THE NAVIGATOR

IN THIS ISSUE

SHIPPERS, BE CAREFUL WHERE YOU SUE

A very recent decision of the Federal Court of Appeal illustrates the potential perils faced by litigants when deciding in which court one should sue for relief in cases involving goods subject to a through bill of lading. In *Elroumi v. Shenzhen Top China Imp & Exp Co. Ltd.* (*1), the Federal Court of Appeal, in a brief decision dismissing the appeal from the court below, affirmed that the Federal Court has no jurisdiction over actions brought against a land carrier delivering goods to their final destination, notwithstanding that the goods were subject to an ocean through bill of lading. This decision underscores a problem in shipping lawsuits, in that parties with claims must be diligent not only with regards to whom they sue, but in which court they sue them.

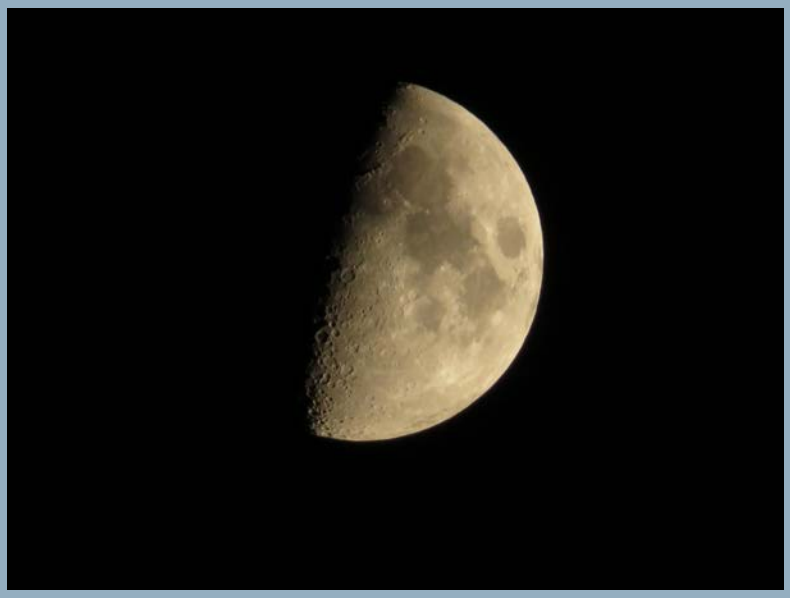
Facts

In this case, a land carrier, Entrepot Canchi ("Canchi"), and CMA CGM, a third party sued by Canchi, both brought motions to dismiss the plaintiff's claim for lack of jurisdiction. The plaintiff Elroumi had shipped goods from Huang Pu, China, to Montreal. Three original bills of lading were issued by King Freight International Corp. showing Vancouver as the port of discharge and Montreal as the port of delivery. Shortly afterwards the third party, CMA CGM, issued a sea waybill showing King Freight as the shipper and Jet-Sea International Shipping Inc. as the consignee. That waybill showed Hong Kong as the port of loading, Vancouver as the port of discharge, and Montreal as the port of delivery.

After arriving in Vancouver, the goods went by train to Montreal. Elroumi hired Canchi to collect the goods and deliver them to the final destination, her home in Montreal. Elroumi was told after the goods cleared customs that they had been damaged, and that they had to be delivered to her residence by Canchi since she was responsible for unloading them. Not knowing which party damaged them, or how, the plaintiff commenced her action against the seller, the insurer, the transport agent and the land storage agent and transport company. The ocean carriers, however, were not sued, although both were named on the bills of lading. Both Canchi and CMA CGM successfully moved to have the claims against them struck for lack of jurisdiction, and the Federal Court of Appeal upheld those rulings.

FIRM AND INDUSTRY NEWS

- **World Rail Festival,** December 3-5, Amsterdam.
- **Canadian Board of Marine Underwriters Annual Conference & Dinner,** December 3, Toronto.
- **Women's International Shipping & Trade Association** – Canada (Wista) Annual General Meeting December 3, Montreal. Kim Stoll was re-elected as Vice President Central Region for a further two-year term.
- **Toronto Transportation Club Annual Dinner,** December 5th, Toronto.
- **Grunt Club Annual Dinner,** December 6th, Montreal.
- **Organization of Women in International Trade** - Toronto Annual General Meeting and Holiday Reception, December 10, Toronto
- **Port Performance North America,** December 10-11, Newark, New Jersey.
- **Conference of Freight Counsel** semi-annual meeting, Palm Springs, California, January 5-6, 2020 **Gordon Hearn** will be representing the firm.
- **Marine Club Annual Dinner**, Toronto, January 17, 2020
- **Transportation Lawyers Association Chicago Regional Conference**, January 23-24, 2020. **Gordon Hearn**, **Kim Stoll** and **Carole McAfee Wallace** will be representing the firm.
- **WISTA Canada: Women in Leadership Luncheon Series**: A Personal Conversation with Lisa Raitt, former Deputy Leader of Her Majesty's Official Opposition and former Minister of Transport under PM Stephen Harper, January 30, 2020, Toronto



The Federal Court and Through Bills of Lading

Both the Federal Court and the Federal Court of Appeal noted that, under section 22(2)(f) of the *Federal Courts Act*, they had express jurisdiction to hear cases involving claims relating to the carriage of goods under a through bill of lading. Nevertheless, both on the original hearing and the appeal, the Court found that the claim would further still have to relate to Canadian maritime law for a case to meet the test set out by the Supreme Court of Canada in *ITO Int'l Terminal Operators v Miida Electronics* for the federal courts to have jurisdiction (*2). It was here that the claims against Canchi and CMA CGM failed.

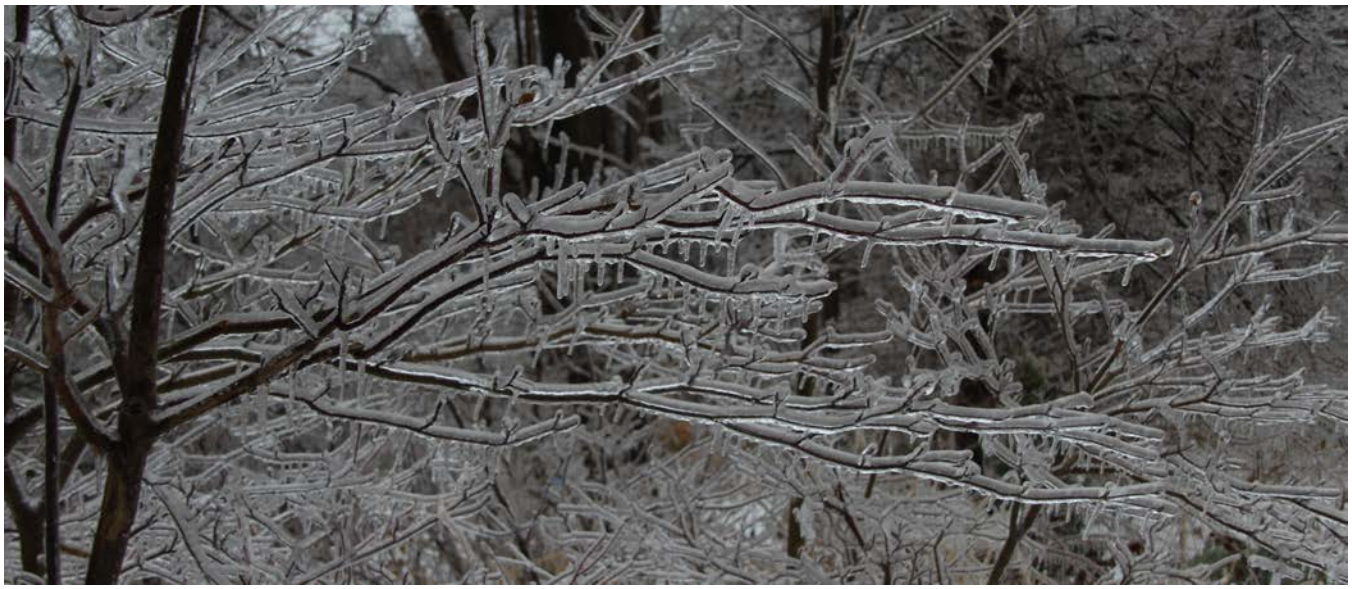
As the Federal Court of Appeal noted in dismissing the plaintiff's appeal, a "claim against a local road transporter or an operator of a warehouse distant from an ocean port is not a claim under Canadian maritime law" (*3). Finding further that Canchi's operations were not "integrally connected to a maritime contract over which the Federal Court has jurisdiction," the appeal was bound to fail. In circumstances such as these, the plaintiff was obliged to sue the road carrier separately in the provincial court that had jurisdiction over it. Because Canchi's claim over against CMA CGM was entirely dependent on the court's jurisdiction over Canchi, that claim was also struck, even though the Court would have had jurisdiction over the claim of the plaintiff over CMA CGM, if she had brought a claim against it in the main action.

Conclusion

The result in *Elroumi* should be borne in mind in all cases involving through bills of lading that involve significant amounts of land carriage. The lesson here is that despite the express jurisdiction granted to the Federal Court by the *Federal Courts Act* in respect of contracts relating to carriage by sea in respect of a through bill of lading, this jurisdiction will not extend to every leg of the carriage of goods despite the apparently plain words of the statute. While it seems an odd result that litigated claims involving a through bill of lading with land carriage components must be divided between provincial and federal courts even though there are many common facts, it is, at least for now, a reality that shippers with damage claims will have to live with and respect.

Oleg M. Roslak

Endnotes
(*1) 2019 FCA 281 [*Elroumi*].
(*2) [1986] 1 SCR 752 [*ITO*].
(*3) *Elroumi* at para. 6.



2. 2020 to Bring Massive Changes to Ontario Court Claims Under $200,000

The Ontario government has recently announced a slew of changes to the rules that govern the adjudication of civil claims under $200,000. The following will all take effect on January 1, 2020. However, for claims started by December 31, 2019, the old Rules will continue to apply.

Small Claims

Alterations to the Small Claims Court will be relatively straightforward. Most notably, the monetary jurisdiction of the court will increase from $25,0000 to $35,000.(*1) This is significant, particularly as it was just increased from $10,000 to $25,000 on January 1, 2010. In effect, it will have risen 350% in the span of a decade.

The Small Claims Court will also be affected by a new rule preventing litigants from appealing matters under $3,500.(*2) The former cut-off was $2,500.

This will have the effect of speeding-up most claims between $25,000 to $35,000. Small Claims trials can generally be scheduled within one year of an action being commenced, in comparison with larger claims that often take three to five years to be scheduled for trial. However, it will also have the effect of nullifying the ability of a litigant to recover legal fees, as the *Small Claims Rules* generally limit costs awards to 15% of the amount claimed.(*3) By contrast, litigants for larger claims can often recover up to approximately 65% of their lawyers' fees and all of their reasonable disbursements.(*4)

Of note, parties in the Small Claims Court may be represented by paralegals or law students, or they may be self-represented. In this regard, the jurisdiction for paralegals will automatically increase from $25,000 to $35,000.(*5) The self-representation aspect of Small Claims Court may be seen as benefit to corporations, which are required by default to be represented by lawyers in matters beyond the Small Claims limit.(*6) Starting on January 1, 2020, non-lawyers on their staff will now be able to represent them at any stage, so long as the matter stays below $35,000.

Simplified Procedure

More significant changes will apply to Ontario Superior Court matters governed by the *Simplified Procedure* set-out at Rule 76 of the *Rules of Civil Procedure*.(*7) Currently, that Rule applies mandatorily to most claims between $25,000 and $100,000.(*8) The monetary limits will be changed to include all claims from $35,000 up to $200,000, so long as the relief is exclusively made in relation to money, or real or personal property.

The Rule is not applicable to certain types of actions. For example, construction lien claims under the *Construction Act* and claims under the *Class Proceedings Act* are specifically excluded. Other claims are not mandatorily applicable, such as are claims for declaratory or equitable relief (but which can be brought into the Rule at the discretion of the parties).(*9)

The *Courts of Justice Act* will be amended to exclude jury trials from all *Simplified Procedure* matters (unless they were commenced before 2020) (*10). Litigants will be permitted to request a jury for matters involving slander or libel, malicious arrest, malicious prosecution, or false imprisonment; but once a jury notice is delivered, the claim will no longer be subjected to Rule 76 (*i.e.* it will be subject to the same rules as for claims in excess of $200,000).(*11)

The right to oral Examinations for Discovery will be augmented from two hours per party to three hours per party.(*12) In other words, each party will be entitled to examine representatives of all other parties for a cumulative three hours. As now, there will be no provision for other, more cooperative forms of discovery, such as written interrogatories as is done in the Federal Court.

Any party who intends to call an expert witness will have to do so by written affidavit.(*13) They will be open to cross-examination at trial.

Trials – no matter how complex – will be limited to a maximum of five days.(*14) It is unclear how this will be managed in practice, but it is certainly clear that all judges and case management masters will have their hands tied when scheduling matters for trial. In any event, in an effort to make this work, all evidence in chief (from each party) will be made by affidavit. (*15) However, all deponents will need to be available for cross-examination.

New rules will apply to encourage cooperation amongst the parties in trial planning. They will be required to submit a joint "Trial Management Plan" to the court at least thirty days before their Pre-Trial Conference, including a list of all witnesses for trial (including experts) and a time estimate for the various stages of trial.(*16) The plan would also include deadlines for the exchange of affidavits for use at trial.

Costs awards will be capped at $50,000 for lawyers' fees and $25,000 for disbursements, before HST (except where specific legislation provides otherwise).(*17) This Rule will apply even where extraordinary costs are called for because of a party's bad behavior.

Some classes of litigants will likely be pleased with the new rules for *Simplified Procedure* matters, including institutional clients who are frequently in litigation. Insurance companies, for example, will likely be pleased to have the cost certainty and to have a streamlined process for adducing expert evidence. For other litigants, the changes may not be very helpful. For example, litigants in multi-party commercial disputes may be frustrated by the limits on documentary discovery and the inability to recover significant costs from unnecessarily litigious adversaries.

Although all of the new procedures will ease the burden on judicial resources, it is far from clear that there will be any cost savings for litigants, or even any significant time savings. The preparation and review of affidavit evidence will be cumbersome and expensive; and it could spur on more motions than we are now accustomed to. Moreover, the new procedures push trial preparation forward, thus "front loading" some of the costs of trial, and potentially making it less likely for parties to settle after they have begun to dig-in and to incur their respective expenses. In any event, with reduced costs

exposure under the *Rules*, more litigants will likely be willing to litigate longer.

Transition

Parties with current claims may wish to consider transferring their claims to either the Small Claims Court or the *Simplified Procedure*, as the case may be. There are pros and cons, which should be considered in the context of every case.

Parties with pending claims may also wish to consider the relative benefit and burden of issuing a claim before or after January 1, 2020. Again, the circumstances of each case with dictate the better strategy.

Alan S. Cofman

Endnotes

(*1) O. Reg. 343/19, s. 1.
(*2) *Ibid.*, s. 2.
(*3) *Courts of Justice Act*, R.S.O. 1990, c. C. 43, s. 29; *Small Claims Court Rules*, O. Reg. 258/98, Rule 19.02.
(*4) Theoretically, costs are entirely discretional, following several statutory rules. See *Courts of Justice Act*, *ibid*., s. 131 and *Rules of Civil Procedure*, O. Reg. 194/90, Rule 57.
(*5) A paralegal may represent clients at any proceeding before the Small Claims Court. See By-Law 4, s. 6 to the *Rules of Professional Conduct* for lawyers and paralegals, online: <https://lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/b/by-law-4.pdf>.
(*6) *Rules of Civil Procedure*, *supra* note 4, Rule 15.01(2).
(*7) For a good summary, see <https://www.ontario.ca/laws/regulation/r19344>.
(*8) *Rules of Civil Procedure*, *supra* note 4, Rule 76.02.
(*9) *Ibid.* See Rules 76.01 and 76.02.
(*10) *Courts of Justice Act*, *supra* note 3, s. 108(2) and (3). Existing exclusions to the right to a jury will remain unchanged.
(*11) *Supra* note 1, s. 4.
(*12) *Ibid*., s. 5.
(*13) *Ibid*., s. 6.
(*14) *Ibid*., s. 7(6) and 9(1).
(*15) *Ibid*., s. 9(1).
(*16) *Ibid*., s. 7(2).
(*17) *Ibid*., s. 10.
(*18) *Rules of Civil Procedure*, *supra* note 4, Rule 24.1.

3. Uniformity of Canadian Maritime Law Takes a Hit

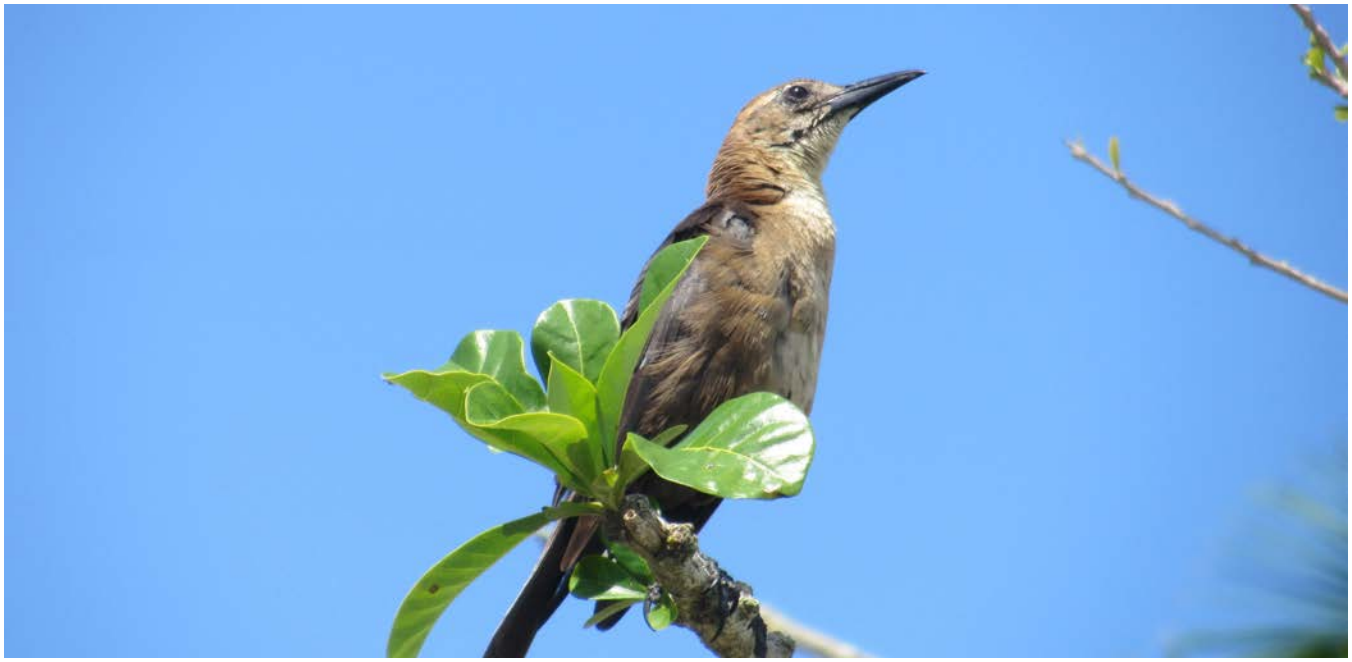
The Supreme Court of Canada has dealt a blow to thirty years of precedent in relation to the uniformity of Canadian maritime law. In *Desgagnés Transport v Wärtsilä Canada*, 2019 SCC 58 the Court held that provincial legislation that regulates private law matters (such as the *Civil Code of Québec*, or sales of goods legislation in common law provinces) can apply to contractual claims governed by Canadian maritime law.

Wärtsilä supplied a reconditioned crankshaft for a cargo vessel owned by Desgagnés Transport. The contract of sale included a limitation of liability clause limiting the supplier's liability to €50,000. The contract also provided for a six-month warranty period. Well after the warranty expired, the ship's main engine suffered a major failure. The shipping company sued the supplier, founding its claim upon a latent defect in the engine parts purchased from the supplier.

Desgagnés Transport sued to recover the full amount of the damages, which greatly exceeded the value of the component supplied to the vessel. The trial judge concluded that the crankshaft sold by the supplier contained a latent defect that caused the damage to the ship. She then determined that the dispute was governed by the *Civil Code of Québec*("*C.C.Q.*"), rather than Canadian maritime law. Under Articles 1729 and 1733 of the *Civil Code of Québec*, a manufacturer cannot contractually limit its liability for latent defects.

She was of the view that while the dispute over the sale was related to maritime activities, it was not integrally connected to them. Accordingly, the limitation of liability clause in the parties' contract was unenforceable and the supplier was liable for the full quantum of damages. The majority of the Court of Appeal allowed the appeal in part. It found that Canadian maritime law governed the dispute, which allowed parties to contractually limit their liability and excluded application of the *Civil Code of Québec*. Hence, the supplier was entitled to rely on the limitation of liability clause, which restricted its liability to €50,000.

The Supreme Court of Canada, however, held that the *Civil Code of Québec* governed the dispute. Therefore, the supplier could not rely on the limitation of liability clause in the parties' contract. The Court noted that the sale of marine engine parts intended for use on a



commercial vessel is sufficiently and integrally connected to navigation and shipping so as to come within federal legislative authority under the federal power enumerated at s. 91(10) of the *Constitution Act, 1867,* and therefore be validly governed by Canadian maritime law. However, art. 1733 *C.C.Q.,* which pertains to warranties in contracts of sale, is also a validly enacted provincial law that, in pith and substance, concerns a matter of property and civil rights pursuant to s. 92(13) of the *Constitution Act, 1867,* and remains applicable and operative. The sale of marine engine parts thus gave rise to a double aspect scenario: a non−statutory body of federal law and a provincial law both validly directed at the same fact situational overlap. Neither inter-jurisdictional immunity nor federal paramountcy ousted the application of art. 1733 *Civil Code of Québec*; it was therefore ultimately the law governing the dispute. Since art. 1733 is a legislative enactment, Canadian non−statutory maritime law did not prevail over it.

The Court also noted the following at para.106:

> The analysis would have been different if Parliament had enacted a valid law or regulation to regulate the matter pursuant to its legislative authority over navigation and shipping. In such case, the courts would have needed to apply the doctrine of federal paramountcy and determine whether there was a conflict between the federal and provincial rules.

In other words, the Court in essence left it open to Parliament to take up the Court's invitation to enact a commercial code applicable to marine contracts so as to ensure the ongoing uniformity of Canadian maritime law.

Rui M. Fernandes

4. Securities Laws – Client Focused Reforms

The Canadian Securities Administrators ("CSA") recently published reforms to enhance Client Focused Reforms (the "Reforms"). The Reforms amend National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* under NI 31-103 and its companion policy as follows:

(a) Expanding the list of enumerated "Know Your-Client" ("KYC") information required to be gathered at inception of, and updated over the course of, the client-registrant relationship, and prescribing time periods for updates of KYC information;
(b) Implementing new "Know-Your-Product" ("KYP") requirements;
(c) Adding to registered firms' existing obligations to assess the suitability of client trades and investment recommendations, including that the registered firm must reasonably determine that any requested or recommended investment action "puts the client's interest first";
(d) Amending the suitability waiver provisions, including to permit non-individual permitted clients to waive suitability determinations for managed accounts;
(e) Expanding requirements relating to client-registrant conflict of interest;
(f) Prohibiting misleading or deceptive communications by registrants aimed at clients or potential clients;
(g) Requiring registered firms to provide training to registered individuals on compliance with securities legislation;
(h) Clarifying the scope of the general requirement that a registered firm maintain records to accurately record its business activities and compliance with securities legislation.

The Reforms thus clarify registrants' KYC obligations by prescribing categories of required KYC information. The enumerated categories of KYC information that registrants are required to gather have been expanded to include information regarding each client's:

(a) personal circumstances;
(b) investment knowledge;
(c) risk profile; and
(d) investment time horizon.

The registrants are required to take reasonable steps to have clients confirm the accuracy of collected information.

The Reforms also introduce KYP requirements for both registered firms and registered individuals. Registered firms must take reasonable steps to assess, approve and monitor securities made available to clients and securities must be approved before being made available to clients.

The Reforms additionally enhance and clarify registrants' obligations regarding client suitability determination and consequently "put the client's interest first" when determining if an investment action is suitable. A suitability determination is required before opening an account for a client or taking any investment action for a client. Registrants must first reasonably determine that the action is suitable on five factors:

(a) KYC obligations;
(b) KYP obligations;
(c) concentration of securities within the account and the liquidity of those securities;
(d) potential and actual impact of costs on the client's return on investment; and
(e) reasonable range of alternative actions available to the registrant through the registered firm, at the time the determination is made.

It is critical to remember that in order to take the investment action or open the account, such action must "put the client's interest first".

The Reforms are expected to come into force on December 31st, 2019 and will be phased in over a two-year transition period.

Robert Carillo

5. Cockpit Recordings ordered for Disclosure in Air Canada Halifax Crash Class Action Litigation

On March 29, 2015, Air Canada flight 624 from Toronto to Halifax crashed on landing at destination. The weather conditions were poor owing to heavy snow and reduced visibility. The Airbus A320 aircraft landed short of the runway at the Halifax International Airport; the aircraft was a total loss and a significant number of passengers were injured.

By a decision dated December 13, 2016, the Supreme Court of Nova Scotia certified a class action on behalf of the injured passengers in respect of the crash (*1). The lawsuit did not only target the airline, but also Airbus S.A.S. as manufacturer of the aircraft, NAV Canada, Halifax International Airport Authority, Transport Canada and two unnamed defendants, understood to be the pilots.

Following the certification of the class action, examinations for discovery proceeded. The questioning of the Air Canada pilots proved challenging by reason of their failure to recollect the sequence of events leading up to the crash.

Following the unsatisfactory discovery process, Airbus brought a motion for an Order to compel release by the Canadian Transportation Accident Investigation and Safety Board ("TSB") of the Cockpit Voice Recorder audio data (*2). The TSB had already publicly released its report of findings, which largely paraphrased the pilots; however, TSB reports are not admissible as evidence under the *Canadian Transportation Accident Investigation and Safety Board Act* (*3).

The Nova Scotia court was thus faced with the decision as to whether to exercise discretion to order release of the audio data, which at first blush is protected by privilege pursuant to s. 28(2) of the *Act* (but subject to an exception at s. 28(4) that permits release by the TSB if such release is in the interests of transportation safety and the contents released must relate to the transportation occurrence under investigation).

Pursuant to s. 28(6) of the *Act*, any court may in the course of proceedings order production and discovery of the audio data where public interest in the proper administration of justice outweighs in importance the privilege attached to the on-board recording by virtue of this section.

Air Canada strongly opposed production, leading evidence that production in legal proceedings risked creating a chilling effect whereby pilots would be reserved in their comments in the cockpit out of fear of public reproduction. The TSB similarly opposed, fearing that investigations would be compromised if the information gathered were to be disclosed in court proceedings.

These fears were however undermined by the evidence from the former Chairman of the United States National Transportation Safety Board, which publicly publishes transcriptions of CVR recordings, and who found no evidence of a chilling impact on pilot interactions in the cockpit. The court further noted that since Air Canada operates into the United States, its pilots would be subject in transborder operations in the event of an accident investigated by the United States agency, to transcription of CVR data.

Justice Duncan found that the content was unequivocally relevant to the allegations of negligence put into issue in the Statement of Claim, based on the paraphrasing of the recordings in the publicly released TSB report that was inadmissible of the purposes of trial.

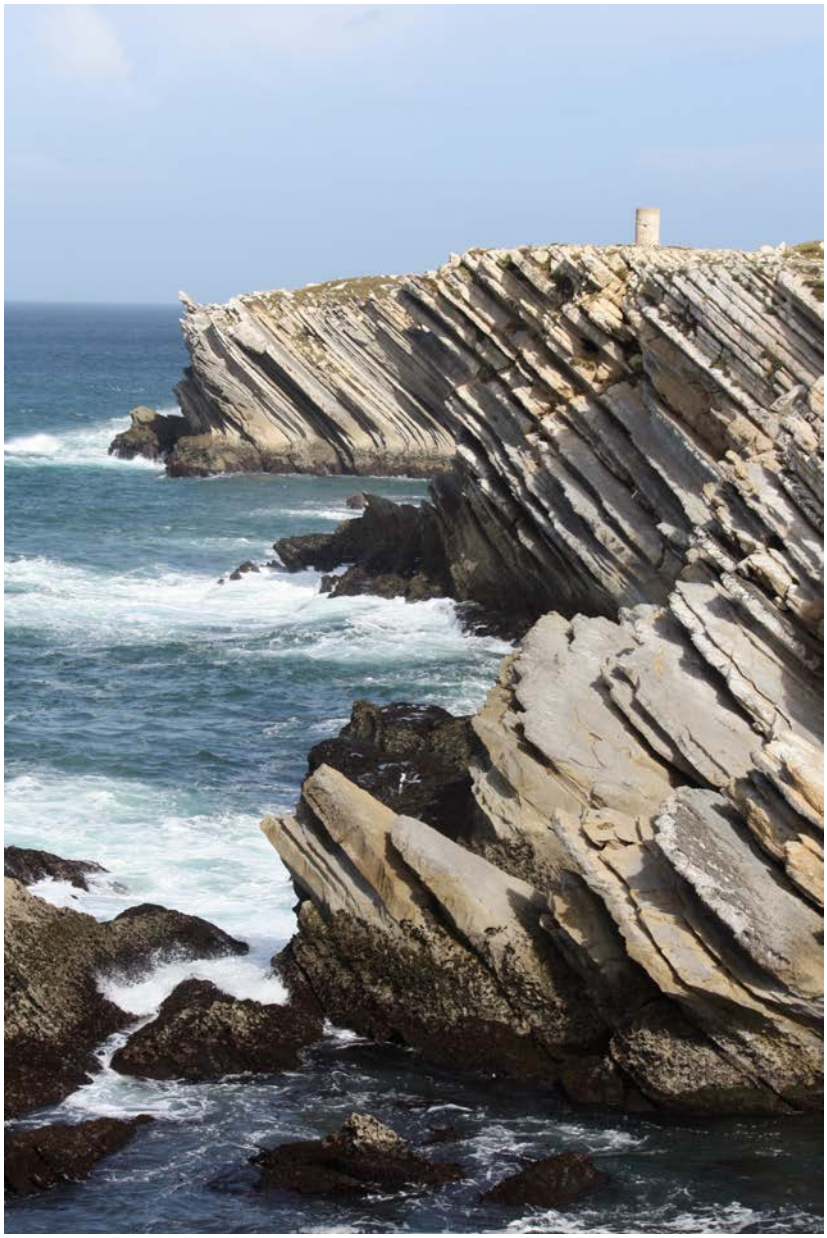
The judge then went to on to consider whether release was consistent with the proper administration of justice. Adopting the reasoning of now Chief Justice Strathy in a first level decision of the Ontario Superior Court (*4), Justice Duncan found that transparency was essential to finding expedient and cost-effective resolutions to litigation, especially in the context of a class action in which behavior modification is a foundational principle.

This interest in transparency outweighed the concerns of pilot privacy. The court adopted the reasoning of then Justice Strathy who had opined that "I cannot imagine that pilots would curtail critical communications, endangering their own safety and the safety of their passengers, simply because those communications might be disclosed in some future legal proceedings in the event of an accident" (*5).

The Court did endorse stringent conditions on the release of the data requiring that the records remain confidential and be used for the purposes of these proceedings only without disclosure to third parties except the parties' experts, consultants, insurers and lawyers, absent further order of the court.

Mark Glynn

(*1) *Carroll-Byrne v Air Canada*, 2016 NSSC 354
(*2) *Carroll-Byrne v. Air Canada,* 2019 NSSC 339
(*3) *Canadian Transportation Accident Investigation and Safety Board Act* (S.C. 1989, c. 3) at s. 33
(*4) *Société Air France v. Greater Toronto Airports Authority*, 2009 CanLII 69321 (ON SC) upheld on appeal in *Société Air France v. NAV Canada*, 2010 ONCA 598
(*5) *Ibid* at 136



6. Discrimination Against a Job Applicant costs the potential Employer $120,000: An Expensive Lesson

In our October 2018 newsletter we told you about a decision of the Human Rights Tribunal of Ontario ("HRTO"), *Haseeb v. Imperial Oil Limited* (*1), in which an employer was found to have discriminated against an applicant for a job, on the basis of citizenship, by requiring that a successful job applicant be able to work in Canada on a permanent basis. The HRTO has now released its decision on the appropriate remedy for this discriminatory conduct.

As a refresher on the facts, Mr. Haseeb was an international student completing his professional engineering degree at McGill University. He applied for a position as an engineer with Imperial Oil. He had a student visa and on graduation he would be eligible for a post-graduate work permit for a 3-year term. Imperial Oil required engineers to have either permanent residency or Canadian citizenship to be eligible for the job. This requirement was set out in the job posting, the on-line application form, and in the questions asked during the interview process. The applicant said that he met this requirement and was offered the job. He was then asked to provide proof of his eligibility and, when he could not, the offer was withdrawn.

The applicant launched a human rights application seeking damages for the breach of his human rights. Under the Ontario *Human Rights Code ("Code")*, citizenship is a prohibited ground; however, discrimination based on citizenship is not discriminatory where Canadian citizenship is a requirement imposed or authorized by law. That was not the basis for Imperial Oil's requirement; rather, it implemented a policy that all entry-level engineers be able to work in Canada permanently in order to address the significant investment it had made in new employees and to further its goal of developing lifelong corporate employees.

The HRTO found that Imperial Oil's job posting, application form and questions during the interview process all included questions about the applicant's ability to work permanently in Canada and, as a result, breached the *Code*. The HRTO found that Imperial Oil had discriminated against the applicant based on citizenship. The HRTO also found that Imperial Oil was not able to rely on a defence that being able to work in Canada permanently was a *bona fide* occupational requirement ("BFOR") because the requirement was not linked to the performance of the essential tasks of the job, and because the requirement was not in fact *bona fide* as Imperial Oil had waived the requirement for business reasons in other cases. Having found Imperial Oil liable for discrimination, the HRTO scheduled a separate hearing with respect to the appropriate remedy.

A year later, the HRTO released its decision on remedy (*2), awarding Mr. Haseeb $101,363.16 for lost wages, $15,000 for injury to dignity, feelings and self-respect, plus pre-judgment interest.

Mr. Haseeb claimed lost income equal to what he would have received had he been hired by Imperial Oil in January 2015, less what he did earn, over a 4-year period. He was eligible to work on March 2, 2015, the date on which he received his post-graduate work permit and SIN. He found work on March 30, 2015, though not as an engineer and for a lower rate of pay than the Imperial Oil job. He worked at this position until May 3, 2019 when he left to pursue another career option. During this 4-year period he also took a leave of absence of 10 months in order to return to Pakistan to visit his family (which he deducted from the period for which he was claiming). The HRTO confirmed that the correct approach to assessing lost income flowing from discriminatory conduct is to determine the appropriate time period required to restore the applicant to the position he would have been in but for the discrimination (contrast this with a wrongful dismissal claim where damages are based on "reasonable notice"). The HRTO considered whether it was likely that Mr. Haseeb would have stayed with Imperial Oil for 4 years, the time period he was claiming. Mr. Haseeb

described working as an engineer in the oil and gas industry for Imperial Oil as his dream job and the HRTO concluded that it was likely that he would have stayed there for 4 years. The HRTO also considered whether, from Imperial Oil's perspective, it was likely that Mr. Haseeb would have remained in their employ for 4 years. Of the 3 engineers hired at the time that Mr. Haseeb had applied, 2 were still employed and one had resigned. As a result, the 4-year time period for assessing lost income was found to be reasonable, and the difference between what Mr. Haseeb earned, and what he expected to have earned, was $101,363.16.

In assessing damages for injury to dignity, feelings and self-respect, the HRTO considered the following two factors: the objective seriousness of the conduct; and the effect on the particular applicant who experienced the discrimination. Weighing these two factors, the HRTO considered the loss of the engineering job, the fact that Mr. Haseeb was a young man at the start of his career who wanted to work as an engineer in oil and gas and had his dream job taken away, and that as an immigrant to Canada of uncertain status he was vulnerable. The HRTO awarded Mr. Haseeb $15,000.

In summary, Imperial Oil was ordered to pay to Mr. Haseeb, who had never been their employee, the total sum of $116,363.16, plus interest. If our first report on this case did not motivate employers to review and assess their hiring processes, including job postings, application forms, interview questions, and other recruitment practices, let this expensive lesson serve as a final warning.

Carole McAfee Wallace

Endnotes

(*1) *Haseeb v. Imperial Oil Limited*, 2018 HRTO 957

(*2) *ibid,* 2019 HRTO 1174

DISCLAIMER & TERMS

FERNANDES HEARN LLP

155 University Ave. Suite 700

Toronto ON M5H 3B7

416.203.9500 (Tel.) 416.203.9444 (Fax)

CONTEST

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