THE NAVIGATOR

IN THIS ISSUE

Bankruptcy Law Runs Aground: *BBC Chartering Carriers GmbH & Co KG v. OpenHydro Technology Canada Limited*

In the typical bankruptcy scenario, the federal bankruptcy statutes impose a regime over all creditors for the orderly disposition of the insolvent's assets. Creditors are subject to the rules governing the priority of their claims and, perhaps most significantly, are prohibited from launching or continuing legal actions for the collection of debts by the statutory stay of proceedings, the purpose of which is to prevent one creditor from getting an unfair advantage over another through a race to the courthouse to obtain judgment.

While the provincial courts in Canada, through which the federal bankruptcy statutes are applied, generally exercise exclusive jurisdiction over bankruptcy matters, there is a curious exception for certain matters governed by maritime law. How this works was recently illustrated in the decision of the Federal Court in *BBC Chartering Carriers GmbH & Co KG v. OpenHydro Technology Canada Limited* (*1). The principles spelled out in this case are useful to keep in mind where marine cargo claims are at issue. As this case illustrates, this exception will sometimes permit a creditor to circumvent the ordinary stay of proceedings and make good on a claim against a debtor, notwithstanding its bankruptcy.

The facts

The plaintiff BBC Chartering Carriers is a German company in the business of chartering vessels. The defendant OpenHydro entered into a charterparty agreement with BBC to ship an OTC03 Turbine Control Centre ("TCC") from Ireland to the Port of Saint John, New Brunswick. OpenHydro had also contracted with BBC for lift operations at the Port of Saint John. Upon delivering the cargo BBC invoiced OpenHydro in the amount of €502,407.57, the equivalent of $871,339.97 Canadian dollars. OpenHydro failed to pay.

Because of the breach of the agreement, BBC was entitled to assert a lien over the cargo. This meant that, in addition to being able to bring an *in personam* action against OpenHydro for non- payment, BBC could, and did, pursue an *in rem* proceeding against the cargo itself.

FIRM AND INDUSTRY NEWS

- **Gordon Hearn** will be participating in a panel presentation entitled "Defending the Claim for Catastrophic Injury: Is There a Way Out Through Mediation?" **at the Transportation Intermediaries Association 2019 Capital Ideas and Exposition** on April 13, 2019 in Orlando, Florida.

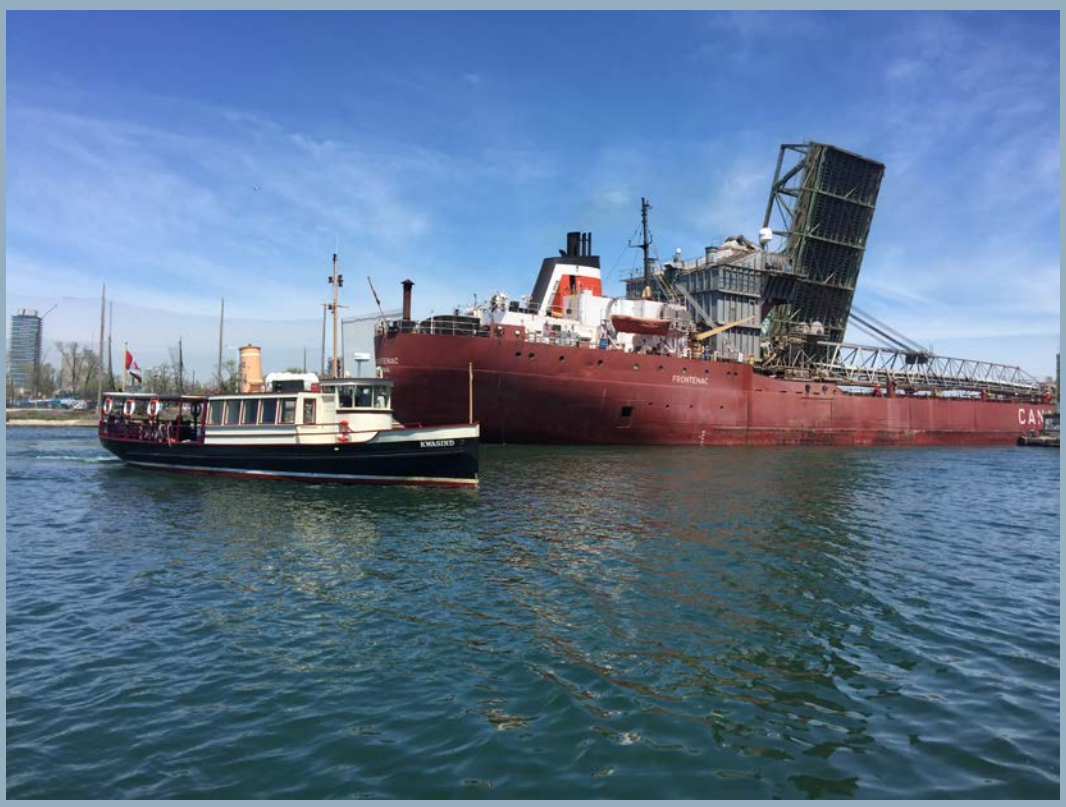
- **Women's International Shipping & Trade Association** (Wista) USA 2019 Annual General Meeting and Conference, Philadelphia Pennsylvania April 26, 2019. **Kim Stol**l will be attending as V.P Central Region for Wista Canada.

- **Maritime Law Association of the United States** Spring 2019 Meetings and Dinner, April 30th to May 3rd, 2019, New York City.

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

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

- **Gordon Hearn** has been recognized in the *2019 Lexpert Guide of the Leading U.S./Canada Cross-Border Lawyers in Canada.* **Rui Fernandes, Gordon Hearn, Kim Stoll** and **Carole McAfee Wallace** have been recognized in the 2019 *Lexpert Guide of Leading Lawyers in Canada* in Transportation Law (Rail & Road). **Rui Fernandes** and **Gordon Hearn** have also been recognized in the category of Shipping & Maritime Law.



Shortly after service was validated on the cargo, OpenHydro filed a Notice of Intention to make a proposal pursuant to section 50.4(1) of the *Bankruptcy and Insolvency Act.*

OpenHydro did not defend BBC's action in Federal Court, and BBC therefore proceeded with a motion for default judgment. OpenHydro argued that, because of the automatic stay of proceedings that took effect as a consequence of the filing of its Notice of Intention, BBC was barred from proceeding with its motion. BBC did not contest the point that its action against the debtor OpenHydro must be stayed. However, it noted that it only was only advancing default proceedings against the *in rem* defendant – *i.e.*, the cargo – and that therefore, since this fell within maritime jurisdiction, the motion should be allowed to proceed. The court agreed with BBC and granted judgment, notwithstanding the stay of proceedings.

Clash of jurisdictions

In this case BBC was able to take advantage of the fact that the Federal Court has concurrent original jurisdiction over navigation and shipping. Further, in the view of the motions judge, it did not matter that the cargo had been off loaded and was, at the time of arrest, in fact located on the seafloor in the Minas Passage. It was sufficient that the cargo, wherever it was, was connected to a charterparty agreement, which permitted the Federal Court to assume jurisdiction.

The only question that then remained for the court was whether the stay of proceedings that took effect with the bankruptcy filing applied to the *in rem* proceeding against the cargo. In concluding that it did not, the court relied on important earlier rulings of the Supreme Court of Canada in *Antwerp Bulkcarriers, NV (Re)* (*2) and its companion decision in *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)* (*3). These decisions established the principle that, notwithstanding the normally comprehensive effect of a stay of proceedings under bankruptcy law, where an arrest of cargo or a ship has properly been made under maritime jurisdiction *before* the commencement of the stay, such actions remain outside of the jurisdiction of the bankruptcy courts and are not affected by the stay of proceedings.

On the facts before the court, BBC was entitled to a lien under the terms of the charterparty agreement as a result of OpenHydro's default. Having arrested the cargo by obtaining an order validating service against the TCC that was effective *prior* to the date of filing of the Notice of Intention to make a proposal, BBC was thus in possession of the goods and asserted the rights of a secured creditor of OpenHydro. With the arrest completed before any bankruptcy proceeding had been commenced, the court applied the principle from *Antwerp* and *Holt Cargo*, which holds that the insolvency jurisdiction of the provincial courts will not oust the maritime jurisdiction of the federal courts properly exercised.

Conclusion

The decision in *BBC Chartering Carriers* has important lessons for parties who may have marine cargo claims. The jurisdiction to arrest a vessel or its cargo, as this case illustrated, can be a particularly powerful remedy in the insolvency context. When exercised swiftly, it can give a creditor a peculiar advantage over the other creditors of a debtor. Since it is hardly uncommon for cargo claims to arise in cases of insolvency, it is difficult to overstate the importance of this curious exception to the otherwise almost comprehensive supremacy of the jurisdiction of the bankruptcy courts. In order to take advantage of it, however, a creditor should act promptly to secure its rights, since the advantage can be lost once a debtor has successfully filed a proposal or made and assignment in bankruptcy.

Oleg M. Roslak

Endnotes

(*1) 2018 FC 1098 [*BBC Chartering Carriers*].
(*2) 2001 SCC 91 [*Antwerp*].
(*3) 2001 SCC 90 [*Holt Cargo*].*Introduction*

2. Worker Misclassification and Poorly Drafted Contracts – Once Again, the Employer Pays

An employee is terminated after 13 years of service. At the start of her employment she signs an employment agreement in which she agrees that if her employment is terminated without cause, she is only entitled to the minimum requirements under the Ontario *Employment Standards Act, 2000* ("ESA") which, based on 13 years of service, equals 8 weeks' notice, and 8 weeks of benefit continuation, plus 13 weeks' severance; a total of just less than 5 months. The Ontario Superior Court awards her 21 months of notice, and additional compensation for loss of benefits for 21 months. How does this happen?

Kelly Cormier, the plaintiff in *Cormier v. 1772887 Ontario Limited cob as St. Joseph Communications* (*1), worked as a freelance wardrobe stylist with the defendant, St. Joseph, between 1994 and 1996. She was either paid hourly or by the project. Between 1996 and 2004 Ms. Cormier worked exclusively for St. Joseph, anywhere between 37 and 40 hours a week. She invoiced the defendant weekly, no deductions were taken from her pay, and St. Joseph did not hold her out as an employee or agent. There was no written contract between the parties.

On June 3, 2004 Ms. Cormier entered into an employment agreement with St. Joseph. On January 16, 2008 Ms. Cormier was promoted and she signed a new employment agreement in which she agreed to ESA minimums only if her employment was terminated without cause. She was promoted a second time, in 2012, and signed another employment agreement in which she again agreed to ESA minimums, and agreed that benefits (other than STD and LTD) would continue for the ESA notice period, and only if employer's insurer consented to continuing benefits.

On June 1, 2017 St. Joseph advised Ms. Cormier that it was terminating her employment and gave her 5 months of working notice. Five weeks later, on July 6, 2017, the employer waived the balance of the working notice period and offered to pay an additional 3 weeks' notice (to bring the working noticed combined with pay in lieu thereof to 8 weeks) plus payment of 26 weeks' severance (double what was required under the ESA). Ms. Cormier was 52 years of age at the date of termination. She sued for wrongful dismissal and brought a motion for summary judgment seeking 24 months' notice which she argued was reasonable based on all of her years of service with St. Joseph, both as a contractor and as an employee. At the time the motion for summary judgment was heard, on January 17, 2019, Ms. Cormier had not been able to find new work.

The first issue the court examined was how to address the years of work that predated Ms. Cormier becoming an employee with St. Joseph and, in particular, how they would factor into the assessment of reasonable notice. In determining this first issue the court stated that there are three categories of worker: employee, independent contractor and dependent contractor, which it described as an intermediate classification in which, while not an employee, termination only upon reasonable notice is implied. In order to determine which category applied to Ms. Cormier the court followed a two-step process. Step one requires determining whether the worker is a contractor or employee. The court summarized the case law setting out the various tests for determining this issue, including the commonly used fourfold test: (1) who has control over the work, (2) who owns the tools of the trade (3) is there a chance to earn a profit and (4) who bears the risk of loss.

If it is determined that the worker is a contractor, Step Two applies, which requires determining whether the worker is an independent or dependent contractor. The factors to be considered at this stage are: (1) the extent to which the worker was economically

dependent on the working relationship; (2) the permanency of the working relationship and (3) the exclusivity or high level of exclusivity of the worker's relationship with the company. The more permanent and exclusive the contractor relationship, the less likely the worker is an independent contractor and the relationship should be classified as a dependent contractor relationship. The assessment at Step Two requires the court to examine the history of the relationship and the extent to which the worker worked exclusively or near-exclusively for the company or was required to devote his or her time and attention to the company's business. The greater the level of exclusivity over the course of the relationship, the greater the likelihood that the worker is a dependent contractor. The court reminds us that the fact that a worker operates as a sole proprietor or through a business or corporation, while relevant, is not determinative of the worker's status.

In this case the court stated that while there were some *indicia* of a genuine independent contractor relationship very early in the relationship (the issuance of invoices being one example), after the first 2 years Ms. Cormier was a dependent contractor as she worked exclusively for St. Joseph and not much changed when she went from Freelance Wardrobe Stylist to a Wardrobe Stylist under an employment contract. In other words, there was little to distinguish Ms. Cormier's services between her years as a contractor and her years as an employee.

The court then turned to the quantum of notice to which Ms. Cormier was entitled and confirmed the principle that an employee or dependent contractor dismissed without cause, is entitled to reasonable notice of termination, or pay in lieu thereof. The court considered the character of employment, the length of service, the age of the employee and the availability of similar employment having regard to the experience, training and qualifications of the employee. Based on Ms. Cormier's 23 "solid years" in the St. Joseph's workplace, the court determined that Ms. Cormier was entitled to 21 months of notice. The court went on to state that even if Ms. Cormier had been an independent contractor from 1994 to 2004, it would be wrong in principle to ignore these years of their relationship in determining the reasonable notice period and found that she would still be entitled to 21 months' notice.

The final issue for the court was whether the termination provision in the 2012 employment contract was enforceable. As a reminder, the provision limited Ms. Cormier's rights to notice and severance under the ESA and also provided the following limitation on benefits: "..subject to the consent of the Company's insurers, you will be entitled to continue to receive Company benefits (excluding STD and LTD benefits) during the [ESA] notice period…". This was presumably to address the possibility that an insurer may not agree to extend all benefits past the employee's termination date.

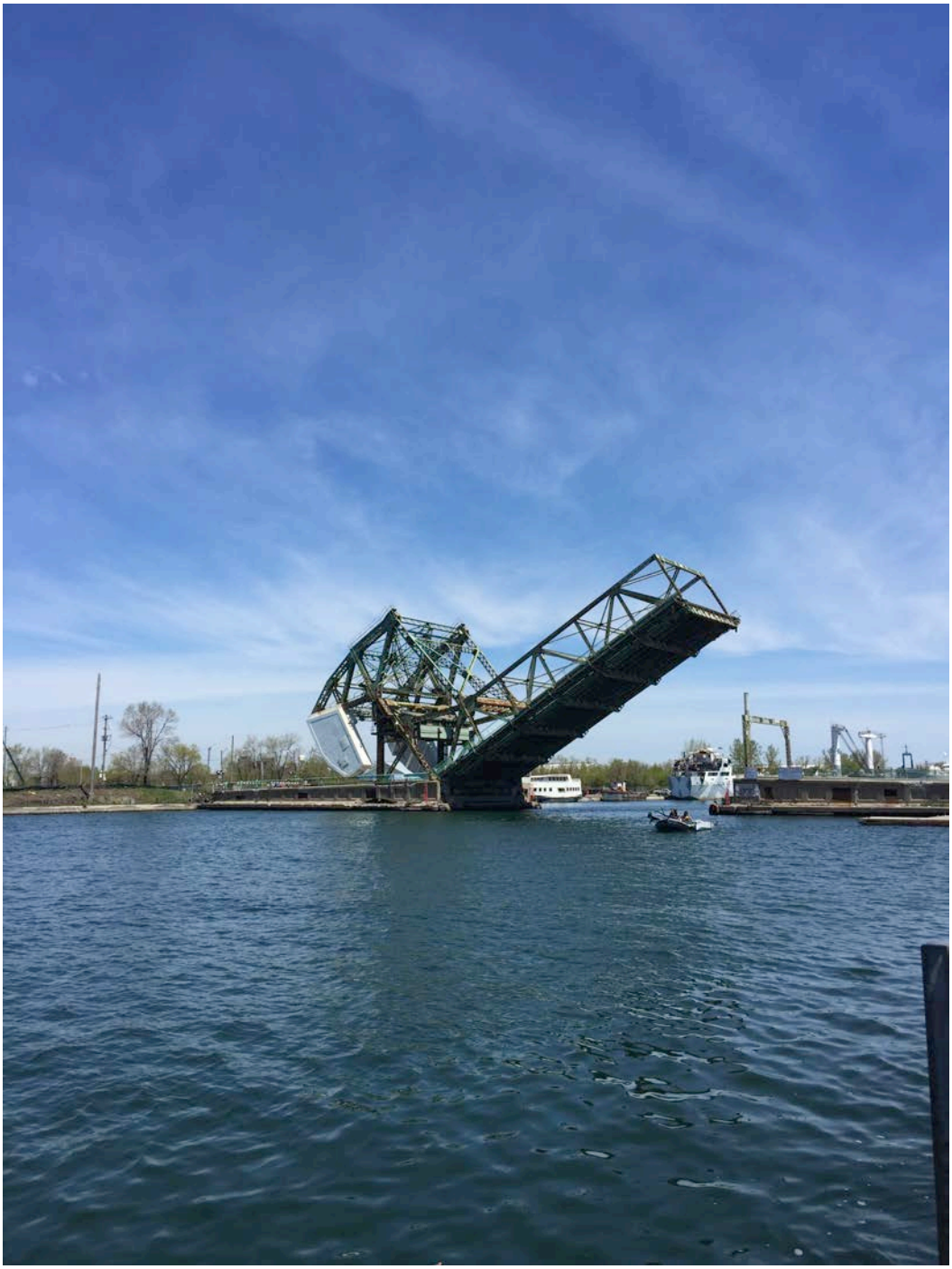
The court stated that there was no doubt that the parties shared a contractual intention to negate the application of common law notice. However, the court went on to find that the treatment of the employee's benefits during the notice period was contrary to the ESA, in that it allowed St. Joseph to provide Ms. Cormier with only some of the employee benefits that she received and, even then, was subject to the consent of St. Joseph's insurers. This was a lesser right than provided for under the ESA and because of that, the entire termination clause was rendered void. Ms. Cormier was therefore entitled to common law notice, which the court had determined was equal to 21 months ($148,750) and that she was also entitled to damages for the loss of benefits during this 21-month period (10% of base salary or $14,875).

In today's climate where worker's rights are fiercely protected, and class action law suits seeking damages for an alleged misclassification of workers are not uncommon, employers need to be vigilant in order to minimize their risks. If you transition a contractor to an employee, you may still be faced with having to take into

consideration all of the employee's years of service at the time of termination. The best way for an employer to minimize risk and provide certainty regarding termination costs when employment comes to an end, is to have the employee sign a properly drafted employment agreement. The law on enforceable termination provisions in an employment agreement is constantly evolving so employers need to ensure that the contracts they rely on are up-to-date and comply with the most recent case law.

Carole McAfee Wallace

Endnotes
(*1) 2019 ONSC 587 (CanLII)



3. *GREENHOUSE GAS POLLUTION PRICING ACT & ROAD CARRIERS*

The *Greenhouse Gas Pollution Pricing Act* (S.C. 2018, c. 12, s. 186) (the "Act")(*1) contains two mechanisms for pricing carbon. The first involves straight taxation. The second mechanism uses "cap and trade".

The Act allows the provinces to implement their own tax system or cap and trade system. The provincial systems must plan to achieve a certain level of emission reductions in order to be comparable to the same results that would have been achieved by the federal system. If the planning objectives are comparable, then the federal system does not apply. The Act thus applies to any province or territory of Canada that requests the price, or to any province or territory of Canada that has *not* implemented a compliant carbon pricing regime.

The Government of Canada will begin collecting a fuel surcharge for road carriers starting on April 1st, 2019, for the provinces of Ontario, Manitoba, New Brunswick, and Saskatchewan (July 1st, 2019 for the territories of the Yukon and Nunavut). All road carriers operating in any of these jurisdictions must consequently register with the Canada Revenue Agency ("CRA") and file quarterly returns to CRA:

Sub-section 63 (1) of the Act provides:

- 63 (1) A person is required to be registered, for the purposes of this Part, as a road carrier in respect of a type of fuel that is a qualifying motive fuel if the person uses fuel of that type in a specified commercial vehicle in a listed province unless the person is, or is required to be, registered, for the purposes of this Part as

(a) a distributor in respect of that type of fuel;

(b) a specified air carrier or air carrier in respect of that type of fuel;

(c) a specified marine carrier or marine carrier in respect of that type of fuel; or

(d) a specified rail carrier or rail carrier in respect of that type of fuel.

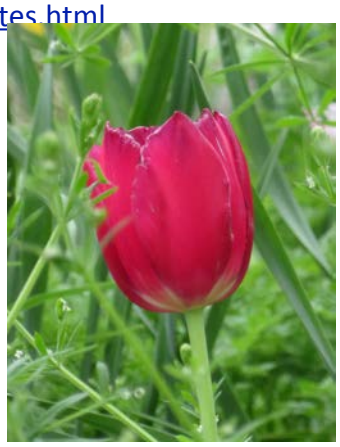
These road carriers (*2) based or doing business in any of these mentioned jurisdictions will have to register with the Federal Government by filing form L400 (*3) and L400-2 (*4). This applies to both Canadian based and US based carriers. They will also be required to complete a quarterly return similar to the International Fuel Tax Agreement ("IFTA") and file with the Federal Government on the same quarterly schedule as the IFTA return.

Fuel (*5) purchased at a retail outlet in a listed province but used outside the listed province may be eligible for a rebate.

Robert Carillo

Endnotes

1. https://laws-lois.justice.gc.ca/eng/acts/G-11.55/index.html
2. https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/fcn1/general-information-registration-greenhouse-gas-pollution-pricing-act.html#_Toc531266859
3. L400: https://www.canada.ca/en/revenue-agency/services/forms-publications/forms/l400.html
4. L440-2: https://www.canada.ca/en/revenue-agency/services/forms-publications/forms/l400-2.html
5. Fuel Charge Rates: https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/fcrates/fuel-charge-rates.html



4. *New Monetary Thresholds in Force under the Competition Act and Investment Canada Act*

As per recent changes, companies whose transactions exceed the applicable monetary and control thresholds under the *Competition Act*, RCS 1985, c C-34 and *Investment Canada Act*, RCS 1985, c 28 (1st Supp.) must submit a filing and undergo a review before they can close their transactions.

The *Investment Act* applies to all investments in Canadian business, directly or indirectly through non-Canadian parent companies, by non-Canadian investors:

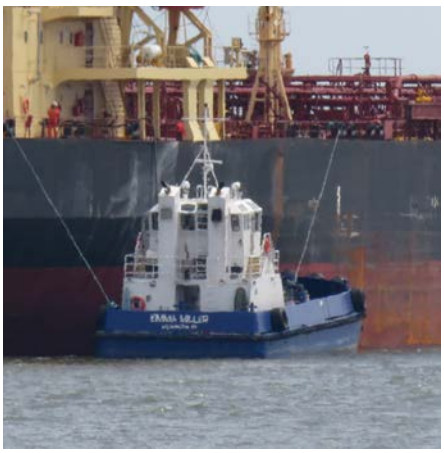
- The threshold for not State-owned investors based in countries with a trade-agreement with Canada (WTO or other Trade Agreement) increased to C$1.568-billion in enterprise value. This threshold includes investors from the United States, Mexico, the EU, Chile, Peru, Colombia, Panama, Honduras, South Korea, Japan, Singapore, New Zealand, Australia and Vietnam.
- Direct acquisition of a publicly-traded entity: C$1.045-billion or more in enterprise value, based on the target's market capitalization, plus total liabilities (less operating liabilities), minus cash and cash equivalents.
- Direct acquisition of a privately-held entity: C$1.045-billion or more in enterprise value, based on the total acquisition value, plus total liabilities (less operating liabilities), minus cash and cash equivalents. Where acquiring less than 100%, total acquisition value will include amounts in addition to those payable by the non-Canadian acquiring control.
- State-owned enterprise investors saw an increase in their threshold to C$416-million in book value of assets of the Canadian business being acquired, while the threshold for all other investments, including investments in Canadian cultural businesses, remained the same.
- For control acquisitions below the applicable threshold and for the establishment of new Canadian businesses, investors are still required to submit a notification filing, but they can do so up to 30 days after closing.
- In addition, no monetary or control thresholds apply for reviews on national security grounds.

Under the *Competition Act*, the pre-merger notification "transaction-size" threshold for 2019 is now C$96 million, an increase from the 2018 threshold of C$92 million. This threshold is reached if the aggregate value of assets in Canada of the target, or the annual gross revenues from sales in, or from Canada that are generated by those assets, exceeds C$96 million. This threshold is updated annually.

The party size threshold remains unchanged at C$400-million. This threshold is reached if the parties to a transaction, and their affiliates, have aggregate assets in Canada, or gross sales in, from or into Canada, in excess of C$400 million. This threshold does not change annually.

It is important to note that the Competition Bureau has one year from closing to review and challenge any mergers, even if they do not exceed the applicable monetary or control thresholds.

Robert Carillo



5. Freight Forwarders – Two Interesting Decisions

Recently, two decisions involving claims against freight forwarders were published, in opposite sides of the country (Nova Scotia and British Columbia). Both decisions are at the small claims court level.

Nova Scotia Decision

In *Ogban v. Adebayo*, 2018 NSSM 72 (CanLII) the Small Claims Court of Nova Scotia heard two self-represented litigants and decided that a freight forwarder was 2/3 liable for the claimant's losses.

Both parties lived in Halifax and had substantial connections to their native Nigeria. The defendant was a registered nurse but had a sideline business as a freight forwarder, carrying on business as "Adadem Import and Export".

Surprisingly, the court referred to Wikipedia for the source of the definition of a freight forwarder. The adjudicator didn't refer to any law but to Wikipedia!

Adjudicator Slone quoted:

> The activities of a freight forwarder are described in Wikipedia as:
>
> A freight forwarder, forwarder, or forwarding agent, also known as a non-vessel operating common carrier (NVOCC), is a person or company that organizes shipments for individuals or corporations to get goods from the manufacturer or producer to a market, customer or final point of distribution. Forwarders contract with a carrier or often multiple carriers to move the goods. A forwarder does not move the goods but acts as an expert in the logistics network. These carriers can use a variety of shipping modes, including ships, airplanes, trucks, and railroads, and often do utilize multiple modes for a single shipment. For example, the freight forwarder may arrange to have cargo moved from a plant to an airport by truck, flown to the destination city, then moved from the airport to a customer's building by another truck.
>
> International freight forwarders typically handle international shipments. International freight forwarders have additional expertise in preparing and processing customs and other documentation and performing activities pertaining to international shipments.

Adjudicator Slone then concluded that: "The most important role that the freight forwarder plays, in my opinion, would be that he has (or professes) expert and inside knowledge of the complex systems surrounding international trade. It is reasonable to observe that many ordinary people lack such knowledge and would be justified in delegating that responsibility to an expert. As expected, such help comes at a price."

The case involved the shipment of a 1999 Toyota Sienna minivan from Halifax to Nigeria. The shipping method was initially planned as a "roll-on-roll-off" (RORO) where the vehicle would be driven into the hold of the vessel and (after being cleared) driven off at the final port. The claimant drove the vehicle to the port at Halifax intending to drive it directly into the ship, but it was refused for RORO because the vehicle was visibly full of other items, which is not permitted for RORO. The claimant was told he would have to ship the vehicle by container. He drove it home and contacted the defendant. The defendant agreed to include the claimant's vehicle in a container along with three other vehicles that he was shipping for other customers. That container left Halifax in February 2014, on a ship bound for Lagos, Nigeria.

The court concluded that goods being imported into Nigeria (like any country) must be accompanied by customs declarations setting out their value so that the appropriate import duties can be paid:

> In some cases, according to the defendant (who should know), there are also bribes to be paid as some port workers and customs officials are corrupt. The container holding the four vehicles (including that of the claimant) was held up at customs pending some payments (legal or otherwise) that may, or may not have been in relation to the claimant's shipment. [para. 11]

The evidence of the defendant was that the claimant had paid his portion of the necessary routine clearance fees, but he had some trouble getting the share owed by the owners of the other vehicles. He says that, in the end, he paid those fees himself, but that was still not sufficient to obtain the release of the goods. In the meantime, the container was just sitting at the port, probably incurring storage charges. The defendant stated that he travelled to Nigeria in March 2015 to attempt to secure the release of the container and its contents. By then, the claimant was making a very public fuss about his vehicle and contents, having (among other things) gone to the media with a claim that the contents of the vehicle were worth $100,000.00. In fact, it appears that the claimant started an action in the Supreme Court of Nova Scotia seeking damages of $100,000.00.

The defendant stated that the port authorities in Lagos became aware of the claimant's complaint through reports on the internet, and took the position that the goods could not be cleared because their value had not properly been declared and the appropriate (and large) customs duties had not been paid. The shipment was seized by the port authorities and sold to pay outstanding storage and other fees.

The defendant claimed that he had no idea when he agreed to ship the vehicle that it would contain any more than a token amount of household goods designated as "gifts."

Adjudicator Slone could not "find either party to be totally in the right or in the wrong."

Adjudicator Slone held that the transaction was a contract of "bailment" where the claimant entrusted the goods to the custody of the defendant, who in turn undertook to exercise reasonable care to account for those goods. "This brings in legal concepts of negligence, including contributory negligence." [para. 17]

The court made the following findings:

> [30] I am prepared to find that the Defendant is largely responsible for the Claimant's losses. But the Claimant is not blameless. I believe that he undervalued the value of the goods he was loading into the vehicle, hoping (perhaps) that they could be treated as used goods having nominal value. I believe he took a risk and that this was at least part of the reason that the shipment was held up in Nigeria. I also believe that the Claimant overstated the value when he made his claim, first in the Supreme Court and then in this proceeding. This calls his credibility into question.
>
> [31] I believe that the Defendant should bear a greater amount of the responsibility, as it was his job to know what he was shipping and I find that he did not do everything possible to solve the problem on the Nigerian side - which was his area of expertise and responsibility. I am prepared to divide liability 2/3 to the Defendant and 1/3 to the Claimant.

Moral of the story – don't use this case as a precedent.

British Columbia Decision

In *46095 B.C. LTD. doing business as MC Freight Systems v. HIMLIGHT TRADING CO INC.*, 2018 BCCRT 886 (CanLII) the forwarder MC Freight

Systems brought an action for two invoices in the amount of $721.99 against the shipper Himlight Trading Co. Inc. The shipper in turn counterclaimed against the forwarder for damages to the cargo of furniture. Both parties were unrepresented by counsel.

The forwarder took the position that its responsibility was to arrange for the carriage. The first part of the trip was from Tacoma to Vancouver (for on carriage to Ontario). After the first part of the voyage the shipper advised the forwarder of damage to the cargo. The forwarder advised the shipper that a claim would be made to the carrier by it on the shipper's behalf. The forwarder advised the shipper that the carrier could limit liability to $2 per pound and that they could only get $240 from the carrier.

The second shipment from Vancouver to Ontario was also damaged. As with the first shipment the forwarder made a claim with the carrier on the shipper's behalf. It discovered that the shipper had also made a claim directly with the carrier.

The shipper sued the forwarder for all the damages (in its counterclaim) without limitation. The forwarder stated that as a freight forwarding and logistics company, all it does is coordinate between a shipper and carrier to arrange for moving freight. The court found that it was undisputed that the forwarder never handled or controlled any item that was damaged.

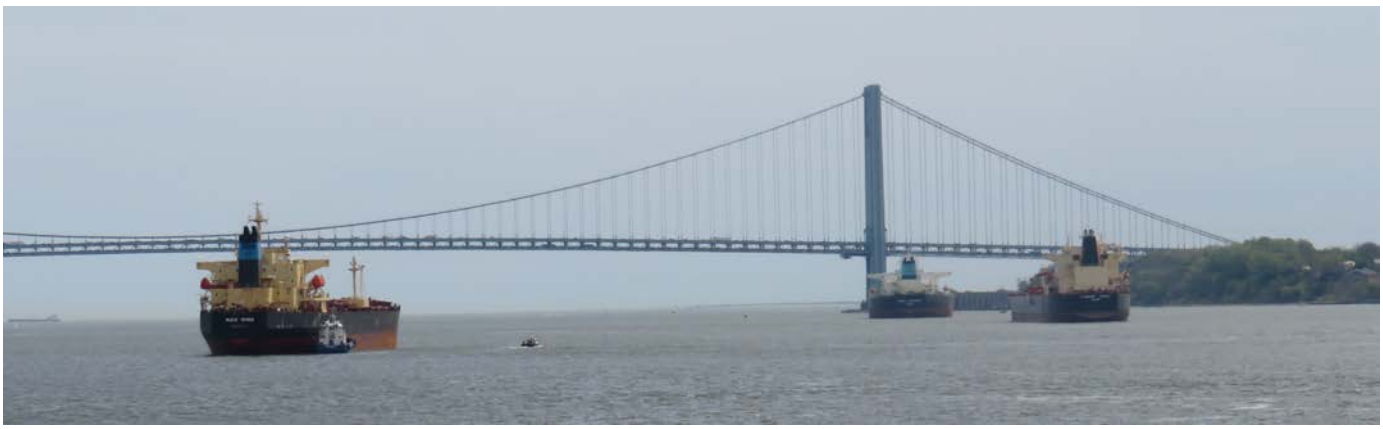
There was no evidence in the hearing of any contract between the parties. The court stated "I infer that Himlight believes that there was an express or implied term in the contract that places full responsibility on MC Freight for damage during shipping. I do not accept that there was such a term."[para. 24]. The court relied on the email correspondence between the shipper and forwarder about the damage to the items. In that correspondence the shipper did not seek any money from the forwarder directly and implicitly accepted that its claim was against the carriers who caused the damage. The court held that:

> If there was a term of the parties' contract that MC Freight would reimburse Himlight for any damage, I find that Himlight would have demanded full reimbursement from MC Freight instead of cooperating with the claims process against the carriers, especially after MC Freight told Himlight that its claim against the carriers would be capped at $2 per pound.

The court found that there was no suggestion that the forwarder did anything wrong in the fulfillment of its duties. Accordingly, it found the forwarder fulfilled the terms of the contract and was entitled to be paid. It dismissed the shipper's counterclaim.

Rui M. Fernandes

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



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 location depicted in photograph on page 13. Email your answer to info@fernandeshearn.com with a subject line "Newsletter contest". First response with the correct answer wins.