THE NAVIGATOR

IN THIS ISSUE

CETA Investment Dispute Resolution Mechanism Compatible with EU Law

In an opinion released on April 30, 2019 (*1), the European Court of Justice (the "Court") confirmed that the investor-state dispute resolution mechanism established by the *Canada-European Union Comprehensive Economic and Trade Agreement*(CETA) is compatible with EU primary law, setting the stage for final implementation.

The request for an opinion was submitted to the Court by the Kingdom of Belgium and was worded as follows:

> Is Section F ('Resolution of investment disputes between investors and states') of Chapter Eight ('Investment') of the Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part, signed in Brussels on 30 October 2016 (OJ 2017 L 11, p. 23; 'the CETA') compatible with the Treaties, including with fundamental rights?

Section F of Chapter Eight of the CETA, which contains Articles 8.18 to 8.45 of that agreement, concerns the establishment of a mechanism for the resolution of investment disputes between investors and States ('the ISDS mechanism') also known as the Investor-State Dispute Settlement system. The investor-state dispute resolution system permits investors to bring international arbitration proceedings against a host state for measures that are harmful resulting in serious harm to their investments in that country.

To that end, Article 8.27 of the CETA provides for the creation of a Tribunal ('the Tribunal' or 'the CETA Tribunal') upon the entry into force of the CETA and Article 8.28 thereof provides for the creation of an Appellate Tribunal ('the Appellate Tribunal' or 'the CETA Appellate Tribunal').

Article 8.29 of the CETA further provides for the subsequent establishment of a multilateral investment tribunal and appellate mechanism ('the multilateral investment Tribunal'), the establishment of which will bring to an end the operation of the CETA Tribunal and the CETA Appellate Tribunal.

FIRM AND INDUSTRY NEWS

- **Transportation Lawyers' Association** and **Canadian Transport Lawyers Association** annual and semi annual meeting, Austin Texas May 1 to May 4th 2019. **Rui Fernandes**, **Gordon Hearn, Kim Stoll, and Carole McAfee Wallace** will be attending.

- **Canadian Board of Marine Underwriters** annual meeting, Vancouver Canada, May 22nd to May 24th, 2019. **Rui Fernandes** will be attending.

- **Canadian Maritime Law Association** annual meeting and seminar, Quebec Canada, June 13 -14, 2019. **Rui Fernandes** and **Alan Cofman** will be attending.

The ISDS Mechanism became a flashpoint during CETA's negotiation. In particular, the Belgian regional government of Wallonia threatened to block CETA from being signed, backing down only when the Belgian federal government undertook to seek an opinion from the ECJ on whether the ISDS Mechanism was compatible with EU legal framework, including fundamental rights.

The Court found that the ISDS Mechanism was compatible with EU primary law on the basis that it:

- did not conflict with the EU's legal order or the ECJ's exclusive jurisdiction over questions of EU law;
- did not infringe the general principles of equality and the "practical effect" requirement of EU law; and
- was compatible with the right of access to courts and the right to an independent and impartial judiciary.

The Court's decision paves the way for the full implementation of CETA in the EU. CETA is currently provisionally in effect within the EU pending ratification from certain member states.

Rui M. Fernandes

Endnotes

(*1) European Court of Justice OPINION 1/17 OF THE COURT (Full Court) 30 April 2019.

http://curia.europa.eu/juris/document/document.jsf?docid=213502&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=929830

2. Why a Corporate PPA?

Corporate Power Purchase Agreements ("PPA") are becoming more popular as large businesses become increasingly interested in managing their electricity procurement costs in the face of volatile and rising power prices and in investing in the renewable energy industry. Corporate PPA thus can provide businesses with the ability to control their exposure to electricity wholesale costs, the wholesale cost of large-scale generation certificates or other green rights.

Numerous businesses have ambitious targets for renewable energy sourcing or emissions reduction and meeting these commitments is usually accomplished through the purchase of green power products from their utility supplier or procuring renewable energy certificates ("REC") matching their needs. Offering a long-term price to a greenfield renewable project is typically the most important reason for a renewable energy project occurring, and as such, a long term corporate PPA with the right pricing structure can provide a hedge against rising electricity costs.

From the renewable generator's side, the need or interest in a corporate PPA is often driven by wider market design aspects for renewable projects and finding a long-term solution for power offtake that includes sufficient revenue certainty is key to accessing limited recourse finance. Bankability captures the idea that a project has a sufficiently balanced risk profile that lenders are willing to finance it. Revenue contracts such as a PPA are key to this assessment. A corporate PPA can offer bankability, thus providing an important bridge to the development of wider and more diverse financing and offtake solutions in the market, particularly those that bear a greater degree of merchant risk. But beyond these immediate economic reasons, there are wider other reasons for renewable generators being interested in entering into long term transactions with businesses. Renewable generators operating globally or regionally may have plans to accelerate development in strategic markets. This creates opportunities for wider partnerships between renewable generators and businesses whereby a business' strategic ambitions for corporate PPA are delivered by the renewable generator.

Regarding contract structures, corporate PPA fall into two types:

1) synthetic PPA; and

2) physical PPA.

The renewable generator will sell its power into a wholesale electricity market. That power will be purchased by a local utility or other buyer for resale to meet the energy needs of that reseller's customers. The renewable generator will be paid the prevailing market price for that power.

In Canada, and more specifically Alberta, since all electricity not consumed on site must be exchanged in the Alberta Power Pool, this purchase and sale of electricity needs to be structured as synthetic (*1) transactions, either as a financial PPA, or a physical PPA, completed by way of Net Settlement Instructions.

The financial PPA involves a flow of cash between the renewable generator and the business. The standard financial terms that the parties must agree upon are the term, the quantity of electricity, the price per MWh with an escalator/indexation over the term (i.e. the strike price), etc. It is important to note that the business should agree that, if the strike price for the contracted volume of electricity is greater than the Pool Price for an hour, then it would pay the renewable generator the difference. Similarly, the renewable generator would pay the business the difference if the strike price is less than the Pool Price for an hour. The settlement process thus acts as a price hedge for a portion of the corporate buyer's energy use corresponding to the quantity of power generated by the project. The settlement process also results in predictable cash flows for the project owner over the life of the contract.

Note that the renewable generator would settle with the Alberta Electric System Operator ("AESO") and be directly paid by the AESO for the power delivered to the grid based on the hourly Pool Prices. The business would settle and pay the AESO for the power it consumed from the grid.

With a physical PPA, the business and the renewable generator won't have to separately settle with the AESO for the contracted power before settling the difference with each other. The parties will consequently settle directly between themselves for the contracted volumes at the full contracted price. Physical PPA are however not often used in Alberta.

Robert Carillo

Endnotes

1) Synthetic transactions do not result in the actual delivery of electrons by the renewable generator to the business. Delivery of the renewable electricity is notional only.

3. Proposed Changes to Canada Business Corporations Act

Various amendments to the *Canada Business Corporations Act* ("CBCA") have been proposed in the federal government's omnibus budget implementation bill.

The omnibus budget implementation bill received its first reading in the House of Commons on April 8th, 2019, and it is expected that following its second reading in the House of Commons, the omnibus budget implementation bill will be referred to the House of Commons Standing Committee on Finance. Following review in committee, it will be returned to the House of Commons for third reading, after which it will be sent to the Senate for consideration.

These proposed amendments would include changes to directors' duties, say-on-pay, diversity disclosure as well as additional disclosure on compensation.

1. *Directors' duties*: The omnibus budget implementation bill would amend the CBCA to specify that directors and officers of the corporation may consider, without being limited to, the interests of shareholders, employees, retirees and pensioners, creditors, consumers, and governments, the environment, the long-term interests of the corporation, when acting with a view to the best interests of the corporation.

Directors are not bound to solely consider the interests of shareholders and investors, but that shareholders and investors, are but one set of "stakeholders" among many.

2. *Say-on-Pay*: The omnibus budget implementation bill would also require that shareholders of prescribed corporations (prescribed by regulations – likely public corporations) be provided a non-binding "say-on-pay" vote on the corporation's approach to compensation at each annual shareholder meeting. Results of the vote would be disclosed to shareholders.

3. *Diversity Disclosure*: The omnibus budget implementation bill contains requirements to disclosure regarding diversity among directors and senior management of a prescribed corporation. Corporations may be required to provide information including, but not limited to, Aboriginal Peoples, persons with disabilities, members of visible minorities, etc. as defined by the federal *Employment Equity Act.*

4. *Additional Annual Disclosure on Compensation and Employment*: The omnibus budget implementation bill also proposes disclosure requirements for certain corporations regarding the recovery of incentive benefits or other benefits paid to directors and senior management of the corporation, and "*the well-being of employees, retirees and pensioners*".

Robert Carillo

4. Court of Appeal for Ontario Rules No Existing Tort of Harassment

In *Merrifield v. Canada (Attorney General)* (*1), the plaintiff who was a member of the RCMP brought a claim against his employers in which he alleged that, following his participation in a nomination meeting for the Progressive Conservative Party in 2005, he was harassed, bullied needlessly investigated and punitively transferred by his superiors after being wrongfully accused of committing criminal offences. The plaintiff claimed damages for harassment and intentional infliction of mental suffering and alleged that the actions of his superiors impaired his career advancement, tarnished his reputation and caused him severe emotional distress.

The Lower Court's Decision

The trial judge, who decided in the plaintiff's favour, found that there is a freestanding tort of harassment in Ontario pursuant to which a party can be held civilly liable. Justice Vallee described the appropriate test for the tort of harassment as follows (*2):

1. Was the conduct of the defendant toward the plaintiff outrageous?
2. Did the defendant intend to cause emotional stress or did they have a reckless disregard for causing the plaintiff to suffer from emotional distress?
3. Did the plaintiff suffer from severe or extreme emotional distress?
4. Was the outrageous conduct of the defendant the actual and proximate cause of the emotional distress?

In addition to finding that the plaintiff had successfully met the test to establish harassment, Justice Vallee opined that the tort of intentional infliction of mental suffering ("IIMS") had also been made out. The test for IIMS requires that the plaintiff demonstrate that the defendant's conduct was (*3):

1. flagrant and outrageous;
2. calculated to harm the plaintiff; and,
3. must have caused the plaintiff to suffer a visible and provable illness.

Justice Vallee further observed that the tests for the tort of harassment and IIMS are similar; however, the tort of harassment was less onerous to prove as it could be committed without an apparent intent to cause harm, and did not need to result in a visible and provable illness (*4).

The Court of Appeal's Decision

The Court of Appeal for Ontario declined to recognize the existence of a common law tort of harassment. In ultimately finding that there was no basis for recognizing the tort, the Court relied on the "evolutionary" nature of common law change, which proceeds slowly and incrementally, as opposed to quickly and dramatically. The Court reasoned that significant change to address problems in the law may be best left to Parliament, and that there was no judicial or academic authority, nor any compelling policy rationale for recognizing a new tort of harassment and its requisite elements (*5).

The Court of Appeal further opined that this was not a case in which failing to recognize a new tort would amount to a deficiency in the laws of the province that would leave the plaintiff stripped of any opportunity for legal remedy. While the Court ultimately decided that the RCMP's conduct was not "flagrant and outrageous" as required to make out IIMS, that tort remained available as a tenable remedy to redress conduct that is alleged to constitute harassment (*6).

Although the Court of Appeal for Ontario determined that there was no compelling reason underlying the facts of *Merrifield* to recognize a new tort of harassment, it did not foreclose the existence of a "properly conceived tort of harassment that might apply in appropriate contexts" (*7). This suggests that harassment

might someday be recognized as a freestanding tort. For the time being, employers should remain cognizant of their statutory obligations pursuant to Ontario's *Occupational Health and Safety Act*—or in the case of federally-regulated employers, the *Canada Labour Code*—to preclude and address harassment in the workplace.

Janice C. Pereira
Articling Student

Endnotes
(*1) *Merrifield v. Canada (Attorney General),* 2017 ONSC 1333.
(*2) *Ibid* at paras 718-9.
(*3) *Ibid* at 838.
(*4) *Ibid* at 839.
(*5) *Merrifield v. Canada (Attorney General),* 2019 ONCA 205.
(*6) *Ibid* at paras 20, 21, 40.
7) *Ibid* at paras 41-2.

5. The ESA has been amended…again!

For the third time in less than 2 years, provincially regulated employers are required to review and update their workplace policies and procedures. Effective April 3, 2019, the *Restoring Ontario's Competitiveness Act, 2019* (also known as Bill 66) made 3 significant changes to the *Employment Standards Act, 2000* ("ESA") as follows:

1. Employers are no longer required to post in the workplace a poster setting out information about the ESA and its Regulations. Employers are still required to provide a copy of the poster to each of their employees.

2. Employers who require that an employee work more than 48 hours in a work week can do so with the employee's written agreement to work up to a specific number of hours in a week, and no longer need the approval of the Director of Employment Standards (the "Director") for such an agreement.

3. Employers can now enter into agreements with employees to average the hours of work for periods of up to 4 weeks, for the purpose of determining entitlement to overtime, without obtaining approval from the Director. The overtime averaging agreement must include a start date and an expiry date (which for non-unionized employees, must be within 2 years of the start date, and for unionized employees, no later than the date on which a subsequent collective agreement comes into operation). Any existing overtime averaging agreements will continue to be valid until they expire or are revoked.

These changes give employers greater flexibility with respect to scheduling and allow for more control over the entitlement to overtime.

Carole McAfee Wallace

6. Completing the Record of Employment: Unintended Consequences

Whenever there is an interruption of earnings, for any reason, an employer is required to issue to the employee a Record of Employment ("ROE"), whether or not the employee intends to file a claim for Employment Insurance ("EI") benefits.

Employers are often unsure as to how to complete Block 16, the reason for issuing the ROE, when the employee is dismissed. This reason is important and may impact the employee's ability to collect EI benefits. Code A, "Shortage of Work", incudes lay off, end of a contract, the elimination of a position or company restructuring. Code M, "Dismissal", covers terminations during the probationary period if the employee is not working out, or any other reason not covered by Code A, and is the code used when an employee is terminated for cause. When an employee is terminated for cause, he or she may not be eligible for EI benefits because the loss of employment is a result of their own misconduct.

An employer, who uses Code M in circumstances where it does not have grounds to assert cause, may be exposed to a claim for punitive damages or bad faith damages, in addition to wrongful dismissal damages. Another potential consequence that an employer needs to be aware of is illustrated in the recent case of *Alexander v. Huron Commodities Inc.* 2019 CanLII 11915, where the adjudicator, in a preliminary ruling in a complaint under the *Canada Labour Code*, held that the employer could not assert dismissal for misconduct in the hearing, as that issue had already been determined by an EI officer in her decision to award EI benefits to the dismissed employee.

After 6 years of employment, Paul Alexander lost his job and applied for EI benefits and also launched an unjust dismissal complaint. The termination letter provided no reasons for the termination and advised that Mr. Alexander would be paid 2 weeks' notice plus 10 days of severance. The employer used Code M, "Dismissal", in the ROE. The EI officer contacted both the employer and Mr. Alexander to determine the reasons for dismissal and determined from the employer that there was an issue of missing fuel (although the employer did not investigate this further) and there were other reasons due to inadequate performance and the employee was no longer suitable.

The EI officer concluded that the test for misconduct was not satisfied as that test requires proof that the employee's actions were wilful or of such negligence that he ought to have known that his actions would impair the performance of duty owed to the employer. Because the employer was unable to provide details or evidence demonstrating conduct that was willful, the EI officer concluded that there was no misconduct. The employer was advised of the EI officer's decision and that it could contact EI if there was additional information that could change the decision, or, if the employer disagreed with the decision, it could request a reconsideration. The employer took no further steps.

Before the hearing of the unjust dismissal complaint began, the employee sought a preliminary ruling that the adjudicator should apply the doctrine of issue estoppel regarding the question of misconduct based on the EI officer's decision, and not permit the employer to argue that the dismissal was for misconduct. The parties agreed that the employer's second argument, that the dismissal was based on the employee's incompetent performance of his duties, was not the subject matter of the EI officer's decision and so issue estoppel would only apply to prevent a finding of dismissal based on misconduct.

Issue estoppel is a general legal concept based on fairness and is relied upon in circumstances where two parties have already litigated an issue. Generally, a judicial decision on an issue should finally resolve that issue between the parties, unless that decision is reversed on

appeal. The case law sets out three requirements for the application of issue estoppel:

1. the same question has been decided;
2. the judicial decision relied upon for the estoppel was final; and
3. the parties were the same in both proceedings.

Applying the test to the facts of this case, the adjudicator held that:

1. The question of the employee's misconduct before the adjudicator was the same question before the EI officer.
2. The EI officer's decision was a final judicial decision as the officer had authority to decide on EI benefits and on whether the dismissal was for misconduct.
3. The parties were the same in both instances.

The adjudicator went on to state that, while issue estopped was met and could be applied, he retained discretion, in his role as adjudicator, as to whether he should apply it in this case. Issue estoppel is intended to promote justice and, if its application would promote an injustice, he need not apply it. The adjudicator considered two factors when exercising his discretion. First, whether the employer took the available steps to challenge the EI officer's decision, which it did not. And second, the expertise of the EI Commission in its investigation into employment dismissals. The adjudicator took arbitral notice that the EI officer has considerable experience and expertise in deciding whether a dismissal was for misconduct. Based on these two factors, and the fact that the termination letter did not mention any misconduct, and the fact that the employer, according to the EI officer's notes, had not looked into and did not pursue the only potential misconduct issue of missing fuel, the adjudicator did not find any basis to conclude that applying issue estoppel would result in an injustice.

As a result of the adjudicator's decision to apply issue estoppel, the employer was prevented from submitting in the unjust dismissal complaint that the employee was dismissed for misconduct. The adjudicator retained jurisdiction to decide the employer' alternative defence that the employee was dismissed due to his inability to adequately perform his duties.

An employer must be careful when completing the ROE and, if there is any doubt about how to do so, should seek legal advice. An employer should also consider carefully how to respond to an inquiry by an EI officer, again, seeking legal advice if necessary. Finally, an employer needs to consider the pros and cons of appealing an EI officer's decision; if the employer's appeal is not successful, this may only strengthen the argument in favour of the application of issue estoppel.

Carole McAfee Wallace

7. Multi-Modal Cargo Claims in the Federal Court: Does the Court Have Jurisdiction?

The recently published Federal Court of Canada decision in *Black & White Merchandising Co. Ltd. v. Deltrans International Shipping Corporation* (*1) illustrates the need for an early and effective assessment as to whether that Court can hear a dispute arising under a through multi-modal bill of lading.

Background

Black & White Merchandising Co. Ltd. ("B & W") sells shoes. It purchased 8580 pairs of rain boots from Fuzhou Harvest Trading Enterprises Co Ltd. in China. B & W made arrangements for the shipment of the rain boots (the "Cargo") from their place of manufacture in China to its premises in Montreal. by engaging a freight forwarder, Delmar International Inc. ("Delmar") to help facilitate this move by arranging carriers and related service providers. To this end, Delmar contracted a company named Deltrans International Shipping Corporation ("Deltrans") to be responsible for a *portion* of the transportation of the cargo over the relevant routing from Ningbo, China to B & W in Montreal Quebec. The word "portion" in the prior sentence is emphasized as it would prove to be an important consideration in this case.

Delmar engaged Deltrans for its own account (the latter thereby assuming responsibility for cargo loss or damage) to be responsible for the Cargo for the period of carriage commencing from a container yard facility (known as "CY" in the industry, and reflected as such on the relevant shipping documents) at Ningbo, China through to the Canadian National Railyard "CY" at Montreal. In effect, Deltrans would then be responsible for the Cargo during the "sea leg" across the Pacific to the discharge port of Prince Rupert, British Columbia, and then for the "on-carriage" by rail from that port through to the CN "CY" at Montreal.

As Deltrans is a non-asset based "non-vessel operating carrier" (i.e. NVOC, in industry parlance). As mentioned, it assumed liability for the Cargo for the above duration of transit, in turn sub-contracting the sea leg to an ocean carrier, and the on-carriage by rail to CN for carriage to Montreal.

Of critical importance is the fact that the CN Montreal "CY" – for Deltrans' purposes, its point of delivery – is a *different* location than B & W's Montreal facility being the final destination for the Cargo. Further arrangements accordingly had to be made to bridge that final "gap". In this regard, in addition to engaging Deltrans as aforesaid, Delmar also separately arranged for IPE Logistics Inc. ("IPE") to provide certain logistics services following the arrival of the Cargo at the CN "CY". In this regard IPE in turn hired a company named Canchi Bon Trading Company Inc. ("Canchi") to store the Cargo in a warehouse facility in Montreal following the delivery to the CN "CY", but before its final delivery to B & W.

Consistent with the foregoing, Deltrans issued a multi-modal bill of lading document, confirming its responsibility for the carriage of the Cargo from the Ningbo "CY" to the CN "CY" in Montreal.

The Cargo was in stolen after delivery to the Canchi warehouse.

The Litigation

B & W sued Deltrans in the Federal Court of Canada. The suit alleged that Deltrans failed in its carriage obligations concerning the Cargo. Deltrans defended the claim, in part on the basis that it did not contract IPE or for that matter the Canchi facility from which the Cargo had been stolen. As far as Deltrans was concerned, proof of the successful delivery of the cargo to the Canchi warehouse exhausted its contractual responsibility over the Cargo.

Deltrans brought a court application for a ruling seeking to strike the court action on the basis that the Federal Court lacked jurisdiction over this claim in addition for summary judgment that it was not liable for the reasons aforesaid. The judge hearing the application agreed that the

Federal Court of Canada did not have jurisdiction to entertain this claim, also ruling that in any event there was no legal basis for the claim against Deltrans for the loss, its bill of lading responsibility having been "exhausted" when the Cargo was received in good order at the CN "CY" yard at Montreal.

Analysis – Why did the Federal Court Not Have Jurisdiction over the "Local" Montreal Contract Logistics?

As mentioned, Deltrans asserted that it had no involvement in the Canchi warehouse storage. It pointed to its issued bill of lading – showing "place of delivery = CY Montreal" as the basis for its involvement having come to an end before the theft.

B&W took a different view. It asserted that it was the mutual intent of B&W and Delmar that the latter was responsible for ensuring that cargo would be delivered to the B&W Warehouse, said to be the customary course of dealings between the companies. As the Cargo was stolen from Canchi, who B&W claims was thereby a subcontractor of Deltrans, Deltrans was liable for the loss.

Quite properly, the judge seized on the question of when and where the Deltrans' bill of lading was "completed" as being determinative of the matter.

In its analysis, the Court noted the following key provisions in the *Federal Courts Act* (*2) concerning the statutory grant of what matters the Federal Court is permitted to hear, focusing on matters coming within the realm of admiralty claims:

> 22 (1) Navigation and Shipping - The Federal Court has concurrent original jurisdiction, between subject and subject as well as otherwise, in all cases in which a claim for relief is made or a remedy is sought under or by virtue of Canadian maritime law or any other law of Canada relating to any matter coming within the class of subject of navigation and shipping, except to the extent that jurisdiction has been otherwise specially assigned.
>
> (2) Maritime Jurisdiction - Without limiting the generality of subsection (1), for greater certainty, the Federal Court has jurisdiction with respect to all of the following:
>
> *(f) any claim arising out of an agreement relating to the carriage of goods on a ship under a through bill of lading,* or in respect of which a through bill of lading is intended to be issued, *for loss or damage to goods occurring at any time or place during transit*;
>
> [Emphasis added]

Deltrans argued that it was plain and obvious that the Federal Court lacked jurisdiction to hear B&W's claim as the Federal Court does not have jurisdiction over losses that occur during warehousing after the completion of "through bill of lading' transportation of cargo. Deltrans pointed to the theft occurring after the carriage under the bill of lading performance was complete.

B&W disputed that the theft occurred outside the scope of the Deltrans bill of lading. It submitted that the "CY/CY" reference on the bill of lading did not accurately represent the agreement between the parties concerning the transport of the Cargo. Rather, B&W said it contracted with Deltrans for the carriage of its Cargo up to the B&W Warehouse. As to the jurisdiction argument, B & W accordingly asserted that, as Deltrans was responsible for the carriage of the Cargo up to the B&W Warehouse, the Court had jurisdiction over the claim, the loss occurring while the Cargo was in the care, custody, and control of Deltrans, pursuant to a combined through bill of lading from Ningbo, China through to the B&W Warehouse. In this regard the judge noted that the Federal Court does have

jurisdiction to hear claims against ocean carriers extending beyond marine transportation when goods continue their journey after discharge *while still in transit under a through bill of lading*. (*3)

After weighing the evidence, the Court noted that the scope of the Delmar and Deltrans involvement was materially different. Delmar acted as B & W's agent in setting up the Deltrans involvement, and it also made arrangements as B & W's agent for the storage of the Cargo at the Canchi warehouse. For its part, as mentioned, the Deltrans "period of responsibility" ended at an earlier point.

The Court found that the transport of the Cargo beyond the "CY to CY" scope was not encompassed by the bill of lading and did not ground jurisdiction in the Federal Court under s. 22(2)(f). To the extent that B&W suggested that the terms of the bill of lading were not what was agreed with Delmar, such was an issue as between Delmar, which was not a party to this action, and B&W, being an "agency" dispute not concerning Deltrans.

The Court found that the Deltran's bill of lading was "exhausted" when the Cargo was delivered in good order at the CN "CY". The judge held that, in the absence of any ambiguity in the bill of lading terms, it was not necessary to resort to the principles of interpretation that B&W was proposing, including that the bill of lading must be construed strictly against the carrier and in accordance with a long standing previous course of dealing between the parties (in terms of it being suggested that the place of delivery as far as Deltrans was concerned was in fact the B & W facility). The Court also noted that evidence of custom cannot be introduced to contradict what is clearly set out in the bill of lading concerning the period of carrier responsibility.

On the basis of the foregoing, Deltrans' motion to strike B&W's action was granted, the claim being dismissed for lack of court jurisdiction.

Some key "Take-aways"

1. A plaintiff will have to determine whether to sue in the Federal Court or in the court of a province – such as the Superior Court of Ontario. The senior level courts of the provinces have (with a few exceptions) "inherent" jurisdiction whereby they are, generally speaking, not restricted as to the subject matter of disputes that they may adjudicate (*4). There are certain benefits to taking suit in the Federal Court to the extent that that court offers remedies not available in the provincial courts. However, for there to be an effective choice as a matter of litigation strategy, both courts must have jurisdiction to adjudicate a matter. This decision illustrates how the Federal Court may not have jurisdiction to hear a matter.

2. Litigants must be "live" to potential time bar problems: there is a possibility that, if a plaintiff sues in the wrong court (i.e. not having jurisdiction over the matter at hand), it may be out of time to "reinvent" the claim by starting a fresh claim in another court that does have jurisdiction.

3. The need for clarity in contracting is a theme addressed in past editions of this Newsletter. The issue as to *when* the Deltrans period of responsibility ended illustrates the need for clarity on key points, such as exactly who bears what risk and responsibility, and when over cargo in transit.

Gordon Hearn

Endnotes
(*1) 2019 FC 379
(*2) *Federal Courts Act*, RSC 1985, c F-7
(*3) The same logic applies, with claims being able to be brought in the Federal Court concerning and against sub-contracted rail carriers or trucking companies who are engaged by a party issuing a through multi-modal bill of lading.
(*4) Certain claims have to be brought in the Federal Court. This involves subject matter unrelated to admiralty or carriage of goods cases and as such that discussion is beyond the scope of this article.

8. When are you really out of time?

Limitation periods and "discoverability"

Perhaps the most common – and often the first – question that a lawyer will ask a client who has come to his office with a complaint is: "When did you first learn there was a problem?" Since Ontario has moved to a 2-year limitation period for most actions as of January 1, 2004, possibly the most serious issue that a potential client faces is the fact that they may be too late to commence an action because a limitation period has expired. The reason this is such an important question to answer when court action is contemplated is because it is frequently an all-or-nothing proposition; that is, if you wait too long, even a legal claim that earlier would have had serious merit and a good chance of success is rendered completely hopeless.

As a recent decision of the Court of Appeal for Ontario has shown, however, it is not always obvious when time has run out. In *Gillham v. Lake of Bays (Township)* (*1), the Court of Appeal overturned a dismissal of a claim for being out of time, allowing an action to proceed regarding defective work on a cottage for which the construction was completed in July 2006, even though the plaintiffs did not commence their action until October 21, 2013. The decision in *Gillham* reminds us that, notwithstanding the statutory 2-year limitation period for commencing an action, it can be far from easy to determine exactly when the 2-year clock begins to run for the purpose of barring a claim. Since this situation is hardly uncommon, the case bears a second look.

The facts

The plaintiffs in this case, Jack and Heather Gillham, had constructed a cottage on a property in the vicinity of the Township of the Lake of Bays, on which work was completed sometime in July 2006. In May of that year one of their contractors, MacKay Construction, excavated the foundation and constructed the pier footings for their deck and a stacked rock retaining wall as part of pre-construction work. The purpose of the retaining wall was to satisfy the frost protection requirement of Ontario's *Building Code*. Later another contractor, Royal Homes Limited, built the footings and foundation for the cottage and deck and completed construction of the pre-fabricated cottage in July.

The Gillhams' claim was that construction was negligent because their cottage was built on loose soil. Their claim against the township was based on its alleged negligent failure in overseeing and approving the construction of the foundation and stone retaining wall.

The Gillhams first noticed a problem in 2009 when they observed that one of the deck piers had sunk slightly. They approached Royal Homes to perform warranty work. Royal Homes told them that the settlement was not a result of any construction deficiency and that, in any event, the settlement was not serious enough to require repair. They also suggested that the problem might have been caused by MacKay Construction, as the deck itself appeared to be settling. The Gillhams then engaged an engineering firm to investigate. It recommended a number of expensive investigative and remedial steps but noted that such steps might not "guarantee" further slope movement in the area. The Gillhams also consulted MacKay Construction. MacKay noted that some settlement in this kind of construction was not uncommon and recommended that they "wait and see" if there was any further movement over the next year or two.

The Gillhams retained another contractor in 2012 to inspect the property which recommended that a soil study be completed. The engineering firm that did the soil study found, in July 2012, that the retaining wall was failing and recommended removal and reconstruction. When the new contractor started remedial work in 2013, it discovered the footings and foundations had been built on loose soil. The Gillhams started their action on October 21, 2013.

The motions judge dismissed the Gillhams' claim on the basis of his conclusion that they knew or ought to have known that they should have proceeded with an action on having received the first engineer's report in 2009. The Court of Appeal allowed the appeal and set aside the dismissal order, permitting their action to go to trial.

Discoverability

In reversing the finding of the motion judge, the Court of Appeal identified some important errors of the motion judge's reasoning relating to the key provision of the *Limitations Act, 2002* (*2), that informs exactly when the two years would *begin* to count against the Gillhams. In deciding this question, courts must consider section 5(1) of the Act, which provides:

> 5 (1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; … (*3)

It is critical to note that *all* of the conditions in (i) through (iv) of this section must be satisfied before the limitation clock will begin to tick against a claimant. In this case the Gillhams were certainly aware of some "injury" or "damage" as early as 2009. However, as noted by the Court of Appeal, the settlement they observed at that time was minor, and "trivial damages do not trigger a limitation period" (*4).

The Court of Appeal also found that the motion judge erred in concluding that the first engineering report the Gillhams had received should have alerted them to the fact that there were deficiencies in construction that would have supported a claim. As was noted in the appeal decision, the first engineering report failed to identify "construction" problems. That report only identified "slope failure" as a problem. Thus, the Gillhams would not have known that any damage was the result of a mistake made by their contractors from reading the first report. It was only the second report in 2012 that connected improper construction of the retaining wall on loose soil to the excessive movement in the foundation.

Finally, the Court of Appeal noted that the motion judge failed to consider the last part of section 5(1)(a), which requires that an action be the "appropriate means" for the Gillhams to seek redress. As the Gillhams were advised by their own contractors that a "wait and see" approach regarding settlement issues was the best course of action in 2009, a legal proceeding would not have then been an "appropriate means" to seek relief, regardless of the state of their knowledge of the damage and who may have caused it.

Conclusion

This decision has important lessons for everyone with a potential legal remedy. Many reasonably well-informed people have some awareness that legal actions can be barred by the passage of time, and many are also generally aware that they have only two years to take action before they may lose their rights. Less well known, however, is the fact that numerous other conditions must be satisfied before the two-year period can even begin to run. While factors that prevent the limitation clock from starting are more common in cases where the damage and its causes might be difficult to identify, there are instances in which the expiry of the limitation period can be unclear even in cases of unpaid invoices. The takeaway here is that even when you think you may be long out of time, you may not be. If there is any doubt, consult a lawyer.

Oleg M. Roslak

Endnotes
(*1) 2018 ONCA 667 [*Gillham*].
(*2) *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B.
(*3) *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, s. 5(1)(a).
(*4) *Gillham* at para. 22.

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CONTEST

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