THE NAVIGATOR

IN THIS ISSUE

Insurer Owes No Duty of Good Faith to Advise Insured of Limitation Period

In *Usanovic v. Penncorp Life Insurance Company (La Capitale Financial Security Insurance Company)*, 2017 ONCA 395, the Ontario Court of Appeal held that an insurer's duty of good faith did not require it to give notice of the limitation period to its insured for an action to be brought against it. The Court held that while the legislatures of some provinces have imposed a statutory obligation to that effect, there is no such requirement in Ontario. Whether there should be is a matter that should be left to the legislature.

Background

The claimant Mr. Usanovic ("Usanovic") was a self-employed eavestrough installer. In 1999, he bought an insurance policy from the insurer Penncorp Life Insurance Company. The policy insured him against disability arising from accidents. In 2004, he purchased additional coverage for disability arising from sickness.

In September 2007, Usanovic fell from a roof and suffered serious injuries. He received disability benefits until November 2011, when the insurer terminated its payments because he no longer had a "total disability", as defined by the policy.

On January 12, 2012, the insurer's lawyer wrote to Usanovic explaining that since benefits had been paid for 24 months, he was not entitled to receive further benefits unless he was unable to engage in any and every occupation for which he was reasonably fit by reason of his education, training and experience. A review of the medical information on his file did not support the conclusion that he had a total disability. Moreover, surveillance undertaken by the insurer was inconsistent with the limitations from which Usanovic claimed to be suffering.

The lawyer's letter added, "If you disagree with this decision, please submit, within sixty days of receipt of this letter, medical records in support of your claim for total disability from any occupation for which you are reasonably trained and educated".

FIRM AND INDUSTRY NEWS

- **Louis Amato-Gauci** was a speaker on a panel dealing with "Transition and Crossover: Cross Border Transit in NAFTA's Uncertain Times," at the 88th annual meeting of the **Association of Transportation Law Professionals**, that took place in Austin, Texas, June 24-27, 2017.

- **Toronto Transportation Club's Ladies on the Links** will be held on July 20th, 2017 at the ClubLink Country Club, Woodbridge. **Kim Stoll**, **Carole McAfee Wallace**, **Jaclyne Reive** and **Andrea Fernandes** will be in attendance.

- **Global Law Experts** has named **Fernandes Hearn LLP Transport Law - Law Firm of the Year in Canada**

- **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.

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: Opens July 1, 2017 http://www.marineenergysymposium.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
10:00 to 11:00 am	Seabed Mining
11:00 to 11:15	Coffee Break
11:15 am to 12:15 pm	Offshore Exploration and Exploitation: Liability and Compensation Issues

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

Concurrent Session Time	Session A - Vanity Fair	Session B - Kensington
1:15 to 2:15 pm	Application of Jurisdiction Clauses in Different Countries	LNG Contracts and Transportation
2:20 to 3:20 pm	Arrest of Vessels in Various Jurisdictions & Alternatives	Update on HNS Convention
3:25 to 4:25 pm	Issues Arising from Project Cargo	Port Security and Liability

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

MESA 2018 CONFERENCE

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	Impact of Climate Change on Shipping and Energy Projects
10:00 to 10:45 am	Autonomous Ships and Equipment	Cyberterrorism in Transportation and Energy Projects
10:45 to 11:00 am	Coffee	Coffee
11:00 to 11:45 am	Roles and Risks for Forwarders in the Next Decade	Pipeline Technologies, Development Issues and Litigation
11:55 am to 12:45 pm	Emerging Issues in Insurance in Marine and Energy	Wind Turbine Litigation

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

Usanovic did not provide new medical records in response to the letter. He claimed in an affidavit that he had sent a letter to the insurer, protesting the termination of his benefits. The insurer denied having received that letter.

In cross-examination, Usanovic admitted that he knew his benefits had been terminated, had received the lawyer's letter, had read the policy over, had discussed the matter with his wife many times and had considered hiring a lawyer, but could not afford to do so.

In early 2015, Usanovic consulted counsel, who told him that there was a two-year limitation period regarding his claim. Usanovic alleged that, had the insurance company told him about the limitation period when it denied his claim, he would have brought an action earlier. He commenced this action in April 2015, more than two years after the termination of his benefits and receipt of the letter from the insurer's lawyer.

The Decision of the Motions Judge

The Court of Appeal reviewed the decision of the judge before whom the original application had been brought. In the court below Usanovic submitted that the insurer's duty of good faith and fair dealing obliged it to advise its insured of the applicable limitation period regarding the denial or discontinuance of insurance benefits and that the two-year limitation period did not begin to run until the insurer gave this notice.

The motion judge rejected this argument. He observed that, "in my view, the extension of the law proposed by the plaintiff [Usanovic] would represent a substantial shift in the boundaries of the obligation of good faith and fair dealing on insurers as they are presently understood" (at para. 38).

The motion judge's core conclusions, at paras. 40-42, were as follows:

> It would appear that, at its highest, the obligation of good faith and fair dealing arguably carries with it a positive obligation on an insurer to inform its insured of the nature of the benefits available under the policy. There is a marked difference, however, between imposing on an insurer a positive obligation to advise with respect to rights and benefits internal to the policy and the imposition of an obligation to advise with respect to the application of law external to the policy, such as pursuant to the *Limitations Act*.
>
> In my view the court should be circumspect in extending the common law to impose positive obligations of general application on parties, particularly where the implications of so doing are unknown. The law of insurance is broadly occupied by legislation and in my view it should be left to the legislature to regulate, if it deems it necessary and appropriate, the nature and extent of information which must be given by insurers to their insureds upon denial of benefits, including the existence and details of applicable limitation periods.
>
> I find that there was no obligation in law on the defendant to advise the plaintiff of the applicable limitation period in the *Limitations Act*.

Court of Appeal

Justice George Strathy, Chief Justice of Ontario, writing for a unanimous panel, summarized the law in Ontario as follows:

1. Parties to an insurance contract owe each other a duty of utmost good faith;
2. This duty requires an insurer to deal with claims by its insured in good faith;
3. The duty of good faith is not the same as a fiduciary duty. In contrast to a fiduciary duty, the insurer is not obliged to treat the insured's interests as paramount. However, the insurer must give as much consideration to the welfare of the insured as to its own

interests. This requirement is based on the recognition that the insured is typically in a vulnerable position when making a claim;

4. The scope of the duty of good faith has not been precisely delineated or definitively settled. Although the assessment is fact-specific and will depend on the particular circumstances of each case, courts have recognized some general requirements of the duty of good faith;

5. The duty of good faith requires an insurer to act both promptly and fairly when investigating, assessing and attempting to resolve claims made by its insureds.

The first part of this duty speaks to the timeliness in which a claim is processed by the insurer. Although an insurer may be responsible to pay interest on a claim paid after delay, delay in payment may nevertheless operate to the disadvantage of an insured. The insured, having suffered a loss, will frequently be under financial pressure to settle the claim as soon as possible in order to redress the situation that underlies the claim. The duty of good faith obliges the insurer to act with reasonable promptness during each step of the claims process. Included in this duty is the obligation to pay a claim in a timely manner when there is no reasonable basis to contest coverage or to withhold payment.

The duty of good faith also requires an insurer to deal with its insured's claim fairly. The duty to act fairly applies both to the manner in which the insurer investigates and assesses the claim and to the decision whether or not to pay the claim. In making a decision whether to refuse payment of a claim from its insured, an insurer must assess the merits of the claim in a balanced and reasonable manner. It must not deny coverage or delay payment in order to take advantage of the insured's economic vulnerability or to gain bargaining leverage in negotiating a settlement. A decision by an insurer to refuse payment should be based on a reasonable interpretation of its obligations under the policy. This duty of fairness, however, does not require that an insurer necessarily be correct in making a decision to dispute its obligation to pay a claim. Mere denial of a claim that ultimately succeeds is not, in itself, an act of bad faith.

Justice Strathy noted that, "in this case, however, we are asked to do something more than impose a duty of good faith on insurers to disclose the contents of the insurance policy. We are asked to extend the duty of good faith to require an insurer to disclose information outside the policy – namely, the existence of a limitation period."

Justice Strathy also noted that some commentators have suggested that it would be severe and unfair for the insured to be denied benefits when the insurer was aware of the limitation period, but the insured was not. He also noted that the British Columbia Court of Appeal has directly addressed this issue and concluded that the insurer is not obliged to advise the insured of the limitation period, although some members of the court suggested that it may be advisable to do so.

The Court noted that while no court has imposed a duty on the insurer to inform the insured of the limitation period, some legislatures have done so. In British Columbia, a regulation introduced in 2012 requires the insurer to give written notice to the claimant of the applicable statutory limitation period when it denies the claim or within a short time thereafter. There are exceptions for claimants represented by legal counsel and those making certain types of claims. If the insurer fails to provide the requisite notice, the running of the limitation period is suspended. Alberta has also adopted specific notice requirements. Pursuant to a 2012 amendment to the *Fair Practices Regulation* an insurer must give written notice of the applicable limitation period within five business days of denying a claim. The notice is not required when the insurer is aware the claimant is represented by counsel and for certain types of claims. If the insurer fails to give that notice, the court may, on application of the claimant, order that the applicable limitation

period be extended and grant any other remedy that the court considers appropriate.

Ontario has not gone as far as Alberta and British Columbia. However, the *Insurance Act* was amended in 2012 to require life, disability and creditors insurers to include the following statement in the insurance policy and certificate:

> Every action or proceeding against an insurer for the recovery of insurance money payable under the contract is absolutely barred unless commenced within the time set out in the *Limitations Act, 2002*.

Justice Strathy concluded that the Ontario legislature might have gone further than it did, for example, by adopting the approach taken in Alberta or British Columbia. It presumably chose not to do so and, "in my respectful view, the court should not impose consumer protection measures on insurers, outside the terms of their policies, that the legislature has not seen fit to require. A properly crafted regime, such as those in effect in Alberta and British Columbia, would not only have to specify the requirement to give notice, but also the consequences of failing to do so."

In this well reasoned decision, Justice Strathy summarized the issue:

> The consequences of the appellant's [Usanovic's] proposed expansion of the duty of good faith are significant. The appellant's interpretation would effectively judicially overrule the provisions of the *Limitations Act, 2002* by making notice given by an insurer to an insured the trigger for the limitation period, rather than discoverability of the underlying claim. This would defeat the purpose of the statute and bring ambiguity, rather than clarity, to the process.

The appeal was dismissed.

Rui M. Fernandes

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

2. Transportation Safety Board Finds Large Wave Caused Leviathan II Capsizing

On June 16th the Transportation Safety Board released its investigative report on the capsizing of the passenger vessel Leviathan II. A summary of the report follows.

Background

On 25 October 2015, at approximately three o'clock in the afternoon, the passenger vessel *Leviathan II* was on a whale-watching excursion with 27 people on board when it capsized off Plover Reefs in Clayoquot Sound, British Columbia. The subsequent rescue operation recovered 21 survivors, which included 18 passengers and 3 crew members. There were 6 fatalities. As a result of the capsizing, approximately 2000 litres of fuel leaked into the water.

The Operations

The operator and owner of the vessel, Jamie's Whaling Station Ltd., has been conducting tours out of Tofino and Ucluelet, British Columbia, since 1982 and operates a fleet that included 3 small passenger vessels and 6 rigid-hull inflatable boats (RHIBs). It offers whale-watching excursions seasonally from March to October, and approximately 25 000 passengers travel on these vessels each year.

A typical whale-watching trip takes 2.5 to 3 hours, and the vessels travel various routes between the south end of Long Beach and Rafael Point on the coast of Flores Island, a distance of approximately 28 nautical miles. These routes change depending upon weather conditions and the locations where whales and other marine wildlife, such as sea lions and otters, are most likely to be found at any given time. As part of the experience, in order to observe wildlife, it is not unusual for the vessels to pass close to land, and the vessels routinely travel near Plover Reefs.

Whale-watching excursions are weather-dependent, and trips are cancelled when conditions are likely to affect the comfort and safety of passengers. The company relies on the masters to determine when a trip must be cancelled because of poor conditions.

Photo: TSB Report M15P0347 *Leviathan II* (Source: David Bly)

On 25 October 2015, 24 passengers arrived at the whaling station in Tofino for a whale-watching trip on board the *Leviathan II*. The master had checked the weather forecast on the Environment Canada website before the voyage, which was his first of the day. The forecast predicted southeast winds at 15 to 25 knots, becoming variable at 10 to 20 knots in the afternoon, and becoming northwest at 15 to 25 knots in the evening. The wave-height forecast predicted seas of 2 m, building to 3 to 4 m in the afternoon, and subsiding to 2 m near midnight. The master also checked the wave conditions recorded at the La Perouse Bank weather buoy. The significant wave height was between 2.6 m and 2.9 m, with a wave period of 9 to 10 seconds. The weather forecast was also available at the whaling station for the information of passengers.

While the *Leviathan II* was proceeding to Plover Reefs so that the passengers could observe sea lions, there was a swell of approximately 2 m from the southeast. On approaching Plover Reefs, the master visually assessed the sea conditions and checked for the presence of breaking waves, in particular at a spot south of the reef that the company's masters commonly used to determine prevailing conditions. There were no signs of breaking waves or aerated water or foam in the surrounding area, other than on the edge of the reef itself.

The *Leviathan II* first proceeded along the south side of Plover Reefs and then made a 180° turn and returned to the southeast side of the reef, where the sea lions were located, to provide passengers on both sides of the vessel with an opportunity to view them. Shortly before 1500, the master was maintaining the vessel's position on a northerly heading approximately 100 m off the reef in water that was approximately 7 m deep while the passengers were watching the sea lions on the port side. As the vessel was departing toward the north side of the reef, the master and one deckhand heard a noise and looked aft, at which time they saw a large breaking wave bearing down on the vessel's starboard quarter. The top of the wave was reported to be above the flying bridge. The master reached for the throttles in an attempt to turn the vessel to port so that the vessel would encounter the wave on the stern. However, at that moment, the wave struck the vessel's starboard quarter, causing the vessel to broach and rapidly capsize.

As the vessel capsized, one deckhand and most of the passengers fell into the water. The master and the other deckhand were initially trapped inside the flying bridge.

Twenty-one survivors were rescued and transferred to Tofino, where they were attended to by emergency health services. Some of the passengers suffered from hypothermia, ranging from mild to severe. Five bodies were recovered on the day of the occurrence and, one remaining passenger was found on 18 November 2015.

Vessel and Personnel Certification

The *Leviathan II* was certified, manned, and equipped in accordance with existing regulations.
The master and crew were adequately certified and experienced.

The stability booklet for the *Leviathan II* was approved by Transport Canada (“TC”) on 12 December 1996, and a copy was stored on board the vessel.

In order to assess the stability of the *Leviathan II* at the time of the occurrence and factors that may have affected it, the Transportation Safety Board (“TSB”) developed a detailed computer model of the vessel and performed various stability calculations. The conclusions of this TSB stability assessment are as follows:

1. The modifications that were made to the vessel since it entered service in 1996 resulted in a small change to the estimated lightship weight and centre of gravity and did not have a significant impact on the stability of the vessel.

2. With consumables, passengers, and crew distributed as at the time of the occurrence, the vessel's stability met and exceeded TC stability standards for normal operating conditions.

3. The results of the stability assessment with applied waves are consistent with the observed behaviour of the vessel at the time of the occurrence; that is, a rapid capsizing to port after having been struck on the starboard quarter by a large steep wave. The evaluation did not point to passenger load and distribution as being a likely factor affecting the outcome of the occurrence, nor were any other possible contributing factors identified, such as water ingress.

4. The stability standards established by TC do not explicitly evaluate a vessel's risk when operating in a wave environment. Although compliance with the standards implies a measure of safety against capsizing in a seaway, the standards do not address exposure to extreme circumstances such as large breaking waves or surf-like conditions. In this regard, TC stability standards are consistent with international standards in warning vessel masters that operational measures must be taken to mitigate the risk of capsizing according to the prevailing circumstances.

4. The results highlight the significance of encounter angle as a factor affecting the vessel's stability in waves. Specifically, the risk of capsizing is significantly reduced when the encounter angle is such that the vessel is meeting the wave head on.

5. The risk associated with the absence of specific passenger controls for the *Leviathan II* in normal operating conditions was evaluated as low.

Cause of Capsizing

While the *Leviathan II* was at Plover Reefs to allow the passengers to view sea lions, the vessel maintained a position on the weather side of the reef, exposed to the incoming swell. As the vessel was leaving the area, a large wave approached the vessel from the starboard quarter. Moments before it struck the vessel, the master heard a noise that caused him to look aft and notice the wave. However, by this point, the wave was breaking and it was too late to realign the vessel in order to minimize the impact of the wave. The TSB stability assessment supports the conclusion that the forces exerted on the vessel by this wave were sufficient to overcome the stability of the vessel and cause it to capsize; no other significant factors contributing to the capsizing were identified. In summary:

1. While the *Leviathan II* was at Plover Reefs, the conditions were favourable for the formation of breaking waves.

2. The vessel maintained position on the weather side of the reef, exposed to the incoming swell, to allow passengers to view wildlife. As the vessel was leaving the area, a large wave approached the vessel from the starboard quarter.

3. Moments before the wave struck, the master became aware of it and attempted to realign the vessel to minimize its impact, but there was not enough time for his actions to be effective.

4. The forces exerted on the vessel by this large breaking wave caused it to broach and rapidly capsize.

5. The rapid capsizing resulted in the passengers and crew falling into the cold seawater without flotation aids or thermal protection, exposing them to the effects of cold water immersion.

6. Approximately 45 minutes elapsed before search-and-rescue (“SAR”) resources became aware of the capsizing, as the crew did not have time to transmit a distress call before the capsizing, nor did the vessel have a means to automatically send a distress call.

7. The crewmembers were able to discharge a parachute rocket, which alerted a nearby Ahousaht First Nation fishing vessel that was instrumental in saving the lives of a number of survivors.

The TSB made the following recommendations that:

1. The Department of Transport ensure that commercial passenger vessel operators on the west coast of Vancouver Island identify areas and conditions conducive to the formation of hazardous waves and adopt practical mitigation strategies to reduce the likelihood that a passenger vessel will encounter such conditions.
2. The Department of Transport take steps to ensure that small passenger enterprises have a safety management system.
3. The Department of Transport require commercial passenger vessel operators to adopt explicit risk management processes, and develop comprehensive guidelines to be used by vessel operators and Transport Canada inspectors to assist them in the implementation and oversight of those processes.
4. The Department of Transport encourage all charter vessel operators to equip their vessels with life-saving and emergency communication and/or signalling equipment suitable for the type of operation.
5. The Department of Transport require small passenger vessels to provide pre-departure briefings and to be equipped with a life raft that is readily deployable, lifesaving equipment that is easily accessible, and the means to immediately alert others of an emergency situation.
6. Transport Canada should consider whether requirements for the use of digital emergency beacons should be applied to additional classes of boats and airplanes.
7. The Department of Transport expedite the proposed changes to the *Navigation Safety Regulations* and expand its current emergency position-indicating radio beacon (EPIRB) carriage requirements to require that all commercial passenger vessels operating beyond sheltered waters carry and EPIRB, or other appropriate equipment that floats free, automatically activates, alerts search and rescue resources, and provides continuous position updates and homing-in capabilities.

Rui M. Fernandes

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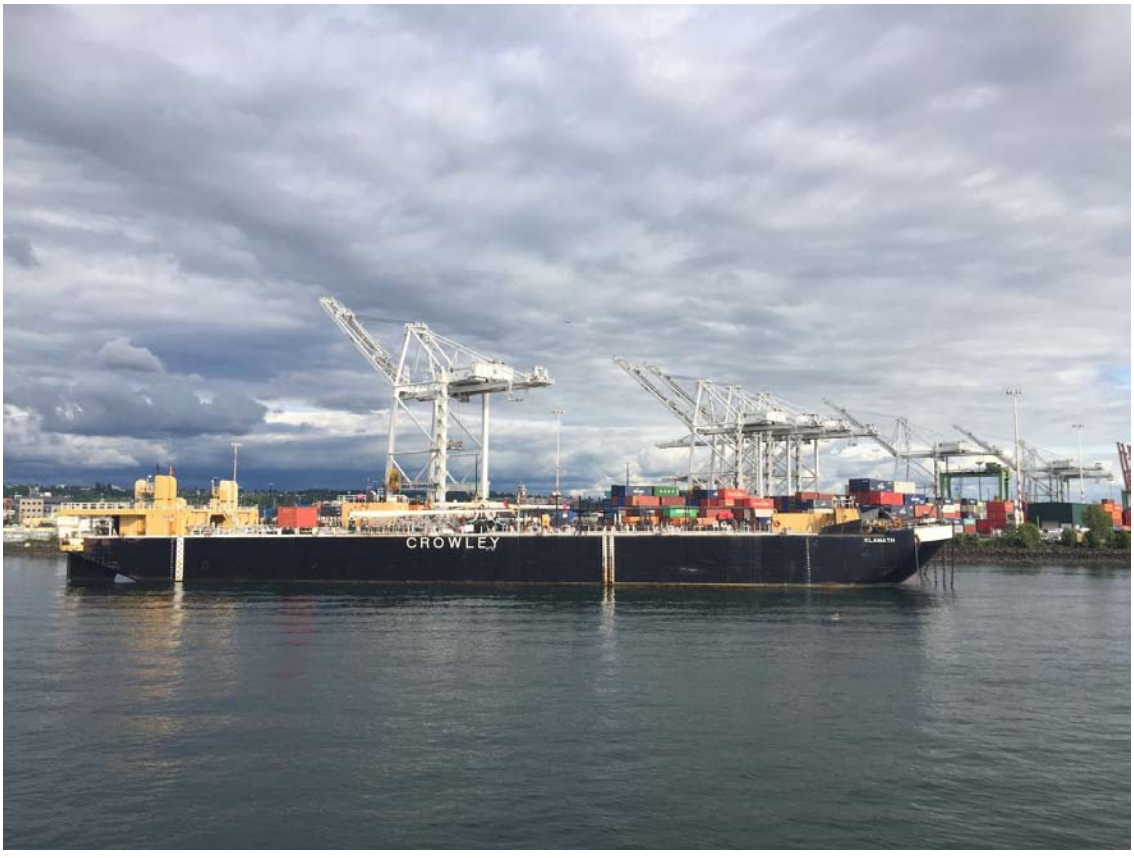


3. Bill 148: Changes to the Ontario Employment Standards Act, 2000: *What Employers Need to Know to be Ready for January 2018*

Overview

In February 2015 the Ontario Government announced that it would review issues and trends affecting the Ontario workplace and, in particular, how the *Employment Standards Act, 2000* ("ESA") and the *Labour Relations Act* ("LRA") might be amended to address the needs of employees and employers.

On May 23, 2017 the Ontario Government issued its 419 page Final Report ("The Changing Workplaces Review: An Agenda for Workplace Rights Final Report"), which contained 173 recommendations to amend the ESA and LRA. One week later, on June 1, 2017, the *Fair Workplaces, Better Jobs Act, 2017* ("Bill 148") passed first reading. A motion to dispense with second reading was passed, and Bill 148 was referred to the Standing Committee on Finance and Economic Affairs ("Committee") for review over the summer. Most of the proposed amendments to the ESA are intended to come into force on January 1, 2018, and will have a significant impact on provincially regulated employers. This article provides a summary of the key amendments to the ESA.

Increase to Minimum Wage

January 1, 2018 - $14.00 per hour
January 1, 2019 - $15.00 per hour
October 1, 2019 onwards - an annual inflation adjustment

Increase to Vacation Time/Pay

After 5 or more years of employment, an employee's vacation entitlement increases from 2 weeks a year to 3 weeks a year, and vacation pay increases from 4% per year to 6% per year. For existing employees with 5 or more years of employment, the employee is entitled to 3 weeks of vacation for the 2017 vacation entitlement year, which means that they will be entitled to 3 weeks of vacation in 2018; the employee is not entitled to additional vacation days in respect of vacation entitlement years before 2017.

Public Holidays

The calculation of public holiday pay is amended so that it is based on the number of days actually worked in the pay period immediately preceding the public holiday. This amendment is more generous to the employee who works part time or irregular hours, than under the current ESA. For an employee who works on a public holiday, the employer will no longer be able to pay the employee his/her regular wages and substitute another day off in the future. The employee will now be entitled to be paid public holiday pay plus premium pay (time-and-a-half) for the hours worked on the public holiday.

Personal Emergency Leave

Personal emergency leave of 10 days in each calendar year will be available to all employees, not just those who work for employers who regularly employ 50 or more employees. Personal emergency leave is available for a personal illness, injury or medical emergency, or the death, illness, injury, medical emergency of certain family members, and is now expanded to include sexual or domestic violence, or the threat of same, experienced by the employee or certain family members. In addition, the first two days of personal emergency leave are to be paid. While an employer has the right to require an employee to provide evidence reasonable in the circumstances that he/she is entitled to take the leave, the employer is not permitted to require a certificate from a qualified health practitioner.

Family Medical Leave

This leave without pay is to be increased from 8 weeks to up to 27 weeks, to provide care or support to certain family members if a qualified health practitioner issues a certificate stating that the family member is at significant risk of death within a period of 52 weeks.

Equal Pay for Equal Work

An employer cannot pay a casual, temporary, part-time or seasonal employee less than what it pays a full-time employee where the employees perform substantially the same work in the same establishment, the performance requires substantially the same skill, effort and responsibility, and the work is performed under similar working conditions. A different rate of pay may be permitted if it is based on seniority or merit, a system that measures earnings by quantity or quality of production, or any other factor other than sex or employment status. An employee who believes that his/her rate of pay does not comply with this provision has the right to request a review of their rate of pay from the employer who is required to either adjust the employee's pay accordingly or provide a written response to the employee setting out the reasons for the disagreement with the employee's belief. These changes, if passed, will come into force on April 1, 2018.

Scheduling

New employee rights have been introduced which allow an employee, with 3 months of service, to request a change to his/her schedule or work location. The employer is obligated to discuss the request with the employee and provide a decision within a reasonable period of time. If the employer denies the employee's request, it must provide reasons for the denial.

An employee is also entitled to a minimum of 3 hours' pay for shifts that are less than 3 hours, if the employee regularly works more than 3 hours in a day. If an employee is on call and is either not called to work or is called to work but works less than 3 hours, the employee is to be paid for 3 hours of work. Further, an employee has the right to refuse an employer's requirement to work, or be on call, on a day they were not scheduled to work, or be on call, if the employer's request is made less than 96 hours in advance. And finally, an employee is entitled 3 hours' pay if the employee's shift or on call period is cancelled on less than 48 hours' notice.

Independent/Dependent Contractors

The Final Report included a recommendation that the definition of "employee" in the ESA be amended to include a "dependent contractor", which is the definition in the LRA. On a positive note for employers, Bill 148 does not amend the definition of "employee" to include a "dependent contractor", but it does amend the ERA to provide that for the purposes of the ERA, an employer shall not treat a person who is an employee as if the person were not an employee. During an investigation or inspection or proceeding, the employer bears the burden of proving that the person is not an employee. It remains to be seen how this section will be used by those who are identified as independent contractors, or who might be considered to be dependent contractors, to seek rights available only to employees.

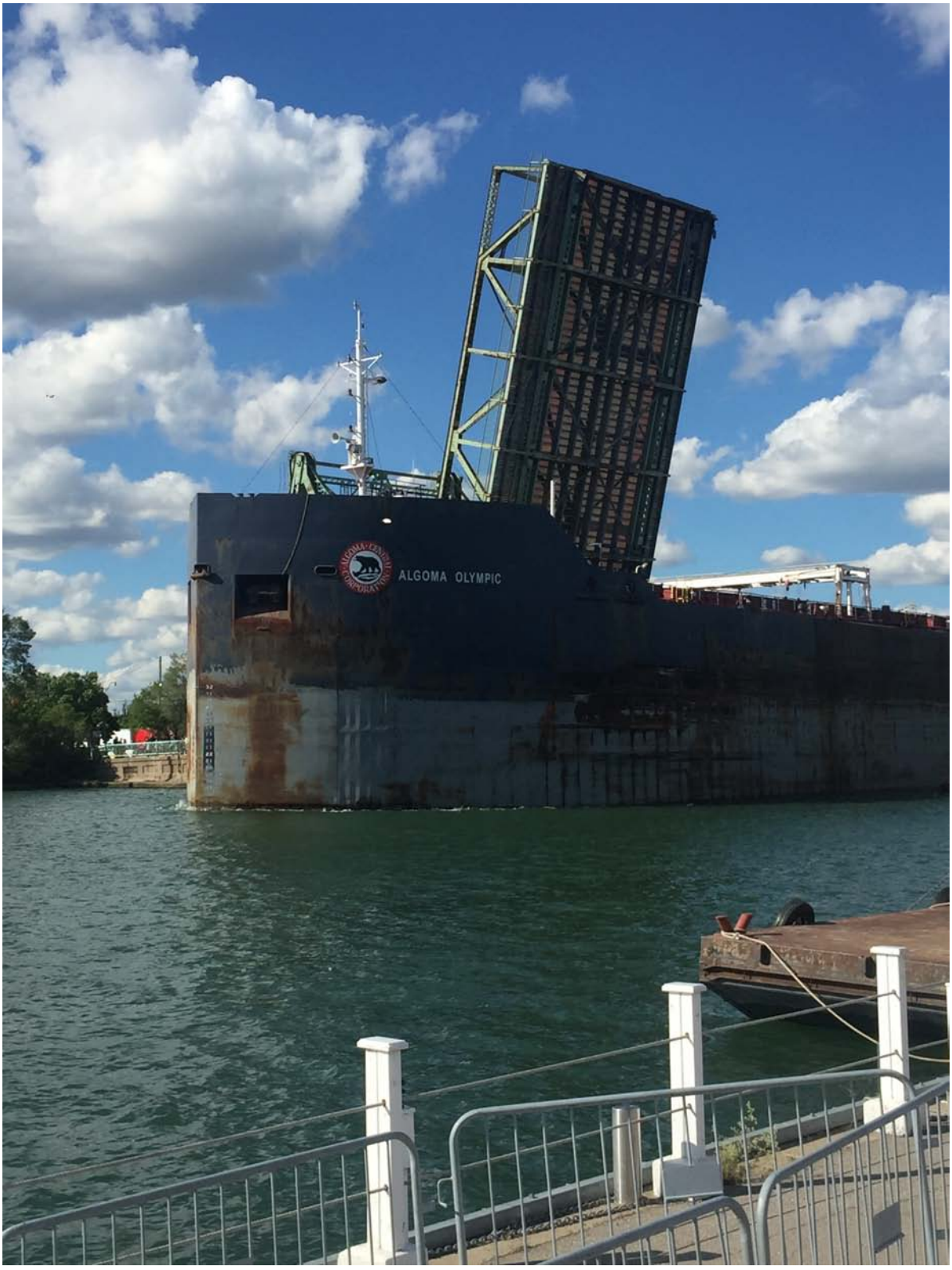
What should Employers do?

Bill 148 creates a more generous employment standards regime for employees and will impact provincially regulated businesses. The changes, if passed, will increase wages, vacation entitlements, certain leaves of absence and create new employee rights regarding scheduling. Employers should conduct an internal audit of their workforce compensation and employment practices to assess the scope of the impact of these changes on operations and consider what changes will be required to workplace policies and procedures.

It is also possible for an Ontario employer to provide the Ontario government with feedback on Bill 148's impact on the workplace. Public hearings are being held across Ontario, in Thunder Bay, North Bay, Ottawa, Kingston and Windsor-Essex during the week of July 10, 2017. Public hearings will also be held during the week of July 17, 2017 in London, Kitchener-Waterloo, Niagara, Hamilton and Toronto. To attend one of these public meetings you must provide a contact

name, mailing address, phone number and email address to the Clerk of the Committee, Eric Rennie at ERennie@ola.org or at 416-325-3506 **by no later than July 4, 2017**. An employer can also provide written submissions to the Committee by no later than July 21, 2017 at 5:30 pm.

Carole McAfee Wallace



4. Private Law Suits for Anti-Spam Violations Suspended, Regulatory Fines Still Imposed

We have previously written about Canada's Anti-Spam Law ("CASL"), which came into effect July 1, 2014. (*1) It prohibits the sending of "commercial electronic messages" – such as e-mails and text messages – without express or implied consent from the recipients. Penalties for breaches of the legislation can be as high as $1 million for individuals and $10 million for corporations.

Up to now, the legislation has been enforced by government agencies, including the Privacy Commissioner, the CRTC, and the Competition Bureau.

We warned that, starting July 1, 2017 a new private right of action was to come into force, pursuant to which the legislation could be enforced by private litigation outside the bounds of the above-mentioned regulatory agencies. This right to sue for damages was highly controversial, particularly as many foresaw an onslaught of new lawsuits, ranging from Small Claims matters to expensive class actions. In addition to any actual damages, courts would be able to award nominal statutory damages of up to $200 per message, to a maximum of $1 million for each day in which a violation occurred. Thus, a single errant message to 250 people, for example, could theoretically cost a company $5,000 or more.

Despite the foregoing, the federal government recently suspended the coming into force of the private right of action by an order in counsel. (*2) Instead, the question of better enforcement of CASL will be referred to a Parliamentary committee for study.(*3)

In the meantime, CASL generally remains in force. Fines may still be levied. Thus, we continue to recommend vigilance in compliance.

Importantly, we note that a transitional provision in CASL will expire on July 1, 2017. Namely, parties have been entitled to rely on implied consent based upon relationships that existed prior to the coming into force of the legislation on July 1, 2014. Those consents should be urgently updated such that anyone intending to send out such communications can show that a recipient has provided express consent.

Alan S. Cofman

Endnotes

(*1) *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Inform*, S.C. 2010, c. 23.

(*2) Order available online: http://www.pco-bcp.gc.ca/oic-ddc.asp?lang=eng&Page=secretariats&txtOICID=2017-0580&txtFromDate=&txtToDate=&txtPrecis=&txtDepartment=&txtAct=&txtChapterNo=&txtChapterYear=&txtBillNo=&rdoComingIntoForce=&DoSearch=Search+/+List&viewattach=34498&blnDisplayFlg=1.

(*3) Press release available online: https://www.canada.ca/en/innovation-science-economic-development/news/2017/06/government_of_canadasuspendslawsuitprovisioninanti-spamlegislati.html

5. Federal Court Permits Amendment of Pleadings But on Terms

Atlantic Container Lines AB v. Cerescorp Company, 2017 FC 465.

Pleadings should contain a clear and concise set of allegations in support of a claim for relief, whether damages or otherwise; however, there are occasions when a party may not be able to sufficiently formulate or articulate its claim at the beginning of the proceedings. Typically, parties will "spread the blanket" widely making allegations broad and inclusive. Even so, sometimes information comes to light or facts are discovered that alter the basis upon which a party is claiming, including, for example, available and additional allegations of negligence or heads of damage, which were unrealized before. In situations where parties wish to add to or otherwise alter their allegations in a case, there are numerous factors to be considered as such changes may not be available as of right. The opposing parties may object on various grounds. Such was the case in *Atlantic Container Lines AB v. Cerescorp Company,* 2017 FC 465. The defendant, Cerescorp Company ("Cerescorp") brought a motion post discovery where it sought to add to its Defence and Counterclaim certain allegations regarding the alleged negligence of Atlantic Container Lines ("ACL"). Prothonotary Habib's decision to allow the proposed amendments upon terms reviews the various grounds argued and is a helpful example of the Federal Court's approach to such amendments.

Facts

ACL operated the container ship "HS Beethoven" pursuant to a time charter party. During the discharge of her cargo in Halifax by Cerescorp, a stack of eight 20-foot containers toppled within one of the vessel's holds damaging both the vessel and cargo. ACL sued Ceres for the associated compensation alleging in its claim that Cerescorp's negligent operation of the crane during unloading operations caused the collapse and damage.

Cerescorp in turn defended by asserting that the collapse was caused, at least in part, by the longitudinal misalignment of the containers at the bottom of the stow, which led to the vertical misalignment of the containers stacked above. Cerescorp's original defence pleaded that the misalignment was solely caused by the negligence of the stevedores responsible for loading the containers, APM Terminal Gothenburg AB ("APM"), a third party. Cerescorp, post discovery, sought to add allegations of negligence concerning allegedly the substandard and inherently dangerous arrangement of the bulkhead vertical cell guides and tank top spacing bars within the vessel's number 4 cargo hold. Cerescorp now sought to allege that ACL was also negligent in failing to detect that defect, to take the necessary precaution to avoid the misalignment and to warn Cerescorp of that danger. Further the loading as performed was also contrary to industry practise and caused an inherently unstable and dangerous condition independent of and in addition to the misalignment of the containers.

The Motion for to Amend Pleading

ACL opposed the amendments on the following grounds (*1):
(1) That the amendments constituted a radical departure from previous pleadings;
(2) That the allegations were unsupported by any evidence and were doomed to fail;
(3) That the amendments were untimely; and
(4) That the amendments were prejudicial because evidence has been lost, and also because ACL's recourse against the ship might be time-barred.

The Decision

(1) Radical Departure from Previous Pleadings

Rule 221 of the Federal Courts Rules (*2) states that pleadings may be struck where they constitute a "radical departure" from previous pleadings.

The Court was not satisfied that the proposed amendments constituted a radical departure from Cerescorp's original pleadings because the proposed amendments did not resile or depart from the original allegation. Rather, the amendment alleged a further root cause of the alleged misalignment and added that a vertical stack of eight 20-foot containers was inherently unstable and dangerous, independently of and in addition to the misalignment. The additional facts were not inherently contradictory to or mutually exclusive of the facts originally pleaded but were consistent with and complementary to Cerescorp's original pleadings. The Court noted that the proposed amendments could raise the possibility that ACL could make allegations against shipowners regarding the alleged contributing structural anomalies to the subject misalignment. However, the Court found that the facts pleaded in the amendments *in and of themselves* did not constitute a radical departure from those in Cerescorp's original pleadings. Any prejudicial consequences to ACL regarding a claim against shipowners could only be considered when considering prejudice, below.

(2) Doomed to Fail/Insufficient Evidence

ACL argued that Cerescorp's proposed amendments did not provide sufficient particulars of their allegations. The Court agreed but did not go so far as to find that the allegations were just a "bald" assertion of a conclusion or part of a frivolous defence. The allegations did not fail on the absence of material facts or show no reasonable prospect of success. Rather the Court found that the cogent explanation provided of how the proposed allegations could have contributed to the misalignment showed that Cerescorp had knowledge of particulars which would properly define and frame this defence, once provided. The Court also found that ACL would be entitled to know and understand the full scope of the allegations, if the allegations were permitted. The lack of particulars in the proposed amendments, however, was not enough to refuse them but rather further particularization would be required as a term of any order.

As to whether the proposed amendments had no reasonable prospect of success, the Court stated that a motion to amend did not require the Court to determine the strength and chances of success of proposed amendments. This was not a situation where there was no evidence whatsoever to support the party's allegation.

(3) Untimeliness

ACL argued that Cerescorp could have made the allegations earlier and, while this was true, this did not make the application for the amendments untimely nor a reason to refuse them. This was not a situation where the conduct of the action would be unduly delayed rather the motion was made shortly after discoveries (depositions), before experts reports were prepared/served and before a trial date was set. Any further discoveries would not be lengthy or would cause undue delay.

(4) Prejudice: Loss of Evidence

Amendments to pleadings can be refused if prejudice results to the opposing party that cannot be compensated by an award of costs. (*3) The Court found that allowing the proposed amendments did not result in an injustice to ACL.

ACL argued that evidence relevant to the proposed amendments had been lost because the vessel had been sold and destroyed together with her documents and computer systems. Further, ACL was unable to locate the vessel's Chief Officer.

The Court found that where a loss of the evidence is fortuitous and the amendments are proposed without undue delay, the Court's analysis should not stop at considering only the prejudice caused to the opposing party but look at all the circumstances of the case. The Court must consider simple fairness, common sense and the overarching interest of justice. (*4) The Court should consider whether, had the amendments been made earlier, the opposing

party could or would have preserved the evidence.

Prothonotary Habib stated that it would be unjust to refuse an amendment that is not unduly late and raises an arguable case simply because, through no fault of the amending party, evidence that might assist both parties has unexpectedly been lost.

The Court further found, given the questions and undertakings at discoveries, that ACL either knew, or should have known, well before Cerescorp formally expressed its intention to amend, that the content of the vessel's computer, its documents and the physical arrangements of the cell guides in its hold number 4 were relevant. Further there had been discussion regarding the possible addition of the shipowner as a party to the litigation. ACL, the Court found, was in a position to secure, and should have secured the evidence and information necessary to protect its rights and interests but did not take steps to secure evidence that was in the possession, care and control of the shipowner, when it knew or ought to have known that this evidence was potentially relevant to the litigation and to possible recourses against the shipowner. This showed that ACL would not have acted differently or taken additional measures to guard against the loss of the vessel had Ceres proposed its amendments earlier.

(5) Prejudice: Loss of a Recourse

ACL argued that, had Cerescorp raised the proposed allegations in its original pleading, it could have sought indemnity from the shipowner, but that timebar might now be in issue for such a claim. The Court found that Cerescorp's failure to include the proposed amendments into the Claim initially did not cause ACL to forego a recourse against a non-party.

The Court found that ACL chose to claim against the shipowner, even when it was aware that APM and Cerescorp were investigating the cell guide arrangements and their role in the incident, being the root of the proposed amendments. ACL was found to be aware at that time that the implication of the shipowner remained possible. The Court was not persuaded that ACL's failure to protect its right against the shipowner resulted from the position taken by Cerescorp or that it would have acted any differently had the proposed amendments been included initially.

Further, the Court found that ACL did not lead evidence to suggest that it relied on Cerescorp's failure to formally raise the issue in its pleadings in deciding not to protect any right it might have had against the shipowner nor did it actually state that any such claim was in fact time barred.

Finally

While the Federal Court seems inclined to permit amendments to pleadings, parties should never assume that an order will automatically be issued and should expect terms where such amendments are permitted. Parties to proceedings are expected to prosecute or defend their positions with expertise and clarity from the start. A party is expected to know its case and anticipate the case of its opponent. Further, a party might be required to take steps upon the other parties' actions and positions taken. A party seeking amendment must do so promptly upon that necessity becoming clear or stricter terms may be imposed. Just as important, a party expecting that its opponent might take steps to amend might also have to ensure that it also takes any necessary steps to properly respond/ defend their opponent's attempt to amend. At all times, long-term strategy must be maintained and engaged from a macro view and not just at a details level - it is both the forest and the trees.

Kim E. Stoll
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Endnotes
(*1) It is to be noted that the Federal Court Rules also provide for other grounds to strike pleadings (or to oppose amendments to pleadings) including failure to disclose a reasonable cause of action or defence or that the pleadings or proposed amendments are an abuse of process.

This article does not attempt to canvass all possible grounds in this regard.
(*2) SOR/98-106
(*3) *MacNeil Estate v Canada (Indian and Northern Affairs Department*, 2001 FCT 470
(*4) *Continental Bank Leasing Corp. v Canada*, [1993] TCJ No 18, (1993) DTC 298 at page 302, as cited in *Merck & Co. Inc. v Apotex Inc*., 2003 FCA 488, [2004] 2 FCR 459, leave to appeal to SCC refused, 30193 (May 6, 2004)

6. Supreme Court Doubles Down on Speedy Trial Requirements

Almost one year ago, the Supreme Court of Canada laid out a new framework for enforcement of the constitutional entitlement to a speedy trial pursuant to section 11 of the *Charter of Rights and Freedoms*. In brief, its unanimous decision in *R. v. Jordan* required most criminal matters in superior courts to be completed within thirty months and most other criminal and regulatory matters in provincial courts to be completed within eighteen months. (*1) Any delay attributable to the accused would be accounted for and an accounting would also be done for any delay issues that were waived by the defendant. If the eighteen- or thirty-month ceiling passed, the Crown would have to rebut a presumption of unreasonable delay.

Subsequent cases over the past year have sorted out several nitty-gritty issues of implementation. For example, it was clarified that the same rules applied to both individuals and corporations; and it was determined that not all defence-initiated adjournment requests would be counted as "defence delay" if there were legitimate reasons to request the adjournment.

There have been some high-profile cases, where charges were dropped, including for serious drug offences. Although the language of *R. v. Jordan* placed an obligation on all parties to work cooperatively and efficiently, it is fair to say that the larger share of the new burden is on the court and the prosecution.

Late last week, the Supreme Court released reasons in a new case, *R. v. Cody*, addressing the continuing problems of institutional delay and a culture of complacency. (*2) Notably, five provincial attorneys general intervened in the case, asking for a softening of the *R. v. Jordan* requirements, which the Court outright rejected. Unanimously, the Court doubled down on its exhortations from last year, urging the courts and the legal profession to improve trial efficiency.

In keeping with some recent lower court cases (but not citing them) the Court affirmed that defence adjournments need not be counted against them in all cases. While "deliberate and calculated" defence tactics are to be punished, the court should be more understanding of "defence actions legitimately taken to respond to the charges."(*3)

The need to subjectively review defence tactics as well as prosecution tactics is welcome news for

defendants. It means that the Crown will have a more difficult time rebutting the presumption that arises after the passing of an eighteen- or thirty-month period. The Crown cannot simply point to a number of defence-initiated adjournments. However, it also means that there will be less certainty. One cannot simply count time on a calendar. Rather, a proper assessment of the speedy trial entitlement will require a full consideration of the maneuvering of both sides, as well as any institutional delays.

On the facts of the case before it in *R. v. Cody*, the defendant – who had been charged with weapons and drug offences in Newfoundland – had waited five years for a five-day trial. Only 2.5 months were attributable to Mr. Cody, for replacing his initial lawyer and for making a motion seeking recusal of a judge whom he alleged was biased. The net delay of 44 months was unreasonable even accounting for arguably "exceptional circumstances" (reducing it to 36.5 months). Accordingly, the charges were stayed.

We expect to see many more cases stayed over the coming months, including in respect of regulatory charges, such as violations of the Ontario *Highway Traffic Act* or the *Transportation of Dangerous Goods Act*.

Defendants would be well advised to seek early legal assistance when facing a charge to ensure that their files run smoothly with this new case law in mind.

Alan S. Cofman

Endnotes
(*1) 2016 SCC 27.
(*2) 2017 SCC 31.
(*3) ibid. at paras. 29-30.

7. New Real Estate Record-Keeping Requirements for Ontario Corporations

The *Forfeited Corporate Property Act, 2015* (the "Act") (*1) came into force on December 10, 2016. The Act creates new record-keeping requirements for companies that are incorporated under Ontario statutes in connection with their "ownership interests in land". The Act applies to companies incorporated under the Ontario *Business Corporations Act* ("OBCA") (*2), the Ontario *Corporations Act* and will apply to the *Not-for-Profit Corporations Act, 2010*, once it comes into force.

Pursuant to section 140.1(1) and (2) of the OBCA, which was amended by the Act, these corporations must maintain a register of all of their ownership interests in land, including the following information:

1. Description of each property;
2. Date of acquisition of each property; and
3. Date of disposition of each property.

Additionally, section 140.1(3) states that corporations must also retain copies of any supporting documents with respect to each property, such as deeds or transfers, that contain further information:

1. Municipal address;
2. Registry or land titles division;
3. Property identifier number;
4. Legal description; and
5. Assessment roll number.

The language "ownership interests in land" has not been defined; however, it has been interpreted broadly by some to include both beneficial and legal ownership interests. (*3)

Section 139(1) of the OBCA states that the records can be kept in a bound or loose-leaf book or electronically. They must be maintained at the corporation's registered office, unless otherwise designated by the directors. We recommend keeping the land register with a corporation's minute book.

Why is the Register Needed?

When a corporation dissolves under certain circumstances, its property is forfeited to the Crown. Company owners used to have 20 years from the date of dissolution to revive the corporation and recover their assets. Now, under the Act, the same concept applies but if the owners do not revive the company within three years of dissolution, they will not be able to recover their assets, with some exceptions. Once the three-year time frame has passed, the Crown has the right to use the property, dispose of it, and delete or amend any encumbrances registered against property title. (*4)

Based on these new rules, it is assumed that the new requirement to maintain a detailed register and supporting documents is meant to assist the Crown in managing and recovering forfeited property in the case of dissolution.

The Act also indicates that forfeited property may include a mortgage or charge as well as a building or structure that is owned separately from the land on which the building is located. Personal property is also forfeited if it is located on or in forfeited land property, left in, on or under forfeited land, regardless of who owns the personal property.

When Must Corporations Start to Comply?

Companies that were incorporated after December 10, 2016 must comply with the requirements of the Act immediately, while companies incorporated prior to December 10, 2016 have a grace period of two years to comply. We recommend that companies with ownership interests in a large number of properties consider turning their minds to compliance prior to the end of the grace period, as some of the supporting documentation may take some time to compile. (*5)

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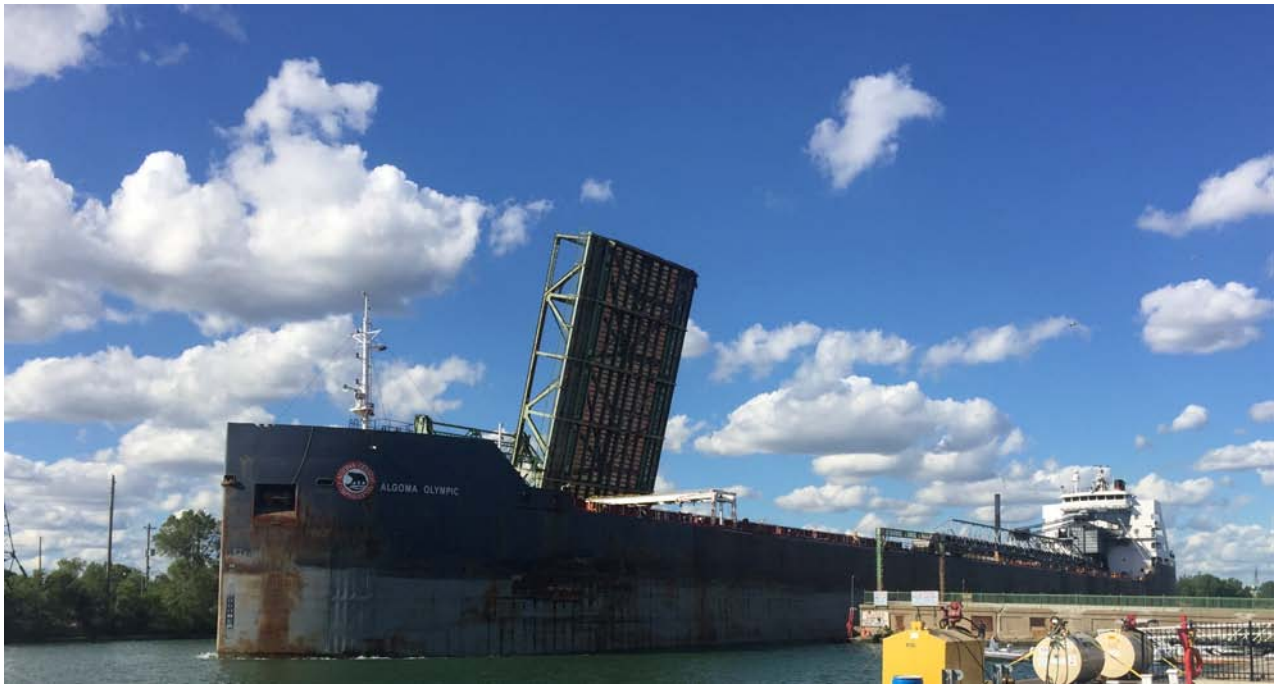
Endnotes
(*1) SO 2015, Chapter 38, Schedule 7.
(*2) RSO 1990, c B-16.
(*3) "Forfeited Corporate Property: the New Ontario Act and How It Affects Your Corporation", Ira Stuchberry; the Minden Brief, March 2017. Online: <http://www.mindengross.com/resources/news-events/2017/03/16/forfeited-corporate-property-the-new-ontario-act-and-how-it-affects-your-corporation-published-in-the-minden-brief>
(*4) Supra note 1, s24.
(*5) Supra note 2, s140(4).



8. *Stewart v. Elk Valley Coal Corp.*: SCC Upholds Termination of Employee in Drug Addiction Case; Finds no *Prima Facie* Discrimination

This month, the Supreme Court of Canada released its decision in *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30. The decision upheld an Alberta Human Rights Tribunal decision brought by an employee after he had been fired by his employer, a mining company.

The employee was a drug user and alleged that the company had discriminated against him on the basis of his addiction by firing him. However, the Tribunal (and the Court) concluded that the firing was not due to the employee's addiction, but rather due to the employee's failure to adhere to a company policy that required employees, in advance of a workplace accident, to disclose their dependence issues to the company without penalty, whereupon they would receive treatment. In this case, the employee had not done so prior to such an accident.

The takeaway from this decision for *employers*: the Court in this case was not asked to rule on the legality of the company policy in question; however, the Court also does not appear to have taken issue with the policy, aimed at ensuring safety in the workplace by requiring employees to disclose addictions or dependence issues in advance of an accident, in exchange for amnesty and treatment. Accordingly, employers who are concerned about being able to terminate employees in these types of circumstances should seriously consider whether a similar policy might be useful in their organizations.

The takeaway from this decision for *employees*: the Court has at least indirectly signaled that policies such as the one at issue in this case are apt to be upheld; therefore, employees who violate such policies (e.g. by using drugs without disclosing to the employer) should be aware of the risk: if, as here, they have the capacity to come forward and report their drug use or otherwise make choices about their drug use, but don't, they could lose their jobs in the process.

The Facts

The appellant, Ian Stewart, worked in a mine operated by the respondent, Elk Valley Coal Corporation. He drove a loader. Mine operations were dangerous, and so maintaining a safe workplace was understandably very important to both Elk Valley, as employer, and its employees.

Accordingly, Elk Valley implemented an Alcohol, Illegal Drugs & Medication Policy, which was intended to ensure safety in the mine. Under the terms of the Policy, employees were expected to disclose any dependence or addiction issues before any drug-related incident occurred. If they did, they would be offered treatment. However, if an employee failed to disclose any such issues, and then was involved in an incident and tested positive for drugs, they would be terminated.

The goal of the Policy was to ensure safety by encouraging employees with substance abuse problems to come forward and obtain treatment before their problems compromised safety.

Mr. Stewart attended a meeting where the Policy was reviewed and explained. He signed a form acknowledging receipt and understanding of the Policy.

Mr. Stewart used cocaine on his days off, and never told Elk Valley. One day, near the end of a 12-hour shift, Mr. Stewart's loader was involved in an accident. Following the accident, Mr. Stewart tested positive for drugs. Following the test, in a meeting with his employer, Mr. Stewart said that he thought he was addicted to cocaine. Nine days later, however, Elk Valley fire Mr. Stewart in accordance with the Policy.

The Alberta Human Rights Tribunal

Following his termination, Mr. Stewart filed a complaint with the Alberta Human Rights Tribunal, alleging that his termination constituted

discrimination based on a medical disability, i.e. his drug addiction.

The Tribunal accepted the settled two-step test applicable in Canada to determine whether there has been discrimination in the workplace. First, the employee must demonstrate that there has been a prima facie case of discrimination by showing three things:

> (1) a disability that is protected under the applicable human rights legislation
>
> (2) adverse treatment with regard to the employee's employment or a term thereof
>
> (3) that the disability in question was a factor in the adverse treatment

Second, if the first step of the test is met, the burden shifts to the employer to show that it has accommodated the employee's disability to the point of "*undue hardship*".

After hearing the evidence, the Tribunal found that Mr. Stewart was addicted to drugs and this constituted a disability protected under the *Alberta Human Rights Act*. Mr. Stewart's termination also constituted adverse treatment by the employer.

However, the Tribunal went on to conclude that Mr. Stewart's disability was "*not a factor in the termination*". In its view, Mr. Stewart was terminated for failing to comply with the Policy, which required him to disclose his drug us prior to the accident, and not because of his addiction *per se*. Thus, the Tribunal found that there was no *prima facie* case of discrimination.

Alternatively, the Tribunal found that even if it had found that a presumptive case of discrimination existed, it still would have found that Elk Valley had discharged its burden under the second step of the discrimination analysis, i.e. that it had accommodated Mr. Stewart to the point of undue hardship. It found that requiring Elk Valley to give Mr. Stewart a second chance and replace the termination with less serious consequences would diminish the deterrent effect of the Policy and constitute an undue hardship on Elk Valley, given its safety responsibilities. The Tribunal found that the opportunity under the Policy to come forward and access treatment without fear of discipline, and other measures, constituted accommodation of the disability.

On Appeal to the Alberta Courts

Mr. Stewart appealed the Tribunal's decision, first to the Alberta Court of Queen's Bench and then to the Alberta Court of Appeal. In both cases, the Court dismissed the appeal and upheld the Tribunal's decision.

On Appeal to the Supreme Court of Canada

The Supreme Court of Canada agreed to hear a further appeal. Before the Court, the main issue on appeal was whether the Tribunal's decision was reasonable. The Court observed at paragraph 20 that reviewing courts generally approach decisions from human rights tribunals with "considerable deference":

> It is the tribunal's task to evaluate the evidence, find the facts and draw reasonable inferences from the facts. And it is the tribunal's task to interpret the statute in ways that make practical and legal sense in the case before them, guided by applicable jurisprudence. Reviewing courts tread lightly in these areas.

Again, the Court agreed that the first two elements of the first step in the discrimination test had been met. The only dispute was the third requirement – whether Mr. Stewart's addiction was a "factor" in his termination.

Essentially, the Court concluded, in keeping with the lower courts, that the Tribunal's decision was

reasonable. It referred to the "most important piece of evidence" on whether Mr. Stewart's addiction was a factor in Elk Valley's reasons for terminating him – the termination letter itself.

The termination letter advised Mr. Stewart that he was being fired because he had failed to comply with the Policy and not because of his drug addiction. The Court wrote at paragraph 35:

> It is clear that there was evidence capable of supporting the Tribunal's conclusion that the reason for termination was not addiction, but breach of the Policy. On the facts of this case, the Tribunal concluded that Mr. Stewart had the capacity to comply with the terms of the Policy. It was therefore not unreasonable for the Tribunal to conclude that there was no prima facie discrimination in this case.

Mr. Stewart argued that while his breach of the Policy may have been a dominant cause of the termination, his addiction was nonetheless a "factor", and that this was enough to ground a case of *prima facie* discrimination. However, the Court disagreed, noting that the Tribunal had expressly found his addiction was *not* a factor – a finding that attracted deference.

Mr. Stewart also argued that his failure to advise of his addiction stemmed from the fact that he was in denial of the addiction – which is itself a symptom of the addiction. Thus, according to Stewart, the addiction was indirectly a "factor" in the termination. But the Court again disagreed, observing again that the Tribunal had considered and rejected this argument. Ultimately, Mr. Stewart had the capacity to come forward and report his drug use, and did make rational choices regarding his drug use. As the Court noted, "It cannot be assumed that Mr. Stewart's addiction diminished his ability to comply with the terms of the Policy."

Ultimately, the majority of the Court found that no *prima facie* discrimination had been made out against Mr. Stewart. Accordingly, Elk Valley was justified in terminating him.

Concurring Reasons

Justices Moldaver and Wagner issued a separate concurring opinion. They would have found that Mr. Stewart had indeed made out a case of apparent discrimination. This was because, in their opinion, there was enough of a connection between Mr. Stewart's addiction and his termination to say that the addition was a "factor" in his termination. Relying on previous Supreme Court jurisprudence (*1), they were of the view that Mr. Stewart only had to show a "connection" between the drug dependence and the termination – which was possible in this case.

The justices held, however, with the majority, that it was reasonable for the Tribunal to have concluded that the employer had reasonably accommodated Mr. Stewart to the point of undue hardship.

The Lone Dissent

In dissent, Justice Gascon would have found that the Policy was discriminatory, and that Elk Valley had failed to accommodate to the point of undue hardship. Gascon J. was of the view that Mr. Stewart was drug-dependent and that he was terminated for giving in to that dependence – an "undeniable symptom of his disability". Further, he held that Elk Valley did not reasonably accommodate Mr. Stewart. Its only accommodation during employment was letting him voluntarily disclose his disability without discipline. However, Gascon J. was of the view that Mr. Stewart could not access this accommodation because he appears to have been unaware of his disability. Thus, the Tribunal's decision was, to him, unreasonable.

James Manson

Endnotes

(*1) See, e.g., *Quebec (Commission des droits de la personne et des droits de la jeunesse) c. Bombardier Inc.*, 2015 SCC 39.

9. Tragedy at the Rail Crossing: *The Anatomy of Civil Suit for Negligence Against a Railway*

The recently published decision in British Columbia of the case of *Chand v. Martin* (*1) tells the tale of a tragic railway casualty and provides an interesting review of the laws and principles applicable to claims based on the tort of negligence.

Background Facts

At approximately 10 p.m. on April 16, 2007, the plaintiff, Mr. Treves Chand ("Mr. Chand"), was involved in a motor vehicle accident with a train owned and operated by Southern Railway of British Columbia Limited ("Southern"). The accident occurred at a railway crossing known as the "Scott Road Crossing" (the "Crossing") in Surrey, BC. Scott Road is a major roadway with three lanes of traffic in each direction. Mr. Chand was driving his vehicle along with two passengers. Kamaljit Kalyan was in the front passenger seat, with Rick Kumar in the back. Mr. Chand was driving northbound on Scott Road in the middle lane when his vehicle struck the front left wheel area of the train's locomotive as the train was moving through the Crossing. There was no rain, and visibility was generally good. The road surface was dry.

As a result of the accident, Mr. Chand and the vehicle's two passengers, Mr. Kamaljit Kalyan and Mr. Rick Kumar, sustained serious injuries, with the latter's injuries being fatal. Mr. Chand was left with no recollection of the accident.

Mr. Chand brought a lawsuit for damages, alleging negligence on the part of Southern and various others. In the action Mr. Chand alleged that that the Crossing lights did not activate to warn those travelling in the northbound direction that a train was about to cross. Consequently, he asserted that Southern was negligent in maintaining the Crossing lights. He also alleged that at the time of the collision that at least one of the train's crew members was negligently carrying out his duties in not keeping a proper watch and sounding the train's whistle, raising the issue of vicarious liability on the part of Southern. By the time the matter proceeded to trial, two individual defendants remained along with Southern, being its employees Martin and Cohen who were in control of the train – or at least were supposed to have been – when it approached the Crossing.

At Trial

A key factual issue at trial related to whether the lights at the Crossing were in fact working. The evidence on point was split between that of certain independent eye witnesses who testified that the warning lights on the south side of the Crossing – being the approach of the Chand vehicle - did not initiate, from that of expert evidence tendered on behalf of Southern, and its train crew employees, who maintained that the lights were functional.

One of the independent witnesses was one Mr. William Harkness, an experienced transit bus driver. At the time of the collision, he was in the left hand lane on Scott Road, likewise driving in a northerly direction, facing the southern side of the Crossing. He maintained that before the collision the signal lights were not activated, nor did he hear the Crossing bells or the train's whistle. He however testified that shortly *after* the collision, he witnessed the signal lights and bells activate. Of importance to Mr. Chand's action, Mr. Harkness testified that the Mr. Chand was not speeding or driving erratically immediately before the collision. Another independent witness was one Bruce Angus, who was driving directly behind Mr. Chand. He too testified that the warning lights and bells at the Crossing did not come on before the collision, but only immediately after. He also testified that Mr. Chand was not speeding or driving erratically.

Members of the train crew also testified, including the defendant Martin, who was an experienced train engineer and was operating the train on the evening in question. As the train's engineer, he controlled its acceleration, braking, and whistle. As the engineer, he operates the

train from the front right of the cabin, and so he could not see out of its left side. Given that the train was moving westbound, this meant that he was only able to see what was outside the train on the north side of the tracks, whereas Mr. Chand had entered the Crossing from south of the tracks. Consequently, while he was not able to testify as to whether the crossing lights were operating for northbound traffic, he did testify that the lights on the opposite side of the tracks were in fact operating. In addition, Martin testified that he sounded his horn prior to entering the Crossing. However, he was not sure how many seconds before entering the Crossing he did this.

Steve Cohen, the train's conductor, also testified. The conductor's role included, among other things, maintaining a lookout for hazards on or near the train tracks, and communicating any potential hazards to the engineer. At the time of the accident, he was located at the front left of the cabin, meaning he was able to see northbound traffic from the window nearest him. While Cohen testified that he observed the signal lights on the south side of the tracks operating normally in the moments leading up to the crash, the trial judge found him to be an unreliable witness, having been combative, and having changed his testimony on a number of key issues during cross-examination, including when he first saw Mr. Chand's vehicle approaching the Crossing. In light of this, the judge found as a fact that Cohen had not observed the Crossing signal lights flashing in the moments before the collision, and that he was not keeping a regular lookout.

The final member of the train crew to testify was one Aaron Cruickshank who was riding in the second locomotive at the time of the collision, facing eastbound. He testified that Mr. Martin always sounded the horn properly, though he could not recall each crossing whistle. Moreover, he had no memory of the signal lights on the night in question. Finally, at odds with Mr. Cohen's evidence, he testified that there was poor visibility out of the left hand "conductor" side of the cabin.

The defence also called one Kevin Tobin as a witness. He was a long serving employee of Southern, and was the designated "signal maintainer" for the Crossing. At the time of the accident, he was a signal maintenance foreman for Southern's rail lines. His responsibility was to maintain, repair and build railway crossing signals for Southern. Mr. Tobin was not called as an expert witness. Instead, he was called to provide evidence regarding his observations and practices in servicing and maintaining the signal lights. Mr. Tobin regularly inspected the Scott Road Crossing. According to his Inspection log, he had inspected the Crossing on April 12, 2007, four days before the collision, and found nothing wrong. In general, at least in the month before the accident, he usually inspected the Crossing once per week. He arrived at the scene of the crash approximately one hour after the collision. He maintained that he inspected the signal system, and found that the system's relays were in their proper position. Specifically, he maintained that he tested the batteries, individual track circuits, and individual relays. In testimony, he also detailed the process by which he went through the signal box, examining each wire and connector on each terminal for corrosion or loose connections. Overall, he examined the signal system for approximately four hours that evening. In his testimony he revealed that the signal system's circuitry was complex and he admitted that any machine could fail, including the fail-safe crossing lights. Moreover, he conceded that this could include intermittent failure. He also noted that the lights facing southbound traffic were on a separate circuit from those facing northbound traffic, meaning that it was possible for lights on one side to fail but not the other.

Mr. Glenn Mullally also gave evidence for the defendants. He was qualified as an expert witness on signal maintenance. He provided extensive expert testimony regarding how the Crossing signal system worked, and maintained there had been no failure. He however also confirmed that it was possible for the lights on the south side of the tracks to fail when the ones on the north side

were still working, and that a partial failure of the signal system was possible.

After a consideration of the evidence, the trial judge found that neither the south side Crossing signal lights nor the bells functioned properly at the time of the collision. Multiple independent eyewitnesses confirmed this, with the only eyewitness testifying otherwise being Cohen who, as noted above, was found to be an unreliable witness. The judge held that Tobin and Mullally's technical evidence confirmed that such a failure, while improbable, was possible. Coupled with the independent eyewitness testimony, the Court found that, on a balance of probabilities, the signal system's malfunction on the night in question had been established.

Based on the uncontradicted evidence noted above as to Mr. Chand's driving, the Court also found that he was not speeding or otherwise driving erratically when entering the Crossing. While the defence had raised the theory that he may have to some degree responsible for his injuries on account of not wearing his seatbelt at the material time, the Court found there to be no credible evidence establishing whether or not his seatbelt had in fact been worn.

The Court also found the evidence to be inconclusive as to whether or not the train operators failed to the sound its whistle as required by applicable regulation – however the question of the Crossing lights would, as indicated below, prove to be a downfall for Southern.

The Legal Issues and Disposition of the Case

The Judge cited the earlier decision of *Agar v. Weber* (*2) outlining the elements of a case for negligence against a defendant:

> In negligence, the common law requires a plaintiff to establish:
>
> 1. a duty of care to conform to a certain standard of care for the protection of others against unreasonable risks. The duty does not extend to the removal of every possible danger, rather the test is one of reasonableness;
>
> 2. a breach of that duty by some act or omission by the defendant; and
>
> 3. the breach of duty is the proximate cause of a plaintiff's injury, meaning there must be a nexus between the injury sustained by the plaintiff and the defendant's negligent act or omission.

The judge noted that in regard to railway crossings, courts have long held that railway companies owe motorists a duty of care. In *Ryan v. Victoria (City)* (*3), the court held that a railway owes a duty of care to motorists crossing their tracks to make certain that appropriate safety precautions exist to warn of a train's approach.

The evidence was clear that neither Martin nor anyone else on the train crew had anything to do with the Crossing signal lights. Consequently, neither Martin nor any other train crew member violated any standard of care on account of the failure of the signal lights.

The judge outlined the relevant standard of care analysis to be applied to railway companies:

> … Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.

The Court provided a helpful analysis on the effect of a breach of legislative standards: *What is the legal effect of a breach of a statute or of a regulation on how a railway is to be run?:*

> Legislative standards are relevant to the common law standard of care, but the two are not necessarily co-extensive. The fact that a statute prescribes or prohibits certain activities may constitute evidence of reasonable conduct in a given situation, but it does not extinguish the underlying obligation of reasonableness (*4). Thus, a statutory breach does not automatically give rise to civil liability; it is merely some evidence of negligence. By the same token, mere compliance with a statute does not, in and of itself, preclude a finding of civil liability. … Statutory standards can, however, be highly relevant to the assessment of reasonable conduct in a particular case, and in fact may render reasonable an act or omission which would otherwise appear to be negligent. This allows courts to consider the legislative framework in which people and companies must operate, while at the same time recognizing that one cannot avoid the underlying obligation of reasonable care simply by discharging statutory duties.

The defendants' submitted that, even if the signal lights failed in breach of any regulatory requirement, the related risk to the public was not foreseeable, as there was nothing to warn Southern that the Crossing lights were faulty.

In light of the defendants' expert evidence, the Court could not find any violation of the standard of care in regards to the maintenance of the signal lights. There was no evidence, expert or otherwise, indicating that the signal lights in question were inadequately or improperly maintained.

However, this did not end the judge's standard of care analysis. As noted above, the witnesses called by Southern to defend the safety of the signal system conceded that a failure of the signal lights to engage remained a possibility, including intermittent failure. Consequently, in order to determine if Southern violated the requisite standard of care, it was necessary for the Court to look at what safety precautions were in place to deal with sudden failures of signal lights

Cohen testified that, when approaching a railway crossing, it was his responsibility to maintain a look out from his side of the cabin to see if any vehicles were approaching the train. This would include checking to see if the signal lights at a crossing were properly working. Tobin testified that holes in the side of the signal lights, called "wigwags," show a white flashing light that train crews could see straight ahead of them when approaching a crossing to indicate that the signals have engaged. With regard to the signal lights on the south side of the Crossing, Cohen testified that on approach, he saw these flashing wigwags, and so, according to him, there was no signal failure.

Accordingly, in addition to the signal lights, Southern had implemented a system in which the train crew was supposed to maintain a lookout for hazards when approaching an intersection. However Southern conceded that a house and trees on the east side of the Crossing (being the side from which the train approached the Crossing) obstructed the train's view from the street to the railway. In fact, northbound traffic at the Crossing would not come into view until a train was only 50 feet from the Crossing.

The above all said, the judge identified a problem: as had been conceded by the defendants, a mechanical failure is always a possibility with even the best protected fail-safe system. Asking the train crew to generally keep a lookout when approaching railway crossings may usually be enough to deal with this contingency; however, given the Crossing itself such a fail-safe would be largely pointless: by the time a member of the train crew could see approaching northbound traffic, it would be too late to prevent any collision even if the train was travelling at the applicable speed limit. As noted above, Mr. Chand was travelling the posted speed limit for motorists when entering the Crossing. Did Southern accordingly fail to meet the standard of care on account of the foregoing constituting an

objectively unreasonable risk of harm which was foreseeable?

The judge hit a "speed bump" on this line of thought: there was no testimony regarding at what point Cohen would have had the ability to see the wigwags flashing from the south-facing signal lights. Presumably, it was only possible for him to see Mr. Chand approaching the Crossing from 50 feet away, but might he have been able to see the wigwags from a greater distance? If it were possible to see the wigwags from a distance that allowed the train to brake in time to avoid a collision, then there would be no objectively unreasonable risk of harm that Southern could have foreseen: the expectation being that, upon seeing that the signal light was not operating, the conductor would immediately ask the engineer to stop the train at a safe distance that it could stop before it entered the Crossing.

In light of this factual gap in the evidence, the court could not find that the plaintiff had proven that Southern violated the standard of care placed upon it to reasonably maintain the signal lights at the Crossing.

So Far, So Good For Southern… but…

At this point in the analysis the Court had found that there was no negligence in the maintenance of the signal lights. Things would however go "south" for Southern when the Court analyzed what it or its employees might have done had it turned its mind to the possibility of a light system failure.

Southern's internal regulation, *Time Table No. 6*, provided that Cohen was not permitted to allow the train to enter the Crossing unless the signal lights had been flashing for at least 20 seconds. In addition, s. 103 of the *Canadian Rail Operating Rules* (TC-O-0-53) dealt with public crossings that are not equipped with automatic warning devices, such as signal lights. This rule required that, if signal lights were not in use at a crossing working, a conductor was to stop the train and manually guide it through the Crossing. From a practical standpoint, a crossing with malfunctioning signal lights was no different than a crossing without signal lights, for the purposes of the application of these particular Rules. It followed then, in the judge's view, that the failure to either ensure that the train stopped before entering the Crossing where the signal lights were off (as found as matter of fact by the Court) or to keep a lookout constituted an unreasonable risk of harm which violated Cohen's standard of care placed on him as the train's conductor.

Did the Breach of the Standard of Care Actually Cause the Losses Sustained?

In *Clements v. Clements* (*5) the Supreme Court of Canada outlined the basic rule on causation in negligence cases as follows:

> … On its own, proof by an injured plaintiff that a defendant was negligent does not make that defendant liable for the loss. The plaintiff must also establish that the defendant's negligence (breach of the standard of care) *caused* the injury. That link is causation. The test for showing causation is the "but for" test. The plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred. Inherent in the phrase "but for" is the requirement that the defendant's negligence was *necessary* to bring about the injury — in other words that the injury would not have occurred without the defendant's negligence. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails. The "but for" causation test must be applied in a robust common sense fashion….

The trial judge found that "but for" Mr. Cohen's failure to meet the requisite standard of care, the accident would not have occurred, and the plaintiff would not have suffered his injuries. Therefore, the plaintiff has established causation.

Was Southern "Vicariously Liable" for Cohen's negligence?

With regard to vicarious liability, a useful summary of the appropriate legal test was recently provided by this Court in *Ari v. Insurance Corporation of British Columbia* (*6):

> … An employer is vicariously liable for (1) employee acts authorized by the employer or (2) unauthorized acts so connected with the authorized acts that they may be regarded as modes of doing an authorized act…. In other words, vicarious liability is a strict form of liability for employers.

The judge found that Southern was clearly liable for Cohen's negligence in this case.

The Effect of a Guilty Plea to an Initial "Charge", on one's Subsequent Law Suit for Damages

On June 22, 2009, Mr. Chand pleaded guilty to a charge under s. 144 of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 (the "MVA") for driving a vehicle without due care and attention. As a result, a $1,500.00 fine was imposed on him. The defendants argued that, even if the signal lights at the Crossing were not operating at the material time, Mr. Chand was required by statute to approach the signals with caution. On this point, they cited s. 185(6) of the *MVA* which provides that the driver of a vehicle approaching the track of a railway must proceed with caution to avoid a collision between the vehicle and an approaching train. In addition, the defendants argued that Mr. Chand's guilty plea constituted proof that he was driving erratically.

The judge cited the key decision regarding the effect of a guilty plea in a subsequent proceeding involving the same facts is *Toronto (City) v. CUPE Local 79*, (*7):

> I find that the case at bar fits within the exception emphasized above in *CUPE Local 79* at para. 53. Mr. Chand had no memory of the collision, and so he could not offer a full and robust defence. In addition, the fine was quite minor, with the stakes of this subsequent proceeding being much higher. In those circumstances, it is not surprising that Mr. Chand chose to enter a guilty plea.

Consequently, the trial judge found in the circumstances that Mr. Chand's guilty plea did not constitute proof that he was driving without due care or attention on the night in question. In keeping with the independent eyewitness testimony of Mr. Harkness and Mr. Angus, the judge found that Mr. Chand was not speeding or driving erratically.

Conclusion

On the basis of the foregoing the judge found that, due to Cohen's conduct on the night in question – specifically, in not following protocol in traveling through the Crossing with the signal lights not working - Southern was vicariously liable in negligence to Mr. Chand. Accordingly Mr. Chand was able to recover for his damages on the basis of Cohen's negligence for whom in law Southern was responsible.

Gordon Hearn

Endnotes
(*1) 2017 BCSC 660
(*2) 2014 BCCA 297 (CanLII)
(*3) 1999 CanLII 706 (SCC)
(*4) *R. in right of Canada v. Saskatchewan Wheat Pool* [1983] 1 S.C.R. 205]
(*5) 2012 SCC 32 (CanLII)
(*6) 2013 BCSC 1308 (CanLII) at para. 68 and 70
(*7) 2003 SCC 63 (CanLII)

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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 city 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.