THE NAVIGATOR

IN THIS ISSUE

S.C.C. Adopts "Business Risk" Test for Distinguishing Independent Contractors from Employees

In a recent decision of the Supreme Court of Canada, the analysis of whether an individual is considered an employee or independent contractor is given a thorough review and a "business risk" test is used to distinguish employees from independent contractors. The test may find its way into the transportation industry and may be the final nail in the "Driver Inc." model of trucking services.

Modern Cleaning Concept Inc. v. Comité paritaire de l'entretien d'édifices publics de la région de Québec, 2019 SCC 28 involved a claim for $9,219.32 in unpaid wages and other benefits in relation to cleaning services performed by Francis Bourque ("Bourque"). Modern Cleaning Concept Inc. ("Modern") provided cleaning and maintenance services in the Québec region through a network of franchises. It negotiated master cleaning contracts with clients, and assigned them for specific locations to its franchisees, who performed the cleaning and maintenance work. Bourque became a franchisee in January 2014, agreeing to perform cleaning services exclusively through the franchise relationship. The franchisees were not involved in negotiating the contracts with Modern's clients.

Francis Bourque had previously owned and operated his own part-time cleaning business, Nettoyage Francis Bourque. His spouse, Jocelyne Fortin, helped him operate the business. Mr. Bourque first contacted Modern in 2013, when he learned that it was looking for a replacement cleaner at an SAQ branch. He initially took on this work as a subcontractor. Several months later, Mr. Bourque decided to become a franchisee. He signed the franchise agreement with Modern on January 1, 2014.

Mr. Bourque was initially assigned cleaning contracts for one National Bank location and one branch of the SAQ. Over the next few months, Mr. Bourque was assigned cleaning contracts for three additional National Bank locations. He had limited interaction with the clients whose premises he cleaned. On May 31, 2014, after approximately five months of working within the Modern network, Mr. Bourque,

FIRM AND INDUSTRY NEWS

- **Rui Fernandes** has recently received the Qualified Arbitrator (Q. Arb.) designation.

- **Opentext Enterprise World** technology conference: Toronto, July 9-11, 2019.

- **Gordon Hearn** will be participating in a Stafford Webinars panel presentation on "Shipper-Broker-Carrier Contracts" on August 14, 2019.

- **Women's Trucking Federation of Canada's 2019 Bridging the Barriers Conference** in Mississauga, Ontario on September 6, 2019. **Kim Stoll** and **Alan Cofman** will be speaking on a panel on Drivers Inc.

- **CIFFA** 2019 Central Region Gulf Tournament: Caledon Woods Golf Club, September 12, 2019.

- **IUMI 2019** (International Union of Marine Insurance) will be holding its annual meeting in Toronto on September 15 to 18, 2019.

- **Canadian Transport Lawyers Association 2019 Annual General Meeting and Conference** in Winnipeg, Manitoba on September 19-21, 2019. **Kim Stoll** is on the Educational Programme Committee and will be moderating the Ethics Panel on *Conscientious Lawyering* and **Carole McAfee Wallace** will be speaking on *Driver's Inc*.

increasingly frustrated by his lack of profits and inability to develop his business as he wished, terminated his franchise agreement and recommenced the operation of his own cleaning business.

The Comité paritaire de l'entretien d'édifices publics de la région de Québec ("Committee") is responsible for overseeing compliance with Quebec law, the *Decree respecting building service employees in the Québec region, CQLR, c. D−2, r. 16* and it can therefore take any necessary action arising from the Decree on behalf of employees. In 2014, the Committee commenced proceedings against Modern.

The trial judge considered the relationship between Modern and Mr. Bourque to determine whether Mr. Bourque was an employee or independent contractor. He found that the following factors suggested Mr. Bourque was an independent contractor: he owned his own cleaning business; he acted as a subcontractor for Modern prior to becoming a franchisee; and Mr. Bourque hoped to enlarge his business. The factors the trial judge said supported Mr. Bourque being an employee included his inability to negotiate the terms of the franchise agreement; Modern's ongoing supervision of his work; and the fact that Mr. Bourque's clients paid Modern who then paid Mr. Bourque.

In order to determine whether Mr. Bourque was actually an employee or an independent contractor, however, the trial judge emphasized Mr. Bourque's intention. He concluded that Mr. Bourque clearly entered into the franchise relationship with the aim of expanding his own cleaning business. That the venture did not go as planned — due to Mr. Bourque's dissatisfaction with Modern's role as franchisor — did not, in the trial judge's view, detract from Mr. Bourque's actual purpose: to expand his own business.

Relying on the language of the franchise agreement, the trial judge concluded that there was a common intention that Mr. Bourque would be an independent contractor, not an employee. Accordingly, as an independent contractor, he was not entitled to the full amount claimed by the Comité on his behalf. He was, however, entitled to $2,877.28, an amount Modern conceded it still owed him pursuant to the franchise agreement.

Kasirer J.A., writing for a majority in the Quebec Court of Appeal, allowed the appeal. He held that the trial judge had misapprehended the nature of the tripartite contractual relationship between Modern, its clients and its franchisee, Mr. Bourque. Specifically, Kasirer J.A. was of the view that the trial judge had made a palpable and overriding error in failing to consider the nature of the assignments of the cleaning contracts from Modern to Mr. Bourque. By failing to recognize that Modern remained contractually liable to its clients, the trial judge erred in his analysis of whether Mr. Bourque was an employee or an independent contractor. Various elements of this tripartite model led the Court of Appeal to conclude that Mr. Bourque was an employee not an independent contractor and ordered Modern to pay the Comité the $9,219.32 it claimed on behalf of Mr. Bourque and Ms. Fortin.

The Supreme Court of Canada agreed with the Quebec Court of Appeal, introducing the "business risk" test. The critical factor distinguishing employees from independent contractors was held to be the respective degree of risk and the attendant ability to make a profit. The independent contractor, in attempting to generate profit, accepts the business risk. Employees, on the other hand, do not.

The Court held that the relevant risk is business risk, not simply any risk accepted by the worker in relation to his or her working conditions. Employees, by virtue of their independence, will always have a degree of autonomy and will likely accept some risk in structuring their work. Even in circumstances where the worker owns his or her own

equipment and is characterized as an independent contractor by tax law, a worker may, nonetheless be an "employee". The working relationship has to be examined in its entirety to determine who bears the business risk. If it is the worker, then he or she is properly characterized as an independent contractor. If not, the worker is an employee. The Court noted at paragraph 36:

> "The case law distinguishing independent contractors from artisans [employees] thus demands a highly contextual and fact-specific inquiry into the nature of the relationship in order to determine which party bears the business risk. The question is not one of comparative risk; rather, it is which party actually assumes the risk of the business."

The Court also noted that Bourque's status as a franchisee was not determinative. Instead, the inquiry must assess the actual nature of the relationship between the parties, regardless of the terms of and labels used in the franchise agreement.

The Court noted that the cleaning services contract and the franchise agreement had to be considered to understand Modern's business model. Modern's cleaning services contract with the Bank and its franchise agreement with Mr. Bourque were inextricable. Mr. Bourque's non-performance of the cleaning contract would permit Modern to terminate the franchise agreement. Similarly, the renewal of the franchise agreement between Mr. Bourque and Modern was contingent on Mr. Bourque's compliance with the obligations to the Bank as set out in the cleaning services contract.

In agreeing with the Court of Appeal, the Supreme Court noted that the trial judge only examined whether Mr. Bourque assumed some risks, not whether he assumed the business risk. It noted that employees will always have a degree of autonomy. But the fact that an employee has a degree of autonomy and assumes some degree of risk does not mean that he or she bears the business risk, in the sense of being able to organize his or her business venture in order to make a profit. By failing to consider the tripartite relationship, the trial judge did not consider the business as a whole, and, as a result, improperly concluded that Mr. Bourque bore the business risk.

Through the operation of the franchise agreement, Mr. Bourque accepted certain risks, including an indemnification clause to the effect that Modern could recover against him for any failure to comply with the terms of the cleaning contracts. Mr. Bourque also assumed some risks relating to any improper use of time, equipment and product. There is, however, a fundamental distinction between the risks assumed by workers relating to working conditions, and the business risk.

Modern's ongoing liability to its clients by virtue of the imperfect assignments was inexorably linked to the controls it placed on Mr. Bourque through the franchise agreements. Modern, at all times, remained liable to its clients. The controls it placed on Mr. Bourque aimed to limit this liability. Modern's strategy to strictly control its franchisees, like Mr. Bourque, was the context for examining Modern's assumption of risk. These controls were critical because from the Bank's perspective it was Modern, not Mr. Bourque, who bore the risk of contractual non-performance.

The Court stated that determining who bears the business risk is a fact-specific, contextual inquiry. "There may be other circumstances in which a franchisee could be said to bear sufficient risks so as to assume the business risk of his or her enterprise and thus be considered an independent contractor"[at para 57].

In the Fernandes Hearn LLP November 2018 newsletter the "Driver Inc." model of trucking services was analyzed. The "Driver Inc." model is an employment model used by commercial vehicle operators who do not own/lease or operate their own vehicles. It is increasing in use. In essence an employee truck driver will

incorporate and receive payment from their carrier with no source deductions. The practice opens the door to the possibility of tax evasion by those engaged in it. It is believed that the practice is becoming a preferred way to attract contract drivers to fleets.

In *71122 Ontario Ltd. v. Sagaz Industries Canada Inc.* , [2001] 2 S.C.R . 983 the Supreme Court of Canada outlined some of the conditions to determine if a worker is an employee or an independent contractor. In the decision, the Supreme Court of Canada makes the following point that one must search for the total relationship of the parties:

> "It is exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a contract of service any longer serves a useful purpose…The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases, or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated as the determining ones."

The Supreme Court of Canada has also made it clear that courts and tribunals must take into account the particular policy objectives of a statute when deciding if a person has employee status. (See *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015) For example, for federally regulated trucking, the policy objectives of the *Canada Labour Code* are important. These are set to ensure minimum employment standards and to prevent accidents and injuries to health arising out of the course of employment.

The decision in *Modern* is the latest Supreme Court of Canada directive on the test to be used in determining whether an individual is an employee or independent contractor. Based on this latest test, the "Driver Inc." model will not stand up and an individual using the "Driver Inc." model will never be found to be operating as an independent contractor. Trucking companies should be aware that they are dealing with employees. For companies whose trucks cross provincial borders the *Canada Labour Code* will apply.

Rui Fernandes

2. Canada's Digital Charter

On May 21, 2019, the federal government launched Canada's new Digital Charter. The Charter sets out ten principles to govern the use of data in the digital world. These principles "are the foundation for a made in Canada digital approach that will guide our policy thinking and actions and will help to build an innovative, people-centred and inclusive digital and data economy. This balanced approach strives to set out the building blocks for a foundation of trust for this digital age that unlocks Canada's innovation potential."

The 10 principles comprising the Digital Charter are as follows:

1. *Universal Access*: all Canadians will have equal opportunity to participate in the digital world and will be given the necessary tools to do so.

2. *Safety and Security*: Canadians will be able to rely on the integrity, authenticity and security of the services they use in order to feel safe online.

3. *Control and Consent*: Canadians will have control over what data they are sharing and will be able to understand who is using their personal data.

4. *Transparency, Portability and Interoperability*: Canadians will have access to their personal data and will be able to transfer data without undue burden.

5. *Open and Modern Digital Government*: Canadians will be able to access modern digital services from the Government.

6. *A Level Playing Field*: The Government will ensure fair competition in the online marketplace to facilitate growth in Canadian business and protect Canadian consumers from market abuses.

7. *Data and Digital for Good*: The Government is committed to the ethical use of data to create value, promote openness to improve the lives of people globally.

8. *Strong Democracy*: The Government will defend freedom of expression and protect against online threats designed to undermine Canada's democratic institutions.

9. *Free from Hate and Violent Extremism*: Canadians can expect that digital platforms will not promote violent extremism or criminal content.

10. *Strong Enforcement and Real Accountability*: meaningful penalties will be implemented for the violation of laws and regulations that support the Digital Charter.

The principles "will help guide the federal government's work, serving as a digital charter for Canadians to help address challenges and leverage Canada's unique talents and strengths in order to harness the power of digital and data transformation. These principles reflect what we heard from Canadians and are the building blocks of a foundation of trust for this digital age. The principles may still evolve over time as it is important to make sure that this continues to be the right approach."

Within days of the announcement of the Digital Charter critics were already predicting that it would be a bust before it even gets going. In an opinion piece in *The Globe and Mail* published May 24th, 2019, Kean Birch, an associate professor at York University outlined five reasons the Charter will be derailed. He outlined the five reasons as follows:

1. First, the Digital Charter is framed by fears about losing out in the emerging "digital economy," an economy that depends on our personal data as a resource. Such data is only valuable if it can be turned into a private asset. Even at a mundane level, free-to-play game apps (such as Angry Birds) collect an enormous amount of potentially valuable data. Introducing a charter seems unlikely to get our privacy back or stop the indiscriminate collection of our personal data.

2. The Charter does not address the underlying drive toward monopoly in the collection of personal data.

3. The Charter lacks any teeth to compel major international companies to act in the interest of Canada.

4. Canada is very comfortable with monopoly and lacks the drive to pursue strong competition or data-privacy agendas – in contrast to the European Union. So, the notion that a Digital Charter will upend a decades-old pro-monopoly position seems unlikely.

5. When it comes to the Digital Charter is really just words, not much else – no regulation, no legislation, no new rights. How well-intentioned these words are is meaningless at present, and will remain so in the future if they are not backed up by a detailed and specific set of policies, regulations, standards and codes designed explicitly to shape and protect how our personal data are used and how they can be used in the future.

Rui M. Fernandes

3. Short Line Railway Demurrage Claim Dismissed

In the recent decision of *G.E.X.R. v. Shantz Station and Parrish & Heimbecker*, 2019 ONSC 1914, Justice Braid of the Ontario Superior Court of Justice dismissed the demurrage claim of a short line railway. Justice Braid started her decision as follows:

> "Time is money", the old adage goes. This is certainly so in the transport sector, which has developed the legal concept of "demurrage". In short, demurrage is a charge levied when it takes longer than anticipated to load or unload goods in transit.

The railway, Goderich-Exeter Railway Company Limited ("GEXR") operates a shortline track that crosses through the Region of Waterloo. This track, called the Guelph Line, is owned by Canadian National Railway ("CN") and connects to lines that are operated by CN. Parrish and Heimbecker ("P&H") is a Canadian grain company that ships grain from Western Canada to Ontario.

GEXR asserted it had the right to charge demurrage to P&H in accordance with its published tariff for the delayed unloading of railcars at the Shantz Station Terminal. P&H refused to pay the charges on the basis that, in the absence of a contract between them, GEXR had neither the contractual right nor the legislative authority to exact demurrage. P&H was always prepared to pay demurrage at Shantz Station, but subject to the invoices coming from CN and not GEXR.

In describing the concept of demurrage, Justice Braid stated:

> The availability of railcars to move goods is a crucial element of the economic operations of a railway. Nevertheless, railway companies allow shippers a reasonable period of "free time" for loading or unloading railcars when equipment is placed at the shipper's disposal. The railcars are provided for the purpose of transport and not for storage. When a shipper exceeds the time period to unload the freight and thereby withholds the railcars from transport service, the shipper may be liable to pay demurrage.

GEXR issued a tariff, which included terms regarding demurrage. Under the tariff's demurrage terms, there was a provision for a free day for an empty car going in for loading and two free days for a railcar going in for unloading. After this "free time", demurrage charges began to accrue. The tariff was intended to be an incentive to shippers to bring extra crew to unload and promptly release any railcars so that they could be used by other customers; and to offset car hire costs for which GEXR was

liable. It also provided a disincentive to use the cars for storage.

P&H had all along dealt with CN and the two parties negotiated a Memorandum of Understanding. P & H were concerned about locating the grain terminal (the Shantz Station Terminal) on a short line and did not want to have difficulties if the short line had financial difficulties. In the negotiated deal with CN, CN assured P&H that only CN would invoice P&H for demurrage and that CN standard demurrage practices would be applied. CN drafted a Memorandum of Understanding, which was the agreement between CN and P&H. Based on the Memorandum, P&H agreed to build a terminal on the Guelph Line.

Justice Braid relied on the Supreme Court of Canada decision in *Sattva Capital Corp. v. Creston Moly Corp*. 2014 SCC 53 to allow evidence of the surrounding circumstances for the interpretation of the Memorandum, stating (at p. 33) " The evidence of the surrounding circumstances, including the genesis and business purpose of an agreement, is admissible when conducting contractual interpretation. This should consist only of objective evidence of the background facts at the time of the execution of the contract and includes anything that would have affected the way in which the language of the document would have been understood by a reasonable person."

Justice Braid went on to find that the Memorandum was contrary to CN's agreement with GEXR as it related to GEXR's ability to bill accessorial charges. This agreement, the "Guelph Line Operating, Marketing and Interchange Agreement" provided that GEXR was the exclusive operator of the Guelph Line. P&H were not a party to this agreement. The agreement stated that CN would continue to market the services on the Guelph Line. CN would continue to be the carrier shown in rates, routes and divisions, and to quote freight rates, publish tariffs, enter into contracts, and collect for its own account all related revenues and applicable freight subsidies for traffic to and from stations on the Guelph Line which will travel over CN lines. It was further agreed that GEXR would have the exclusive right and responsibility to publish tariffs and enter into contracts governing the handling of intra-line traffic as well as collect for its own account only all related revenues, including any applicable subsidies The agreement further stated that CN would pay GEXR a haulage fee. GEXR would be responsible for paying for all car hire charges on individual freight cars in its possession, and CN would pay a reclaim of the car hire in accordance with the agreement. Notably, the agreement stated that GEXR "is responsible for invoicing customers for demurrage."

There was a significant difference in the CN and the GEXR tariffs. The CN tariff was more beneficial to P&H. In an arbitration involving only CN and GEXR, the arbitrator determined that in the Memorandum P&H and CN agreed that only CN would bill P&H for demurrage. He also found that CN had breached its Memorandum and its promise that CN would be the only carrier that would charge demurrage in connection with the traffic to the terminal during the term of the Memorandum. On August 9, 2018, the arbitrator awarded damages to P&H against CN for the breach of CN's promise that it would be the only carrier that would charge demurrage in connection with the terminal. The quantification of damages has been adjourned until after the completion of the trial before Justice Braid.

As a result of the arbitration ruling, and in an effort to discharge its obligations as set out in that award, CN sent an invoice to P&H dated June 13, 2018, for demurrage charges.

Justice Braid found the following:

1. GEXR was not a subcontractor of CN.
2. Common law principles now apply to railway companies (since deregulation).
3. A railway's relationship with a customer is a contractual one.
4. Section 113 of the CTA ("*Canada Transportation Act*") imposes certain "common carrier obligations" on railway companies,

requiring them to take, carry, and deliver traffic on "payment of the lawfully payable rate." A railway sets the rate for the movement of the traffic; once a customer has agreed to pay the rates, the railway must deliver the cars to the destination specified in the contract

5. Section 118 of the CTA states that a railway company shall, at the request of a shipper, issue a tariff in respect of the movement of traffic on its railway. Section 119 of the CTA directs that a railway company that proposes to increase a rate in a tariff shall publish a notice of the increase and shall charge the rates in that tariff.

6. Section 87 of the CTA defines "tariff" as "a schedule of rates, charges, terms and conditions applicable to the movement of traffic and incidental services." "Demurrage" is not a defined term under the CTA.

7. The CTA and the Certificate of Fitness issued to GEXR do not contain explicit language stating precisely who is liable for demurrage. The legislation is silent regarding on to whom a railway may impose tariffs such as demurrage. The CTA does not go so far as to empower a railroad to unilaterally impose penalties on parties with whom it has no contractual relationship.

8. A contract of carriage that incorporates tariff terms is necessary between two parties for the railway to levy demurrage charges. The railway may not charge demurrage to a party with whom it has no contract.

9. The mere provision of services, even under the structure of the CTA, does not create a contract.

10. There was no implied contract to pay GERX demurrage. "There cannot be an implied contract where there is a clear, express intention to the contrary" (p. 116).

11. P&H were not unjustly enriched. P&H were willing to pay charges for demurrage that CN rendered in accordance with the Memorandum.

Rui M. Fernandes

4. Revised Cannabis Licensing Process

Health Canada published a statement last month (May 8th, 2019) concerning a major change in the application process for granting licences to cultivate or process cannabis, or to sell cannabis for medical purposes. Applicants for licences to cultivate cannabis, process cannabis, or sell cannabis for medical purposes are now required to have a fully-built site that meets all of the requirements of the *Cannabis Regulations* at the time they submit their application. Applicants must now also submit an "evidence package" demonstrating that their proposed facility (for cultivation, processing and/or sale) meets the licensing criteria.

For applications already submitted, Health Canada will make a general review of these applications. The applications considered as being complete will receive an update letter that will indicate the result. Once a fully constructed and compliant site is available to applicants, then Health Canada will review the application in detail in priority based on the original application date.

These changes are being made in an effort to reduce instances where applicants just submit a paper application, which would be reviewed, with the applicant being allowed to swiftly proceed to build a facility. Health Canada is concerned that a significant amount of resources is being used to review applications from applicants that are not ready to begin operations. Consequently, only once a site is ready, will existing applications then receive priority review and be placed in the queue based on their *original* application date, and not when the complete application was submitted.

Health Canada suggests that this change is consistent with the need to align the cannabis licensing framework with other regulated industries, including the pharmaceutical sector. This critical change should thus bring increased efficiency to the licensing process and hopefully not only benefit the already well-capitalized applicants, as applicants must now front-load their largest capital investment before even submitting their application, and also risk that their application may not be approved by Health Canada …

Robert Carillo

5. Forum Selection Clauses: Making Sure They Stick

It has long been routine for agreements between parties acting internationally to contain at least one of a "choice of law" clause and a forum selection clause, and frequently the two are combined. The need for these is quite obvious. Parties acting across borders are resident in different jurisdictions. Whenever a dispute arises involving a cross-border agreement it is rarely straightforward in which country litigation should be pursued, and it is common principle across both common law and civil law jurisdictions that any legal dispute should only be permitted to be litigated in one jurisdiction to the exclusion of all others. Furthermore, even in cases where the proper country for the hearing of a dispute appears obvious, local courts can still decide the case on the basis of a "foreign" rather than local law if that is what the parties have specifically agreed.

Choice of law and forum selection clauses can provide commercial parties with valuable certainty, if not about the outcome of the dispute, at least about where the decision will be made and according to what law. A recent decision of the Court of Appeal for Ontario has shown, however, that these clauses are not always as certain as they appear. In its decision in *Forbes Energy Group Inc. v. Parsian Energy Rad Gas* (*1) the court showed that these clauses need to be carefully drafted in order to have the intended effect of providing certainty.

The facts

Forbes Energy Group, the plaintiff in this proceeding, brought an action in Ontario under its agreement with the defendants to determine certain issues related to an agreement involving upstream oil and gas rights in Iran. Forbes Energy Group was incorporated in Alberta with a head office located in Calgary and a registered office in Toronto. It was also a wholly owned subsidiary of Forbes & Manhattan Inc., an Ontario company with a head office in Toronto. The defendants variously incorporated in Iran, the United Arab Emirates, and the British Virgin Islands, and had offices located in Iran, Dubai, London, Edinburgh, Durban, and Bermuda.

The agreement that was the subject of the action contained the following term:

> This term sheet shall be governed by and construed in accordance with the laws of England and the Parties agree to attorn to the courts of England (*2).

Relying on this clause, two of the defendants brought a motion to have Forbes' action stayed in favour of the English courts. The motion judge had found that Ontario courts had jurisdiction over the matter but, considering the relevant factors, also found that the plaintiff had shown "strong cause" why the courts in England should be preferred, and therefore stayed the action.

The Court of Appeal reversed this decision. It noted that the "strong cause" test only applies to *exclusive* jurisdiction clauses. One of the issues on the appeal was in fact whether the motion judge had made a ruling on whether the clause, quoted above, was in fact an exclusive jurisdiction clause. The Court of Appeal concluded that no finding had been made, and that the clause in question clearly had *not* granted exclusive jurisdiction to the English courts; that is, it stated that the parties "attorn to the courts of England," but crucially did *not* say that no *other* courts may exercise jurisdiction over the contract.

In the absence of an exclusive jurisdiction clause, the courts will then consider the jurisdiction clause only as one factor among many relevant to determining what is the most appropriate place to hear a dispute. Thus, the Court of Appeal proceeded to weigh the relative merits of a hearing in Ontario versus one in London, England, as follows:

> (i) there was no evidence that the Term Sheet was signed in either England or Ontario;

(ii) there did not appear to be a strong connection between the subject matter of the Term Sheet and England, and, since the witnesses were scattered around the world, there was no one location that would be more convenient for all of the witnesses;

(iii) although the Term Sheet provided that the law of England is the governing law, it is common for Ontario courts to apply foreign law;

(iv) there was no suggestion of the loss of a legitimate juridical advantage if the action proceeded in Ontario; and

(v) there was nothing to suggest that the respondents contemplate bringing an action concerning the Term Sheet in England, thereby triggering Forbes' obligation under the Clause to attorn to the jurisdiction of the English courts. (*3)

Placing all of these factors in the scales, the Court of Appeal ruled that there was on balance no reason why the action should not be tried in Ontario rather than in England, and therefore reversed the stay granted in the lower court.

Conclusion

The Court of Appeal wrote a short decision in *Forbes* with an important lesson; namely, be careful what you ask for, *and* be careful *how you ask for it*. Specifically, it illustrates a key difference between exclusive and non-exclusive jurisdiction clauses. A non-exclusive jurisdiction clause might be preferred by the parties who do not wish to commit to a particular jurisdiction in which to adjudicate their disputes, but nevertheless want the limited certainty that a dispute *may* be heard in one jurisdiction in particular. However, where the parties want certainty as to the place of court proceedings, an exclusive jurisdiction clause is a necessity. Even with the latter there is no guarantee that a dispute connected with an agreement will not ultimately be heard elsewhere, but the likelihood is far greater that the parties' choice will be respected where an exclusive clause has been used.

Oleg M. Roslak

Endnotes
(*1) 2019 ONCA 372 [*Forbes*].
(*2) *Forbes* at para. 2.
(*3) *Forbes* at para. 8.

6. The New "Carbon Tax" and Road Carriage Contracts

The federal "carbon tax" began in Ontario, New Brunswick, Saskatchewan, and Manitoba on April 1, 2019. The other provinces were not affected by this recent government initiative as they had earlier implemented carbon pricing regimes in the nature of the carbon tax.

Introduction - What is the Carbon Tax?

The Carbon tax puts a direct price on emissions. "Greenhouse gas" emitters—usually fuel producers and distributors—pay a designated amount per each tonne of carbon dioxide emitted from burning carbon-based fuels. As a motivation for emitters to decrease emissions, the price usually goes up slowly over time such that households and industries will have time to adjust and adopt less carbon-heavy practices.

The carbon tax differs from what is known as "cap-and-trade" in industry. Cap-and-trade is indirect carbon pricing. The government sets a limit (the cap) on carbon emissions by companies, who are then given emissions permits. If a company's emissions fall below their permits, they are allowed to sell excess permits (the trade) to a company that has exceeded theirs.

The Carbon Tax and the Canadian Consumer

Consumers do not pay the carbon tax directly as do corporations and businesses – however they will face higher prices for goods and services from industries that emit higher greenhouse gases. For example, as reported by the Canadian Department of Finance gas prices saw a price increase of 4.4 cents per litre in April 2019, being projected to go up to 11 cents a litre by April 2022 as the carbon tax gradually increases. A federal carbon tax "backstop" policy will help counter this cost with a general annual rebate to Canadian households based on the average expenses of a province and divided evenly across the board. It is reported that the average rural household in Saskatchewan, who drive more than urban counterparts, for example, would receive a projected $598 rebate – regardless of how much they spend or emit (although it should be noted that gas and diesel for farming are eligible for exemption from carbon tax fuel charges). By comparison, the average household in Ontario would receive $300.

The Carbon Tax and the Negotiation of Road Carriage Contracts?

The Freight Carriers Association of Canada (the "FCA") (*1) has provided a very helpful review of how the Carbon Tax may affect carriage contact negotiations: the decision to charge a "Carbon Tax Surcharge" – just as a conventional "fuel surcharge" is of course an independent decision by each individual carrier. In the result there are several differing scenarios at play in the marketplace as a result of the recent introduction of the carbon tax.

The FCA produces a weekly "Diesel Cost Change Impact Index" that was originally developed as an industry "fuel surcharge guideline" back in the day before the revised *Competition Act* eliminated any remnants of "collective ratemaking" by otherwise competing carriers, using the services of membership based "rate bureaus" or "tariff bureaus".

The FCA weekly diesel cost index is based on a formula of the cost of highway diesel fuel as a percentage of carriers' overall operating costs as determined by an extensive financial analysis conducted prior to the elimination of collective ratemaking under the revised *Competition Act.* Most major trucking companies that were operating in Ontario and Quebec at that time actively participated in that financial study through which a widely accepted 'baseline' was produced establishing a meaningful industry-wide relationship between fuel costs and total operating costs for the trucking industry. Then by comparing the "current" cost of diesel fuel against the baseline cost for fuel (the price in effect at the time the industry study was

conducted – which was $0.39 per litre, excluding GST/HST) – a cost impact could be imputed. The resulting percentage impact then became the "fuel surcharge" required to offset the impact of the change in diesel fuel cost. The surcharge of course would go up or down, based on the actual change in diesel fuel purchased by carriers in that original study market area (Ontario and Quebec).

The FCA weekly diesel cost index remains, by a large margin, the most widely accepted methodology for calculating the industry impact of fluctuating diesel fuel cost. Most Canadian carriers rely on the FCA weekly bulletin as the basis for their own fuel surcharge regimen, or at least a major data input for their independent fuel surcharge calculation.(*2)

Accordingly, the initial impressions and "take aways" that can be gleaned on the effect of the carbon tax are as follows:

- to the extent that the carbon tax is incorporated into the 'pump price' for fuel purchased in Ontario, the impact of the carbon tax is captured in the FCA weekly impact formula.

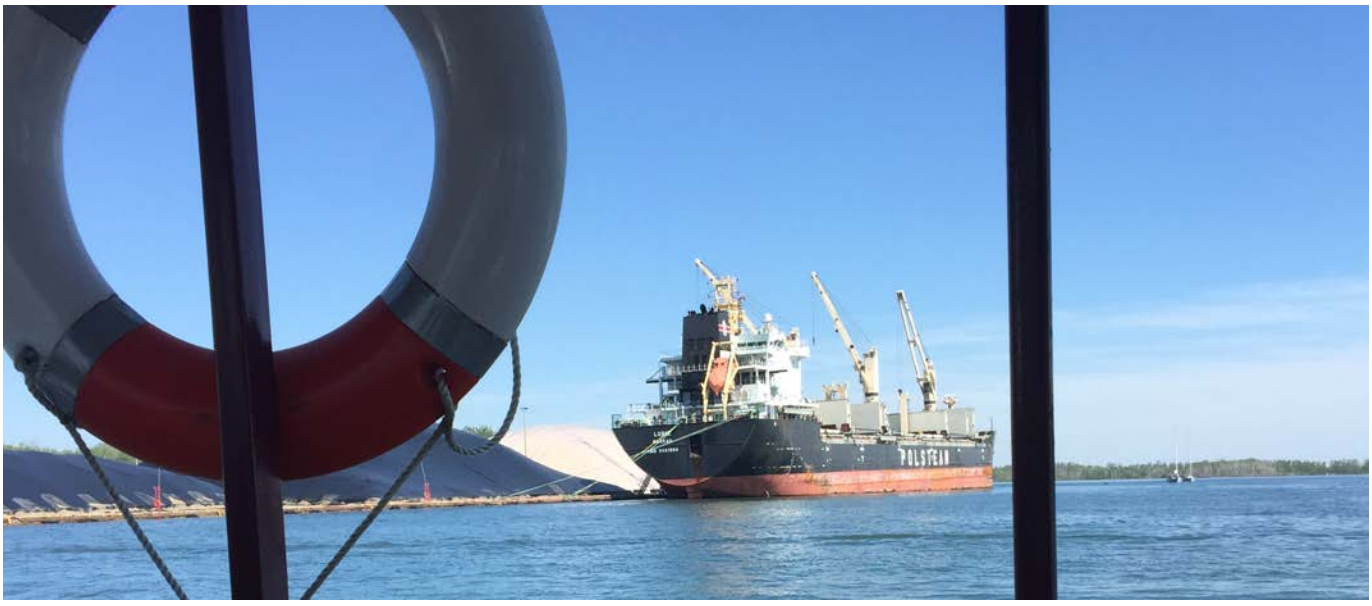
- certain carriers have determined that they required a separate "Carbon Tax Surcharge" – in addition to their otherwise applicable fuel surcharge regimen – in order to offset the full impact of the new carbon tax for their operations. This is within their independent prerogative.

- it is understood that there has been considerable resistance by major shippers against carriers who have introduced a separate Carbon Tax Surcharge in addition to their existing Fuel Tax program. Resulting market pressure from large shippers may force them to waive any application of a separate Carbon Tax Surcharge. This may expose smaller shippers with less leverage or less and leave them "on the hook".

- on a contract-by-contract basis things therefore come down to how well each individual contract addresses carrier compensation, fees and surcharges. Again, the larger, better informed and more sophisticated shippers usually have the better crafted contracts to insulate them from any new fees.

Gordon Hearn

Endnotes
(*1) https://fcafuel.org
(*2) The FCA currently has roughly 425 motor carriers, couriers, brokers and intermediaries that subscribe to its weekly bulletin. Additionally, there are over 275 major "shippers" that also subscribe to the weekly FCA fuel bulletin.



7. The New Regulation of Small Hobby and Commercial Use Drones: "*It's Not Just a Toy*"

We are being ushered into an era of small drone regulation. We hear in the news reports of airport air space being comprised of "near misses". We now read of prison airspace being invaded by contraband delivering drones, of invasion of privacy and harassment concerns. A new regulatory regime is at play to keep aviation lanes clear, to optimize public safety and to allow the authorities to identify drone operators: who is behind the controls?

On January 9, 2019 Transport Canada published new rules for flying drones, officially referred to in the legislation as "Remotely Piloted Aircraft Systems" (RPAS) in Canada. The rules introduce two categories of drone operations, being "basic" and "advanced". The categories are based on the operating distance from bystanders and on airspace rules.

Effective June 1, 2019, drone "pilots" must be registered to fly their drones weighing over 250 grams but under 25 kilograms.

The new rules will be enforced by Transport Canada and the Royal Canadian Mounted Police. There are serious penalties, for those not in compliance. Individuals and corporations can face fines or jail time for:

- putting aircraft and people at risk
- flying without a "drone pilot certificate"
- flying unmarked or unregistered drones

Pilot certificates, knowledge tests and flight reviews

All pilots of drones that weigh between 250 grams and 25 kilograms must get a drone pilot certificate. Pilots conducting basic operations need a "Pilot Certificate – Basic Operations". Pilots conducting advanced operations need a "Pilot Certificate – Advanced Operations". To obtain an Advanced Operations certificate a pilot must pass a "Small Advanced Exam" and an in-person interview. The flight review will assess the pilot's ability to operate drones safely.

Registration

All drones that weigh between 250 grams and 25 kilograms must now be registered with Transport Canada. Pilots must mark their drones with their registration number before they fly. Drones under 250 grams do not need to be registered. Drones over 25 kilograms do not need to be registered but require a "special flight operations certificate". If you fly an unregistered drone you may be fined $1000 if you are a person and $5000 if a corporation is behind the operation. Registration can be done through the "Drone Management Portal".

RPAS Safety Assurance

Drones are provided with a "safety assurance declaration" that is provided to Transport Canada by the manufacturer. This information advises users of the safety limits of the drone that they are operating. Pilots are required to operate their drone within the prescribed safety limits. Drones must be specifically approved for advanced operations. The drone safety assurance declaration will prescribe what advanced operations a drone will be approved for. The drone pilot must first register with Transport Canada. Transport Canada will then send the registered drone pilot an email explaining which advanced operations the drone is approved for. Until this email is obtained, the pilot may only fly the drone for basic operations.

Safe and Permitted Operation

Transport Canada provides the helpful following "Infographic" showing where one can fly their drone. Note that there are general "maintain line-of-sight" and ceiling of flight requirements. Operation is to be kept a prescribed distance from bystanders, airports, heliports, emergency sites and advertised events. There are exceptions concerning authorized "advanced operations". (*1)

The National Research Council has created an interactive map. The map helps drone operators understand airspace and find out where to fly. Prior to each flight, drone pilots must conduct a survey of the area and also consult:

- Notice to Airmen (NOTAMs) for the flight location: NAV Canada NOTAMs portal
- the "Canada Flight Supplement"(*2)
- the Designated Airspace Handbook (*3)
- appropriate aeronautical charts

NOTAMs tell pilots about events and obstacles that may affect them, indicating the time and location of the event. Air Traffic Control approval is required for operations in controlled airspace. For airspace controlled by NAV CANADA an RPAS Flight Authorization is required. (*4) Drone pilots will need to maintain communications with the air traffic control authority while flying.

Gordon Hearn

Endnotes
(*1) http://www.navcanada.ca
(*2) see (*1) above
(*3) see (*2) above

8. Disciplinary Hearings: A different Kind of Legal Proceeding

Those who work in a regulated industry or profession may at some point face a disciplinary hearing. Retirement homes, motor vehicle dealerships, and travel agencies are some examples of regulated industries, while opticians, physiotherapists, accountants and lawyers are among the many regulated professions.

It is important to understand how these proceedings differ from court proceedings. The first step is to determine the authority of the regulating body, and the scope of its powers. This is usually set out in the governing statute. It is also important to know the standards which the regulated business or professional must meet. This may be set out in the statute but can also be found in a Code of Conduct or Standards of Practice, set by the Regulator. In responding to the disciplinary action of the Regulator, special Rules of Procedure, which govern all aspects of the disciplinary hearing, from pre-hearing disclosure to whether the hearing is in writing or in person, will apply.

Ontario based bus and trucking companies may at some point in the life of their business, face a disciplinary proceeding. In order for these companies to operate commercial vehicles they require a Commercial Vehicle Operator's Registration ("CVOR") issued by the Registrar of Motor Vehicles (the "Registrar"). The CVOR program is a safety-based system, the details of which are provided for under the Ontario *Highway Traffic Act* ("HTA"), including who can apply for a CVOR, the grounds upon which the Registrar can refuse to issue a CVOR, and the components of the safety record of the CVOR holder, or operator, which is monitored by the Registrar. In addition, the Ministry of Transportation for Ontario ("MTO") publishes on its website the Commercial Vehicle Operator's Safety Manual ("Safety Manual") which sets out a wide range of information including how the National Safety Code is applied in Ontario, the components of a safety program and driver record keeping practices. A CVOR holder is expected to comply with both the HTA requirements, and the additional expectations set out in the Safety Manual.

Under the HTA, the Registrar has broad powers to suspend or cancel a CVOR or limit the number of the operator's vehicles, if the Registrar has reason to believe , based on the operator's safety record, or that of any person related to the operator, that the operator will not operate commercial motor vehicles safely or in accordance with the HTA or laws related to highway safety, *or for any other sufficient reason not set out in the statute*. The HTA requires the Registrar to notify the operator before taking any such action. In the notice of the proposed sanction (the "Notice") the Registrar provides the operator with the opportunity to attend a meeting and "show cause" as to why its CVOR should not be cancelled/suspended/limited. This is the first stage of the disciplinary process, yet there are no published guidelines or Rules of Procedure which govern this meeting. When a statutory decision-maker is making a decision that affects the interests of a party, the concept of procedural fairness is engaged. Procedural fairness includes the right to know the case against you, and the right to make submissions. For that reason, the Registrar includes with the Notice all of the documents and information reviewed in support of the proposed sanction. The operator should follow up with the Registrar if there are any concerns that the documents or information provided are incomplete. The right to make submissions in response to the proposed sanction is provided for in the show cause meeting. This is the operator's opportunity to address the Registrar's concerns and demonstrate that a sanction is not necessary in order to protect public safety. The show cause meeting is a private meeting with the Registrar, and is not open to the public. There is no sworn evidence taken, and no transcript of the meeting is created, although the Registrar will take notes. Notwithstanding its appearance of being a somewhat informal proceeding, an operator should never lose sight of the fact that this meeting is with the decision maker who has the

power under the HTA to cancel, suspend or limit its CVOR.

The Registrar will consider the operator's submissions and any additional documentation or information provided and decide whether to move forward with the proposed cancellation or suspension or limitation of the CVOR and will render a decision accordingly. If the Registrar decides not to proceed with the proposed sanction, there is no public record of this first phase of the disciplinary process – no sanction is imposed, and nothing will appear on the operator's CVOR record. If the Registrar decides to cancel or suspend the CVOR, the operator has the right, under the HTA, to appeal the Registrar's decision to the Licence Appeal Tribunal ("Tribunal"). Filing the appeal will put the sanction on hold pending the hearing of the appeal.

The *Licence Appeal Tribunal Act, 1999* establishes the Tribunal and gives it authority to make rules establishing procedures for hearings held by the Tribunal. The Tribunal's authority on a CVOR related appeal is found in the HTA which provides that the Tribunal has the authority to confirm, modify or set aside the Registrar's decision. The Tribunal is one of the constituent tribunals of Tribunals Ontario – Safety Licensing Appeals and Standards Division (formerly the Safety, Licensing Appeals and Standards Tribunals Ontario, or SLASTO), which has established Common Rules of Practice & Procedure (the "Rules of Procedure"). The Rules of Procedure cover a wide range of matters including the scheduling of a case conference, whether the hearing is in writing or oral, how to request an adjournment and how to summons a witness to attend. The hearing by the Tribunal is also governed by the *Statutory Powers Procedure Act*, which applies to a proceeding by a tribunal in the exercise of a statutory power of decision conferred under legislation (in this case the HTA) where the tribunal is required by the legislation to give the parties the opportunity for a hearing before making a decision. It provides a general framework for the conduct of hearings before Ontario administrative bodies, including the Tribunal. It is imperative that a party who appears before the Tribunal has a clear understanding of the Tribunal's authority to make a decision, the type of decision it can make, and the Rules of Procedure that will be followed. This is in addition to understanding the laws and standards of safety compliance that the operator will be measured against.

The appeal before the Tribunal is a hearing *de novo*, and the Tribunal owes no deference to the Registrar. The Tribunal member hearing the appeal, and making the decision, may not be a lawyer. Each party presents its evidence through witnesses who attend in person and provide sworn evidence and are then subject to cross-examination. After the evidence of each party is completed, legal submissions are made. The hearing is open to the public unless the Tribunal orders otherwise. Within a reasonable period following the completion of the hearing, the Tribunal will render its decision in writing. The decision is available to the public. If the Tribunal confirms the Registrar's decision to cancel or suspend the CVOR, it will direct the Registrar to carry out the sanction, and that sanction will appear on the operator's CVOR record and is a matter of public record. An operator may appeal the Tribunal's decision to the Divisional Court, within 30 days. The appeal before the Divisional Court is not a hearing *de novo*. In order to succeed, the appellant must show that the Tribunal's decision was not reasonable. The Tribunal's decision will be found to be reasonable if it is within the range of possible outcomes given the applicable facts and law. Filing an appeal does not stop the sanction from taking effect; one must apply to the Divisional Court for an order staying the sanction, which requires demonstrating that there is a serious issue to be tried (that the grounds of appeal have merit), that if the sanction is imposed pending the hearing of the appeal, the appellant will suffer irreparable harm, and where the balance of convenience lies, which involves a consideration of the impact of a stay on public safety.

It is clear that with each stage of the disciplinary process, the proceedings become more complicated. It is imperative, no matter what the

stage, to have a clear understanding of the decision maker's authority, the scope of their power, the procedural rights and safe guards that apply, and the laws (the HTA) and industry standards (Safety Manual) that will be used to evaluate the conduct which has triggered the disciplinary process.

Carole McAfee Wallace

9. E-Scooters – Disruptive Innovation or Welcomed Relief to Toronto Traffic?

An e-scooter is an electric two-wheeled vehicle with an open frame. The rider stands on a narrow platform while steering the e-scooter using handlebars. E-scooters are designed for single occupancy and typically travel between 20-30km/h. On average, they can travel 20km per charge, and as such they are intended to replace short car rides or to connect people to more wide reaching transportation. (*1)

During the last two years, e-scooters have emerged as a popular choice in many cities across the globe. They have semi-famously "disrupted" the transportation industry in several US cities including San Francisco, Chicago, and Austin.

The big players in the US – Lime, Bird, Spin, Uber's Jump, Lyft, Bolt – have created ride programs that allow people to gain access to an e-scooter near them through an app. Typically, a small initial payment is charged to the user, followed by a pay per minute of use. Other companies are targeting private ownership, with the purchase price of an e-scooter ranging from $300 - $1000+ CAD. (*2)

Despite their drawbacks (limited range, dockless parking posing a side walk hazard, and seasonal restrictions) e-scooters have much to offer to city dwellers. They have the potential to reduce congestion, reduce emissions, and simply offer people a more convenient mode of transportation.

So when are they coming to Toronto?

In Ontario, vehicles are regulated through the *Highway Traffic Act*, (the "*HTA*"). This legislation defines the difference between a vehicle and a motor vehicle, and how they are to be operated on public roads. Motor vehicles under the *HTA* include automobiles, motorcycles, motor assisted bicycles unless otherwise indicated in the *HTA*, and any other vehicle propelled or driven otherwise than by muscular power, but does not include a street car or other motor vehicle running only upon rails, a power-assisted bicycle, a motorized snow vehicle, a traction engine, a farm tractor, a self-propelled implement of husbandry or a road-building machine. (*3) As a vehicle propelled otherwise than by muscular power, an e-scooter falls into the *HTA's* definition of motor vehicle. However, e-scooters do not comply with the requirements for motor vehicles under the *HTA*. For example, they do not have brake lights, plates, or permits and as such are not permitted to drive on any highway. (*4) As a result, e-scooters are only permitted to be driven on private property and, if allowed by municipal bylaws, on sidewalks and pathways.

Under Chapter 886 of Toronto bylaws – Footpaths, Pedestrian Ways, Bicycle Paths, Bicycle Lanes and Cycle Tracks – the term "bicycle" includes a bicycle, tricycle, unicycle, and a power-assisted bicycle which weighs less than 40 kilograms and requires pedaling for propulsion ("pedelec"), or other similar vehicle, but does not include any vehicle or bicycle capable of being propelled or driven solely by any power other than muscular power. (*5) Only vehicles which fall into this definition of bicycle may be operated in Toronto's bicycle lanes and cycle tracks. (*6) E-scooters do not fall into this Toronto bylaw's definition of bicycle as they can be propelled and driven solely by electric power.

As for sidewalks, under Toronto bylaw 950-201 only persons under 14 years of age may ride a "bicycle" on a sidewalk. (*7) A bicycle in this section has the same definition as stated above. E-scooters do not qualify as bicycles, and as vehicles, they are prohibited from driving upon sidewalks. (*8)

In the summer of 2018, mayor John Tory commented on the possibility of for-rent e-scooters in Toronto, but shared some concerns regarding how to properly regulate them and the effect that dockless parking may have on sidewalks. (*9) A change in the bylaws has yet to come.

As new technologies develop in the transportation industry, Ontario cities are left playing catch up. A regulative overhaul is necessary in order to accommodate innovative transportation technologies that give people expanding mobility options, reduce inner city traffic, and reduce emissions.

Andrea Fernandes

Endnotes
(*1)https://www.theglobeandmail.com/canada/toronto/article-the-e-scooter-invasion-is-coming-to-canada-what-will-our-cities-do/
(*2)https://www.theglobeandmail.com/canada/toronto/article-the-e-scooter-invasion-is-coming-to-canada-what-will-our-cities-do/
(*3) s. 1(1) *HTA.*
(*4) s. 7(1) *HTA.*
(*5) Toronto Municipal Code, Chapter 886, 1-B.
(*6) Toronto Municipal Code, Chapter 886, 10 and 15.
(*7) Toronto Municipal Code, Chapter 950, 201-C.
(*8) Toronto Municipal Code, Chapter 950, 200-D.
(*9)http://www.iheartradio.ca/newstalk-1010/news/watch-are-for-rent-electric-scooters-coming-to-toronto-1.3985360

10. CIFFA 9 Month Limitation Period Upheld

The Federal Court of Canada has upheld the 9-month limitation period contained the Canadian International Freight Forwarders Association ("CIFFA") Standard Trading Conditions in *Labrador-Island Link et al v. Panalpina Inc. et al.* ("*Labrador-Island Link*") (*1), released May 24 2019.

Parties performing carriage mandates typically do so under certain terms and conditions, which likely include limitations of liability including a specific time period in which a legal action may be commenced. Such terms may be contained in carriage documentation or referred to therein but located on a website or in associated contractual agreements. The parties involved in any movement of goods should ensure that they are aware of the terms and conditions in place and, if needed, negotiate for the appropriate protection.

In *Labrador-Island Link,* the plaintiffs, collectively known as "Nalcor", sued their freight forwarder (Panalpina Inc.), carrier (Desgagnés Transarctik Inc.) and stevedore, (Logistec Stevedoring Inc.) for alleged damage to two shipments of aluminum conductor steel reinforced cable provided on steel reels (the "Cargo"). Nalcor sought judgment for $3,711,451.94. The defendants brought summary judgment motions on the basis that the action was time barred.

Justice LaFrenière granted summary judgment in favour of the defendants and dismissed the action enforcing the nine (9) month limitation period. Alternatively, His Honour granted summary judgment on the basis that the limitation period of one year under the Sea Waybills applied. Either way, Nalcor was out of luck and stuck with the ineffective provisions in its contract

Facts

Nalcor retained Panalpina to provide general freight forwarding services to effect carriage of all cargo for the Lower Churchill electrical transmission project between Labrador and Newfoundland Island. On October 3, 2013, the parties executed a freight forwarding service agreement (the "Service Agreement"), wherein Panalpina agreed to act as a principal and not as an agent for Nalcor and that it would be fully responsible for the associated services contained in the terms of that Service Agreement.

After Nalcor's "request for quotation" process, Panalpina contracted with the other parties directly and upon approval from Nalcor to effect

the carriage of the Cargo by sea from Trois-Rivières, Quebec to Argentia, Newfoundland. Upon the separate arrival of the two shipments on June 1, 2015 and October 28, 2015, Nalcor noticed during discharge operations that the Cargo was damaged. Nalcor provided notice of its intent to claim for damage to Panalpina regarding each shipment respectively on September 9, 2015 and November 2, 2015. The legal action was commenced on May 29, 2017.

The defendants each brought summary judgment motions for dismissal on the basis that the claim was time barred. The action was commenced almost 2 years post loss with the plaintiffs relying upon Newfoundland and Labrador law as cited in its contract with Panalpina. The defendants relied upon (1) the CIFFA Standard Trading Terms and Conditions' nine (9) month limitation period, or (2) the Sea Waybills incorporated by reference the *Hague Rules* (*2) that carried a one year limitation of liability.

Summary Judgment as Procedure

Justice Lafrenière considered whether use of the summary judgment procedure under the Federal Court Rules was appropriate in the circumstances. Citing *Graymar Equipment (2008) Inc.* v *Cosco Pacific Shipping Ltd* (*3), His Honour determined that he was able to make necessary findings of fact that allowed him to apply the law to the facts and that the summary judgment procedure was an expeditious, proportionate and less expensive way to proceed. His Honour stated at paragraph 16,

> The substantial evidence adduced by the parties provides a thorough paper trail concerning their activities and contractual relationships. Further, the affidavits provided by the parties and transcripts of cross-examinations allow the Court to ascertain the parties' intention when concluding the underlying agreements. No credibility assessments of witness are required to deal with these matters. Further, allowing a time-barred claim to proceed to trial on facts that are largely undisputed would be a waste of the Court's resources and time. I therefore conclude that it is just and appropriate to determine whether Nalcor's claim is time-barred by way of summary judgment.

The Trial Decision

The Court examined the contracts and business between the parties and the circumstances involved.

A. The Relationships

The Service Agreement set forth the terms and conditions that applied to movements of Nalcor's cargo by Panalpina, including Panalpina's role, obligations, representations and warranties, the furnishing of personnel and equipment, subcontracting, compensation and terms of payment, default and termination, liability and indemnification and other related provisions.

Nalcor, through its detailed Request for Quotation ("RFQ") process required Panalpina to go to the market and request quotes from carriers based on the specifics provided by Nalcor. The quotes would then be relayed by Panalpina to Nalcor. After a detailed review of pricing, scheduling and logistics, Nalcor selected its preferred quote which informed Panalpina and confirmed the mode of transport, collection point, delivery point, required delivery date and information relevant to the collection and transportation of the goods.

From there Panalpina contacted the selected carrier and made all of the necessary arrangements and bookings for the transportation of the cargo, including issuing booking notes to Nalcor.

As between Nalcor and Panalpina, Article 1.9 of the Service Agreement stated that the agreement would "be construed in accordance with the laws of the Province of Newfoundland and Labrador and Canada" and that Panalpina "irrevocably attorns to the exclusive jurisdiction of the courts

of the Province of Newfoundland and Labrador and Canada for the resolution of any dispute arising in respect of this Agreement."

Article 2.2 of the FFSA explicitly stated that Panalpina "is not an agent of [Nalcor] or an agent of any Affiliate of [Nalcor]." Further, Panalpina was specifically stated to be a principal and "fully responsible for the services in accordance with and subject to the provisions of the Agreement". Other clauses included the requirement for approval before subcontracting duties to other parties and that Panalpina was responsible any omissions or negligence of the subcontractors' work. There was also an "Entirety of Agreement" clause which stated that the terms of the Service Agreement superseded all other agreements, documents, writings, and verbal understandings between the parties and that there were no oral or written understandings, representations or commitments of any kind, express or implied, unless expressly set out. No modification of the terms was permitted unless in writing and signed.

Panalpina had acted as freight forwarder for Nalcor regarding hundreds of shipments. For each quote from various carriers and stevedores and provided to Nalcor, Panalpina made the following reference in the document containing the quote(s): *"Rates are subject to latest CIFFA Terms and Conditions (available upon request)"*. Pursuant to section 19 of the CIFFA Terms, any suit against the freight forwarder must be brought within 9 months from *"the date of delivery of the goods for claims for damage to goods"*, failing which the freight forwarder *"shall, unless otherwise expressly agreed, be discharged from all liability"*. Nalcor admitted receiving each one and accepting the quotes from Desgagnés and Logistec as carrier and stevedore respectively, and which had provided their own rates, terms and conditions to Panalpina.

Panalpina then sent to Nalcor "back-to-back" booking notes with respect to each shipment (Desgagnés issuing to Panalpina and Panalpina issuing to Nalcor) containing the following statement under "Sea Waybill": *"All other terms and conditions are as per Desgagnés Transarctik's Sea Waybill"*. The terms and conditions of the Sea Waybills included the following clauses:

> Condition of Carriage
>
> **1. DEFINITIONS.** "Carrier" means DESGAGNÉS TRANSARCTIK INC. (hereinafter DTI) (…).
>
> "Shipper" means not only the person or the company which deliver the goods to the Ship at the loading port but also the owner of said goods as well as any person or company acting on behalf of said owner.
>
> "Consignee" means anyone entitled to the delivery of the goods at the port of discharge including, as the case may be, the owner of the goods or the person designated as Consignee.
>
> **2. PARAMOUNT CLAUSE.** The parties acknowledge and agree that the carriage performed under this contract is not governed by a Bill of Lading but rather by this Sea Waybill. However, they agree that the terms, provisions and conditions of Articles II to IX of the International Convention for the Unification of Certain Rules Relating to Bills of Lading signed at Brussels on August 25, 1924 (The Hague Rules) are incorporated by agreement into this contract. The Carrier's rights and immunities including the $500.00 limitation of liability per package or unit are more specifically herein incorporated. In the event said rules are in contradiction with the other terms, provisions and conditions of this contract, said other terms, provisions and conditions shall prevail.

Nalcor's representative signed the booking notes issued by Panalpina on behalf of Nalcor and returned them to Panalpina. Panalpina's representatives signed Desgagnés' booking notes.

After each shipment departed, Panalpina issued an invoice to Nalcor, which paid same. Each invoice contained the following text in the section entitled "Terms and Conditions":

> 1) All business will be accepted by Panalpina Inc. (hereinafter the "Company") from the Owner, Consignee or Shipper (hereinafter the "Customer") subject to the Standard Trading Conditions of the Canadian International Freight Forwarders Association, Inc. currently in effect which Conditions contain provisions which exonerate the Company from liability and limit the amount recoverable, and each Condition shall be deemed to be incorporated in and to be a Condition of any agreement between the "Company" and the "Customer". In transacting such business with the "Company", the "Customer" acknowledges that he is familiar with and accepts such Conditions. A copy of the Standard Trading Conditions can be obtained on request from the "Company" or from the Canadian International Freight Forwarders Association, Inc., in the latter case, by addressing such request to: the Canadian International Freight Forwarders Association (CIFFA), 170 Atwell Drive, Suite 480, Toronto, Ontario, M9W 5Z5, or via web http://www.ciffa.com/.

The Court determined that Panalpina could only have acted as: (a) freight forwarder and agent for Nalcor or (b) carrier or agent of the carrier. Either way, the CIFFA Terms or the terms and conditions set forth in the Sea Waybills must apply leaving only a nine month or one year limitation period to apply.

The Court reviewed the traditional legal role of a freight forwarder as an agent of the shipper and how the shipper may not have a claim against the freight forwarder provided that it performed its agency duties with the appropriate skill and care. However, the Court also noted that, at times, the freight forwarder acts as principal contractor arranging for the carriage in its own name and assumes responsibility for carriage on the basis of its expertise in choosing competent carriers.

The Court found that the contractual documents and the parties' dealings in relation to the subject shipments were consistent with Panalpina acting as Nalcor's principal and not its agent.

B. Which Terms Apply

Nalcor argued that Panalpina never advised it of the CIFFA Terms' application further to the execution of the Service Agreement and further that the CIFFA Terms were in direct contradiction with the Service Agreement's terms. The Court disagreed.

Citing Nalcor as a sophisticated shipper, the Court noted Nalcor knew that, given its role as a freight forwarder, that Panalpina was likely a member of CIFFA and found that Nalcor was or ought to have been aware that Panalpina was a member of CIFFA from the start and as a matter of common knowledge. Knowing that such membership would not be enough to amount to the incorporation of CIFFA Terms into a contractual agreement between parties, the Court confirmed that the evidence established that the CIFFA standard terms and conditions were brought to Nalcor's attention by Panalpina in its dealings with Nalcor, and specifically in connection with the May and October Shipments. The Court did not accept Nalcor's submission that only pricing, scheduling and logistics were reviewed in Panalpina documentation and the CIFFA terms were ignored, since the Service Agreement covered such items. However, there was no evidence that Nalcor took issue with the terms or sought clarification but rather approved the documentation. The Court stated at paragraph 66,

> "I should note that even if Nalcor failed to take actual notice of the reference to the application of the CIFFA Terms, this cannot serve as a basis to refuse to apply the CIFFA Terms. Any failure by Nalcor to take proper notice of terms that were

> clearly set forth in the documents exchanged between the parties is simply not an excuse and cannot serve to alter or render inapplicable such contractual terms."

As for Nalcor's reliance on the clauses that provided that the Service Agreement was the sole agreement, the Court noted that the Service Agreement made no mention of the transportation of the Cargo or any of the material terms relating to the carriage. The Court found that it was clearly contemplated by the parties to the Service Agreement that the terms and conditions of each specific shipment would be determined in the future by way of distinct contractual documents. (*4)

Nalcor further submitted that, if Panalpina wished to rely on the shorter limitation period in the CIFFA terms, it should have sought to amend the Service Agreement in writing as required, as such term was directly contrary to the provisions of the Service Agreement, which relied on the laws of Newfoundland and Labrador and Canada. The Court dismissed this argument stating that the laws of Newfoundland and Labrador and Canada were only meant to apply to the construction of the Service Agreement and to the resolution of any dispute arising in respect of the Service Agreement itself. The Service Agreement was silent on the issue of limitation period. The Court stated,

> [72] In the absence of any language in the FFSA dealing with a specific limitation period to commence an action, it was open to Panalpina to put forward terms when providing quotes to Nalcor which placed it in the same position as if it were only an agent and, therefore, had the advantage of leaving the burden of any contract so made on its customer, Nalcor: *Schenker and Co (Aust) Pty Ltd v Maplas Equipment and Services Pty Ltd*, [1990] VicRp 74; [1990] VR 834.
>
> [73] Nalcor submits that the contractual allocation of risk between the parties must be respected. It maintains that concluding that Nalcor contracted with and is bound by terms not found in the FFSA would set aside the well-established doctrine of privity of contract. However, Panalpina's trading conditions are in standard form and are incorporated in many contracts in regard to the carriage of goods. These are substantially contracts of adhesion. Nalcor could have taken issue or rejected the CIFFA Terms upon reviewing the quotes received from Panalpina, but failed to do so.
> …
>
> [76] For the above reasons, I conclude that Nalcor is bound by the CIFFA Terms and the action as against Panalpina is time-barred.

The Court went on to find that the action as against Desgagnés and Logistec, as contractors engaged by the Panalpina to perform transport and related service in relation to the Cargo, was also time-barred as both relied upon the Himalaya clause (*5) in section 2 of the CIFFA Terms to invoke the shorter nine (9) month time-bar. Both parties knew that third parties would be engaged and that this was a standard practice in the industry. The Court concluded that it would not be unreasonable to hold that the contracting party was acting as agent for the third parties for the purposes of the contract.

The Court stated:

> [80] Himalaya clauses are well recognized terms in transport contracts, and they are enforceable by the courts notwithstanding a third party's complete ignorance of the existence of a clause granting it a benefit at the time of the performance of its own contract: *Boutique Jacob Inc. v Pantainer Ltd,* 2006 FC 217 (CanLII) at para 38, overturned on appeal on other grounds: *Boutique Jacob Inc v Pantainer Ltd*, 2008 CAF 85 (CanLII).

> [81] The effect of such clauses is simple. Every participant in the contract of carriage, whether they are explicitly named or simply an agent or sub-contractor, is entitled to rely upon and benefit from the conditions of carriage set forth in said contract.

In the alternative, the Court also found that the Sea Waybills were the best evidence of the contracts of carriage of the Cargo. The Court noted that Panalpina did not issue any shipping document for the carriage by sea of the cargo, which was consistent with Panalpina acting as an agent of Nalcor, not a principal. The Court stated,

> [82] In his RFQ forms, Mr. Capporicio (*for Nalcor*), indicated under "Contract": "… No NVOC bill of lading", which could only mean that the actual shipping document evidencing the contract of carriage had to come from the actual carrier by sea, not from a freight forwarder acting as a Non-Vessel Operating Carrier. The bills of lading instructions naming Nalcor as shipper of each shipment actually originated from Nalcor itself and were relayed to Desgagnés by Panalpina. In the circumstances, Nalcor was a party to the contract of carriage with Desgagnés as evidenced by the Sea Waybill for each shipment and is therefore bound by all of its terms and conditions, including the Paramount Clause reproduced at paragraph 44 of these reasons.
>
> [83] In the futher (*sic*) alternative, even if Nalcor were to succeed with their contention that Desgagnés and Logistec acted strictly as subcontractors of Panalpina, the claims would still be time-barred.
>
> [84] I agree with the Defendants that attempts by cargo claimants to circumvent the carriers' limitations of liability and other terms, whether it be by suing in tort or by artificially raising privity of contract issues, are long passé now. Sub-bailment on terms and the increased recognition of Himalaya Clauses have brought an end to these artificial attempts, especially in cases such as the present one where Nalcor was fully aware that Panalpina would not be the party actually performing the stevedoring and carriage by sea of the Conductor Reels.
>
> [85] There is sub-bailment where a contracting carrier subcontracts the whole or part of the carriage to subcontracting carrier(s). There is sub-bailment on terms where the primary carrier (here assumed to be Panalpina for present purposes) either had express, implied or ostensible authority from the owners of the cargo (here Nalcor) to subcontract the portion of the carriage under the terms of the sub-carrier (here Desgagnés) in which case the owner of the goods is bound by these terms, including terms excluding or limiting the liability of that sub-carrier. These principles have been recognized and consistently applied in Canadian shipping cases.

Finally

The current trend is for shippers to download as much responsibility as possible onto their freight forwarders and/or carriers (whether in marine or trucking matters), but, where the drafting is imprecise, the courts will take the opportunity to enforce long standing principles of Canadian shipping law and custom and to give recognition to noted terms and conditions. Care must be taken in the drafting of agreements seeking circumvent carriers' limitations of liability and other terms. The Service Agreement's drafting in this case as between the shipper and freight forwarder was found to be lacking in specificity in more than one area causing the failure to recover on this $3 million dollar claim. It is also to be noted that the freight forwarder was successful in part because it consistently referred to the CIFFA terms and conditions in its documentation. This is a good reminder for those relying upon such terms or similar to also be sure to do so.

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Endnotes
(*1) 2019 FC 740
(*2) The formal name is the *International Convention for the Unification of Certain Rules of law relating to Bills of Lading.*
(*3) 2018 FC 974 (CanLII), at para. 16
(*4) at para 67
5) A Himalaya clause is a contractual provision that attempts to extend the benefits of the carrier's contractual limitations to sub-carriers or other third parties engaged by the carrier to assist in the transportation of goods. Himalaya clauses have are accepted as forming a part of Canadian law.

11. Officer and Director Liability for Regulatory Offences

Directors and officers, and sole proprietors, are subject to potentially large penalties, and even jail time, for corporate regulatory offences. The Ontario Court of Appeal's decision earlier this year in *R. v. New Mex Canada Inc.* should serve as a warning.(*1)

The facts in the case were somewhat extreme, as it involved a workplace fatality. An employee, who was known to be epileptic, suffered a seizure and fell off equipment while trying to retrieve inventory. He had no safety gear or safety training.

The company and its directors took ownership of their failings, including taking a leading role in funeral arrangements and assisting co-workers with the tragedy, notwithstanding that the incident was damaging to the business, which had to shut down temporarily and to downsize.

The incident led to an investigation and charges under Ontario's *Occupational Health and Safety Act*.(*2) The charges were laid against both New Mex Canada and also its two directors. The company was charged with failing to provide information, instruction and supervision with respect to fall protection and with failing to comply with regulated workplace procedures under the *Industrial Establishments* Regulation. (*3) The individuals were charged with failing to ensure compliance with the Act and the Regulation.

Notwithstanding that the directors only collectively made about $40,000 in gross income, notwithstanding that the directors would be paying the corporations fines out of their own pockets, and notwithstanding that they had no prior convictions, the sentencing judge ordered the company to pay $250,000 (more than double what the Crown had asked for); and she ordered the individual directors to serve 25-day jail terms, followed by a year of probation. All three defendants appealed, where an appellate judge varied the sentences to $50,000 in fines to the company and $30,000 in fines against the directors, without any jail time. The Crown then appealed to the Ontario Court of Appeal, which upheld the varied sentences and dismissed the appeal.

In coming to his decision, the Honourable Mr. Justice Paciocco (writing for a unanimous panel of three appeals judges) gave lengthy guidance with respect to several factors that must be considered during sentencing.

First, His Honour considered the principle of "moral blameworthiness", which refers to an offender's level of culpability based upon his mental state. He rejected the argument that regulatory offences ought to be concerned with public policy rather than blameworthiness, although he accepted that it was a less important factor than in the criminal context. His Honour explained that moral blameworthiness was a necessary component of keeping sentences proportional to the offences. Each sentence must "fit" the offence.

Next, His Honour considered the principle of "restraint" for first offenders. On this score, His

Honour rejected the notion that a fine is the only fit sentence for a first offender. In fact, he reasoned that the principle is less important in the regulatory context than the criminal context. In particular, he found that there was less concern that incarceration would push someone towards criminality because the sentences are shorter in the regulatory context; and His Honour agreed with the Ontario Court of Appeal's prior jurisprudence that "general deterrence" (*i.e.* sending a general message to the public) is a more important objective than "specific deterrence" (*i.e.* sending a specific message to the offender) in the regulatory context.(*4)

Third, His Honour considered the argument that fines are significantly more common than incarceration, including longstanding jurisprudence from Ontario Court of Appeal that "to a very large extent" the enforcement of regulatory offences, such as those concerning occupational health and safety, are achieved by fines.(*5) However, His Honour rejected that the "primacy" of fines should be a principle in sentencing. Rather, he declared, "the rarity of incarceration for regulatory offences is a descriptive observation, not a prescriptive one."(*6)

Fourth, the appeals judge considered the relevance of corporate fines to the directors' ability to pay in closely-held corporations. He left it to another day for a defendant to argue that a particular corporate sentence would indirectly impoverish him in the sense that it would damage his equity. However, that argument was not directly before the court. The argument at hand was simply that the directors would be making the payment personally. On this ground, Mr. Justice Pacciocco noted that they were not under any particular legal obligation to do so.

Finally, His Honour considered the relevance of post-incident compliance and cooperation by the company. However, he also rejected that as a possible mitigating factor in sentencing, even where compliance was statutorily required. Following earlier jurisprudence, he found that such a consideration could encourage lighter compliance before an accident occurs in the first place.(*7)

In the circumstances, His Honour found that the fines – although "light" in his view – were not so out of line with the sentencing principles that he ought to interfere at the appellate level. He also found that incarceration was not necessary in this case.

Despite the forgoing, the case should be seen as opening the door to steeper penalties and, especially, to more incarcerations of directors and officers for serious regulatory violations. His Honour explicitly rejected that these individuals should be spared jail time on grounds of "restraint", "primacy of fines", impoverishment by virtue of corporate fines, or post-incident compliance.

Regulatory penalties at first instance are rarely reported in official sources. However, some secondary sources suggest that incarcerations might be on the rise. For example -- without specifically referencing the *New Mex Canada* decision – it has been published online that the sole proprietor of a small roofing firm, in a case called *R. v. Bell*, was sentenced to seven days in jail because one of his employees was found to be working over three metres high without any safety gear. The technical violation had resulted in no particular injury or damage or property, but the owner did have a history of three prior convictions.(*8)

The likelihood of steeper penalties, including more incarcerations, should concern officers and directors in every regulated sector. Now is the time for officers and directors to ensure that appropriate compliance systems are put in place.

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Endnotes

(*1) 2019 ONCA 30.
(*2) R.S.O 1990, c. 0.1.
(*3) R.R.O. 1990, Reg. 851.
(*4) *Ontario (Labour) v. Flex-N-Gate Canada Company*, 2014 ONCA 53; *R. v. Currie*, 2018 ONCA 218.
(*5) *R. v. Cotton Felts Ltd.* (1982), 2 C.C.C. (3d) 287 (Ont. C.A.).
(*6) paragraph 85.
(*7) *Flex-N-Gate*, *supra*, note 4.

(*8) Unfortunately, sentencing reasons are not generally published by the Ontario Court of Justice. However, *R. v. Bell* is reported by Cynthia R. C. Sefton, "Employer With Three Prior Convictions Given Jail Sentence", online: <<http://www.mondaq.com/canada/x/808362/Health+Safety/Employer+With+Three+Prior+Convictions+Given+Jail+Sentence>>.

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CONTEST

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