THE NAVIGATOR

IN THIS ISSUE

The Ontario Court of Appeal Rules that Uber's "Arbitration Clause" is Unenforceable

The Ontario Court of Appeal has ruled (*Heller v. Uber Technologies Inc.* 2019 ONCA 1) that an arbitration clause in Uber's standard contract form with delivery drivers is unenforceable in Ontario.

Background

David Heller provides "UberEATS" food delivery services for Uber through the "Uber Driver App". He earns roughly $400 to $600 per week based on 40 to 50 hours of work driving his own vehicle. The UberEATS app allows customers seeking food delivery to order food from restaurants and have it delivered by a nearby driver. The App displays each restaurant's menu, collects each customer's order and transmits the orders to the restaurants. The restaurant updates the App as the food is prepared. The App then advises a nearby driver that a delivery is available. Drivers who wish to deliver the order accept that mandate through the App, which in turn provides that driver's identifying information to the restaurant and the customer. After delivering the food, the driver confirms the delivery in the App, which collects the customer's payment and remits payment to the restaurant. Uber then remits payment to the drivers in accordance with a fixed formula.

Uber requires drivers like Mr. Heller to create an online account to access the Uber Driver / UberEATS app. The first time that a driver logs onto that App they are required to accept a services agreement which appears on their "smartphone" screen. Drivers accept by indicating "I AGREE" and are then asked to reconfirm their acceptance to the terms by again clicking "I AGREE" a second time. This sequence occurs after each driver is presented with the following wording: "PLEASE CONFIRM THAT YOU HAVE REVIEWED ALL THE DOCUMENTS AND AGREE TO ALL THE NEW CONTRACTS". The particular UberEATS service agreement in question (the "Agreement") is 15 pages in length.

The Agreement contained the following arbitration clause:

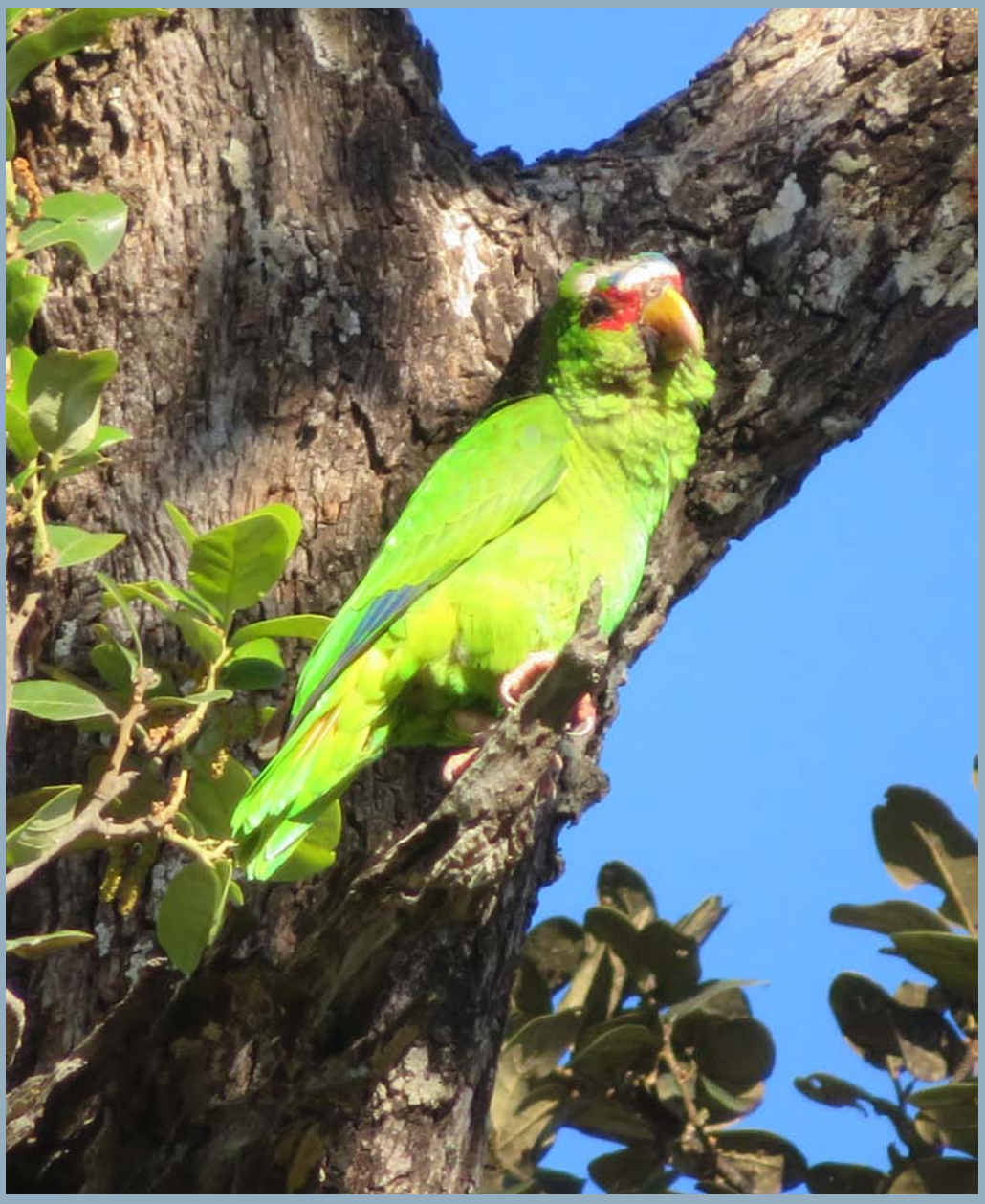
FIRM AND INDUSTRY NEWS

- **Cargo Logistics Canada Expo & Conference**, 05-07 February, 2019, Vancouver, Canada.

- **Arctic Shipping Summit,** 13-14 March, 2019, Montreal, Canada.

- **Supply Chain Conference,** 19-21 March 2019, Atlanta U.S.A.

- **Gordon Hearn** will be presenting a paper on "International Trade: Trends and Developments from A Canadian Perspective" at the **Transportation & Logistics Council Annual Conference** being held on March 25, 2019 in Memphis, Tennessee.



> *Governing Law; Arbitration. Except as otherwise set forth in this Agreement, this Agreement shall be exclusively governed by and construed in accordance with the laws of The Netherlands, excluding its rules on conflicts of laws. . . . Any dispute, conflict or controversy howsoever arising out of or broadly in connection with or relating to this Agreement, including those relating to its validity, its construction or its enforceability, shall be first mandatorily submitted to mediation proceedings under the International Chamber of Commerce Mediation Rules ("ICC Mediation Rules"). If such dispute has not been settled within sixty (60) days after a request for mediation has been submitted under such ICC Mediation Rules, such dispute can be referred to and shall be exclusively and finally resolved by arbitration under the Rules of Arbitration of the International Chamber of Commerce ("ICC Arbitration Rules"). . . . The dispute shall be resolved by one (1) arbitrator appointed in accordance with ICC Rules. The place of arbitration shall be Amsterdam, The Netherlands. . . .*

Mr. Heller commenced a proposed class action (that is, one not yet 'certified' to proceed under the relevant rules of court) in the Ontario Superior Court on his own behalf and for "any person who since 2012 worked or continues to work for Uber in Ontario as a Partner and/or an independent contractor" pursuant to a contract in the nature of the Agreement. The intended Class Members all provide food delivery services and/or personal (ride share) transportation services using various Uber Apps.

The basis for Mr. Heller's intended Class Action concerned his desire for a declaration that all such drivers in Ontario are *employees* of Uber and are accordingly governed by and benefit from the provisions of the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (the "*ESA*"). The claim asserts that Uber violated certain provisions of the *ESA* and seeks significant monetary damages. The claim also anticipated Uber's reliance on the aforementioned arbitration clause, seeking a pre-emptive strike on same on the basis that the clause is void and unenforceable, as Mr. Heller did not want to commence the prescribed mediation and potential arbitration in the Netherlands. Mr. Heller cited Ontario legislation in the *Arbitration Act, 1991* S.O. 1991 c.17 that provides that arbitration clauses be of no force or effect where the circumstances suggest that the enforcement of same would be "unconscionable".

Uber challenged the application to certify the class action, seeking a "stay" of same on the basis of the arbitration clause. An Ontario Superior Court judge initially granted Uber's request that the proposed Class Action be stayed in favour of the Netherlands mediation / arbitration process on the basis that, subject only to limited (and inapplicable) legislative exceptions Canadian case law provides that that arbitration agreements freely entered into should be enforced. The judge also noted that there was no restriction in the *ESA* restricting the parties from arbitrating disputes, that any question as to the "arbitrability" of employment agreements was a matter for the designated arbitrator to consider and that in any event there was nothing "unconscionable" in the nature of or effect of the arbitration clause.

Accordingly, Mr. Heller's only recourse to advance his claims would be to commence the mediation / arbitration process in the Netherlands. Mr. Heller appealed to the Ontario Court of Appeal.

At the Court of Appeal

The Court of Appeal concluded that the first instance just erred in granting Uber the stay of Mr. Heller's Proposed Ontario action. The Court ruled that the arbitration clause was

unenforceable, that it had the discretion to allow the Class Action certification process to proceed and that in fact the matter should proceed without Mr. Heller having to "go to the Netherlands".

The Court identified two key issues:

> i) whether the arbitration clause amounted to an illegal contracting out of the *ESA* and was thus invalid, and
>
> ii) whether the arbitration clause was in any event unconscionable and accordingly invalid.

The "Contracting Out" Issue

The Court considered the provisions of Ontario's *Arbitration Act, 1991* to be applicable, inasmuch as they mirror international rules concerning the footing of "agreements to arbitrate". This legislative regime provides that, if a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court shall stay the proceeding. There are however a number of stated exceptions to this mandatory requirement, such as in the event of a finding that an arbitration agreement is invalid. Mr. Heller asserted that the arbitration clause was invalid because it amounted to a contracting out of certain compulsorily applicable provisions of the *ESA,* which statute prohibits parties from contracting out of its prescribed "employment standards".

In its analysis the Court of Appeal made it clear that it was only dealing with *preliminary* or threshold procedural issues as concerned Mr. Heller's grievances: it would *not* decide the core issue raised as to whether Mr. Heller (or other drivers) were employees – so as to enjoy certain ESA benefits and protections - as distinct from independent contractors. The Court noted that this "core issue" would only be decided later in time in the Class Action, *were it to proceed.* Rather, what had to be decided was whether the arbitration clause was invalid such that the mandatory stay would not apply. The Court ruled that it was invalid, taking into account the following factors:

> 1. Pursuant to the *Arbitration Act, 1991* a court *must* grant a stay unless one of five exceptions as provided for therein applies. If any of those exceptions applies, then the court has a discretion whether or not to grant a stay.
>
> 2. It is the court in which the impugned action is launched that is charged with making the determination whether one of the *Arbitration Act, 1991* exceptions applies. This is *not* left to the 'foreign" arbitrator to make this ruling.
>
> 3. For the purposes of this preliminary motion, the court must work with the presumption that Mr. Heller would in due course be able to prove that he is an employee of Uber – but only for the purposes of Uber's present stay application. As noted by the Court, "… This is a preliminary motion in a proceeding and, like many other preliminary challenges to the court's jurisdiction to entertain a claim, the court normally proceeds on the basis that the plaintiff's allegations are true, or at least, capable of being proven."
>
> 4. With this approach it then followed that the question to be resolved was whether, *if* Mr. Heller *is* an employee of Uber, did the arbitration clause constitute a prohibited contracting out of the *ESA*? If it did, then the clause was invalid, and the mandatory stay would not apply.
>
> 5. The *ESA* provides on point as follows:
>
> (1) Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an **employment standard** and any such contracting out or waiver is void.

> (2) If one or more provisions in an employment contract or in another Act that directly relate to the same subject matter as an employment standard provide a greater benefit to an employee than the employment standard, the provision or provisions in the contract or Act apply and the employment standard does not apply.
>
> [emphasis added]
>
> The *ESA* defines an "employment standard" as a "*requirement or prohibition… that applies to an employer for the benefit of an employee*". Accordingly, *if* Mr. Heller was an Uber employee, then he would be covered by the *ESA* and be entitled to the benefits provided thereunder and he would not be bound by any contractual term that purports to oust those benefits.
>
> 6. Subject then to two inapplicable exceptions, the *ESA* provides benefits by way of a right of an employee to make a complaint to the Ontario Ministry of Labour that his or her employer has contravened the *ESA*. When an employee makes a complaint, an Employment Standards Officer must investigate the complaint, who may then exercise certain rights and authorities such as requiring the employee and employer to attend before him or her at a meeting, or to produce documents. Ultimately that Officer may issue an order to pay wages against the employer if a contravention of the *ESA* has occurred.
>
> 7. The Court of Appeal reasoned that this investigative process constitutes an "employment standard", being a requirement that "applies to an employer for the benefit of an employee".

On the basis of the foregoing, the arbitration clause constituted a contracting out of the *ESA*, by purporting to eliminate Mr. Heller's right to make a complaint to the Ontario Ministry of Labour regarding the actions of Uber and their alleged violation of certain ESA requirements. In essence, the clause would deprive Mr. Heller of his right to have an Employment Standards Officer investigate his complaints. In this regard it is worth noting that the Court of Appeal's analysis was not displaced by the fact that Mr. Heller had not chosen to make a complaint under the *ESA*, opting rather for litigation. Upon finding that the clause was invalid, the Court did not think that what Mr. Heller did or did not do was relevant.

On the basis of the foregoing, the Court of Appeal ruled that Uber could not "stay" the proposed class action in favour of arbitration in the Netherlands.

The Unconscionability Issue

Independent of the foregoing analysis, the Court of Appeal cited a separate basis to deny Uber's request to stay the proposed class action: the arbitration clause was invalid on the basis that it was "unconscionable".

In this regard the Court of Appeal noted the following:

> 1. There was no dispute resolution available to Mr. Heller other than recourse to the arbitration clause.
>
> 2. The arbitration clause seemed improvident given the fact that any driver with a claim - that might not ordinarily amount to more than a few hundred dollars - must undertake the mediation / arbitration process in the Netherlands in order to have their rights determined.
>
> 3. The up-front administrative and filing costs for a driver to participate in the Netherlands mediation /arbitration process would be in the range of US $14,500 if arbitration was necessary. In the regard the Court noted the evidence

> that Mr. Heller earns about $20,800 - $31,200 annually from the UberEATS operation, before taxes and expenses.

In Ontario, the test established in governing case law determining whether a contractual provision is unconscionable – so as to be rendered invalid and unenforceable - involves four elements:

> 1. A grossly unfair and improvident transaction;
>
> 2. A victim's lack of independent legal advice or other suitable advice;
>
> 3. An overwhelming imbalance in bargaining power caused by the victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility or similar disability, and
>
> 4. The other party's knowingly taking advantage of this vulnerability.

The Court of Appeal found the arbitration clause to be unconscionable when viewed "properly and in the context in which it is intended to apply": i) as representing a substantially improvident or unfair bargain, ii) there being no evidence that Mr. Heller had any legal or other advice prior to entering into the services agreement nor was it realistic to expect that he would have, with there being no reasonable prospect of someone in the position of Mr. Heller being able to negotiate any of the terms of the services agreement, iii) there being a significant inequality of bargaining power between someone in Mr. Heller's position and Uber, and iv) the court drawing the inference that Uber chose the clause wording to favour itself and thus "take advantage of its drivers, who are clearly vulnerable to the market strength of Uber".

Accordingly, the Court of Appeal concluded that the arbitration clause amounted to an illegal contracting out of an "employment standard" contrary to the *ESA* should the drivers be found to be employees as alleged by Mr. Heller - *and* that the clause was unconscionable at common law. On the basis of each finding, the arbitration clause was found invalid and accordingly the matter should not be stayed in favour of Netherlands arbitration.

Conclusion

This decision puts in stark relief the challenges that exist in the drafting of contracts in the evolving "gig economy". Much ink will be spilled in the near future in gig economy "employee versus independent contractor" classification disputes. The question of the effectiveness and validity of arbitration clauses is one "live" issue: on the one hand, while arbitration clauses may have merit in paving an expeditious way to resolving employment disputes, we see how the courts are being careful in protecting the interests of parties to contracts who were not in a position to bargain for their interests.

It remains to be seen whether Uber will appeal this decision to the Supreme Court of Canada.

Gordon Hearn

2. Doing Business in Canada – Part 16 –

Insolvency

Under Canadian constitutional law (s. 91 of the *Constitution Act)*, the federal government has exclusive legislative control over bankruptcy and insolvency matters. Insolvency proceedings in Canada may take a variety of different forms. When a corporation becomes insolvent, two options are generally available:
(i) liquidate the corporation's assets for the benefit of its creditors, or
(ii) restructure the affairs of the corporation.

Although several different legislative regimes are available to effect either a liquidation or a restructuring of a corporation, the *Bankruptcy and Insolvency Act* (BIA) and the *Companies' Creditors Arrangement Act* (CCAA) are the two most common federal statutes employed for these purposes. The BIA provides for both restructurings (via BIA proposals) and liquidations (via bankruptcies) of insolvent businesses, while the CCAA is used primarily for the restructuring of more complex corporate businesses, although it can also be used to conduct a sale or liquidation.

The Office of the Superintendent of Bankruptcy is charged with the administration of the BIA and the CCAA. All records relating to matters under those Acts are accessible at their website. The Office also licenses trustees in bankruptcy, who are authorized to:

- administer estates of bankrupts
- handle consumer and commercial proposals in order to forestall an assignment in bankruptcy
- act as a monitor under the CCAA
- act as a receiver under Part XI of the BIA, to take possession and administer property as a consequence of provisions in a security agreement or by virtue of any federal or provincial law that authorizes the appointment of a receiver or receiver-manager.

Provincial legislation under the property and civil rights power of the *Constitution Act, 1867* regulates the resolution of financial difficulties that occur before the onset of insolvency, and the BIA incorporates many of them by reference in the application of its provisions. Notable legislation is in effect for governing:

- absconding debtors
- fraudulent conveyances
- relief of creditors
- seizure of assets

With certain exceptions, the *BIA* covers a wide range of entities.

It covers anyone who has resided or carried on business in Canada.

It "includes a partnership, an unincorporated association, a corporation, a cooperative society or a cooperative organization, the successors of a partnership, of an association, of a corporation, of a society or of an organization and the heirs, executors, liquidators of the succession, administrators or other legal representatives of a person;"

It does not apply to banks, insurance companies, trust companies, loan companies, and railways.

Insolvent financial institutions are governed by the *Winding-Up and Restructuring Act* and insolvent railways by the *Canada Transportation Act*.

Partners in a partnership may be placed into bankruptcy with that partnership, but that can only occur where the partnership is located in one of the common-law jurisdictions; the *Civil Code of Quebec* defines partnership property as being a patrimony independent from its partners.

The *Farm Debt Mediation Act* provides that farmers cannot be forced into bankruptcy, but they can make a voluntary assignment.
The CCAA covers insolvent companies (together with their affiliates) with debts greater than $5 million.

The most common forms of insolvency proceedings are: (a) BIA reorganization; (b) CCAA reorganization; and (c) private or court-supervised receivership.

BIA Reorganization

A restructuring under the BIA is commenced by a debtor either filing a proposal (e.g., its restructuring plan) or filing a notice of intention to make a proposal (NOI). Upon the filing of an NOI or the filing of the proposal itself, the BIA imposes a stay of proceedings against the exercise of remedies by creditors against the debtor's property or the continuation of legal proceedings to recover claims provable in bankruptcy. Provisions in security agreements providing that the debtor ceases to have rights to use or deal with the collateral upon either insolvency or the filing of an NOI have no force or effect.

The BIA also provides that, upon the filing of an NOI or the filing of a proposal, no person may terminate or amend any agreement with the insolvent person or claim an accelerated payment under any agreement with the insolvent person simply because the person is insolvent or has filed an NOI or a proposal. The court can lift a stay in a BIA restructuring if the creditor is able to demonstrate that it will be "materially prejudiced" by the stay or if it is equitable on other grounds that the stay be lifted.

A proposal trustee monitors the reorganization, but the insolvent person remains in possession and control of its business and assets. The BIA does not set out specific criteria for the proposal, but a successful proposal requires approval by a majority in number and by a two-thirds majority in dollar value of claims that are voted for each class of creditors, as well as court approval for fairness.

CCAA Reorganization

Generally speaking, the CCAA is most commonly used for larger, more complicated restructurings. This means larger sized corporations tend to use CCAA proceedings to restructure. To initiate the proceedings, the company brings an initial application to the court for an order (referred to as the Initial Order), imposing a stay of proceedings on creditors (i.e., a freeze on the payment of indebtedness) and authorizing the company to prepare a plan of arrangement to compromise its indebtedness with some or all of its creditors. The materials presented to the court include a proposed form of Initial Order and an affidavit prepared by the company describing its background, its financial difficulties and the reasons why it is seeking the protection of a court order made under the CCAA.

The company continues in possession of its assets throughout the restructuring period, subject to any restrictions that the court may impose with respect to use of funds or specific assets. The plan of compromise or arrangement must be approved by a majority of the creditors in each class of creditors and by a two-thirds majority in dollar value of claims for each class of creditors. The court must also approve the plan of compromise or arrangement. The CCAA has relatively few procedural requirements. The court is given a great deal of discretion in a CCAA proceeding.

Receivership

Receivership is the most common method used by secured creditors for realizing on assets (for example, equipment, inventory, commercial real estate) over which they have been granted a security interest by a debtor. Receivership involves the appointment of a receiver (either a private appointment or a court appointment) to take possession of the debtor's assets and arrange for their sale. On sale of the debtor's assets, the funds are dispersed first to the receiver (for administrative fees), next to secured creditors in accordance with their priorities, and the balance to unsecured creditors.

Rui Fernandes

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

3. What's the "Appropriate" Limit: When to Commence an Action in Ontario

Since January 1, 2004, most actions in Ontario have been governed by a new limitations regime introduced through the *Limitations Act, 2002* (*1), which has considerably shortened the time a potential litigant has to commence a legal action in the province. This has shortened the limitation period for most new claims from 6 years down to only 2. Further, as with all limitations legislation, just when the 2-year clock commences to run is a critical question for parties who may have a claim. In its recent decision in *Nasr Hospitality Services Inc. v Intact Insurance* (*2), the Court of Appeal for Ontario has attempted to provide some clarity on the issue of when the clock starts ticking. This is crucial information for all potential litigants, since missing the deadline can very often be the difference between getting something and getting nothing at all.

In this case, the insurer defendant, Intact Insurance, brought a motion for summary judgment against its insured to dismiss its claim for being out of time, having been commenced more than 2 years after the date of loss. The plaintiff had purchased premises in Niagara Falls in which it intended to run a restaurant. Its owner, Mr. Nasr, discovered water damage on January 31, 2013, from a ruptured pipe. He reported this to his broker, who reported it to Intact the same day. Intact proceeded to pay the plaintiff for its business interruption claim, stating that payments would continue to the end of June 2013. Intact then discovered that the plaintiff was not operating a business in the premises at the time of loss, and was thus in breach of the policy. By a letter dated July 22, 2013, it advised the plaintiff that it was denying coverage, and that it had until 2 years following the date of loss (February 1, 2013) to begin proceedings against Intact if it wished to protect its claim.

The plaintiff commenced its action against Intact on April 22, 2015, seeking compensation under its policy for business losses and other damages. Intact brought a summary judgment motion to dismiss the plaintiff's action for being commenced more than 2 years following the loss. The motion judge dismissed Intact's motion and Intact appealed to the Court of Appeal for Ontario. In a split decision, the majority of the Court of Appeal allowed Intact's appeal and dismissed the plaintiff's claim for being out of time.

When does the clock start?

On the appeal, the Court of Appeal noted that it is section 5 of the *Limitations Act, 2002*, that sets the rules of when the 2-year limitations clock begins ticking. In sum, the start date is the later of the dates when a party first learned: a), that the injury, loss or damage occurred; b) that the injury, loss, or damage was caused or contributed to by an act and omission; c) that the acts or omissions were those of the person against whom the claim is made; and, d) that, considering the nature of the loss, damage or injury, "a proceeding would be *an appropriate means to seek to remedy it*" (emphasis added) (*3).

Although a plaintiff must know all of the foregoing before the limitations clock begins to run, ignorance of one or more than them will not necessarily delay the beginning of the limitation period. If this were permitted, then the legislation would perversely punish those parties who were better informed about their obligations, while at the same time rewarding the ignorant or careless. Thus the legislation further provides, pursuant to section 5(2), that the limitations clock will begin to run where a court concludes that a reasonable person in the plaintiff's shoes *ought to have known* of all four necessary elements by a particular date.

When is it "appropriate" to seek a legal remedy?

Not surprisingly, it is the fourth element – that is, knowledge of the "appropriateness" of seeking a legal remedy – that is the most flexible element of the test. This date was determinative

of the outcome of the motion and thus the focus of the subsequent appeal. In the motion decision, the court ruled that it was only when Intact wrote to the plaintiff to advise it was denying the claim that it was first "appropriate" to commence a legal action. The majority of the Court of Appeal, however, saw it as crucial that the plaintiff conceded on appeal that it was not able to argue "promissory estoppel" against Intact.

Promissory estoppel arises where one party makes a promise or gives assurances to another, through words or conduct, that are intended to affect their legal relationship, and on which the promisee then relied. The type of conduct falling under this legal doctrine that would thus prevent the limitations clock from starting would be where, for example, the insurer admits liability, or otherwise engages in settlement discussions in a manner that would lead the insured to believe that the insurer was not relying on the limitation period. While Brown J.A., writing for the majority, noted that the facts in this case were very similar to those in the Supreme Court of Canada's decision in *Maracle v. Travellers Indemnity Co. of Canada* (*4), the plaintiff could not rely on this because of its concession that promissory estoppel did not apply.

On the motion for summary judgment, the motions judge held that the conduct of Intact made it inappropriate to commence a legal action before July 2013. To that point, Intact had been paying amounts to the plaintiff under its insurance, and thus a breach of contract claim would have been immature until Intact indicated that it was denying the plaintiff coverage. However, Brown J.A. rejected this reasoning. Concerned about the "appropriate means" requirement being open to abuse, he quoted the court's earlier decision in *Markel Insurance Company of Canada v. ING Insurance Company of Canada* (*5), where Sharpe J.A. noted:

> To give "appropriate" an evaluative gloss, allowing a party to delay the commencement of proceedings for some tactical or other reason beyond two years from the date the claim is fully ripened and requiring the court to assess to [*sic*] tone and tenor of communications in search of a clear denial would, in my opinion, inject an unacceptable element of uncertainty into the law of limitation of actions (*6)

What the majority had in effect ruled was that the court would not allow a party that admitted, as the plaintiff had in this case, that the conduct of Intact did not set up a "promissory estoppel" to then say it was nevertheless not "appropriate" for it to commence legal action. In other words, if there was *not* a genuine promissory estoppel, then it must be "appropriate" for the plaintiff to launch a legal action. Promissory estoppel requires, for one, an "unambiguous" promise, by words or conduct, that Intact would not rely on its rights under the *Limitations Act, 2002*, and that was not the case here.

Conclusion

While this case offers some comfort to insurers that not every step taken towards responding to an insurance claim will in effect "add time" to the limitation period for the insured, care nevertheless must be taken when dealing with an insured so as to avoid creating the impression that the insurer is no longer relying on the limitation period. For once ambiguity appears to have favoured the insurer rather than the insured. The other takeaway, however, is that the old doctrine of promissory estoppel continues to operate under Ontario's new limitations regime, effectively "stopping the clock" where the elements have been made out.

Oleg M. Roslak

Endnotes
(*1) S.O. 2002, c. 24, Sched. B.
(*2) 2018 ONCA 725 [*Nasr Hospitality*].
(*3) *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, s. 5.
(*4) [1991] 2 S.C.R. 50.
(*5) 2012 ONCA 218 [*Markel Insurance*].
(*6) *Markel Insurance* at para. 34.

4. Whose Obligation is it Anyway? Identical "Other Insurance" Clauses; Identical Responsibilities

On a clear spring day, Nate gets permission from his friend Liam to take Liam's boat out on the water. Nate brings his friend Sophie along. The pair enjoy a great afternoon at sea. It then comes time to head home: Nate is worn-out, and is not as careful as he usually is while bringing the boat in. The boat accidentally strikes the shoreline, causing Sophie to fall over and sustain injuries. Chaos ensues. Sophie sues both Nate as the driver of the boat, and Liam as its owner. Nate is covered by his own homeowner's insurance policy issued by Intact. Liam has a TD insurance policy that also covers Nate as the driver of the boat, as he was operating it with Liam's consent.

Both insurance policies have identical "other insurance" clauses that provide:

> If you have other insurance which applies to a loss or claim, or would have applied if this policy did not exist, this policy will be considered excess insurance and we will not pay any loss or claim until the amount of such other insurance is used up.

So, whose obligation is it to defend and indemnify Nate vis-à-vis Sophie's claim? Such was the conundrum faced by the Court of Appeal for Ontario in *TD General Insurance Company v. Intact Insurance Company* ("*TD v. Intact*"), in which TD brought an application seeking an order that both TD and Intact were on equal footing with respect to the passenger's claim against the driver of the boat, and as such, had to share equally in the defence and indemnity of the driver. (*1)

The Lower Court's Decision and the Minnesota Approach

The application judge dismissed TD's application, and found that although both policies provided coverage for the loss, TD was "closest to the risk": by specifically referring to the boat in its policy, TD had demonstrated an intention to treat its policy as the "primary insurance for the watercraft in question," and as such, was on the hook for defending and indemnifying the driver. (*2)

The Court of Appeal referred to the lower court's decision as an application of the "Minnesota approach" to overlapping coverage, which assesses each insurer's "closeness to the risk" by considering the following non-exclusive factors:

1. Which policy specifically described the accident-causing instrumentality?
2. Which premium is reflective of the greater contemplated exposure?
3. Does one policy contemplate the risk and use of the accident-causing instrumentality with greater specificity than the other policy – that is, is coverage of the risk primary in one policy and incidental to the other? (*3)

The Supreme Court's Approach to Overlapping Coverage

The Court of Appeal in *TD v. Intact* found that the application judge erred in law by applying the Minnesota approach, which was rejected by the Supreme Court of Canada in *Family Insurance Corp. v. Lombard Canada Ltd*. ["*Lombard*"]. In *Lombard*, the Supreme Court adopted an alternate approach to overlapping coverage and noted that "the focus of the examination is to determine whether the insurers intended to limit their obligations to contribute, by what methods, and in what circumstances vis-à-vis the insured". (*4) Where there are no limiting intentions or where those intentions cannot be reconciled, the insurers must "share the burden equally under a coordinate [sic] obligation to make good the loss." (*5).

In applying the principles from *Lombard*, the Court of Appeal in *TD v. Intact* set out the following two-part analysis for determining each insurer's obligation in relation to the loss:

1. Is there overlapping coverage with respect to the loss in question?

2. Did the insurers intend to limit their obligation to contribute to the loss, by what method, and in what circumstances in relation to the insured?

In applying this analysis to the facts at hand, the Court of Appeal determined that since both policies afforded primary coverage to the driver, and both policies provided that they were in excess to other insurance that covered the loss, the conflict between the TD and Intact policies were irreconcilable. As such, TD's appeal of the application judge's decision was allowed: TD and Intact had to equally share the burden of defence and indemnity of the driver (*6).

Following the Court's decision in *TD v. Intact,* overlapping coverage between insurance policies with identical or similar "other insurance" clauses will likely lead to equal contribution to defence and indemnity. Insurers would be wise to consider tailoring their "other insurance" clauses to be more precise in order to limit their obligations to contribute.

Janice C. Pereira
Articling Student

Endnotes
(*1) *TD General Insurance Company v. Intact Insurance Company,* 2019 ONCA 5 ["*TD v. Intact*"].
(*2) *TD General Insurance Co. v. Intact Insurance Co.,* 2018 ONSC 23 at para 23.
(*3) *TD v. Intact, supra* note 1 at para 16.
(*4) *Family Insurance Corp. v. Lombard Canada Ltd*., 2002 SCC 48 ["*Lombard*"] at para 28.
(*5) *TD v. Intact, supra* note 1 at para 17.
(*6) *Ibid* at paras 19-23.

5. Procedural Fairness in Unjust Dismissal Complaints under the *Canada Labour Code*: What Does it Mean?

The recent decision of the Federal Court in *Transport Car-Fré Ltée v. Lecours* (*1) is a good illustration of what constitutes procedural fairness in an unjust dismissal complaint, how a party should respond to a concern about a breach of procedural fairness, and how a finding that procedural fairness has been breached will result in the decision being set aside. In this case the employer sought judicial review of the adjudicator's decision which held that the employee had been unjustly dismissed, and ordered that he be reinstated, and that the employer compensate the employee in the amount of $296,883.91 for lost wages, $25,000 for moral damages and $25,502.03 for professional fees and expenses, based on an allegation that procedural fairness had been breached.

Facts leading up to unjust dismissal complaint

In August 2008, Transport Car-Fré Ltée ("TCL") hired Mr. Lecours as a delivery driver. In January 2010 Mr. Lecours suffered a lumbar strain injury and stopped work. On May 26, 2010 Mr. Lecours was ready to return to work and asked that he not be assigned long haul work to start. Mr. Lecours alleges that TCL denied his request and, as a result, he relapsed and on June 9, 2010 he stopped work. TCL was suspicious about Mr. Lecours' injury and surprised him at home where he was engaged in physical labour. The relationship soured.

Proceeding under Part III of the Canada Labour Code

On October 31, 2010 Mr. Lecours filed an unjust dismissal complaint under the *Canada Labour Code* ("Code"). It took until the spring of 2014 for Adjudicator Nicol Tremblay to be assigned to the complaint. The employer raised two preliminary issues: that Mr. Lecours had named the wrong company in his complaint, and that he was too late to bring his complaint as he had been terminated on June 21, 2010, not October 28, 2010 as Mr. Lecours alleged, and his complaint was filed beyond the 90-day limitation period under the Code. Adjudicator Tremblay reserved his decision on the preliminary issues and unfortunately died before making a decision.

On October 19, 2016 Jean-Claude Bernatchez was appointed adjudicator and the hearing commenced on April 26, 2017 with the employee's evidence. The hearing continued in August 2017 and the employer raised the two preliminary objections which had been raised before Adjudicator Tremblay, and also objected to the employee being allowed to make submissions related to the relief he was seeking, which was $650,000 for lost wages. Adjudicator Bernatchez allowed the employee to present his evidence, which consisted of financial statements of companies he had operated since his employment ended. Following this testimony, and at the employer's request, the employee's lawyer subsequently produced 4 boxes of documents to support his client's claim.

The employer asked the Adjudicator to issue summonses to the employers and companies with whom the employee, or his companies, had done business over the period covered by the employee's claim for lost income. The Adjudicator denied this request. Two days before the hearing was to resume, the employer's lawyer advised the Adjudicator that the employer had engaged a court reporting firm to attend the balance of the hearing, and he also advised the Adjudicator that he intended to examine the employee with respect to the boxes of documents he had received since the last day of hearing.

The Adjudicator initially denied the employer's request to have a court reporter present, but later the same day changed his mind and allowed the court reporter to attend but only on an "informal" basis, to take notes on the employer's behalf and not to record the proceeding, which change of heart was in response to a letter from the employer's lawyer advising that he intended to apply for judicial review if the Adjudicator

continued to refuse the court reporter to be present. The lawyer's letter also asked the Adjudicator to recuse himself because of "evident bias" in refusing or complicating every step taken by the employer to obtain a fair proceeding in accordance with the principles of natural justice. The Adjudicator responded by stating that he had no conflict of interest in the matter.

The hearing resumed the day following these communications, at the start of which the Adjudicator held a private session to discuss how to proceed. The parties reached a consensus on the issues to be addressed and the employer advised that it required 3 to 4 days to complete its evidence, and the employee required a half-day for reply. Unfortunately, when the actual hearing resumed, the Adjudicator did not allow the court reporter to be present. The employer left the hearing and informed the Adjudicator that the decision to refuse the presence of a court reporter would be challenged before the courts and that he would deliver a motion for recusal. The Adjudicator stated that the hearing would proceed without the employer, and he also took the position that he was without jurisdiction to dispose of the request for recusal.

On November 16, 2017, the employer delivered a written request for recusal to the Adjudicator and alleged that the Adjudicators' conduct in the hearing gave rise to a reasonable apprehension of bias. On November 21, 2017, the Adjudicator ruled that the employee had been unjustly dismissed and ordered the relief outlined above. In his reasons for decision the Adjudicator noted the employer's decision "to stop participating in the hearing", and the fact that it had been informed of the consequence for doing so, and further stated that he was satisfied that he had given the employer full opportunity to present evidence and make submissions. Nowhere in his decision does the Adjudicator dispose of, or even mention, the formal request for recusal.

Employer's application for judicial review

The employer filed with the Federal Court an application for judicial review of the Adjudicator's decision, based on a breach of its right to procedural fairness and natural justice. It alleged that the Adjudicator breached procedural fairness by:

- Not providing the employer with a reasonable opportunity to reply to evidence presented against it
- Refusing to authorize the presence of a court reporter
- Holding an *in camera* session without justification
- Poor management of the hearing throughout
- Refusal to consider the request for recusal

The Federal Court stated that the actions of the Adjudicator appointed under the Code are subject to the rules of procedural fairness and natural justice. These rules have two components: the right to be heard and the right to an impartial hearing. The Federal Court held that the Adjudicator, in making his decision on the merits of the employee's complaint after ignoring or refusing to dispose of the employer's request that he recuse himself, violated his duty to give full opportunity to the parties to the complaint to present evidence and make submissions, to the extent that he violated the rules of procedural fairness and natural justice.

The Court went on to state that the employer rightly raised at the first possible opportunity its concern about the apprehension of bias on the part of the Adjudicator, so that the Adjudicator could then address the issue. Had it not done so, the employer would have been precluded from raising it later in a potential review of the Adjudicator's decision. The Adjudicator was required to respond to the employer's concerns, one way or another, and claiming a lack of jurisdiction was not responsive. The Court also confirmed that the employer's decision to leave the hearing room following its request for recusal, was not to be taken as renouncing its right to defend itself, and that where a party has a reasonable apprehension of bias, it should not

be required to submit to the tribunal giving rise to this apprehension.

The Court held that the Adjudicator, by claiming he lacked jurisdiction to recuse himself (without any legal basis), by ignoring the request for recusal formally submitted, by erroneously treating the employer's decision not to participate in the hearing until he decided the recusal request as a permanent withdrawal from the proceeding, by ending the hearings at that time and by rendering a decision when he knew the evidence was incomplete, violated the employer's right to fully respond to the employee's complaint. This was a breach of the rules of procedural fairness and natural justice and his decision was set aside.

In light of the Adjudicator's comments about the employer in his decision, the Court did not refer the matter back to him, which could have saved the parties time and money, and instead ordered that the unjust dismissal complaint be referred to a new adjudicator. The Court also exercised its discretion to not order costs of the judicial review proceeding in favour of the employer, stating that the employee had nothing to do with the outcome and is now faced with a new adjudication process, and ordering him to pay the employer's costs would penalize him twice.

Lessons learned

- A party to an unjust dismissal complaint proceeding is entitled to a hearing before an adjudicator free from bias, and is also entitled to procedural fairness and natural justice
- A party's legitimate concerns about bias on the part of the decision maker, or other breaches of procedural fairness, must be raised, and must be raised as soon as they have been identified
- The decision maker is then obligated to address these concerns and respond to any recusal request
- "Winning" the procedural fairness battle may not win the war – in this case the parties will have to start fresh with a new adjudicator, more than 8 years after the alleged unjust dismissal occurred.

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Endnotes
(*1) 2018 FC 1133

DISCLAIMER & TERMS

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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 (date to be advised) - for the first individual to email us the name of the butterfly depicted in photograph on page 17. Email your answer to info@fernandeshearn.com with a subject line "Newsletter contest". First response with the correct answer wins.