THE NAVIGATOR

IN THIS ISSUE

SUPREME COURT OF CANADA REVERSES ONTARIO COURT OF APPEAL: REASONABLE FORESEEABILITY IN FOCUS

The Ontario Court of Appeal's decision in *J.J. et al v. C.C., James Chadwick Rankin, carrying on business as Rankin's Garage & Sales et al* (*1) was reviewed in the March 2018 edition of the *Navigator*. At that time, it was noted that leave had been sought by the defendant garage to appeal to Canada's highest court.

As noted earlier, a duty of care is required to be established before a court can consider whether there is liability on a defendant for negligence if damages accrue. There must be a duty or obligation upon one person to another that is then breached causing damages to flow.

The Court of Appeal had found that, where keys were left inside an unlocked vehicle located at a repair garage, it was reasonably foreseeable that minors might steal it. Further, the Court of Appeal found that it was then common sense that minors might injure themselves while operating that stolen vehicle.

The Supreme Court of Canada has now weighed in and, significantly, has reversed the Court of Appeal's decision. (*2)

Facts

Rankin's Garage was a business that sold and serviced cars and trucks but its property was not secured in any way. A 16-year old stole a car from Rankin's Garage, drove and crashed it, leaving his 15-year passenger catastrophically injured. The two boys had entered onto the Rankin Garage property and stolen an unlocked vehicle, with the keys that had been left in the ashtray.

The Trial Decision

The 15-year-old passenger sued the 16-year-old driver and Rankin's Garage as well as the adult who had allegedly been supervising (but who had gone to bed). The 15 year old plaintiff admitted that he was partially responsible for his own injuries.

FIRM AND INDUSTRY NEWS

- **Posidonia 2018** (The International Shipping Exhibition) will be taking place in Athens, Greece, on June 4-8, 2018.

- **Kim Stoll** will be attending the **DRI Women's Caucus Luncheon** in Toronto on June 5, 2018

- **Louis Amato-Gauci** will be moderating a panel discussion at the **Association of Transportation Law Professionals, 89th Annual Meeting** in Georgetown, Washington, DC June 10-12, 2018. The discussion will focus on the NAFTA modernization negotiations, and features Colin Bird, Minister-Counsellor (Economic and Trade Policy), Embassy of Canada, international trade lawyer Evelyn Suarez (Washington DC), and transport and logistics lawyer Carlos Sesma, Jr. (Mexico City).

- **Kim Stoll** will be attending the **Toronto Transportation Club's Ladies' Lunch** in Toronto on June 12, 2018.

- **The Association of Average Adjusters of United States and Canada** will be holding its Spring Luncheon in New York City, on June 13, 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*.

- **The Canadian Maritime Law Association** will be holding its General Annual Meeting and Seminar in Vancouver on June 14-15, 2018. **Rui Fernandes** is nominated to continue his role as Vice President Central Region.

- **Rui Fernandes** and **Kim Stoll** will be attending an advanced mediation program at **Pepperdine University** in Los Angeles, June 20-23, 2018.

- **Gordon Hearn** will be attending the mid-year meeting of the **Conference of Freight Counsel** being held in Alexandria, Virginia June 24 -25.

- **Gordon Hearn** has been appointed to the **Transportation Lawyers Association's** Executive Committee as a voting past-president.

- **Kim Stoll** has been appointed to the Education Committee for the **Transportation Lawyers Association's** 2019 Chicago Regional Seminar to be held January 24-25, 2019.

The trial judge instructed the jury that Rankin's Garage owed J.J. a duty of care, "because people who [are] entrusted with the possession of motor vehicles must assure themselves that the youth in their community are not able to take possession of such dangerous objects." The jury found Rankin's Garage to be 37% negligent because the car in its possession was left unlocked with the keys inside the car when it knew or ought to have known of the potential risk of theft, given the poor security on the premises. (*3)

The Court of Appeal's Decision

The main issue on appeal was whether Rankin's Garage owed a duty of care to J.J. who had helped to steal the subject vehicle from its premises. The Court of Appeal noted at paragraphs 28 and 29, that the finding that a duty of care is owed to a third party is relatively rare in cases arising out of the theft of a vehicle. In most cases, a duty of care to a third party had not been found because injury to the third party was not a reasonably foreseeable consequence of the theft.

The Court of Appeal found the facts to be "a novel case" and ultimately found that there was ample evidence to support the conclusion of foreseeability given the poor security practices at Rankin's Garage as well as the history of theft in the area. There was a clear risk of theft because cars were left unlocked with the keys in them.

At paragraph 53, the Court also concluded, "it was foreseeable that minors might take a car from Rankin's Garage that was made easily available to them. …It is a matter of common sense that minors might harm themselves in joyriding, especially if they are impaired by alcohol or drugs." The Court considered whether the business should have had minors in mind when considering security measures at Rankin's Garage. The Court found proximity between the two parties.

Further, the securing of the vehicles was not an onerous obligation and involved only locking the vehicles and storing the keys. The Court found it fair and just to impose a duty of care in these circumstances. Rankin's Garage could easily have met the standard of care simply by ensuring that all of its vehicles were locked and that their keys were protected.

The Supreme Court of Canada's Decision

Canada's highest court does not typically weigh in on just any case. This case, however, deals with the existence of a newly articulated duty of care where there appears to have been little close or direct relationship or proximity between the parties. With the Supreme Court of Canada's review, the law on the establishment of a duty of care is now clearer.

The Supreme Court of Canada found that a court must consider more than just whether the theft of the vehicle was foreseeable but rather there must be a further connection between the theft and the negligent operation of the stolen vehicle. It was not just a matter of "common sense". The Court found that Rankin Garage's practices relating to the storage of the vehicles and the history of thefts in the area did not suggest that the stolen vehicle would be used in a negligent manner. The test of "reasonable foreseeability" was an objective one and was not to be affected by the benefit of hindsight. The Court went on to find that it would be extending tort liability too far to conclude that a foreseeable risk of injury automatically flows from a risk of theft. The Court stated that there must be specific circumstances that made it reasonably foreseeable that a stolen car would be driven in an unsafe manner such that personal injury would occur.

The Supreme Court of Canada found that reasonable foreseeability was therefore not established. It also found that there was no positive duty on repair garages to generally prevent harm nor did the fact that the plaintiff was a minor automatically create a positive duty to act.

The Court stated at paragraphs 25 and 26,

> The facts of this case highlight the importance of framing the question of whether harm is foreseeable with sufficient analytical rigour to connect the failure to take care to the type of harm caused to persons in the plaintiff's situation. Here, the claim is brought by an individual who was physically injured following the theft of the car from Rankin's Garage. The foreseeability question must therefore be framed in a way that links the impugned act (leaving the vehicle unsecured) to the harm suffered by the plaintiff (physical injury).
>
> Thus, in this context, it is not enough to determine simply whether the theft of the vehicle was reasonably foreseeable. The claim is not brought by the owner of the car for the loss of the property interest in the car; if that were the case, a risk of theft in general would suffice. Characterizing the nature of the risk-taking as the risk of theft does not illuminate why the impugned act is wrongful in this case since creating a risk of theft would not necessarily expose the plaintiff to a risk of physical injury. Instead, further evidence is needed to create a connection between the theft and the unsafe operation of the stolen vehicle. The proper question to be asked in this context is whether the type of harm suffered — personal injury — was reasonably foreseeable to someone in the position of the defendant when considering the security of the vehicles stored at the garage

Finally

The Court's majority decision was rendered by 7 of the 9 judges.

The two dissenting judges agreed with Ontario Court of Appeal and that: (1) the garage owed a duty of care; (2) that the required foreseeability was subject to a low threshold and should be satisfied when injury resulted; and (3) that there was no requirement for further evidence to show that the harm was connected to the theft of the vehicle.

However, the Supreme Court of Canada majority's decision has highlighted the role of reasonable foreseeability when considering whether there is a duty of care between the parties. The decision confirms that it is not the event that occurred that must be reasonably foreseeable (in this case, the theft of the vehicle) but, to find liability, the defendant must have reasonably been able to foresee that there was ultimately a risk of injury to the plaintiff. The benefit of hindsight or the fact that an injury actually did occur should not be considered.

At paragraph 66, Karakatsanis J. for the majority stated:

> Under tort law, liability is only imposed when a defendant breaches a duty of care. The *Anns*/*Cooper* test ensures that a duty of care will only be recognized when it is fair and just to do so. As such, it is necessary to approach each step in the test with analytical rigour. While common sense can play a useful role in assessing reasonable foreseeability, it is not enough, on its own, to ground the recognition of a new duty of care in this case. Aside from evidence that could establish a risk of theft in general, there was nothing else to connect the risk of theft of the car to the risk of someone being physically injured. For example, Rankin's Garage had been in operation for many years and no evidence was presented to suggest that there was ever a risk of theft by minors at any point in its history.

Going forward, those with care, custody and/or control of vehicles should review their policies and procedures to ensure that all appropriate security measures are taken for such vehicles to

avoid similar results and any possible connection to harm that might result from a theft. The Court noted at paragraph 67:

> This is not to say that a duty of care will never exist when a car is stolen from a commercial establishment and involved in an accident. Another plaintiff may establish that circumstances were such that the business ought to have foreseen the risk of personal injury.

Kim E. Stoll

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Endnotes

(*1) 2016 ONCA 718

(*2) 2018 SCC 19

(*3) The adult was found 30% negligent for providing alcohol to minors and failed in her supervision. The 16-year-old driver was found 23% negligent and the plaintiff was 10% negligent for getting into a vehicle with a driver who he knew was unlicensed and impaired.

2. Doing Business in Canada – Part 8 (*1) – International Trade

Canada is a member of the World Trade Organization ("WTO") and a signatory to a number of free trade agreements including the following:

• North American Free Trade Agreement (Entered into force 1 January 1994, includes Canada, U.S. and Mexico)
• Canada-Israel Free Trade Agreement (Entered into force 1 January 1997, modernization ongoing)
• Canada-Chile Free Trade Agreement (Entered into force 5 July 1997)
• Canada-Costa Rica Free Trade Agreement (Entered into force 1 November 2002, modernization ongoing)
• Canada-European Free Trade Association Free Trade Agreement (Iceland, Norway, Switzerland and Liechtenstein; entered into force 1 July 2009)
• Canada-Peru Free Trade Agreement (Entered into force 1 August 2009)
• Canada-Colombia Free Trade Agreement (Signed 21 November 2008, entered into force 15 August 2011; Canada's ratification of this FTA had been dependent upon Colombia's ratification of the "Agreement Concerning Annual Reports on Human Rights and Free Trade Between Canada and the Republic of Colombia" signed on 27 May 2010)
• Canada-Jordan Free Trade Agreement (Signed on 28 June 2009, entered into force 1 October 2012)
• Canada-Panama Free Trade Agreement (Signed on 14 May 2010, entered into force 1 April 2013)
• Canada-Honduras Free Trade Agreement (Signed on 5 November 2013, entered into force on 1 October 2014)
• Canada-South Korea Free Trade Agreement (Signed on 11 March 2014, entered into force 1 January 2015)
• Canada-Ukraine Free Trade Agreement (CUFTA) (signed 11 July 2016, entered into force on 1 August 2017)
• Comprehensive Economic and Trade Agreement (concluded 5 August 2014, signed 30 October 2016, provisionally applied on 21 September 2017, European Union)

Foreign investors establishing a business in Canada should be cognizant of Canada's obligations and the remedies available to them under the agreements, particularly where they are facing discriminatory or otherwise harmful government measures.

WTO Participation

The WTO is an intergovernmental organization that regulates international trade. The WTO officially commenced on 1 January 1995 under the Marrakesh Agreement, signed by 124 nations on 15 April 1994, replacing the General Agreement on Tariffs and Trade ("GATT"), which commenced in 1948. It is the largest international economic organization in the world. The WTO deals with regulation of trade in goods, services and intellectual property between participating countries by providing a framework for negotiating trade agreements and a dispute resolution process aimed at enforcing participants' adherence to WTO agreements, which are signed by representatives of member governments. Canada has been a participant since 1948 in the GATT. Since 1995 Canada has subject to the dispute resolution of the WTO. As a result of WTO cases brought against Canada by other countries, Canada has had to terminate or amend off ending measures in numerous sectors, including automotive products, magazine publishing, pharmaceuticals, dairy products, green energy, and aircraft. Canada has also been successful in the numerous cases it has brought under the mechanism.

North American Free Trade Agreement

The North American Free Trade Agreement among Canada, the United States, and Mexico came into force on January 1, 1994, creating the largest free-trade region in the world. By 2014, the NAFTA area GDP was

estimated to be over C$20 trillion with a market encompassing 474 million people. The Agreement is currently being negotiated. There is a risk that it may be scrapped by the Trump administration.

Comprehensive Economic and Trade Agreement

On October 30, 2016, Canada and the European Union signed the final legal text of the EU-Canada Comprehensive Economic and Trade Agreement ("CETA").

CETA liberalizes trade and investment rules applicable to economic relations between the two regions. CETA addresses trade in services (including financial services), movement of professionals, government procurement (including at the provincial and municipal levels), technical barriers to trade, investment protection and arbitration, and intellectual property protections (including for geographical indications and pharmaceuticals).

Where a dispute arises under CETA, the parties have agreed to establish a permanent tribunal that utilizes the Investor –State Dispute Settlement arbitration mechanism. The tribunal is to be comprised of 15 members: five nationals of Canada, five nationals of EU members states, and five nationals of third countries — each of which must be a jurist in their home jurisdiction. Cases will be heard by panels of three tribunal members (one for each party's state, and the third selected from a list of neutral members).

The Trans-Pacific Partnership Agreement

The Trans-Pacific Partnership Agreement ("TPP") is a trade agreement among 12 Pacific Rim countries, representing a market of 792 million people and a combined GDP of C$28.1 trillion, which is approximately 40% of the global economy. The agreement promises to provide significantly enhanced access to Pacific markets for Canadian business. The agreement was finalized, and was signed by ministers of Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam on February 4, 2016. It did come into force. The United States withdrew from the TPP in January 2017. This withdrawal meant that the agreement could not enter into force. The remaining nations negotiated a new trade agreement called Comprehensive and Progressive Agreement for Trans-Pacific Partnership, which incorporates most of the provisions of the TPP.

Foreign Investment Promotion and Protection Agreements

A foreign investment promotion and protection agreement (FIPA) is an agreement to promote foreign investing. Canada has 36 bilateral investment treaties in force, seven concluded but not yet in force and has another 9 in negotiation.

These treaties govern a range of foreign investment issues, including the treatment of foreign investors and their investments, performance requirements, expropriation and compensation,
and government-to-government dispute settlement mechanisms. They also contain private investor-state dispute settlement mechanisms that enable foreign investors to sue host governments, including Canada, for damages arising out of breaches of their investment treaty obligations.

Economic Sanctions

A number of nations, entities and individuals are subject to Canadian trade embargoes under the United Nations Act, the Special Economic Measures Act, the Freezing Assets of Corrupt Foreign Officials Act, and the Criminal Code of Canada. Canadian sanctions of varying scope apply to activities involving many countries or regions. These include Burma (Myanmar), Central African Republic, Côte d'Ivoire, the Crimea Region of Ukraine, the Democratic Republic of the Congo, Egypt, Eritrea, Guinea Bissau, Iran, Iraq, Lebanon, Liberia, Libya, North Korea, Pakistan, Russia, Somalia, South Sudan,

Sudan, Syria, Tunisia, Ukraine, Yemen, and Zimbabwe.

Canada also maintains very significant prohibitions on dealings with listed "designated persons," terrorist organizations and individuals associated with such groups.

Export and Import Controls on Goods and Technology

Canada, for reasons of both domestic policy and international treaty commitments, maintains controls on imports, exports and transfers of certain goods and technology and, in the case of exports, their destination country. The federal *Export and Import Permits Act* (EIPA) controls these goods through the establishment of three lists: The Import Control List (ICL), the Export Control List (ECL) and the Area Control List (ACL).

Anti-Dumping

Canada has legislation and regulations in place to control the import of dumped and subsidized goods if such imports cause injury to domestic production. To investigate alleged dumping or subsidization, the federal *Special Import Measures Act* provides for two types of investigations conducted by two separate agencies.

The Canada Border Services Agency investigates whether dumping or subsidization has taken place. The Canadian International Trade Tribunal ("CITT') deals with the injury aspects of investigations arising under Canada's anti-dumping, safeguards and countervailing duty laws. The CITT determines whether the complaining domestic industry has been materially injured by dumped or subsidized imports. As required by Canada's WTO obligations, dumping (or subsidization) and injury to domestic producers must both be found before definitive duties can be imposed.

Controlled Goods Program

The Canadian government has established the *Controlled Goods Program* under the authority of the *Defence Production Act*. This program is a domestic industrial security regime for certain goods and technology that have a military application, including but not limited to items subject to the U.S. *International Traffic in Arms Regulations*. It provides for defence trade controls to regulate and control the examination, possession and transfer in Canada of controlled goods and technology.

Anti-Corruption Legislation

The federal *Corruption of Foreign Public Officials Act* ("CFPOA") makes it a criminal offence for any person to offer or pay a bribe to a foreign public official. The CFPOA prohibits Canadians from directly or indirectly (i.e., through an agent or other representative) giving, offering, or agreeing to give or offer a loan, reward, advantage, or benefit of any kind to a foreign public official in order to obtain or retain an advantage in the course of business.

Duties and Taxes on the Importation of Goods

Canada's *Customs Act* imposes a general duty to report the importation of all goods into Canada. It also regulates the valuation of goods for duty purposes on importation to Canada, the basis for any exemptions from the payment of duty, and procedures for contesting the federal customs authorities' classification of goods for customs purposes. The *Customs Tariff* sets out the various rates of duty that apply to the importation of goods into Canada. Goods are subject to varying rates of duties depending upon the type of commodity and its country of origin and any agreements in place.

Other Provisions Relating to the Importation of Goods

There are a number of legislative regimes governing the importation of goods into Canada. These include the following:

Certain imported goods are required to be marked with their country of origin.

Pre-packaged products (i.e., products packaged in a container in such a manner that it is ordinarily sold to or used or purchased by a consumer without being re-packaged) imported into Canada are also subject to requirements under the federal *Consumers Packaging and Labelling Act*.

Consumer textile articles are subject to the requirements of the federal *Textile Labelling Act*.

There are also significant legislative requirements relating to the importation of foods, agricultural commodities, aquatic commodities, and agricultural inputs. They are all subject to the inspection procedures of the Canadian Food Inspection Agency.

Counterfeit trade-mark or pirated copyright goods may be detained upon importation into Canada. In accordance with the *Copyright Act* and the *Trade-marks Act*, the owner of a valid Canadian copyright or a Canadian trade-mark holder registered with the Canadian Intellectual Property Office is eligible to file a Request for Assistance application with the CBSA. This procedure provides an important enforcement tool for intellectual property rights.

Certain goods are prohibited from being imported into Canada. These include: materials deemed to be obscene under the *Criminal Code of Canada*; base or counterfeit coins; certain used or second-hand aircraft; goods produced wholly or in part by prison labour; used mattresses; any goods in association with which there is used any description that is false in a material respect as to their geographical origin; certain used motor vehicles; certain parts of wild birds; certain hazardous products; white phosphorous matches; certain animals and birds; materials that constitute hate propaganda; and certain prohibited weapons and firearms.

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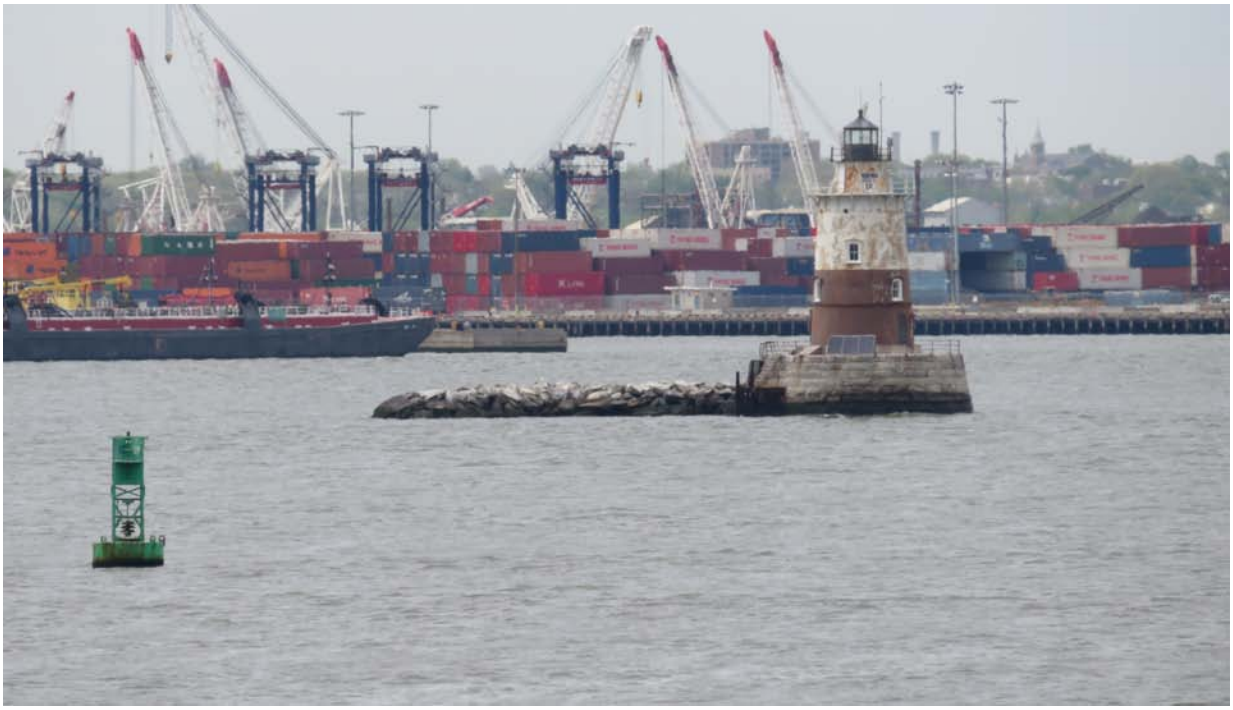
Endnotes
(*1) This article is part 8 of 17 parts dedicated to a review of doing business in Canada. Subsequent articles will include Competition, Sale of Goods, Intellectual Property, Privacy, Real Property, Environmental Laws, Taxation, Insolvency, Litigation and ADR.



3. Breach of Confidence and the Protection of Trade Secrets

Trade secrets are an important and often very valuable asset in a business environment that can provide a critical edge over competitors. What is perhaps underappreciated is the sheer variety of things that may qualify as trade secrets, or, more broadly, as confidential information, for which legal protection is available. Confidential information, which includes, but is not limited to, trade secrets, applies to a far broader category of information and know-how than those for which other forms of legal protection, such as copyright, trademark, and patent, are available. Furthermore, while it is always helpful, it is not necessary that the information in question be subject to a non-disclosure or confidentiality agreement in order to obtain a remedy from the courts where such information has been disclosed or shared without permission.

Trade secrets form a subset of those things that can be characterized as confidential information. It is important to recognize that in Canada trade secrets do not constitute a separate legal category for which there is statutory protection, as is available in certain other jurisdictions. In the eyes of the law, they are simply lumped in with all other forms of confidential business information. (*1) That certain information is confidential can also be implied in contractual relationships, particularly between employer and employee. In such cases it is further presumed that the duty to keep information confidential continues even after the contractual relationship has ended. However, legal protection of confidential information does not require a pre-existing contractual relationship. For instance, legal protection extends to information that is confidential in nature, and thus not to be shared without permission, where exchanged between parties engaged in negotiations towards a partnership or joint venture, even if no agreement is ever finally reached.

Of course, to obtain relief from the courts for damages resulting from the disclosure of confidential information, one first has to establish that the information was genuinely confidential. This will not necessarily be obvious from the nature of the material itself. Often the one confiding the information will need to demonstrate that there was a definite intention that the person receiving the information was receiving it for a limited purpose, and was expressly informed that it was not to be shared. Other indications of the confidential nature of business information considered by the courts will be things such as the efforts made to keep the information a secret, the money spent in developing a particular technical or business "know-how", and the value of the information may have to competitors.

The classic expression of the legal test for establishing a breach of confidence remains the one affirmed in the landmark decision of the Supreme Court of Canada in *LAC Minerals Ltd. v. International Corona Resources Ltd*. (*2) Simply put, for a finding of breach of confidence, three elements must be satisfied

1. the material used must have been confidential;
2. it must have been communicated in confidence; and
3. the material was misused by the party to whom it was communicated.

Also, just as the range of material that can be subject to legal protection due to confidentiality is very broad, such that it need not even be something in which one can have a genuine property right, so too is the range of remedies that the courts have power to apply to correct any injustice resulting from its breach. For instance, a party that is the victim of a breach of confidence can seek relief not only against the party that broke faith, but even against other third parties who acquired it subsequent to its first disclosure. A remedy against the latter usually will require that the third party have some knowledge of the confidential nature of the information, but they may be exposed to a claim even if they did not know that there had been a breach of confidence when they first came to the

information, but only later became aware of the fact. (*3)

One powerful remedy available to a party aggrieved by a breach of confidence is an injunction. As an equitable remedy, the court has wide discretion both as to whether to apply it, as well as having great flexibility in determining both its scope and duration. Injunctions will often be sought to prevent any future damage from accruing as a result of the improper transfer and misuse of critical business information. In order to obtain an injunction, a claimant will have to demonstrate the following: (1) a serious issue to be tried; (2) that it will suffer irreparable harm if the injunction is not granted; and (3) that the balance of convenience between the parties favours the granting of the injunction (often meaning that the harm to the defendant if the order is granted does not exceed that which the claimant will suffer if it is not). Injunctions are extraordinary remedies. Seeking an injunction where there has been a breach of confidence can furthermore be a useful signal to the court, as it may indicate the high value of the information and the critical role it plays in a plaintiff's business. Conversely, failure to seek an injunction, or to seek it promptly, may have the opposite effect.

Apart from restrictive orders in the nature of an injunction, the party harmed by the disclosure of confidential information will be entitled to recover its damages from the party that misused the information. The goal of the courts in such cases is to put the plaintiff in a position as if the confidential information had never been released. Calculating these damages will lead it to consider such issues as the loss in value of the information itself once it has been more broadly disseminated, as well as loss of any profit that would have been made by the claimant had the disclosure not been made. The court may also order an accounting of profits made by the wrongdoer. (*4) The latter remedy is less commonly awarded, however. One is more likely to see it in cases where the party that breached confidence also owed a fiduciary duty to the victim (in the case of employees, such duties are typically only owed by very senior management or other key employees).

Given the broad remedial powers of the courts in cases of breach of confidence, one may well ask

why it would be necessary to take the further step of protecting one's trade secrets and other confidential information through non-disclosure or confidentiality agreements. The latter are nevertheless an important tool in guarding against the harm that can result from the wrongful use of a company's confidential information. For one, establishing what information is confidential can sometimes be less obvious than it sounds. As noted earlier, that the information passing between parties can be implied in an employer-employee relationship. However, omission of a confidentiality clause from an employment contract may in some cases create the impression that the company had no confidential information to protect, or that the business did not value it particularly highly. The presence of such a clause, by contrast, helps to put special emphasis on the importance and value that an employer attaches to its confidential business information. Further, as employees come and go, spelling out their obligations regarding confidential business information after they leave can help to avoid problems in the future.

In short, while the absence of a confidentiality agreement will not necessarily leave a party that has suffered from the unauthorized disclosure of valuable confidential information without a remedy, the usefulness of non-disclosure agreement is still clear. Although a claim for breach of confidence is not restricted to a contractual setting, a well-drawn agreement can help establish both that a breach occurred and that the harm suffered was significant.

Oleg M. Roslak

Endnotes

(*1) *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142 at para. 47 [*Cadbury Schweppes*].

(*2) [1989] 2 S.C.R. 574 [*LAC Minerals*].

(*3) *Cadbury Schweppes* at para. 19.

(*4) *LAC Minerals* at para. 67.

4. So, You Bought a Business. Now What? Transitioning a Business to New Owners

You've spent considerable time and money negotiating the purchase of a business, and the deal has finally closed. One of the next steps is to make sure that the business keeps running smoothly and remains a going concern, to ensure that your investment will be worthwhile in the long run. A smooth transition from the sellers to the new owners can be difficult. For that reason, many buyers will ask the sellers to stay with the business and assist for some time, to ease the transition. This can range from a couple of months to even a year or more, depending on the nature and complexity of the business, and the relationship between the parties.

Most buyers recognize that sellers often have a lot of knowledge that might not be readily available in writing, and so they may choose to make use of the seller's knowledge, skills, experience and advice. The seller can also assist by making the transition smoother and much less abrupt for employees, customers and suppliers, if he or she remains involved for a period of time after the deal closes.

If, as buyer, you choose to request that the seller stay on to assist, you'll need to consider whether that will be in the capacity of an employee or consultant. While both roles might be similar in practicality, they have different advantages and disadvantages from a legal standpoint of a buyer should be aware of these before taking the seller on to assist with the business post-closing.

Employment Agreements

Employment agreements are most useful where the seller is going to stay on for a significant period of time. We often see this as part of succession planning in family owned businesses where the child takes over the business from the parent, but the parent stays on for a few more years to help out. The parent receives the benefits associated with being an employee (e.g. participation in benefit plans and pension plans, vehicle allowance, access to workers compensation benefits if they are injured, etc.) for the duration of his or her employment.

However, it may be less advantageous when buyers and sellers are at arm's length. If the seller is retained as an employee, the buyer will be required to collect and remit certain funds to various authorities (e.g. income taxes, Canada pension plan contributions, workers compensation premiums) and should allow the seller to participate in any of the business' benefit and pension plans. The seller will also be entitled to the statutory rights of employees, such as job protected leaves of absence, hours of work, notice of termination or pay in lieu thereof, and severance pay.

In the case of a share purchase, the buyer must be cautious when the seller also occupied a role as an employee of the business before it was sold, as the buyer must recognize the seller's past years of service to ensure that it is not unilaterally changing the terms of the seller's employment, without any form of consideration being provided, so as to create grounds for the seller to use as evidence of constructive dismissal, should the relationship sour post-closing. Buyers should be especially cautious where the seller was an employee prior to closing but did not have a written employment agreement in place. In that case, the buyer should ask the seller for written confirmation, prior to closing, of the key terms of his or her employment by the target company so that the buyer can ensure that those terms are being continued post-closing. The buyer can then use that pre-closing document prepared by the seller and provided to it as evidence that the terms of the new written employment agreement did not deviate from the former verbal terms of employment. This issue is of less of a concern in the context of an asset purchase because the employer is changing. Where the employee is provided with a new offer of employment, the terms of employment can be different than they were with the seller because the new offer in this context constitutes good consideration, regardless of whether the employee's terms of employment change materially or stay mostly the same. (*1)

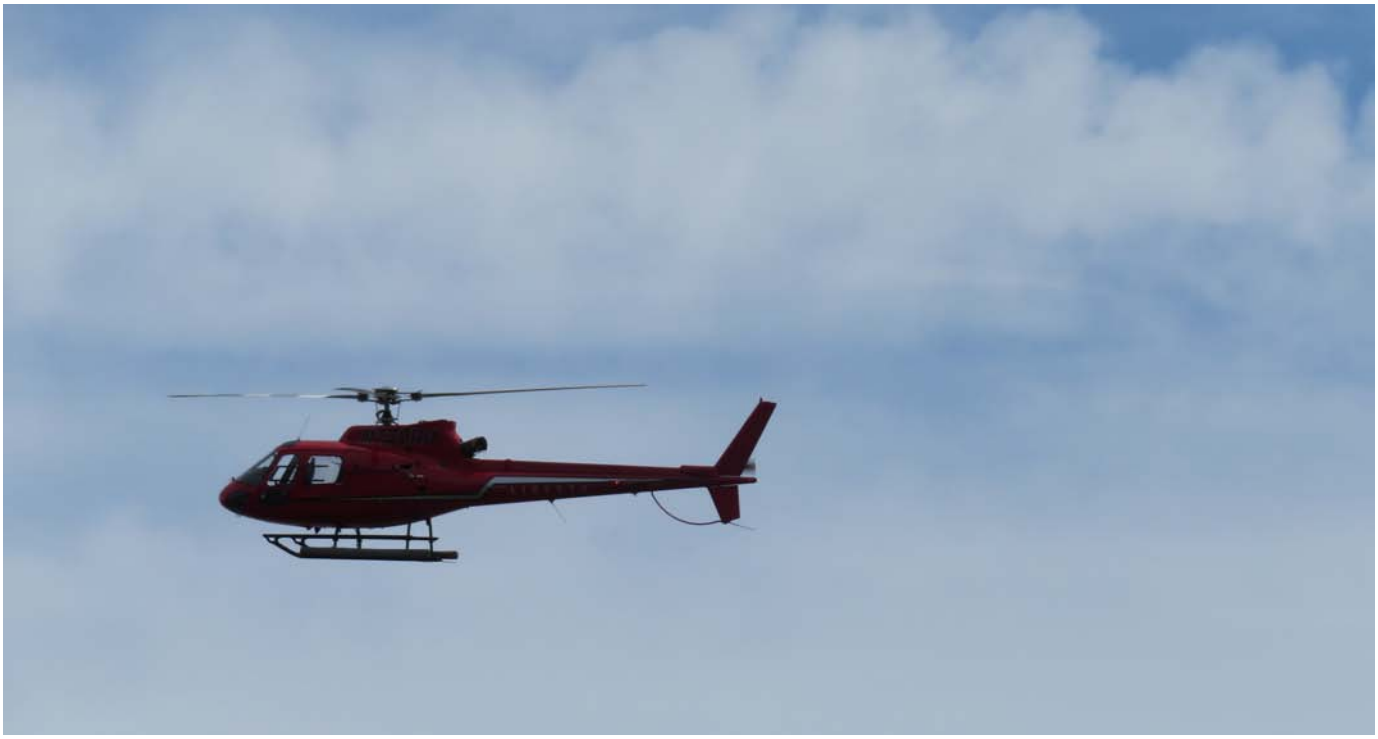
Consultancy Agreements

In cases where buyers and sellers are at arm's length, the most common option used is to have the seller be engaged by the buyer or the target business post-closing as a consultant. Because the seller would be an independent contractor, this option provides much more flexibility because of the parties' rights of "freedom of contract", meaning that they can agree to whatever terms best suit their intended goals, without worrying about employment standards laws. By having a consultancy agreement in place, both parties are entering into the contract as sophisticated business persons, on equal footing; whereas, the courts will often characterize the relationship between employer and employee as one of inequality, and, therefore, are more likely to rule in favour of the employee when all other things are equal.

The parties have the freedom to set up the length of the contract and termination provisions as they see fit. They can include an option to renew the contract if things are going well at the end of the term, and they can include an option to terminate the contract early in case the business relationship starts to deteriorate. The parties can dictate exactly what role the seller will play and what obligations the parties have to each other. Everything can be tailored to meet the needs of both parties.

When retaining the seller as a consultant, the buyer also has the benefit of not being required to remit funds to governmental authorities in the way it would if the seller was an employee (e.g. income taxes, Canada pension plan contributions, workers compensation premiums); nor does the buyer need to worry about employment standards statutory or common law obligations regarding leaves of absence, notice periods, or termination pay. Additionally, the seller has the benefit of being able to incorporate a company to enter into the contract on his or her behalf, thereby creating a separate legal entity to carry any risk exposure. The seller can also claim many of his or her expenses as business expenses for income tax purposes, which may be advantageous for him or her.

However, when retaining the seller as a consultant, the buyer should be aware that simply calling the seller a "consultant" or "independent contractor" may not be enough to



actually make it so. The true nature of the relationship between the parties must meet the legal test for independent contractor status. For example, if the buyer has a large amount of control over the seller in his or her consultant position, the seller may be deemed to be an employee or a "dependent" contractor in reality, and, as a result, the buyer may not be entitled to many of the benefits described above.

Final Considerations

Whether it will be more advantageous for the buyer to bring the seller on post-closing as an employee or a consultant will depend on the circumstances in each case and the goals of the parties.

The buyer should be cautious in each case and ensure that the agreement is well drafted so as to avoid common pitfalls. For example, the buyer should ensure that the consultancy agreement is drafted to avoid a classification of the seller as a "dependent contractor", which would entitle him or her to many of the benefits associated with being an employee, especially in the eyes of the court. Similarly, the buyer should ensure that an employment agreement is also well drafted, so that it is not offside any employment standards laws and to ensure that it follows the same terms and conditions as the seller's previous employment contract with the target company, where applicable. Finally, the buyer may wish to consider, in either case, adding restrictive covenants to the agreement to ensure that the seller will be prohibited from leaving and starting a new business that could compete with the buyer and solicit its customers. These covenants must be properly drafted to ensure that they will be enforceable at law, by not overreaching in terms of the nature of the business, the scope of customers and the geographic area from which the seller is restricted from engaging in or with, and the length of time during which the restriction would remain in place.

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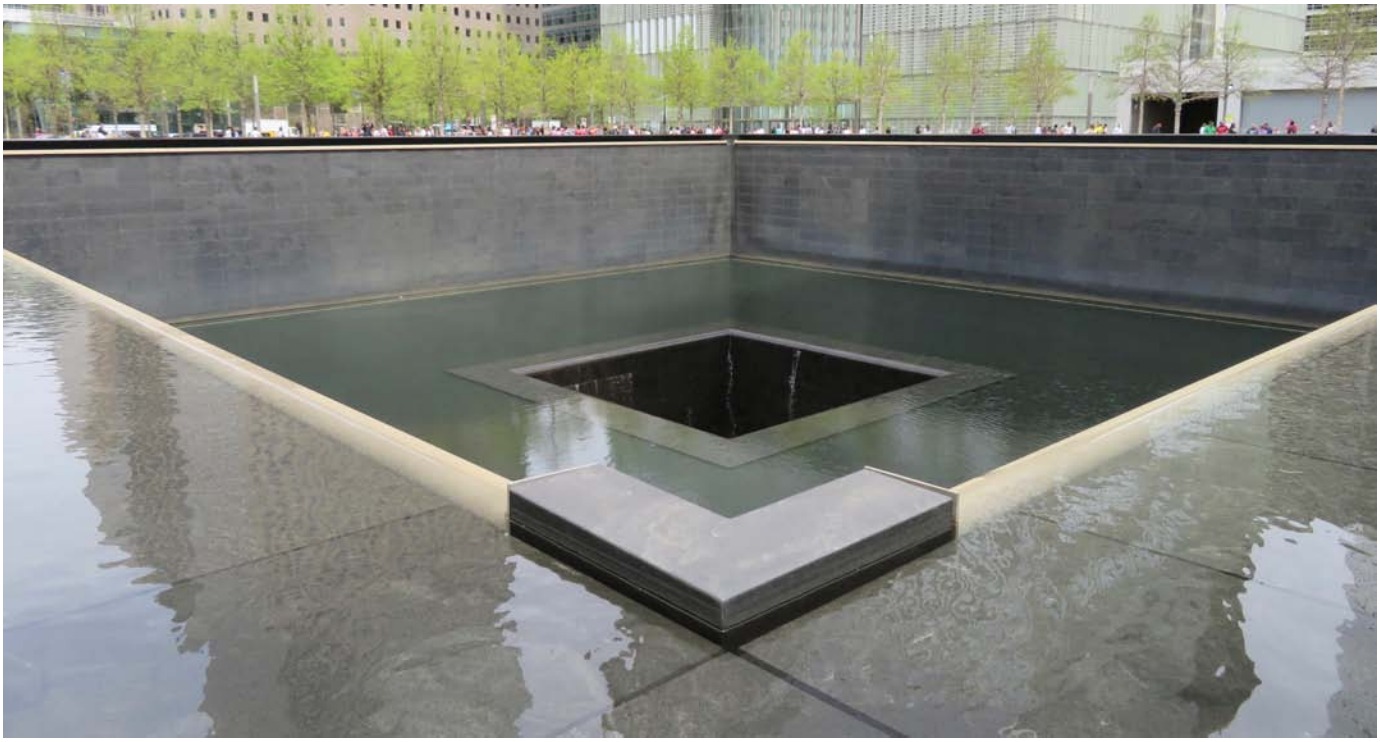
Endnotes:
(*1) See for example, *Krishnamoorthy v Olympus Canada Inc.,* 2017 ONCA 873.



5. *Mega International Commercial Bank (Canada) v. Yung*: Court of Appeal Clarifies Discoverability Principles Apply to Contribution Claims

The Ontario Court of Appeal has just released its decision in *Mega International Commercial Bank (Canada) v. Yung*, 2018 ONCA 429 ("*Yung")*, in which it has clarified that the "discoverability" principle applies to claims for contribution and indemnity. A claim for contribution and indemnity usually arises when a defendant is served with a Statement of Claim; that defendant usually has two years in which to commence a Third Party Claim against another party. Some lower courts (including the motions judge in this case) have taken this rule to be an "absolute" limitation period that cannot be extended.

However, in *Yung*, the Court confirmed that the two-year limitation deadline for commencing a claim for contribution and indemnity yields to the "discoverability" principle, meaning that the limitation deadline will only start to run where the defendant knows (or ought to know) of the facts giving rise to his claim and that it would be appropriate to commence a proceeding in order to seek redress.

This case is significant in that it provides clarity on this important issue.

The Facts

The facts can be briefly stated, as they do not have much bearing on the legal issues in this case. Basically, a married but separated couple (Mr. Yung and Ms. Lai) were involved in a business venture that ultimately failed. They had arranged for various rounds of financing with respect to the business venture, which included giving personal guarantees in order to secure funding (i.e. a mortgage) from Mega International Commercial Bank (the "Bank").

Ultimately, the mortgage fell into arrears and the Bank exercised its powers of sale. The mortgaged property was sold, leaving a shortfall in the amount of just over $1.1 million owing to the Bank.

Throughout the course of the business venture and the various rounds of financing, both Mr. Yung and Ms. Lai had been represented by corporate counsel, Mr. Sun.

The Bank then sued Mr. Yung and Ms. Lai for the shortfall, relying on their personal guarantees. The Statement of Claim was issued on December 20, 2010. It was then served on Ms. Lai shortly thereafter. However, Mr. Yung was never served with the Statement of Claim as he had been living in Hong Kong for years, apart from his wife.

Ms. Lai ultimately secured legal counsel of her own, and filed a Statement of Defence. She did not commence a Third Party Claim against Mr. Sun.

Two years later, the Bank obtained an order allowing it to serve Mr. Yung through substituted means (i.e. not by serving him personally, but by other means). In this case, the Court ordered service by publishing notice of the Bank's claim against Mr. Yung in the Toronto Star and in English in a Hong Kong newspaper, and by letter to Mr. Yung care of Ms. Lai.

Mr. Yung denied having had notice of the claim, despite these alternative measures.

Based on the substituted service ordered by the Court, in 2015 the Court then awarded default judgment to the Bank in the full amount of $1.1 million against Mr. Yung.

Upon learning of the default judgment against him, Mr. Yung then spoke to litigation counsel, who advised him that he may have a claim against his former corporate lawyer, Mr. Sun. This was apparently the first time that anyone had advised Mr. Yung or Ms. Lai that they may have a claim against Mr. Sun.

Mr. Yung then managed to get his default judgment set aside. Then, on September 1, 2015, both he and Ms. Lai issued third party claims

against Mr. Sun and his firm, seeking contribution and indemnity.

The state of affairs, with operative dates, therefore can be summarized as follows:

> December 20, 2010 - Bank commences action against Yung and Lai
>
> January 6, 2011 - Bank serves Lai with Statement of Claim; Yung is not served
>
> March 2, 2011 - Lai files Statement of Defence
>
> April 2013 - Court orders substituted service of Statement of Claim on Yung
>
> 2015 - Bank obtains default judgment against Yung; Yung learns of default judgment and obtains order setting it aside; Yung and Lai learn of their potential claim against Sun
>
> September 1, 2015 - Yung and Lai issue a Third Party Claim against Sun

The Motion

Mr. Sun and his firm then brought a motion for summary judgment, seeking a dismissal of the Third Party Claim. Mr. Sun argued that the claims against him were filed beyond the two-year limitation deadline imposed in Ontario by the *Limitations Act, 2002*.

The motions judge agreed with Mr. Sun's position. He held that for cases where a party seeks contribution and indemnity from a third party, there is an absolute limitation period of two years to so. Moreover, he held that the limitation period starts to run from the date on which the Statement of Claim is served on a defendant; when this happens, the defendant has two years within which to file a Third Party Claim against a third party.

In this case, because of his finding of an absolute two-year limitation period in the circumstances, the motions judge was of the view that the Third Party Claims were filed out of time (i.e. more than two years beyond the time the Statement of Claim was served on both Ms. Lai (January 2011) and Mr. Yung (April 2013).

Given his finding that the two-year limitation period was absolute, the motions judge did not consider whether the "discoverability" principle could assist Mr. Yung or Ms. Lai to extend the limitation deadline.

Rather, Mr. Yung and Ms. Lai argued that the doctrine of "fraudulent concealment" could assist them. This doctrine is an equitable principle that operates to prevent a limitation period from running in circumstances where the necessary facts are kept from a potential claimant. In this case, Mr. Yung and Ms. Lai argued that Mr. Sun did not advise them that they had a potential claim against him.

The motions judge disagreed, and held that both Mr. Yung and Ms. Lai "*were aware of the essential facts giving rise to a claim against the alleged wrongdoer*". The fact that Mr. Sun had not told them anything did not change their own knowledge of a potential claim against Mr. Sun.

Thus, the motions judge dismissed both Third Party Claims.

The Appeal

Mr. Yung and Ms. Lai appealed the motions judge's decision. On appeal, the Court of Appeal overturned the decision, and dismissed the summary judgment motion. The Court ordered the case to proceed to trial.

The central issue on the appeal was the correct interpretation of the *Limitations Act, 2002*. Specifically, the Court addressed the "discoverability" principle and how it related to the "contribution and indemnity" provisions contained in the Act. "Discoverability" is essentially a principle that operates to push back the commencement of a limitation period in circumstances where a claimant is not aware of

the facts giving rise to a potential claim or that it would be appropriate to commence a proceeding in order to seek a remedy.

Over the years, lower courts have diverged on whether the 2-year limitation period for contribution and indemnity claims is an "absolute" deadline, or whether it is subject to "discoverability" principles.

In this case, while the motions judge took the view that the contribution and indemnity provisions in the Act established an "absolute" deadline, the Court of Appeal disagreed. Writing for the Court, Justice Paciocco provided a thorough analysis in which he held that discoverability principles are equally applicable to claims for contribution and indemnity.

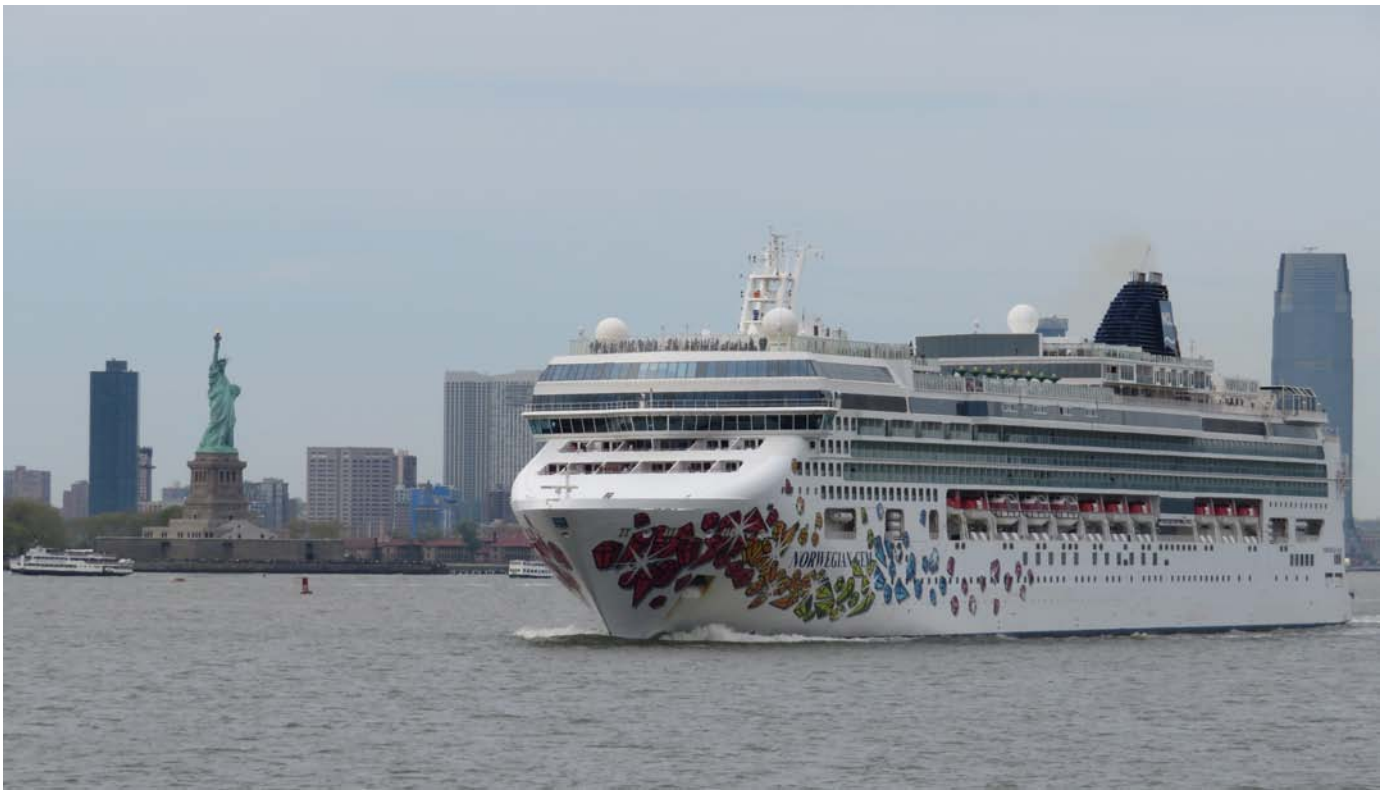
Thus, while a claim for contribution and indemnity is presumed to arise on the date that service of a Statement of Claim is effected, this presumption can be rebutted like any other claim brought by a plaintiff against a defendant.

Thus, in this case, because the motions judge did not consider whether the limitation period in Mr. Yung and Ms. Lai's claim should be extended on "discoverability" principles, he erred.

The Court of Appeal also went on to hold that the findings of fact made by the motions judge in his decision (i.e that Mr. Yung and Ms. Lai were aware of the underlying facts giving rise to a potential claim against Mr. Sun) could not be relied upon as an indirect finding that the claim was discoverable. The Court held that because the motions judge had erred in his legal interpretation of the *Limitations Act, 2002*, he did not have a full appreciation of the significance of the conflicting evidence and facts central to the discoverability issue. Consequently, the findings of fact made by the motions judge in his decision could not be relied upon to resolve the discoverability issue against Mr. Yung and Ms. Lai.

In the result, the appeal was allowed and remitted to the lower court to proceed accordingly.

James Manson



6. Important Update For Provincially Regulated Employers

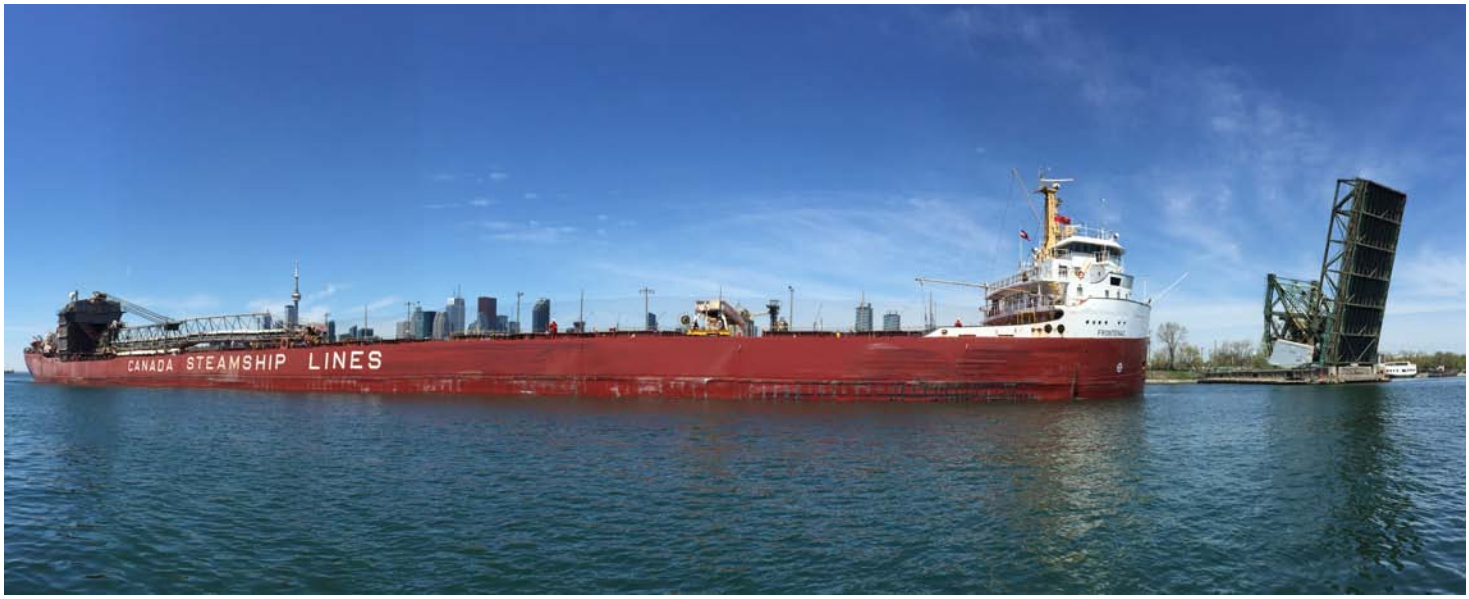
Change to Public Holiday Pay – Effective Canada Day

In our June 2017 Newsletter, we reported a number of significant changes to the *Employment Standards Act, 2000* ("ESA") set out in Bill 148, the *Fair Workplaces, Better Jobs Act, 2017*.

On May 7, 2018, the Ontario Government announced that it would reverse the Public Holiday Pay amendments introduced in Bill 148. Pre-Bill 148, public holiday pay was equal to the regular wages earned and vacation pay payable to the employee in the previous 4 weeks, divided by 20. This meant that full time employees were usually paid more public holiday pay than a part-time or casual employee.

Bill 148 introduced a more generous holiday pay, by changing the calculation to the total regular wages earned in the pay period immediately preceding the public holiday, divided by the number of days the employee worked. This meant that a part time or casual employee who worked only one day in the previous pay period would earn the same public holiday pay as a full-time employee. As a result of this amendment, employers have had to pay significantly higher public holiday pay than in the past. The negative feedback from employers prompted Ontario to pass Regulation 375/18 *Public Holiday Pay*, which changes the formula for calculating public holiday pay to the pre-Bill 148 version, effective July 1, 2018, just in time for Canada Day. The Regulation is subject to further review and while set to expire on December 31, 2019, may also be extended.

Carole McAfee Wallace



8. CRTC Requires CASL Opt-Out Simplification

Canada's Anti-Spam Legislation ("CASL") (*1) has been the subject of much ink, but not a lot of law. Many companies are not yet in compliance with it, despite having come into force almost a year ago. Of particular relevance to most businesses, CASL regulates privacy aspects of "commercial electronic messages" ("CEMs"), including e-mails. Most famously, the legislation requires express or implied consent before a CEM may be sent. It also regulates the ways in which that consent may be revoked.

Because of the muddy landscape, the legislation's creation of a private right of action – an entitlement for regular people to sue corporations for breaches – has been postponed, perhaps indefinitely.(*2) In the meantime, the House of Commons Standing Committee has released a report, saying that "clarifications are in order" for the legislation, generally.(*3)

Despite the foregoing, significant penalties may still be levied by regulators today for breaches of CEM obligations. Companies who ignore them may do so at their peril.

The Canadian Radio-Television and Telecommunications Commission ("CRTC") has general oversight responsibility for CASL CEM compliance. Recently, it published the results of a settlement that it made with the operators of the Ancestry.com website, Ancestry Ireland Unlimited Company ("Ancestry").(*4) Pursuant to the settlement, Ancestry made certain undertakings to ensure better compliance, as detailed below.

Ancestry had allegedly violated section 6(2)(c) of CASL and section 3(2) of its *Electronic Commerce Protection Regulations*, (*5) which require that CEMs contain an unsubscribe mechanism and that the mechanism be "readily performed".(*6)

Ancestry had sent two types of CEMs: one type for promotional offers and another type for product-related information. Each type had a separate unsubscribe option. Thus, it was alleged that it was impossible to unsubscribe from all messages with just one operation, and that the two-step requirement was a violation of the "readily performed" requirement.

As the alleged violation had lasted from July 1, 2015 to January 2, 2017, the potential penalty was significant. In order to avoid that, Ancestry made several undertakings, including:

(i) to comply with and ensure that all third parties sending CEMs on its behalf comply with the requisite "unsubscribe" rules,

(ii) to put in place a program to ensure compliance with CASL generally,

(iii) employee training and awareness raising,

(iv) taking proper disciplinary measures in the event of non-compliance with internal procedures, and

(v) implementation of complaint follow-up and settlement measures, including mechanisms for reporting to CRTC personnel.

The undertakings are significant in light of the alleged violation. After all, Ancestry did have an unsubscribe mechanism on each CEM, which does not appear to have been difficult to ascertain. Presumably, each recipient could have rid his or her life of Ancestry messages with one or two simple clicks of a mouse.

This suggests that the CRTC is very serious about the ease of opting out. It might be seen as a shot across the bow to industry. Get your CEM compliance regime in order – both for opting-in and opting-out!

Alan S. Cofman

Endnotes

(*1) An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic

Documents Act and the Telecommunications Act, S.C. 2010, c. 23.

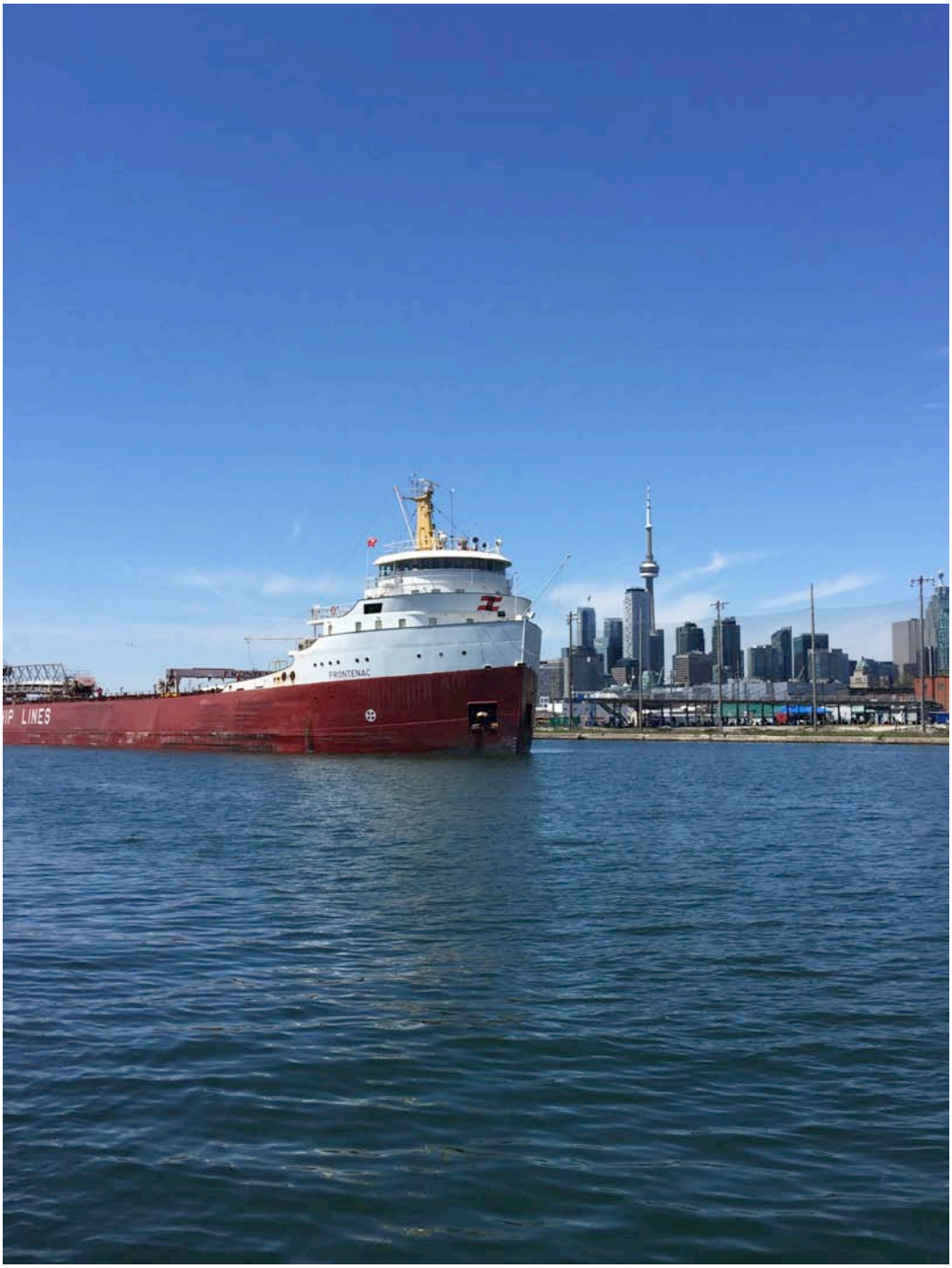
(*2) Order in Council, P.C. 2017-0580.

(*3) Standing Committee on Industry, Science and Technology, *Canada's Anti-Spam Legislation: Clarifications are in Order*, December 2017, online: << http://www.ourcommons.ca/Content/Committee/421/INDU/Reports/RP9330839/indurp10/indurp10-e.pdf >>. Also see the Government's response, given by letter, online: << http://www.ourcommons.ca/content/Committee/421/INDU/GovResponse/RP9762984/421_INDU_Rpt10_GR/421_INDU_Rpt10_GR-e.pdf>.

(*4) Online: << https://crtc.gc.ca/eng/archive/2018/ut180124.htm>>.

(*5)SOR/2012-36.

(*6) Section 2(2) of the *Regulations* permits the unsubscribe function to be posted on the internet, but only if it is "impractical" to include it in the message itself.



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CONTEST

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