regarding their own particular entitlement to the Funds.

MP claimed a contractual lien pursuant to contractual terms with Canpotex as well as a maritime lien under s. 139 of the *Marine Liability Act*. ING opposed MP's claim to a lien in respect of the Funds given that a lien would allow direct payment of the Funds to MP and outside of OW' bankruptcy estate. ING also sought to preserve Canpotex's debt should the Court find that the Funds should be paid directly to MP by attacking the use of interpleader proceedings.

The Judgment

The Court, amongst other things (*8), dismissed ING's objections to Canpotex's status as interpleader by noting that it had consented to the order paying the Funds into trust which thereby allowed the Court to make decisions regarding payment out of the Funds. The Court stated at para. 97:

> Clearly, ING is seeking to preserve the debt that Canpotex owed to OW UK in the event that the Court decides that the Funds are to be paid to MP. In my view, that bridge has already been crossed. ING has already accepted that the Court should decide the allocation of the Funds issue pursuant to interpleader proceedings under Rule 108. In my view, that acceptance necessarily involves the concession that these are suitable proceedings for interpleader under Rule 108.

The Court decided which company would receive pay out of the Funds and also considered which parties had liens, if any, and whether Canpotex's liabilities and any claims against the Vessels were extinguished by the payment into trust.

The Court went on to consider the liens.

The Court found that Canpotex, OW UK and MP were all bound to the MP Standard Terms and Conditions, which stated, at para. 139 :

> …Customer acknowledges and agrees that Marine Petrobulk has and can assert a maritime lien on the Vessel or Customer's delivery vessel, and *may take such other action or procedure against the Vessel, Customer's delivery vessel and any other vessel or asset beneficially owned or controlled by Customer,* for all sums owed to Marine Petrobulk by Customer. Marine Petrobulk shall not be bound by any attempt by any person to restrict, limit or prohibit its lien attaching to the Vessel and, in particular, no wording placed on the bunker delivery receipt or any similar document by anyone shall negate the lien hereby granted… [emphasis added]

The Court stated that these provisions made it clear that MP had a contractual lien against the Vessels for all sums owed by Canpotex, as MP's customer; however, it was not clear that MP's contractual lien extended beyond the Vessels to the Funds held in trust as "any asset beneficially owned" by Canpotex, as highlighted above.

The Court confirmed ~~that~~ that MP had a maritime lien over the vessels under S. 139 of the *Marine Liability Act*, as the statutory requirements were met; specifically, MP was a Canadian company, carrying on business in Canada and it supplied goods to the foreign Vessels for their operation. The *Marine Liability Act* at S. 139 (2) states:

> Maritime lien
> (2) A person, carrying on business in Canada, has a maritime lien against a foreign vessel for claims that arise
> (a) in respect of goods, materials or services wherever supplied to the foreign vessel for its operation or maintenance, including, without restricting the generality of the foregoing, stevedoring and lighterage; or
> (b) out of a contract relating to the repair or equipping of the foreign vessel.

However, the Court also stated that, simply because there was a maritime lien under S. 139 in respect of the Vessels, it did not automatically follow that such a lien extended to the Funds. The Court stated:

> [142] …..The Funds were put up by Canpotex so that neither MP nor OW UK would asset *(sic)* liens and arrest the Vessels. This doesn't mean that they replace the *res*.
>
> [143] What is clear, I think, is that ING has no lien or security interest against the Vessels or any asset beneficially owned by Canpotex, including the Funds, so that once Canpotex pays MP the purchase price for the bunkers supplied to the Vessels from the Funds, ING has no claims against Canpotex or any asset Canpotex or the other Plaintiffs own or control.

Regarding whether there was any lien on the Funds (as opposed to the Vessels), the Court stated, at para. 144,

> "Given this situation, I don't think it is necessary for me to decide whether MP has a contractual or a s 139 maritime lien in the Funds."

Regarding ING,

> [145} In the present case it seems to me that ING has no contractual or lien right to assert against the Funds or the Vessels, and that MP is entitled to the disputed portion of those funds as a function of contract law and equity. In *Balcan*, above, Balcan pursued a necessaries claim under s 22(2)(m) of the *Federal Courts Act* in a situation where Balcan had not paid for the necessaries. The Court concluded that Balcan was not in the position of a necessaries claimant (para 19) so that Balcan had no *in rem* right of action because no such action could arise where a claimant fails to supply necessaries to a

> ship. In the present case, OW UK did not supply the marine bunkers and, in addition, OW UK has not paid for the marine bunkers that were supplied by MP to the Vessels. Consequently, based upon the reasoning in *Balcan*, I do not see how ING can now assert any *in rem* claims against the Vessels or the Funds. MP has supplied the marine bunkers to the Vessels under MP's Standard Terms and Conditions which supersede any contractual arrangements to the contrary between Canpotex and OW UK. MP is contractually entitled to payment for the bunkers from Canpotex. ING, standing in the shoes of OW UK, is not entitled to any payment representing the purchase price of the bunkers because MP was not paid that purchase price and, under the Standard Terms and Conditions, has thus triggered a direct liability for Canpotex to pay it. This being the case, I don't think I need to consider any priority position based upon lien rights between MP and the OW Group of companies

Ultimately, the Court found that MP and ING's entitlement to the Funds depended upon the contractual terms between the parties. Pursuant to the MP conditions, the plaintiff and OW UK were both customers of MP and were jointly and severally liable to pay it for the bunkers delivered. Accordingly, the plaintiff was found liable to pay to MP the full invoice price of MP for the bunkers delivered. ING, in the "shoes" or position of OW UK was entitled to an amount equal to the mark-up of OW being the difference between the OW UK invoice and the MP invoice.

Further, the Court found that MP had both a contractual and a S. 139 maritime lien in the Vessels that was not extinguished until such a time as MP received payment in full for the marine bunkers.

Finally

Canpotex highlights the Court's process in determining whether parties can assert maritime liens under S. 139 of the *Marine Liability Act*. The Court interpreted S. 139 to include the provision of bunkers where the statutory requirements of that section were met; that is, MP was a Canadian company, carrying on business in Canada and it supplied goods to the foreign Vessels for their operation. OW UK did not fit into this description and had not supplied, paid for or received payment for the bunkers.

The use of interpleader, as described above, is also confirmed as appropriate where the intermediary and the actual bunkers supplier both demand payment of the charterer, who has yet to pay any party.

As indicated above, the Court also confirmed that a valid maritime lien is not extinguished until payment of the debt is paid in full. The Court, however, was not inclined to decide whether maritime liens or contractual liens extended to the funds deposited in trust, as such payments were made and posted to avoid the assertion of maritime liens and arrest of the Vessels and did not necessarily release the *res*. (*9)

Kim E. Stoll

Endnotes

(*1) There are many different types of maritime liens, which are not canvassed in this article.

(*2) William Tetley, *Maritime Liens and Claims* 2d ed. (Montreal: Yvon Blais, 1998

(*3) There are three differences between a statutory right *in rem* lien and a maritime lien. The former arises on the day of the arrest and subject to any existing rights. Some statutory right *in rem* liens are defeated by a transfer of title (unless a statute says otherwise) and there must be personal liability on the part of the owner.

(*4) In S. 139 (2.1), there are differences for stevedoring and lighterage services , which must be done at the request of the owner or person acting on behalf of the owner. Section 139(2.1) is subject to s.251 of the Canada Shipping Act, 2001 which provides that, when stevedores contract with the authorized representative or bareboat charterer of a vessel, they have the right to

maintain an action *in rem*, but this right is only valid while the vessel remains under charter.

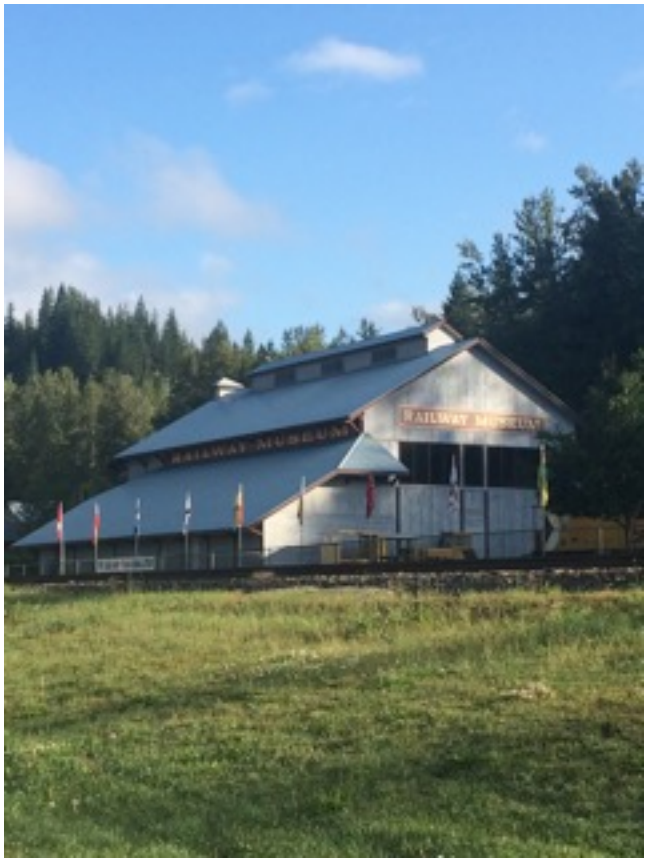
(*5) 2015 FC 1108

(*6) Where parties have a dispute involving a maritime claim (as identified in the Federal Court Act S. 22(2) which includes under subsection (m): goods, materials or services supplied to a ship for the operation or maintenance of a the ship), it is possible to arrest the ship involved. Claims involving *in rem* jurisdiction may use ship arrest to advantage as bail or security is posted for the arrested ship's release allowing for immediate satisfaction of any judgment. See also (*8) below. Please see the author's article "Ship Arrest: Warrant Confirmed and Sale *Pendente Lite* Denied" in the Fernandes Hearn LLP Newsletter, June 2016.

(*7) Interpleader proceedings are brought under the Rules of the Federal Court, S 108. Such proceedings are brought where two or more parties make conflicting claims regarding property as against another person who (1) is in possession of that property; and (2) has no interest in the property; and (3) is willing to deposit that property or dispose of it pursuant to court directions. The court then makes directions as to the claim and its handling.

(*8) This decision also includes review and consideration of contractual issues as between the parties that are not canvassed in this article.

(*9) This is in contrast to a ship arrest where posting of the bail or security releases the vessel and the monies are left in court until adjudication or settlement. In this situation, the maritime lien would attach to the Funds.



3. Changes to the *Repair and Storage Liens Act*: Two Important Steps Towards Taming the Jungle

Introduction

Important changes are being made to Ontario's *Repair and Storage Liens Act* (*1) (the "RSLA") as pertain to the repair and storage of motor vehicles. These changes are being heralded by different interests. Motor vehicle insurers and owners can embrace tightened rules in whether – or for how much – a lien may be claimed by a towing company following the removal of a tractor from a roadside accident. Secured creditors such as motor vehicle lenders will benefit by the increased regulation of what might be claimed by way of a 'preferential' lien by a towing company or a storage facility – and the rest of us who for what ever reason will have a car towed will benefit from related changes being made to the Ontario *Consumer Protection Act*, 2002. (*2) (the "CPA").

These changes are being introduced in two discrete phases.

Phase 1 Amendments: Effective as of July 1, 2016

The RSLA is the statutory means whereby repairers and storers of goods in Ontario are granted lien rights for unpaid services. The legislation provides certain conditions precedent for the assertion of a repairer's lien – a "repairer" being one who makes a repair on the understanding that he or she will be paid for the repair.

The legislation also provides conditions precedent for a storer's assertion of a lien, a "storer" in similar fashion being defined as a person who receives an article for storage or repair on the understanding that he or she would be paid for the storage or the storage and repair as the case may be.

The legislation includes in the definition of "repair" for these purposes a) the transportation of the article for the purpose of making a repair, b) the towing of an article, and c) the salvage of an article.

On July 1st the RSLA was amended in various respects. One amendment was to reduce the maximum time period during which a storer could provide the necessary notice of a lien over a motor vehicle bearing a permit issued under Ontario's *Highway Traffic Act*. (*3) This time period used to be 60 days. It is now 15 days. Accordingly, if notice is not provided within 15 days, a storer's lien is then limited to the unpaid amount owing for that period. The 60 day notice period remains unchanged for out of province vehicles.

Under the RSLA a storer of vehicles has priority over other secured creditors who have registered security interests in the article being stored. Under the former 60 day regime, a storer was allowed to accumulate storage costs for up to 60 days without notifying the owner of motor vehicle when the vehicle was brought into storage by a person other than the owner or a person having the authority of the owner. As mentioned above, with the new change to 15 days, a failure to give the vehicle owner notice within that time will have the effect of capping the storage charges that can be claimed to 15 days of storage fees.

On the same date the RSLA also saw another key amendment, intended to provide guidance on what should be included in calculating the "fair value" of the repair or storage of an article (which can include a tractor or something much smaller…).

Prior to July 1st, certain conditions being satisfied, a repairer or a storer had a lien against an article (including a tractor) that he or she had stored (or stored and repaired) to equal to:

> (a) the amount agreed upon for the storage or storage and repair of the article;
> (b) where no such amount had been agreed upon, the *fair value* of the storage or storage and repair, including all lawful claims for money advanced, interest on

money advanced, insurance, transportation, labour, weighing, packing and other expenses incurred in relation to the storage or storage and repair of the article.
(c) Where only part of a repair is completed, the *fair value* of the storage and the part of the repair completed, determined in accordance with any applicable regulations. [emphasis added]

The problem – surfacing in many commercial disputes pitting insurers and consumers against towing companies – is that there was no pronouncement on what constituted "fair value". The new changes to the RSLA set out factors to be considered in assessing what constitutes "fair value" where no amount is agreed upon for the service. The new legislation now provides that a storer has a lien against an article that the storer has stored or stored and repaired for an amount equal to one of the following, and the storer may retain possession of the article until the amount is paid:

(a) The amount agreed upon for the storage or storage and repair of the article.
(b) Where no such amount has been agreed upon, the fair value of the storage or storage and repair, *determined in accordance with any applicable regulations*.
(c) Where only part of a repair is completed, the fair value of the storage and the part of the repair completed, *determined in accordance with any applicable regulations.* [emphasis added]

As of July 1, 2016 Regulation 427/15 enacted under the RSLA provides the new criteria for "fair value" consideration:

In determining the fair value of repair …… the following factors shall be considered and may be included:

1. The repairer's fixed costs, variable costs, direct costs and indirect costs.
2. The repairer's profit.
3. Any other relevant factors.

In determining the fair value of the storage or storage and repair…… the following factors shall be included:

1. the expenses incurred by the storer in relation to the storage or storage and repair or storage and part of the repair of the article, including expenses related to insurance, transportation, labour, weighing and packing, and
2. all lawful claims for money advanced and interest on money advanced by the storer in relation to the article; and

… and the following factors shall be considered and may be included:

1. the storer's fixed costs, variable costs, direct costs and indirect costs,
2. the storer's profit, and
3. any other relevant factors.

These amendments should be of assistance in establishing objective – and legally relevant – criteria for a court (or, for that matter, parties trying to negotiate a resolution of a dispute) to take into consideration to assess the "fair value" of a service.

Phase 2 Amendments: Effective as of January 1, 2017

On this date amendments to the CPA and new Ontario Regulation 426/15 come into force, adding new part VI.1 to the CPA dealing with towing and storage services provided to "consumers" as defined by the CPA (*4). This new regime provides mandatory content to be provided to consumers by a towing company and/or storage company similar in spirit and effect to Part VI of the CPA dealing with repairs done for a consumer.

Regulation 427/15 under the RSLA combines these new CPA changes into the RSLA regime with the effect that as of January 1, 2017 a storer is obliged to honor the CPA provisions where the towing and storage is for a consumer's vehicle.

New section 3(2.0.1) in the RSLA will provide, in respect of tow and storage services, that "*if the repair includes one or more tow and storage services in respect of which Part VI.1 of the CPA applies, no lien arises with respect to those services if the repairer fails to comply with the prescribed provisions of that Part, if any*". Part VI. 1 of the CPA in fact will provide, the following as of January 1, 2017, requiring owing services providers and storers to:

- get permission from a consumer or someone acting on behalf of a consumer before providing or charging for towing and storage services
- record the name and contact information of the consumer or the person giving the authorization, along with the date and time of authorization;
- disclose certain information, in writing, such as the provider's business name, contact information and address to where the vehicle will be towed.
- refrain from recommending repair and storage facilities, legal service providers or health care service providers, unless a consumer or a person acting on their behalf specifically asks, or the provider offers to make a recommendation and that person agrees
- disclose to a consumer whether the provider is getting a financial reward or incentive for towing a vehicle to a particular storage or repair shop
- establish minimum insurance coverage including general liability insurance of $2 million, customer vehicle insurance of $100,000 and $50,000 cargo insurance
- maintain authorization and disclosure records, invoices, copies of insurance policies and statements of rates for a three year period

There will be some exemptions for certain towing companies and storage services providers, for example where services are provided under a prepaid agreement or membership in an association such as the Canadian Automobile Association (CAA) where the consumer is not be charged for the specific service being provided. These exemptions will also apply when the tow and any storage is being provided in the context of a vehicle purchase and the consumer is not charged for the specific service being provided.

When a vehicle is towed and stored for law enforcement purposes, or detained or impounded under other statutes or regulations or municipal by-laws, or a result of a lawful power of seizure a limited number of the above new rules will apply inasmuch as the consumer generally remains responsible for these types of charges. The consumer will not be protected by requiring the provider to make publicly available a statement of rates and other information.

Further, by way of an important development, a lien for towing and storage will be capped at the maximum amount permitted under the CPA. As of January 1, 2017 the RSLA will provide as follows: *"in cases where Part VI.1 of the CPA applies, the amount of a repairer's lien … with respect to tow and storage services shall be determined in accordance with the prescribed requirements, if any*".

The maximum amount of a lien for tow and storage services will in fact now be subject to certain restrictions under the CPA:

- a tow and storage provider cannot charge a greater amount simply because the cost is to be paid by an insurer or another third party, or being impounded or detained for law enforcement purposes.
- if an authorization includes an estimate, the amount charged may not exceed it by more than 10 per cent. However, the consumer or a person acting on their behalf can agree to change the estimate if they require additional or different services.

Conclusion: "Anything to Avoid the Spiral"

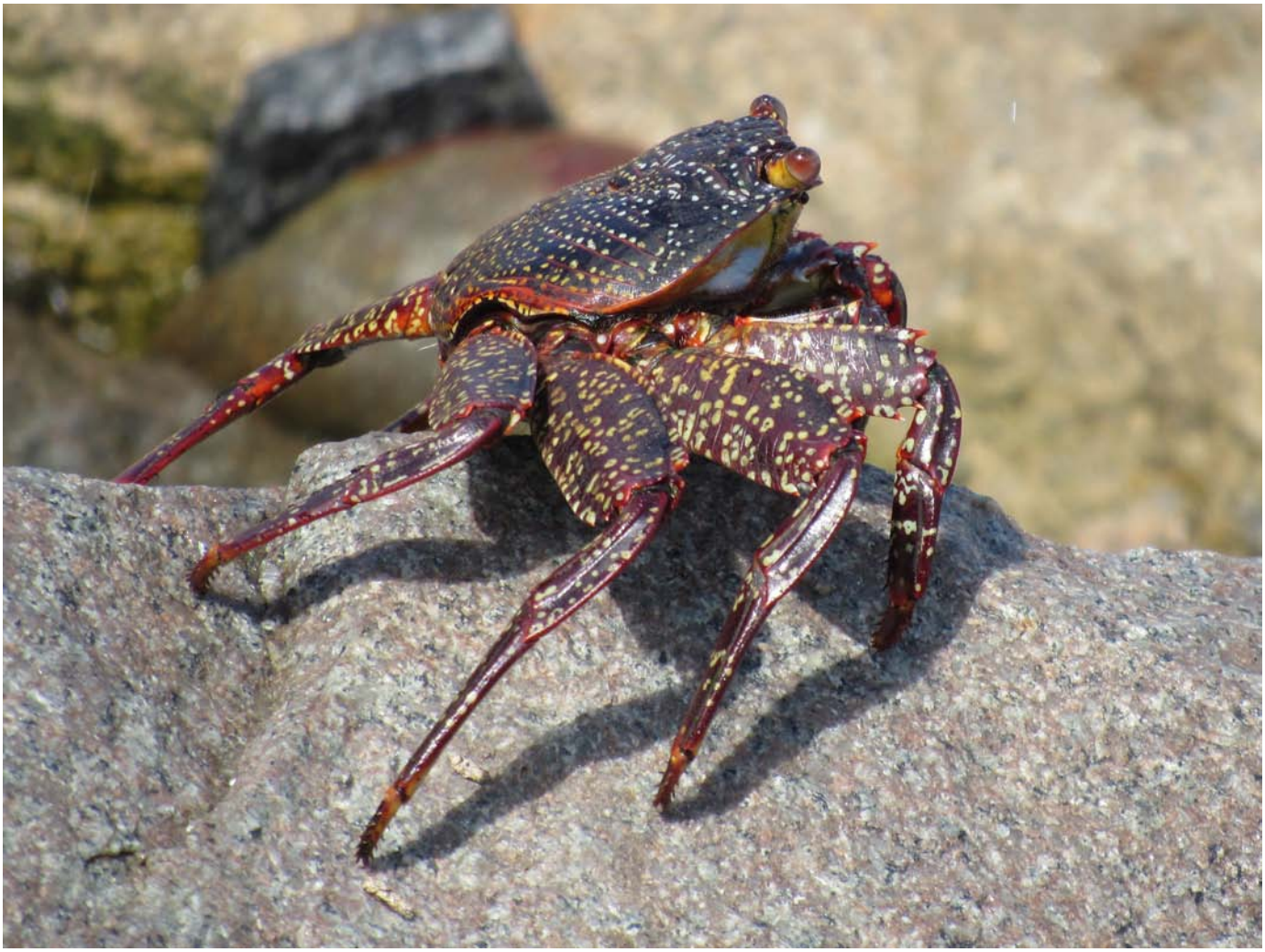
The foregoing amendments are welcomed. Anything that can be done to avoid the vicious "spiral" seen in motor vehicle towage and storage lien disputes will help avoid economic waste and frustration. What of the reference to a "spiral"?

We have seen on countless occasions the spiraling of a dispute where the amount of a lien is the subject of controversy, only to then force the extension of the time where the liened goods on hand are kept in storage, only to the increase the amount of the lien…

Certainty and predictability are always good for commerce, and the above amendments will help objectify how lien amounts will be calculated while at the same time providing further protections for consumers who were unlucky in the first place having to have a vehicle towed.

Gordon Hearn

Endnotes
(*1) R.S.O. 1990, c. R.25
(*2) S.O. 2002, c. 30 Sch A.
(*3) R.S.O. 1990, c. H.8
(*4) A "consumer" is defined as "an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes".



4. Bye-Bye to the Bulk Sales Act?

On June 8, 2016, the Province of Ontario signaled its intention to repeal the century-old *Bulk Sales Act*, R.S.O. 1990, c. B.14 (the "BSA"), when Bill 218 - the *Burden Reduction Act, 2016* - passed its first reading in the Legislative Assembly of Ontario. Assuming this legislation makes its way through the system and receives Royal Assent before the current session of parliament is prorogued, Ontario will fall in line with all the other Canadian provinces and territories, and with 44 U.S. states, that have long since repealed their own bulk sales statutes. (*1)

Relevance for the Transportation Industry

The prospect of the BSA's imminent repeal should be of particular interest to carriers and freight intermediaries that are seeking to expand their operations through strategic acquisitions here in Ontario. Within the transportation industry, buyers have a greater incentive to structure their acquisitions by way of asset purchase transactions rather than by way of mergers or share purchases, so as to avoid the risk of inheriting the target company's negative safety performance record. A buyer who has successfully negotiated for the transaction to proceed by way of an asset purchase must then immediately determine whether the BSA applies, and if so, whether and how to comply with its requirements.

The BSA has bewitched and bewildered purchasers of businesses, company owners, creditors and their respective legal counsel for decades. It applies to every sale of stock in bulk, where "stock" is defined as goods or inventory that a seller disposes of out of the usual course of business or trade of the seller; or goods, fixtures and chattels that the seller uses to operate its business. (*2) There is no question, then, that it applies to all transactions whereby the buyer will purchase all or part of a business through an acquisition of the real and personal assets of a target company. However, it is unsafe to assume that there would be no need to comply with the BSA during the acquisition of an "asset-light" transportation management company or 3PL: Ontario courts have held that the BSA applies even in those cases where the purchased assets are all intangibles, such as goodwill, distribution and customer lists, or where the buyer acquires a trade-mark along with a supply of branded packaging. (*3)

To Comply or Not to Comply

The BSA sets out the following procedure for compliance:

1. The buyer must obtain a closing affidavit from the seller, listing all its secured and unsecured trade creditors, showing the names and addresses of the creditors, the secured collateral (if any), and the amount of each debt that is outstanding at the time of closing.

2. If the seller's statement shows that the claims of the unsecured and secured trade creditors exceed $2,500, the buyer must then ensure all trade creditors that have been listed are paid, unless alternate arrangements are made. This could involve a direct payment of the claims out of the purchase price on closing; or the assumption by the buyer of some or all of the claims at the time of closing; or payment of all or part of the purchase price to a trustee, with the consent of the trade creditors. Alternatively, the buyer may rely upon written waivers issued in a prescribed form by each of the seller's creditors.

3. Within five days of the closing of the asset purchase, the buyer must file an affidavit in the offices of the court for every county or district in which all or part of the stock in bulk is located, attesting to compliance with the BSA, setting out the particulars of the sale, and attaching the seller's trade creditor list as an exhibit. (*4)

4. In the alternative, the buyer may apply for an exemption from the Superior Court of Justice; however, an exemption cannot be granted unless there is unequivocal evidence that the transaction will be advantageous to the seller and that it will not impede the seller's ability to settle

its debts with any of its trade creditors.

Compliance can be costly and cumbersome, while failure to comply can trigger significant consequences. And yet, more often than not buyers and sellers of businesses voluntarily waive compliance with the BSA altogether, with the buyer choosing instead to rely on the seller's representations, warranties and indemnities concerning outstanding liabilities at the time of closing, and perhaps setting aside a holdback amount from the purchase price, that can be accessed by the buyer in the event of a third-party claim arising post-closing.

The risks of non-compliance cannot be overstated. Although both parties are obliged to comply, it is the buyer who suffers the results of non-compliance. Under subsection 16(1) of the BSA, a sale in bulk is voidable at the insistence of the seller's creditors, at any time before the buyer files its post-closing affidavit, or up to six months thereafter. The seller's creditors can take the purchased assets from the buyer, even if the buyer acted in good faith. Under subsection 16(2) of the BSA, if a sale in bulk has been set aside or declared void and the buyer has received or taken possession of the stock in bulk, "the buyer is personally liable to account to the creditors of the seller for the value thereof, including all money, security and property realized or taken by the buyer from, out of, or on account of, the sale or other disposition by the buyer of the stock in bulk."

Effectively, a buyer who has not taken steps to comply with the BSA may find that it has to pay twice for the purchased assets. Contractual indemnities will only go so far to mitigate the added cost, particularly if the purchase transaction has left behind a seller that is nothing more than a shell company without any operating assets.

Origins of Bulk Sales Legislation

Bulk sales legislation has its origins in the late-19th century, when American wholesalers demanded that government step in to curb a fraudulent practice that was quite prevalent. Retail merchants would purchase inventory on credit, then avoid repaying those debts by selling their entire stock of goods "in bulk" to a third party, pocketing the proceeds, and disappearing into thin air. In the absence of any evidence that the bulk purchaser had prior knowledge of the seller's intention to defraud the creditors, it was next to impossible for the creditors to challenge these types of transaction. By 1922, 45 U.S. states and all the Canadian provinces had responded by imposing a positive, statutory obligation on the buyer in respect of the seller's creditors. (*5)

The BSA, and indeed all the bulk sales statutes that were previously in force across Canada, had three primary goals:

1. To make it more difficult for business owners to sell their stock in bulk and abscond with the proceeds without paying their creditors.

2. To require the bulk purchaser to take certain steps prior to closing the transaction, or lose its title to the assets as against the seller's unpaid creditors.

3. To require the bulk purchaser to either satisfy themselves that the seller's debts had all been paid, or take steps to ensure that the proceeds from a sale are distributed among the seller's creditors, rather than being paid directly to the seller without deduction.

It is worth noting that this third requirement goes far beyond the obligations imposed on a buyer under similar legislation in the United States. Under the American model, a buyer is only required to ensure that the seller's creditors have received notice of the pending transaction.

Key Reasons for Repeal of the BSA

Upon introducing Bill 218 for First Reading, the Minister for Economic Development and Growth, Brad Duguid, informed the Legislature that: "[t]he amendments are intended to reduce regulatory burdens to save businesses time and money."

Indeed, compliance with the BSA can add significant costs and delays to asset purchase transactions. However, the burdens imposed by the BSA go far beyond timing and costs. The threat of voidability undermines transaction finality and contributes to an inefficient use of scarce judicial resources.

Writing for the majority of the Supreme Court of Canada in 2003, Justice Bastarache outlined the most compelling reasons for the repeal of the BSA:

From the outset, bulk sales legislation has been judicially recognized as protecting the interests of creditors whose merchant debtors had disposed of all or substantially all of the inventory, chattels and fixtures by which they carry on business. See *McLennan v. Fulton* (1921), 50 O.L.R. 572 (C.A.), at p. 577; *Re St. Thomas Cabinets, Ltd*. (1921), 61 D.L.R. 487 (Ont. S.C.), at p. 491; and *Garson v. Canadian Credit Men's Trust Association,* 1929 CanLII 53 (SCC), [1929] S.C.R. 282, at pp. 285-86. However, such laws were recently repealed in Alberta, British Columbia, Manitoba, Saskatchewan, Yukon and the Northwest Territories, following reports of law reform commissions in those jurisdictions that *the goal of protecting creditors, to the extent that it is achieved by bulk sales legislation, is realized only at the cost of significant commercial inconvenience, disruption and expense. (*6)*

There is general consensus among legal practitioners that the BSA has outlived its utility, because its primary goal of protecting creditors can generally be achieved through the operation of other, more modern statutes. These include the following:

- The Ontario *Personal Property Security Act* (the "PPSA") provides for the creation and perfection by registration of security interests in the assets of both commercial entities and consumers. The PPSA also permits the creation of purchase-money security interest, which gives the creditor the added benefit of a super-priority lien over all the equipment, vehicles and inventory it has supplied to the debtor.

- The *Fraudulent Conveyances Act* (Ontario) permits a creditor to recover property that the debtor has conveyed or transferred to others with the intent to defeat, delay or defraud the rights of creditors or others.

- The *Assignment and Preferences Act* (Ontario) gives creditors an effective remedy in the event that a debtor transfers assets to one or more of its other creditors in preference to the others.

- The *Absconding Debtors Act* (Ontario) provides for the seizure of real or personal property in Ontario if a resident of Ontario leaves the province with the intent to defraud creditors.

- The Ontario *Business Corporations Act* and the *Canada Business Corporations Act* both provide creditors with recourse to the oppression remedy and derivative actions.

- The Canada *Bankruptcy and Insolvency Act* (the "BIA") provides that a court can either void a transfer that takes place at undervalue, or order a party to the transfer to pay to the trustee in bankruptcy the difference between the fair market value of the property or services sold or disposed of by the debtor and the actual consideration given or received by the debtor. The BIA also permits the supplier or distributor of goods to repossess goods that it has delivered to a customer who later becomes bankrupt or placed into receivership.

The continued existence of the BSA here in Ontario is now totally inconsistent with mainstream commercial practices observed elsewhere in Canada. Arguably, the continued existence of the BSA places the prospective seller of a business based in Ontario at a competitive disadvantage against the prospective seller of a business based elsewhere in Canada. Simply put, as a result of the BSA, the acquisition of an Ontario business by means of an asset purchase has inherently higher risks than the acquisition of any other Canadian business.

Various Canadian law reform commissions have

studied the impact of bulk sales legislation over the years, and in each case, they have recommended that these statutes be repealed, and legislators across the country have favourably received those recommendations. The Alberta Law Reform Commission ("ALRC"), in particular, considered the experience in British Columbia in the years following the repeal of its bulk sales legislation, and noted with satisfaction that the repeal "had little impact on debtors, creditors, suppliers, or the insolvency area in general." The ALRC observed further that:

Potential creditors can now get effective security on inventory. It is easy for a creditor to obtain a credit history of any established business from a credit reporting agency.

In addition to changed circumstances, the Act's inherent limitations are also reasons why the Act does more harm than good. Unsecured creditors of businesses are much more likely to be done in by the swoop of the secured creditor than by a fraudulent bulk sale. The Act does a poor job of protecting creditors from a fraudulent bulk sale, because a rogue can short-circuit the Act simply by swearing a false declaration. (*7)

None of these sentiments were lost on the drafters of Bill 218, who summed up their initiative as follows:

Repealing the outdated *Bulk Sales Act* that was established over 100 years ago to protect creditors when a business sells off assets. Creditors now have access to a number of more effective ways to protect their interests, and the legislation is expensive to administer. Ontario would join all other Canadian jurisdictions in eliminating this statutory vehicle. (*8)

Next Steps

Sometime after the Legislative Assembly reconvenes from its current summer recess, Bill 218 will be placed on the agenda for second reading and a full debate. It will then be referred to a committee of the legislature for further review prior to being voted on in third reading. Those of us who work in the M&A field will no doubt be waiting with bated breath until Bill 218 passes into law.

Louis Amato-Gauci

Endnotes

(*1) Bulk sales legislation was repealed in all the other Canadian provinces and territories between 1985 and 2008: British Columbia: *Sales of Goods in Bulk*, R.S.B.C. 1979, c. 371 – repealed as of May 17, 1985; Northwest Territories: *Bulk Sales* Act, R.S.N.W.T. 1988, c. B-2 – repealed as of April 18, 1991; Manitoba: *Bulk Sales Act*, R.S.M. 1987, c. B100 – repealed as of June 24, 1992; Alberta: *Bulk Sales Act*, R.S.A. 1980, c. B-13 – repealed as of July 8, 1992; Saskatchewan: *Bulk Sales Act*, R.S.S. 1978, c. B-9 – repealed as of August 24, 1992; Yukon Territory: *Bulk Sales* Act, R.S.Y. 1986, c. 14 – repealed as of December 17, 1992; Nova Scotia: *Bulk Sales Act*, R.S.N.S. 1989, c. 48 – repealed as of November 3, 1997; Prince Edward Island: *Bulk Sales Act*, R.S.P.E.I. 1988, c. B-6 – repealed as of April 27, 1998; Québec: Articles 1767 to 1778 of the *Civil Code* – repealed as of June 13, 2002; New Brunswick: *Bulk Sales Act*, R.S.N.B. 1973, c. B-9 – repealed as of August 1, 2004; and Newfoundland & Labrador: *Bulk Sales Act*, R.S.N.L. 1990, c. B-11 – repealed as of June 4, 2008. Nunavut never enacted bulk sales legislation.

(*2) BSA, s. 1.

(*3) *Excelsior Brands Ltd*. v. *Italfina Inc.*, 24 O.R. (3d) 801; [1995] O.J. No. 4889.

(*4) BSA, s. 11.

(*5) Alberta Law Reform Institute, *Report No. 56 - The Bulk Sales Act* (January 1990) at 1-2.

(*6) *National Trust Co.* v. *H & R Block Canada Inc.*, [2003] 3 SCR 160, 68 OR (3d) 800; 232 DLR (4th) 193; 38 BLR (3d) 1; 312 NR 91; 44 CBR (4th) 249.

(*7) *Supra*, note 4, at 2-3.

(*8) Ontario Ministry of Economic Development and Growth, *Backgrounder to the Burden Reduction Act, 2016* (June 8, 2016). Online at: https://news.ontario.ca/medt/en/2016/06/burden-reduction-act-2016.html

5. "Timely Justice": The Supreme Court of Canada's New Framework for the Prosecution of Regulatory Offences

Overview

Eighteen months is about one-third the length of World War I, about twice the gestation period for a human baby, and about eight times the length of Columbus' voyage to the New World. Now, according to the Supreme Court of Canada, it is also the maximum amount of time for the Crown to prosecute a regulatory offence in most instances.

Background

Provincial regulatory statutes cover the gambit of commercial activity. They range from the sale of tobacco products to occupational health and safety matters to the *Highway Traffic Act* and the transportation of dangerous goods. Most are prosecuted pursuant to the *Provincial Offences Act* in the Ontario Court of Justice as pseudo-criminal matters and in similar courts in other provinces.

One of the more common defences in these cases is a defence of "unreasonable delay" as all accused persons are constitutionally entitled to a speedy trial in Canada. Delays often occur, for example, where the Crown fails to make prompt disclosure of its materials, or where it has difficulty scheduling its officers to attend as witnesses.

Section 9 of the *Charter of Rights and Freedoms* specifically provides:

> 9. Any person charged with an offence has the right
>
> …
>
> (b) to be tried within a reasonable time.
>
> … (*1)

That right – the right to a speedy trial – extends to a corporate accused, not just a natural-born human.

Time begins ticking for the purpose of assessing reasonableness under the *Charter* at the moment the charge is laid (which must be within six months of the offence date, at least in Ontario) (*2). Deductions are made for delay that is attributable to the accused or for matters where the accused waived its rights (*e.g.* where an accused has consented to an adjournment for a more convenient trial date).

For the past many years, it has been unclear exactly how much delay is enough delay to have a charge "stayed" (*i.e.* to have it discarded by the Court). As a rule-of-thumb, it generally took at least a year-and-a-half. Sometimes, it could take closer to two full years.

Until recently, the Court would rely upon the 1992 criminal case of *R. v. Morin* ("*Morin*"), where the Supreme Court of Canada had provided a "contextual" approach (*3). Under the old *Morin* scheme, the Court could consider factors such as the seriousness or gravity of the offence, or the absence of prejudice to the accused, in determining reasonableness. Critics charged that the system fostered a culture of delay, or, at the least, that it lacked sufficient incentives to encourage the parties to take proactive steps.

"Timely Justice"

Earlier this month, in another criminal case, called *R. v. Jordan*, the Supreme Court of Canada reconsidered the "delay" issue. The majority began with the principle that "[t]imely justice is one of the hallmarks of a free and democratic society", followed by a recognition of the above-noted criticisms (*4).

In a narrow 5-4 split, the Court found that there was a presumptive 18-month ceiling for matters in provincial courts and a 30-month ceiling for criminal cases in superior courts (where more procedure is involved), counting from the time the charge is laid to the end of trial (*5).

Theoretically, there has been no shifting of any evidentiary burden. In other words, the accused continues to have an onus to prove any allegation of unreasonable delay; however, that delay will be presumed to be unreasonable if it exceeds 18 months in the case of provincial courts or 30

months in the case of superior courts (*6). Delays attributable to the accused, or waived by the accused, will continue to be deducted. In other words, they will not count towards the presumptive ceiling. However, institutional delay – even if it is not the fault of the prosecution – will now be counted (in contrast to the old *Morin* framework). The Crown will have an onus to confront such delays.

The presumptive ceiling can only be augmented (lengthened) in exceptional, complex circumstances, or where there were unforeseeable events. However, the majority in *R. v. Jordan* went so far as to say that even a typical murder case would not be sufficiently complex (*7). Moreover, a lack of prejudice to the accused can no longer justify delays. Rather prejudice is presumed if the ceiling is surpassed, and it is not rebuttable (*8). Thus, any leniency towards the prosecution will be curtailed and the presumptive ceilings will be applied in almost every case. The Court itself said that exceptions will be "rare, and limited to clear cases"(*9).

Despite the foregoing, it remains open to an accused to establish that a shorter period of delay was unreasonable in the circumstances. However, below the presumptive ceiling, the accused will have to demonstrate diligence on its own part and fault on the part of the Crown. According to the Court, a stay will only be ordered where the time taken "markedly exceeds the reasonable time requirements of the case" (*10).

In Mr. Jordan's case, it took 49.5 months to try five drug-related offences. Both the majority and the minority would have stayed the charges. In a companion case, called *R. v. Williamson*, the majority also found that a 34-month delay to prosecute sexual offences against a minor was unreasonable (*11).

Transitional Exceptional Circumstances

The new law will apply to matters that are already in the system, subject to two qualifications, referred to by the majority as "transitional exceptional circumstances".

First, for cases beyond the presumed ceiling, the Crown will be entitled to justify its delay on proof of reliance on the old law. In this regard, it will not have to show that it took any special initiative to expedite matters in the face of institutional delay problems, as the *Morin* framework did not require any special Crown initiative.

Secondly, for cases below the presumed ceiling, the Court may consider defence initiative contextually. Evidence of defence initiative to push matters forward will be helpful in assessing the reasonableness of delay. However, any lack of defence effort will not be automatically taken as waiver of the desire for a timely trial.

Conclusion

The presumptive 18-month ceiling for regulatory offences will effectively be a hard cap going forward. Whether for good or ill, the new system should provide a much better level of certainty.

Alan S. Cofman

Endnotes

*1. Part I of *The Constitution Act, 1982*, being *Schedule B* to the *Canada Act* (U.K.), 1982, c. 11, Part I.
*2. *Provincial Offences Act*, R.S.O. 1990, c. P.33, section 76(1).
*3. *R. v. Morin*, [1992] 1 S.C.R. 771.
*4. R. v. Jordan, 2016 SCC 27.
*5. 12. The majority reasons for judgement were actually penned by three justices (Moldaver, Karakatsanis and Brown JJ.), with two others concurring (Abella and Cote JJ.). Another justice delivered separate reasons that arrived at the same result (McLachlin C.J.). Three justices outright dissented (*per* Cromwell J., with Wagner and Gascon JJ. concurring).
*6. The 30-month presumption also applies to provincial court criminal matters that begin with a preliminary inquiry.
*7. *R. v. Jordan*, *supra*, at para. 78.
*8. *Ibid*. at para. 54.
*9. *Ibid.* at para. 48.
*10.*Ibid.* at para. 87.
*11. *R. v. Williamson*, 2016 SCC 28.

6. New Charterparty Standard Form for Liquified Natural Gas Shipments

In April 2016, the Baltic and International Maritime Counsel (BIMCO) and the International Group of Liquified Natural Gas ("LNG") jointly issued a standard form voyage charterparty ("LNGVOY") for use in the trade of LNG. A sample of the LNGVOY can be found at: http://www.giignl.org/system/files/lngvoy.pdf

The International Group of Liquified Natural Gas has indicated that the purpose of the new charterparty is to address an emerging "spot market" or charters of shorter distances and time periods. Previously, time charters were used most often. The new charterparty is meant to provide necessary flexibility to charterers and shipowners (*1).

Notable clauses under the new LNGVOY charterparty

Clause 2 of the new charterparty indicates that the vessel will not only be compatible with the listed terminals but will also be "accepted" by the terminals. The acceptability requirements create difficulties for shipowners because that element is essentially outside of their control - terminals have different standards and requirements. (*2) However, the degree to which shipowners must ensure acceptability is simply to the point that they must exercise due diligence.

Clause 5 deals with the condition of the vessel's tanks at the loading port. It recognizes the practical reality that the vessel may arrive with cargo tanks in one of the following conditions: cold and ready to load; warm and under natural gas vapours; or warm and inerted. The clause addresses who will be responsible for the conditions of the tanks depending on how they arrive. For example, if it was agreed that they would arrive cold and ready to load, but do not do so, then the charterer must provide LNG to cool the tank before loading and the cost associated with doing so rests with the shipowners. However, the clause allows shipowners to tender a Notice of Readiness ("NOR") even if the vessel is not actually ready for loading, transferring the risk onto the charterer for any delay and associated charges for the time that passes between the tender of the NOR and loading.

This is problematic because it conflicts with other sections of the charterparty. It is confusing when read with clause 9, which states that the NOR shall be tendered when the vessel has moored and is ready for loading. Similarly with clause 17, which indicates that charges for lay time or demurrage, where a shipowner has tendered an NOR but the vessel is not in fact ready for loading, shall be borne by the shipowner.

Clause 8 deals with ship to ship transfers and discusses the allocation of risk in those situations. The clause states that the risk and expense rests with the charterer and same shall indemnify the shipowner for all liabilities, losses or costs, and additional insurance arising out of the transfer.

Clause 23 addresses the risk associated with the boil off of cargo. As part of the charterparty, the charterer and shipowner agree to a boil off cap, whereby the shipowner can use natural boil off as propulsion for the vessel up to the agreed upon cap. Any boil off used in excess of the cap must be paid for by the shipowner at the rate for LNG specific in the charterparty. The charterparty provides for certain excepts where boil off will not be counter towards the cap. For example, where the boil off results from the actions of the charterer or any delays arising from blocked or restricted channels, seizure or detention of the vessel by piracy or war risks, blockages, strikes or lockouts.

Clause 27 provides that the charterers shall indemnify the shipowners against all liabilities that may arise from signing bills of lading where the terms and conditions of same impose more onerous liabilities on the shipowner than the conditions contained in the charterparty.

The limitation of liability set out in clause 32 indicates that the shipowners shall have the benefit of all limitation of liability accorded to

owners or chartered owners of vessels by any statute or rule of law for the time being in force.

Lastly, clause 37(a) states that English law applies to the charterparty and any dispute shall be resolved by arbitration in London. This is the default provision, however, the charterparty allows the parties to choose an alternative jurisdiction to govern the charterparty. If the Parties which for Canadian law and jurisdiction to apply, they should amend the standard form LNGVOY to reflect this, considering that pursuant to *T. Co Metals LLC v Fednav International Ltd. et. al.,* 2011 FC 1067, charterparties (unless a bill of lading has been issued pursuant to same) are not considered "contracts for carriage of goods by water" for the purposes of s46(1) of the *Marine Liability Act*. This means that even where the actual port of loading or discharge is in Canada, or the defendant has a place of business in Canada, or the contract was concluded in Canada, Canadian jurisdiction applies despite what is listed in the contract for the carriage of goods by water.

Conclusion

It will be interesting to see if parties will begin using the new LNGVOY standard form charterparty, considering that it is a voyage charter party rather than a time charter party, the latter being the most popular type of charterparty used for spot market transportation of LNG, currently.

The use of the voyage charterparty will change certain circumstances that parties are used to working under. For example, the cost to the charterer will be calculated based on the quantity/type of cargo loaded rather than the length of the voyage. Furthermore, the voyage charterparty will address the seaworthiness and carrying capacity of the ship, the date of arrival and time permitted for and places of loading and discharge, payment of freight, limitations of liability and choice of law.

Shipowers will also be required to provide a realistic estimate of the expected date of arrival since the new LNGVOY allows for a delivery time to be prescribed in the charterparty.

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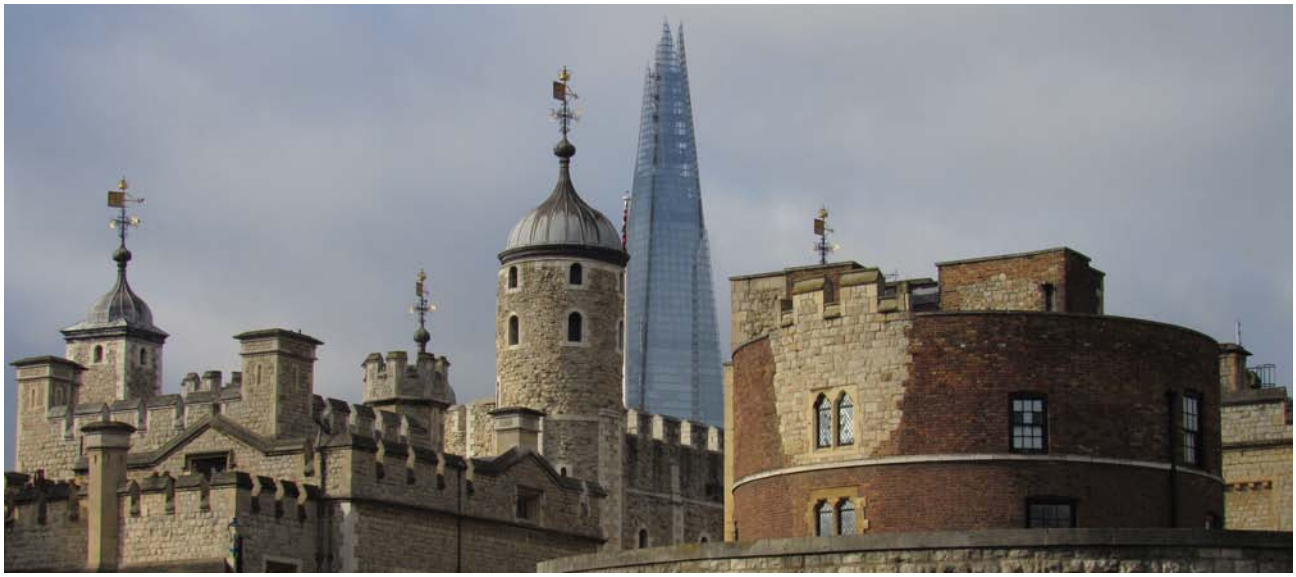
Endnotes
(*1) "LNG Charterparty Explanatory Notes" Bimco and Giignl, online: <http://www.giignl.org/system/files/lngvoy_explanatory_notes_0.pdf>
(*2) "Shipping: BIMCO launch new LNG voyage charter party" Eversheds, online <http://lexology.com/library/detail.aspx?g=d76abbcb-2be7-477a-b51c-3f009a65a38c>



7. New Marine Liability and Information Regulations to Take Effect in 2017

The Canadian Government recently issued a set of proposed regulations under the *Marine Liability Act* (*1). The new regulations, entitled the *Marine Liability and Information Regulations* (the "*MLI Regulations*"), are expected to enter into force on January 1, 2017. They are intended to replace the existing *Marine Liability Regulations* (*2), which are currently in force. The *MLI Regulations* will require persons in Canada each year to report receipt by sea of what are known as "hazardous and noxious substances" ("HNS") over a certain amount. The first reporting deadline will be February 28, 2018. Failure to report can result in a $1,000 fine for each day of non-compliance.

Background

Canada is already a party to various international treaties dealing with maritime pollution damage. For example, Canada is party to an international liability and compensation regime related to persistent oil spills (such as crude oil, fuel oil, lubricating oils), and bunker oil from oil tankers (*3). Canada is also party to the *Bunkers Convention* (*4), which covers bunker oil spills from ships other than oil tankers. As well, the *Ship-source Oil Pollution Fund* provides additional compensation for oil pollution damage in Canada by any type of ship and from any type of oil.

Currently, however, there is no comprehensive Canadian or international liability and compensation regime for ship-sourced incidents involving HNS.

The HNS Convention

All of this will soon be changing. The *MLI Regulations* are designed to facilitate Canada's ratification of a new international treaty known as the *International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 2010* (the "*HNS Convention*"). Briefly stated, the *HNS Convention* is an international instrument designed to provide for, and regulate, compensation for damage caused by the carriage by sea of HNS. HNS, for purposes of the HNS Convention, is essentially a list of some 6,500 substances including oils, noxious and/or dangerous liquid substances, liquefied gases, solid bulk materials possessing chemical hazards, etc. HNS include both bulk cargoes and packaged goods.

Canada and several other countries signed the *HNS Convention* in October 2011; however, none of the signatories (including Canada) has yet ratified the treaty. The *HNS Convention* must be ratified by at least twelve member states of the International Maritime Organization, who together have received at least 40 million tonnes of HNS in the preceding calendar year (excluding oils, liquefied natural gas and liquefied petroleum gas). Four of the ratifications must also come from states whose ships have a total capacity of at least 2 million units of gross tonnage.

Essentially, the *HNS Convention* establishes a strict liability regime for owners of ships who are involved in incidents causing damage arising out of the international or domestic carriage of HNS by sea. It covers any damage caused by HNS in the territory of territorial sea of a State Party. It also covers pollution damage in the exclusive economic zone, or equivalent area, of a State Party and damage (other than pollution damage) caused by HNS carried on board ships registered in, or entitled to fly the flag of, a State Party outside the territorial sea or territory of any State.

"Damage" under the HNS Convention includes loss of life or personal injury or board or outside the ship carrying HNS, loss of or damage to property outside the ship, loss or damage caused by contamination of the environment, loss of income in fishing and tourism, and the costs of preventive measures and further loss or damage caused by such measures.

The *HNS Convention* does not cover pollution damage caused by persistent oil, since such

damage may already be covered under other existing treaties. However, non-pollution damage caused by persistent oil, e.g. damage caused by fire or explosion, is covered.

A Two-Tier Model of Compensation

The *HNS Convention* provides for a "two-tier" model of compensation. First, the registered owner of a ship will (subject to a few exceptions) be strictly liable to pay compensation following an incident involving HNS. This means that the shipowner is liable, even in the absence of fault on its part. The fact that there is damage is enough to trigger liability, provided there is a causal link between the HNS and the damage.

However, the shipowner is then entitled to limit its liability under the *HNS Convention* in respect of any one incident, to a total amount calculated on the basis of the units of gross tonnage of the ship. For example, for ships not exceeding 2,000 gross tonnes, the limit of liability with respect to incidents involving bulk HNS is 10 million Special Drawing Rights ("SDRs") – an amount equal to roughly CAD$18.3 million at current exchange rates. The limit increases by 1,500 SDRs for each unit of gross tonnage between 2,001 and 50,000 gross tonnes. For each unit of tonnage in excess of 50,000 gross tonnes, the limit is increased by a further 360 SDRs. Notwithstanding this formula, for incidents involving bulk HNS, there is an overall maximum liability exposure of 100 million SDRs.

Similar limits apply to incidents where the damage is caused by packaged HNS, or both packaged and bulk HNS, or where it is impossible to differentiate between the two. In this case, the maximum liability exposure is 115 million SDRs.

Furthermore, the shipowner is required to take out insurance, or maintain other acceptable financial security, to cover its liability under the HNS Convention. Claims for compensation may be made directly against the insurer or person providing financial security.

The "second tier" constitutes an international fund of money (the "HNS Fund"), which is made up of contributions from various industry players (not governments) based on the amount of HNS they receive each year (above a certain threshold) through trade. The HNS Fund will be self-governed pursuant to the terms of the HNS Convention, with a director, secretariat and an assembly consisting of representatives from the various States Parties.

The HNS Fund will provide additional "top-up" compensation when the total amount of a claim exceeds the available amount under the "first tier", or when the shipowner is exonerated from liability or is otherwise financially incapable of meeting its obligations. The maximum amount payable by the HNS Fund in respect of any single incident is 250 million SDRs.

The Purpose of the MLI Regulations

Canada has taken steps to prepare for ratification of the *HNS Convention*. It has already drafted and received royal assent on legislation amending the *Marine Liability Act* to incorporate the operative provisions of the *HNS Convention* into law upon ratification.

However, before Canada can ratify the *HNS Convention*, it must collect enough data (in the preceding calendar year) on HNS traffic in Canada so that it can report on which entities in Canada have received what amounts of HNS. This is so that the HNS Fund can be properly constituted by contributions from the appropriate entities in the proper amounts.

Accordingly, for purposes of the *HNS Convention*, the *MLI Regulations* have been proposed in order to set up a system by which receivers of contributing cargo (i.e. HNS) must report the quantities of bulk HNS above certain thresholds received in a calendar year.

The New Requirements

Essentially, the *MLI Regulations* retain the same requirements that currently exist under the *Marine Liability Regulations*, albeit organized slightly differently. For example, they do not change the existing reporting requirements in

connection with the International Oil Pollution Compensation Funds, which provides similar coverage in the oil pollution context.

Instead, the "new" reporting requirements relate to HNS. Once the *MLI Regulations* come into force, they will require persons in Canada to report, on a yearly basis (by February 28 of each year), the quantities of bulk HNS they receive if, in a given calendar year, they receive at least 17,000 tonnes of non-persistent oils, liquefied petroleum gas, or any other type of HNS. Any quantity of liquefied natural gas received must also be reported (*5).

In addition, the *MLI Regulations* also provide that each such report must include other information, including the name and contact information of the receiver, the type and total quantity of contributing cargo received, whether or not the receiver has received contributing cargo on behalf of a principal, and if so, its name and the type and quantity of HNS received, etc.

The first reporting deadline is to be February 28 of the calendar year following the year that the contributing cargo is received. Thus, if the regulations take effect on January 1, 2017, the first reporting deadline will be February 28, 2018. Any person who fails to file a necessary report is liable to pay a fine of $1,000.00 per day that the report remains unfiled.

It is estimated that only about 50 entities in Canada will surpass the reporting threshold in a given year. Reports will be made through a dedicated Government of Canada electronic reporting system.

The Bottom Line

The *MLI Regulations* will soon have the force of law in Canada. Interested players in the shipping industry should definitely review these new regulations and take the necessary steps to ensure that they are prepared to report their receipts of contributing cargo in 2017 by February 28, 2018.

James Manson

Endnotes

(*1) *Marine Liability Act* (S.C. 2001, c. 6).

(*2) SOR/2002-307.

(*3) See e.g. the *International Convention on Civil Liability for Oil Pollution Damage, 1992, as Amended by the Resolution of 2000*, the *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992, as Amended by the Resolution of 2000*, and the *Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992*, all of which have force of law in Canada pursuant to the *Marine Liability Act*.

(*4) *International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001*

(*5) Note that under the HNS Convention, the reporting requirements in fact carry a threshold of 20,000 metric tonnes received. However, the Government of Canada chose to reduce the threshold to 17,000 metric tonnes in order to create a buffer to ensure that reporting fluctuations and inconsistencies in national reporting do not lead Canada into a state of non-compliance under the *HNS Convention*.

8. Recours collectif visant l'accident aérien AH5017 rejeté par la Cour supérieure du Québec

The Quebec Superior Court recently considered an application brought by the surviving husband/ father of three victims of flight AH5017 which crashed in Mali in 2014 for certification of a class action for compensation for the survivors of all 108 passengers who perished in the accident. The court denied certification of the class action, finding that the Quebec courts only had jurisdiction in respect of claims concerning twelve of the victims pursuant to Article 33 of the Montreal Convention, and this did not suffice to justify a class action under Article 575 of the Quebec Code of Civil Procedure.

Le 18 mai 2016, la cour supérieure du Québec a considéré une demande de certification d'un recours collectif visant la compagnie aérienne Air Algérie (*1). Le recours concerne l'écrasement du vol AH5017, exploité par un sous-contractant espagnol, qui a eu lieu au Mali le 24 juillet 2014. Le vol était en provenance de Ouagadougou, Burkina Faso, et se dirigeait vers Alger, la capitale algérienne.

La Convention de Varsovie (1929) et la Convention de Montréal (1999) représentent le droit international régissant l'indemnisation des passagers lors d'un accident aérien (*2). Selon l'article 1 (2) de chacune des Conventions, leur application est subordonnée à la condition que le point de départ ainsi que le point de destination du transport se trouvent dans une Haute Partie Contractante. Par conséquent, pour déterminer la convention applicable, il convient de considérer l'itinéraire individuel de chacun des passagers et non pas, simplement, la route du vol fatal AH5017. Selon la cour supérieure, la Convention de Montréal s'appliquait à tous les passagers à bord sauf trois d'entre eux qui faisaient un aller-retour Alger-Ouagadougou et qui relevaient en conséquence de la Convention de Varsovie applicable en l'espèce, l'Algérie n'étant pas une partie à la Convention de Montréal.

L'épouse et les deux filles du demandeur, tous des citoyens burkinabés, ont péri dans le vol. Le demandeur était un résident permanent du Canada qui avait parrainé sa famille afin qu'elle le rejoigne au Canada en leur achetant des billets d'avion avec le transporteur algérien qui dessert l'aéroport de Montréal. Ces trois victimes étaient parmi les douze personnes à bord du vol AH5017 qui avaient un droit d'action devant les juridictions canadiennes selon l'article 33 de la Convention de Montréal. Cet article prévoit cinq rattachements pour déterminer les juridictions compétentes pour entendre tout litige régi par la Convention. Bien que ni le domicile ni le siège d'Air Algérie (ni du transporteur de fait, Swiftair S.A., société espagnole qui exploitait cette route pour Air Algérie) ne soient au Canada, ces douze passagers pouvaient poursuive une action juridique au Canada en vertu des trois autres critères alternatifs de l'article 33, notamment en vertu du lieu ou leur contrat de transport a été conclu, la destination finale du passager, ou la résidence principale et permanente du passager.

Au lieu de poursuivre une action individuelle contre le transporteur au Québec, les avocats du demandeur ont intenté un recours collectif pour les ayants droit de tous les passagers à bord du vol AH5017.

La compagnie aérienne a présenté un moyen préliminaire à l'encontre de l'action collective visant le rejet de la demande de certification au motif que le demandeur ne pouvait pas représenter devant les tribunaux canadiens des personnes ne répondant pas aux critères de l'article 33 de la Convention de Montréal (ou 28 de la Convention de Varsovie).

Hamilton J.C.S. de la cour supérieure a rejeté la demande en exception déclinatoire de la défenderesse considérant que bien que l'article 584 du nouveau Code de Procédure Civile (« Cpc ») (*3) reconnaisse la possibilité d'un moyen préliminaire à l'encontre d'une action collective, cet article, énoncé dans le chapitre relatif au déroulement de l'action collective, exclut la présentation du moyen préalablement à la certification de l'action.

Le juge a commencé son analyse de la demande de certification par application du premier critère de l'article 575, considérant qu'il y avait des questions de droit ou de fait identiques, similaires ou connexes parmi les victimes. Air Algérie ne disputait pas que le deuxième critère, soit que les faits allégués paraissent justifier les conclusions recherchées, et que le quatrième critère, soit que le demandeur pouvait représenter adéquatement tous les membres de la classe, étaient en espèce rencontrés.

La problématique soulevée par Air Algérie et concernant la représentation par le requérant des personnes n'ayant pas autrement accès aux tribunaux canadiens figurait en revanche dans l'analyse, par le juge, du troisième critère pour la certification. Selon l'article 575 (c) du Cpc, il faut que la composition du groupe rende difficile ou peu pratique l'application des règles sur le mandat d'ester en justice pour le compte d'autrui ou sur la jonction d'instance.

Pour décider de la satisfaction de ce critère, le juge a pris en compte le nombre de membres de la classe alléguée.

Le juge a tout d'abord statué que bien que l'article 33(4) de la Convention de Montréal dispose que la procédure sera régie selon le droit du tribunal saisi de l'affaire, les dispositions du Cpc, notamment sur les action collectives, ne pouvaient pas modifier les règles de compétence prévues dans la Convention de Montréal. Par conséquent, a priori, les ayants droit des 96 victimes sans rattachement à la juridiction canadienne selon l'article 33 de la Convention ne pouvaient pas être représentés devant la cour supérieure par le demandeur dans le cadre du recours collectif.

Le juge a ensuite considéré si, exceptionnellement, les autres victimes pouvaient poursuivre leurs recours devant les tribunaux québécois en vertu de l'article 3136 du Code Civil, lequel prévoit deux conditions cumulatives pour son application: que l'action à l'étranger se révèle impossible ou que l'on ne puisse exiger qu'elle y soit introduite, et que le litige présente un lien suffisant avec le Québec.

Le demandeur a argué que toutes les autres juridictions disponibles aux 96 victimes étaient soit corrompues, soit n'offraient pas la possibilité d'un recours collectif. Le juge a déterminé que toutes les actions pouvaient être poursuivies en Espagne, lieu du siège de Swiftair S.A., un forum garantissant l'indépendance des juges. Le juge a précisé que le seul fait de ne pas pouvoir poursuivre un recours collectif devant un tribunal étranger ne suffisait pas à satisfaire la première condition de l'article 3136 exigeant que l'action à l'étranger soit impossible.

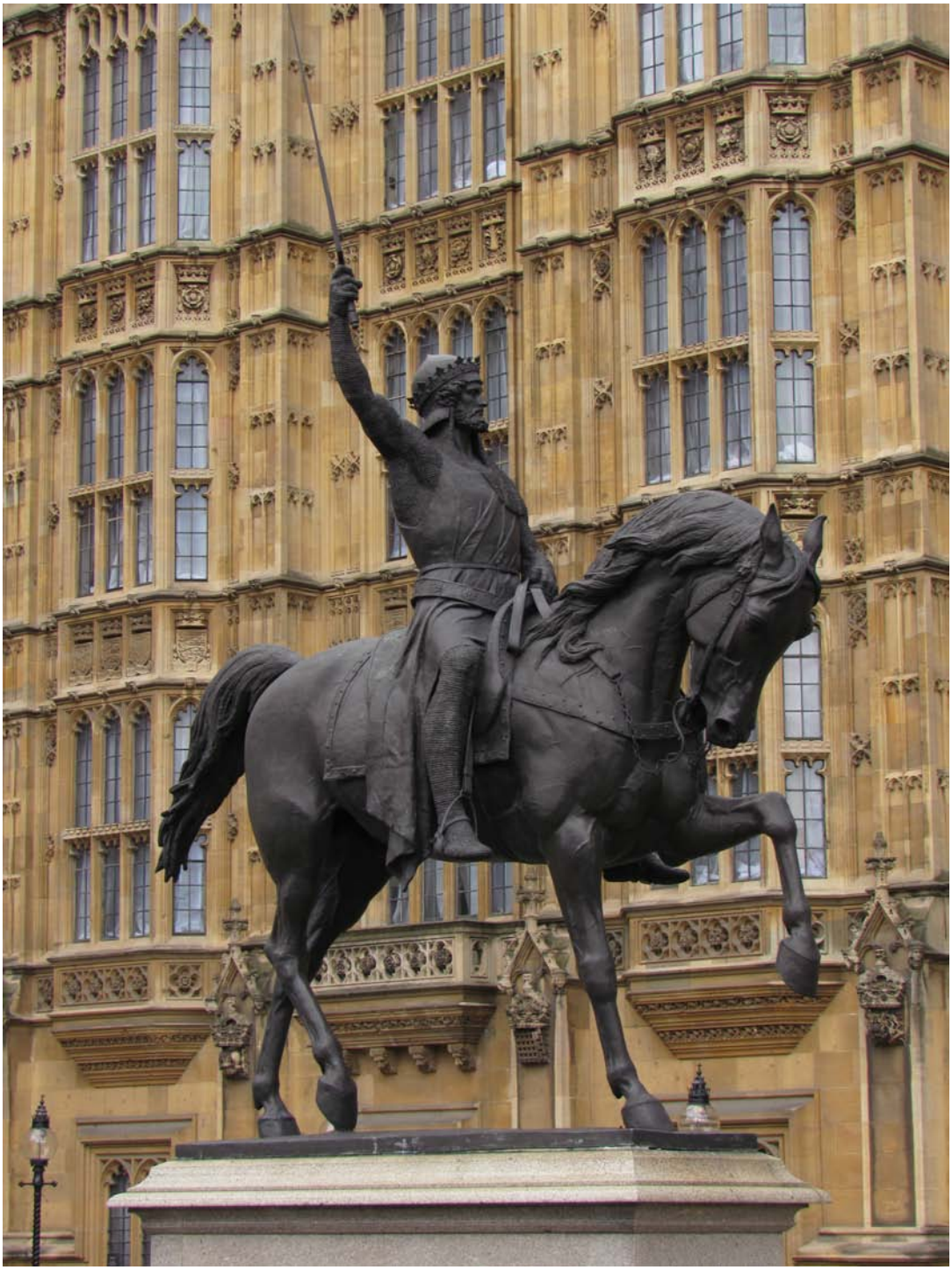
Bien que la première condition ne soit pas établie, Hamilton J.C.S. a aussi considéré le deuxième critère exigeant un lien suffisant entre le litige et le Québec. Cette condition n'était pas davantage remplie étant donné que le seul lien avec le Québec qui était invoqué pour justifier la juridiction des tribunaux québécois pour entendre des réclamations des ayants droit des 96 victimes sans rattachement avec le Québec selon la Convention résidant dans le fait que d'autres victimes de l'accident avaient des droits d'action susceptibles d'être exercés au Québec. Ceci ne suffisait pas pour satisfaire la deuxième condition imposée par l'article 3136. En résumé, seuls les ayants droit des douze passagers soumis à la juridiction des tribunaux québécois en vertu de l'article 33 pouvaient faire partie du recours collectif.

Étant donné que les douze victimes éligibles à poursuivre une action au Canada appartenaient à seulement quatre familles, le juge a déterminé qu'un recours collectif n'était pas indiqué selon le critère de l'article 575(c) du Cpc dans la mesure où d'autres moyens procéduraux pouvaient être employés pour joindre les actions.

Le 15 juin 2016, la Cour d'appel du Québec a acceuilli une requete de al compagnie aerinne pour rejeter l'appel interjeté par le demandeur à l'encontre de cette decision de premiere instance (*4).

Mark Glynn

(*1) *Zoungrana c. Air Algérie*, 2016 QCCS 2311
(*2) *La Loi sur le transport aérien L.R.C. (1985),* ch. C-26 donne suite au Canada à la Convention pour l'unification de certaines règles relatives au transport aérien international, signée à Varsovie le 12 octobre 1929 ainsi qu'à la Convention pour l'unification de certaines règles relatives au transport aérien international faite à Montréal le 28 mai 1999
(*3) *Code de procédure civile*, RLRQ c C-25
(*4) *Zoungrana c. Air Algérie*, 2016 QCCA 1074



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CONTEST

This month we are giving away a complimentary ticket for attendance at our annual seminar day - January 19th 2017 in Toronto - for the first individual to email us the name of location of the railway museum depicted in photograph on page 11. Email your answer to info@fernandeshearn.com with a subject line "Newsletter contest". First response with the correct answer wins.