THE NAVIGATOR

IN THIS ISSUE

Proposed Legislation for Wrecked, Abandoned or Hazardous Vessels

Derelict and abandoned vessels are a problem from coast to coast to coast. They pose safety and environmental concerns, they are a threat to navigation, and they are unsightly for local communities, who often want them removed but do not have the wherewithal to address them.

There is currently a legislative patchwork regarding such vessels. For example, the *Navigation Protection Act*, (*1) the *Canada Shipping Act, 2001*, (*2) and the *Canada Marine Act* (*3) all have relevant provisions generally addressing the vessel owner. However, these provisions are more remedial than proactive, they are generally discretionary, and they are often moot because the responsible owner might not be available or even readily discernable.

Late last year, in order to unify and bolster this patchwork, the federal government tabled Bill C-64 to create the *Wrecked, Abandoned or Hazardous Vessels Act*. (*4) This legislation will impose liability on the owners of derelict vessels and require insurance and other financial security. The proposed legislation has now been referred to study by a parliamentary committee, which has been holding hearings this month.

The proposed legislation, as it is currently conceived, contains nine major elements:

i) implementing the *Nairobi International Convention on the Removal of Wrecks, 2007*,

ii) requiring vessels of 300 gross tonnage and above, and unregistered vessels being towed, to have wreck removal insurance or other security,

iii) generally prohibiting vessel abandonment,

iv) prohibiting leaving dilapidated vessels in place for more than 60 days without authorization,

FIRM AND INDUSTRY NEWS

- **Gordon Hearn** and **Louis Amato-Gauci** have been recognized in the *2018 Lexpert® Guide to US/Canada Cross-border Lawyers in Canada.* Gordon is noted for his dispute resolution practice, with Louis being noted for his trade law practice.

- **Meet the Buyers Forum Marine Trade**, February 28 to March 3, 2018, Virginia.

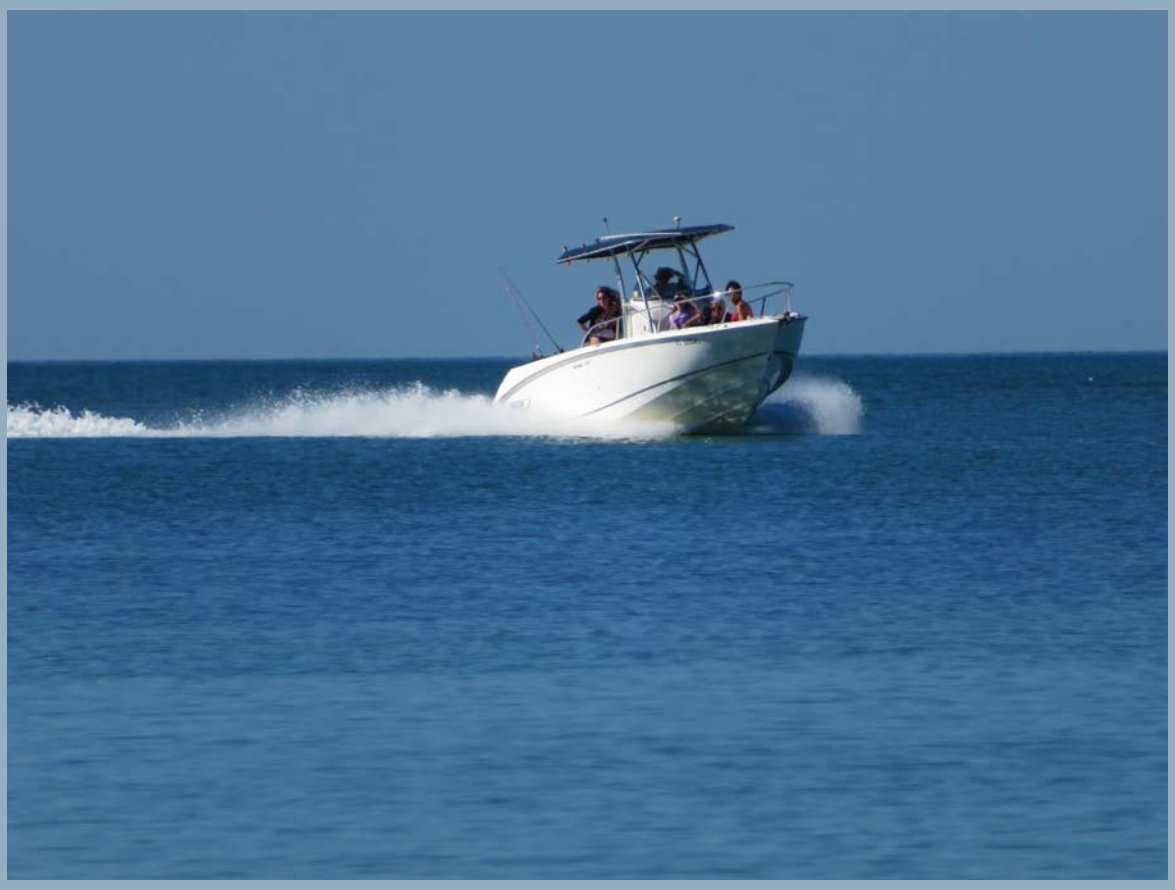
- **Tulane University Law School Admiralty Law Institute**, February 28 to March 2, 2018, New Orleans Louisiana.

- **International Warehouse Logistics Association Convention and Expo**, March 11-13, 2018, Tampa Florida.

- **CMA Shipping and Conference Expo and ABA TIPS Admiralty & Maritime Law Committee/WISTA Panel**, March 12-14, 2018, Stamford Connecticut.

- **Transportation and Logistics Council 44th Annual Conference**, March 19-21, 2018, Charleston South Carolina.

- **Transportation Intermediaries Association Conference**, April 8-11, Palm Desert California.



INVITATION TO MESA 2018 CONFERENCE

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

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

Registration: http://www.mesa2018.com

Wednesday, April 18, 2018

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

Thursday, April 19, 2018

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

Time	Joint Session - Vanity Fair Ballroom
8:30 to 8:45	**Welcome - Rui Fernandes**, Partner Fernandes Hearn LLP
8:45 to 9:45 am	**Arctic Exploration and Shipping / The Polar Code** Moderator: **Rui Fernandes**, Partner Fernandes Hearn LLP **Peter Pamel** – Partner Borden Ladner Gervais, (Canada) **Aldo Chircop** – Professor of Law; Canada Research Chair (Tier 1) in Maritime Law and Policy Dalhousie University (Canada)
9:45 to 11:15 am	**NAFTA Modernization and Impact on Energy and Trade** Moderator: **Louis Amato-Gauci**, Partner, Fernandes Hearn LLP Hon. **Lisa Raitt**, Member of Parliament for Milton, Deputy Leader of the Official Opposition (Canada) **Daniel Ujczo – Counsel, Dickinson Wright PLLC (USA)**
11:15 to 11:30 am	Coffee Break
11:30 am to 12:30 pm	**Catastrophes and Crisis Management** Moderator: **Kim Stoll** – Partner, Fernandes Hearn LLP **Mark Newcomb** – Counsel and VP Claims & Insurance, Zim Integrated Shipping Services Ltd. (USA) **Bruce Hennes**, Managing Partner, Hennes Communications (USA)

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

MESA 2018 CONFERENCE

Concurrent Session Time	Session A - Vanity Fair	Session B - Kensington
1:30 to 2:30 pm	**Application of Jurisdiction Clauses in Different Countries** **Shelley Chapelski** – Partner Norton Rose Fulbright (Canada) **Robert Reeb** – Shareholder Marwedel, Minichello & Reeb (USA) **Fabiana Simões Martins** – Partner, Siano & Martins (Brazil)	**LNG Contracts and Transportation** **Jason Hicks** – Associate, Bernard LLP (Canada)
2:30 to 3:30 pm	**Arrest of Vessels in Various Jurisdictions** **Susan Dorgan** – Special Lines Recovery Lead, Global Recovery, AIG (USA) **Jean-Francois Bilodeau** – Partner, Robinson Sheppard Sharpiro (Canada) **Jorge Luis Cordoba** – Partner, Cordoba & Associates (Colombia)	**Port Security and Liability**
3:30 to 4:30 pm	**Issues Arising from Project Cargo** **John Evans** – Senior Vice-President, Marine, Berkshire Hathaway (USA)	**Blockchain & Smart Contracts** **Craig Fuller** – CEO, TransRisk (USA)

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

Friday, April 20, 2018

10:00 to 10:45 am	**Autonomous Ships and Equipment** **Laura Hill** – Perkins Coie LLP (U.S.) **Roger Adamson** – Futurenautics (U.K.)	**Cyberterrorism in Transportation and Energy Projects** **Caroline Leprince** – Canadian Cyber Incident Response Centre – Public Safety Canada
10:45 to 11:00 am	Coffee	Coffee
11:00 to 11:45 am	**Offshore Exploration and Exploitation: Liability and Compensation Issues** **Lawrence Malizzi** – Senior Manager – O'Brien & Gere **Lucas Leite Marques** – Partner, Kincaid Mendes Vianna Advogados (Brazil)	**Pipeline Technologies, Development Issues and Litigation** **Joshua Jantzi**, Partner, Dentons Canada LLP **Kori Patrick**, Technical Manager, Research & Development, Enbridge, Edmonton Alberta
11:55 am to 12:45 pm	**Emerging Issues in Insurance in Marine and Energy** **Simon Swallow** – Chief Executive Shipowner's Club **Brian Murphy** – Vice President, Berkley Offshore	**Wind Turbine Litigation** **Sarah Powell** – Partner – Davies Ward Phillips & Vineberg LLP

12:45 pm to 2:00 pm Lunch – Ethics Presentation

MESA 2018

v) authorizing Transport Canada and the Ministry of Fisheries and Oceans to order the removal of vessels from federal property,

vi) authorizing the Ministry of Fisheries and Oceans to address hazards posed by vessels or wrecks,

vii) authorizing Transport Canada to take measures with respect to abandoned and dilapidated vessels, and to hold the owners liable,

viii) implementing a regulatory scheme, including administrative monetary penalties (AMPs) and other penalties, and

ix) authorizing the government to make regulations concerning the foregoing, for example to grant exemptions, to set fees, and to establish requirements for salvage operations.

The legislation would apply to all vessels, regardless of "flag" or size, in all Canadian waters, except for vessels that are less than 5.5 meters long and designed to be primarily human-powered or wind-powered. It would cover both commercial vessels and pleasure craft.

The various provisions would mostly be administered by Transport Canada and the Ministry of Fisheries and Oceans. The former would develop regulations and policies, address insurance obligations, supervise provisions concerning salvage and wreck receivers, enforce prohibited acts, and make removal orders on government property. The latter would take actions concerning small craft harbours and make removal orders on government property.

Enforcement officers would have broad inspection powers. Penalties would range from $5,000 per day for certain offences, up to $6,000,000 for other offences (subject to reduction based on evidence of hardship); and, in some cases, the penalty may also include imprisonment for up to three years. Nonetheless, the penalties are explicitly designed to encourage compliance rather than to punish.

In addition to the foregoing, the courts would have wide discretion to make orders to avoid the continuation or repetition of any offence, or to avoid future offences; to direct a respondent to pay the government's costs for any remedial or preventative actions; or to prohibit a person from operating a vessel or providing services related to the operation of a vessel.

The court's powers would also include a statutory injunction provision allowing it to issue an order without weighing the prejudice of that order to any respondent, which would otherwise be required under the common law. Rather, the court would only need to be satisfied that an offence was about to be committed or likely to be committed.

It is noteworthy that directors, officers, employees or anyone who "directed, authorized, assented to, acquiesced in or participated in" an offence could be held vicariously liable for any violation of the legislation. In fact, those held vicariously liable may be charged even if a corporation itself is not identified. However – except for knowingly causing a vessel to sink or become stranded – such persons would be entitled to make a "due diligence" defence. Similarly, in this regard, no charge would lie against a vessel *in rem* for a violation of the Act, if the person in charge of that vessel did "due diligence" to try to prevent the commission of the offence. Moreover, the legislation contains a provision for a level of whistleblower protection, which might serve to encourage early reporting of a potential violation.

In addition to the aforementioned penalties, the federal government would be enabled to recover debts, for example, by seizing and selling vessels. With respect to the non-payment of fees, the government may even apply for an order permitting the seizure and sale of a "sister

ship"; that is, another vessel under the same ownership as the offending vessel.

We will be monitoring this proposed legislation as it moves forward.

Alan S. Cofman

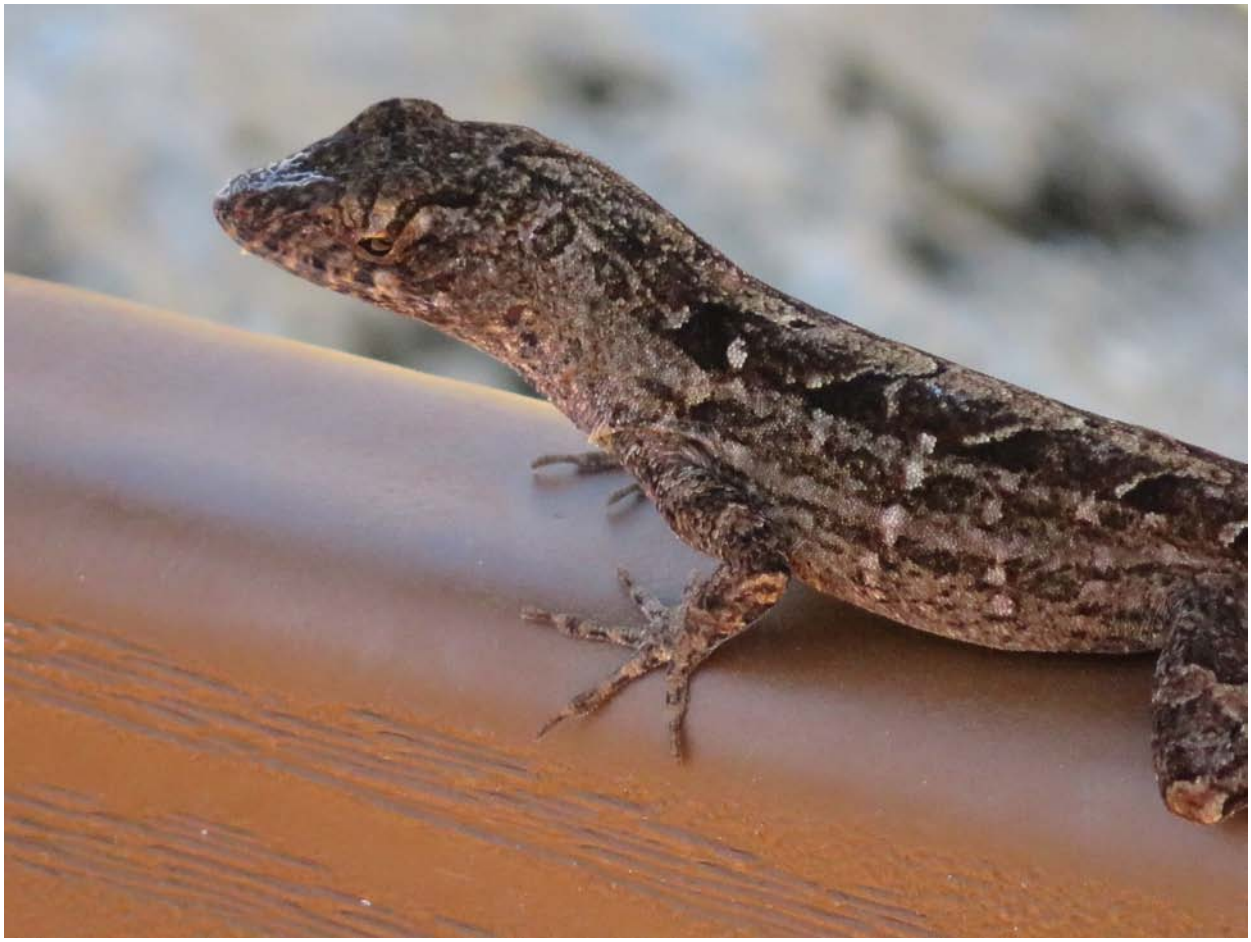
Endnotes

(*1) R.S.C. 1985, c. N-22

(*2) S.C. 2001, c. 26

(*3) S.C. 1998, c. 10

(*4) available online: << http://www.parl.ca/DocumentViewer/en/42-1/bill/C-64/first-reading >>



2. Doing Business in Canada – Part 5 (*1) - Canadian Immigration

Generally, all persons who are not Canadian citizens or permanent residents require a work permit to work in Canada.

Obtaining Permanent Residency

Immigration in Canada is the responsibility of the federal government; however, some provinces have entered into agreements with the federal government called Provincial Nominee Programs. Each program has its own "stream" (immigration programs that target certain groups) and criteria. There are also a number of programs available for immigration to Canada. Some of these include:

1. Family Sponsorship – Canadian residents living in Canada may sponsor closely related family relatives such as spouse, partner, children, parents, grandparents and others.

2. Immigrant Investors - International investors with the skills and abilities needed to contribute to the Canadian economy and able to integrate into Canadian society, may be eligible to apply for permanent residence under the Immigrant Investor Venture Capital (IIVC) Pilot Program.

3. Express Entry – Skilled workers that fall within certain economic programs including the Federal Skilled Worker Program, Federal Skilled Trades Program, Canadian Experience Class and a portion of the Provincial Nominee Program. Express Entry was designed with three main objectives in mind: 1) flexibility in selection and application management, 2) responsiveness to labour market and regional needs, and 3) speed in application processing.

4. Start-up Visa Program - Canada's Start-up Visa Program targets immigrant entrepreneurs with the skills and potential to build businesses in Canada that: (a) are innovative, (b) can create jobs for Canadians, and (c) can compete on a global scale.

5. Self-Employed Program - The Self-Employed Program seeks to bring people who will become self-employed in Canada. They must have either: a) relevant experience in cultural activities or athletics, and intend and be able to make a significant contribution to the cultural or athletic life of Canada, or (b) experience in managing a farm, and intend and be able to buy and manage a farm in Canada.

6. Caregivers – Options for Permanent Residence – Caregivers working with a temporary permit may apply for permanent residence based on Canadian work experience as a caregiver. The programs available require two years of work experience in Canada as a caregiver.

7. Provincial Nominee Programs - Most provinces and territories in Canada can nominate immigrants through the Provincial Nominee Program (PNP). These immigrants must have the skills, education and work experience to contribute to the economy of that province or territory, and must want to live there. Quebec does not have a PNP. It has its own program.

8. Quebec-Selected Skilled Workers - Quebec has a special agreement with the Government of Canada on immigration. The province has its own rules for choosing immigrants who will adapt well to living there.

9. Refugees – Technically refugees are not immigrants. An immigrant is a person who chooses to settle permanently in another country. Refugees are forced to flee their countries because of a well-founded fear of prosecution. They are not able to return home. The Canadian refugee system has two main parts: (a) the Refugee and Humanitarian Resettlement Program, for people who need protection from outside Canada, and (b) the In-Canada Asylum Program for people making refugee protection claims from within Canada.

Non-Immigrant or Temporary Entry Work Permits

There are two types of work permits: open work permits and employer-specific work permits. There are many categories under which a work permit can be obtained. Some of these include:

a) Intra-Company Transferee - These are persons in senior executive or managerial positions or positions requiring specialized knowledge regarding the employer's products, services or processes and procedures, who have been employees of a branch, subsidiary or parent of the company located outside of Canada for at least one year, and who seek to enter Canada to work at senior executive or managerial levels or in a position requiring specialized knowledge for a temporary period in a related Canadian company.

b) Trade Agreements - Certain international trade agreements to which Canada is a party, such as the North American Free Trade Agreement ("NAFTA"), the General Agreement on Trade in Services ("GATS") and the Canada-Chile Free Trade Agreement ("CCFTA"), facilitate the temporary entry of certain categories of workers who are nationals of one of the other member states. Three categories of work permits are generally granted under these agreements: (a) traders and investors; (b) professionals; and (c) intra-company transferees. For these persons no Service Canada Labour Market Impact Assessment is needed.

c) Job Offer – A Canadian individual or company may offer temporary work to a foreign national. In most cases a Labour Market Impact Assessment is required from Service Canada. Service Canada must be satisfied that qualified Canadians or permanent residents are not available in Canada to perform the work at issue (because the requisite specific recruiting/ advertising in Canada has been done) or, put another way, that the hiring of a foreign worker will not have a negative impact on the Canadian labour market.

d) Spousal Work Permit Program – A work permit permits a spouse and children to accompany a person authorized to work in Canada. In some cases, it may be possible for the spouse to obtain a work permit under the Spousal Work Permit Program. Generally, a job offer is required and a Labour Market Impact Assessment may also be required.

Visitors

Visitors to Canada may or may not require a travel visa for entry. The list of visa-exempt countries is long; however, for entry into Canada by air, even exempt individuals may require an Electronic Travel Authorization ("ETA"). American citizens and permit or visa holders do not require an ETA. Travelers do not need an ETA if entering by land or sea – for instance driving from the U.S. or coming by bus, train, or boat, including cruise ship.

Business Visitors

A business visitor may enter Canada without the need for a work permit. A business visitor is someone who comes to Canada for international business activities without directly entering the Canadian labour market. Examples of this include someone who comes to Canada: (a) to meet people from companies doing business with their country, (b) to observe site visits, and (c) because a Canadian company invited them for training in product use or sales or other business transaction functions. They do not need a work permit to come to Canada. Business visitors must prove that their main source of income and their main place of business are outside Canada. If the person is doing work for a Canadian company, the person is not considered a business visitor, and may need to get a work permit. For example, an employee sent by a foreign company to fulfill a contract with a Canadian company is not a business visitor.

Citizenship Criteria

Canada offers Canadian citizenship through naturalization. A permanent resident ("PR") may apply for citizenship if that person has PR status in Canada and has no unfilled conditions relating to the PR status. The resident must not: (a) be under review for immigration or fraud reasons, and (b) be under a removal order (to leave Canada). The PR must have been physically present in Canada for at least 1095 days during the five years before signing the citizenship application. The PR must have met the personal income tax filing obligations in three tax years that are fully or partially within the five years right before the date of application. The PR must show that he or she can speak and listen in one of two official languages (English or French). The PR must take a test to meet the knowledge requirement for citizenship. The PR needs to answer questions about Canada's:

a) values
b) history
c) symbols
d) institutions
e) rights, responsibilities and privileges of citizenship, such as voting in elections and obeying the law.

If the PR has committed a crime in or outside Canada, the PR may not be eligible to become a Canadian citizen for a period of time.

Marrying a Canadian does not give citizenship. The same steps as everyone else must be followed. There isn't a special process for spouses of Canadian citizens.

Rui M. Fernandes

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

Endnotes

(*1) This article is part 5 of 17 parts dedicated to a review of doing business in Canada. Subsequent articles will include Employment Laws, Directors and Officers, International Trade, Competition, Sale of Goods, Intellectual Property, Privacy, Real Property, Environmental Laws, Taxation, Insolvency, Litigation and ADR.

3. Hard Ball Strategy in Modest Case Attracts Huge Costs Award Against Defendants

Persampieri v Hobbs 2018 ONSC 368

The significant aspect of this case may have a wide-ranging effect and relates to the Offers to Settle and the resulting Costs Endorsement rendered after a two-week jury trial.

Offers to Settle by parties in an action have costs consequences. Such formal offers are meant to encourage the receiving party to seriously consider the other party's offer because costs of the action might be awarded against it depending on their treatment of such offer. To attract costs consequences, the offer must be open for acceptance up to the commencement of trial. A court does have discretion to vary the amount of costs that might be awarded to the other side. The standard levels of costs awarded under Rule 49 of the *Rules of Civil Procedure* allow for recovery of approximately 60% of costs expended on a "partial indemnity" basis and approximately 80%-90% at the higher "substantial indemnity" costs level. Disbursements must be reasonably incurred and are generally recoverable on a 100% basis by the party to whom costs are awarded.

For the defendant, should the plaintiff fail to do better at trial than the defendant's offer (but still be successful on liability at a minimum), it would recover its partial indemnity costs from the plaintiff from the date of the offer forward to trial. The plaintiff would recover partial indemnity costs to the date of the defendant's formal offer in that scenario.

For plaintiffs' offers, where the plaintiff does better at trial than the offer it served itself, costs are awarded against the unsuccessful defendant on a partial indemnity basis to the date of the plaintiff's offer and then on a substantial indemnity basis from the date of the offer to trial. (*1)

Facts

In *Persampieri v Hobbs,* 2018 ONSC 368*,* ("*Persampieri*"), an 84 year old plaintiff had been a passenger in a motor vehicle on February 11, 2009, when it was rear-ended by the defendants' motor vehicle. She, and other occupants of the plaintiffs' vehicle brought an action for compensation for personal injuries.

Counsel for the defendants and their insurer, Aviva Canada (the "Insurer"), advised shortly after the service of their statement of defence that there would be no payment of tort damages whatsoever and that, in fact, no Offers to Settle would be made to the plaintiff. Further, the defendants' counsel advised that the Insurer's internal system of assessing motor vehicle accident claims had concluded that not even $1.00 would be offered to her and that nothing could be done to alter this decision. The defence never wavered from this position and launched a vigorous defence or, colloquially, "played hardball" regarding what it considered to be a spurious claim. The various defence counsel handling the matter all made it clear that, unless the plaintiff agreed to a dismissal without costs, the matter would proceed to trial. The defendants' case alleged that the plaintiff would not meet the statutory threshold test under Section 267.5 (5) of the *Insurance Act* and took issue with her damages and credibility.

The matter proceeded to mandatory mediation in January of 2013. The defendants admitted liability at mediation and the plaintiff, in return, agreed to limit her claim against them for the policy limits remaining after the settlement of other passengers' claims. In September of 2013, the defendants offered to agree to a dismissal of the action and to not pursue costs against the plaintiff. The plaintiff did not accept this informal offer.

In November 2016, the defendants then served a formal Offer to Settle under Rule 49 to attract costs consequences if it was not accepted before trial thereby putting pressure on the plaintiff given the risk of a costs award against her. The defendants' offer stated that that they would consent to an order dismissing the action

without costs and this offer was open for acceptance to the commencement of trial. This gave little room for the plaintiff to seriously consider settling before trial.

The pretrial took place in February of 2017. In March of 2017, the plaintiff also made a Rule 49 offer that she would accept $20,000 plus partial indemnity costs and disbursements but waiving prejudgment interest. The trial was scheduled for May 29, 2017 before a jury.

To attract costs consequences, Offers to Settle must be served more than 7 days before trial. Two weeks before the trial, the plaintiff revoked her March 2017 offer and replaced it with a more modest formal Offer to Settle under Rule 49. The plaintiff's new offer was for $10,000 for damages net of the statutory deductible, plus costs on a partial indemnity basis and was open for acceptance to the commencement of trial. Neither party accepted the other's Rule 49 Offer to Settle and the matter proceeded to a 14-day trial.

Sanderson J. stated at paragraph 23,

> During the trial of the substantive issues, counsel for the Plaintiff predictably, and in my view reasonably, called extensive lay, medical and future cost of care evidence.

The jury awarded the Plaintiff: $40,000 for general damages, $25,000 for housekeeping and home maintenance, $2,000 for attendant care, and $500 for medical and rehabilitation expenses.

After application of statutory deductibles and deductions for accident benefits, the net Jury award was $20,414.83, calculated as follows: (a) $2,614.83 for general damages (net of the deductible); (b) $15,800 for housekeeping and home maintenance damages (net of housekeeping benefits received); (c) $0 for caregiving; (d) $2,000 for attendant care damages; (e) $0 for out of pocket expenses; (f) $0 for medical and rehabilitation benefits (net of medical rehabilitation benefits.)

The Costs Endorsement

This was clearly a modest case and the Court then had to consider the issue of the costs to be awarded to the plaintiff, given the ultimate result that the net jury award obtained by the plaintiff was more favourable to the plaintiff than her own offer made two weeks before trial of $10,000 plus partial indemnity costs. The plaintiff had "beaten" or done better than her offer. The defendants, then, should have accepted her offer and, because they did not, they faced costs consequences.

The Court, in considering the costs consequences, is to exercise its discretion (*2) in light of the specific facts and circumstances, and that, in so doing, the quantum of the costs awarded should be fair and reasonable. The parties made submissions in this regard.

The plaintiff pointed to the fact that the defendants understood the risks and possible consequences of proceeding to trial. The plaintiff had been reasonable and had offered modest sums in both of her Offers to Settle to resolve the matter and to avoid a lengthy, costly and unnecessary trial. These offers had been ignored. The jury had awarded more than double the plaintiff's offer. The defendants, of course, were entitled to adopt their defence strategy, but knew the risks of not accepting a modest offer of $10,000 and that costs would be awarded against them should the plaintiff beat this offer.

Sanderson J. agreed and declined to depart from the usual order on costs where the plaintiff did better than her own offer at trial. The Court granted costs on a partial indemnity scale to the date of her offer and then on a substantial indemnity scale to the end of trial.

On the quantum of costs, the Court was urged by the defence to consider the reasonableness and proportionality of the costs sought by the plaintiff's counsel in light of the jury's award. The

defence submitted that such a modest award should not attract disproportionate costs. The Court went on to examine various court awards and provided a good summary of the case law in this respect.

Sanderson J. noted the recent case of *Cobb v. Long Estate* [2017] OJ NO 4830 wherein the Court of Appeal stated, "On any proportional basis, the plaintiff's costs, even taking the defence offer out of the equation for the moment, could not have been expected to exceed approximately $200,000, given the results achieved."

Sanderson J. then stated at paragraph 66,

> In saying that on a net judgment of $22,136.30 a costs award on a partial indemnity scale should not have exceeded $200,000, the Court of Appeal appeared to have been providing guidance to the effect that a costs award on a partial indemnity scale should not exceed 9.035 times the amount of the net Judgment.

Sanderson J. then noted *Corbett v Odorico* 2016 ONSC 2961, where, after a six-week trial, the jury awarded $141,500 before deduction of statutory deductions and collateral benefits. The net award was $108,500. Neither party beat its own Offer to Settle in that case. The Plaintiff claimed $159,249.90 in fees on a partial indemnity basis and $242,521.50 in fees on a substantial indemnity basis. The trial judge rejected the submission of counsel for the defendant on proportionality and held that, to over emphasize proportionality, could result in under compensation of the plaintiffs and be an injustice by depriving them of otherwise appropriate and reasonable costs because of a modest recovery at trial and in the face of a $7.00 settlement offer from the Defendant. The trial judge awarded the plaintiffs costs as follows: fees of $159,249.90, HST of $20,702.48 and disbursements of $89,347. The Court in *Corbett* stated that presenting the plaintiff with an offer on the eve of trial that suggested she would either have to walk away from her case with no compensation or proceed to trial, did not encourage settlement as intended by Rule 49. Limiting the amount of costs payable in the face of such circumstances would only serve to encourage defendants' "hardball" strategies and deny access to justice. Rather, a costs award should have been readily foreseeable to the defendants and their counsel when they chose not to make a "genuine" Rule 49 offer, instead forcing the plaintiffs to proceed forward. The fact that the amount of costs exceeded the amount awarded for damages did not render such costs award inappropriate so long as the costs and disbursements were legitimately incurred and necessary for the plaintiff to prove the claim at trial.

Sanderson J. went on to state that the legislature intended to impose stiffer costs consequences on defendants where plaintiffs beat their own Offers to Settle than when defendants were successful in this regard. Further, reducing costs to the plaintiff by application of the proportionality principle serves to deprive the plaintiff of the greater costs protection intended by the legislature.

Sanderson J. stated,

> [96] The proportionality principle is generally invoked to foster access to justice.
>
> [97] However a strict application of the proportionality principle here could work against the achievement of that goal and could have the opposite effect.
>
> [98] Here, the party invoking the proportionality principle and thereby seeking to minimize the effects of a usual order for costs under Rule 49.01(1) is a sophisticated insurer that made a tactical decision to reject a Plaintiff's formal Rule 49 Offer to Settle understanding the risk in costs that it was taking by so doing.
>
> [99] Because it had framed its defence in the manner that it had, it knew that the resolution of the issues at a trial would involve the hearing of lengthy and costly

> evidence, including extensive medical evidence.

The Court concluded that attempting to unduly minimize the quantum of otherwise usual amounts of costs, including substantial indemnity costs, on the basis of proportionality, would be to sanction under compensation of Plaintiffs for costs legitimately incurred, to make many lawsuits uneconomic and could generally discourage Plaintiffs with modest claims, even if valid, from pursuing them. The benefits to insurers could be significant and wide ranging and such discouragement could seriously jeopardize overall access to justice.

At paragraph 103, Sanderson J. stated, "Insurers can, of course, pursue whatever strategy options they deem fit, but especially where such strategies may have wide ranging and adverse implications involving widespread denial of access to justice, the use such strategies should not be encouraged by the giving of cost breaks on foreseeable costs consequences."

The Court further stated there should be no sanction of the adoption of "unalterable" decision-making processes that would render meaningless and make a mockery of the pretrial resolution process, which is aimed at encouraging and effecting settlement to avoid unnecessary trials:

> [108] Total unwillingness to reassess/ discuss settlement based on full information and advice should not be sanctioned or encouraged in any way, [including by sheltering insurers from the foreseeable costs consequences of such a decision, should it fail to yield a result favourable to an insurer in a particular case].

The Court went on to fix costs finding that the Court of Appeal in *Cobb*, *supra*, indicated that partial indemnity costs should not exceed 9.035 times the net award and that substantial indemnity awards (almost complete indemnification of 90% of costs expended) should be 1.5 times higher than partial indemnity awards or 13.5525 times the net award.

The total of partial and substantial indemnity costs awarded was $62,715 plus $174,302.50 = $237,017.50.

The Jurisdiction Issue

The submissions of the defendants' counsel that the matter should have been commenced in Small Claims Court (jurisdiction of $25,000) or under Simplified Rules (jurisdiction $100,000) was not accepted. The plaintiff's decision to commence in Superior Court was, according to Sanderson J., reasonable given the issues (including deductibility of benefits and challenge to her credibility) and the evidence as required by the defence for the plaintiff to prove her damages case. The procedures of the Small Claims Court or those under Simplified Rules would not have been practicable since a full trial, with live evidence and full examination and cross-examination, was required.

Finally

This case is instructive in that a hard fought position may indeed be maintained at the insurer's discretion, but the risks associated with trial must also be borne. One who lives by the sword may very well die by the sword. If the risk is taken, there may be costs to be paid should the case go sideways. This costs award in *Persampieri* is likely a "cost of doing business" for the Insurer, given the likely success of other tough negotiating positions on spurious (and perhaps other) claims. This judgment was based in part on the "unalterable" decision-making process of the subject insurer, which attracted the Court's attention as discouraging legitimate though modest claims. It appears that the courts expect the defence attitude toward resolution of actions and offers to settle to have an overarching interest of encouraging settlement generally throughout the action. To have any sway with the courts on costs awards, defendants taking a tough defence stance forcing an ultimate trial will have to show that, otherwise, they had and made

genuine offers and had taken reasonable steps to encourage settlement throughout the action.

Kim E. Stoll
Follow Kim on LinkedIn and at url: linkedin.com/in/kim-stoll-transportationlaw and on Twitter @KimEStoll

Endnotes

(*1) Rule 49 offers are used in situations where the plaintiff is successful on liability and receives costs. Rule 57 offers are used where the defendant wins on liability and are at the discretion of the court.
(*2) under Section 131(1) of the *Courts of Justice Act*. The Court is to also consider the factors set out in Rule 57 and the case law.

4. *Adventurer Owner Ltd. v. Canada*: FCA Dismisses Appeal in Arctic Ship Grounding Case

The Federal Court of Appeal recently released its decision in *Adventurer Owner Ltd. v. Canada*, 2018 FCA 34. The case deals with the grounding of an expedition cruise ship, the *M/V Clipper Adventurer* ("*Clipper*") owned by the appellant, Adventurer Owner Ltd. ("Adventurer"). Fundamentally, the main issue was whether the federal Crown had satisfied its duty of care to mariners by issuing a certain type of public notice (called a "Notice to Shipping"), but not issuing another type of public notice (called a "Notice to Mariners"). Adventurer argued that the Crown had not discharged its duty of care; the Crown argued that it had, and that Adventurer's own negligence was the cause of the grounding.

At first instance, the Federal Court ruled in the Crown's favour. Adventurer appealed, as discussed below. Ultimately, the appeal was dismissed.

The Facts

This case was first reported in the Fernandes Hearn LLP newsletter's February 2017 edition.

On August 27, 2010, the *Clipper*, sailing at full speed, ran aground on a submerged and uncharted shoal in the Coronation Gulf, in the Canadian Arctic. The *Clipper* was in Nunavut, *en route* from Port Epworth to Kugluktuk, when she struck the shoal with such force that more than half her length became firmly embedded on the shoal.

Fortunately, none of the 128 passengers and 69 crew members was injured. Over the next few days, the passengers and non-essential crew were rescued by the Canadian Ice Breaker *Amundsen*.

The shoal itself had been discovered on September 13, 2007 by another icebreaker, the *Sir Wilfred Laurier*. Following its discovery, a public notice was issued to signal its existence. The notice is known as a "Notice to Shipping" – "NOTSHIP" for short. In this case, NOTSHIP A102/07 was ultimately issued, calling attention to the newly-discovered shoal.

Under the existing practice, NOTSHIPs are broadcast over the radio for 14 days, at which point they become written NOTSHIPs and are placed on the Canadian Coast Guard's website. They can also be obtained from the Canadian Coast Guard Centre. Moreover, written NOTSHIPs are distributed on a weekly basis to all those who make a request in that respect. The evidence in this case was that neither those on board the *Clipper* nor their managers had made such a request.

NOTSHIP A102/07 was to have been supplemented by another more permanent type of notice referred to as a "Notice to Mariners" – "NOTMAR" for short. NOTMARs are intended to be permanent updates to paper hydrographic charts.

Directly following the shoal's discovery, the hydrographer responsible for the discovery did in fact prepare a draft NOTMAR. It was approved by the government but ultimately was never issued.

Ultimately, the chart being used by the *Clipper* was never updated following the release of NOTSHIP A102/07. This was apparently because the *Clipper*'s chart agent only updated its charts from NOTMARs. Meanwhile, however, NOTSHIP A102/07 remained in force at the time of the incident and could have been located.

The Action

Essentially, the *Clipper* sued the federal Crown on the basis that its servants were negligent, among other things, in failing to issue a NOTMAR when the shoal was discovered.

For its part, the Crown countersued to recover its costs (in the amount of $445,361.64) associated with clean-up efforts in respect of some oil pollution occasioned by the incident. The lower court judge dismissed the main action. Justice Harrington found, essentially, that the Crown discharged its duty by issuing NOTSHIP A102/07. Harrington J. also concluded that those on board

the *Clipper* had been negligent in selecting a course through the Coronation Gulf without the benefit of NOTSHIPs, which they were legally required to consult (under section 7 of the *Charts and Nautical Publication Regulations*, 1995, S.O.R./95-149, and also section 7 of the *Collision Regulations*, C.R.C., c. 1416).

The Court further found that, even in the absence of direct knowledge arising from NOTSHIP A102/07, those on board the *Clipper* should have known there were uncharted shoals in the area and should have proceeded through the area at a much slower speed in the wake of a zodiac boat with a portable echo sounder.

Thus, the Court found that the Crown had discharged its duty of care, and that the accident was caused solely by those in charge of the navigation of the *Clipper*.

Justice Harrington also allowed the Crown's countersuit for costs associated with the oil pollution clean-up.

The Appeal

On appeal, Adventurer did not challenge the Court's finding that it had been negligent. Rather, it sought to challenge the Court's finding that the Crown had not been negligent. It argued that Justice Harrington erred in finding that the Crown's issuance of NOTSHIP A102/07 was sufficient to meet its duty of care in the circumstances. Essentially, Adventurer sought a 50% apportionment of liability to the Crown.

Adventurer also argued that Justice Harrington had awarded the Crown pre- and post-judgment interest at an incorrect rate of 5%. It argued on a technical reading of the *Marine Liability Act*, S.C. 2001, c. 6, that interest should only have been awarded at 1%.

The Federal Court of Appeal dismissed both grounds of appeal. Writing for the Court, Justice Gauthier addressed Adventurer's main argument, which was that, if the relevant NOTMAR had been issued, as it should have been, then the *Clipper*'s chart agent would have found out about the shoal, the chart would have been updated, and the incident would not have occurred.

Gauthier J. rejected this argument. Her Honour held, at paragraph 31:

> There is no legal principle that a failure to satisfy the level of services set by internal management as its target is determinative of the standard of care in all circumstances. It is clearly a relevant factor to consider in assessing the reasonableness of one's conduct, but it is the task of the trier of fact to determine the weight to be given to it after considering all the circumstances of the case.

Essentially, the Court held that this was not a case where no warning was given of the presence of the shoal. Rather, the NOTSHIP A102/07 was issued, and remained in force at the time of the incident.

The Court also noted that mariners have their own duty of care at common law. They must have on board, and make use of, up-to-date charts and nautical publications.

In short, the Court found there was ample evidence before Justice Harrington to permit His Honour to conclude that the issuance of NOTSHIP A102/07 fulfilled its duty to warn mariners of the presence of the shoal. Thus, the Court did not find that Justice Harrington made a palpable and overriding error justifying appellate intervention on this issue.

Similarly, the Court found that Justice Harrington did not err in awarding the Crown 5% interest. Adventurer's argument in favour of a lower rate involved a close and overly-technical reading of the *Marine Liability Act*. The Court did not accede to Adventurer's argument on this issue either.

In the result, the appeal was dismissed in its entirety.

James Manson

5. Workplace Harassment: Steps To Take Before A Complaint Is Made

You cannot read the newspaper or watch the news without hearing about another actor, musician, politician or senior executive who has been accused of sexual harassment. In today's climate, it is imperative that all workplaces take stock of their policies and procedures so as to ensure that they are properly equipped to respond appropriately to any allegation of workplace harassment, including sexual harassment.

Human rights laws across Canada prohibit workplace discrimination and harassment based on various protected grounds. In September 2016 Ontario amended the *Occupational Health and Safety Act* ("OHSA") to include sexual harassment as a form of workplace harassment, and to impose new obligations on employers. Similar amendments to the *Canada Labour Code* received first reading in November 2017.

Under the OHSA workplace harassment is defined as "engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome, or workplace sexual harassment". The Act defines workplace sexual harassment as "engaging in a course of vexatious comment or conduct against a worker in a workplace because of sex, sexual orientation, gender identity or gender expression, where the course of comment or conduct is known or ought reasonable to be known to be unwelcome, or making a sexual solicitation or advance where the person making the solicitation or advance is in a position to confer, grant or deny a benefit or advancement to the worker and the person knows or ought reasonable to know that the solicitation or advance is unwelcome".

The key changes under the OHSA require:

1. a written workplace harassment program and policy
2. identification of who will investigate claims if the alleged harasser is an employer or supervisor
3. review of the harassment program and policy at least once a year
4. investigation of incidents and complaints of workplace harassment; investigation must be "appropriate in the circumstances"
5. informing the complainant and the alleged harasser, if he/she is a worker, in writing of the results of the investigation and of any corrective action taken, or to be taken
6. the Ministry of Labour may order an employer to undertake an investigation by an impartial person, with certain experience or qualifications, at the employer's expense.

Whether you are a provincially or federally regulated employer, what are the practical steps you should take now, before you receive a complaint?

1. Review your workplace harassment policy and your procedure for filing a complaint, and for investigating incidents; the policy and the procedures must be in writing and be made available to all employees.
2. Train all employees on these workplace policies and procedures to ensure that everyone in the workplace knows what conduct is acceptable and what is not, how incidents and complaints will be investigated, and they also understand the consequences for a breach of the policy.
3. Be aware of what is happening in your workplace; the duty to investigate is triggered if the employer becomes aware of any incident of harassment, not just if an employee makes a complaint. Also note that the complaint does not need to be in writing to trigger an investigation.
4. Train someone in-house to conduct a workplace investigation. An investigator must ensure that all information obtained during the investigation is kept

confidential. An investigator must thoroughly interview both the complainant and the alleged harasser, and allow the alleged harasser to respond to the specific allegations. There may be additional relevant witnesses to interview. The investigator must take notes, prepare statements, and prepare a written report. Each of these steps requires specific skills and an awareness of confidentiality and impartiality. The failure to conduct a proper investigation can lead to significant consequences including an order by the Ministry of Labour that the employer hire a third party investigator.

5. Establish a relationship with an outside investigator; if the alleged harasser is the supervisor or manager of the complainant, or the in-house investigator is under the direct control of the alleged harasser, an outside investigator will be necessary to ensure a proper and impartial investigation. Consider having counsel retain the outside investigator in order to maintain privilege over the investigation and report, to the extent possible.
6. Conduct the investigation promptly; while there is no specific time limitation in the legislation, the Ministry of Labour suggests that it should be completed within 3 months of the incident or complaint.
7. Communicate, in writing, the results of the investigation, and corrective action taken or to be taken, to both the complainant and the alleged harasser.

Workplace harassment that is not adequately investigated can lead to allegations of constructive dismissal and human rights violations, which can result in expensive legal proceedings and costly damage awards. An employer's failure to discharge its statutory duty to ensure a safe workplace free from harassment can also lead to an investigation by the Ministry of Labour, the issuance of compliance orders, including an order to investigate using a third party investigator with specific qualifications and experience, and can also lead to charges for non-compliance, with significant fines.

Carole McAfee Wallace

6. Do Employers Have Obligations to Whistleblowers in Ontario?

The current state of whistleblower protection laws in Canada are often described as sparse in comparison to other countries. This article will focus on the legislation that is in effect in Ontario and how employers with operations in Ontario should be addressing requirements under that legislation. It will not discuss the protections in place with respect to public sector employees, such as government workers.

Complying with Ontario legislation involves ensuring that your organization's workplace policies include provisions that deal with anti-retaliation or reprisals against employees who speak up about issues within the workplace or concerns with regard to the management and financial accounting of the organization. These policies should also set out internal reporting procedures and confirm investigation and record keeping procedures with which the employer intends to comply. It is important for employers to have these internal procedures mapped out and available to employees for review, otherwise the employee might feel that the only options available to them would be to report concerns directly to law enforcement or the media.

Applicable Legislation

There are four key pieces of legislation that may affect organizations with operations in Ontario: *The Criminal Code of Canada*, the *Employment Standards Act*, *2000* (ON), the *Occupational Health and Safety Act* (ON), and the *Securities Act* (ON).

Criminal Code of Canada (the "Code")

Although a Federal statute, the *Code* applies to criminal acts that are committed in Ontario. Section 425.1 prohibits an employer or a person acting on its behalf from taking any disciplinary measure against, demoting, terminating, or otherwise adversely affecting the employment of an employee or threatening to do so with the intent to either (i) compel the employee to abstain from providing information to; or (ii) retaliate against the employee because the employee provided information to, law enforcement respecting an offence that the employee believes has been committed contrary to the Code or another federal or provincial statute, by the employer.

As a result of the language used in the above-noted section, protection under the *Code* is quite limited as it only applies where an employer's conduct constitutes a criminal offence or an otherwise unlawful act and the only extends to employees who report the conduct to law enforcement. This means that if an employee were to report misconduct internally and the conduct itself was not unlawful (perhaps it was just unethical), then the employee would not be protected under the *Code* from any reprisals from the employer.

However, where the conduct does meet the requirements of the *Code* and the employer has reported the conduct to law enforcement officials, punishment for an employer who engages in retaliatory behaviour towards the employee could include up to five years imprisonment and fines.

Employment Standards Act, *2000 ("ESA")*

Pursuant to section 74 of the ESA, an employer may not intimidate, dismiss or penalize an employee or threaten to do so where the employee has asked the employer to comply with the ESA, has made inquiries of his or her rights under the ESA, files a complaint with the Ministry of Labour, exercises or attempts to exercise a right under the ESA or gives information to an employment standards officer.

This anti-reprisal provision extends to persons acting on behalf of an employer, including human resources employees, directors, or officers of the corporation. If this provision is breached, the employer and such persons could be subject to a fine of not more than $50,000 or to imprisonment for a term of not more than 12 months or both (for an individual) or to a fine of

not more than $100,000 (for a corporation) under section 132. Furthermore, section 133 allows a court to order the employer to pay the employee any wages that are owing, reinstate the employee, and/or compensate the employee for any losses incurred as a result of the breach of the ESA.

In order to protect themselves from possible liability, organizations should set out clear standards regarding whistle blowing connected to the ESA that must be complied with by all persons acting on its behalf. This can be achieved by adding a framework to the organization's existing workplace policy manual outlining the steps that must be followed under these circumstances.

Occupational Health and Safety Act (the "OHSA")

Section 50 of the OHSA sets out the employer's obligation to protect whistleblowers. If a worker has acted in compliance with the OHSA, tried to ensure the enforcement of the OHSA, or has given evidence in a proceeding regarding OHSA enforcement or in an inquest under the *Coroners Act*, the employer may not engage in retaliatory action. This includes dismissing the worker, disciplining the worker, threatening to do either of the foregoing, imposing a penalty on the worker or intimidating or coercing the worker. If the employer breaches section 50, it could be subject under section 66 to a fine of not more than $100,000 or to imprisonment for a term of not more than 12 months, or to both (for an individual) or to a fine of up to $1,500,000.00 (for a corporation).

Complying with OHSA in this regard can be achieved by including additional provisions in the organization's existing occupational health and safety policy that focuses on internal reporting, anti-reprisal, investigation and record keeping. Note that where an employer breaches the OHSA or the ESA, details regarding their conviction can be published for the general public to access.

Securities Act (the "SA")

In July 2016, the SA was amended to add protection for whistleblowers, as a result of ongoing commentary that Canadian whistleblower protections needed to become more in line with the vast protection granted in the United States.

Section 121.5 now states that a company or a person acting on its behalf, may not take any reprisal measures against an employee of the company who has: (i) sought advice about providing information; (ii) expressed an intention to provide information; or (iii) provided information, regarding an act of the company or a person acting on its behalf that has occurred, is ongoing or is about to occur, where the employee thinks that the conduct is contrary to Ontario securities law. This protection extends to cases where the information is provided to the company, the person acting on its behalf, the Ontario Securities Commission ("OSC"), a recognized self-regulatory organization, or a law enforcement agency.

Under the SA, a "reprisal" includes "any measure taken against an employee that adversely affects his or her employment" and includes: (i) ending the employee's employment; (ii) demoting, disciplining or suspending the employee; (iii) imposing a penalty related to the employment of the employee; (iv) threatening to do any of the foregoing; and (v) intimidating or coercing an employee in relation to his or her employment. Where reprisal has occurred, the employee may be remedied by being reinstated and/or by being paid twice the amount of the remuneration that he or she would have been paid if the reprisal had not taken place.

The SA specifically states that the company may not try to protect itself from penalty under this section by trying to use a confidentiality agreement that restricts the employee from disclosing information to the OSC or assisting the OSC in an investigation.

Note that if a company, or a person acting on its behalf, commits an offence under the SA, as described in section 122, which includes

"contravening Ontario securities law", they may be found liable to a fine of not more than $5,000,000.00 or to imprisonment for a term of not more than five years less a day, or to both. Note that a director or officer of the company is subject to the same penalties, irrespective of whether the company is found guilty, if he or she authorized, permitted or acquiesced in the commission of an offence by the company.

In addition to the sections under the SA, the OSC has gone even further to promote the reporting of breaches of securities law and to protect whistleblowers through OSC Policy 15-601 (the "**Policy**"). The Policy sets out confidentiality requirements and establishes a framework for the payment of rewards to whistleblowers under certain circumstances where information provided to the OSC was meaningful and resulted in an "impactful breakthrough" of an investigation. The Policy also restates the anti-reprisal provisions of the SA.

Under the Policy's reward program, if the information provided by the whistle blower assisted in obtaining an order imposing monetary penalties of $1,000,000.00 or more, pursuant to section 18, the OSC will pay an eligible whistleblower an award of between 5% and 15% of the total monetary sanctions that were imposed or payments that were voluntarily made by the company.

Employee Fidelity

Many employee agreements will include confidentiality provisions or, depending on the level of employment, a person may owe a duty of fidelity to their employer. How does this affect a situation where the employee learns that its employer has acted unethically or unlawfully? In 2005, the Supreme Court of Canada stated that in most cases, the employee must first report the conduct internally, rather than to law enforcement, regulatory authorities, or to the media. (*1) In that case, the Court suggested that employers have robust and transparent whistleblower protection policies as this would assist with detecting wrongdoing by employees at an earlier stage, would protect the employee who engaged in the whistleblowing, and would provide justification to employers if they take disciplinary action against an employee who breached his or her duty of loyalty, the policy, and his or her confidentiality obligations. (*2) However, employers should keep in mind that there may be circumstances where it is more appropriate for the employee to go to law enforcement first, and this should be addressed in the employer's policy.

Key Items to Cover in Your Whistle Blower Protection Policy

A whistleblower policy may take several forms. It could be a stand-alone policy, or it might be added to existing policies; for example, an occupational health and safety policy. The most appropriate form will depend on each organization and their existing policy framework. An effective policy will include detailed provisions regarding internal reporting chains, confidentiality requirements, investigation procedures, investigative reports, preservation of evidence, recordkeeping, anti-reprisal, and remediation measures.

Jaclyne Reive

Twitter: @jaclyne_reive
Blog: https://jaclynereive.wordpress.com

Endnotes
(*1) ***Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 77*****,** 2005 SCC 70.
(*2) *Ibid*., at 25-26.

DISCLAIMER & TERMS

FERNANDES HEARN LLP

155 University Ave. Suite 700

Toronto ON M5H 3B7

416.203.9500 (Tel.) 416.203.9444 (Fax)

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 19. Email your answer to info@fernandeshearn.com with a subject line "Newsletter contest". First response with the correct answer wins.