THE NAVIGATOR

IN THIS ISSUE

ARBITRATION CLAUSE ENFORCED:
TELUS COMMUNICATIONS INC. V. WELLMAN 2019 SCC 19

Avraham Wellman filed a proposed class action in Ontario against Telus Communications Inc. ("Telus"), on behalf of about two million Ontario residents, who had entered into mobile phone service contracts with Telus during a specified timeframe. The class consisted of both consumers and non-consumers, the latter being business customers. The action centred on the allegation that Telus engaged in an undisclosed practice of "rounding up" calls to the next minute such that customers were overcharged and were not provided the number of minutes to which they were entitled.

The contracts in question, which were not negotiated, contained standard terms and conditions drafted by Telus, including an arbitration clause which, broadly speaking, stipulates that all claims arising out of or in relation to the contract, apart from the collection of accounts by Telus, shall be determined through mediation and, failing that, arbitration.

By virtue of the *Consumer Protection Act*, *1992*, however, this arbitration clause is invalid to the extent that it would otherwise prevent class members who qualify as "consumers" from commencing or joining a class action of the kind commenced by Mr. Wellman. The *Consumer Protection Act, 1992,* expressly shields consumers from a stay of proceedings under the *Arbitration Act, 1991*. Consequently, they are free to pursue their claims in court. The business customers, however, do not benefit from these protections. So where does this leave them?

By a 5-4 majority, the Supreme Court of Canada held that s. 7(5) of province's *Arbitration Act, 1991* does not give courts discretion to decline to enforce arbitration agreements between businesses, even when those businesses are members of a class alongside consumers under the *Class Proceedings Act, 1992*.

Wellman affirms the principle of freedom of contract. Private parties may order their own affairs, including how disputes between them will be resolved. Legislation may limit this liberty, but it is for legislatures,

FIRM AND INDUSTRY NEWS

- **Canadian Board of Marine Underwriters** spring conference, Vancouver Canada, May 22, 23, 2019. **Rui Fernandes** and **Alan Cofman** will be attending.

- **Toronto Commercial Arbitration Association** annual general meeting and conference, Toronto, May 28, 2019. **Rui Fernandes** and **Kim Stoll** will be attending.

- **Conference of Freight Counsel** Semi-Annual Meeting, Greenville, South Carolina, June 9, 10, 2019. **Gordon Hearn** will be attending.

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

- **Toronto Transportation Club** Ladies' Luncheon, Toronto, Ontario, June 19, 2019. **Kim Stoll** will be attending.

- Release 2018-1 for the 3 volume legal text **Transportation Law** by **Rui Fernandes** is now available from Aerospark Press.

not courts, to make this policy judgment. The Court also highlighted the history of arbitration in Canada and the slow move by courts to accept and promote this method of dispute resolution. At paragraphs 48 to 50 the Court described the growth of arbitration:

> [48] Throughout the better part of the 20th century, Canadian courts displayed "overt hostility" to arbitration, treating it as a "second-class method of dispute resolution" (*Seidel*, at para. 89, per LeBel and Deschamps JJ., dissenting (but not on this point)). Courts guarded their jurisdiction jealously and "did not look with favour upon efforts of the parties to oust it by agreement" (*Seidel*, at para. 93, citing *Re Rootes Motors (Canada) Ltd. and Wm. Halliday Contracting Co.*, 1952 CanLII 304 (ON SC), [1952] 4 D.L.R. 300 (Ont. H.C.J.), at p. 304). The prevailing view was that only the courts were capable of granting remedies for legal disputes and that, as a result, any agreement by the parties to oust the courts' jurisdiction was contrary to public policy, regardless of the nature of the substantive legal issues (see *Seidel*, at para. 96). This judicial hostility, coupled with a lack of modern legislation supporting arbitration, inhibited the growth of arbitration in Canada (see *Seidel*, at para. 89, citing J. B. Casey and J. Mills, *Arbitration Law of Canada: Practice and Procedure* (2005), at pp. 2-3).
>
> [49] It was against this backdrop that, in 1991, the Ontario legislature enacted the *Arbitration Act*, which was based on the *Uniform Arbitration Act* adopted by the Uniform Law Conference of Canada a year earlier (online) (see J. K. McEwan and L. B. Herbst, *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations* (loose-leaf), at pp. 1-9 to 1-15). The purpose and underlying philosophy of the *Arbitration Act* was discussed by Blair J. (as he then was) in *Ontario Hydro v. Denison Mines Ltd.*, 1992 Carswell Ont 3497 (WL Can.) (Gen. Div.):
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> > The *Arbitration Act, 1991* came into effect on January 1, 1992. It repealed the former *Arbitrations Act*, R.S.O. 1980 c.25, and enacted a new regime for the conduct of arbitrations in Ontario . . . . It is designed, in my view, to encourage parties to resort to arbitration as a method of resolving their disputes in commercial and other matters, and to require them to hold to that course once they have agreed to do so.
> >
> > In this latter respect, the new *Act* entrenches the primacy of arbitration proceedings over judicial proceedings, once the parties have entered into an arbitration agreement, by directing the court, generally, not to intervene, and by establishing a "presumptive" stay of court proceedings in favour of arbitration. [paras. 8-9]
>
> [50] During legislative debate on the bill that later became the *Arbitration Act*, the Attorney General of Ontario stated that one of the "guiding principles" of the *Arbitration Act* is that "the parties to a valid arbitration agreement should abide by their agreements" (Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, 1st Sess., 35th Parl., March 27, 1991, at p. 256). He later emphasized that under the new legislation, "the law and the courts will ensure that the parties stick to their agreement to arbitrate" (Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, 1st Sess., 35th Parl., November 5, 1991, at p. 3384).

The Court noted that the policy that parties to a valid arbitration agreement should abide by their agreement gives effect to the concept of party autonomy — which, in the arbitration context, stands for the principle that parties should generally be allowed to craft their own dispute resolution mechanism through consensual agreement.

The Court also noted that since the *Arbitration Act* was passed, the jurisprudence — both from this Court and from the courts of Ontario — has consistently reaffirmed that courts must show due respect for arbitration agreements and arbitration more broadly, particularly in the commercial setting. The policy that parties to a valid arbitration agreement should abide by their agreement goes hand in hand with the principle of limited court intervention in arbitration matters.

In dissent, Abella and Karakatsanis JJ. relied a number of policy considerations, placing particular emphasis on the importance of promoting access to justice, the difficulty of distinguishing between consumers and non-consumers, and the potential unfairness caused by enforcing arbitration clauses contained in standard form contracts. In response Justice Moldaver, writing for the majority of the Court, stated:

> While I appreciate these concerns, I am respectfully of the view that they cannot be permitted to distort the actual words of the statute, read harmoniously with the scheme of the statute, its object, and the intention of the legislature, so as to make the provision say something it does not. While policy analysis has a legitimate role in the interpretative process (see Sullivan, at pp. 223-50), the responsibility for setting policy in a parliamentary democracy rests with the legislature, not with the courts. The primary role of the courts, in my view, is to interpret and apply those laws according to their terms, provided they are lawfully enacted. It is not the role of this Court to re-write the legislation.

In overturning the Court of Appeal of Ontario, the Supreme Court applied the ordinary principles of statutory interpretation to conclude that s. 7(5) of the *Arbitration Act* could not be interpreted so as to undermine the legislature's decision to shield only consumers from the potentially harsh effects of arbitration clauses through the *Consumer Protection Act*. The Court reinforced the freedom of parties to structure their affairs through arbitration.

Rui Fernandes

2. Insurer versus the Towing Company: What is a Reasonable Storage Rate?

Towing company charges have long been the subject of dispute. The charge for the "tow" is just one item in the equation. Towing companies also charge for the storage of the vehicles following their tow. These are usually assessed on a "rate per day" basis. A dispute may blossom exponentially: an argument arising over the amount of a tow charge, or an initial storage period fee pending the vehicle's return being requested by the owner. Time passes and meanwhile the storage charges accrue…

The recent Superior Court decision in *J.P. Towing v. Intact Insurance* (*1) provides an interesting review of the positions that might be taken by the parties to such a dispute and certain available remedies. In this case Intact Insurance ("Intact") provided insurance coverage for certain vehicles that had been towed and put into storage. Intact's coverage included providing an indemnity to its insured vehicle owners for towing company charges. Intact decided that it had had "enough" of what was being charged.

The Story

J.P. Towing Service & Storage Ltd. ("J.P. Towing*")* is as a towing company operating in the Toronto area. It also stores vehicles. The Toronto Police Service ("TPS") is responsible, to maintain the roadways in Toronto in a safe and clear condition:

> Where a police officer considers it reasonably necessary,
>
> a) to ensure orderly movement of traffic; or
>
> b) to prevent injury or damage to persons or property

he or she may remove and store or order the removal and storage of a vehicle, cargo or debris that are directly or indirectly impeding or blocking the normal and reasonable movement of traffic on a highway and shall notify the owner of the vehicle of the location to which the vehicle was removed (*2).

J.P. Towing had been a service provider to the TPS since 1992. At the material time J.P. Towing's approved rate with TPS had been set at $160.00 for towing and $70.00 a day for storage. Back in 2012 Intact took exception to the $70.00 daily storage rate that J.P. Towing charged Intact's insureds for the storage of their vehicles and that it had towed at the request of TPS. In order to register and reserve that protest and so as to still obtain possession of its insureds' vehicles to resolve claims, Intact relied on a procedure set out in the *Repair and Storage Liens Act*, (the "*Act*") (*3).

The *Act* provides that a storer such as a towing company has a lien against a vehicle for the amount of the storage charges agreed to. Where no amount has been agreed, "the fair value of the storage" may be claimed and the storer is provided lien rights, being allowed to retain possession of the vehicle until paid.

In the event of a dispute concerning the storage, the *Act* provides the following procedure for resolution of the amount of the storer's lien, while at the same time releasing the item stored to its owner (*4):

> Where a claimant claims a lien against an article under Part I (Possessory Liens) and refuses to surrender possession of the article to its owner or any other person entitled to it and where one of the circumstances described in subsection (1.2) exists, the owner or other person lawfully entitled to the article may apply to the court in accordance with the procedure set out in this section to have the dispute resolved and the article returned.

The costs and charges for the removal and storage of the vehicle, cargo or debris removed are a debt due by the owner, operator and driver of the vehicle, (which may, as in this case, be the concern of an insurance company) for which they are jointly and severally liable. This debt may be recovered in

a lawsuit and also may be the subject of a lien by the towing company upon the vehicle, pursuant to and which may be enforced in the manner provided by the *Act*.

The *Act* further provides that the owner or other person entitled to the article (the applicant) shall pay into court, or deposit security with the court in the amount of the full amount claimed by the lien claimant (the respondent). Where money is paid into court, the clerk or register shall issue an initial certificate under seal which the applicant shall give to the respondent who, within three days, shall release the article described therein or file a notice of objection with the court. In the event of a notice of objection, the applicant may pay into court any additional amount claimed and obtain a final certificate and, upon receipt, the respondent shall immediately release the article. The money paid into court is returned to the applicant if the respondent does not commence an action to recover the amount claimed within 90 days after the article is returned.

As an insurer, Intact had standing in this case as an "applicant" to trigger the above process. In order to obtain possession of its insureds' vehicles, Intact commenced a series of court applications on behalf of each of its insureds in the Small Claims Court, paying the disputed amount of J.P. Towing's storage charge into court and obtaining a certificate entitling it to possession of the vehicles from J.P. Towing. The record indicates that from late 2012 to July 2018, Intact has issued a total of 108 such applications: 16 by the end of 2013; a further 20 in 2014; a further 16 in 2015; 28 in 2016; 17 in 2017; and 11 to July 2018.

The "Test Case"

In the late fall of 2013, Intact and J.P. Towing agreed to pick one of their disputed cases in court as a "test case". The remaining disputes were put on hold. The terms of this approach provided that, on completion of the "test case," the parties could either attempt to settle the remainder or then determine the appropriate course of action for the remaining cases. The test case was tried over a nine day period between September 2014 and January 2016 before Deputy Judge Ashby of the Toronto Small Claims Court. The main issue before the Court was a determination of the "fair value" for J.P. Towing's storage of the vehicle in question pursuant to the *Act*. Both sides called fact witnesses and Intact called an expert to give an opinion on "fair value". In a written decision released January 25, 2016, Deputy Judge Ashby concluded that the "fair value" for J.P. Towing's storage fee was $70.00 a day. Intact did not appeal the decision.

Following the completion of the test case, other similar disputes arose with Intact refusing to accept the $70 daily storage fee as found by Deputy Judge Ashby to be binding on it. Intact continued to file applications in the Small Claims Court pursuant to the *Act*.

The Current Dispute

As a result of Intact's continued refusal to accept J.P. Towing's $70 daily storage fee, further applications were filed by Intact under the *Act*. As a result, J.P. Towing commenced a court action in the Ontario Superior Court (the "Action"). Despite what was likely the best of intentions behind having the test case, the "temperature in the room" was now rising. J.P Towing claimed for various items, including:

i) a declaration that the issue of the daily rate of the storage had been fully adjudicated and was now binding on the parties as a result of the finding in the test case, which had not been appealed by Intact;

ii) a declaration that Intact was a "vexatious litigant", as defined by statute, as a result of which Intact should be prevented from commencing any further applications without the permission of a judge;

iii) $500,000 on account of storage and towage services fees, and

iv) $1,000,000 for punitive damages "to act as a deterrent to Intact and other insurers".

Intact brought an application for summary judgment, dismissing the Action in its entirety on the ground that it raised no viable claim against it. In response, J.P. Towing brought a cross-application for various declarations and an order consolidating various actions similar to its claims in the Action.

The Court dismissed Intact's motion. While finding that most of J.P. Towing's claims in the Action could not succeed, the Court found that J.P. Towing's claim for a declaration that the daily storage rate for the vehicles (as determined by Deputy Judge Ashby) was binding and *was* a valid claim.

The above said, the Court ruled that J.P. Towing's claims for a declaration that Intact was a vexatious litigant - prohibiting Intact from commencing any further litigation in respect of towing and storage without leave of the court - and for compensatory and punitive damages - could not succeed. J.P. Towing had not raised a "genuine issue" requiring a trial on those points and accordingly to that extent Intact was successful in having those claims dismissed. The Court addressed the nature of the "vexatious litigant" prohibition from commencing suit.

The *Courts of Justice Act* grants the Superior Court authority to declare a litigant "vexatious" where that person has "persistently and without reasonable grounds, (a) instituted vexatious proceedings in any court; or (b) conducted a proceeding in any court in a vexatious manner"(*5). The judge ruled that this situation did not "come close" to establishing that Intact's use of the *Act*'s procedures was vexatious or that any one application had been conducted by Intact in a vexatious manner. While as noted above (and further addressed below) Intact was found to be bound by the finding that $70 per day storage rate was "reasonable", the Court noted that other pending applications by Intact could potentially involve unrelated issues calling for adjudication. In the absence of a valid claim for a vexatious litigant, there was accordingly no basis for the Court to require Intact to obtain leave before commencing further litigation concerning towing and storage charges.

The Court ruled that J.P. Towing's claims for both $500,000.00 on account of storage and towing services and for $1 million in punitive damages could not succeed on the facts before the Court and pursuant to governing law. There was no contract for storage and towing services between J.P. Towing and Intact or any debt owed by Intact to J.P. Towing. The charges for towing and storage were owed by the *owner* of the vehicle, not Intact. Intact's obligations were to its insureds, the vehicle owners, and in commencing applications under the *Act* for return of the vehicles, Intact was not acting as principal but as an agent of the owner. As there was no proper claim for compensatory damages, it followed that there was no claim against Intact for punitive damages. The Court also found that in any event there was no evidence demonstrating that the conduct of Intact or any of its insureds was in any way oppressive, high-handed or malicious such that an award of punitive damages would be possible.

The Previous Finding on the Storage Rate was Binding on Intact

Despite its successes as indicated above, Intact did not prevail in defending J.P. Towing's argument that the $70 per day storage rate was binding. J.P. Towing in effect asserted that there was an "issue estoppel" in this case (and future such cases) such that Intact should not be allowed to re-litigate the issue of an appropriate daily storage fee.

Issue estoppel precludes the re-litigation of issues decided between parties in previous litigation. The Supreme Court set out the following three-part test for issue estoppel in *Angle v. Minister of National Revenue* (*6):

1. The same question has been decided;

2. The judicial decision that is said to create the estoppel is final; and

3. The parties to the judicial decision or their privies are the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

The *Angle* test was confirmed by the Court in *Danyluk v. Ainsworth Technologies Inc.* (*7) which dealt with the question of whether issue estoppel applied to decisions of administrative tribunals. In this case Mr. Justice Binnie noted that the application of issue estoppel was a two-step process. At para. 33 of the decision, he stated:

> The rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case. (There are corresponding private interests.) The first step is to determine whether the moving party (in this case the respondent) has established the preconditions to the operation of issue estoppel set out by Dickson J. in Angle, supra. If successful, the court must still determine whether, as a matter of discretion, issue estoppel ought to be applied…

Intact argued that J.P. Towing's claim for a declaration that the issue of the daily storage rate had already been determined and was binding on it failed to meet two parts of the *Angle* test. First, the issue decided in the test case was not the same as the issue in the present action. Rather, the test case was a determination of the fair storage value for a particular vehicle only, whereas the declaration claimed in the present action sought to settle the fair value for storage under the *Act* for *all* Intact's insureds' vehicles. Second, the present action did not involve the same parties or their "privies."

The Court found that in fact the test case *had* dealt with two issues: (a) what was the "fair value" for the daily storage of that vehicle; and (b) how many days was the vehicle stored. The former issue was decided by Deputy Judge Ashby to be $70.00 a day. That finding gives rise to the question of whether Intact was "privy" to the earlier finding even though it was the owner of that insured vehicle and was in effect the party at interest. In this regard the Court noted that "privity" requires "mutuality". In *McNaughton Automotive Ltd. v. Co-operators General Insurance Co.* (*8), the court held:

> In considering whether there is mutuality, courts and commentators have found it helpful to consider whether the party seeking the benefit of the earlier decision would have considered itself bound, had the decision been decided against its interests…

Based on the above, the Court found that Intact *was* a privy to the vehicle owner insured in the test case. Intact had acted as his throughout. It actively participated in the case, not only on behalf of the insured owner but also on its own behalf as it was obligated under its policy of insurance with Mr. Sherwood to pay the towing and storage charges for his vehicle.

The second step in determining whether issue estoppel should be applied is whether, on the facts of this case, the court should exercise its discretion and apply issue estoppel. In the Court's view, the answer to that question is yes.

Intact submitted that, while it may have been a privy of the vehicle owner in the test case by acting as his agent, that case did not bind *other* vehicle owners on the basis that Intact was also their agent. In this regard the Court agreed: to the extent that the other vehicle owners bring their own application under *the Act* without Intact. Where, however, Intact would be acting on their behalf and have carriage of the proceedings, Intact would bound *by the test case*

that the "fair value" for J.P. Towing's daily storage rate is $70.00.

Accordingly, J.P. Towing was successful in its claim for a declaration that the issue of the "fair value" under the *Act* that its daily storage rate being $70.00 had been finally determined by the test case and was binding against Intact.

Gordon Hearn

Endnotes

(*1) 2019 ONSC (CanLII)

(*2) See: *Highway Traffic Act 1990 R.S.O. c.H.8* and the *Police Act*, R.S.O. 1990,

c. P.15

(*3) R.S.O. 1990, c. 25

(*4) *Repair and Storers Lien Act*, s. 24(1)

(*5) *Courts of Justice Act*, R.S.O. 1990 c. C.43 s. 140

(*6) [1975] 2 S.C.R. 248

(*7) [2001] 2 S.C.R. 460 ("*Danyluk*")

(*8) [2006] O.J. No. 5234 (Div. Ct.)

3. Pleasure Craft Navigation Ban Due to Flooding

Can the federal government ban all boating on a navigable waterway? Yes, it can, in certain circumstances.

On April 27th Transport Minister Marc Garneau announced a ban on boating on the Ottawa River between Ottawa-Gatineau and the Carillon generation station east of Hawkesbury. The ban also includes Lac des Deux-Montagnes, Rivière des Mille-Îles, and Rivière-des-Prairies. The only exception is for people who can only reach their property by boat because of the flooding. The ban includes all pleasure craft, including human-powered boats such as canoes and kayaks. The penalty is stiff: anyone caught on the river faces a fine of between $250 and $5,000.

It was the first time the government has made use of a 2018 amendment to the Canada Shipping Act that was enacted mainly as a way to protect the marine environment and animals, including endangered whale populations. The amendment also gives the Minister the power to close waterways for urgent or unforeseen circumstances.

Section 10.1 of the Canada Shipping Act, 2001 provides:

> The Minister of Transport may make an interim order that contains any provision that may be contained in a regulation made, under this Act, on the recommendation of only that Minister, if he or she believes that immediate action is required to deal with a direct or indirect risk to marine safety or to the marine environment.

The second interim order was issued on April 30th 2019, and extended the ban to additional waterways including Lake Muskoka, the north and south branches of the Muskoka River and Moon River in Ontario.

The latest Interim Order (No. 3) issued on May 14, 2019, builds on prior interim orders. Interim Order No. 3 now applies to the following waterways:

- the Ottawa River between the Otto Holden Dam (near Mattawa, Ontario) and the Deux Montagnes Lake (near Hudson, Quebec);
- the Mattawa River, between Hurdman Dam and confluence of Mattawa River and Ottawa River;
- Deux Montagnes Lake in the Province of Québec;
- the Mille Îles River in the Province of Québec; and
- the Des Prairies River in the Province of Québec.

The news release on this order provides the rationale for the move:

> To ensure vessel movements do not pose a risk to the safety of individuals or cause damage to the environment, properties and infrastructure, the Ottawa River between the Otto Holden Dam and the Deux Montagnes Lake, and the Mattawa River between Hurdman Dam and confluence of Mattawa River and Ottawa River have been included in this new Interim Order Respecting Flooded Areas. In the listed areas, navigation by non-emergency vessels is strictly prohibited. This includes pleasure craft and human-powered craft, such as canoes or kayaks. The Interim Order does not apply to public ferry service in the waters listed below.
>
> The speed restriction of 9 knots for upriver traffic and 11 knots for downriver traffic remains in place between Ile des Barques and Batiscan, Quebec.
>
> Individuals who can only access their property by boat are exempted from the Interim Order and other restrictions for the purpose of going to and from their property. If citizens must use a waterway to access a property, they are urged to navigate at as slow-a speed as possible.
>
> Any violations of these provisions are subject to fines. Speed violations between Ile des Barques and Batiscan can go up to

$1 million and/or up to 18 months in prison, or the seizure of the vessel.

The spring flood is peak playtime for whitewater kayakers and surfers on the river, who have been left high and dry by Transport Minister Garneau's order.

Interim Order No. 2 was repealed on May 14th, 2019 thereby removing the restrictions on navigation in Muskoka.

Transport Minister Garneau stated: "Although we have expanded the area covered by the Interim Order [No. 3], I am pleased to see the improved situation in the Muskoka area. We continue to work with municipalities and law enforcement to ensure the safety of our fellow citizens."

Rui Fernandes

4. Ballast Water Control and Management Regulations

In 2010, Canada acceded to the *Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004*, requiring all ships that travel internationally to manage their ballast water. The objective of this Convention is to prevent, reduce and control the intentional or accidental introduction of harmful aquatic organisms and pathogens (*e.g.,* invasive species) which may cause significant and harmful changes to the marine environment, human health, property and resources.

Key elements of the Convention require all ships to implement a Ballast Water Management Plan. All ships must maintain a Ballast Water Record Book and are required to carry out ballast water management procedures to given standards.

Currently Canada has in place the Ballast Water Control and Management Regulations. These regulations give shipowners two options: a) to exchange the ballast water at sea; or b) to treat the water to a performance standard. This year, Canada announced it will amend the Ballast Water Control and Management Regulations. Until these amendments are made, Canada will continue to apply the existing Ballast Water Control and Management Regulations. The objective is to restrict ballast water from outside of Canadian waters being released into Canadian waters.

The current regulations provide for ballast water management in the following ways:
a) the ballast water is exchanged
(b) the ballast water is treated;
(c) the ballast water or any sediment that has settled out of it in the vessel's tanks is transferred to a reception facility; and
(d) the ballast water is retained on board the vessel.

Ballast water that is taken on board a vessel outside waters under Canadian jurisdiction must be managed in order to:

(a) minimize both the introduction of harmful aquatic organisms or pathogens into the ballast water and their release with the ballast water into waters under Canadian jurisdiction; or

(b) remove or render harmless harmful aquatic organisms or pathogens within the ballast water.

Ballast water that is taken on board a vessel in the United States' waters of the Great Lakes Basin or in the French waters of the islands of Saint Pierre and Miquelon need not be managed unless it is mixed with other ballast water that was taken on board the vessel in any other area outside waters under Canadian jurisdiction.

The proposed amendments to the regulations are the first step in a transition which will require all ships to implement a Ballast Water Management Plan. All ships will have to maintain a Ballast Water Record Book and will be required to carry out ballast water management procedures to given standards. The ballast water management standards will be phased in over a period of time. Eventually most ships will need to install an on-board ballast water treatment system.

Rui Fernandes

5. Shrinking Opportunities for Summary Judgment

Under the Ontario *Rules of Civil Procedure*, it appears on a plain reading that a court has the power to grant summary judgment in respect of only part of an action in an appropriate case, leaving the balance of claims for a full trial (*1). The purpose of this rule has been, at least in theory, to significantly shorten trials by deciding certain issues between the parties on a summary basis where the evidence was unambiguous, and the issue decided was distinct and separate from the other contested matters. In practice, however, Ontario's courts have shown increasing reluctance to deal with issues in an action separately in this manner.

A very recent decision in of the Ontario Court of Appeal has further reinforced the judicial trend of shying away from "partial summary judgment". In *Service Mold + Aerospace Inc. v. Khalaf* ("*Khalaf")* (*2), the Court of Appeal once again allowed an appeal against a lower court decision in which partial summary judgment was granted. The decision contains within it several important lessons to litigants about the appropriate strategy where summary judgment appears to be an option. Most importantly, however, it sends a warning to litigants and to the profession that partial summary judgment will be very rarely granted.

To see why this is so, a brief review of the facts would be informative.

The Facts

In *Khalaf*, the plaintiff corporations brought an action against their former bookkeeper, Khalaf, alleging fraud. The alleged fraud took two forms: (1) forged signatures on cheques drawn against the plaintiffs' bank accounts; and (2) unauthorized payroll payments directed into Khalaf's bank account. The plaintiffs also sued their bank, the Toronto-Dominion Bank ("TD"), claiming it was strictly liable for the cheque fraud and negligent in respect of the payroll fraud.

The plaintiff corporations elected to bring a summary judgment motion on the cheque fraud portion of their claim. At first glance, this appeared exactly the kind of case for which partial summary judgment was intended. As a strict liability claim under the *Bills of Exchange Act*, a bank is liable to its customer for negotiating cheques bearing a forged signature even where the bank has no knowledge of the forgery. TD in fact conceded it was liable but for two defences it had raised: a) that by a separate verification agreement the plaintiffs agreed to exclude the bank from liability for forged instruments; and b) that the claim for the cheque fraud was statute barred for being out of time.

On the summary judgment motion, the motion judge granted partial summary judgment in favour of the plaintiffs against TD. The Court of Appeal, however, allowed TD's appeal, ruling that summary judgment was inappropriate. In reversing the judgment below, the Court of Appeal emphasized its own recent prior rulings on partial summary judgment, noting that, unlike in full summary judgment cases, the courts here must take care to avoid "the risk of duplicative proceedings or inconsistent findings of fact" (*3). It specifically highlighted its own prior ruling from 2017 in *Butera v. Chown* (*4), in which it held that partial summary judgment:

> … should be considered to be a rare procedure that is reserved for an issue or issues that may be readily bifurcated from those in the main action and that may be dealt with expeditiously and in a cost effective manner.

In this case, both conditions identified in this passage – that is, that it is necessary that the partial judgment can be "readily bifurcated" (or separated) from the rest of the claim, and that it must be both expeditious and cost effective – informed the Court's decision to allow TD's appeal. On the matter of it being a distinct and separate issue, the Court found that the motion judge erred at law, in that no consideration was given to the fact that TD had defended both the cheque fraud and payroll fraud claims on the

same basis; that is, the verification agreement alleged to exclude TD's liability to its customer. The fact that there was even a possibility of there being a different finding on this same evidence in the trial of the payroll fraud issue than on the summary judgment was enough reason for the Court of Appeal to allow the appeal.

Further, although it was unnecessary for the purpose of this appeal, the Court of Appeal expressed its concern that the motion had done nothing to shorten, and may have even lengthened, the full proceeding. The motion judge ultimately decided that she could not rule on the limitations defence to the cheque fraud claim without a mini-trial. It thus took three years from the time the Statement of Claim was issued for the plaintiffs to obtain judgment on their summary judgment motion. The motion had thus seriously delayed the trial of the remaining issues with little purpose and at considerable expense.

Conclusions

With this decision the Ontario Court of Appeal has further reinforced the reluctance of the Ontario courts to entertain motions for partial summary judgment, notwithstanding that these appear to be clearly permitted under the rules of court. This fact may now influence strategic decisions of litigants even before claims are issued. For example, in certain cases one might want to avoid combining genuine claims involving highly contested evidence together with simple debt claims in order to preserve the possibility of pursuing full summary judgment for the latter. For the sake of expediency, then, parties might consider abandoning even quite meritorious claims against a wrongdoer where the additional claims add little value to other claims against the same party that are more certain to succeed.

From the defendant's perspective, on the other hand, one should now be careful to plead in a way that indicates that the same evidence will be needed for both strong and weak claims of the plaintiff in any action so as to circumvent any opportunity a plaintiff may have to seek partial summary judgment. More than anything, what is now abundantly clear is that both litigants and lawyers should think twice before deciding that partial summary judgment may be the solution to their problem.

Oleg M. Roslak

Endnotes

(*1) See rules 20.01(1) and (3), 20.04(2)(b), and 20.05(1) of the *Rules of Civil Procedure*, R.R.O 1990, Reg. 194.
(*2) 2019 ONCA 369 [*Khalaf*].
(*3) *Khalaf* at para. 14.
(*4) *Butera v. Chown, Cairns LLP*, 2017 ONCA 783 [*Butera*].
5) *Butera* at para. 34.

6. No Increased Duty of Care to Intoxicated or Vulnerable Individuals by Taxi Drivers

The Ontario Supreme Court recently considered whether to generally expand a "duty of care" to intoxicated individuals. A duty of care is required to be established before a court can consider whether there is liability on a particular defendant and then to determine if damages accrue to the plaintiff as a result. There must be a duty or obligation upon one person to another that is then breached thereby causing damages to flow as a result of that breach.

Establishments that sell or provide liquor to patrons to the point of intoxication risk a finding of liability against them, if the patron then hurts himself or others as a result of his conduct and damages are sought.

In *Stewart v The Corporation of the Township of Duoro-Dummer* the Court was asked to consider whether there is an increased duty of care to intoxicated persons (in this case, by taxi drivers to intoxicated passengers in their vehicle) to ensure that they are wearing their seatbelts. Taxi drivers are not in the business of selling liquor to their paying passengers and are therefore not responsible for their passengers' intoxication. In this case, the taxi driver accepted an intoxicated person's fare and that person ultimately was not

wearing his seatbelt when an accident occurred. The intoxicated and unbelted passenger was badly injured in an accident that occurred.

Facts

The plaintiff passenger, Mr. Stewart, and three other men had been to a stag and doe party at a restaurant/bar. Mr. Stewart was very intoxicated when he left at 2 a.m. He and his companions made the responsible decision to take a taxi home rather than drive. Mr. Yaxley, the defendant, was the taxi driver who accepted Mr. Stewart's fare and who operated the taxi owned by Liftlock Coach Lines Limited ("the Taxi"). The Taxi was broadsided or "t-boned" by another vehicle driven by a drunk driver who ran a stop sign, which impact caused serious injuries to Mr. Stewart and also to his companions and resulted in extended litigation.

At trial, however, the parties had settled many aspects of the case and only one issue remained being whether the owner and/or operator had any liability for failing to ensure that Mr. Stewart was wearing his seatbelt and, if there was such a duty of care, whether Mr. Yaxley met the standard required of him. Without such a finding, Mr. Yaxley's/ the vehicle owner's insurance policy limits would not be available to help satisfy any judgment obtained by Mr. Stewart (*2).

The parties agreed that Mr. Yaxley did not cause the accident, that Mr. Stewart did not have his seatbelt on and that he was injured to a greater degree than he would have been if he had been belted.

The Court accepted the evidence of the restaurant bar's part owner that she had ensured that all of their 4 intoxicated patrons were seatbelted in the Taxi after leaving that premises. She belted in two of the rear-seated passengers and saw Mr. Stewart put on his own seatbelt. She paid Mr. Yaxley and made sure he has the right destination address. This may have satisfied the restaurant/bar's duty to its intoxicated patrons, though this was not dealt with at trial.

Mr. Yaxley testified that he knew that his 4 passengers were intoxicated, he did not check to see if they were belted, as this was the passenger's responsibility in his mind. He testified that Mr. Stewart was going in and out of consciousness/sleeping during the drive. Mr. Yaxley could not recall the seat belt minder chiming but, even if it had, he would only have requested Mr. Stewart to put on his seatbelt to stop the chiming.

The OPCF 44R insurer, see (*2), contended that Mr. Yaxley owed a duty of care to his passenger to make sure he was belted and remained belted at all times during the fare, because Mr. Yaxley knew that Mr. Stewart was intoxicated and was a vulnerable individual who could not take care of himself. The Court did not agree. The Law

Section 106 of the *Ontario Highway Traffic Act* requires passengers to wear seatbelts while driving on a highway. There are no provisions that mandate that the driver is responsible in any way where adult passengers are unbelted. The Court examined the law in various other jurisdictions regarding whether "special circumstances" would increase a driver's duty to his passengers. (*3) The Court did not find enough support to be persuaded that other jurisdictions were inclined to recognize such an enhanced duty of care. The Court also distinguished *Galaske v. O'Donnell* ("Galaske") (*4) which found that there is an enhanced duty of care beyond operating a safe vehicle in a careful manner so as to recognize "special circumstances", such as ensuring passengers under 16 years old are belted. In Galaske, however, the facts did not involve a taxi or adult passengers (who are required to belt themselves) intoxicated or not. The Court also distinguished *Colebank v. Kropinske* (*5), where the unbelted passenger had refused to wear her seatbelt, was under 16 and had been provided with alcohol and cannabis by the speeding driver, which driver was aware of her history of unpredictable behaviour when intoxicated. In that case, she opened the car door and fell out, injuring herself.

The Court therefore found that there has been no previously recognized duty of care upon a taxi driver to a visibly intoxicated adult or to any other vulnerable adult person that has been recognized in Canada. Nor was the Court willing to expand such duty of care.

The Court, in considering whether to recognize such an expanded duty of care, concluded at paragraph 113:

> "Imposing a positive duty to ensure adult intoxicated passengers are and remain buckled in a taxi cab, in light of existing legal responsibilities for all adults to buckle their seat belts in vehicles and the voluntary creation of the risk by the adult becoming intoxicated, is an unnecessary and unprincipled extension of the scope of any duty which a taxi driver owes to adult intoxicated passengers."

There was no sufficiently proximate relationship between the taxi driver and the passenger. The Court also could not find any expectation by Mr. Stewart, in his intoxicated state, that he expected Mr. Yaxley, a taxi driver, to protect him from injury and no representation by Mr. Yaxley that he would take steps to protect him by ensuring that he was and stayed belted during the fare. Nor was there reasonable reliance on Mr. Yaxley by Mr. Stewart because Mr. Yaxley did not cause Mr. Stewart's voluntary intoxication.

At paragraph 129, the Court stated,

> "As stated above, the law obligates all adult passengers to buckle their seat belt in a vehicle. Absent evidence which demonstrates reliance by the intoxicated adult passenger and a representation of acceptance of that responsibility by the taxi cab driver (explicitly or implicitly), the obligation and responsibility on an adult passenger to buckle his seat belt cannot justifiably and unilaterally be imposed on the taxi driver." (emphasis in the original)

Further, the adult passenger has the autonomy to be belted or not and there was nothing Mr. Yaxley could do to force Mr. Stewart to wear his seatbelt and remain buckled.

The Court also cited policy reasons for its decision. At paragraph 145,

> "There is no dispute that a taxi cab driver owes no duty of care to an adult passenger who is not intoxicated.
>
> [146] Imposing the duty of care on the taxi driver for an adult intoxicated passenger would amount to a unilateral transfer of the adult passenger's statutory and common law duty of care to buckle his seat belt to a taxi cab driver. Worst, this unilateral transfer of responsibility to the taxi cab driver only arises as a result of the self-induced intoxication of the adult passenger.
>
> …
>
> [148] Adults can self-induce intoxication. They can make a choice to consume alcoholic beverages to the point of intoxication. It is obvious that persons who choose to become intoxicated, as in this case, will be less able to care for themselves, make appropriate choices, or make safe decisions to protect them from harm when intoxicated. If an adult chooses to become intoxicated to the point that the adult cannot protect their own safety or carry out their responsibility in a taxi cab to buckle their seat belt, there is little reason why the law should find a duty and impose an obligation on a taxi cab driver to assume the responsibility and liability for the voluntarily intoxicated adult.
>
> [149] I see no valid policy reason why this "transfer" of responsibility/liability should occur arising solely from the hiring of a taxicab. There is no obvious societal benefit for this transfer of responsibility

> arising solely from the hiring of a taxi cab by an intoxicated adult passenger.

Finally, the Court also noted that Mr. Stewart had a real remedy in that he had a cause of action against those that are responsible, through negligence, for the accident, whereas Mr. Vaxley had not caused the accident. By imposing an extended duty, a taxi driver would have the burden of determining whether adult passengers are intoxicated; the extent of the intoxication; and whether the intoxication was such that the adult passenger is not capable of buckling their own seat belt and this would be even a greater and unreasonable burden with the many other possible types of "vulnerable" passengers. Further, the Court could not determine how a taxi driver could compel compliance and might even compel taxi drivers to decline fares.

The Court concluded that there is no positive duty on a taxi cab driver to ensure that vulnerable adult passengers are or remain buckled.

Finally

The case is interesting in that the same reasoning should apply to any driver with non paying adult passengers and not just to taxi drivers. The Court found in this case that there is no positive duty on taxi drivers to ensure that "vulnerable" adult passengers are or remain belted. The Court was clear that adult passengers are responsible for wearing a seatbelt and this does not fall to anyone else to make sure they do. However, the Court also found that the taxi driver did not contribute to the intoxication of the adult passenger and this weighed significantly in the finding that the driver had no duty in the circumstances. Therefore, businesses providing alcohol and contributing to intoxication of passengers (including livery companies, party boats and buses) may face extended liability and increased risk of being found partially responsible in similar type situations. Policies and procedures should be diligently reviewed regarding over-service and handling of patrons upon and after exit.

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Endnotes
(*1)2018 ONSC 4009
(*2) In fact the case was defended by Mr. Stewart's own insurer whom he sued to access the OPCF 44R coverage under his own policy of insurance. This insurance provides coverage where the third party vehicle is either uninsured or underinsured. If liability could be found on Mr. Yaxley, the OPCF 44R insurer's exposure would reduced or eliminated. Such detail was not available in the Court's judgment.
(*3) The case law generally does not provide that there was any expanded duty on a driver other than in some cases of young age; however, Australia passed legislation that specifically stated that there is no duty of care generally to an intoxicated person.
(*4) 1994 CanLII 128 (SCC), [1994] 1 SCR 670
(*5) 2002 BCSC 436 (CanLII).

7. Is Post-Indian Act Governance Within Reach?

For thousands of years, the Aboriginal people of what is now called Canada organized themselves as sovereign nations, with governmental jurisdiction over their lands. Those rights of governance and property were then disregarded post-European colonization.

Nowadays, Aboriginal self-government in Canada is the formal structure through which Aboriginal communities may control the administration of their people, land, resources and related programs and policies, through agreements with federal and provincial governments. It is worth noting that in Canada since 1867, the federal government has been in charge of Aboriginal affairs.

The *Indian Act* from 1876, repealed and replaced in 1951 (the "Act") (*1), replaced traditional systems of governance and allowed the Canadian federal government to control Indian status, land,

resources, wills, education, band administration, etc. Even though Aboriginal rights to self-government was asserted in the *Constitution Act* (1982), the right to Aboriginal self-government is not the law in Canada. Various case laws however expanded law-making powers and jurisdiction (*2) through the exercise of Aboriginal rights. In the *Pamajewon* case, for example, the Court was prepared to consider the possibility that a right of self-government was recognized by section 35 (*3) but did not actually rule that the section had that effect. The case involved the Shawanaga and Eagle Lake First Nations and their right to authorize and regulate high-stakes bingo games on their respective reservations. The Court held that such gaming was not a defining or integral feature of the societies in question prior to contact with Europeans and was not protected as an Aboriginal right. In general, for the Court to acknowledge jurisdiction to regulate, a group would have to establish that the activity itself is a protected right and that it was regulated by their ancestors prior to contact. This suggests an incremental judicial approach to self-government rather than general recognition of the right to self-determination.

In Canada, as a direct consequence to the above, Aboriginal communities tried to achieve various levels of self-government through land claims rather than constitutional amendments. Various agreements (*4) helped Aboriginal groups pave the way for negotiating treaties and enabling bands to set-up municipal and corporate structures (*5).

Just like Aboriginals in Canada, Native Americans have struggled for recognition of their rights to self-governance, with the key difference between Canada and the United States rests on the recognition of Aboriginal sovereignty. Treaties were negotiated with hundreds of Native American tribes, and tribal sovereignty is recognized in the US Constitution, with inherent rights to govern within their reservations, to make laws, to establish courts and to enjoy immunity from external lawsuits. Unlike in the United States, this doctrine of domestic sovereignty has never been applied in Canada.

The current judicial approach to Aboriginal self-government in Canada as well as other various political negotiations have established some powers of self-government for some First Nation and Inuit communities and it is possible, albeit not certain, that all land claim and self-government negotiations may ultimately replace the Act as the chief instrument governing the relationship with the Aboriginal people.

Robert Carillo

Endnotes

(*1) Métis and Inuit are not governed by the Act.

(*2) See *R v Sparrow*, [1990] 1 S.C.R. 1075; *R v Pamajewon*, [1996] 2 S.C.R. 821; and *Delgamuukw v British Columbia*, [1997] 3 S.C.R. 1010.

(*3) Section 35 of the *Constitution Act, 1982,* had recognized "existing Aboriginal and treaty rights," but this term was left undefined.

(*4) *James Bay and Northern Quebec Agreement* (JBNQA), 1975; Inuvialuit Final Agreement.

(*5) See also Nunavut claim settlement; and Nisga'a Final Agreement in British Columbia: The Nisga'a treaty granted the right to self-government within the 2,019 km^2 in the Nass Valley to which the Nisga'a hold title.

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