THE NAVIGATOR

IN THIS ISSUE

S.C.C. HOLDS N.B. *LIQUOR CONTROL ACT* DOES NOT IMPEDE INTERPROVINCIAL TRADE

Provisions of the New Brunswick *Liquor Control Act*, specifically s. 134(*b*), make it an offence to "have or keep liquor" in an amount that exceeds a prescribed threshold purchased from any Canadian source other than the New Brunswick Liquor Corporation. Mr. Comeau, a resident of New Brunswick, entered Quebec, visited three different stores, and purchased quantities of alcohol in excess of the applicable limit. Returning from Quebec to New Brunswick, Mr. Comeau was stopped by the RCMP; he was charged under s. 134(*b*) and was issued a fine. Mr. Comeau challenged the charge on the basis that s. 121 of the *Constitution Act, 1867* — which provides that all articles of manufacture from any province shall be "admitted free" into each of the other provinces — renders s. 134(*b*) unconstitutional. The trial judge found s. 134(*b*) to be of no force and effect against Mr. Comeau and dismissed the charge. The Court of Appeal dismissed the Crown's application for leave to appeal.

On appeal to the Supreme Court of Canada, the Court allowed the appeal, holding that Section 134(*b*) of the *Liquor Control Act* did not infringe s. 121 of the *Constitution Act, 1867.* In essence, the legislation was not an impediment to interprovincial trade.

Section 121 of the *Constitution Act, 1867* provides:

> All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

The Supreme Court held that text of the provision must be read harmoniously with the context and purpose of the statute.

> Constitutional texts must be interpreted in a broad and purposive manner … Constitutional texts must also be interpreted in a manner that is sensitive to evolving circumstances because they 'must continually adapt to cover new realities' … This is the living tree doctrine (*2)Applying this framework to s. 121 of the *Constitution Act, 1867*, we conclude

FIRM AND INDUSTRY NEWS

- **Gordon Hearn, Louis Amato-Gauci and Carole McAfee Wallace** will be representing the Firm at the Annual Meeting of the **Transportation Lawyers Association** on May 3, 2018 in Orlando, Florida. **Gordon** will be hosting a panel presentation on the "The Need for Freight Forwarder and Load Broker Due Diligence: A Study in Risk Management and the Protection of Commercial Interests". **Carole** will be presenting a paper on updates and developments in "International Transportation".

- **James Manson** will be doing a presentation on May 10th, 2018 on "Civil Litigation in the Transportation Industry" at a meeting of the **Inland Marine Underwriters Association**, in Toronto.

- **James Manson** will be participating on a panel on May 14th, 2018 on "Legal, Regulatory and Shipper Updates" at a meeting of the **Chartered Institute of Logistics & Transport In North America**, in Toronto.

- **Carole McAfee Wallace** will be speaking at the Southwestern (London) Chapter of the Fleet Safety Council on May 15, 2018, on the "Legalization of Cannabis, Charges Under the Highway Traffic Act, and the Defence of Due Diligence."

- **CBMU Spring Conference** 2018 will be held in Niagara On the Lake on May 23-24, 2018.

- **Jaclyne Reive** will be speaking at **the Supply Chain Management Conference** in Newfoundland on June 13-15 about the *Safe Food for Canadians Act*.

- **Gordon Hearn** will be representing the Firm at the **Conference of Freight Counsel** being held June 25-26 in Alexandria, Virginia

MESA 2018 Conference in Toronto

> — as detailed below — that the interpretation of "admitted free" proposed by Mr. Comeau should be rejected. Section 121 does not impose absolute free trade across Canada. We further conclude that s. 121 prohibits governments from levying tariffs or tariff-like measures (measures that in essence and purpose burden the passage of goods across a provincial border); but, s. 121 does not prohibit governments from adopting laws and regulatory schemes directed to other goals that have incidental effects on the passage of goods across provincial borders. (*3)

The Court noted that with respect to the text of s. 121, the phrase "admitted free" is ambiguous, and falls to be interpreted on the basis of the historical, legislative and constitutional contexts. To achieve economic union, the framers of the Constitution agreed that individual provinces needed to relinquish their tariff powers. The historical context supports the view that, at a minimum, s. 121 prohibits the imposition of charges on goods crossing provincial boundaries — tariffs and tariff−like measures. The Court noted, however, that the historical evidence nowhere suggests that provinces would lose their power to legislate under s. 92 of the *Constitution Act, 1867* for the benefit of their constituents even if that might have impact on interprovincial trade. Section 92 allows each province to legislate in the areas enumerated under that section which includes local works and undertakings and matters of a merely local or private nature in the province.

The Court concluded that the objective of the New Brunswick regulatory scheme was not to restrict trade across a provincial boundary, but to enable public supervision of the production, movement, sale, and use of alcohol within New Brunswick. The primary purpose of s. 134(*b*) is to prohibit holding excessive quantities of liquor from supplies not managed by the province. While one effect of s. 134(*b*) is to impede interprovincial trade, this effect is only incidental in light of the objective of the provincial scheme in general. Therefore, while s. 134(*b*) in essence impedes cross−border trade, this is not its primary purpose. Section 134(*b*) does not infringe s. 121 of the *Constitution Act, 1867.*

This is a timely decision in relation to interprovincial trade, given that the province of Alberta has threatened to cut supplies of oil to British Columbia. Can the *R. v. Comeau* decision be distinguished?

The Court noted that stand-alone laws that have the effect of restricting trade across provincial boundaries will not violate s. 121 if their primary purpose is not to impede trade, but some other purpose. Thus a law that prohibits liquor crossing a provincial boundary for the primary purpose of protecting the health and welfare of the people in the province would not violate s. 121. (*4)

Can Alberta find a primary purpose for any legislation which incidentally also restricts the interprovincial trade of oil?

Interestingly, the Supreme Court cautioned that "a law that in essence and purpose impedes cross-border trade cannot be rendered constitutional under s. 121 solely by inserting it into a broader regulatory scheme. If the primary purpose of the broader scheme is to impede trade, or if the impugned law is not connected in a rational way to the scheme's objective, the law will violate s. 121." (*5)

Only time will tell.

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

Endnotes
(*1) 2018 SCC 15
(*2) *Ibid*, at para. 52
(*3) *Ibid*, at para. 53
(*4) *Ibid*, at para. 112
(*5) *Ibid*, at para. 113

2. Doing Business in Canada – Part 7 (*1) – Directors and Officers' Duties & Liability

A director or officer of a corporation is subject to certain duties. These duties arise from the common law as well as from legislation. In a number of instances, a director or officer can be held personally liable for failing to fulfill these duties.

Directors

Directors have common law fiduciary duties and duties of care. In addition, directors have other duties arising from federal and provincial legislation.

Fiduciary Duty

In Canada, directors are regarded as fiduciaries of their corporation and, as such, directors must ensure the corporation's interests are paramount. It is the fiduciary duty of the director to act honestly and in good faith, with a view to the best interests of the corporation. If a director fails to meet his or her fiduciary duty, courts will hold the director strictly liable.

The fiduciary duty is owed to the corporation as such, rather than to shareholders, creditors, employees or other stakeholders or constituencies of the corporation, or to any one of them.

The Supreme Court of Canada has nevertheless held that, in determining the nature of the best interests of the corporation, the directors may be obliged to consider the interests of shareholders, bondholders, employees and other stakeholder groups (*2)

The fiduciary duty under the federal corporate legislation (and similar provincial statutes) requires that directors:

1. Act honestly and in good faith vis-à-vis the corporation;
2. Respect the trust and confidence that have been reposed in them to manage the assets of the corporation in pursuit of the realization of the objects of the corporation;
3. Avoid conflicts of interest with the corporation;
4. Not abuse their position for personal benefit;
5. Maintain the confidentiality of information they acquire by virtue of their position; and
6. Serve the corporation selflessly, honestly and loyally.

Duty of Care

In Canadian law, the duty of care is distinct from the fiduciary duty. However, except in situations governed by Quebec's *Civil Code*, the duty of care is not an independent foundation for legal actions. Rather, the duty is relevant to the assessment of the "standard of behaviour that should reasonably be expected" of a director and is therefore most likely to come into play where a board (or individual director) is sued in tort (e.g. with respect to alleged negligence) or under the oppression remedy.

The duty of care under the federal *Canada Business Corporations Act* ("CBCA") requires a director to "exercise the care, diligence and skill that a reasonably prudent individual would exercise in comparable circumstances." While the "reasonably prudent individual" is an objective standard, the court will take into account the context of the situation to determine whether the standard has been met in particular circumstances. (*3)

In considering whether directors have complied with their duty of care, the courts may afford them the benefit of the "business judgment rule". This basically means that the court will often decide to defer to business decisions provided that they fall within a range of reasonable alternatives.

Statutory Duties

Duties relating to wages and pensions: Under the various federal and provincial statutes

governing employment standards, directors can be held liable to the corporation's employees for unpaid wages and vacation pay earned by the employees during the individual's directorship.

Tax-related duties: A director may be liable for employee source deductions, nonresident withholding taxes, excise taxes, and certain other provincial taxes that the corporation has failed to withhold, deduct or remit as required.

Duties arising from environmental legislation: Directors can be held liable where the corporation commits certain environmental offences. This liability can arise even where the director was not actively involved in committing the offence, since directors are deemed to have control of the corporation and its employees.

Duties relating to publicly-traded corporations: Directors of publicly-traded corporations are subject to additional duties and potential liabilities. A director of a publicly-traded corporation must ensure that the corporation has complied with the various filing, disclosure and reporting requirements and restrictions arising from relevant provincial securities statutes.

Liabilities of Directors

A director may be held personally liable for damages arising as a result of various actions (or inaction) by the director, including any act that is illegal (such as a breach of their fiduciary or statutory duties), permitting the corporation to act outside of its authority, and for torts they commit individually or on behalf of the corporation.

Indemnification of Directors

Under most Canadian corporation statutes, corporations may indemnify and purchase insurance to protect directors and former directors against liabilities incurred by reason of them acting as director, provided the director acted consistent with his or her fiduciary duties and had reasonable grounds for believing his or her conduct was lawful.

Officers

The officers of a corporation are responsible for the day-to-day operation of the corporation. Officers are appointed by the directors and, together with the directors, form the management of the corporation. Officers can fill any position in the corporation that directors want them to fill (president, secretary or any other position). Any individual can be an officer of the corporation. Officers can be shareholders or directors of the corporation, or both, but they do not have to be. One person could act as a director, officer and shareholder simultaneously. For many small businesses, one individual is the sole director, the sole officer and the sole shareholder.

Like directors, a corporation's officers owe a fiduciary duty to the corporation and, generally, are subject to the same duty of care that is imposed on directors. Therefore, officers face many of the same potential liabilities as directors. Whether an employee is an officer will depend not on the employee's stated position or title, but rather on the degree of actual power and control that the employee has over the corporation.

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Endnotes

(*1) This article is part 7 of 17 parts dedicated to a review of doing business in Canada. Subsequent articles will include International Trade, Competition, Sale of Goods, Intellectual Property, Privacy, Real Property, Environmental Laws, Taxation, Insolvency, Litigation and ADR.

(*2) *BCE Inc. v. 1976 Debentureholders,* [2008] 3 S.C.R. 560 and *Peoples Department Stores Inc. (Trustee of) v. Wise* (2004), 244 D.L.R. (4th) 564 (S.C.C.).

(*3) *Ibid, Peoples Department Stores, at para.* 67.

3. Rule 12 Striking of Frivolous Claims in Small Claims Court: Air Canada Prevails

The Small Claims Court procedures can be a source of significant frustration for defendants and defence counsel when faced with what is apparently a frivolous or especially weak lawsuit. While even in the post *Hyrniak* era (*1), the threshold for a summary judgment motion to succeed in Superior Court remains elevated, in Small Claims Court there is no mechanism akin to summary judgment.

Rather, the only provision of the Rules of Small Claims Court (the "Rules") (*3) that allows for a preliminary disposition of the substance of a claim or a defence is found at Rule 12, which is analogous to the even more exacting Rule 21.01(1)(b) of the *Rules of Civil Procedure*. (*3) Specifically, Rule 12.02(1)(a) provides as follows:

> The court may, on motion, strike out or amend all or part of any document that,
>
> (a) discloses no reasonable cause of action or defence.

This is a rarely used provision, given that most claims that are ultimately frivolous on their merits, do at least plead or, when prepared by self-representing parties, suggest causes of action that can be argued on their merits and proven or disproven at trial. This, combined with the common assumption that the Small Claims Court will generally accommodate plaintiffs and exercise restraint in denying parties their "day in court", serves to curb enthusiasm for motions to strike.

There are however niche cases which lend themselves to a Rule 12.02(1)(a) motion, and it is important that this litigation tool not be overlooked as a way to short circuit problematic small claims court actions which incur legal costs disproportionate to the amount at issue.

In *Sultana v. Air Canada* (*4), the plaintiff passengers brought suit against the airline on the basis of the failure of the defendant to provide Halal meals as purportedly pre-ordered for return travel between Toronto and London, UK. The plaintiffs claimed $25,000 each for, amongst other items, breach of contract, pain and suffering, inconvenience and violation of their religious rights. On the outbound journey, the airline allegedly misrepresented a meal as Halal that did not meet the applicable religious specifications, and, on the return journey, no special meal was catered at all.

Air Canada made an offer to settle the action for $2,050.65 plus interest and costs, a generous offer given the modest marginal cost of airline catering; however, more likely reflective of the apparent cultural insensitivities on the facts as alleged in the Plaintiff's Claim.

The offer was never withdrawn, but, rather than defend the action and proceed to settlement conference and trial, the airline brought a pre-defence Rule 12 motion predicated on the unavailability of civil remedies to the plaintiffs given the exclusivity of the liability regime set out in the Montreal Convention (*5), in force in Canada pursuant to the *Carriage by Air Act* (*6).

Buoyed by the authority of the Supreme Court of Canada in *Thibodeau v. Air Canada* (*7), in which the Supreme Court clearly laid out that an action for damages by passengers pertaining to carriage by air may only succeed if a remedy is prescribed by the Montreal Convention, the Small Claims Court considered whether any indemnity could be owed pursuant to Articles 17-19 of the Montreal Convention, which lay out the causes of action thereunder.

The only possible provision giving rise to a cause of action to the plaintiffs would be Article 17 of the Convention pertaining to death or bodily injury to passengers. (*8) However, Dickinson D.J. relied on U.K. precedent authorities that prescribe that bodily injury pursuant to the Convention requires the inflicting of injury that can be objectively proven by examination of the body. (*9) Pure mental anguish is not compensable under Article 17. The plaintiffs admitted before the court that they had no

medical evidence of injury resulting from the alleged service failure of the airline to provide a tailored meal.

Accordingly, the Court indicated that, as with language rights claims (*Thibodeau*) and disability discrimination claims (*10) in past cases, the plaintiffs' claims, headlined by alleged breaches of their religious rights, could not succeed, and accordingly the plaintiffs' Claim was struck without leave to amend at the preliminary juncture in Small Claims Court pursuant to Rule 12.

Taking account of the complexity of the motion and that the motion fully disposed of the plaintiffs' claims, and considering the settlement offer made by Air Canada, the Court awarded costs of $1,000, being significantly more than the standard award of $100 provided by Rule 15.07 of the Rules.

Mark Glynn

Endnotes

(*1) In *Hyrniak v. Mauldin* 2014 SCC 7*, the* Supreme Court advocated a broader use of summary judgment disposition in keeping with principles of access to justice and proportionality in civil litigation.

(*2) *Rules of Small Claims Court*, O. Reg. 258/98

(*3) *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

(*4) *Sultana v. Air Canada*, 2018 CanLII 3446

(*5) *Convention for the Unification of Certain Rules for International Carriage by Air*, opened for Signature at Montreal on 28 May 1999 (ICAO Doc No 4698)

(*6) *Carriage by Air Act*, R.S.C., 1985, c. C-26

(*7) *Thibodeau v. Air Canada* 2014 SCC 67, dismissing claims for damages arising from alleged failures by airline to provide bilingual service in flight as required by *Official Languages Act* on basis of exclusivity of Montreal Convention scheme governing liability of air carriers.

(*8) Article 18 of the Convention governs liability for Cargo and Article 19 for Delay, neither of which were at issue.

(*9) *Morris v KLM Royal Dutch Airlines*, [2002] 1 Lloyd's Rep. 745 (H.L.)

(*10) *Stott v. Thomas Cook Tour Operators Ltd.*, [2014] UKSC 15

Unveiling of the ´Miss Destiny Star' by the Women's Trucking Federation of Canada
Attendees from Fernandes Hearn LLP: Kim Stoll, Carole McAfee Wallace, Jaclyne Reive

4. Are You in Compliance with Canadian Cabotage Laws?

In the transportation industry, the word "cabotage" is used to refer to the transport of goods or passengers between two points in the same country by vehicle, trailer or container ("conveyance") registered in another country and/or by a foreign driver or crew. Accordingly, there are two categories of cabotage laws: those affecting the equipment used and those affecting the driver. This article discusses the Canadian context. Carriers who are using foreign-owned and registered equipment and foreign drivers should pay particular attention to these laws and consider conducting a review of their current routes to ensure that they are not offside Canadian cabotage laws.

The General Rule and Exceptions

In Canada, generally only Canadian operators (i.e. Canadian citizens or permanent residents of Canada), driving conveyances that are registered, licensed and plated in one of the Canadian provinces or territories are permitted to make point-to-point deliveries of within Canada.

However, subject to compliance with immigration restrictions (which are described in further detail below), there is an exception that allows foreign-based conveyances used in the international commercial transportation of goods or passengers to be temporarily imported into Canada to engage in certain point-to-point deliveries within Canada without payment of duties and taxes. These movements are allowed where: (i) the transportation is incidental to the international traffic of the goods; (ii) the transportation does not occur outside the territorial limits of Canada; and (iii) the conveyance has not entered Canada for the purpose of an in-transit movement through Canada to a point outside Canada. (*1) Only one "incidental move" can be made per international trip to pick up or drop off goods while carrying less than a full truckload of imported goods or goods to be exported.

What constitutes a "foreign-based conveyance or trailer"

"Foreign-based conveyances or trailers" are those that: (i) are owned or leased and imported by a person domiciled in a foreign country; (ii) leave from and return to the foreign country in the normal course of operation; (iii) are controlled from the foreign country; and (iv) are exported within 30 days of the date of importation (subject to certain exceptional circumstances). (*2) A similar definition applies to a "foreign-based container", but it must be exported within 365 days of the date of importation.

What constitutes transportation "incidental" to the international traffic of goods?

In the context of cabotage, transportation will be considered "incidental" to the international traffic of goods where it occurs during, immediately before or after the conveyance is used for international commercial transportation. Specifically:
(a) the incidental movement must be in the general direction of the delivery point of the international shipment;
(b) if the international movement is an export, the conveyance must have entered Canada empty;
(c) the conveyance must be picking up a load for export after the delivery of the international load; or
(d) the incidental movement must be part of the return movement of the conveyance to its country of origin. (*3)

It is important to note that only minor deviations from the original international route are allowed. (*4) For example, a truck owned and registered in the United States that leaves from Buffalo to deliver a to Mississauga may pick up a domestic load from Mississauga and deliver it to St. Catherine's on its way back to Buffalo, as this move occurs immediately after an international move and is in the general direction of the international route. In this case, an empty trailer

could also be picked up in St. Catherine's for return to Buffalo.

In-Transit Movements

Incidental domestic moves are not allowed when a foreign-based conveyance is transporting goods from a point outside of Canada in-transit through Canada to another point outside of Canada. Incidental domestic moves are also prohibited when goods are being transported from a point in Canada through a foreign territory to another point in Canada. (*5) For example, a foreign-based conveyance may not take a load from Seattle, Washington, to pick up a domestic load in Vancouver, British Columbia, drop the domestic load off in Prince George, British Columbia, and then travel to Anchorage, Alaska.

Empty Conveyances, Containers and Trailers/ Repositioning Moves

An empty foreign-based conveyance can be moved to any location in Canada freely and without restrictions. Where an empty foreign-based conveyance enters Canada to pick up a load for export that has already been scheduled prior to entering Canada, it can be used for an incidental domestic move, as long as the domestic move follows a route that is similar and consistent with the destination where the load intended for export will be picked up. The same rules apply with respect to domestic moves by foreign-based conveyances, which are repositioning from the site of a Canadian delivery to the site of a Canadian point of origin for their next international move. (*6) For example, a foreign-based conveyance may take a load from Buffalo to Woodstock, then an empty trailer or a domestic load from Woodstock to Windsor, where it will pick up an export load from Windsor to Detroit, provided that the final move was scheduled prior to the conveyance entering Canada. Once again, these comments are subject to compliance with the immigration restrictions set out below.

Enforcement

The Canada Border Services Agency ("CBSA") has an option to perform periodic audits of the records kept by carriers who import conveyances, containers or trailers into Canada. Carriers must keep all invoices, bills, accounts and statements relating to those movements for three years commencing the following January 1. (*7)

There are a variety of penalties that can be applied by the CBSA if a carrier breaches cabotage laws, including detentions, duties, taxes, interest, fines and penalties under the Advanced Monetary Penalty System (AMPS), cancellation of "Free and Secure Trade" (FAST) status and other trusted trader privileges, seizure, ascertained forfeiture, and criminal liability. The CBSA has also set up a Border Watch toll-free line where people can report complaints of alleged violations of the cabotage laws. (*8)

Drivers & Immigration Law

It is important not to assume that compliance with customs laws regarding equipment means that cabotage will be allowed under immigration law with respect to truck drivers. Canada's *Immigration and Refugee Protection Regulations* (the "Regulations"), provide that a foreign national can work in Canada without a work permit if he or she is:

(i) employed by a foreign company;
(ii) aboard a means of transportation that is foreign-owned and not registered in Canada; and
(iii) engaged primarily in international transportation. (*9)

When conducting inspections at the Canadian border, CBSA officers consult operational bulletins and manuals (collectively, the "IRCC Guidelines") for guidance on how to interpret and apply the Regulations. The IRCC Guidelines outline various factors that the officers should consider to assist them in deciding whether to grant someone entry into Canada, including the following advice for consideration,

when deciding whether to grant US truck drivers entry into Canada:

> "Foreign truck drivers who are employed by Canadian trucking companies to pick up goods in Canada for delivery to the U.S., and who are operating Canadian owned and registered vehicles, cannot receive consideration under R186(s), since both the company and vehicle are Canadian. Nor can independent foreign truckers working under contract to Canadian trucking companies receive consideration under R186(s), since they are being employed by a Canadian company." (*10)

Accordingly, any non-Canadian truck drivers who do not meet the exemption under the Regulations will need a work permit to enter the country to complete any cross-border carriage and incidental moves. However, before a foreign truck driver can apply for a work permit, Employment and Social Development Canada must conduct a Labour Market Impact Assessment ("LMIA"). If this federal agency concludes that no Canadian workers are available to perform the job, it may issue a positive LMIA (or confirmation letter) to the carrier, authorizing the driver to apply for a work permit. The application for a work permit must be accompanied by a job offer, the contract of employment and a copy of the LMIA.

Of interest, the Canadian Trucking Alliance wrote in 2012 to the Canadian Minister of Citizenship and Immigration on this topic because of the unintended regulatory consequences that have occurred as a result of the application of the regulations. (*11) The CTA stated that:

> The specific problem arises when a Canadian owned and registered truck attempts to enter the country with a U.S. citizen driver. A literal reading of s. 186(s) would suggest that such a move is forbidden, since the driver in this situation is required to be employed by a foreign company and driving foreign equipment. […] the regulation can actually have serious negative consequences (which I believe are unintended) for Canadian businesses. This typically arises when a Canadian carrier either has a subsidiary in the United States, or has a US operation with US employees, who are paid out of the United States. […] situations do arise where one of these [American] drivers is required to move a Canadian-registered vehicle into Canada. The carrier recently ran into a situation where a driver on such a move was told by a Canadian official at the border that what he was doing was illegal, and not to do it again. A literal reading of s. 186(s) would suggest that the officer at the border was acting correctly.
>
> However, this has now created a situation where the carrier must stop the Canada bound truck on the US side of the border; send a Canadian driver into the US to pick up the truck and make the delivery in Sarnia; and then return the truck back across the border empty to the United States, to the waiting US driver. Surely this makes no sense from an efficiency standpoint. And given that the US driver is paid and operates from a US base, and would not be involved in any way in domestic Canadian moves (i.e., cabotage) if he were to make such a cross-border move, one must question what threat would be posed to the Canadian labour market if he were allowed to cross into Canada.

The CTA's comments are all the more relevant today, given the shortage of drivers in North America; however, we have yet to see a change to the Regulations on this point and it continues to be an issue today.

Steps to Consider for Foreign Carriers

If you are a foreign carrier engaged in cross-border transportation to and from Canada, as a starting point, you should review the following to determine whether you are in compliance with

Canada's cabotage laws, both in terms of your equipment and your drivers:

- are your drivers Canadian or American citizens?
- do American drivers hold dual citizenship or work permits?
- was the company that employs the drivers formed in Canada or the United States?
- in which jurisdiction are the vehicles used for cross-border moves registered and plated?
- was the company that is the registered owner or lessee of the vehicles formed in Canada or the United States?
- where are the pick-up and drop off points located in both Canada and the United States for the international movements?
- where are the pick-up and drop off points located in Canada for the domestic movements?
- are trailers and containers loaded or empty during each point of the movement?
- when was the export movement scheduled if the equipment has entered Canada empty?

Depending upon the answers to these questions, foreign carriers may need to make adjustments to their current business structures to ensure that their operations are in compliance with Canadian cabotage laws.

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Endnotes
(*1) Customs Tariff Schedule (Canada), Chapter 98.
(*2) CBSA Memorandum D3-1-5; Tariff Items 9801.10.10.
(*3) CBSA Memorandum D3-1-5.
(*4) *Ibid.*
(*5) *Ibid*.
(*6) *Ibid.*
(*7) *Ibid*., and *supra*, at 1.
(*8) *Supra,* at 3.
(*9) Immigration and Refugee Protection Regulations, SOR/2002-227, s 186(s).
(*10) IRCC Guidelines, s 5.20.
(*11) Letter dated June 15, 2012 from the Canadian Trucking Alliance to the Honourable Jason Kenney, P.C., M.P., Minister of Citizenship and Immigration.

MESA 2018 Gala Dinner - King Eddie Hotel

5. Limitation Periods On Enforcing Foreign Judgments in Ontario

In *Independence Plaza 1 Associates, L.L.C. v. Figolini*, ("*Independence Plaza")* (*1) the Court of Appeal for Ontario provided some welcome clarity regarding the limitation period applicable to enforcing foreign judgments in the Province. Ontario's law of limitations is now comprehensively governed (subject to its express exceptions) by the *Limitations Act, 2002* ("Act"). (*2) For most matters, the Act provides for a basic 2-year limitation period for commencing proceedings following the discovery of a claim. Among the exceptions, the Act contains a provision with no parallel in Ontario's former *Limitations Act*. Specifically, its section 16 provides that there is "no limitation period" for certain enumerated forms of relief. Included among these, at s. 16(1)(b), is any "proceeding to enforce an order of a court, or any other order that may be enforced in the same way as an order of a court." It is not surprising, then, that litigants have attempted to extend the superficially broad language of "order of a court" to include orders made by foreign courts.

The interpretation of this section was considered by the Court of Appeal in *Independence Plaza*. This case involved a claimant that had obtained a money judgment in the New Jersey Superior Court on January 24, 2013. An appeal of that judgment was dismissed on July 17, 2014. On May 1, 2015, the judgment creditor brought an application in the Ontario Superior Court of Justice to recover damages in respect of the New Jersey judgment. The judgment debtor opposed the application on the grounds that it was statute-barred in Ontario, having been commenced more than 2 years after the original New Jersey judgment was made. Both the applications judge and the Court of Appeal rejected this submission, finding instead that time began to run only after the appeal of the New Jersey decision was dismissed on July 17, 2014.

In ruling in the respondent's favour, the Court of Appeal definitively rejected the more generous view taken in two prior Ontario decisions, (*3) each of which viewed section 16(1)(b) as including foreign judgments among orders against which no limitation period applied in enforcement. These earlier decisions based their conclusion on the principle of comity—a general principle favouring mutual recognition judgments between jurisdictions—and also on the language of the provision itself, noting that the relevant provision did not expressly exclude foreign orders in its reference to the order of "a court". The Court of Appeal in *Independence Plaza*, rejecting this interpretation, instead looked at the entire language of the provision, noting its focus on the word "enforce." It thus noted that, since a New Jersey judgment cannot be "enforced" in Ontario without an additional step—that is, through bringing an application or action in Ontario to enforce the judgment debt—a foreign judgment must have no higher status in Ontario than any other contract debt, and was thus subject to a 2-year limitation period. (*4)

Further, by counting time, not from the date of the initial New Jersey judgment, but from the dismissal of its appeal, the Court of Appeal affirmed the other key principle in Ontario's new limitations regime; that is, that time is to be reckoned from when a claim is first "discovered." (*5) Section 5 of the Act provides in part that a claim is not discovered for the purpose of a limitation period before the time that a claimant first knew, or ought to have known, "that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it." (*6) Concluding that a proceeding would not be "appropriate" where an order was under appeal, or the time for appealing it had not expired, the relevant 2-year limitation period could not be said to have started before the New Jersey appeal was dismissed. (*7)

Even if more than two years have passed following the expiry of the relevant appeal period, an action on a foreign judgment may still not be barred by a limitations defence, however. The concept of "discovery" of a claim, and the "appropriateness" of commencing a legal proceeding in Ontario to pursue it, is not limited

solely to the timing of the expiry of the relevant appeal period but extends to all of the circumstances of the case. The Court of Appeal specifically noted that an action in Ontario may not be the "appropriate" means of proceeding unless and until a claimant first knew, or ought to have known, that the judgment debtor had exigible assets; that is, assets available to recover in satisfaction of a judgment in Ontario. (*8)

Independence Plaza provides important guidance to foreign judgment creditors seeking to enforce their rights in Ontario. In the most typical case, the prudent lawyer should move quickly on behalf of his client, since the limitation period under Ontario's new *Limitations Act*, *2002*, is much shorter for commencing an action to enforce a foreign judgment debt than under the old *Limitations Act*, which was twenty years. (*9) Also, as the recent Ontario Superior Court decision in *Grayson Consulting Inc. v. Lloyd,* (*10) (which applied the principles from *Independence Plaza* to the enforcement of a South Carolina judgment) reminds us, expert evidence is necessary to prove the relevant appeal periods in foreign law. This can be a matter of some importance in cases that appear marginal on timing. Finally, one should always consider that the expiry of the 2-year limitation period following an appeal decision on a foreign judgment may not end the matter. Counsel should further consider at what time there was first sufficient knowledge in the judgment creditor of the possibility of bringing a proceeding in Ontario before concluding that the claim is statute-barred. This knowledge may potentially have first arisen a considerable time after the judgment was first granted, thereby changing the time from when the limitation period should be calculated.

It should be noted, however, that not all foreign judgments are equal. Some, like judgments in made in other provinces, or those made in the United Kingdom, may fall within the statutory regimes established the *Reciprocal Enforcement of Judgments Act* or the *Reciprocal Enforcement of Judgments (U.K.) Act*, respectively. (*11) Each of these permit the registration of judgments granted in their respective jurisdictions in Ontario on application made to the appropriate Ontario court, following which they become enforceable in the same way as if they had been originally made in Ontario. To succeed on an application, the judgment must meet the conditions provided for in the respective statute. Usefully, however, assuming that the statutory conditions can be satisfied, each of these Acts provides for a 6-year limitation period on registering a judgment in Ontario.

Finally, in all this, the fact that a judgment in Ontario has no limitation period on enforcement should not be forgotten. Many jurisdictions still place statutory time limits on the enforcement of orders, although these tend to be more generous than ordinary limitation of action provisions. Any foreign judgment, once a successful application has been brought in Ontario for its enforcement, will thereby become enforceable without any time limit, regardless of any time limits under the law in the original jurisdiction in which judgment was granted.

Oleg M. Roslak

Endnotes

(*1) [2017] O.J. No. 243 (C.A.).
(*2) *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B.
(*3) *PT ATPK Resources TBK (Indonesia) v. Diversified Energy and Resources C*orp., 2013 ONSC 5913; *S.A. Horeca Financial Services v. Light*, 2014 ONSC 4551.
(*4) *Independence Plaza* at paras. 47-50.
(*5*) Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, s. 5.
(*6) *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, s. 5(1)(a)(iv).
(*7) *Independence Plaza* at paras. 47-50.
(*8) *Independence Plaza* at para. 82.
(*9) *Limitations Act*, R.S.O. 1990, c. L.15, s. 45(1)(c).
(*10) [2018] O.J. No. 2081.
(*11) *Reciprocal Enforcement of Judgments Act*, R.S.O. 1990 [REJA]; c. R.5; *Reciprocal Enforcement of Judgments (U.K.) Act*, R.S.O. 1990, c. R.6 [REJUKA]. It should be further noted that judgments made in Quebec are not recognized under REJA, and therefore are subject to the same 2-year limitation period governing other foreign judgments.

6. Smoking in a Work Vehicle Can Cost You

Trucks are workplaces. In particular, trucks are specifically defined as "workplaces" for the purposes of provincial and federal legislation concerning smoking. Fines can accrue to both drivers and employers.

Ontario – Smoke-Free Ontario Act

In Ontario, the *Smoke-Fee Ontario Act* prohibits smoking in a host of situations. (*1) Section 9(1) specifically prohibits smoking tobacco (or holding a lighted tobacco product) in an "enclosed workplace". For the purposes of the legislation, an "enclosed workplace" includes the "inside of any vehicle that is covered by a roof" that is "not primarily a private dwelling" and in which "employees work in or frequent during the course of their employment, whether or not they are acting in the course of their employment at the time". (*2)

Penalties for breaches of the *SFOA* range up to $5,000 for individuals and up to $300,000 for employers. (*3)

New Ontario legislation has been passed, but not yet proclaimed into force, which would address medical marijuana, e-cigarettes, and other proscribed substances. (*4) The new legislation will continue to regulate work vehicles. (*5)

Other provinces have similar legislation. For example, Alberta's *Tobacco and Smoking Reduction Act* includes "work vehicles" in its definition of a "workplace". (*6)

Last summer, in a case called *Peel (Regional Municipality) v. Con-Drain and de Medeiros*, a pick-up truck was found to have been an "enclosed workplace" for the purposes of Ontario's *SFOA* by a Justice of the Peace. (*7) Thus, there is no question that the Act applies to commercial motor vehicles – at least with respect to non-federally regulated operators (see below).

As one might expect, section 9(1) of the *SFOA* makes a person liable for smoking (or holding) lit tobacco. Section 9(3)(a) makes an employer vicariously liable for any violation of the smoking prohibition by one of its employees. However, the legislation goes much further with respect to employers. Sections 9(3)(b) to (f) place additional requirements on employers, including to advise employees of the regulation, to post prescribed non-smoking signage, and to ensure that no ashtrays or other equipment remains in a "workplace". In addition to the foregoing, section 10 of the *SFOA* provides an obligation on the owners or "occupiers" of workplaces to ensure that signage is posted in accordance with regulations.

Theoretically, an employer would be entitled to a "due diligence" defence to any charge under section 9 – in other words, it would be open to an employer to argue that it took reasonable steps to prevent any lack of compliance with the legislation – however, there are statutory limits on the enforcement measures that an employer can take. In particular, an employer is not permitted to fire (or threaten to dismiss) an employee for a violation of the *SFOA*, to discipline or suspend the employee (or even threaten to do so), to impose a penalty on the employee, or to "intimidate or coerce" an employee. (*8) Of course, these are the sorts of activities that an employer would ordinarily rely upon to make a "due diligence" defence. Thus, the section is potentially open to challenge. In appropriate circumstances, an employer might argue that the section violates the principles of administrative law.

In the meantime, there are also several substantive challenges that an employer might attempt to run. For example, it is unclear whether the section 10 obligation to post non-smoking signage would be applied against a carrier who was operating leased equipment. As discussed, that section only applies ostensibly to owners or "occupiers" – language that is ordinarily used for real estate and not trucks. (*9) A commercial operator might also challenge the authority of police officer to lay a charge as a matter of administrative law, as the legislation specifically delegates inspection authority to

appointed "inspectors" (who, in practice, are employees of local public health units in Ontario – not officers of the Ministry of Transportation or the Ontario Provincial Police, for example). (*10) Further, a long-distance driver might argue, in appropriate circumstances, that the sleeper on his truck should not be considered part of the "workplace" and that the *SFOA* only ought to apply to the cab.

Federally Regulated Operators – Non-smokers' Health Act

With respect to federally-regulated operators – that is, those whose operations cross provincial and or international borders – the federal *Non-smokers' Health Act* applies. (*11) It is more lenient than the *SFOA*. This is particularly so insofar as it permits an employer to designate "smoking" and "non-smoking" areas – including on vehicles – where only one person normally has access during a shift. (*12) As in the Ontario context, though, questions remain, such as whether a sleeper unit is included in the "workplace" definition.

As under the *SFOA*, respondents to any charges under the federal legislation would be entitled to make a "due diligence" defence; however, they would not be hindered by any prohibition on penalizing employees for breaches.

For individuals, penalties under the federal *Non-Smokers' Health Act* for a breach of the basic prohibition are up to $50 for a first offence and up to $100 for a subsequent offence. (*13) For employers, they are up to $1,000 for a first offence and up to $10,000 for a subsequent offence. (*14)

Overlap Amongst Provincial and Federal Schemes

Although there is no question that federally-regulated operators are subject to the federal *Non-Smokers' Health Act*, it is an open question whether than can also be caught by the provisions of Ontario's *SFOA*. Constitutionally, prosecutors attempting to apply the *SFOA* – which is more restrictive – might argue that the Ontario legislation is within provincial jurisdiction (health) and that it does not directly tread upon a federal area of competence (interprovincial commerce). Such arguments could shield the provincial legislation from the doctrine of "interjurisdictional immunity", which protects the authority of one level of government from an encroachment by the other. In the case of smoking, the prosecutors might argue that both regimes can co-exist. The result would be a blanket ban on smoking in work vehicles – even for interprovincial or international operators – as set-out in the *SFOA*. However, a convincing counter-argument would apply the concept of "paramountcy" – which allows a federal law to trump a provincial one in the case of a direct conflict – where the truck has been designated as a "smoking" area. This is because the federal legislation is permissive, affirmatively permitting smoking in appropriate places.

There are other direct conflicts in the federal and Ontario laws. For example, the federal regulations require the equipping of ashtrays in designated "smoking' areas, whereas the *SFOA* outright bans ashtrays. Thus, the question of "paramountcy" is ripe for a judicial determination.

No Safe Rating Demerits

It ought to be noted by commercial vehicle operators that the consequences of a conviction under one of the aforementioned statues are limited to fines. By contrast to offences under the Ontario *Highway Traffic Act*, or similar laws in other provinces, no demerit points will accrue to any safety rating or other status as a result of a smoking violation. Nonetheless, a record of sloppy compliance will give ammunition to an inspecting officer when vehicles are pulled over on highways or at weigh stations.

Alan S. Cofman

Endnotes

(*1) S.O. 1994, c. 10.

(*2) *Ibid*, s. 1. A "private dwelling" does not specifically refer to a motor vehicle, but it does include "private self-contained living quarters in any multi-unit building or facility".
(*3) *Ibid*., s. 15 & Table.
(*4) *Smoke-Free Ontario Act, 2017*, S.O. 2017, c. 26, Sch. 3.
(*5) *Ibid*, see esp. s. 17.
(*6) S.A. 2005, c. T-3.8.
(*7) 2017 ONCJ 478.
(*8) *Supra* note 1, s. 9(4).
(*9) Interestingly, by contrast, Alberta's legislation specifically defines "work vehicles" to include any vehicle that is leased. *Supra* note 6, s. 1(l).
(*10) *Supra* note 1, s. 14.
(*11) R.S.C. 1985, c. 15.
(*12) *Ibid.*, s. 2; *Non-smokers' Health Regulations*, S.O.R./90-21, s. 4(b).
(*13) *Ibid*., s. 11(2). If given a discretionary ticket, then the fines are $50 for a first offence, $75 for a second offence, and $100 for a third offence. See s. 16 & Schedule II of the *Regulations*, *ibid*.
(*14) *Ibid.*, s. 11(1).

7. Warrant Quashed for TSB's Abuse of Process and "Misguided Use of Powers": *Kingston and the Islands Boat Lines Ltd. et al. v. Transportation Safety Board of Canada*, 2018 ONSC 2083

Fernandes Hearn LLP was recently successful on an application to quash a search warrant obtained by the Transportation Safety Board of Canada (the "TSB") in the course of its investigation into a marine occurrence that took place in August 2017 on Lake Ontario, when a passenger vessel, the *Island Queen III*, touched bottom.

The TSB investigated the matter, and in so doing, first issued a summons under its governing statute, seeking certain information that the owners of the vessel had refused to provide voluntarily. The owner, Kingston and the Islands Boat Lines Ltd. ("KTI"), took the position that the requested information was outside the scope of the TSB's power to request, as it did not properly relate to the incident in question. KTI thus challenged the TSB's authority by way of judicial review proceedings in the Federal Court.

Surprisingly, the TSB, who was fully engaged in the judicial review proceeding, then decided to use another of its powers also authorized by its governing statute: it went ahead, despite the judicial review proceeding that was ongoing, and obtained a search warrant from a justice of the peace that authorized the TSB to seize the very same information that was the subject of the judicial review proceeding!

KTI then brought an urgent application in the Superior Court of Justice to quash the TSB's warrant. Justice Mew agreed with KTI's position and found that the TSB's conduct was an abuse of process. His Honour used his inherent jurisdiction to "put an end to the TSB's misguided use of its powers and the abuse of the courts' processes in the circumstances." His Honour ordered that the information obtained by the TSB cannot be used in any way, pending the Federal Court's decision in the judicial review proceeding.

Interested readers in the transportation and pipeline sectors should take note of this decision insofar as their own dealings with the TSB are concerned, particularly with respect to summonses and warrants issued or obtained by the TSB during the course of an investigation. If in doubt about the propriety of any such actions, the best course is to consult competent counsel.

The Facts

On August 8, 2017, there was an incident on Lake Ontario when the sightseeing passenger vessel *Island Queen III* touched the bottom of the lake without going aground while on a tour of the Thousand Islands. 274 passengers were on board at the time. The vessel took on some water in a stern compartment, but otherwise suffered no damage. No injuries or pollution were reported.

As required by law, the company that owns and operates the *Island Queen III*, KTI reported the incident to the TSB. In accordance with its statutory mandate, the TSB commenced an investigation.

The TSB has developed a classification policy for the purpose of classifying transportation occurrences. The marine occurrence in this case has been classified as a "Class 3" occurrence. In fact, the occurrence has been classified as an "A(4)(c)(ii)" incident, which means a marine occurrence resulting directly from the operation of the ship in which the ship makes unforeseen contact with the bottom without going aground.

The TSB's Investigation

The cause of the incident is still under investigation; however, KTI's position is that the incident was caused by an error in navigation.

In the course of its investigation, KTI provided the TSB's investigators with a plethora of information, including written statements from the crew aboard; navigation plans; particulars of KTI's evacuation procedures; onboard training; passenger briefings; lifejacket procedures; passenger count procedures; chart tracking;

onboard equipment; the Master's qualifications and also a statement from one passenger who claimed to have been "shocked" by the incident.

KTI, however, refused to provide the TSB's investigators with (a) names and contact information of all of the passengers on board the *Island Queen III* at the time of the occurrence; and (b) the crew list and related information about the crew for all of KTI's other vessels. KTI took the position that the TSB was seeking this information without a rationale for it, and also that this information related to KTI's operations generally rather than the A(4)(c)(ii) incident.

Indeed, KTI went further and took the position that the TSB is improperly using the incident as a pretext for conducting a much broader and intrusive audit of KTI's operations, and those of other operators in the Thousand Islands region.

The TSB Issues a Summons; KTI Applies for Judicial Review in the Federal Court

As a result of KTI's refusal to provide the above information voluntarily, the TSB issued a summons to Hugh MacKenzie, owner of KTI. TSB investigators are given the authority to issue summonses pursuant to section 19 of the *Canadian Transportation Accident Investigation and Safety Board Act*, S.C. 1989, c. 3 (the "TSB Act"). The TSB Act permits investigators to do so when they believe, on reasonable grounds, that a person is in possession of information relevant to an investigation.

Instead of complying with the summons, KTI filed an application in the Federal Court for judicial review of the TSB's conduct in issuing the summons. KTI took the position that the TSB's summons was unlawful, as it requests information that does not pertain to the A(4)(c)(ii) occurrence and is therefore not authorized by the TSB Act.

Ultimately, the hearing date was set for April 3, 2018.

The Warrant

On February 9, 2018 and again on March 2, 2018 (while the judicial review proceeding was still pending), the TSB (without notice to KTI) applied for and obtained a search warrant to enter onto KTI's premises and seize the very things that it had requested under the Summons. (*1)

The Warrant was executed on March 6, 2018. The result was that the TSB came into possession of the very information that was the subject of the Summons being the very same information that KTI contended that the TSB had no right to obtain in the first place.

Application to Quash the Warrant

KTI then brought an urgent application in the Ontario Superior Court of Justice, seeking an order quashing the Warrant.

KTI's position was that the TSB's conduct (in obtaining the Warrant while the judicial review proceeding was ongoing) amounted to an abuse of process and a breach of KTI's rights against unreasonable search and seizure under the *Canadian Charter of Rights and Freedoms*.

KTI also argued that the TSB had obtained the Warrant improperly. KTI argued that there was insufficient evidence placed before the justice of the peace who had issued the Warrant; accordingly, Her Worship had acted in excess of her authority in doing so.

For its part, the TSB argued that there was sufficient evidence before the justice of the peace to enable her to issue the Warrant. It also argued that where, as here, the TSB Act allowed investigators to apply for a warrant, there could be no abuse of process. The TSB characterized its conduct not as an "end run" around the Federal Court proceeding (as argued by KTI), but rather a "parallel track", which was expressly authorized by the TSB Act.

Justice Mew's Decision

Ultimately, Justice Mew agreed with KTI, and quashed the Warrant. His Honour ordered that all of the seized information and material shall not be used in any way until such time as the Federal Court's decision in the judicial review proceeding (including any appeal) has been determined.

Justice Mew confined his analysis to the issue of abuse of process, and did not comment on the underlying merits of whether or not the Summons was properly issued. His Honour left that issue to the Federal Court judge hearing the judicial review application.

Justice Mew recognized that the TSB Act does indeed provide for two different powers that can be used by TSB investigators to obtain information: 1) issuance of a summons; 2) application for a warrant. His Honour also recognized that these powers are not conferred in the alternative. Rather, it is open to the TSB to choose the method of proceeding.

Justice Mew observed, however, that TSB *did* choose its method of proceeding, by issuing the Summons. His Honour noted that KTI objected to the Summons and commenced the judicial review proceeding, and that the TSB joined issue in that proceeding. The TSB filed affidavit evidence, and its witness was cross-examined. Undertakings were given and complied with. A hearing date was obtained.

There was thus no reason for KTI to think that the TSB was not fully engaged with the judicial review proceeding and participating in good faith, according to Justice Mew.

His Honour found that the TSB may have had a right to seek a search warrant, but to exercise that option when the parties "had gone so far down the road in the judicial review application" was improper. His Honour commented:

> What should be made of the strategy of the TSB, a publicly funded agency, to "use a warrant to undermine… appropriately engaged judicial review proceedings… at the 11th hour"? Was it not foreseeable that obtaining a warrant would generate a response from the applicants that would result in additional expense being incurred? As it turns out in two different courts?

Justice Mew continued:

> Courts have a responsibility to deter and, if necessary prevent, misuse of the finite public resource that are our provincial and federal courts. It is a particular concern when a government agency acts to undermine a legal process that it would be expected to engage in in good faith and, in so doing, to generate the sort of flurry of time and resource-consuming legal manoeuvres that have occurred in the Federal Court and this court during the past two weeks.

Having regard to the circumstances, and in particular the timing of the TSB's request for a search warrant and its subsequent execution, Justice Mew concluded that there had been an abuse of process.

His Honour concluded that courts in Canada have an inherent jurisdiction to regulate the processes and proceedings in their courts to ensure the observance of the due process of law. He held that it was "appropriate to deploy that inherent jurisdiction to put to an end the TSB's misguided use of its powers and the abuse of the courts' processes."

The TSB has Moved for Leave to Appeal

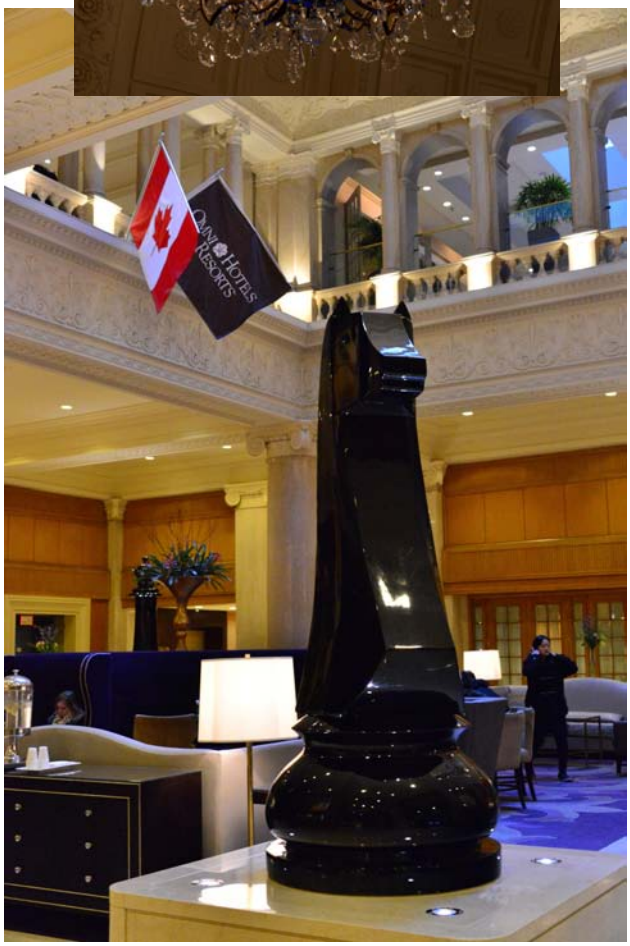
The TSB has since filed a motion with the Court of Appeal for Ontario, seeking leave to appeal Justice Mew's decision.

Stay tuned!

James Manson

Endnotes

1) The TSB Act also provides that an investigator can also apply to a justice of the peace for a search warrant, where the investigator believes "that there is, or may be, at or in any place, any thing relevant to the conduct of an investigation of a transportation occurrence".



8. Signed Waivers of Liability Under Occupier's Liability Act Not Voided by Consumer Protection Act

Schnarr v. Blue Mountain Resorts Limited, 2018 ONCA 313

The Ontario Court of Appeal heard the within appeals in respect of two actions at the same time. The plaintiffs were patrons of the defendant ski resorts and who had purchased ski tickets. In both cases, the plaintiffs executed the ski resorts' waivers of liability as a condition of their participation and were later injured on the ski resorts' premises. These signed waivers appeared to be valid under one piece of legislation, but invalid under another. Which legislation applied? Were the signed waivers valid, thereby protecting the ski resorts? Or were the signed waivers invalid, stripping the ski resorts of protection and thereby allowing the injured parties to proceed with their claims for damages?

One plaintiff, Mr. Schnarr, brought an application to determine an issue for trial. The parties agreed that there was a "consumer agreement" pursuant to the *Consumer Protection Act 2002* (*1) ("*CPA*") between Mr. Schnarr and the defendant, Blue Mountain Resorts Limited ("Blue Mountain"). On that basis, the application judge held that Blue Mountain's waiver was void given (1) s. 3(3) of the *Occupier's Liability Act* (*2) ("*OLA*") which permits an occupier to "restrict, modify or exclude" the duty imposed by the statute regardless of whether a claim is founded in contract or in tort; (2) the CPA's section 7(1) (which provides that substantive and procedural rights given under this Act apply despite any agreement or waiver to the contrary); and section 9(3)(which provides that any term or acknowledgement, whether part of the consumer agreement or not, that purports to negate or vary any implied condition or warranty under the *Sale of Goods Act* or any deemed condition or warranty under the *CPA* is void.) Her Honour held that Blue Mountain's waiver, insofar as it purported to waive liability in contract, was void

and severed it from the consumer agreement. Blue Mountain appealed.

Further, the plaintiff, Ms. Woodhouse, brought a similar application and the judge in that case held that Snow Valley's waiver was void in respect of both tort and contract claims. However, His Honour held that a court nevertheless had the equitable power to enforce a void waiver in a consumer agreement pursuant to s. 93(2) of the *CPA*. Snow Valley appealed.

The main issue before the Ontario Court of Appeal raised the question of whether the *CPA* or the *OLA* governs the relationship between the parties and whether ss. 7 and 9 of the *CPA* vitiate or void an otherwise valid waiver of liability under S. 3 of the *OLA*, where the party seeking to rely on the waiver is both a "supplier" under the *CPA* and an "occupier" under the *OLA.*

The Ontario Court of Appeal found that the subject sections of the *CPA* fundamentally undermined the purpose of the *OLA* and that the two statutes were irreconcilable and conflicted thereby undermining the purpose of s. 3 of the *OLA*. Therefore the specific provision of the *OLA* prevailed over the general provisions of the *CPA*.

The appeals were granted in both cases.

Facts

(a) *Schnarr v. Blue Mountain*

Mr. Schnarr purchased a 2010-2011 season ski pass from Blue Mountain's website on April 29, 2010. As part of his online transaction, Mr. Schnarr executed a Release of Liability Agreement, Waiver of Claims, an Assumption of Risk and Indemnity Agreement (the "Blue Mountain waiver"). On March 26, 2011, while skiing down a ski run, Mr. Schnarr allegedly collided with a piece of debris from a broken ski pole and he, then, lost control, struck a tree, and sustained injuries.

The Blue Mountain waiver contained a number of provisions purporting to shield Blue Mountain from certain liabilities and intending to preclude Mr. Schnarr from commencing action. One heading, in bolded font located in a yellow box with a red border, specifically instructed the person signing to "PLEASE READ CAREFULLY!" and stated that, by executing the document, the customer was waiving certain legal rights. The waiver specifically provided that, in consideration for Blue Mountain accepting his application for a season's pass, Mr. Schnarr agreed to waive any and all claims against the ski area operator and others, and also to release them from liability for any damages that he might suffer.

Mr. Schnarr, in his action, claimed that the season ski pass was a consumer transaction and alleged that Blue Mountain had breached the "reasonably acceptable quality" standard under s. 9(1) of the *CPA*. He also pleaded that he was relying on s. 7(1) of the *CPA* to vitiate the entirety of the Blue Mountain waiver without any additional or different facts to support his allegation that Blue Mountain failed to provide a reasonably acceptable quality of service.

(b) *Woodhouse v. Snow Valley*

On December 23, 2008, Ms. Woodhouse went skiing with her husband and grandson at Snow Valley. Ms. Woodhouse purchased a beginner ski package from Snow Valley, which included a lift ticket, equipment rental and a lesson. The lift ticket contained a Release of Liability and the plaintiff was required to execute a Rental Agreement and Release of Liability (the "Snow Valley waiver").

The Snow Valley waiver contained a section entitled "Waiver of Claims". The release on the lift ticket and the content of the Snow Valley waiver were not explained by Snow Valley to Ms. Woodhouse. The evidence did show that Ms. Woodhouse reviewed the Snow Valley waiver's wording on Snow Valley's website; but she was neither informed about nor was she aware of the *CPA* or any rights it afforded her prior to the date of loss.

While she was using a towrope, Ms. Woodhouse allegedly sustained injuries and she commenced action in negligence and the issues of the applicability of the CPA were raised.

Issues on Appeal

The Court of Appeal framed the issues thus:

(a) Does s. 9 of the *CPA* conflict with s. 3 of the *OLA* or can the impugned provisions be read harmoniously? ;

(b) If they conflict, how should each statute be interpreted and what effect should be given to the impugned provisions? ; and

(c) In any event, does s. 93(2) of the *CPA* allow a court to hold a consumer bound to a voided waiver under s.9 (3) of the *CPA*?

The Decision of the Court of Appeal

The Court of Appeal was unanimous in its holding that the *CPA* does not void or vitiate valid waivers of liability under the *OLA* where the waiver was contained in a consumer agreement relating to the use of the subject property. The defendant resorts' waivers, that were required to be signed by the plaintiffs prior to the use of the property, were upheld. The *CPA* precludes a supplier's requirement of a signed waiver of liability while the *OLA* permits the occupier to do so. The *CPA* and *OLA* were clearly in conflict.

The reasoning behind each act was examined. Essentially, the *OLA*'s requirements were drafted to encourage landowners to make their property available for recreational use by others by limiting their liability. Further the *OLA* has not been amended to include the higher obligations under the *CPA*, which legislation's purpose is to modernize consumer protection law. At paragraph 39, the Court stated that there was "nothing in the background to the passage of the *CPA*, or in the provisions of the *CPA* itself, that would suggest that it was intended to regulate duties of care of the type stipulated by the *OLA*, or that it was intended to regulate liability arising from the use of premises that are subject to the *OLA*."

The Court stated, at paragraph 49, that, on their face, the statutes take different approaches to waivers because they have very different legislative purposes. Waivers in the *OLA* are designed to shield occupiers. The rejection of waivers in the *CPA* is designed to shield consumers. A conflict in the application of both statutes arises when consumers clash with suppliers who are also occupiers.

At paragraph 50, the Court stated, "Simply put, under the *OLA*, an occupier can obtain a waiver of liability (within limits as defined by the common law) from any person coming onto their premises. However, that same occupier, if they are also a supplier under the *CPA*, cannot obtain an equivalent waiver. This despite the fact that the factual foundation for both tort and contract causes of action are the same. A plain reading of the amended statements of claim allows for no other conclusion." The result, the Court found, was an absurdity.

The Court went on to find that the *OLA* was intended to be exhaustive in relation to the liability of occupiers to entrants on their premises flowing from the maintenance or care of the premises. The very purpose of the *OLA* would be undermined if the *CPA* were allowed to reintroduce another novel contractual duty that subjected occupiers to an obligation to warrant that their premises are of a "reasonably acceptable quality".

Because "specific" overrules "general", the Court noted that the *OLA* must be reasonably seen as dealing directly the ability of occupiers of premises to obtain waivers of liability. In contrast, the *CPA* deals generally with all forms of consumer transactions. To the extent that an occupier engages with members of the public for the use of the occupier's premises in return for payment, and thus creates a consumer agreement, the provisions of the *CPA* do not apply to that agreement. At the same time, insofar as parties who are occupiers engage with

members of the public and create consumer transactions that do not relate to "persons entering on premises or the property brought on the premises by those persons" (*OLA*, s.2), then the *CPA* would still apply to those consumer transactions.

The Court went on to state that, essentially, it made no sense for the Legislature to amend the *OLA* to clarify the liability of occupiers, and to encourage them to open their property for use by members of the public, but to then have those amendments be of no force or effect because of the existence of the *CPA* and when, in fact, no reference is made to the *CPA*.

The Court was careful to note that this finding would not affect the *CPA*'s effectiveness but rather allowed for the commercial flexibility necessary to promote the goal of encouraging landowners to permit their premises to be used for recreational activities and also preserves, at paragraph 69, "a sphere of individual liberty and commercial flexibility".

Finally

The Court found that the Blue Mountain waiver was valid and bound Mr. Schnarr and that Ms. Woodhouse was bound by the valid release in her lift ticket and the Snow Valley waiver. They were bound regardless of whether their claims were in tort or for breach of warranty. The matters were sent back to the Superior Court to proceed in the regular course and in light of these findings. (*3)

This case is significant in that occupiers, such as ski resorts and other recreational or sporting industry suppliers, may now use waivers without the worry that such waivers are negatively affected by the *CPA*, which issue has recently been raised with more frequency.

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Endnotes
(*1) S.O. 2002, c. 30
(*2) R.S.O, 1990 as amended c. O.2 .
(*3) Given the findings that the waivers were binding, no doubt serious settlement discussions will be or were had.

DISCLAIMER & TERMS

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CONTEST

This month we are giving away a complimentary ticket for attendance at our annual seminar day - Wed. January 16th 2019 in Toronto - for the first individual to email us the name of exact location depicted in photograph on page 23. Email your answer to info@fernandeshearn.com with a subject line "Newsletter contest". First response with the correct answer wins.