THE NAVIGATOR

IN THIS ISSUE

PADDLEBOARDS: DIFFERENT TREATMENT UNDER CANADIAN AND U.S. MARITIME LAW

On December 4, 2019, the United States Court of Appeals for the Ninth Circuit issued an opinion affirming the United States District Court for the Central District of California's dismissal of an action for lack of subject matter jurisdiction.(*1)

Davies Kabogoza rented a paddleboard from Blue Water Boating Inc. ("Blue Water"). Mr. Kabogoza drowned while using the rented stand-up paddleboard. Blue Water filed an action in federal court seeking to limit its liability. The district court dismissed the action for lack of subject jurisdiction. The Court of Appeals affirmed the decision.

The Court held that tort claims invoking a federal court's admiralty jurisdiction under 28 U.S.C. § 1333 must satisfy the location and maritime nexus tests, which require that: (1) the alleged tort occur on navigable waters; (2) the alleged tort have the potential to disrupt maritime commerce; and (3) the general character of the activity giving rise to the tort have a substantial relationship to traditional maritime activity. The Court held that the activity was not closely related to an activity traditionally subject to admiralty law.

The Court stated that:

> Here, "the general character of the activity giving rise to the incident" does not have "a substantial relationship to traditional maritime activity." … Blue Water's alleged negligence involved the rental of a [paddleboard]. Traditional maritime activity, however, generally relates to specialized rules and technical concepts of maritime commerce such as "maritime liens, the general average, captures and prizes, limitation of liability, cargo damage, and claims for salvage," … as well as the navigation, storage, and maintenance of traditional vessels. …Those are not at issue here. Blue Water's alleged negligence lacks both "maritime flavor," … and a "close relation to activity traditionally subject to admiralty law…. And there is no reason why special admiralty rules should apply.

In Canada, this case would likely have been decided differently. Section 25(1)(a) of the *Marine Liability Act,* S.C. 2001, c. 6 provides a definition of ship as:

FIRM AND INDUSTRY NEWS

- **Conference of Freight Counsel** semi-annual meeting, Palm Springs, California, January 5-6, 2020 **Gordon Hearn** will be representing the firm.
- **Marine Club Annual Dinner**, Toronto, January 17, 2020
- **Transportation Lawyers Association Chicago Regional Conference**, January 23-24, 2020. **Gordon Hearn**, **Kim Stoll** and **Carole McAfee Wallace** will be representing the firm.
- **WISTA Canada**: Women in Leadership Luncheon Series: A Personal Conversation with Lisa Raitt, former Deputy Leader of Her Majesty's Official Opposition and former Minister of Transport under PM Stephen Harper, January 30, 2020, Toronto
- **Cargo Logistics Conference**, February 4-6, 2020, Vancouver.
- XXI **International Congress of Marine Arbitrators,** March 7 to 14, 2020, Rio de Janeiro. **Rui Fernandes** will be presenting a paper on "Limitation of Liability and Arbitration in Canada". **Kim Stoll** will also be attending.
- **Marine Insurance London 2020**, March 20, 2020, London England.

> Ship means any vessel or craft designed, used or capable of being used solely or partly for Navigation, without regard to method or lack of propulsion

Sections 28 and 29 of the *Marine Liability Act,* S.C. 2001, c. 6 allows a shipowner to limit liability based on the tonnage of the vessel (and whether it is used for pleasure purposes or commercially).

There is also case law to support the finding that a paddleboard would be considered a vessel or ship for the purposes of maritime legislation (*Canada Shipping Act, 2001* S.C. 2001, c. 26 or the *Marine Liability Act,* S.C. 2001, c. 6). In *Quebec (Procureur General) v. Vincent* [1984] C.S. 1037 (Que. S.C.) a windsurfer was held to be a vessel.

In *R. v. Sillars,* 2018 ONCJ 816 Justice West held that a canoe was a vessel. David Sillars was charged with impaired operation of a vessel causing death, operating a vessel with more than 80 mg of alcohol in 100 ml of blood and dangerous operation of a vessel. He was also charged with criminal negligence causing death. A canoe was a vessel. In coming to this conclusion the judge reviewed the history of various pieces of legislation dealing with "vessels" stating:

> One thing was clear from the 1961 Hansard debates provided by the Crown that when "vessel" was added to a number of offences in the *Criminal Code*, through Bill C-110, those offences were originally set out in the *Small Vessel Regulations* under the *Canada Shipping Act* and the definition of "vessel," in that Act at that time, included vessels without propulsion, such as a canoe. The debates reflected the large number of pleasure craft in use on the inland waterways of Canada in 1961. They also reflected the growing concern that members of the public were not taking those regulations seriously because they were only regulatory offences under the *Canada Shipping Act*. A number of MPs specifically referred to the increasing prevalence of motorboats on the lakes and river in Canada and their dangerous operation. It was believed by the drafters and members of Parliament to be necessary to move these offences contained in the *Small Vessels Regulations* to the *Criminal Code* to ensure members of the public recognized the seriousness of dangerous operation of a vessel and impaired operation of a vessel and operating a vessel with a BAC greater than 80 mg. In fact, a number of the MPs who spoke commented on the need for a criminal stigma to attach to these new offences involving "vessels" to cause members of the public to take more seriously the safe operation of pleasure craft.

The judge noted that the *Canada Shipping Act, 2001*, provides detailed safety requirements and regulations for vessels operating on inland waterways and territorial waterways in Canada. In particular, the *Small Vessel Regulations*, enacted under the *Canada Shipping Act, 2001* provide safety regulations for persons operating small vessels, including canoes, setting out safety rules and regulations and the penalties imposed for non-compliance. These safety requirements are analogous to the regulatory schemes for driving a motor vehicle created by provincial *Highway Traffic Acts*. The federal government has jurisdiction over the waterways in and around Canada and is responsible for enacting legislation dealing with those waterways and the vessels that travel and operate on them. The judge noted that this does not detract or prevent the court from referring to the definition of "vessel" in the *Canada Shipping Act* or other federal legislation, to inform and clarify whether a canoe is included in the word "vessel" as it appears in the three offences under the *Criminal Code*.

The court also noted that:

> In 1961 Parliament added "vessel" [to the *Criminal* Code] as a further mode of transportation as a result of a concern about the rapidly rising number of pleasure crafts being operated on Canadian inland waterways and territorial waterways while persons were impaired or operating those "vessels" dangerously. This concern has not diminished over the ensuing years as evidenced by the newspaper articles included in the Crown's materials relating to police media releases about programs to reduce impaired operation of a vessel, whether or not the pleasure craft was motorized. The Canadian Safe Boating Council supports non-motorized "vessels," including canoes and kayaks, being included in the definition of "vessel" in the *Criminal Code*. In their submissions before the Justice Committee speaking against the exclusion of vessels propelled exclusively by muscular power, the CSBC indicated there were approximately 8.6 million boats in use in Canada, of which about 60 per cent were human-powered vessels. It was the representations and submissions of this organization, in large part that caused the Justice Committee to remove the exclusion of vessels propelled exclusively by means of muscular power… The Crown pointed to the recent amendments to the *Criminal Code* respecting the offences of dangerous operation, impaired operation and operation with 80 or more mg alcohol/100ml blood involving conveyances pursuant to Bill C-46. It is important to note that an earlier draft of the definition of "*vessel*" stipulated it did not include a vessel that is propelled exclusively by means of muscular power. This amendment would have specifically excluded canoes, rowboats, standup paddleboards, kayaks and other vessels propelled exclusively by means of muscular power. Yet, as a result of representations by the *Canadian Safe Boating Council*, which indicated in their submissions to the Standing Committee on Justice and Human Rights, that between 1991 and 2010 there were 375 deaths in suspected and confirmed cases involving alcohol and unpowered vessels such as canoes and rafts in Canada. Further, a number of MPs on the Justice Committee considering the new bill C-46 spoke against the amendment. The amendment excluding vessels propelled exclusively by means of muscular power was removed in the final draft, which then received royal assent in June 2018 in Parliament and will come into force December 18, 2018.

The difference in approach to limitation between Canada and the U.S. also reflects the limitation of liability quantum in each country. In the U.S. the limitation amount is the value of the vessel. So, for a paddleboard this would be less than $1500. In Canada, for a pleasure craft the limitation of liability is $1,000,000 Canadian for personal injury or death. For commercial vessels under 300 tons gross tonnage and involving passengers, the limitation for personal injury is $3,600,000 (being the approximate value of two million special drawing rights).

Rui M. Fernandes

Endnotes

(*1) *Blue Water Boating Inc. v. Agnes Nabiser Mubanda* December 4, 2019 No. 18-55575.

2. Technology Companies Use of Extreme Contract Clauses

Many technology companies in Canada are demanding that corporate clients sign what are very onerous one-sided contract clauses. The two examples that companies must guard against are limitation of liability (or exclusion clauses) and indemnification clauses.

In 2010 the Supreme Court of Canada in *Tercon v. B.C.,* 2010 SCC 4 upheld the principle of freedom of contract. Parties are entitled to enter into contracts, which the courts will enforce, including exclusion clauses, unless there exists an overriding public policy not to enforce such clauses. The following analysis should be applied when a party seeks to escape the effect of an exclusion clause or other contractual terms to which it had previously agreed. The first issue is whether, as a matter of interpretation, the exclusion clause even applies to the circumstances established in evidence. This will depend on the court's interpretation of the intention of the parties as expressed in the contract. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable and thus invalid at the time the contract was made. If the exclusion clause is held to be valid at the time of contract formation and applicable to the facts of the case, a third enquiry may be raised as to whether the court should nevertheless refuse to enforce the exclusion clause because of an overriding public policy. The burden of persuasion lies on the party seeking to avoid enforcement of the clause to demonstrate an abuse of the freedom of contract that outweighs the very strong public interest in their enforcement. Conduct approaching serious criminality or egregious fraud are but examples of well-accepted considerations of public policy that are substantially incontestable and may override the public policy of freedom to contract and disable the defendant from relying upon the exclusion clause.

An example of a clause found in many technology contracts is the limitation or exclusion of liability clause which reads:

> **Limitation of Liability**: SUPPLIER AND RELATED PARTIES WILL NOT BE LIABLE TO CUSTOMER FOR ANY DIRECT, INDIRECT, INCIDENTAL, SPECIAL, CONSEQUENTIAL OR EXEMPLARY DAMAGES (INCLUDING DAMAGES FOR LOSS OF PROFITS, GOODWILL, USE, OR DATA), EVEN IF A PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. FURTHER, NEITHER WE NOR ANY OF OUR RELATED PARTIES WILL BE RESPONSIBLE FOR ANY COMPENSATION, REIMBURSEMENT, OR DAMAGES ARISING IN CONNECTION WITH: (A) CUSTOMERS INABILITY TO USE THE SERVICES, INCLUDING AS A RESULT OF ANY (I) TERMINATION OR SUSPENSION OF THIS AGREEMENT OR CUSTOMERS USE OF OR ACCESS TO THE SERVICES OR THE RENTED EQUIPMENT, (II) THE DISCONTINUATION, SUSPENSION OR TERMINATION OF ANY OR ALL OF THE SERVICES, OR, (III) WITHOUT LIMITING ANY OBLIGATIONS UNDER THE SLAS, ANY UNANTICIPATED OR UNSCHEDULED DOWNTIME OF ALL OR A PORTION OF THE SERVICES FOR ANY REASON, INCLUDING AS A RESULT OF POWER OUTAGES, SYSTEM FAILURES OR OTHER INTERRUPTIONS; (B) THE COST OF PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES; (C) ANY INVESTMENTS, EXPENDITURES, OR COMMITMENTS BY CUSTOMER IN CONNECTION WITH THIS AGREEMENT OR CUSTOMER'S USE OF OR ACCESS TO THE SERVICES OR THE RENTED EQUIPMENT; OR (D) ANY UNAUTHORIZED ACCESS TO, ALTERATION OF, OR THE DELETION, DESTRUCTION, DAMAGE, LOSS OR FAILURE TO STORE ANY OF CUSTOMER'S CONTENT OR OTHER DATA. IN ANY CASE, THE AGGREGATE LIABILITY OF SUPPLIER AND RELATED PARTIES UNDER THIS AGREEMENT WILL BE LIMITED TO THE

> AMOUNT CUSTOMER ACTUALLY PAID UNDER THIS AGREEMENT FOR THE SERVICE THAT GAVE RISE TO THE CLAIM DURING THE 4 MONTHS PRECEDING THE CLAIM.

This clause has the effect of limiting the exposure of the technology supplier to a maximum of what the fee for the service was for four months prior to the claim. For example, an internet provider charging $200 a month would only be liability for $800.00 for any losses suffered by the customer. If the company's internet is down for two weeks, and there is loss of business the technology supplier will try to exclude or limit liability even if it is fully at fault.

Another extreme and onerous clause is the indemnification clause found in many contracts. Typical wording is:

> **Indemnification:** You will defend, indemnify, and hold harmless Supplier, its parent and holding companies, affiliates, subsidiaries and licensors, and each of their respective employees, officers, directors, agents and representatives ("Related Parties") from and against any claims, damages, losses, liabilities, costs and expenses (including reasonable attorneys' fees) arising out of or relating to any third person or party claims, actions or proceedings concerning: (a) any Customer or end users' use of the Services (including any activities under your account and use by Customer's employees and personnel); (b) any breach of this Agreement or violation of applicable law by You or any end user; (c) Customer's content or the combination of Customer content with other applications, content or processes, including any claim involving alleged infringement or misappropriation of third-party rights by Customer's content or by the use, development, design, production, advertising or marketing of Customer's content; or (d) a dispute between You and any end user. If We or any Related Parties are obligated to respond to a third party subpoena or other compulsory legal order or process described above, You will also reimburse Supplier or any Related Parties for reasonable attorneys' fees and court costs, as well as for the time and materials for responding to the third party subpoena or other compulsory legal order or process at our then-current hourly rates.

This means that a company using a service provided by a supplier will be responsible for defending the supplier, even where the supplier is at fault. For example, if the supplier provides cloud services and through its negligence it allows their system to be hacked, the company could be sued by its customers, who may also sue the supplier. The indemnification clause would require the company to pay for any defence costs and awards given to the customer against the supplier.

Companies faced with these two clauses have very few choices:
a) refuse to sign an agreement containing such clauses and find alternative suppliers who are more reasonable; or
b) negotiating the two clauses to alleviate the extreme burden of these two clauses. For the limitation clause the amount for the supplier's liability should be increased and removed if the supplier is grossly negligent or the loss results from the supplier's willful misconduct or recklessness. The indemnity clause should only apply if the supplier is sued as a result of the company's negligence or omission.

Failing to recognize one-sided clauses in contracts can be dangerous and expensive for companies. Contract terms should be read and understood. Review by a lawyer is recommended. Courts are instructed by the Supreme Court of Canada to enforce contracts, even if they are "bad" or "onerous" contracts. Establishing that a contract is contrary to public policy is difficult and rare.

Rui M. Fernandes

3. Limitation of Liability for Ship Source Oil Pollution

The Federal Court of Canada recently reviewed the limitation of liability provisions of the *Marine Liability Act*, S.C. 2001, c. 6 ("MLA") in *Kirby Offshore Marine Pacific LLD v. Heltsuk* 2019 FC 1009. Justice Strickland was the presiding judge.

Kirby Offshore Marine Pacific LLC and Kirby Offshore Marine Operating LLC [both referred to as "Kirby"] commenced an action seeking to limit their liability arising from a ship-source oil pollution incident. Kirby brought a motion seeking an order providing direction as to the constitution of a limitation fund, and to enjoin other claims in other courts.

Heiltsuk Hímás and Heiltsuk Tribal Council, each on their own behalf and on behalf of the members of the Heiltsuk First Nation [together, "Heiltsuk"] filed a claim against Kirby and others in the British Columbia Supreme Court pertaining to oil pollution damage arising from the same ship-source incident. Heiltsuk brought a motion seeking to stay Kirby's limitation action in the Federal Court, on the basis that it was not a convenient forum.

The Court reviewed the legislative backdrop and the regime surrounding a shipowner's entitlement to limit its liability. The MLA sets out how maritime claims, as defined in that Act will be addressed in Canada. Importantly, this includes incorporating into the law of Canada the provisions of international conventions, to which Canada is a signatory, which permit shipowners to limit their liability for maritime claims (including the ~~the~~ Convention on Limitation of Liability for Maritime Claims, 1976, concluded at London on November 19, 1976, as amended by the Protocol, "Limitation Convention"). The Court also discussed Part 6 of the MLA that deals with liability and compensation for pollution and includes International Convention on Civil Liability for Oil Pollution Damage, 1992, concluded at London on November 27, 1992 ("CLC") and the Convention on Civil Liability for Bunker Oil Pollution Damage, 2001, concluded at London on March 23, 2001 ("Bunkers Convention").

Article 2 of the Limitation Convention describes the claims that are subject to limitation. Specifically, it states that subject to Articles 3 and 4, the claims listed, *whatever the basis of liability may be*, shall be subject to limitation of liability.

The Court reviewed the tests for enjoinment and a stay of proceedings as set out in the trial and appeal decision in *J.D. Irving v. Siemens* 2011 FC 791 and 2012 FCA 225. In the case Siemens had commenced an Ontario action for damages to cargo on a barge. JD Irving as the operator of the barge brought a Federal Court action to limit its liability. In the Federal Court of Appeal Justice Nadon stated that "the only court that can adjudicate Irving's … right to limit their liability is the Federal Court." In reviewing the Irving decision Justice Strickland noted:

> In my view, for the purposes of placing a limitation action in context, it is significant to note that Justice Nadon also addressed the purpose and impact of a decision rendered in such an action. In the limitation action, the Federal Court would not be called upon to determine, as a matter of law, whether Irving and MMC were liable for the loss. Rather, the true issue which arose from both the Ontario and the Federal Court proceedings in that case *was whether Irving and MMC were entitled to limit their liability*. If both could limit their liability, then, given the facts, the case against them was likely to go away upon payment of the limitation amount. If one or both of those parties were not entitled to limit their liability, then the Ontario liability and damages proceedings would continue against the party or parties not entitled to limitation. In the event that limitation was "broken", settlement was also very likely because the judge of this Court in the limitation action would have concluded that the loss resulted from

> intent or recklessness within the meaning of Article 4 of the LLMC, or in the case of MMC, that it did not fall under the protection of Article 1(4) of the LLMC. As stated by Justice Nadon at para 94: "In other words, the fundamental issue between the parties is not liability nor damages, but the right to limit liability. Once the right to limit liability has been determined, the debate between the parties will most likely be at an end" (*JD Irving FCA*).

Justice Strickland, in accordance with the Irving decision in the Federal Court of Appeal, held that the proper test for enjoinment is appropriateness as set out in section 33 of the MLA. The decision to enjoin is a discretionary one, to be made taking into account all of the relevant circumstances. Justice Strickland noted that the Federal Court has been granted exclusive jurisdiction with respect to any matter relating to the constitution and distribution of the limitation fund by way of s. 32(1) of the MLA. That jurisdiction did not lie with the British Columbia Supreme Court. Justice Strickland found that it was therefore appropriate the limitation action proceed in the Federal Court and the action in the British Columbia Supreme Court be enjoined until the limitation action was determined.

Justice Strickland added:

> Thus, the limitation of liability permitted by the LLMC, and thereby the Bunkers Convention, is the result of policy decisions made and adopted into the domestic law of the states who are signatories to those, and other, international conventions. In this case, the MLA is the statutory vehicle by which the limitation of liability provisions of the Bunkers Convention, the LLMC, the CLC, and other conventions are incorporated into Canadian law.
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> [162] As in *JD Irving FCA*, the facts surrounding the Incident are not greatly disputed. Here the second mate fell asleep at the helm. The tug and barge hit a reef and the resultant hull damage permitted pollutants to escape into the sea. This situation entirely lends itself to a summary determination as to whether Kirby's entitlement to liability is barred pursuant to Article 4 of the LLMC.

> Whether framed as recklessness, negligence, nuisance, breach of contract, or otherwise, what Heiltsuk asserts is that the Kirby Defendants are liable for pollution damages arising from the Incident. The Limitation Action determines only one thing, whether Kirby is entitled to limit its liability pursuant to the Bunkers Convention and the LLMC. If the Limitation Action proceeds in advance of the liability trial and it is found that Kirby is entitled to limit its liability, then this will effectively put a cap on the amount that Kirby is liable to pay and will remove from the litigation in the BCSC Claim all issues of liability and damages in that regard. Thus, there will be no duplication of proceedings and a cost savings will be achieved.

The Court gave the following directions and orders:

a) Directed that a limitation fund may be constituted pursuant to the Bunkers Convention and the Limitation Convention;

b) Since the pollution incident involved a tug and barge integrally connected, the limitation fund to be constituted was based on the combined tonnage of the tug and barge. However, Kirby was not precluded to bring a preliminary motion in the limitation action to reduce the amount of the fund on the basis that the fund should only be based on the tonnage of the tug. Justice Strickland noted that "In the matter before me, it is open to debate as to whether a flotilla exists, given the articulated tug and barge configuration, whether the tug was responsible for the navigation of the barge, and whether the barge contributed to the resultant damage arising from the Incident. In my view, this issue should be pursued in greater depth within the Limitation Action";

c) Kirby's motion for enjoinment was granted to the extent Heiltsuk was enjoined from proceeding in the British Columbia Court claim until such time as the limitation action was determined.

Rui M. Fernandes

4. When is a Price Increase in a Utility a "Tax"?

In an interesting decision rendered at the end of last month, the Ontario Court of Appeal has opened the door to arguments that the use of power to regulate pricing – in this case, of electricity – might, in certain cases, be open to challenge as a disguised "tax." The central complaint raised by the applicant in *National Steel Car Limited v. Independent Electricity System Operator* (*1) was that, if the government wishes to raise taxes, it can certainly do so, but that it is not permissible to raise revenue for a specific purpose through price regulation, a *de facto* tax, simply to avoid following the proper legislative process for levying new taxes.

Facts

The applicant in this case, National Steel Car Limited ("NSC"), initially launched its application under the former Liberal government in Ontario. Ontario's electricity pricing formula is administered by the Independent Electricity System Operator (IESO), which is governed by the *Electricity Act*, as later amended by the *Green Energy and Green Economy Act* (2009). IESO sets the price of electricity by something called a "Global Adjustment", part of which was used to fund a program called the feed-in tariff, or "FIT", program. NSC argued in its application that the FIT Program was in fact a disguised tax. NSC, a heavy consumer of electricity, saw its spending on electricity increase by 1,335.94% from 2008 to 2016, a period during which total rate of inflation was only 13.28% and NSC's use of electricity increased by only 21.06%. In its application NSC identified the FIT Program as the main culprit behind the colossal price increase in electricity it had to bear.

The problem the court had to resolve, therefore, was whether the FIT Program charges were proper regulatory charges under Ontario law, or a tax levied unconstitutionally. The difficulty this presents is that it is somewhat difficult to distinguish true taxes from regulatory charges in practice, as both are just money raised by the government through legislative action. The key difference between the two, however, as noted by the Court of Appeal in its decision, is that a genuine regulatory charge should have "a close correspondence between the costs [of the service] and the revenue generated by the charges" (*2). Put in other words, a regulatory charge is something that is, by design, geared to "reasonably recover regulatory costs," and not "to produce an unreasonable surplus" (*3). A regulatory charge will cross that line and become a tax where it appears "unconnected" to the regulatory scheme that it pretends to follow.

Regulatory charge or "tax"

How did the FIT Program violate this principle? A further way to state the central constitutional principle regarding the power to tax is that the government cannot through legislation "do indirectly what it cannot do directly." The thing that it could not do directly here was to raise revenue through electricity price regulation to fund some "unconnected" policy goal. Here is where the applicant argued that the FIT Program went astray. The program paid private suppliers of renewable energy a fixed rate. Further, under the program, the Minister could set out goals for the program. Specifically, under the version of the *Electricity Act* then in force, the applicant noted that these could include furthering the participation of aboriginal and other rural communities, and further allowed the regulator to permit select FIT Program projects to charge enhanced rates where they were located in what NSC referred to as "Preferred Communities." The net effect of these regulations, NSC argued, was to provide a financial subsidy to certain regional communities in a manner that was clearly "unconnected" to the general purpose of funding electricity regulation.

In rejecting the motion judge's analysis and allowing the appeal, the Court of Appeal in essence said that the applications judge did not probe deep enough to see whether there was an arguable case for the FIT Program being a tax "in disguise," which was precisely the question NSC sought to have answered. In granting the appeal,

the Court of Appeal also rejected IESO's submissions that, because the revenue generated remained in a "closed system"- that is, that the "actual costs," or the money paid through the FIT contracts for generating electricity, were fully accounted for in the Global Adjustment –it must therefore be a cost recovery mechanism linked to regulation of electricity.

The Court of Appeal highlighted the fundamental problem with this argument, and the application judge's error in accepting it, by noting that (*4):

> [70] The appellant plainly challenges what the motion judge assumed: the government's good faith in setting up the closed system. Although Ontario could provide financial support to the Preferred Communities through a system of grants funded by tax revenues, it did not do so, but instead impermissibly chose the electricity pricing mechanism as the vehicle.
>
> [71] The motion judge accepted Ontario's argument that because the proceeds of the FIT program component of the Global Adjustment did not go into its coffers, it cannot be a tax. But the appellant argues that, in effect, the structure of the system was to set up an "off-book" wealth transfer mechanism. If it was aimed at the betterment of the Preferred Communities, was this aim a "regulatory purpose" or a "general purpose" usually funded by tax revenues? The motion judge did not address this argument.

Conclusion

This decision would be as important as it is interesting were it not for the fact that the Court of Appeal's ruling has been largely overtaken by events. Since the original decision there has been a change in provincial government in Ontario with the policies of the former government, particularly on energy, becoming the subject of intense scrutiny. Further, the Court of Appeal's ruling here was a narrow one, as the only matter it decided was that it was not "plain and obvious" that NSC's arguments would fail, and that they would therefore require a full hearing on the merits. The ruling does, however, uphold an important principle; that is, that while the government's power to tax its citizens is broad, it is nevertheless not a blanket power. Though it can impose taxes for almost any purpose, it must do so openly and honestly, and not by stealth. It is therefore heartening to see the highest court in Ontario restate this principle in such strong terms, even though the legitimacy of this particular regulatory charge remains for the moment a question still to be decided.

Oleg M. Roslak

Endnotes
(*1) 2019 ONCA 929 [*National Steel Car*].
(*2) *National Steel Car* at para. 38.
(*3) *National Steel Car* at para. 37.
(*4) *National Steel Car* at paras. 70-71.

5. Slip and Fall: Property Owners' Duty of Care of Care Revisited

The law as it stands today does not hold property owners liable for failure to clear or maintain adjacent public sidewalks unless the homeowner has somehow exercised some jurisdiction or control over that public sidewalk. Bylaws may require snow and ice clearance ("Be Nice, Clear Your Ice") failing which a homeowner may be fined, but civil liability does not attach. A city cannot delegate its legal obligation to clear snow and ice to property owners.

An "occupier" has a duty to ensure that persons entering upon its premises are reasonably safe. The occupier is not an insurer and perfection is not the standard. Rather, the occupier must have a reasonable system of maintenance and inspection. For adjacent public sidewalks, the property owner is not an occupier, unless that homeowner expressed "dominion" over or in "possession" over the sidewalk. If drainage occurred from eavestroughing from the homeowners' premises causing ice to buildup on the sidewalk, that homeowner might be liable if someone fell on that ice, for example.

Homeowners, therefore, can risk a citation, but typically do not attract civil liability if someone slips and falls on the adjacent public sidewalk. However, just last month, a novel duty of care argument was made to the Supreme Court of British Columbia that suggested that homeowners (on the basis of negligence) should face civil liability for negligently clearing the snow and ice from a public sidewalk in their attempt to comply with a snow clearance bylaw. However, the plaintiff in *Der v Zhao and Huang et al* 2019 BCSC 1996 was unsuccessful in his novel argument, but it appears that the case is headed for the British Columbia Court of Appeal.

Facts and the Claim

Mr. Zhao and Ms. Huang (the "homeowners") owned a home in Burnaby, BC. In December of 2017, Mr. Der slipped and fell on black ice located on a municipal sidewalk adjacent to the Zhao-Huang home, and suffered catastrophic injuries. Mr. Der sued the homeowners and the City of Burnaby. The action against the City of Burnaby was discontinued.

While the action was commenced in both negligence and in occupier's liability, the plaintiff, at trial, acknowledged that the homeowners were not "occupiers" of the sidewalk under the *Occupiers Liability Act* (*1) as they did not have possession of it or responsibility or control over it. Further, Mr. Der acknowledged that breach of the city bylaw to clear ice did not create civil liability against the property owner to a third party using the sidewalk. (*2)

Mr. Der's sole claim at trial was that the defendant homeowners (or their agent contractors) failed in their attempt to clear snow and/or ice thereby negligently creating a hazardous, slippery sidewalk containing black ice that was not visible to the reasonable pedestrian.

The sidewalk in question had been cleared and Mr. Der had no trouble stepping on to the sidewalk. The fact that there was ice on the sidewalk was corroborated by the firefighters who attended the scene. The plaintiff's expert opined on the requirements of proper winter maintenance of sidewalks stating that the homeowners' clearance of the sidewalk without following up with applications and reapplications of salt caused the black ice to form given the specific weather conditions at the time along with the slope in sidewalk itself. Apparently, if the snow had not been shovelled at all, there would have been more traction given the ice.

The Court Application

Mr. Der argued that the homeowners, by attempting to clear the sidewalk of snow and ice pursuant to the bylaw, had done so negligently and, in doing so, had created a hazard for which they should be held liable. They had, he argued, voluntarily assumed the responsibility of clearing the sidewalk even though they had no legal duty to do so. Alternatively, Mr. Der sought to establish a novel duty of care that the homeowners, in

their attempts to clear the sidewalk, had created or contributed to a set of dangerous conditions (black ice), which imposed a positive duty to warn sidewalk users of the risk or to ameliorate the danger.

The homeowners testified that they had cleared the sidewalks and laid down salt, but could not remember exactly when or how much. The homeowners argued that they owed no duty of care to Mr. Der, whether they cleared and salted the sidewalks or not, and sought dismissal.

On a summary trial application by the defence, the sole issue before the Court was to determine with respect to liability whether the homeowners owed Mr. Der a duty of care.

MacNaughton J. rejected the argument that acting to comply with a bylaw that required property owners to clear an adjacent sidewalk of ice and snow was equivalent to an earlier case regarding a snowplow contractor's voluntary undertaking or explicit promise (or control) to resolve a specific danger on a highway, which (failed) promise then interfered with the notice that the police would otherwise have given the municipality, who then would have taken steps to manage the risk. (*3) In Mr. Der's case, absent the homeowners' conduct, there was no evidence that the City would have done anything differently. Also, there was no evidence of an agreement between the City and the homeowners regarding the latter's assumption of control over snow and ice clearance to avoid ice accumulation or black ice creation on the sidewalk. Her Honour stated, at para. 59, that, "It is not reasonable to interpret an attempt to comply with a bylaw as a voluntary undertaking to the City to maintain the sidewalk and resolve dangers that later form on it."

Regarding the establishment of a novel duty where a the property owner failed in their attempt to clear the sidewalk thereby causing or contributing to a creation of dangerous conditions, Mr. Der argued that prior cases had only considered actions where there was no attempt to clear or where no such dangerous conditions had resulted from negligent attempts to clear.

MacNaughton J. stated:

> [62] In my view, Mr. Der's argument is logically flawed. It seeks to impose a duty of care on the basis that the act of clearing the sidewalk was performed negligently—in other words, that the *standard of care* was breached—in circumstances in which he accepts that a duty of care does not exist.
>
> [63] To agree that homeowners owe no duty to users of the sidewalk to maintain it, but argue that failing to act to the appropriate standard in doing so can create a duty of care, is contrary to basic negligence principles in that it conflates concepts of duty of care with standard of care. It is circular reasoning.

Her Honour further stated that it might have been a different situation had Mr. Der argued that the direct actions of the homeowners had created a danger that had caused reasonably foreseeable harm to sidewalk users. However, that was not Mr. Der's argument but rather he argued that the homeowners' actions, combined with additional circumstances relating to weather patterns, and the slope and structure of the sidewalk, led to the formation of a danger after the fact. Her Honour wrote, at para. 72, "It is in the context of these circumstances that Mr. Der bears the burden of establishing that reasonable foreseeability and proximity are met such that it would be just and fair to impose a duty of care on Mr. Zhao and Ms. Huang. He has not met this burden."

The Court went on to note that there would be expected policy reasons that would stand against recognizing a duty of care in such circumstances. If property owners who ignored snow removal bylaws had no liability, but those who attempted to comply with the bylaws exposed themselves to liability, "the result would be that property owners would have an incentive not to make any

effort to comply with snow removal bylaws. The potential loss of the assistance of private property owners in snow removal efforts out of fear of the potential legal ramifications would be likely to cause more danger than it would prevent."(*4)

The Court found that Mr. Der had failed to establish that the homeowners had a duty of care to him and granted judgment in favour of the defendant homeowners.

Finally

The reality is that the plaintiff was attempting to find someone to pay damages, but it is very difficult to find a municipality liable for poor public sidewalk conditions, as the test in this regard is one of "gross negligence". The City must fail to implement its winter maintenance programme in such a way that its conduct would be considered extremely negligent. The plaintiff here fell on black ice and suffered greatly, but neither the City nor the adjacent property owners, who did what they could to comply with the bylaw, are liable.

The decision was released on November 22 2019 and the plaintiff has 30 days in which to appeal to the British Columbia Court of Appeal. (*5)

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Endnotes
(*1) British Columbia's *Occupier's Liability Act*, RSBC 1996, c 337, is similar to Ontario's legislation.
(*2) See *Bongiardina v Vaughan* (City) 2000 CanLII 5408 (ONCA).
(*3) See *Goodwin v Mainroad North Island Contracting Ltd* 2007 BCCA 81 (CanLII).
(*4) At para. 74.
(*5) According to an interview given to Ian Burns of The Lawyer's Daily (December 4 2019), counsel for Mr. Der expected to appeal the decision.

6. Ocean Leg Versus Road Leg: Applicable Limitation of Liability Under German Law

Iamgold Corporation and Niobec Inc.("Iamgold") were the owners of a cargo of ferroniobium loaded into four containers (the "Cargo"). Iamgold contracted with Hapag-Lloyd AG ("Hapag-Lloyd") to transport the Cargo from Montreal to Antwerp, Belgium by ship, and then from Antwerp to Moerdijk, Netherlands by truck. A Hapag-Lloyd Sea Waybill was issued citing German law.

Three of the four containers were stolen from the terminal in Antwerp when an unauthorized trucker provided the terminal operator with the PIN numbers to pick up the containers and left the terminal with those containers.

Hapag-Lloyd admitted liability, but the parties disagreed on the limitation of liability that applied to the loss. The question for the Court was, whether under German law, the loss of the Cargo occurred during the ocean leg or the road leg of the carriage and the applicable limitation of liability.

If the loss of the Cargo occurred during the ocean leg, the limitation of liability would be 2 Special Drawing Rights ("SDRs") per Kg, by virtue of the provisions of the Hapag-Lloyd Sea Waybill.

If the loss of the Cargo occurred during the road leg, the limitation of liability would be 8.33 SDRs per Kg, pursuant to the terms of the Convention on the Contract for the International Carriage of Goods by Road ("CMR") and/or provisions of the Hapag-Lloyd Sea Waybill.

The Court found that the loss of the Cargo occurred on the road leg of the carriage and that the loss was therefore subject to the limitation of liability applicable to road carriage under German law (8.33 SDRs per Kg).

The Court agreed with the Iamgold's expert that the determination of whether a particular loss occurred on the ocean or road leg of a multimodal transport turns on whether the activity giving rise to the loss was characteristic of or attributable or closely tied to a particular leg. The German jurisprudence focuses on the materialization of risk and the allocation of that risk as between the different transport legs.

The Court determined that the risk that materialized was the risk that the Cargo would be released to a party that was not entitled to have it. The process involving the release of the containers using the PIN numbers was determined to be characteristic of or attributable to road transport. It was intended to mitigate the risk and represented a security feature meant to ensure the transfer of the Cargo to the correct road carrier. The risk associated with such a failure was determined to be a risk associated with the road leg.

Therefore, as the loss of the Cargo arose from an activity characteristic of road transport, J. Southcott accepted that German law governed the loss as having occurred on the road leg of the multimodal transport and that the loss was subject to the limitation of liability applicable to road carriage.

Andrea Fernandes

Endnotes

(*1) *Iamgold Corporation and Niobec Inc. v Hapag-Lloyd AG et al*, 2019 FC 1514

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CONTEST

This month we are giving away a complimentary ticket for attendance at our annual seminar day - in 2020 in Toronto Feb. 10 2020 - for the first individual to email us the location depicted in photograph on page 9. Email your answer to info@fernandeshearn.com with a subject line "Newsletter contest". First response with the correct answer wins.