THE NAVIGATOR

IN THIS ISSUE

Canada Introduces Electronic Logging Device Regulations

On December 16th, 2017 Transport Canada introduced draft regulations for the implementation of electronic logging devices for hours of service for commercial motor vehicles ("CMVs"). Stakeholders are entitled to provide Transport Canada with commentary over the next sixty days on the draft regulations published in the Canada Gazette Part 1 Vol. 151, No. 50. (*1)

The introduction of the draft regulations coincides with the U.S. federal government hours of service rules coming into force December 18, 2017 that mandate the use of an electronic logging device ("ELD") in CMVs. Canadian motor carriers operating in the United States (estimated at 82,100) will be required to comply with the U.S. legislation. (*2)

An ELD is a piece of hardware that connects directly to the engine's control module to automatically record driver compliance with hours of service requirements. ELDs replicate and automate the logbook process. Engine information on speed, motion changes, distance driven, and engine hours are automatically tracked and loaded into the ELD system. GPS location information is also tracked in the ELD. The driver simply needs to log in, and comment on each change of status.

The executive summary of the draft Canadian regulations states:

> The current *Commercial Vehicle Drivers Hours of Service Regulations* (the Regulations) require drivers of commercial buses and trucks to self-report their on-duty time, off-duty time and driving time in a paper- based daily log, and also permit the use of an electronic recording device (ERD). An ERD is a first-generation device that is subject to few technical specifications. The information generated from these daily logs can be falsified, incomplete, duplicated or missing altogether in an effort to avoid accountability for non-compliance with the Regulations. It can be difficult and frequently impossible for roadside enforcement or the motor carrier to detect non-compliance by the driver simply by viewing the daily logs. Non-compliance with hours of service (HOS) requirements by a motor carrier or driver can significantly increase crash risk and provide the

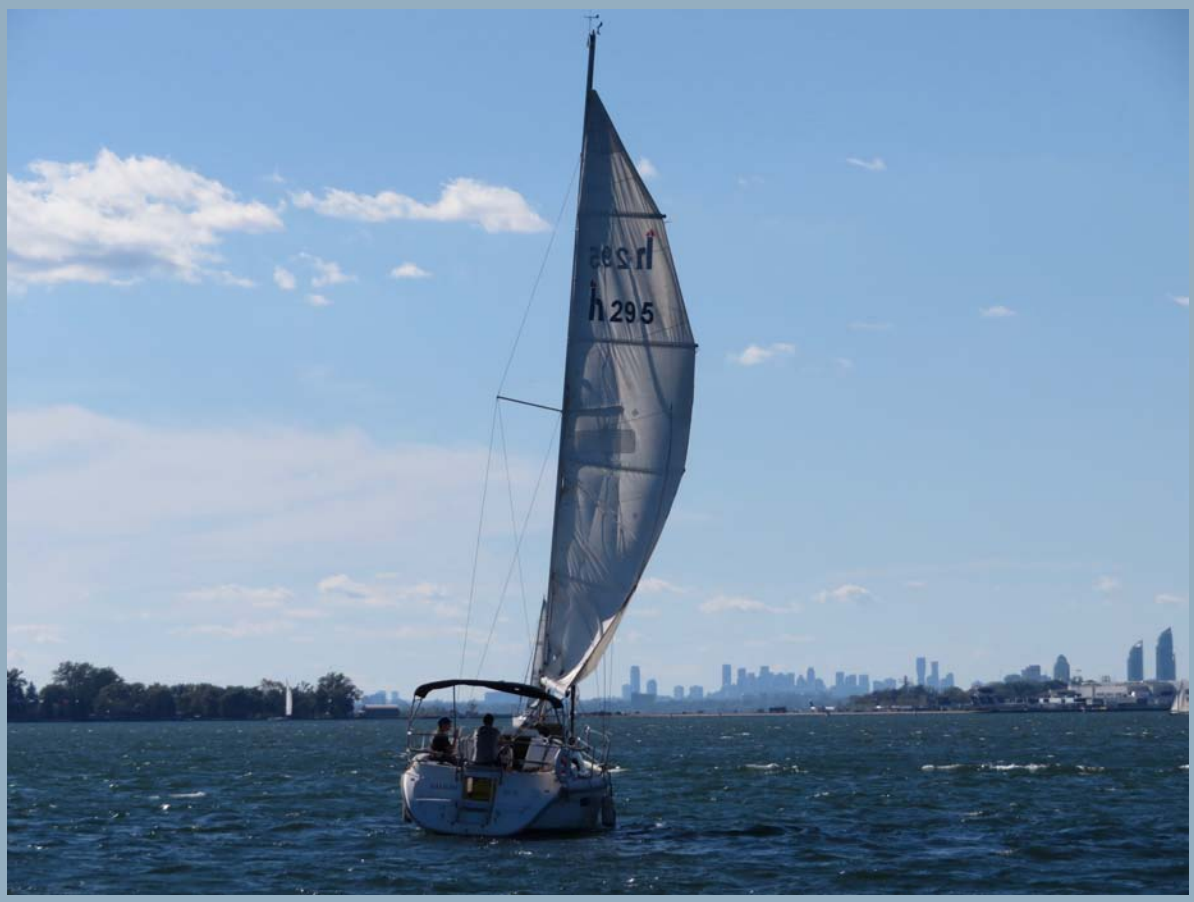
FIRM AND INDUSTRY NEWS

- The **Legal 500 Canada 2018** *"guide to outstanding lawyers nationwide"* has listed Fernandes Hearn LLP as a leading transportation law firm. **Rui Fernandes** and **Gordon Hearn** are listed as "Leading Lawyers."

- **Conference of Freight Counsel** at Tucson, Arizona on January 7-8, 2018. **Gordon Hearn** will be attending representing the firm.

- **Transportation Lawyers Association** "Chicago Regional" meeting on January 19, 2018 in Chicago, Illinois. **Rui Fernandes** will be speaking on "Cargo Claims." **Rui Fernandes, Gordon Hearn** and **Louis Amato-Gauci** we will be in attendance representing the firm.

- **Marine Club** Annual Dinner, January 19, 2018, Toronto. **Kim Stoll, Alan Cofman, James Manson,** and **Andrea Fernandes** will be attending the dinner representing the firm.



Fernandes Hearn LLP 18th Annual Seminar, January 17th, 2018, Toronto Ontario, **by invitation**.
Tentative Program:

Date: **Wednesday January 17th, 2018**
Location: The Advocates' Society Education Centre
250 Yonge Street, Suite 2700 Toronto
Cost: $65.00 - Includes light lunch and materials (by download)
Registration: Sharifa Green, Fernandes Hearn LLP 416-203-9500
Send cheques to: Fernandes Hearn LLP,
155 University Ave. Suite 700, ON M5H 3B7
Limited to 120 attendees 6.0 RIBO Credits (Technical Category)

Topics and Speakers:

8:00-8:25	**Registration & Coffee**	**Sponsor: RIO Insurance Brokers**
8:25-8:30	**Welcome**	**Rui Fernandes**
8:30-9:30	NAFTA Update and Effects on Transportation	**Louis Amato-Gauci** – Moderator **Stephen Laskowski** – OTA **Ruth Snowden** – CIFFA **Dan Ujczo** – Dickinson Wright
9:30-10:30	Autonomous Vehicles, Vessels and Aircraft	**Kim Stoll** – Moderator **Donna Burden** - Burden, Hafner & Hansen LLC **Matt Arbour** - Hrycay Consulting Engineers Inc.
10:30-10:45	**Coffee**	**Sponsor: AON**
10:45-11:45	Insurance Online- Risks for Brokers, Insurers and Customers	**Alan Cofman** – Moderator **Tracy McLean** – McLean Hallmark Insurance Group Inc.
11:45-12:45	Blockchain, Smart Contracts, and Accountability	**Rui Fernandes** – Moderator **Sandeep Kar** – Fleet Complete **Craig Fuller** - TransRisk
12:45-1:30	**Lunch**	**Sponsor: Burns & Wilcox Canada**
1:30-2:30	Hurricanes, Fires, Climate Change, Risk Analysis and Legal / Insurance Issues	**James Manson** – Moderator **Gordon Ryder** -Berkshire Hathaway
2:30-3:15	Social Media: Source of Information in Litigation	**Gordon Hearn** – Moderator **Julia Valladao** -Robert Half Legal
3:15-4:00	Medical and Recreational Marijuana Use During Employment	**Carole McAfee Wallace**- Moderator **Olga Janek** – Aphria Inc. **Barbara Butler** – Butler Consultants

INVITATION TO MESA 2018 CONFERENCE

Fernandes Hearn LLP is one of the sponsors for the **Marine & Energy Symposium of the Americas 2018 ("MESA 2018")** conference in Toronto April 18-20, 2018 in Toronto. The following is the program for the conference.

Where? Omni King Edward Hotel, Toronto Canada
When? 18-20 April 2018

Registration: http://www.mesa2018.com

Wednesday, April 18, 2018

6:00 - 8:00 pm Registration - Mezzanine, Omni King Edward Hotel
6:30 - 8:00 pm Opening Reception - Palm Court, Omni King Edward Hotel
8:00 pm Dinner on your own - or join us at a pre-arranged restaurant

Thursday, April 19, 2018

8:00 am to noon Registration - Mezzanine, Omni King Edward Hotel

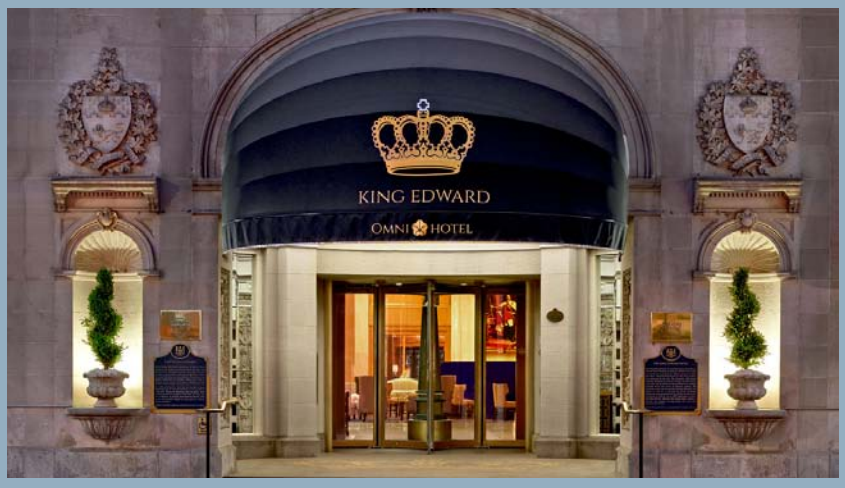
Time	Joint Session - Vanity Fair Ballroom
9:00 to 10:00 am	Arctic Exploration and Shipping / The Polar Code Moderator: **Rui Fernandes**, Partner, Fernandes Hearn LLP **Peter Pamel –** Partner, Borden Ladner Gervais**,** **Aldo Chircop –** Professor of Law; Canada Research Chair (Tier 1) in Maritime Law and Policy Dalhousie University
10:00 to 11:00 am	Seabed Mining Moderator: **James Manson –** Associate, Fernandes Hearn LLP **Wylie Spicer QC –** Counsel – McInnes Cooper
11:00 to 11:15	Coffee Break
11:15 am to 12:15 pm	Aftermath and Implications of Recent Catastrophic Hurricanes Moderator: **Kim Stoll** - Partner, Fernandes Hearn LLP **Mark E. Newcomb**– Counsel and VP Claims & Insurance, Zim Integrated Shipping Services Ltd. (USA)

12:15 pm to 1:15 pm Lunch - Keynote Address -TBA

MESA 2018 CONFERENCE

Concurrent Session Time	Session A - Vanity Fair	Session B – Kensington
1:15 to 2:15 pm	Application of Jurisdiction Clauses in Different Countries **Shelley Chapelski** – Partner, Norton Rose Fulbright **Robert Reeb** – Shareholder, Marwedel, Minichello & Reeb LLC (USA) **Fabiana Simões Martins** – Partner, Siano & Martins Advogados Associados (Brazil)	LNG Contracts and Transportation **Jason Hicks** – Bernard LLP
2:20 to 3:20 pm	Arrest of Vessels in Various Jurisdictions Arrest of Vessels in Various Jurisdictions & Alternatives **Susan Dorgan –** AIG (USA) **Jorge Luis Cordoba** – Partner, Cordoba & Associates (Colombia)	NAFTA PANEL
3:25 to 4:25 pm	Issues Arising from Project Cargo **John Evans –** Berkshire Hathaway Inc. (USA)	Port Security and Liability **Bruce Hennis,** Managing Partner, Hennes Communications (USA)

6:00 PM MESA 2018 Cocktail Reception and Dinner – Hotel



Friday, April 20, 2018

Concurrent Session	Session A - Vanity Fair	Session B - Kensington
9:00 to 9:55 am	Limitation of Liability by Statute - Conventions and in Contracts **George Arghyrakis** - E.G. Arghyrakis & Co. (U.K.) **Steven W. Block –** Foster Pepper LLC (USA) **Hon. J. Elizabeth Heneghan –** Federal Court of Canada	Impact of Climate Change on Shipping and Energy Projects
10:00 to 10:45 am	Autonomous Ships and Equipment **Roger Adamson** – Futurenautics (U.K.) **Laura Hill** - Perkins Coie LLP (USA)	Cyberterrorism in Transportation and Energy Projects **Caroline Leprince**- Canadian Cyber Incident Response Centre – Public Safety Canada
10:45 to 11:00 am	Coffee	Coffee
11:00 to 11:45 am	Offshore Exploration and Exploitation: Liability and Compensation Issues **Lawrence Mallizzi –** Senior Manager – O'Brien & Gere (USA) **Lucas Leite Marques** – Partner, Kinkaid Mendes Vianna Advogados (Brazil)	Pipeline Technologies, Development Issues and Litigation **Joshua Jantzi,** Partner, Dentons Canada LLP **Kori Patrick**, Technical Manager, Research & Development, Enbridge, Edmonton Alberta
11:55 am to 12:45 pm	Emerging Issues in Insurance in Marine and Energy **Simon Swallow** – Chief Executive Shipowners' Club **Brian Murphy –** Vice President, Berkley Offshore	Wind Turbine Litigation **Sarah Powell –** Partner – Davies Ward Phillips & Vineberg LLP

12:45 pm to 2:00 pm Lunch – Presentation on Arbitration in Canada

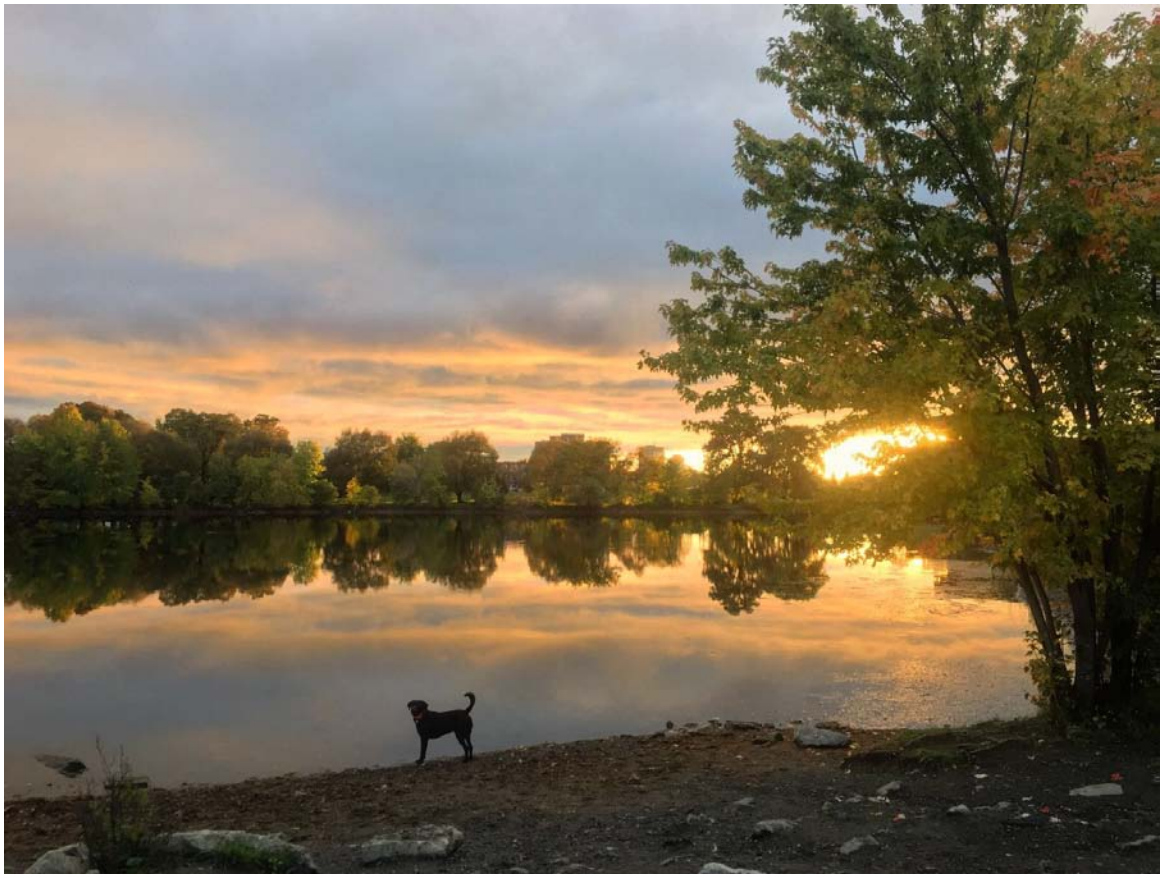
non-compliant operator with a competitive advantage over those motor carriers that comply with the Regulations.

The proposed amendments are applicable to CMVs that are federally regulated; that is, those vehicles that operate extra-provincially. CMVs operating solely within a province are not affected. It will be up to each province to decide if the federal regulations will be implemented for provincially operated only vehicles. Transport Canada estimates that there are 174,700 federally regulated CMVs based in Canada. Of this total, the drivers of an estimated 146,300 CMVs are required by the regulations to maintain a paper-based daily log because they operate their CMV outside of a 160-km radius of their home terminal.

The proposed regulations are aligned with the U.S. requirements. The regulations require ELDs to be phased in over a two-year period from the date the regulations become legislation. The proposed regulations mandate the use within two years and mandate the use of more specific requirements for supporting documents (e.g. bills of lading) that must be kept by the driver and motor carrier. The regulations would also incorporate by reference a technical standard to establish minimum performance and design specifications for ELDs. (*3) The U.S. Final Rule (giving effect to the current ELD requirement) also includes extensive technical specifications for the devices and revised requirements for supporting documents in order to simplify the validation of records of duty by motor carriers and enforcement, thereby reducing the administrative burden on motor carriers and drivers.

Exemptions

There will be four main exemptions to the mandatory requirement to use an ELD, namely: CMVs that are operated under a permit issued pursuant to the regulations by a provincial or territorial hours of service director, or under a statutory exemption, CMVs that are subject to rental agreements for a term of 30 days or less, and CMVs that were manufactured before the year 2000.



The following table illustrates the exemptions in the U.S. and Canada:

Canada	**U.S.A.**
A truck, tractor, trailer or any combination of them that has a registered gross vehicle weight less than 4,500 kg	CMV has a gross vehicle weight rating or gross combinations weight rating of less than 4,536 kg.
A bus that is designed and constructed to have a designated seating capacity of 10 or less persons, including the driver	A CMV designed or used to transport less than 8 passengers including the driver, for compensation
	A CMV designed or used to transport less than 15 passengers including the driver, and is not used for compensation
	Drivers who use paper records of duty status for not more than 8 days out of every 30-day period
	Drivers who are required to keep records or duty status not more than 8 days within any 30-day period.
CMV manufactured before the model year 2000	Drivers of vehicles manufactured before 2000 and drivers of vehicles manufactured before the model year 2000. (As reflected on the vehicle registration)
	Drivers who conduct drive-away-tow-away operations, where the vehicle being driven is the commodity being delivered, or the vehicle being transported is a motor home or a recreation vehicle trailer with one or more sets of wheels on the surface of the roadway
- Driver drives or is instructed to drive a commercial vehicle within a radius of 160 km of the home terminal -the driver returns to the home terminal each day to begin a minimum of 8 consecutive 8 hours of off-duty time - the motor carrier maintains accurate and legible records showing, for each day, the cycle the driver followed and on-duty times and keeps those records for a minimum period of 6 months after the day on which they are recorded	-Short Haul Exception: Operate within a 100/150 air-mile radius of the normal work-reporting location (100 air-miles if you are a commercial driver's license (CDL) driver and 150 air-miles for drivers without a CDL). -Start and return to the same location. -12 consecutive hours of duty time. -Drive time cannot exceed 11 hours. -Must log a minimum of 10 consecutive hours of off-duty time after shift.

Records

The proposed regulations require motor carriers to acquire and install ELDs in their CMVs that are compliant with the technical standard. (*4) What were previously referred to as "daily logs" will now be known as "records of duty status". Drivers will be required to enter into the ELD some of the information associated with their record of duty status (e.g. on-duty time associated with fueling, loading or unloading the CMV) and the ELD would automatically record the remaining information, such as driving time, odometer readings, and engine power up, in accordance with the regulations and the technical standard. Other provisions will require the motor carrier to create distinct accounts for each driver within the ELD's operating system so that their hours can be tracked independently. At the end of a day, drivers will be required to certify the accuracy of their record of duty status and the motor carrier will have to verify and retain those records. The integrity of the ELD system is protected through anti-tampering provisions.

Supporting Documents

The proposed regulations are intended to be harmonized with the U.S. rules for supporting documents that are used by the motor carrier and enforcement officers to validate the accuracy of the driver's record of duty status. The current regulations require the motor carrier to retain all documents that could be required by enforcement officials to assess compliance. Transport Canada has advised that the "current provisions come with significant costs to collect, distribute, organize and retain the wide variety of documents needed to meet these requirements." The amended provisions for supporting documents would apply to all motor carriers and drivers, including those that would continue to maintain a paper-based daily log. The new rules standardize the types of supporting documents into five separate categories: bills of lading, dispatch records, expense receipts, electronic mobile communication records and payroll records.

The provisions have been amended to mirror the U.S. provisions and limit the number of supporting documents that must be collected and retained to eight for each driver's work day. The new rules will also clarify the information that is required to appear on each supporting document, such as the driver's name and location, the date and the time of day. If the driver retains more than eight supporting documents during one day, the motor carrier must retain at least eight of the documents, including those supporting documents that contain the earliest and last time indications for the day. Where the driver records fewer than eight supporting documents in one day, then those supporting documents must contain at least the driver's name and location and the date. When there are more than eight documents retained in one day, each of the saved documents must include the time to which the document pertains.

Forwarding of Records By Driver to Motor Carrier

The proposed regulations establish separate provisions for the forwarding by the driver to the motor carrier of the paper records of duty status and of the records of duty status that are generated by the ELD. The requirements for the forwarding of ELD records and accompanying support documents are intended to be harmonized with the U.S. rules and require that the driver send both to the motor carrier within 13 days after their creation. The requirements for paper records of duty status remain the same as they are under the current regulations. Paper records of duty status may be forwarded by mail, and in recognition of the extra time that is needed for them to reach the motor carrier, the drivers will continue to have 20 days to send their records of duty status and supporting documents to the home terminal out of which they are dispatched.

Transport Canada states that the draft regulations are harmonized to the U.S. technical specifications and should result in CMVs needing

only one ELD to be compliant in both countries. There are some differences (*5).

> "As well the proposed amendments mirror the U.S. rules for supporting documents, such as fuel receipts and bills of lading, allowing for both Canadian and U.S. international motor carriers to retain the precise number and type of documents to remain compliant with rules in both countries. By aligning with the requirements in the United States, the strengthened and streamlined daily logging requirements in Canada should not result in any impediments to trade."

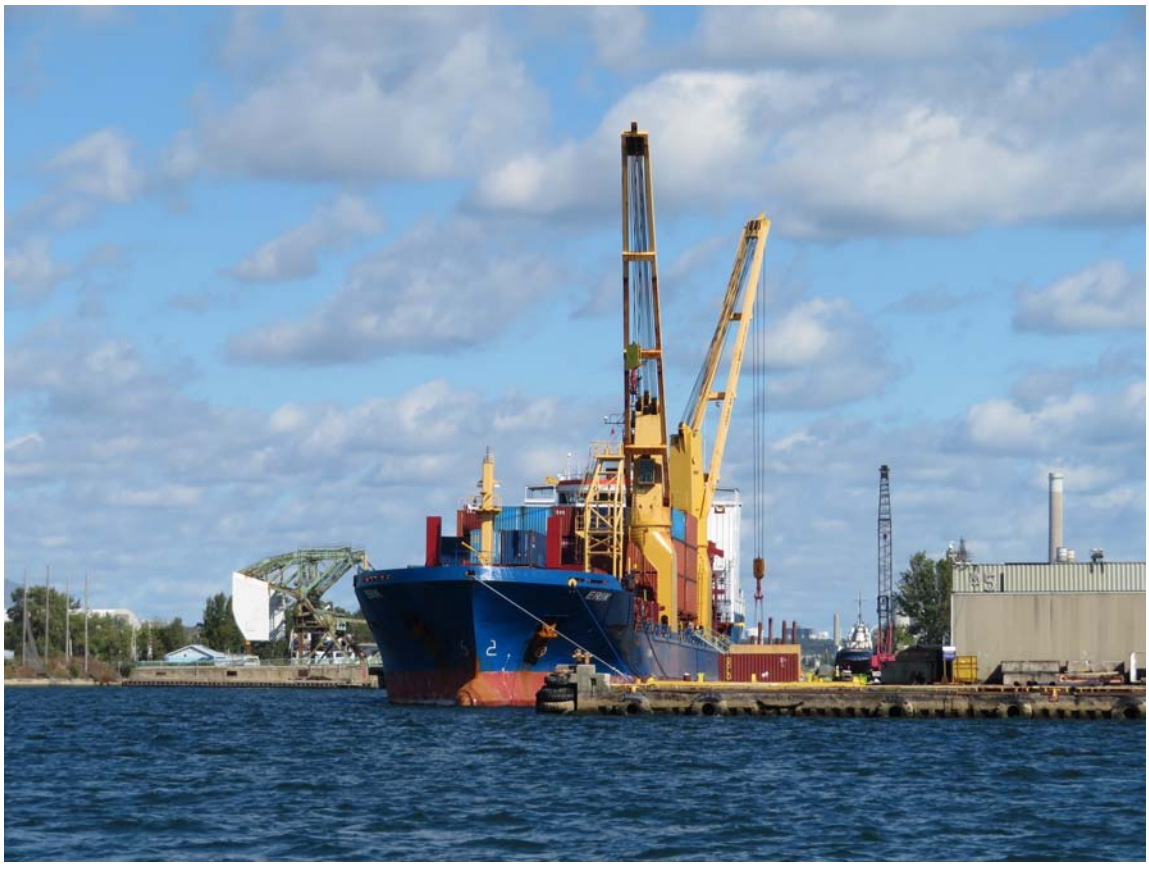
The proposed regulations would not mirror the U.S. requirement for vendors of ELDs to self-certify and register their devices like in the U.S. Final Rule. Transport Canada believes that vendors will make every effort to ensure that their devices are compliant, that the marketplace will quickly identify any issues with the devices and that the vendors will quickly rectify any problems that are uncovered. "Self-certification by the vendors would not be expected to add any value in terms of ensuring compliance by the vendor." However, in order to assist Canada's motor carriers, Transport Canada is considering the establishment of a website that would include the names of ELD suppliers serving the Canadian market that are also prepared to attest that their products meet the provisions of the technical standard.

Commentary on the draft regulations can be made to Transport Canada within 60 days of December 16th, 2017. Submissions must be sent to:

Andrew Spoerri
Senior Research Analyst
Motor Vehicle Safety Directorate Transport Canada
330 Sparks Street, 9th Floor Ottawa, Ontario
K1A 0N5

Fernandes Hearn LLP will keep you apprised of the final version of the regulations once passed.

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



3. Doing Business in Canada – Part 3(*1) – Business Structures

Foreign persons (individuals and corporations) wishing to establish a business in Canada must decide whether to do so as a sole proprietorship, a partnership of some form, a joint venture or as a corporation of some form. A decision as to whether to establish a branch office or a separate Canadian business organization also must be made. A wide variety of legal arrangements may be used to carry on business activity in Canada. Factors in the decision-making will include the circumstances of the investor, the nature of the business activity, the tax implications and the potential liabilities related to the business undertaken.

Corporations with Share Capital

Branch Operations

A branch operation in Canada must be registered in each of the provinces in which it carries on business. In addition, foreign entities must complete many of the same disclosures and filings with the federal and provincial governments as are required of domestic entities.

Generally, if the Canadian operation is expected to incur significant losses in its early years of operation, the foreign entity may wish to carry on business in Canada directly through a branch, in order to deduct those losses for foreign tax purposes, if possible. A Canadian branch structure might also be relevant to enable a better matching of the Canadian corporate tax paid with the foreign tax credits available in the home jurisdiction.

Provincial or Federal Corporate Registration?

Most provinces and territories in Canada have their own corporate legislation. In limited circumstances (for example, banking) the incorporation must be done federally. The federal legislation is the *Canada Business Corporations Act* ("CBCA"). The provincial and territorial legislation is similar with minor differences. Some provinces and territories, for example, have no requirements for the directors of a corporation to be resident in Canada.

Under the Federal CBCA, foreigners should be aware of the following:

1. A Canadian corporation must have twenty-five percent of its directors being resident Canadians. A resident Canadian can be either a Canadian citizen or a Canadian permanent resident. Each corporation is required to have a minimum of one director. A director must be an individual person. Directors need not own any shares in a corporation.
2. A director of a Canadian corporation is subject to a number of liabilities and obligations under corporate law and under federal and provincial legislation. These include liabilities involving environmental, payroll, securities, pensions and tax.
3. Single shareholders are permitted in a Canadian corporation. The identities of a Canadian corporation's shareholders are not a matter of public record and a corporation is not obliged to disclose the names of its shareholders, unless it is a public company or a company carrying on business in Québec.
4. It is common for shareholders to enter into a unanimous shareholders' agreement to govern the relationship between the shareholders, and to restrict the powers of directors. Minority shareholders have statutory rights and remedies.
5. Annual financial statements must be approved by the shareholders at an annual meeting properly constituted.
6. Financial statements are only required to be filed with government bodies for public corporations.
7. Statutory books and records of a Canadian corporation must be kept in Canada.

The advantages of a corporate structure include:

1. Liability is limited to the assets of the corporation. The shareholders do not own the property of the corporation, and the rights and

liabilities of the corporation are not those of the shareholders. The liability of the shareholders is generally limited to the value of the assets they have invested in the corporation to acquire their shareholdings.

2. The corporation is treated as a separate entity for tax purposes and there may be tax advantages to using a corporation.

3. Corporate shares are more readily marketable compared to partnership units/ interests or joint venture interests.

Partnerships

Another form of carrying on business in Canada is in a partnership. A partnership is not a separate legal entity. The "partnership" is usually subject to a partnership agreement where one or more individuals carry on business in common with a view to profit. On dissolution of the partnership, the individual partners share in the profits, losses and net proceeds. The partnership agreement typically also deals with events such as death, selling interests in the partnership, retirement, management and other common issues to a business.

In Canada profits and losses flow through to the individual partners subject to some rules under the *Income Tax Act*. A general partnership's disadvantage is that each partner is personally liable for the liabilities of the partnership. Each partner's assets are exposed in the event of the assets being insufficient to cover the liabilities. Limited partnerships are available in some instances to be used. The liability of a limited partner is limited to the extent of the partner's investment in the partnership, provided that the partner does not take an active role in the business that could attract liability for a decision or action.

Unlimited Liability Corporations

An unlimited liability company ("ULC") can be formed under the laws of Alberta, British Columbia or Nova Scotia. Legislation in each province is different so an assessment of the advantages and disadvantages of the legislation for the particular business activity is necessary. A ULC is a form of corporation where the shareholders of the ULC can be liable for the obligations of the ULC. In this respect, a ULC can be similar to a general partnership and is different from the common form of corporation where the corporation's shareholders are not, in general, liable for the liabilities, acts or omissions of the corporation. This unique nature of the shareholder liability under an ULC also requires that the liability be assessed and mitigated. Some advantages may arise from tax perspectives. In the U.S., for example, the IRS treats the ULC as a flow-through. In Canada, an ULC is treated as any other corporation. The end result is that a ULC is generally a hybrid entity – a corporation for Canadian tax purposes and a flow-through entity for U.S. tax purposes. For U.S. businesses operating in Canada, there may be some advantages in the right situation. Professional advice should be sought.

Proprietorships

The simplest form of business organization, a proprietorship, exists when an individual person carries on business as the sole owner without incorporating. At law, there is no distinction between the proprietorship and the owner; the proprietorship's income is the owner's income and the proprietorship's liabilities are the owner's personal liabilities. For tax purposes, the proprietorship is not treated as a separate taxpayer.

Joint Ventures

The term "joint venture" does not have a precise legal definition in Canada. It typically refers to any situation where two or more legal entities share in a common venture. It can refer to joint venture corporations, to partnerships of corporations or, most commonly, to a structure (usually referred to as a contractual joint venture) under which separate corporations own certain assets in common, in the expectation that the venture does not constitute a partnership, at least for tax purposes. The

relationship is usually governed by a joint venture contractual agreement.

Corporate and Trade Names

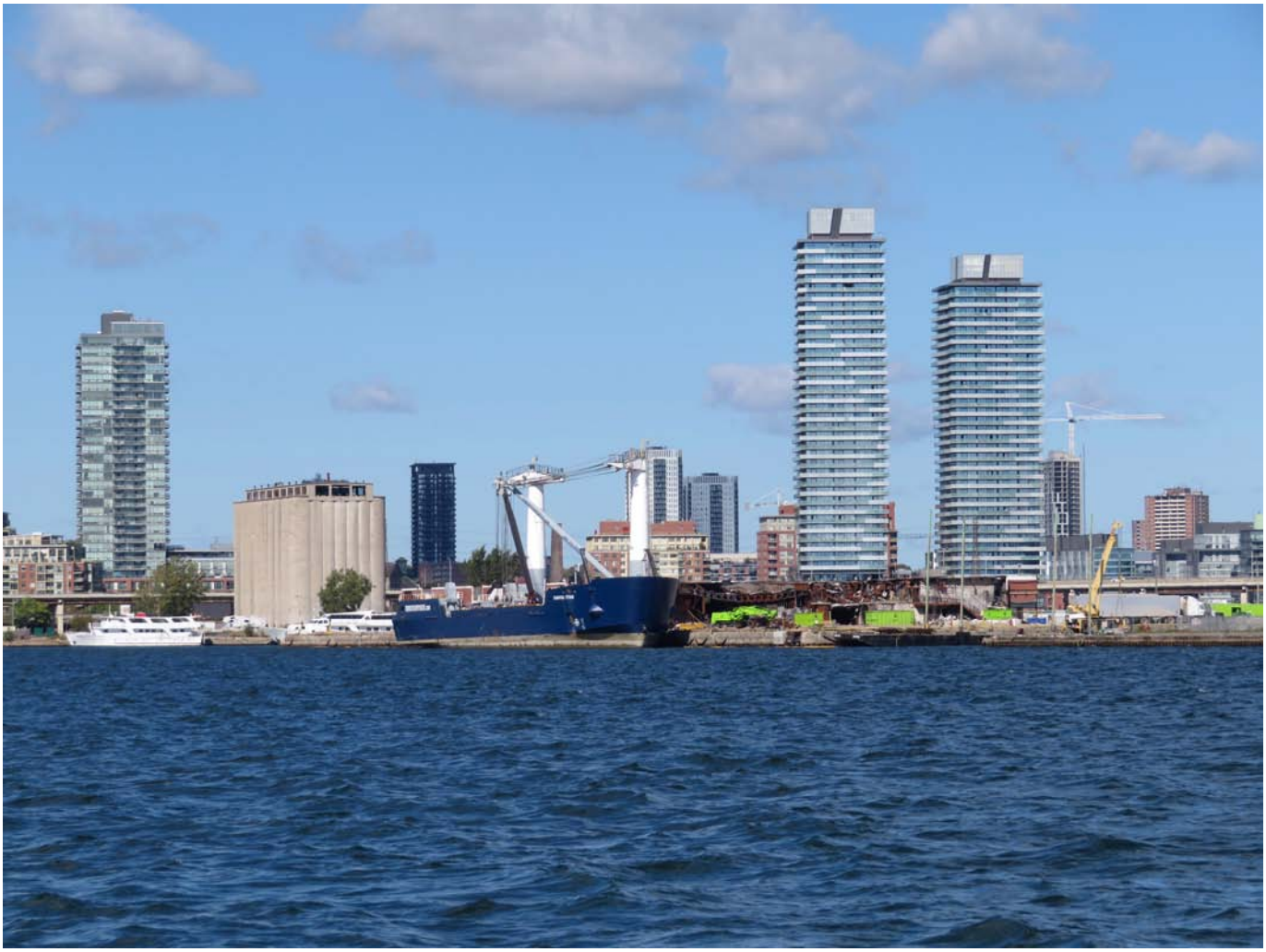
Registration of corporate and trade names is available federally and in the provinces and territories. Name registration, by itself, does not constitute "incorporation" nor does it give the entity proprietary ownership in the name. It simply is a practical way to protect the name as most of the registrars in the provinces will refuse to allow a name to be registered in that province that is the same as, or substantially similar to, that of another existing corporation within that jurisdiction. A name that is used in association with goods or services can be protected by registering it as a trademark under the federal *Trademarks Act*. Registration gives the owner of the trademark the exclusive right to use the trademark in association with its goods and services throughout Canada.

Rui M. Fernandes

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

Endnotes

(*1) This article is part 3 of 17 parts dedicated to a review of doing business in Canada. Subsequent articles will include Securities Regulation, Canadian Immigration, Employment Laws, Directors and Officers, International Trade, Competition, Sale of Goods, Intellectual Property, Privacy, Real Property, Environmental Laws, Taxation, Insolvency, Litigation and ADR.



3. The Carriage of Medical and Recreational Marijuana

With the increasing number of licensed producers of medical marijuana and the incoming legalization of recreational marijuana in Canada, carrier companies are starting to ask how they can become involved. For carriers who are interested in transporting medical and recreational marijuana, they may wish to obtain assistance in conducting a review of their current equipment, procedures and contracts and determining what changes need to be made to ensure compliance with existing and proposed legislation.

Medical Marijuana - Transportation Requirements under the Current Framework

Pursuant to section 28 of the *Access to Cannabis for Medical Purposes Regulations* ("ACMPR") (*1), a licensed producer must take any necessary steps to ensure the safekeeping of marijuana and certain other related substances when shipping, delivering, or transporting the products, including when transporting them to a port of exit from Canada and when transporting between the port of entry into Canada and the producer's site.

Additionally, if a licensed producer is shipping fresh or dried marijuana, cannabis oil or related substances to another licensed producer, licensed dealer, individual client, hospital employee or health care professional, it must ship the substance in only one shipment per order, and prepare the package in a manner that ensures the security of its contents such that:

(i) it will not open or permit the escape of its contents during handling and transportation;
(ii) it is sealed so that it cannot be opened without the seal being broken;
(iii) it prevents the escape of cannabis odour; and
(iv) it prevents its contents from being identified without it being opened.

It must also use a shipping method that ensures the tracking and safekeeping of the package during transportation. The licensed producer must only ship the product to a shipping address as registered by a doctor, licensed dealer or another licensed producer. For shipments to individuals, the quantity must not exceed 150 grams of dried marijuana. (*2)

For substances that are imported, the importer is responsible for ensuring that after it is released through customs, it is transported directly to the site specified in the producer's licence. (*3)

If a licensed producer experiences a theft of cannabis, it must report the occurrence to the police within 24 hours of becoming aware of it and provide a written report to the Minister within 10 days. (*4)

With respect to cannabis that is being destroyed, if this is to occur at a location other than the licensed producer's site, the senior or responsible person in charge must accompany the cannabis to the location at which it is being destroyed. (*5)

Medical Marijuana – Carrier Requirements

The ACMPR does not set out specific requirements with which carriers must comply. Rather, the responsibility to ensure that the product is safe during transport falls on the licensed producer. However, since the licensed producer is handing over power and possession of the product to a carrier, liability in regards to safekeeping is often shifted by contract to the carrier.

Since carriers are technically in "possession" of marijuana while it is being transported, they must ensure that their carriage mandate is undertaken pursuant to sections 3(4) and (5) of the ACMPR, which allow an individual or company to possess marijuana if they are an employee or agent of the licensed producer and are acting in the course of their employment or their role as agent.

While the ACMPR does not dictate specific requirements for carriers, in order to ensure that licensed producers are in compliance with the ACMPR's requirements for transportation,

carriers should consider implementing the following to assist with compliance:

(1) Robust security measures: some producers are requiring carriers to use armoured vehicles and require drivers to be trained and licensed to carry weapons where large quantities of marijuana are being transported (for example, from one licensed producer to another or from one location to a storage location). Carriers could also ensure that background checks are conducted on all drivers;

(2) Tracking: carriers should have a system in place that allows licensed producers to be able to easily track shipments and should consider working with the licensed producer to find a method that is complementary to their existing tracking methods;

(3) Recordkeeping: carriers should ensure that they keep detailed records and logs of each shipment, in case the licensed producer is required to prove to Health Canada that the product is being kept safe and properly tracked;

(4) Contract: carriers should ensure that their contracts with licensed producers properly reflect their role as "agents" of the producer, to ensure that they are not offside the rules regarding possession. Carriers should also ensure that these contracts are carefully drafted and reviewed so that the allotment of risk and level of liability that they have agreed to take on is properly addressed.

Recreational Marijuana

In November 2017, the federal government started a consultation on their Proposed Approach to the Regulation of Cannabis. (*6) The consultation is open until January 20, 2018 and written submissions have been requested from the public. The consultation paper discusses the proposed framework in connection with the licensing and general regulation of authorized persons with respect to various activities involving cannabis under the proposed *Cannabis Act*.

The proposed *Cannabis Act* would provide the Minister of Health with authority to issue licences and permits to conduct certain activities. The framework under the proposed regulations has set out the following categories of licensed activities:

- cultivation
- processing (which would authorize "large-scale manufacturing, packaging and labeling of cannabis products destined for sale to consumers, and the intra-industry sale of these products, including to provincially/territorially authorized distributors, as well as associated activities")
- sale to the public (for medical purposes to registered clients and for non-medical purposes to adults in provinces that have not yet enacted a framework for sale and distribution)
- analytical testing
- import/export
- research

Many of the above-noted licence categories would include the authority to engage in related activities, such as the possession, transportation, research and development, storage and destruction of the product. (*7)

It is unclear from the proposal as to whether carriers could apply for a "standard processing" licence to transport cannabis for licensed producers without engaging in the other processing related activities.

In terms of security requirements, these would be designated mainly to mitigate against the risk of the product being stolen during transit. The proposal indicates that large quantities of high-value products would face proportionally higher physical security requirements. While the proposal provides an outline of site-specific requirements, it does not elaborate on transit-related requirements. The proposal also discusses personnel security requirements, including the creation and maintenance of an organizational security plan, a list of key security positions and roles (with valid security clearances to be issued

by Health Canada), and identification of shareholders, officers and directors of the licence holder. It is noted that shipping requirements for medical marijuana with respect to security will likely remain similar to the ACMRP rules. (*8)

For carriers who are interested in transporting medical and recreational marijuana, we recommend obtaining assistance to conduct a self-audit of the company's current equipment, procedures and contracts and to determine what changes must be made to ensure compliance with existing and proposed legislation.

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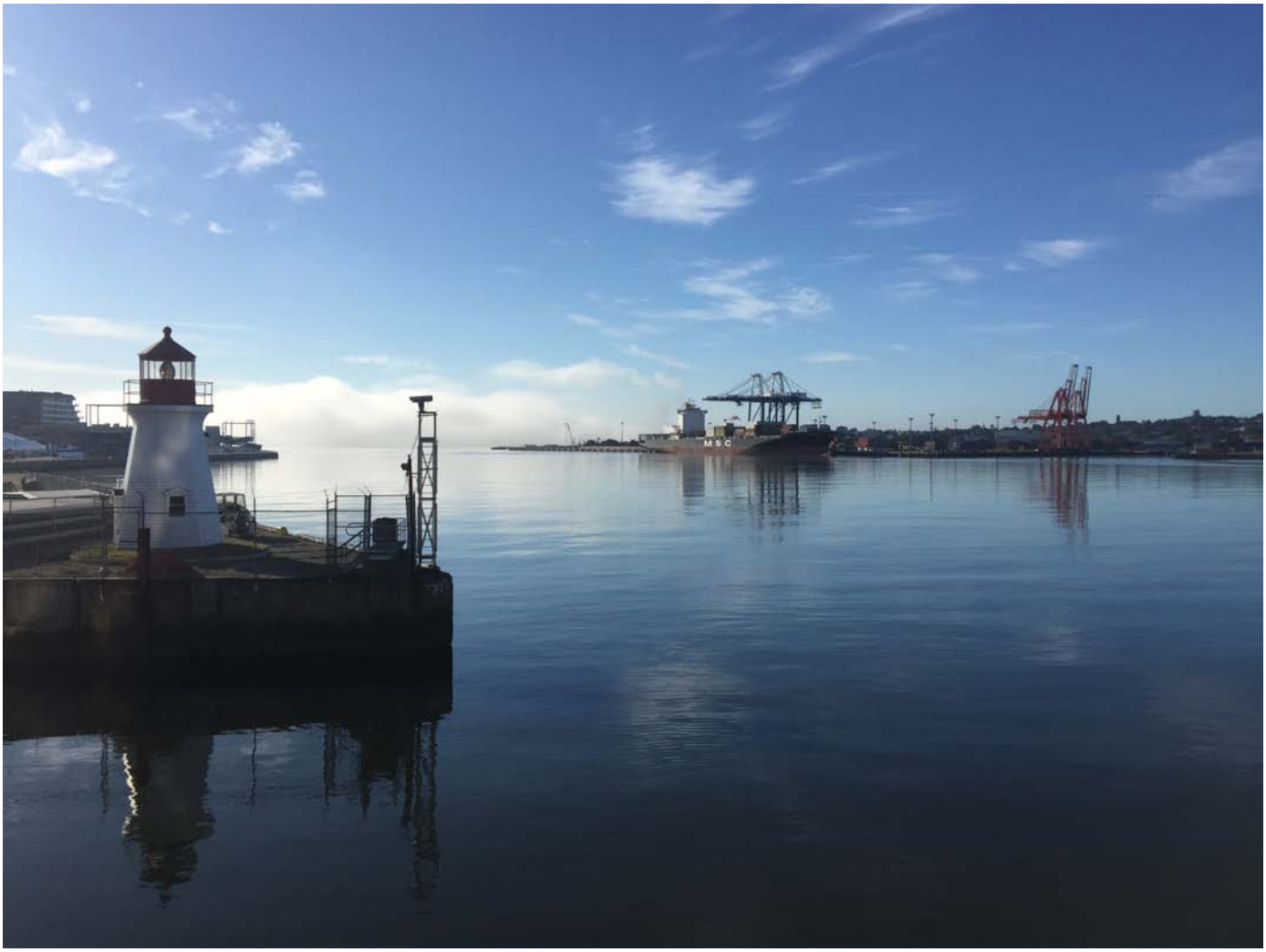
Endnotes
(*1) SOR/2016-230
(*2) *Ibid.,* s 93(1).
(*3) *Ibid*., s 99.
(*4) I*bid*., s 29.
(*5) *Ibid*., s30(3)).
(*6) "Proposed Approach to the Regulation of Cannabis" Government of Canada, online: <https://www.canada.ca/en/health-canada/programs/consultation-proposed-approach-regulation-cannabis/proposed-approach-regulation-cannabis.html)>
(*7) *Ibid.*
(*8) *Ibid.*



4. Significant Changes to the Ontario *Employment Standards Act, 2000*: Now in Effect *Is your workplace in compliance?*

Introduction

In our June 2017 Newsletter, we reviewed proposed changes to the Ontario *Employment Standards Act, 2000* ("ESA"), as set out in Bill 148, the *Fair Workplaces, Better Jobs Act, 2017.* After a period of consultation, Bill 148, with some adjustments, was passed, effective November 27, 2017. Some changes are already in effect and others are effective January 1, 2018, April 1, 2018 or January 1, 2019. This article will provide a review of these changes and their effective dates, and a "to-do" list for Ontario employers to ensure compliance.

Changes Already in Effect

A new provision was introduced as s. 5.1 of the ESA, which prohibits an employer from treating an employee as if that person is not an employee. During an investigation, inspection or proceeding, the employer bears the burden of proving that any independent contractor it has retained is not, in fact, an employee~~,~~ entitled to the protections and rights under the ESA. While it has always been the law that an employer cannot avoid its obligations under the ESA by misclassifying an employee as an independent contractor, it is now an express prohibition under the ESA.

Parental leave has increased from 35 weeks to 61 weeks, for employees who take pregnancy leave, and from 37 weeks to 63 weeks, otherwise, to mirror the recent amendments to the *Employment Insurance Act* ("EI"), which allow for an extended period of parental leave benefits. This amendment came into effect on December 3, 2017 and is available if the child is born, or comes into the custody, care and control of the parent, after December 3, 2017.

The Critically Ill Childcare Leave is replaced with the Critical Illness Leave and allows an employee who has been employed for at least 6 consecutive months to take an unpaid leave of absence to provide care and support to any critically ill (defined as "baseline state of health has significantly changed and life is at risk as a result of illness or injury") family member. The leave is up to 37 weeks in respect of a critically ill child under the age of 18, and 17 weeks for a critically ill adult. This amendment also came into effect on December 3, 2017, to correspond with the new EI entitlement to Family Caregiver Benefit for Adults.

Changes in Effect January 1, 2018

The minimum wage increases to $14 an hour.

Paid vacation increases from 2 weeks to 3 weeks (and 6% of wages) for employees with 5 or more years of service. This is not retroactive, as the increase does not apply to any vacation entitlement year that ends before December 31, 2017. Both active and inactive employment is included in calculating length of service – this is not new.

Public Holiday Pay is now calculated based on the actual days worked in the previous pay period, as opposed to wages earned in the previous 4 weeks divided by 20.

The Personal Emergency Leave has been amended and now applies in all workplaces, not just those with 50 or more employees. After being employed for one week, an employee is allowed up to 10 days off for personal illness, injury or medical emergency, or for the death, illness, injury or medical emergency of a family member or for an urgent matter with respect to a family member, in each calendar year. The first two days are paid, the remaining 8 days are unpaid. If an employee has been employed for less than one week, the employee is still entitled to the leave, but is not entitled to paid days until employed for one week or longer. An employer is no longer permitted to require a certificate from a qualified health practitioner to support the leave, but does have the right to require that the employee provide "evidence reasonable in the circumstances" that he/she is entitled to the leave.

Family Medical Leave is increased from 8 weeks to up to 28 weeks, to care for certain family members if a qualified health practitioner issues a certificate stating that the individual has a serious medical condition with a significant risk of death within a period of 26 weeks.

The new Child Death Leave replaces the Crime-Related Child Death or Disappearance Leave, and allows an employee with 6 consecutive months of employment, to take an unpaid leave of up to 104 weeks if a child of the employee dies.

The new Crime-Related Child Disappearance Leave allows an employee with 6 consecutive months of employment to take an unpaid leave of up to 104 weeks (was previously 52 weeks) in the event that the employee's child disappears as a result of a crime.

The new Domestic or Sexual Violence Leave allows an employee with 13 consecutive weeks of employment to take a leave if the employee, or the employee's child, experiences domestic or sexual violence or there is a threat of same. The leave is to allow the employee time off to seek medical attention, access victim services, obtain counselling, retain or seek legal assistance and to prepare for a legal proceeding. The leave is up to 10 days in each calendar year (taken one day at a time) plus up to 15 weeks in each calendar year (which must be taken in full weeks). The first 5 days of this leave are paid.

It is important to keep in mind that if an employee takes a leave of absence provided for under the ESA, the employee's benefits continue during the leave, unless the employee confirms in writing that he/she does not want them to continue and is not paying the employee portion of the benefits. While on leave, the employee's length of service continues to accrue. Finally, at the end of an ESA leave, the employer shall reinstate the employee to the position he/she most recently held if it still exists, or to a comparable position if it does not.

Temporary Help Agencies must provide an assignment employee with one week's notice, or pay in lieu thereof, if the assignment had an estimated term of three months or more when offered, and it is terminated before the end of its estimated term, unless another assignment of at least one week is offered to the employee.

Penalties for a contravention of the ESA shall be determined in accordance with the regulations and it is anticipated that the regulations will allow for administrative monetary penalties.

The Director of Employment Standards can publish information, including on the internet, about an employer's contravention of the ESA, including the date and description of the contravention, the name of any individual who was been issued a penalty and the amount of the penalty.

Changes Effective April 1, 2018

The Equal Pay for Equal Work provisions have been expanded to provide that casual, part-time, temporary or seasonal employees be paid the same as full time employees if they perform substantially the same kind of work, in the same establishment, their performance requires substantially the same skill, effort and responsibility, and the work is performed under similar working conditions. The ESA defines "substantially the same" to mean "substantially the same but not necessarily identical". An employee who believes that their rate of pay does not comply with this provision can request a review of their rate of pay from the employer, and the employer shall either adjust the pay, or respond to the employee, in writing, setting out why the employer disagrees with the employee. An employer cannot reduce the rate of pay of an employee in order to achieve compliance. This provision does not apply where the difference in rate of pay is due to a seniority system, merit system, a system that measures earnings by quantity or quality of production, or any other factor, other than sex or employment status.

Changes Effective January 1, 2019

The minimum wage increases to $15 an hour and is subject to an annual inflation adjustment on October 1st of each year, starting in 2019.

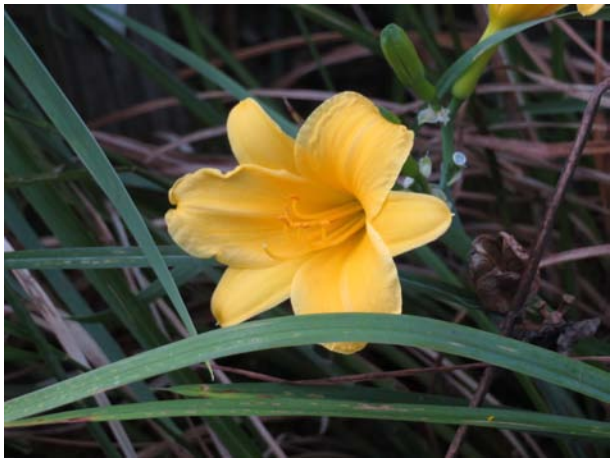
A new Part VII.1 is introduced which allows an employee with at least three months of service to request changes to his/her schedule or work location. The employer must discuss the request with the employee and notify the employee of its decision, within a reasonable period of time. If the change is granted, the employer must provide the employee with the date on which the change will take effect and its duration. If the employer denies the change, the employer must provide the reasons for the denial to the employee.

A new Part VII.2, also known as the "three-hour rule", introduces protections for employees with respect to the scheduling of work. If an employee who regularly works more than three hours in a day attends at work ready to work the full shift, but works less than three hours, the employer shall pay the employee for three hours. This does not apply if the reason the employer is unable to provide work for the employee is due to fire, lightning, power failure, storms or similar causes beyond the employer's control. If an employee is on call and is not required to work, or is called in to work, but works less than three hours, the employer shall pay the employee for three hours of work, unless the employee was on call for the purpose of providing essential public services. The amendments also give the employee the right to refuse an employer's request or demand to work, or to be on call, on a day they were not scheduled to work or be on call, if the employer's request or demand is made less than 96 hours in advance, unless the request is due to an emergency (which is a defined term), to address a threat to public safety, or to deliver essential public services. If an employer cancels the employee's scheduled day of work, or on call period, within 48 hours of the start time, the employer must pay the employee for three hours of work, unless the cancellation is due to fire, lightning, power failure, storms or similar causes, or the nature of the work is weather dependent, and there is no work due to weather related reasons.

Employer to-do List

1. Conduct a workplace audit to determine which employees are entitled to an increase in minimum wage or an additional week of vacation.
2. Review the work done by part-time, temporary, casual or seasonal employees and consider whether there are any pay equity issues likely to arise.
3. Review the terms of engagement of existing independent contractors to ensure that these workers are not misclassified. Review the form of independent contractor agreement being used.
4. Review all workplace policies and employee handbooks to ensure they comply with the new leaves of absence, increased vacation time, paid sick days, scheduling requirements.
5. Review the form of employment agreement in use to ensure it complies with these amendments.
6. Review company practices for scheduling work to determine whether there is any risk of exposure to the "three-hour rule". Also consider vacation scheduling practices, to account for increased vacation time.
7. Plan for covering longer parental leaves and consider impact of any current benefit plan that provides for "topping up" EI benefits.

Carole McAfee Wallace



5. Railway's Freight Claim Permitted to Proceed in Federal Court

Canadian National Railway Company v. Hanjin Shipping Co. Ltd. et al. 2017 FC 198

This legal action involved one of the many pieces of litigation arising out of the Hanjin Shipping Co. Ltd. ("Hanjin") insolvency. The Federal Court of Canada, has very specific limited subject matter jurisdiction, including that of Admiralty jurisdiction. The issue in this case was whether the Canadian National Railway Company ("CN") could claim for part of a debt alleged to be owing it by Hanjin for over $20,000,000 could be brought in Federal Court. The defendant Hanjin brought a motion to attempt to dismiss this action at an early stage on account of the Federal Court not having jurisdiction over a debt claim; however, Mr. Justice Harrington dismissed the motion thereby permitting the action to stay in Federal Court.

Facts

Hanjin operated a worldwide door-to-door liner container service and also chartered vessels, including the *Hanjin Vienna*, for the ocean carriage portion. Hanjin also hired CN for the inland carriage portion, which included the pick-up of inbound containers at Vancouver and Prince Rupert terminals and delivering them to consignees at destination. Hanjin also carried containers to the Vancouver and Prince Rupert terminals for export.

As noted, CN brought action in the Federal Court of Canada relating to that part of Hanjin's alleged debt associated with the *Hanjin Vienna.* CN alleged that it was in a contractual relationship with Hanjin as well as with the owners of the vessels that Hanjin chartered, more particularly, the owners ("Owners") of the *Hanjin Vienna*. The Owners sought to dismiss the action under the *Federal Courts Rule* 221 on two grounds being either: (1) the claim disclosed no reasonable cause of action; or (2) the claim was scandalous, frivolous or vexatious. To do so, the Owners had to convince the Court that it was "plain and obvious" (*1) that the Claim should not go further or was indeed scandalous, frivolous or vexatious.

Mr. Justice Harrington dismissed the motion finding that it was not plain and obvious that the Federal Court did not have jurisdiction to adjudicate CN claims on the merits. His Honour found, at this stage of the early stage of the action, it was arguable that (1) CN enjoyed a maritime lien by virtue of s 139 of the *Marine Liability Act*; (2) CN's claim was governed by Canadian Maritime Law; and (3) CN's claim fell within the *Canadian Transportation Act*, a federal statute, and was in relation to a work and undertaking extending beyond the limits of a single province.

The Court stated that no evidence would be permitted at this stage on the merits of the claim, but allowed some affidavit evidence given that the Court's jurisdiction over the subject matter in question was at issue. There would be no definitive ruling on the Court's jurisdiction. Since the Court found that it was not "plain and obvious" that the Court lacked jurisdiction, the argument that the Court had no subject matter jurisdiction would still be open for the Owners to argue at the eventual hearing on the merits.

The Court further found that the Claim was plainly and obviously not, in any event, scandalous, frivolous or vexatious. The action was not so clearly futile that it did not have the slightest chance of success.

The burden upon Owners when bringing a motion under the relevant Court rule relied upon *(i.e.* Rule 221) was a heavy one: "If there is a chance that the plaintiff might succeed, then the plaintiff should not be 'driven from the judgment seat'" (*Hunt v Carey Canada Inc.*, [1990] 2 SCR 959, [1990] SCJ No 93). The Court, at this early stage, was not going to weigh CN's chances of success but only consider whether there was a reasonable cause of action with "some chance of success" and whether it was "plain and obvious" that the action could not succeed (*2)

The Decision

(1) Maritime Lien under the *Marine Liability Act*

The court found that CN enjoyed a maritime lien pursuant to the *Marine Liability Act* S. 139, which states:

> A person carrying on business in Canada has a maritime lien on a foreign ship:
>
> (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.

If the claim were with respect to stevedoring or lighterage, the services would have to have been provided at the request of the shipowner or a person acting on the owner's behalf. However, in this case, the Court found that the services rendered by CN were clearly not by way of stevedoring or lighterage. The issue here was whether the services allegedly rendered to the *Hanjin Vienna* were supplied for its operation and the court found that the supply of containers fell within that category. (*3)

The Court also found that Hanjin and the Owners arguably operated an international liner service, which service formed part of Canadian Maritime Law in virtue of s 92(10) of the Constitution Act.

(2) Canadian Maritime Law Applied

The Owners had submitted that CN and they were both sub-contractors of Hanjin and were unrelated to each other in their roles. CN conducted land-based activities and did not load containers onboard nor discharge containers from the *Hanjin Vienna*. CN took containers from, or delivered them to, the terminals at Vancouver and Prince Rupert. These facts were uncontested.

The Federal Court was established pursuant to s 101 of the Constitution Act, 1867 and Canadian Maritime Law is referred to in ss 2, 22, 42 and 43 of the Federal Courts Act. Essentially, the Act confers jurisdiction upon the Federal Court in any matter coming within the class of navigation and shipping, unless otherwise assigned to a different Court. Section 22(2) provides specific instances over which the Court has jurisdiction, including:

> f) any claim arising out of an agreement relating to the carriage of goods on a ship under a through bill of lading, or in respect of which a through bill of lading is intended to be issued, for loss or damage to goods occurring at any time or place during transit;

CN's claim, however, was not a claim relating to loss or damage to goods but rather one for non-payment of freight.

The leading case on the content of Canadian Maritime Law is the *Buenos Aires Maru*, (*4). The Supreme Court held that the Federal Court had jurisdiction over a claim for loss of cargo carried under a port-to-port Bill of Lading from Caen, France, to Montréal where it was stolen in the hands of the terminal operator after discharge from the ship but before delivery.

The Court went on to review the nature of Canadian Maritime Law and jurisdiction of the Federal Court's jurisdiction. Under s 22(1), the law to be administered is the law that the Admiralty division of the Exchequer Court would have administered had it had unlimited jurisdiction in maritime and admiralty matters. Section 22(1) confers jurisdiction upon the Court in any matter coming within the class of navigation and shipping, unless otherwise assigned.

Mr. Justice Harrington stated,

> [33] The division between sea and shore is not nearly as clear as the owners of the *Hanjin Vienna* would like. If they were sued under a through Bill of Lading

for cargo damage, this Court would have jurisdiction over their indemnity claim against CNR (see *Quebec Liquor Corp v The Dark Europe*, [1979] FCJ 518, [1979] 3 ACWS 10, and *Boutique Jacob Inc. v Paintainer (sic) Inc*., 2008 FCA 85, 375 NR 160).

[34] CNR's claim is for unpaid freight and thus does not fall within s 22(2)(f). It may, however, fall within s 22(1). Is it reasonable that CNR would have to defend a cargo claim in the Federal Court but would have to go to a provincial court to sue its shipper for freight? As Mr. Justice Binnie stated in Canada (Attorney General) v TeleZone Inc., 2010 SCC 62, [2010] 3 SCR 585, at para 18:

> *This appeal is fundamentally about access to justice. People who claim to be injured by government action should have whatever redress the legal system permits through procedures that minimize unnecessary cost and complexity. The Court's approach should be practical and pragmatic with that objective in mind.*

[35] The ocean carrier is the shipper *vis-à-vis* CNR (*Boutique Jacob,* above). One of its obligations is not to ship undeclared, dangerous goods. Another is to pay freight. It seems peculiar to me that CNR could defend a claim for damage to dangerous goods in this Court, but could not sue for unpaid freight.

(Emphasis in the original)

The Court also noted that the Bill of Lading defined the carrier as not only meaning Hanjin Shipping Co. Ltd. but also its "vessels, agents and subcontractors at all stages of carriage; in context of Multimodal Transportation". The Court found that it was certainly arguable that there was, in fact and in law, a contractual relationship between CN and the Owners. The Court found that any interpretation must be made within the modern context of commerce and shipping and the understanding of navigation and shipping could evolve from time to time.

(3) CN's claim fell within the *Canadian Transportation Act*, a federal statute, and was in relation to a work and undertaking extending beyond the limits of a single province in that CN's railway connected British Columbia with other provinces and the United States.

The Court considered whether federal laws applied and found that, while the *Canada Transportation Act*, S.C. 1996, c. 10 and the *Railway Traffic Liability Regulations*, SOR/91-488, did not create the cause of action, it was part of the statutory framework that applied to the issues and constituted applicable federal law for the purposes of determining jurisdiction. It was noted that The *Canadian Transport Act* was applied in the through Bill of Lading context by the Federal Court of Appeal in *Boutique Jacob* (*5) and *Cami Automotive Inc. v Westwood Shipping Lines Inc.*, (*6). Further, and apart from a through bill of lading which had an ocean leg, it was noted that the Federal Court had taken jurisdiction over a claim against a railway which had no maritime connection.

Finally

The Court was not prepared to upon motion dismiss a claim unless it was plain and obvious that it should not go further or was scandalous, frivolous or vexatious. It would appear that such motions (which are expensive and time consuming) should be rare given the heavy onus on the moving party.

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Endnotes
(*1) *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42, [2011] 3 SCR 46
(*2) *Operation Dismantle v The Queen*, [1985] 1 SCR 441, [1985] SCJ No 22

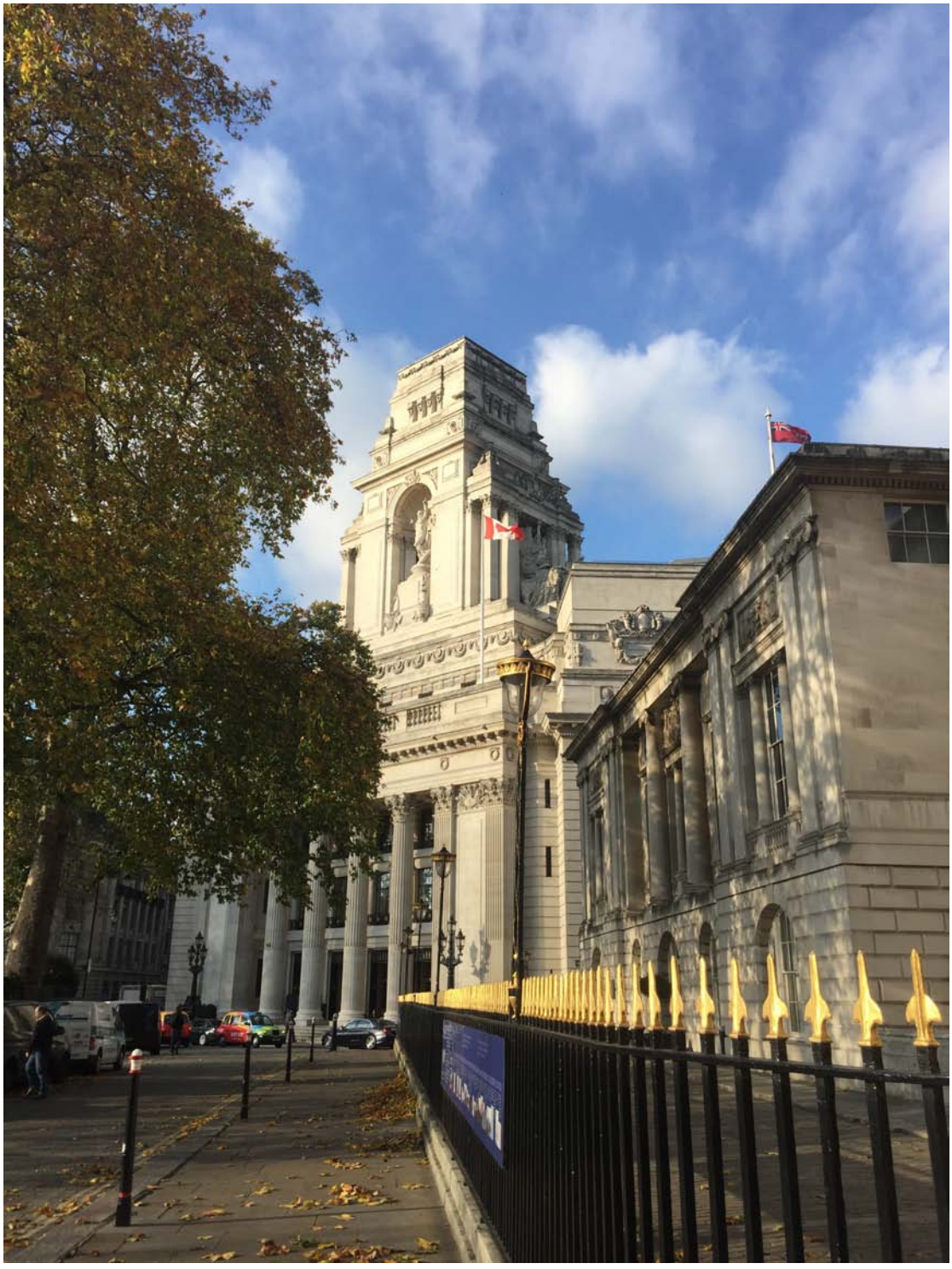
at pp 486 and 487

(*3) *Textainer Equipment Management BV v Baltic Shipping Co*, 84 FTR 108, [1994] FCJ No 1267

(*4) *ITO-International Terminal Operators Ltd v Miida Electronics Inc*, [1986] 1 SCR 752 (the *Buenos Aires Maru*)

(*5) *Boutique Jacob Inc. v Pantainer Inc.,* 2008 FCA 85, 375 NR 160

(*6) 2009 FC 664, aff'd 2012 FCA 16).



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CONTEST

This month we are giving away a complimentary ticket for attendance at our annual seminar day - Wed. January 17th 2018 in Toronto - for the first individual to email us the name of exact location depicted in photograph on page 23. Email your answer to info@fernandeshearn.com with a subject line "Newsletter contest". First response with the correct answer wins.