FERNANDES HEARN LLP NEWSLETTER SEPTEMBER 2017

THE NAVIGATOR

IN THIS ISSUE

CONTRACT INTERPRETATION IN QUEBEC

The Supreme Court of Canada recently affirmed the validity of contracts in Quebec that contain perpetual terms. In so doing, the Supreme Court of Canada also reaffirmed general principles of interpretation and freedom of contract in Quebec.

Uniprix Inc. v. Gestion Gosselin et Bérubé Inc. 2017 SCC 43 concerned a number of pharmacists who decided to affiliate their pharmacy with the Uniprix Inc. ("Uniprix") banner. The parties had entered into a contract of affiliation for a fixed term of five years. The contract contained a clause to the effect that it would be renewed automatically unless the member pharmacists gave notice to the contrary six months prior to the automatic renewal date.

The contract was renewed automatically in 2003 and 2008 (two terms). On July 26, 2012, Uniprix notified the member pharmacists that their contractual relationship would terminate as of January 28, 2013, thus providing notice six months prior to the automatic renewal period. Of note is the fact that the contract had a provision for termination for the member pharmacists but no equivalent clause for Uniprix. Uniprix could only terminate the contract for cause. The member pharmacists objected, arguing that the contract of affiliation was to be renewed automatically unless they gave notice to the contrary. In their view, nothing in the renewal clause entitled Uniprix to oppose this renewal. Uniprix argued that it could oppose the renewal and terminate the contract upon the expiry of the term. It added that the interpretation proposed by the pharmacists had the effect of binding it in perpetuity, which would be contrary to public order.

In a 6 to 3 decision, the Supreme Court of Canada held that unilateral renewal clauses are valid in Quebec law even though they may give a contract perpetual effect. The dissent opinion held that the renewal clause made it impossible for Uniprix to know the contract's termination date, which turned the contract into one for an indeterminate term. The contract could therefore be terminated on reasonable notice, six months in this case. For indeterminate [...page 5]

FIRM AND INDUSTRY NEWS

- **RIMS Canada** Conference, September 24-27, 2017, Toronto.

- **Canadian Ferry Association** Annual Conference, September 24-26, 2017, Halifax.

- **Canadian Society of Customs Brokers** Annual Conference, September 24-26, 2017, St. Andrews New Brunswick.

- **International Congress of Maritime Arbitrators**, September 25-29, 2017, Copenhagen.

- **31st Annual Conference on Transportation Innovation & Cost Savings** September 26, 2017 in Burlington, Ontario. **Gordon Hearn** will be presenting a paper on "*When the Broker Fails to Pay: Shipper and Consignee Liability for Freight Charges".* **Louis Amato-Gauci** and **Carole McAfee Wallace** will also be in attendance.

- **International Marine Claims Conference**, September 27-29, Dublin.

- **Women's International Shipping & Trade Association** Annual Conference, October 3-6, 2017, Rotterdam. **Kim Stoll** is the Vice President-Central Region of WISTA Canada and will be attending and representing the firm.

- **Association of Average Adjusters of U.S. & Canada** Annual Dinner, October 5, 2017, New York City.

- **Canadian Transport Lawyers Association** Annual Conference, October 5-7, 2017, Ottawa. **Kim Stoll** will be moderating two panels: *Dos and Don'ts of Federal Court Practice* and the *Modal Updates Panel.* **Carole McAfee Wallace** will speak on the *Trucking/Logistics (Canada) Modal Update* and **Mark Glynn** will speak on the *Air (Canada) Modal Update.*

- **Surface Transportation Summit**, October 11th, 2017, Mississauga Ontario.

- **11th Mare Forum USA 2017 (Maritime Transportation of Energy)**, October 17, 2017, Houston.

- **United States Maritime Law Association** Annual Conference, October 18-22, 2017, Napa California. **Rui Fernandes**, **Kim Stoll**, and **James Manson** will be attending representing the firm.

- **Ontario Trucking Association (OTA) Convention & Executive Conference**, November 8-9, 2017, Toronto, Ontario. **Louis Amato-Gauci** and **Carole McAfee Wallace** will be attending representing the firm.

- **50th Transportation Law Institute** November 10, 2017 in Norfolk, VA. **Gordon Hearn**, **Kim Stoll** and **Louis Amato-Gauci** will be attending representing the firm.

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

MESA 2018

contracts the *Civil Code* allows a court to fix the term of the contract or to allow termination on reasonable notice.

The Supreme Court of Canada held that autonomy of the will (freedom of contract) is a fundamental principle of Quebec civil law. This contractual freedom allows the parties to a contract to structure their relationship as they see fit within the limits imposed by legislation and the requirements of public order. The contract did not fit within the limits imposed by legislation or the requirements of public order. At paragraph 26 the Court described this type of contract:

> The parties signed a contract entitled contract of affiliation. This type of contract is not a nominate contract within the meaning of the *Code*. Rather, it is an onerous, bilateral contract of successive performance in which the parties obligate themselves reciprocally, each to the other (arts. 1380, 1381 and 1383 *C.C.Q.*). Because the contract was freely negotiated, it can hardly be characterized as a contract of adhesion (art. 1379 *C.C.Q.*).

The Supreme Court of Canada provided a pathway of analysis of a contract in Quebec.

a) The first step in interpreting a contract is to determine whether its words are clear or ambiguous. If the words are clear, the court's role is limited to applying them to the facts before it. If the court identifies an ambiguity, it must resolve the ambiguity by proceeding to the second step of contractual interpretation.

b) The cardinal principle that guides the second step of the interpretation is that "the common intention of the parties rather than adherence to the literal meaning of the words shall be sought." In this exercise, it is necessary to consider intrinsic aspects of the contract, such as the words of the clause at issue and the other clauses, in order to ensure that each of them is given a meaningful effect and that each is interpreted in light of the others. The interpretation of a contract also requires consideration of the nature of the contract and of the context extrinsic to it, including the factual circumstances in which it was formed, how the parties have interpreted it, and usage.

The Court went on to find that the termination clause was not ambiguous and that nothing in the Quebec *Civil Code* prohibits such a contract of affiliation from having effects that could be perpetual. Nor was there any basis for concluding that such contracts are contrary to public order. The Court noted that Uniprix was unable to identify the fundamental values that would be undermined by a perpetual contract, and more specifically, by its contract of affiliation with the member pharmacists.

At paragraph 91 the Court commented on when perpetual contacts may offend public order:

> We agree that there are circumstances in which the imposition of perpetual obligations could offend public order. For example, the protection of individual freedom and fundamental rights is one of our fundamental societal values. It is why the legislature has limited the term of contracts of employment: to preserve the freedom of employees (Baudouin and Jobin, at No. 441; *Asphalte Desjardins inc. v. Québec (Commission des normes du travail)*, 2013 QCCA 484, at para. 50 (CanLII); reversed on appeal, but not on this point: 2014 SCC 51 (CanLII), [2014] 2 S.C.R. 514). For contracts whose attributes have not been regulated by the legislature, it is also necessary to [translation] "reconcile two principles, autonomy of the will and freedom of the person — especially that of natural persons" (Lluelles and Moore, at No. 2154). It follows that it would likely be contrary to public order to impose in perpetuity obligations whose nature is such as to affect an individual's person and freedom (*ibid.*, at No. 2156).

The Court also rejected the argument that an express stipulation is required in order to give effect to the term of the contract whose effects could be perpetual. The Court added at paragraph 72:

> In Quebec civil law, the fundamental principle of consensualism prevails unless a "particular or solemn form is required as a necessary condition for the formation of a contract" (art. 1414 *C.C.Q.*). As Professors Baudouin and Jobin point out, [translation] "a contractual obligation arises from the meeting of two minds and does not have to be expressed in a particular form prescribed by law in order for the contract to be valid" (No. 90). The problem raised by the possibility of the contract having perpetual effect must be resolved not by taking a formalistic approach, but by analyzing the common intention of the parties having regard to the provisions of the *Code* and to public order. Once this common intention has been identified, it does not matter whether the possibly perpetual effects of the contract result from an express stipulation. In our opinion, the metaphor our colleague employs in this regard (at para. 167) seems inappropriate. While it is true that the *Code* requires the observance of formalities, on pain of nullity, for the exchange of marriage vows (arts. 365 to 377 and 380 *C.C.Q.*; *Rules respecting the solemnization of civil marriages and civil unions*, CQLR, c. CCQ, r. 3), it does not do so for an innominate commercial contract of affiliation entered into by sophisticated parties.

The majority of the Supreme Court of Canada dismissed Uniprix's appeal. The minority found that the contract was indeterminate. As such, the parties would be able to terminate the contract on reasonable notice.

Lesson learned: Clarity is required in drafting contracts to ensure that a party has an avenue for exit unless that is the intention of the parties and it should be clearly set out.

The last paragraph of the dissent decision of the Supreme Court of Canada, delivered by Justice Cote is apt:

> I acknowledge that the civil law's workings in this case are somewhat complex. But, as always, its underlying rationale is simple. A court should not forever wed two parties in an unhappy marriage where only one of them has an avenue for exit, in the absence of express vows to that effect. In other words, in characterizing the term of a contract, perpetuity should not be inferred.

Rui M. Fernandes

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

2. Blockchain 101 - Part 1

What is blockchain? When this question is posed by someone unfamiliar with blockchain, the typical answer by someone familiar with blockchain is that it is a distributed "digital ledger." To the person asking the question, this may mean absolutely nothing. There is no clarity or understanding gained. This article is the first in a series of three articles. The three articles will attempt to set out the following: an explanation of how blockchain works, its potential uses in the supply chain and the legal issues arising from its use.

Blockchain has been linked to Bitcoin, a digital currency. Bitcoin is built on the foundation of blockchain, which serves as Bitcoin's shared ledger. Blockchain is like an operating system or platform. Bitcoin is only one of the many applications of blockchain. Blockchain is a shared ledger, a record of transactions, like a traditional ledger. The transaction can be any movement of money, goods, services or data. Blockchain facilitates the process of recording transactions and tracking assets in a business network. An asset can be tangible — a house, a car, cash, land — or intangible like intellectual property, such as patents, copyrights, or branding. Virtually anything of value can be tracked and traded on a blockchain network, reducing risk and cutting costs for all involved. (*1)

Typically, transactions are verified by a central authority such as a bank or government authority. An example is illustrative. Your bank account transactions are stored on a computer server hosted by or for the bank. Your transactions such as deposits, withdrawals, fees, cheques, Interac payments and receipts etc. are stored on a computer server. They may be reflected in paper records such as deposit slips, withdrawal slips, cheques and bank books but the full record of the transactions are stored as data on the bank's servers. Blockchain applications replace the centralized systems with decentralized ones, where verification comes from the consensus of multiple users. This is what distinguishes and is unique to blockchain. The information is not stored in any one server that can be hacked. The transactions are stored as blocks of data on multiple worldwide servers. The blocks are time stamped and sent out to the blockchain network. The blocks are connected as chains. Hence the term "blockchain" or originally "block chain." The blocks are chained together securely using cryptography. In order to change or add to a record the transaction has to be verified by the majority of computers on the network. The records on the chain is like a traditional computer database. All the information is sequential which avoids duplicate entries. Blockchain networks are anticipated to meet the needs of the future. That need has been described as follows (*2)

> Throughout history, instruments of trust, such as minted coins, paper money, letters of credit, and banking systems, have emerged to facilitate the exchange of value and protect buyers and sellers. Important innovations, including telephone lines, credit card systems, the Internet, and mobile technologies have improved the convenience, speed, and efficiency of transactions while shrinking and sometimes virtually eliminating the distance between buyers and sellers. Still, many business transactions remain inefficient, expensive, and vulnerable, suffering from the following limitations:
>
> (a) Cash is useful only in local transactions and in relatively small amounts.
>
> (b) The time between transaction and settlement can be long.
>
> (c) Duplication of effort and the need for third-party validation and/or the presence of intermediaries add to the inefficiencies.
>
> d) Fraud, cyberattacks, and even simple mistakes add to the cost and complexity of doing business, and they expose all participants in the network to risk if a central system, such as a bank, is compromised.

(e) Credit card organizations have essentially created walled gardens with a high price of entry. Merchants must pay the high costs of onboarding, which often involves considerable paperwork and a time-consuming vetting process.

(f) Half of the people in the world don't have access to a bank account and have had to develop parallel payment systems to conduct transactions.

Transaction volumes worldwide are growing exponentially and will surely magnify the complexities, vulnerabilities, inefficiencies, and costs of current transaction systems. The growth of ecommerce, online banking, and in-app purchases, and the increasing mobility of people around the world have fueled the growth of transaction volumes. And transaction volumes will explode with the rise of Internet of Things (IoT) — autonomous objects, such as refrigerators that buy groceries when supplies are running low and cars that deliver themselves to your door, stopping for fuel along the way. To address these challenges and others, the world needs payment networks that are fast and that provide a mechanism that establishes trust, requires no specialized equipment, has no chargebacks or monthly fees, and provides a collective bookkeeping solution for ensuring transparency and trust.

Some descriptions describe blockchain as a "transparent ledger". This does not mean that it is visible to everyone. On a public blockchain (such as is used on bitcoin) the information is stored on everyone's computers on the blockchain network. There is security involved. The key to blockchain's security is a "hash". A hash is a bit of cryptographic math (a digital fingerprint or unique identifier) that makes the links between the blocks virtually unbreakable. Each block contains hash timestamped batches of recent valid transactions, and the hash of the previous block. The previous block hash links the blocks together and prevents any block from being altered or a block being inserted between two existing blocks. In this way, each subsequent block strengthens the verification of the previous block and hence the entire blockchain. Blockchain has its own language. Every computer (yours and mine) are considered "nodes". Every node has a file of transactions (a "ledger"). There are also "miners" - verifiers of the transaction who receive a reward. A very good comparison of how a traditional transaction takes place versus how a blockchain transaction takes place has been described as follows (*2):

In a traditional environment, **trusted third parties** act as intermediaries for financial transactions. If you have ever sent money overseas, it will pass through an intermediary (usually a bank). It will usually not be instantaneous (taking up to 3 days) and the intermediary will take a commission for doing this either in the form of exchange rate conversion or other charges.

The original **Blockchain** is open-source technology which offers an alternative to the traditional intermediary for transfers of the crypto-currency **Bitcoin**. The intermediary is replaced by the **collective verification of the ecosystem** offering a huge degree of traceability, security and speed.

In the example above (a "**public Blockchain**"), there are multiple versions of you as "nodes" on a network acting as executors of transactions and miners simultaneously. Transactions are collected into blocks before being added to the Blockchain. Miners receive a Bitcoin reward based upon the computational time it takes to work out a) whether the transaction is valid and b) what is the correct mathematical key to link to the block of transactions into the

correct place in the open ledger. As more transactions are executed, more Bitcoins flow into the virtual money supply. The "reward" miners get will reduce[s][sic] every 4 years until Bitcoin production will eventually cease (although estimates say this won't be until 2140!). Of course, although the original Blockchain was intended to manage Bitcoin, other virtual currencies, such as Ether, can be used.

Blockchain technology does not have to exist publicly. It can also exist privately - where nodes are simply points in a private network and the Blockchain acts similarly to a distributed ledger.

The following is an example of how blockchain could hypothetically transform an everyday transaction - sale and purchase of a trusted concert ticket (*3):

Can You trust Your Seller?
It's hard to tell real tickets from counterfeits, especially if you bought them from a third-party website or a private individual.
Going Straight to the Source
A blockchain can help buyers quickly establish that a ticket (and its seller) can be trusted.
The event venue registers the event, date and serial number of each ticket to a blockchain which is accessible online.
When the ticket is first sold, it's assigned an address - a string of data which is publicly viewable on the blockchain.
The owner is given a private key, which is a hash of the address data. The key can be used to "unlock" the address.
So by producing the correct key, the buyer can prove the item is hers, without having to check with the event venue.
If she chooses to sell the ticket, it's assigned a new address, and the new owner gets a new private key. And the new transaction is added to the blockchain.
The ticket can be resold multiple times, and when a seller unlocks the address with this private key, the buyer knows the ticket he is getting is authentic.

Blockchain has a number other potential uses. It can hold and protect sensitive information such as ID's. Traditionally ID documentation has been issued and monitored by governments. Digital identification with the assistance of a blockchain network could be more secure. It's the decentralization of the bits of information that is critical to the security. Many companies have been hacked and customer information compromised. Home Depot and more recently Equifax suffered from hacking incidents whereby customer information was obtained by hackers. The hacker was able to "hack" into the server storing the information and this should not happen with a decentralized storage system, where the information (blocks and chains) are stored on multiple nodes in the blockchain network.

A number of hurdles have to be overcome for businesses to separate from manual processes and to adopt blockchain in their processes. Many businesses in the transportation field are already moving in this direction. For example, most ocean carriers already use electronic bills of lading. These were the first steps into the future. For businesses the new costs and risks of utilizing new technology may delay its implementation. Goldman and Sachs sets out the milestones relating to the adoption of blockchain (*4):

1. Companies Begin Piloting Uses of Blockchain Technology
2. Global Companies Start Adopting Blockchain
3. Early adopters begin to benefit
4. Majority of Corporations Have Blockchain projects in production
5. Widespread Adoption of Blockchain

Security concerns can also delay blockchain adoption. No technology is one hundred percent secure. Where large sums of money are involved, hackers will try to follow. Through the use of private keys, IDs and permissions, users

can specify which transaction details they want other participants to be permitted to view. Permissions can be expanded for special users, such as auditors, who may need access to more transaction detail. The ledger itself is shared, updated with every transaction and selectively replicated among all participants (nodes) in near real time. It is not owned or controlled by a single organization. The platform's continued existence is not dependent upon any individual entity. All relevant network participants (or a large majority) must agree a transaction is valid. This is achieved through a use of consensus algorithms. Each blockchain network can establish the conditions under which a transaction or asset exchange can occur. Smart contracts (those that execute based on one or more conditions being achieved) can be built into the platform (*5). Below is another example of a potential use in the automotive industry (*6):

1. The government regulator creates and populates the registration for the new vehicle on the blockchain and transfers the ownership of the vehicle to the manufacturer.
2. The manufacturer adds the make, model, and vehicle identification number to the vehicle template within the parameters allowed by the smart contract (a digital agreement or set of rules that govern a transaction
3. The dealer can see the new stock availability, and ownership of the vehicle can be transferred from the manufacturer to the dealership after a smart contract is executed to validate the sale.
4. The leasing company can see the dealer's inventory. Ownership of the vehicle can be transferred from the dealer to the leasing company after a smart contract is executed to validate the transfer.
5. The lessee can see the cars available for lease and complete any form required to execute the lease agreement.
6. The leasing process continues between various lessees and the leasing company until the leasing company is ready to retire the vehicle. At this point, ownership of the asset is transferred to the scrap merchant, who, according to another smart contract, has permission to dispose of the vehicle.

Part 2 of this article will examine the uses of blockchain in the supply chain.

Rui M. Fernandes

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

Endnotes

(*1) Gupta, Manav "Blockchain for Dummies - IBM Edition", 2017 John Wiley & Sons, Inc., page 3.
(*2) *Ibid*, pages 4-5.
(*2) "Blockchain explained … in under 100 words." https://www2.deloitte.com/ch/en/pages/strategy-operations/articles/blockchain-explained.html
(*3) "Blockchain - The New Technology Trust" http://www.goldmansachs.com/our-thinking/pages/blockchain/
(*4) *Ibid*
(*5) *Supra* note 1 at page 11
(*6) *Supra* note 1 at pages 8 and 9.

12. Duty Free Importing under the Canada-EU Trade Deal

As of September 21, 2017, the Canada-EU Comprehensive Economic and Trade Agreement ("**CETA**") has been provisionally applied in Canada and the EU. (*1) 98% of Canadian-origin goods are now able to enter the EU tariff free, with similar zero duties being applied to the importation of EU-origin goods into Canada. (*2) Certain sections of the agreement, regarding investment, financial services and other administrative services, have not yet been applied.

Background

Canada has officially proclaimed 21 regulations to supplement our *Canada-EU CETA Implementation Act*. These regulations cover a wide variety of topics, including rules of origin, import and export controls, government procurement, patent protection and the *Investment Canada Act.* The full text of each regulation was published in the Canada Gazette, Part II, on September 7, 2017. (*3)

Importing & Preferential Tariff Treatment

Canadian importers will now benefit from CETA as a result of duty eliminations and reductions with respect to imports originating in any of the EU Member States. The CBSA recently published Customs Notice 17-30, which provides the new tariff rate code for imports of goods originating in the EU (CEUT – Code 31). This code is to be inserted in Box 28 of the B3 Canada Customs Coding Form. (*4)

CETA eliminates the customs duties on all imports from an EU country or other CETA beneficiary (except for some agricultural goods), either immediately or through a phase-out over a period of years. (*5) The list of countries eligible for the preferential tariff is set out in the Regulations Defining "EU country or other CETA beneficiary".

In order to determine if your goods are entitled to CETA tariff treatment, you must first determine the HS tariff classification number for the good that you intend to import and confirm that good satisfies the CETA rules of origin. If the goods that you wish to import are included as duty free pursuant to CETA, then you are entitled to preferential tariff treatment, as long as you comply with the CBSA's requirements for importation. (*6)

The importer must have in their possession, proof of originating status of the goods. CETA refers to this as an Origin Declaration. It can be provided on an invoice or any other commercial document that describes the product with enough detail to enable it to be identified. The Origin Declaration must be completed by the exporter in the EU country or CETA beneficiary country. (*7)

Note that some goods may also be subject to import quotas. For example, products such as cheese, textiles and apparel goods are subject to quotas and require a permit for the shipment. (*8) The preferential CETA tariff can only be used if the importer has possession of the Origin Declaration, completed by the exporter, and any permits (as applicable), even if the goods meet the CETA rules of origin.

For further information on CETA generally, please see the February 2017 Fernandes Hearn LLP Newsletter.

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Endnotes

(*1) Joint Statement by Mr. Jean-Claude Juncker, President of the European Commission and Mr. Justin Trudeau, Prime Minister of Canada; July 8, 2017, online: http://europa.eu/rapid/press-release_STATEMENT-17-1959_en.htm

(*2) Brochure: The Comprehensive Economic and Trade Agreement is a big deal for Canadian companies; Government of Canada, online: http://www.international.gc.ca/gac-amc/

campaign-campagne/ceta-aecg/brochure.aspx?lang=eng
(*3) Canada Gazette, Part II; September 7, 2017, online: http://www.canadagazette.gc.ca/rp-pr/p2/2017/2017-09-07-x1/pdf/g2-151x1.pdf
(*4) Customs Notice 17-30, CBSA; September 14, 2017, online: <http://www.cbsa.gc.ca/publications/cn-ad/cn17-30-eng.html >
(*5) Ibid.
(*6) Ibid.
(*7) Ibid.
(*8) Ibid.

4. Privacy Law Update: Breach Reporting and Record Keeping Obligations of Companies

The Canadian Government recently released a statement and proposed new regulations under the *Personal Information Protection and Electronic Documents Act* ("**PIPEDA**") with respect to mandatory breach reporting and recordkeeping requirements for commercial organizations. (*1)

PIPEDA - Background

PIPEDA applies to the collection, use and disclosure of personal information by all organizations in the course of commercial activity. PIPEDA automatically applies to interprovincial and international transactions, as well as federally regulations businesses, such as banks, telecommunications and transportation companies. It also applies to businesses operating only within a single province, unless that province has substantially similar legislation in place. To date, only Quebec, British Columbia and Alberta have adopted such legislation. Public sector organizations have a different privacy regime with which they must comply.

PIPEDA was last amended in June 2015; however, the key changes regarding the establishment of breach reporting and recordkeeping requirements are not yet in force. The proposed regulations, titled "Breach of Security Safeguards Regulations" (the "Regulations") are meant to fill in any gaps where specific information is still needed with respect to the implementation of the reporting and recordkeeping amendments.

What to do if you Experience a Data Breach

Pursuant to PIPEDA and the Regulations, organizations that experience a breach of security safeguards have certain obligations. They must determine if the breach poses a "real risk of significant harm" to the individual about whom the information relates. This risk assessment must consider the sensitivity of the information involved and the probability that the information could be misused.

If the breach poses a real risk as outlined-above, the organization is required to notify the affected individual and report the breach to the Privacy Commissioner of Canada (the "Commissioner"), "as soon as feasible".

Finally, the organization must keep a record of any data breach of which it becomes aware. This record must be provided to the Commissioner upon request.

Notifying the Affected Individual

The Regulations include a list of information that must be contained in any notice provided to the affected individual. This list is intended to be a minimum standard, and additional information can also be provided, at the organization's discretion. Included within this list is a requirement to notify the individual about the organization's internal complaint procedure and about the fact that they have a right to file a complaint with the Commissioner under PIPEDA.

Both direct and indirect methods of notification are specified in the Regulation. Direct methods include by email (if the individual has consented to receiving email notifications), by letter, by telephone and in person. Indirect methods include a conspicuous message posted on the organization's website for at least 90 days, or by means of an advertisement that is likely to reach the affected individual.

It is important to note that indirect notice may only be used under limited circumstances: (a) the giving of direct notification would cause further harm to the affected individual; (b) the cost of giving direct notice would be prohibitive for the organization; or (c) the organization does not have contact information for the affected individual, or such information is out of date.

We recommend consulting a privacy specialist prior to using an indirect method, especially if (i) harm to the individual could result from any delay in receiving notice; or (ii) there is a chance that litigation could result from the breach. If indirect notice is provided where direct notice was more appropriate, and the individual experiences a loss as a result, the organization may face exposure to liability in court, if litigation is commenced.

Notifying the Commissioner

The Regulations set out the specific information that must be provided in a report to the Commissioner after becoming aware of a data breach. Note that a description of the steps that the organization has taken to reduce the risk of harm to each affected individual resulting from the breach (or to mitigate that harm) must be included in the report.

Recordkeeping Requirements

Pursuant to the Regulations, organizations must maintain records of any data breach for a minimum of 24 months. This is in line with the limitations put in place in most provinces with respect to initiating civil litigation. Note that during this time period, the Commissioner can request access to these records, and such access must be provided. The records should contain enough detail for the Commissioner to be satisfied that the organization is in compliance with PIPEDA.

Bottom Line: Robust Privacy Polices are Needed

We strongly recommend that companies start preparing for these regulations by creating robust privacy policies, if they do not already have them, or amending existing policies. Clear guidelines should be set out that specify:
(i) under what circumstances the company will collect, use and disclose personal information;
(ii) a form of consent that the company intends to use in order to comply with PIPEDA's rules about valid and informed consent;
(iii) what security safeguards will be put in place to protect personal information in the possession and control of the company;
(iv) a risk assessment framework to assist in determining when a breach poses a "real risk of significant harm";

(v) standard forms of notification that will be provided to affected individuals and to the Commissioner in the case of breach;
(vi) standard notification procedures;
(vii) an internal complaint procedure in the case of breach;
(vii) a requirement to attempt to mitigate any harm resulting from a breach; and
(vii) record keeping procedures in the case of a breach.

Companies should ensure that their policies are in full compliance with the specific obligations and requirements set forth in PIPEDA and its regulations. We also recommend that companies conduct spot checks and audits every so often to ensure that its polices are being followed. Having standard procedures in place can assist to both avoid litigation and to show that the company was not negligent if a civil claim is initiated.

Finally, we also recommend that companies who disclose personal information in their control to third party service providers pay particular attention to their contracts with such third parties. By doing so, companies can ensure that these other organizations are protection the personal information to the same standards.

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Endnotes
(*1) Breach of Security Safeguard Regulations, Government of Canada; Canada Gazette Vol. 151, No. 35, September 2, 2017, online: <http://www.gazette.gc.ca/rp-pr/p1/2017/2017-09-02/html/reg1-eng.php>

5. Dismissal of B.C. Fuel Surcharges Class Action Upheld

Fuel surcharges, typically coded by airlines as a "YQ" charge, or increasingly as a "YR" charge in the calculation of a total airfare, have proven litigious recently in Canada. In the Fernandes Hearn LLP March 2017 Newsletter, we reviewed the decision of the Quebec Superior Court to certify a class action brought by a passenger who was shocked to learn that the YQ component of his Air Canada flight from Montreal to Paris represented the majority of the total fare, exceeding base fare plus other governmental taxes and third-party charges combined (*1).

In 2015, the Supreme Court in British Columbia had denied certification of class proceedings in five joined actions in which the plaintiffs alleged that airlines were in breach of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 and also were unjustly enriched by the practice of listing YQ charges as taxes or taxes and charges on ticket receipts issued by travel agents (*2).

YQ charges are curious insofar as they bear little resemblance to the relative cost of fuel to operate the flight. Air Canada has a single domestic fuel surcharge, which applies equally to the airline's shortest flight between Victoria and Vancouver, to the longest transcontinental routings. For long haul routings, fuel surcharges are less harmonious but equally illogical to common sense reasoning.

In some cases, the incongruity of international fuel surcharges is explained by governmental regulations: Brazil outlaws them while South Korea sets airline surcharges indexed to fuel prices. However, in other markets, only competitive forces explain the differences of surcharges applicable. For example, Air Canada levies $874 YQ charge on a roundtrip business fare from Toronto to London; but for the identical itinerary originating in London, only $480 is levied to cover fuel costs.

Before chambers judge Madam Justice Adair, the defendant airlines, Delta, United, Air Canada, Lufthansa and British Airways prevailed. Adair J. held that the plaintiffs failed to disclose any cause of action and moreover she determined that there were no common issues that could be efficiently resolved in a class proceeding. The plaintiffs brought their appeal before the British Columbia Court of Appeal and judgment was rendered on September 12, 2017 (*3).

On appeal, the plaintiffs abandoned their primary line of argument before the judge of first instance, which had been that they had a cause of action under the *Business Practices and Consumer Protection Act*. Rather, the plaintiffs focused on the subsidiary and marginal argument made at first instance that the airlines had been unjustly enriched by collecting the impugned fuel surcharges pursuant to the representation that these amounts were in fact taxes.

Groberman JJ.A. for a unanimous court dismissed the appeal. The Court did find that the plaintiffs were not without foundation with respect to their argument that they had a cause of action in unjust enrichment. The Court indicated that, although the pleadings were insufficiently detailed to find such a cause of action, given that the pleadings did not specify what the plaintiffs understood to constitute their contract with the airlines and how the ticket receipt played into the contractual matrix, this could not be excluded from the realm of possibility.

However, further evidence on this issue was not requisite given that such analysis was unnecessary given the negative conclusion of the appeal court in respect of the appeal of the second peremptory reason given by the chambers judge for denying certification at first instance, being the absence of common issues to be resolved efficiently by way of a class proceeding.

In this respect, the Court of Appeal agreed with Adair J. that there was no common issue with respect to the claims of unjust enrichment. The circumstances of the procurement of the air

tickets of class members were too varied to be dealt with in a mass proceeding. The agents involved were operating on different bases, some were authorized agents of the airlines, others were agents of the passengers or operated as independent vendors, in some instances the agents were buying fares in bulk or procuring from consolidators who had in turn bought seats in bulk. Whether in each instance the defendant airlines were in fact the instructing principals of the intermediate travel agencies would require individual analysis unsuitable to the context of a class action.

Furthermore, there were differences between the ticket receipts issued by the different agencies and how they represented the fuel surcharges - this again required individual examination of issues, which is incompatible with a class proceeding. Without excluding the possibility that a class could be formed on much narrower premises, such as the clients of a particular agency, the court saw nothing in the evidence to support so redefining the plaintiff class(es) and thus wholly dismissed the appeal.

Mark Glynn

Endnotes

(*1) *Choquette c. Air Canada,* 2017 QCCS 234
(*2) *Unlu v. Air Canda*, 2015 BCSC 1453
(*3) *Simsek v. United Airlines, Inc*., 2017 BCCA 316

6. Contracting Due Diligence: That Innocent Looking Termination Clause Might Bite!

The "termination clause" is so standard that it is often appears in a written contract by default. Chances are that this is in a contract template that one party decides to use. The parties may glaze over the language, focusing only on the specific items being negotiated. An example of a termination clause is as follows:

> *Either party may terminate the Agreement, at any time, with or without cause, upon sixty (60) days' prior written notice to the other.*

There may also be a right of termination for "cause", allowing a party to terminate the agreement for certain enumerated causes. The focus of this article relates to the element of surprise that may come with the above "without cause" wording.

Scenario

Assume that your company enters into a written agreement that provides that either party may end the agreement, for no reason, on "x" number days notice. This might seem innocuous. After all, both parties want the relationship, right? However after a period of time when things seem fully "on side" the other side wants to "pull the plug". You're shocked. You may feel that you have been "led down a path", or taken advantage of. You may have been led to believe by the other side that this would not happen. You seek counsel to explore your legal remedies and you want recourse because the other side has been unfair.

As the aggrieved party in the recently published decision of *S.N.S. Industrial Products Limited v. Omron Canada Inc.* (*1) has learned, "unfairness", by itself, will not be the basis for any recourse absent overt deception or sharp practice in the other sides exercise of its contract rights. As will be touched on below, while a party to a contract must not lie or knowingly mislead the other about matters linked to the performance of a contract, they have no duty of loyalty to the other and they are not required to forego advantages flowing from the contract.

Accordingly, one must be careful what one agrees to in a contract…

S.N.S. Industrial Products Limited, Omron Canada Inc. and the "Termination Clause"

Omron Canada Inc. ("Omron") manufactures industrial automation products. S.N.S. Industrial Products Limited ("SNS") was a distributor of Omron's products between 1996 and 2015. They entered into a distribution agreement dated January 8, 2010 (the "Distribution Agreement") by which Omron appointed SNS as a non-exclusive distributor of Omron's products for resale to customers in a territory defined in the Distribution Agreement.

The Distribution Agreement provided for a mutual right of termination as follows:

> <u>Termination by Notice</u>. Notwithstanding any other provision, either party may terminate this Agreement, at any time, with or without cause, upon sixty (60) days' prior written notice to the other.

The Law Suit and the Motion for Summary Judgment

SNS commenced an action against Omron by Statement of Claim issued July 23, 2015. Omron defended SNS' action and counterclaimed for payment of an outstanding invoice.

In addition to other claims not germane to this discussion, SNS claimed damages for breach of the Agreement. One ground for the damages claimed was that Omron breached the "Good-Faith Doctrine". SNS made reference to a pre-termination meeting attended by representatives of the parties where Omron was alleged to have represented that all was fine with the relationship and that the Agreement would not be terminated. SNS also cited other dealings, which

it said amounted to assurances that Omron would not do what it ultimately did do in the termination.

Omron defended the action, pleading that it exercised its right to terminate the Agreement. Omron pleaded that it acted honestly in its contractual performance, did not act in bad faith, and that it did not knowingly mislead SNS with respect to any matters directly linked to the performance of the contract. Omron also denied that it made any statements or assurances with respect to whether the Agreement would ever be terminated, and that in any event any statements made by any of its employees were not made with any dishonest intent.

Omron brought a motion for summary judgment seeking dismissal of SNS' action against it and allowing Omron's counterclaim against SNS.

In support of its motion for summary judgment SNS filed affidavit evidence that the primary purpose of the above noted meeting was for SNS to get comfort that there was to be no termination of the Distribution Agreement, and that its representatives left the meeting feeling assured. The SNS affidavit asserted that Omron "misled and/or lied to SNS" in reference to the termination issues.

Did Omron Breach its Duty of Good Faith in Contract Performance?

The Court reviewed the Agreement and noted that the parties deliberately bargained for an agreement with relatively minimal security of tenure on both sides. Each party bore the risk of the other party terminating the agreement on 60 days' notice. The Court cited the decision of the Supreme Court of Canada in *Bhasin v. Hrynew* (*2) in finding that in the circumstances Omron did not breach its obligation of good faith. The Court cited the following key points from the *Bhasin* decision:

> … there is a general duty of honesty in contractual performance. This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance.
> …
>
> The principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest. In commerce, a party may sometimes cause loss to another — even intentionally — in the legitimate pursuit of economic self-interest… Doing so is not necessarily contrary to good faith and in some cases has actually been encouraged by the courts on the basis of economic efficiency…

Even if Omron's representatives had in fact made the statements attributed to them, the Court found no admissible evidence that, insofar as they were statements of fact, that they were untrue at the time that they were made or that insofar as the comments were expressions of opinion that they were not genuinely held.

The reality is that, pursuant to the terms of the Agreement, each party retained for itself the right to terminate the Agreement, without cause, on sixty days' notice to the other. The Court found no basis to suggest that, in giving notice to terminate in accordance with the express terms of the Agreement, Omron sought to undermine the legitimate contractual interests of SNS in bad faith.

Accordingly the Court ruled that Omron was entitled to terminate the Distribution Agreement and SNS was not awarded any damages.

The "Take Aways"

The cautionary tale comes down to two key "take away" points.

First, the courts do not want to engage in scrutinizing the motives of a party to a contract in the exercising of their rights. Where the representations of one party are alleged to form the basis for a "bad faith" attack on the other, absent clear and admissible evidence (which was lacking in this case) of lies or deliberate deception, the courts will not find bad faith so as to compensate or otherwise protect the latter.

The second "take away" is that when entering into a contract a party must take care to consider each and every term and to avoid "glossing over" standard template wording. In the "termination rights" realm, a party must appreciate that they may be agreeing to minimal security of tenure. Of course this admonition extends past the issue of termination rights and extends to each and every term of the contract: be aware and deliberate of what you are agreeing to.

Gordon Hearn

Endnotes
(*1) 2017 ONSC 4746
(*2) 2014 SCC 71

7. Employment Law Update: When Can an Employer Require an Employee to Undergo an Independent Medical Examination?

Under both the federal and provincial human rights legislation an employer must accommodate an employee with a disability, to the point of undue hardship. One of the most challenging issues an employer may face is how to discharge this duty. Disability is broadly defined and includes mental health illness, such as depression and anxiety. The duty to accommodate has both a procedural and substantive component. The procedural duty involves the considerations and steps taken by the employer to respond to the accommodation request. The substantive duty refers to the reasonableness of the accommodation chosen, including the reasons for not providing an accommodation and proof of undue hardship. The accommodation process requires co-operation between the employer and employee.

In a not uncommon scenario, an employee presents the employer with a doctor's note which states that the employee must be absent from work for a specified period of time or, in some cases, an indefinite period of time, due to a medical condition. The employer is not entitled to know the underlying diagnosis. The employer accommodates the employee by providing a leave of absence from work. Following the sick leave, the employee presents an updated doctor's note which states that the employee is able to return to work and sets out certain accommodations required by the doctor, such as working reduced hours, requiring a change to the employee's responsibilities, or a change in reporting structure. What can an employer do in response to an accommodation request which it believes is unreasonable in light of the particular workplace, and the medical information provided to date?

The Ontario Divisional Court's decision, in *Bottiglia v. Ottawa Catholic School Board and Human Rights Tribunal of Ontario* (*1) provides welcome guidance for an employer in this situation. Marcello Bottiglia ("Mr. B") had worked for the School Board since 1975, first as a teacher and, from 1999, as Superintendent of Schools. In 2010 the School Board appointed someone to fill the vacancy of Director of Education, a position that Mr. B was interested in competing for. He was upset that there was an appointment to the position, without an open competition. He felt betrayed, distraught and upset which eventually triggered depression and an extended absence from work. In a note dated March 19, 2012, Mr. B's doctor stated that Mr. B required an extended period of time off work and that a return to the current workplace could trigger a risk of relapse. A subsequent letter from Mr. B's doctor, dated August 31, 2012, stated that Mr. B was ready to return to work that fall, subject to certain conditions: working 2 days a week, for 4 hours each day and no evening meetings, and that this would continue for at least 6 to 12 months. The doctor went on to state that, even after 12 months, Mr. B might not be able to return to full time work. The doctor also identified 5 areas of concern regarding Mr. B's return to work, and provided strategies to address those concerns.

The School Board was concerned that the doctor was recommending accommodation without an objective understanding of the workplace, or of the essential duties of Mr. B's position, which had changed since Mr. B started his sick leave. The School Board was concerned that it was premature for Mr. B to return to work, in light of the demanding nature of the job and the reduced hours requested, and that the doctor could not provide a clear prognosis. Finally, the School board was concerned that the return to work coincided exactly with the end of Mr. B's paid sick leave.

In all of these circumstances, the School Board wanted a second medical opinion and requested that Mr. B undergo an Independent Medical Examination ("IME"), to assess his current health status, his ability to conduct supervisory duties, and to determine relevant accommodations which might be necessary for a successful return to work. While Mr. B, who had hired a lawyer by this time, agreed to the IME on certain

conditions, he ultimately refused to attend. The basis for the refusal was the School Board's communication with the IME doctor in advance of the appointment, in which it advised that Mr. B left the workplace following a dispute, and that it was concerned that the return to work coincided with the end of paid sick leave and might be premature. In response to Mr. B's concerns about this communication, the School Board advised Mr. B's lawyer that they would provide the IME doctor with any supplementary information that Mr. B wanted him to have. Mr. B continued to refuse to attend the IME, and the School Board did not allow him to return to work.

This brought the matter to a standstill and Mr. B launched a complaint to the Ontario Human Rights Tribunal, ("Tribunal") alleging that the School Board was not acting in good faith during the accommodation process. The Tribunal disagreed and dismissed Mr. B's application. It found that the School Board had met its procedural duty to accommodate Mr. B, as its actions were reasonable. The substantive aspect of the duty to accommodate had not been triggered because Mr. B ultimately failed to participate in what the Tribunal concluded was a reasonable request for medical information by way of an IME.

Mr. B sought judicial review of the Tribunal's decision before the Divisional Court. The Court found that the duty to accommodate, set out in the *Human Rights Code*, brings with it the right, in certain circumstances, to request an IME. In this case, the Court upheld the Tribunal's finding that the circumstances supported the right to an IME. Those circumstances included the fact that Mr. B had been off work for almost 2 years, that in June 2012 his lawyer advised the School Board that he was unable to return to work and that returning would put him at serious risk of relapse. Shortly thereafter, in August 2012, Mr. B's lawyer advised that School Board that Mr. B was able to return to work. It was reasonable, given the significant and unexpected change in Mr. B's ability to return to work, for the School Board to want further information about Mr. B's medical condition and ability to return to work. In addition, it was reasonable for the School Board to be concerned that the doctor provided only a tentative and uncertain prognosis for Mr. B and that based on the proposed accommodations, it was not clear what knowledge the doctor had of the workplace and essential duties of a superintendent. It was also reasonable for the School Board to be concerned with the fact that Mr. B's proposed return to work coincided with the end of his paid sick leave.

The Court stated that an employer is not entitled to request an IME in order to "second guess" the employee's doctor. In addition, an employer should only request an IME when it cannot reasonably expect to obtain the information it needs from the employee's own doctor. With respect to communications with the IME examiner, the Court agreed with the Tribunal that the employer is entitled to provide the IME examiner with information related to accommodation, but cautioned employers to take care so as not to impair the objectivity of the examiner as doing so may justify an employee's refusal to attend the IME.

What was really key to the Court's decision was the fact that the doctor had done an "about face" within a span of 5 months, with respect to Mr. B's ability to work. This provided a reasonable and *bona fide* basis for the School Board to question the adequacy and reasonableness and reliability of the doctor's opinion, as he had been writing for 2 years that Mr. B was unable to resume his duties at all. The court went on to state that this does not mean that employers have a freestanding unrestricted right to an IME. But it does confirm that in certain circumstances, an employer will be justified in requiring an IME as part of discharging its duty to accommodate.

Lessons Learned

When an employee is on sick leave it is important for the employer to keep in regular contact with the employee and obtain up-to-date medical information. In this case, the abrupt change in the doctor's opinion about the employee's ability to return to work was unreasonable in the

context of the communications over the previous two years. It was also unreasonable for the doctor to make the accommodation recommendations he did, without an objective understanding of the workplace and the employee's responsibilities. Both of those factors led to the unreliability of the accommodations requested, which allowed the employer to require the employee undergo an IME in order to be able to discharge its duty to accommodate. It is also imperative that, in any communication with the IME examiner, an employer must not provide any information that may impair the examiner's objectivity.

Carole McAfee Wallace

Endnotes
(*1) 2017 ONSC 2517 (CanLII)

8. *Soline Trading v. MSC et al.* – Federal Court Declines Maritime Jurisdiction Over Negligence Claim by Ocean Carrier Against Land Carrier

Recently, in *Certain Underwriters at Lloyds and Soline Trading Ltd v. Mediterranean Shipping Company S.A.*, 2017 FC 460, the limits of the Federal Court's jurisdiction in maritime matters once again came up for consideration. Following existing Federal Court jurisprudence, Prothonotary Mireille Tabib held that the Federal Court's jurisdiction over maritime law matters did not apply to an ocean carrier's third party claim, founded in negligence, against a land-based carrier in connection with a cargo mis-delivery, in circumstances where there was no contract of any kind in place between the two carriers themselves.

The Court's decision is currently under appeal and is expected soon. However, the decision is certainly in line with existing principles and jurisprudence concerning how far the Federal Court's jurisdiction should extend. An appellate reversal of the Court's decision in this case would be surprising.

The Facts

This case is about the misdelivery of a cargo of shrimp. The plaintiff, Soline Trading Ltd. ("Soline"), purchased two containers of frozen shrimp and hired the defendant, Mediterranean Shipping Company S.A. ("MSC"), to transport the containers from Ecuador to Montreal. Both containers arrived uneventfully and were discharged from MSC's vessel by MSC's agent/ sub-contractor, Termont Terminal, on or about June 26, 2013.

Soline had by then sent instructions to its local carrier to attend at Termont Terminal and retrieve the containers. Soline's carrier, however, was only able to retrieve one of the containers.

The other container of shrimp was co-opted by a rogue. Apparently, the rogue contacted another carrier, the Third Party, 4103831 Canada Inc. (o/a

Trans-Salonikios) ("Trans-Salonikios"), and engaged Trans-Salonikios to attend and pick up the second container of shrimp from Termont Terminal. Trans-Salonikios, who had no reason to doubt its instructions, complied with the rogue's instructions and completed the delivery, although in reality it had no authority to do so.

Ultimately, the second container of shrimp was never seen again.

The Action

This (of course) led to a cargo claim brought in the Federal Court by Soline against MSC. The matter has not yet been heard. One of the major issues is whether MSC is liable for the misdelivery of the shrimp from the Termont Terminal to Trans-Salonikios, who then unwittingly delivered it into the rogue's hands.

The Third Party Claim Against Trans-Salonikios

MSC then launched a Third Party Claim against Trans-Salonikios, alleging that Trans-Salonikios was negligent in attending to retrieve the container of shrimp at the rogue's behest.

The Motion to Strike

Trans-Salonikios promptly brought a motion to strike the Third Party Claim on the basis that the Federal Court had no jurisdiction to hear MSC's claim against Trans-Salonikios because the claim being asserted by MSC did not pertain to maritime or admiralty law matters.

The Decision

At the motion, MSC argued that its claim against Trans-Salonikios, being based on the theft of cargo from the Termont Terminal, was indistinguishable from the claim considered in the seminal case on the issue of the limits of the Federal Court's maritime jurisdiction – *ITO-International Terminal Operators v. Miida Electronics Inc.*, [1986] 1 SCR 752 [*Miida*].

The *Miida* case also dealt with theft of cargo stored at a sea terminal. The Supreme Court of Canada found that the matter was governed by Canadian maritime law and there within the Federal Court's jurisdiction. The Court held:

> It is clear, in my view, that such incidental storage by the carrier itself or by a third party under contract to the carrier is also a matter of maritime concern by virtue of the "close, practical relationship of the terminal operation to the performance of the contract of carriage" (*per* Le Dain J. in the Court of Appeal). It may then be concluded that cargo handling and incidental storage before delivery and before the goods pass from the custody of a terminal operator within the port area is sufficiently linked to the contract of carriage by sea to constitute a maritime matter within the ambit of Canadian maritime law, as defined in s. 2 of the *Federal Court Act*.

In the *Miida* case, the Court went on at paragraph 22 to summarize "three significant factors" that defined its maritime nature:

> 1) the proximity of the terminal operation to the sea;
>
> 2) the connection between the terminal operator's activities within the port area and the contract of carriage by sea;
>
> 3) the fact that the storage at issue was short-term, pending final delivery to the consignee.

Considering those factors in the present case, Prothonotary Mireille Tabib concluded that this was not a situation where MSC's claim against Trans-Salonikios was based on the execution of a contract of carriage of goods by sea, or a claim

based on the duties and liabilities of the Termont Terminal. Rather, MSC's claim against Trans-Salonikios was based only on its obligations as a trucker, or its conduct as a thief.

This reasoning by the Court is nothing new. Indeed, Prothonotary Tabib referred to a few Federal Court precedents where these very issues were dealt with.

For example, in *Matsuura Machine Corp. v. Hapag Lloyd AG*, [1997] FCJ No. 360, the Federal Court held that transportation by a land carrier, even if under contract to the ocean carrier, and even where the land carrier's part in the carriage forms part of a continuous movement, is not so "*integrally connected to maritime matters as to be legitimate Canadian Maritime Law within federal legislative competence*".

Similarly, in *Sio Export Trading Co. v. The "Dart Europe"*, [1984] 1 FC 256, negligence of a land carrier was also alleged. In this case, the packaging of certain cargo was damaged during an ocean voyage, and the ocean carrier had arranged to have the cargo sent to be repaired at a local repair shop away from the Port of Montreal. The cargo was further damaged on the trip back to port from the repair shop. The Federal Court held it had no jurisdiction to deal with the claim, because "*the land transport operation undertaken by Godin from the Dorval repair shop to the Port of Montreal cannot be considered so "closely connected" to the voyage by sea as to be "part and parcel" of the marine activities essential to the carriage of goods by sea.*"

Finally, in *Marley Co. v. Cast North America (1983) Inc.*, [1995] FCJ No. 489, the Federal Court also held that it had no jurisdiction over a claim against a rail carrier, where its negligence caused damage to cargo being transported pursuant to a through bill of lading. The Court held:

> It is not because a contract of carriage by rail or by land is entered into in the context of a through bill of lading, a portion of which calls for carriage by sea, that the former contracts necessarily fall within jurisdiction of this Court. I am certainly not prepared to accept that a contract to carry goods by rail or by truck in the United States, Canada or Europe is within the maritime jurisdiction of this Court simply because they are part of the ongoing movement of a container between Shiller Park, Illinois, to Tiel, Holland.

Thus, in the case at bar, the Court held that, because Trans-Salonikios was not even alleged to be bound by contract to any party to the contract of carriage by sea, it was clear that its activities were not "part and parcel of the carriage by sea" and that an action against Trans-Salonikios was not properly within the Court's maritime jurisdiction.

MSC argued that the central issue in the action was misdelivery, and that pursuant to modern methods of transport logistics, proper delivery of cargo containers was handled by terminal operators on behalf of shipping lines, and required intricate logistical integration between the terminal operators and local trucker's activities. These facts, MSC argued, required the Court to reassess the limits of Canadian maritime law in light of evolving technology and practices.

The Court held that MSC's argument missed the point. It observed that terminal operators' activities have already been recognized as being integrally connected to maritime matters and that their duties towards shipping lines and cargo owners are governed by Canadian maritime law; this would include terminal operators' duties to deliver the container to the proper consignee. However, the Court held:

The integration of the logistics between the terminal operator and truckers does not bring the matter of the trucker's activities within federal jurisdiction by association.

The Court noted that MSC's cause of action may arise because of the terminal operator's failure to ensure proper delivery; however, its cause of action was against the trucker, not the Termont Terminal.

MSC also argued that as a matter of judicial economy, the Federal Court should proceed to hear the Third Party Claim, since it involved the same facts and evidence as the main claim. The Court rejected this argument as well, noting that the same argument had been considered and rejected in the past (*1).

In conclusion, the Court granted Trans-Salonikios's motion and dismissed the Third Party Claim (*2).

James Manson

Endnotes

(*1) See *Sio Export Trading Co. v. The "Dart Europe"*, [1984] 1 FC 256, paragraph 12.

(*2) This case is being conducted for the plaintiff by Gordon Hearn and James Manson.

9. Defence Win: Default Prejudgment Interest Rates and Increased Statutory Deductibles Apply to All Actions

On September 20, 2017, the Ontario Court of Appeal released decisions regarding two appeals heard together arising out of jury trials in the Ontario Superior Court of Justice (*1). The decisions of Doherty, MacFarland and Rouleau JJ.A. answered numerous ongoing questions that directly relate to personal injury cases regarding matters involving motor vehicle accidents. The decisions will impact on all cases currently in the system, whether upon settlement or at trial.

The issues involved primarily two questions that were unresolved until now and had been the subject of contentious debate between the plaintiff and defence bars. Both questions relate to whether recent changes to legislation were to apply retroactively to all actions in the court system or only to those actions commenced from the date of the legislative change. (*1)

The first issue was with regard to the prejudgment interest rate applied to general damages for bodily injury and death that had historically been higher than the changing default interest rate applied to all other claims. This higher rate was laid out in the Rules of Civil Procedure as 5% per annum. Recently, the law changed and the pre-judgment interest rate for bodily injury and death general damages for motor vehicle accidents was reduced to the default interest rate, which was significantly less than the mandated 5% per annum. The default rate was identified as the rate in place in the quarter before the issuance of the associated Statement of Claim. There is also a provision allowing the Trial Judge discretion to set the rate of prejudgment interest.

The second issue related to the change in the statutory deductible applied to an award for non-pecuniary or general damages for pain and suffering. Prior to the recent change, the statutory deductible was $30,000, which was increased to $36,540 through an amendment to s. 5.1(1) of the regulation entitled *Court Proceedings for Automobile Accidents that Occur on or After November 1, 1996*, O. Reg. 461/96. Again, the unresolved issue related to whether or not these changes applied to all claims in the system or only those commenced after the changes.

The answers provided by the Court of Appeal follow policy and are in keeping with the Ontario Legislature's intention to keep auto premiums down. Those answers are favourable for defendants.

In *Wade Brett Cobb et al v The Estate of Martin T. Long* ("*Cobb*") (*2), the Trial Judge, when assessing prejudgment interest, did not make a decision on whether the new rate was to be used retrospectively but rather used his discretion to reduce the interest rate to 3% per annum. (*3) With regard to the change in statutory deductibles, the Trial Judge concluded that the change to the regulation was "substantive", as opposed to "procedural", and, accordingly, did not apply the change retrospectively. The Trial Judge applied a statutory deductible of $30,000 on the jury awarded general damages $50,000, leaving a net general damage award of $20,000.

Prejudgment Interest

The rate of prejudgment interest applicable to a plaintiff's general damages for pain and suffering related to s. 258.3(8.1) of the *Insurance Act*, which came into force on January 1, 2015. The provision originated in Schedule 3, s. 12 of the *Fighting Fraud and Reducing Automobile Insurance Rates Act*, 2014, S.O. 2014, c. 9, also known as "Bill 15". Section 258.3(8.1) reads:

> (8.1) Subsection 128(2) of the *Courts of Justice Act* does not apply in respect of the calculation of prejudgment interest for damages for non-pecuniary loss in an action referred to in subsection (8).

The kind of action to which subsection (8) refers is an action "for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile".

However, neither Bill 15 nor s. 258.3(8.1) specifically provided for whether the new rate applied to actions commenced before January 1, 2015 but went to trial thereafter. This was key.

Many provisions under the same legislation contained a transition rule whereas this amendment to the *Insurance Act* was entirely silent on whether it applied only to proceedings concerning accidents that occurred on or after the provision's enactment.

The application of s. 258.3(8.1) to accident cases must be read in the context of the statutory regime for prejudgment interest. S. 128(1) of the *Courts of Justice Act,* creates an entitlement to prejudgment interest and refers to a default rate:

> **128** (1) A person who is entitled to an order for the payment of money is entitled to claim and have included in the order an award of interest thereon at the prejudgment interest rate, calculated from the date the cause of action arose to the date of the order.

The default "prejudgment interest rate" is defined in S. 127 as "the bank rate at the end of the first day of the last month of the quarter preceding the quarter in which the proceeding was commenced". However, s. 128(2) creates an exception from this default rate of prejudgment interest for damages for non-pecuniary loss arising from personal injuries:

> (2) Despite subsection (1), the rate of interest on damages for non-pecuniary loss in an action for personal injury shall be the rate determined by the rules of court made under clause 66 (2) (w).

Rule 53.10 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, then provides:

> **53**.10 The prejudgment interest rate on damages for non-pecuniary loss in an action for personal injury is 5 per cent per year.

Needless to say the default rate changes and is far less than the stated 5% per annum rate.

S. 130 of the *Courts of Justice Act* gives the court discretion to reduce or increase the prescribed rate of interest or to disallow interest otherwise payable under s. 128.

Therefore, in an action for damages arising out of a motor vehicle accident, the prejudgment interest rate on non-pecuniary damages will now be the rate provided for in Sections 127 and 128(1) of the *Courts of Justice Act*, *subject to the overriding discretion of the court in S. 130 to increase or reduce the rate, to change the interest period, or to disallow interest altogether*.

The Court of Appeal concluded that the amendment in the *Insurance Act* to the prejudgment interest rate was intended to have retrospective effect and it applies to all actions that are tried after its commencement.

With regard to both issues, the Court of Appeal noted that the common law generally presumes that legislation does not have retrospective application but that this presumption applies within a contextual analysis of legislative intent, and can be rebutted.

Further the presumption against legislative interference with vested rights and the presumption that procedural legislation applies immediately must be considered.

The Court of Appeal found that there was no crystallized or certain right to a particular rate of prejudgment interest as they fluctuate over time and interest rates set by the court should reflect these changes as well. Prejudgment interest is meant to compensate for the loss of use of money's worth from the date of the loss to the date of judgment. The injured party is to be fairly compensated and restored as far as money can do. The Court's retained discretion to change the default rate ensures that fairness continues in play and the changing rates ensure that the courts keep pace with economic realities to ensure that plaintiffs are not overcompensated nor undercompensated for the lost value of their damage award over time.

The Court further found that it was not necessary to consider the application of the presumptions or to decide whether s. 258.3(8.1) of the *Insurance Act,* which only deals with

the rate of prejudgment interest and not with the entitlement to prejudgment interest, is substantive in nature.

The Court stated that Section 258.3(8.1), and the statute that introduced it, contained no transition language unlike the predecessor legislation, which clearly stated that it would only have prospective application. (*4) The Court said at paras. 101 and 102:

> The absence of similar temporal language in s. 258.3(8.1) supports the view that the legislature intended for this change to the prejudgment interest regime to have retrospective effect so as to apply to pre-existing causes of action.
>
> [102] I take further support for the view that this amendment was intended to have retrospective effect from a consideration of how such an interpretation would serve the purposes that the legislature must have intended to achieve in Bill 15. During the introduction of the Bill at First Reading,[5] the policy underlying the Bill and the rationale for the prejudgment interest amendment were discussed. The expressed goal was to bring down the cost of claims to achieve a reduction in automobile insurance rates within a two-year window and the adjustment of the prejudgment interest rate was one part of that strategy:
>
>> In August of last year, we announced our cost and rate reduction strategy, which is targeting an industry-wide average of a 15% reduction in authorized auto insurance rates within two years. The measures proposed in this bill would move forward on our strategy by helping to reduce costs in the system and continuing to fight fraud. Auto insurance rates are directly linked to claim costs. Reducing cost and uncertainty in the system would help reduce rates for Ontario drivers.
>>
>> ...
>>
>> Lastly, the bill would implement measures to reform the pre-judgement interest rates for general damages and again reduce costs by protecting and expediting matters more quickly for claimants. This rate, actually, hasn't been updated since 1990. Linking the rate to current market conditions would help reduce the cost to bodily injury claims and auto insurance systems while still ensuring fairness for consumers.

The Court of Appeal then found that the newly reduced prejudgment interest rate applied retrospectively and to all claims in the system.

Statutory Deductible Application

The same principles apply to the interpretation of legislation as discussed in the prejudgment interest question above.

Subsection 267.5(7)3(i) of the *Insurance Act* requires the deduction of a prescribed statutory deductible from an award of general damages in "an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile"

Further:

> 3. Subject to subsections (8), (8.1) and (8.1.1), the amount of damages for non-pecuniary loss to be awarded against the protected defendant shall be determined by reducing the amount [of damages for non-pecuniary loss for which the defendant would be liable without regard to Part VI of the *Insurance Act*] by,
>
> (i) in the case of damages for non-pecuniary loss other than damages for non-pecuniary loss under clause 61(2)(e) of the *Family Law Act*, the greater of
>
> A. $15,000, and
>
> B. <u>The amount prescribed by the regulations</u>
>
> [Emphasis added in the original]

The amount prescribed came in the form of an amendment in force August 1, 2015 being a

regulation (the "*Court Proceedings Regulation*") and the issue was whether this amount can apply to an accident that occurred in 2008, as in *Cobb*. The relevant provision of the *Court Proceedings* Regulation in force immediately before August 1, 2015 required the deduction of $30,000:

> 5.1 (1) The amount of $30,000 is prescribed for the purpose of sub-subparagraph 3 i B of subsection 267.5 (7) of the Act in respect of incidents that occur on or after October 1, 2003. [Emphasis added in original.]

Effective August 1, 2015, s. 5.1 of the *Court Proceedings* Regulation was amended and required the deduction of $36,540.

> 5.1 (1) For the purpose of sub-subparagraph 3 i B of subsection 267.5 (7) of the Act, the prescribed amount is the amount determined in accordance with the following rules:
>
> 1. Until December 31, 2015, the prescribed amount is $36,540.
>
> 2. On January 1, 2016, the prescribed amount set out in paragraph 1 shall be revised by adjusting the amount by the indexation percentage published under subsection 268.1 (1) of the Act for that year.
>
> 3. On January 1 in every year after 2016, the prescribed amount that applied for the previous year shall be revised by adjusting the amount by the indexation percentage published under subsection 268.1 (1) of the Act for the year.

The Court noted that, like the amendment to the *Insurance Act* respecting prejudgment interest, the 2015 amendment to s. 5.1 of the *Court Proceedings* Regulation contained no transitional provision that clearly indicates its temporal application. In contrast, the previous version specifically stated that it was applicable to accidents that occurred *on or after* October 1, 2003. Further, S. 267.5(8.1.1) of the *Insurance Act* specifically provides that the statutory deductible does not apply to "damages awarded for non-pecuniary loss awarded in respect of a person who dies as a direct or indirect result of an incident *that occurs after August 31, 2010.*"

The language distinguishes between those sections that are specifically intended to have only a prospective application and those that are not.

Section 5.1(1) of the *Court Proceedings* Regulation, which prescribes the actual amount of the statutory deductible, implements an identical inflation-adjustment regime according to the same schedule of dates as in s. 267.5(8.3) (the provision which provides that the deductible will not be applied if the damages awarded exceed a prescribed amount). Both of these provisions refer to s. 268.1(1) of the *Insurance Act* as the source of the applicable "indexation percentage".

The Court found that the *Insurance Act* authorizes the immediate application of the amended regulation to accidents that occurred before its promulgation. The fact that the dates for calculating the prescribed damage quantum in s. 267.5(8.3) of the *Insurance Act,* above which the deductible does not apply, match the dates in s. 5.1(1) of the *Court Proceedings* Regulation proves that the legislature must have authorized the executive to amend s. 5.1(1) with retrospective application to pending and future proceedings.

The Court then stated at para. 126 and 127,

> Concluding that the statutory deductible was intended to apply retrospectively helps achieve the policy of the Act. Like the pre-judgment interest provisions in the *Courts of Justice Act*, the provisions respecting the statutory deductible in the *Insurance Act* recognize that both the quantum of the deductible and the prescribed damage quantum above which the deductible does not apply require variation in the future to keep pace with economic realities.
>
> [127] The incorporation of a formula for calculating the statutory deductible in s. 5.1(1) of the *Court Proceedings* Regulation on a go-forward basis, which is based on a published indexation percentage,

> demonstrates that the quantum will adjust according to future inflation rates. The time value of the deductible will properly correspond with that of the damage quantum above which the deductible does not apply only if the quantum of the deductible is inflation-adjusted to the date of the award of damages rather than to the date of the accident. As the defendant puts it in its factum, "since the jury awards damages in today's dollars, the quantum of the deductible should similarly be calculated in today's dollars."

The Court then concluded that the legislature intended for the 2015 amendment to s. 5.1(1) to have retrospective application and applied to the *Cobb* case.

Finally

The Court of Appeal decisions favour the defence and ultimate payments to plaintiffs will be significantly reduced in this regard.

The reduced (default) rate for prejudgment interest on general damages in respect of motor vehicle accidents applies to all actions regardless of when they were commenced or will be tried.

Likewise, the statutory deductibles of $37,385.17 (plaintiffs) and $18,692.59 (FLA Claimants) will apply to all general damages of less than the monetary threshold of $124,616.21 (until December 31, 2017) and $62,307.59 (FLA Claimants) without consideration of whether the action was commenced before or after the amendment.

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Endnotes

(*1) There are other issues canvassed and resolved by the Court of Appeal but they are not covered in this article. Such issues included the Trial Judge's failure to allow the issue of punitive damages to be put to the jury; the assessment regarding a defence offer to settle and application of costs; whether deduction for SABs paid should be applied "apples for apples" against amounts awarded by the jury.

(*2) *Wade Brett Cobb et al v The Estate of Martin T. Long* 2017 ONCA 717

(*3) *Kossay El-Khodr v. Raymond C. Lackie et al* 2017 ONCA 716 was the other case heard and, while it had the issue of prejudgment interest, the focus was on other issues including whether deduction for SABs paid should be applied "apples for apples" against amounts awarded by the jury.

(*4) The Court of Appeal gave numerous examples of legislation, which had transitional sections.

DISCLAIMER & TERMS

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CONTEST

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