THE NAVIGATOR

IN THIS ISSUE

WIDESPREAD CHANGES TO *CANADA LABOUR CODE* AND TRUCKING INDUSTRY EXEMPTIONS

Significant amendments to the *Canada Labour Code* (the "*Code*") (*1) have come into force as of September 1, 2019 in efforts to modernize labour standards to reflect the realities of the 21st century workplace (*2). Below is a bird's eye view of some of the many changes to the *Code* that federally regulated employers ought to take note of.

Scheduling

Flexible work arrangements: Employees who have completed six consecutive months or more of continuous employment now have the right to request a change to certain terms and conditions of their employment, including the number of hours the employee is required to work, and the employee's schedule and location of work (*3). Employers may refuse such requests on limited grounds, including when granting the request would result in additional costs that would burden the employer, or where there is insufficient work to accommodate a request.

Advanced notice of shift changes and work schedules: Employers must now provide 24 hours' written notice of any change to a work period or shift (*4). Employers are also required to provide 96 hours' notice in writing of an employee's work schedule. An employee may refuse to work any shift or work period in their schedule that starts within 96 hours from the time that the schedule is provided to them (*5). These rules do not apply where an employee has requested a flexible work arrangement as noted above, or where an 'unforeseeable emergency' (*6) necessitates a last-minute change to an employee's shift or necessitates that the employee work overtime in order to deal with said emergency.

Breaks and rest periods: Employees are now entitled to an unpaid 30-minute break for every five consecutive hours of work. If the employer requires the employee to be at their disposal during the break period, the employee must be paid for the break (*7). Further, every employee must be given an 8-hour rest period at minimum in between shifts (*8).

FIRM AND INDUSTRY NEWS

- ***The 2020 Canadian Legal Lexpert® Directory*** has recognized **Rui Fernandes** and **Gordon Hearn** in the areas of Transportation Law and Maritime Law, **Kim Stoll** and **Carole McAfee Wallace** in the area of Transportation Law.

- **Fernandes Hearn LLP** has been recognized in ***Chambers and Partners' 2020 Guide to Leading Canadian Law Firms*** in the areas of road, rail and shipping transportation. **Rui Fernandes** and **Gordon Hearn** are individually listed as leading Road and Rail Transportation lawyers. **Rui Fernandes** is also listed as a leading Shipping lawyer with **Kim Stoll** noted as a "recognized practitioner".

- **CMI 2019 Colloquium,** September 30 to October 2nd, 2019, Mexico City.

- **Breakbulk Americas Conference**, October 8-10, Houston Texas.

- **Pacific Admiralty Conference,** October 10-11, San Francisco California.

- **Conference Board of Canada Conference** "Cannabis at work, one year later", October 12, Toronto Ontario. **Carole McAfee Wallace** will be attending.

- **Surface Transportation Summit,** October 16th, Mississauga Ontario. **Alan Cofman** will be attending.

- **12th Annual McGill Conference on International Aviation Liability Insurance and Finance,** October 18-19, Montreal Quebec.

- **Inland Distribution Conference,** October 21-23, Chicago Illinois.

- **Canada Logistics Conference,** October 23-25, Niagara Falls Ontario.

- **Canadian Society of Customs Brokers Annual Conference,** October 27-29, Whistler B.C.

- **Fort Lauderdale Mariners Club Seminar,** October 28-29, Fort Lauderdale Florida.

- **WISTA Conference**, October 29 to November 1, Cayman Islands.

- **United States Maritime Law Association Fall Meeting,** October 29 to November 2, Scottsdale Arizona. **Rui Fernandes** and **James Manson** will be attending representing the firm.

SAVE THE DATE:
FERNANDES HEARN LLP ANNUAL CONFERENCE - FEBRUARY 10TH, 2020
FERNANDES HEARN LLP "THE FUTURE IS HERE" CONFERENCE - FEBRUARY 11TH, 2020

Exceptions to these provisions include where there is an unforeseeable emergency.

Entitlements

Vacation entitlements: Vacation entitlements have increased as follows (*9):

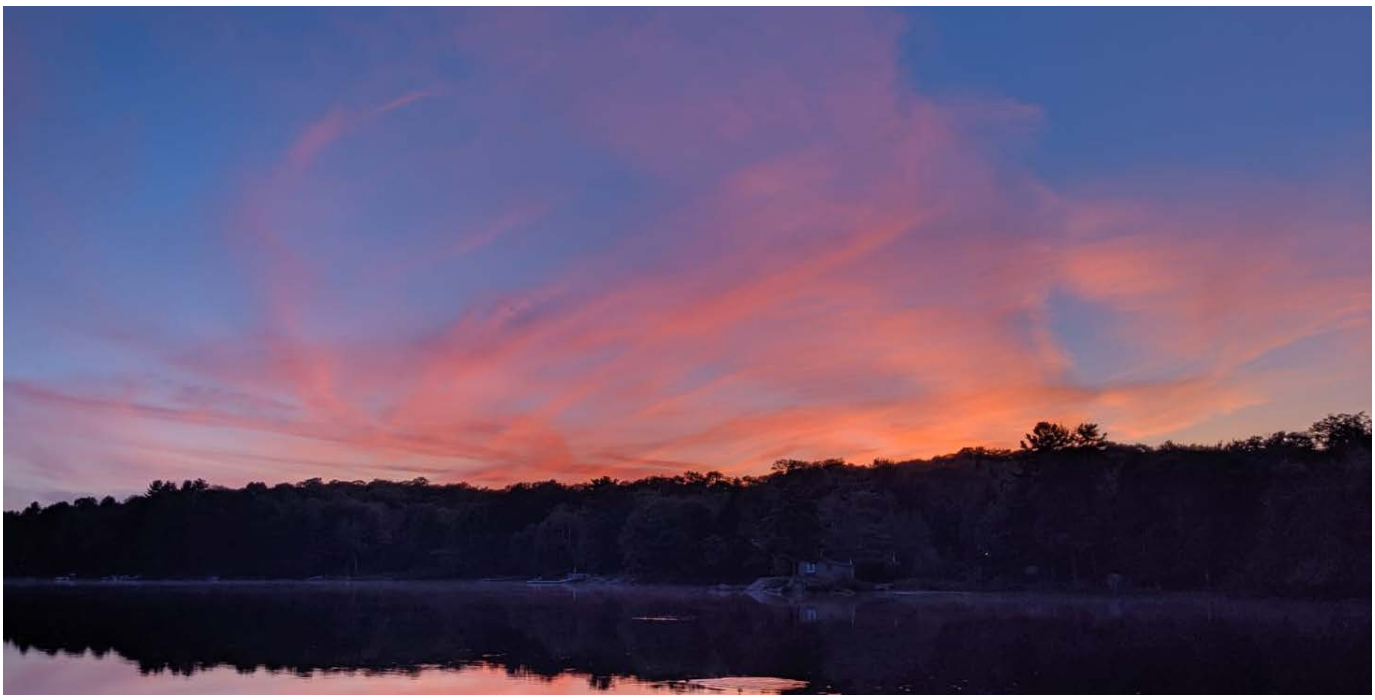
- Two weeks' vacation and 4% vacation pay after completing one year of employment (this is unchanged from the previous *Code* provisions);
- Three weeks' vacation and 6% vacation pay after completing 5 years of employment (down from 6 years of employment under the previous *Code* provisions);
- Four weeks' vacation and 8% vacation pay after completing 10 years of employment (this is a new entitlement unseen in the previous provisions).

Holiday Pay: The 30-day length of service requirement for entitlement to holiday pay under the previous *Code* provisions is now eliminated, therefore allowing all employees entitlement to vacation pay.

Equal Treatment: Employers are prohibited from paying an employee a different rate of wage from another employee due to a difference in their employment status if they work in the same industrial establishment, perform substantially the same type of work, perform their work under similar working conditions, and the performance of that work requires substantially the same skill, effort and responsibility (*10). This rule does not apply if the employees' rates of wages differ due to a system based on seniority, merit or the quantity or quality of each employee's production.

Relief for the trucking industry in light of Code *amendments*

While the amendments to the *Code* allow for an improvement of work-life balance and eligibility for entitlements and will help to ensure that employees receive equal compensation, some of the changes have also been criticized as a one-size-fits-all model that is simply impractical in certain federally regulated industries. This includes the trucking industry within which the nationwide shortage of drivers, time-sensitive



deliveries across provincial borders and unplanned disruptions in the supply chain are realities of the industry that prove incompatible with some of the changes prescribed by the recent amendments.

In light of the foregoing, Employment and Social Development Canada (ESDC) has issued Interpretations, Policies and Guidelines (IPGs) that clarify the new laws and exempt certain positions in trucking from specific provisions of the *Code* (*11). For example, truck drivers are exempt from the requirements of receiving 96 hours' written notice of work schedules and 24 hours' notice of shift changes. Truck drivers are also exempt from the 8-hour rest period requirement between shifts.

To ensure compliance with the amended *Code* provisions, federally regulated employers would be wise to review their current workplace policies and practices with respect to areas such as scheduling, breaks, overtime and entitlement.

Janice C. Pereira

Endnotes

(*1) *Canada Labour Code,* R.S.C., 1985, c. L-2 (the "*Code*")
(*2) The amendments to the *Code* came into force under Bill C-63*, Budget Implementation Act, 2017,* No. 2, which received Royal Assent in December 2017, and Bill C-86, *Budget Implementation Act, 2018*, No. 2 which received Royal Assent in December 2018.
(*3) The *Code* at section 177.1.
(*4) *Ibid* at section 173.1.
(*5) *Ibid* at section 173.01.
(*6) Under the *Code,* an unforeseeable emergency includes situations that the employer could not have reasonably foreseen and that could reasonably be expected to present an imminent or serious threat to the life, health or safety of any person; threat of damage to or loss of property; or, threat of serious interference with the ordinary working of the employer's industrial establishment.
(*7) *Ibid* at section 169.1.
(*8) *Ibid* at section 169.2.
(*9) *Ibid* at section 184.01.
(*10) *Ibid* at section 182.1.
(*11) *Interpretations, Policies and Guidelines (IPGs): Labour Program.* Economic and Social Development Canada. September 1, 2019.

2. Load Brokers' Trust Obligation under the Ontario *Highway Traffic Act :* Part I

The following is Part I of two articles on this topic. This part addresses the trust obligation under the *Highway Traffic Act* ("HTA") (*1) and case law involving priority disputes. Part II will follow in the October 2019 issue of *The Navigator.*

Ontario continues to be the only province in Canada requiring that persons who arrange for carriage, typically load brokers or "load arrangers", must hold "in trust" any freight charges earmarked for the associated carriers.

Prior to the enactment of the trust provisions, carriers were frequently at the mercy of unscrupulous or eventually insolvent load brokers who had already received freight payment from the shipper, but had failed to pay the carrier.

To combat this problem, the *Load Brokers Regulation* (Ontario Regulation 556/92) under the former Ontario *Truck Transportation Act* (*2) was enacted to regulate the activities of load brokers. Regulation 556-92 required load brokers to register with the Ministry of Transportation, to obtain and maintain a surety bond and to hold "in trust" those funds that a load broker owed to carriers for freight charges. To most carriers, this regulation was ineffective, especially given the lack of enforcement by the Ministry of Transportation.

Deregulation efforts saw the repeal of the Ontario *Truck Transportation Act* and Regulation 556/92 as of January 1, 2006. One provision of the *Load Brokers Regulation* was reborn as part of the HTA*,* specifically, Section 191.0.1(3) for the trust fund requirement, applying to all "persons" (which arguably may include any carrier who sub-brokers a load). This section continues to be important as a tool for carriers to collect freight charges (particularly in bankruptcy and insolvency situations) though there continues to be no regulatory "teeth" to enforce such trust provisions in the normal every day course of business. The trust protection afforded to carriers regarding freight owed by Ontario-based load brokers is based on an honour system. While not specifically enforced, that provision has been a key factor in priority disputes where the load broker has declared bankruptcy or entered into voluntary receivership.

Priority Disputes and the HTA Trust Obligation

Case law continues to be limited regarding how the courts have dealt with carrier claims generally or in priority disputes or whether the corporate veil will be lifted, allowing for personal liability of officers and directors, where funds are not held separately in trust.

Outside of priority disputes, lack of enforcement and litigation regarding unpaid freight charges often leaves the carrier unpaid and opens the doors for legal creativity.

The Legislation – The Statutory Trust in the HTA

> Contracts of carriage
>
> **191.0.1** (1) Every contract of carriage for a person to carry the goods of another person by commercial motor vehicle for compensation shall contain the information required by the regulations and shall be deemed to include the terms and conditions set out in the regulations. 2002, c. 18, Sched. P, s. 34.
>
> . . .
>
> Money for contract of carriage held in trust
>
> (3) A *person who arranges with an operator to carry the goods of another person, for compensation and by commercial motor vehicle, shall hold any money received from the consignor or consignee of the goods in respect of the compensation owed to the operator in a trust account in trust for the operator*

> *until the money is paid to the operator.* 2002, c. 18, Sched. P, s. 34.
>
> Other rights unaffected
>
> (4) *Nothing in subsection (3) derogates from the contractual or other legal rights of the consignor, the consignee, the operator or the person who arranged for the carriage of the goods with respect to the money that is held in trust under that subsection.* 2002, c. 18, Sched. P, s. 34.
>
> (emphasis added)

Case Law

(a) *GMAC Commercial Credit Corp. – Canada v. TCT Logistics Inc. (2005) CanLII 3584 (ON CA) ("GMAC v TCT")*

Section 15 of the *Load Brokers Regulation*, in force at the time of this case, provided that:

> … every load broker shall hold in trust for the benefit of the carriers to whom the load broker is liable all of the money that the load broker receives in respect of the carriage of goods.

The Court held that any statutory deemed trust created by Section 15 of the *Load Brokers Regulation* would not be a trust for the purposes of Section 67(1)(a) of the *Bankruptcy and Insolvency Act*, and thereby excluded from distribution to creditors, *unless* such trust otherwise conformed with the three common law trust principals of certainties of intention, object and subject matter – specifically, that the funds be segregated.

The Ontario Court of Appeal ruled that any co-mingled (or mixed in) monies (which included freight charges intended for the carriers) received by the bankrupt *prior* to the receivership had not been properly maintained separately and "in trust". Therefore, those originally earmarked funds for the carriers became part of the bankrupt's estate generally, the funds having lost their "trust" character. As such, the usual priority distribution rules under bankruptcy law applied and the secured creditor "outranked" the carriers in terms of recovery. (*3)

(b) *Re Norame ONCA* [2008] O.J. No. 1580

Norame Inc. carried on business as a load broker for shippers of goods such as Dimplex North America. Norame Inc. engaged a carrier, Vitran Corporation, to ship Dimplex's goods. Dimplex paid Norame Inc. but, unfortunately for Vitran Corporation, Norame Inc. (at some point prior to Vitran receiving payment) filed a voluntary assignment into bankruptcy. Norame had also co-mingled monies received as freight charges from its shipper customers and intended for carriers with its own money. Norame was required to segregate those trust funds in a separate trust account as per the *Load Brokers Regulation* (Ontario Regulation 556/92), then in force.

In this case, the question concerned monies received *after* the filing in bankruptcy. The Court, on application by the Trustee for directions, ordered all monies owed by shippers in respect of carriage services to be paid to the Trustee to be held in a separate account. Ultimately, the Court ruled that those segregated funds satisfied the conditions for a trust and accordingly were to be paid to Vitran Corporation. The carrier had argued that it was entitled to the funds pursuant to Section 67(1)(a) of the *Bankruptcy and Insolvency Act* which provides that a bankrupt's property is available for distribution to creditors; however, such does not include "*property held by the bankrupt in trust for any other person*". The Trustee maintained that it held the funds for distribution to Norame Inc.'s creditors pursuant to the *Bankruptcy and Insolvency Act*.

Recall that Section 15 of the *Load Brokers Regulation* (the "Section 15 trust obligation"), in force at the time, provided that every load broker:

> …shall hold in trust for the benefit of the carriers to whom the load broker is liable all of the money that the load broker receives in respect of the carriage of goods.

The Trial Court ruled, based on *GMAC v TCT*, that any statutory "deemed trust " created by the Section 15 trust obligation would not be a trust for the purposes of Section 67(1)(a) of the *Bankruptcy and Insolvency Act*, and thereby excluded from distribution to creditors unless the funds were properly segregated and held their "trust" character.

In *GMAC v TCT*, the interim Receiver was bound by the s. 15 of the Regulation trust obligation with regard to carrier freight charges that it collected *after* the receivership's commencement. Those funds collected after the commencement of the receivership were required to be segregated and held "in trust". The issue in that case related to funds not held in trust and received by the debtor *before* the receivership commenced.

The Trustee, in *Re Norame*, had attempted to argue, regarding funds collected *after* the commencement of the bankruptcy, that it was not subject to the same rules as the Receiver in *GMAC v TCT*. The Trustee argued that it was not continuing to run the business of the bankrupt as the Receiver did in that case and so did not need to keep the funds segregated. The Court held that, in the case of priority disputes, there was no difference between a Receiver carrying on the business of a company and a Trustee in Bankruptcy since that Trustee in Bankruptcy would be required, upon receiving funds that were required to be segregated, to hold those funds in a separate trust account. The Trustee would continue to hold those funds in accordance with the Section 15 trust obligation for the benefit of the unpaid carrier as beneficiary.

It was held that a load broker's non-carrier creditors were not entitled to monies paid to the Trustee in Bankruptcy in respect of a carrier's shipping services where such funds were and were required to be segregated into a separate trust account for the benefit of those carriers.

(c) *CIBC v. Nadiscorp Logistics Group Inc.,* 2009 Can LII 50866, 2010 ONCA 397

This was another case involving a bankrupt load broker and the resulting priority dispute involving secured creditors against unpaid carriers. The Ontario Court of Appeal gave very brief reasons in its dismissal of the appeal and cross appeal of the trial decision.

Nadiscorp Logistics Group Inc. ("Nadiscorp") was a logistics company that arranged services for shippers and engaged the services of truckers in that regard. The carriers in this matter did not carry goods into or out of Ontario. Typically, shippers paid freight charges to Nadiscorp, which would then pay the carriers. Unfortunately, Nadiscorp went into Receivership and a receiver was appointed to handle all the property and business including undertakings of Nadiscorp.

Pursuant to the Receivership order, the Receiver was authorized to deposit all funds received or collected by it "into one or more new accounts to be opened by the Receiver". Accordingly, the Receiver opened a general trust account and deposited all the funds it received or collected. The Receiver was aware that there was a trust obligation under the HTA and its predecessor legislation and that logistics companies such as Nadiscorp were required to hold "in trust" those funds that were received from shippers and intended for carriers.

The Receiver had made a review to determine if Nadiscorp owed any monies to any carriers and transferred the sum of approximately $300,000 from the general trust account that it had opened into a separate trust account as owing for carriers' trust claims. Needless to say, the secured creditors, particularly Hospitals of Ontario Pension Plan ("HOOPP"), did not agree that such a "priority" be given to the claims of the carriers. The issue also arose as to whether

only "Ontario" carriers would be able to so claim, if the priority was valid, Ontario being the only province with such a "trust" obligation.

Citing *GMAC v. TCT* and the *Re Norame* decisions, HOOPP submitted that the Receiver had not complied with the requirements of the HTA trust obligation when collecting receivables and, as such, those monies allegedly earmarked by Nadiscorp's Trustee for the carriers were not maintained in "trust" as was required to establish priority. Those funds, it was alleged, had not been segregated as received and kept in a separate trust account for the carriers, but instead had been improperly co-mingled into the general trust account. Accordingly, the general trust account opened initially by the Receiver and into which all amounts had been deposited did not conform to general trust principles and, accordingly, even though the funds were later separated, the funds had, at that moment in time, lost their status as "trust funds". Therefore, it was argued that the carriers had lost the protection afforded by the HTA and lost the associated priority over the secured creditors in the bankruptcy proceedings.

The Ontario Superior Court did not agree with HOOPP's submission and held that the Receiver was required to comply and did comply with both the aforementioned provision of the HTA as well as the relevant Receivership Appointment Order. The Court ruled that all of the funds in the Receiver's account were always considered funds held in trust for the creditors of Nadiscorp regardless of which trust account the monies were initially kept in. The Receiver had deposited all initial monies into a general trust account, thereafter transferring the amount of $300,000 into a separate trust account to fund potential carrier trust claims. Both accounts were trust accounts to the benefit of creditors and were not used for other purposes or those not in the nature of trust funds. Accordingly, the Court held that the funds earmarked for the carriers had not lost their status as trust funds. As such, the Court found for the carriers in terms of priority over the secured creditors. This was a significant win and the Court of Appeal agreed. It stated in brief reasons,

> "In our view, the funds collected by the receiver never lost their character as trust funds. Unlike the case of *T.C.T. Logistics Inc.,* none of these funds were co-mingled with funds collected by the bankrupt company pre-receivership, and those collected by the receiver for services provided by carriers remain identifiable. The appeal therefore fails."

Outside of Ontario Carrier claims protected by the HTA trust obligation?

The second issue in the case was the question regarding which of the carriers would be protected by the HTA trust obligation and also the legislation's associated scope.

Counsel for the Receiver took the position that any carrier that did not carry goods into or out of Ontario was not entitled to the benefit of the HTA trust obligation. The carriers in this case did not carry goods for Nadiscorp into or out of Ontario and were not resident in Ontario. They were, then, not automatically within the purview of the Ontario legislation. The carriers had, however, carried goods for Nadiscorp in other Canadian jurisdictions and counsel for these carriers argued that consideration of the "reach" of the legislation should be whether or not Nadiscorp itself, as operating in Ontario, was bound by the HTA and the HTA trust obligation, as opposed to concerning an analysis as to *where* the carriers happened to undertake their mandate.

The Court ruled that the applicability of the HTA trust obligation did not depend on an analysis of the contracts as between the broker and the carrier and the particular geographic routing of the carrier for any shipment in question. Rather, the question was whether the operations of Nadiscorp were governed by the HTA.

The Court found that the HTA trust obligation concerned any "person who arranges with an operator to carry the goods of another person". Nadiscorp conducted its business in Ontario and it engaged the services of various operators or carriers to transport various loads both interprovincially and intraprovincially.

Counsel for the "outside of Ontario" carriers submitted that it followed that Nadiscorp's arrangement of the carriage of the goods in question, therefore, took place in Ontario, where Nadiscorp conducted its business. Insofar as the orders to carry goods originated in or were arranged from Ontario, it was submitted that the "out of Ontario" carriers should benefit from the protection of the HTA trust obligation.

The Court accepted this submission, ruling that, insofar as Nadiscorp arranged the carriage of goods of another person while Nadiscorp was a resident in Ontario, there was no basis in upon which the Receiver could discriminate between carriers who were resident in Ontario and those who were not, or as concerns where they happened to undertake their services once mandated by Nadiscorp. The Court also noted that there is nothing in the definition of "operator" in the HTA to suggest that the term is limited to a carrier resident in Ontario.

The Court of Appeal agreed and said in its brief reasons dismissing the cross appeal,

> "…we agree that the purpose of s. 191.0.1(3) is to impose obligations on persons in Ontario who arrange with an operator to carry the goods of another person. That is what the Ontario Legislature intended and what it is empowered to enact. The cross-appeal therefore is dismissed. "

The monies claimed by the unpaid carriers retained their nature as trust funds and the protection of the HTA trust obligation applied to any carrier engaged by Nadiscorp, as a resident of Ontario. The carriers maintained their priority over the secured creditors.

Other Provinces

Regarding other provinces, the non-payment of a carrier by the unscrupulous or bankrupt load broker may still happen, but without the deemed trust protection as there is in Ontario where load brokers are required to hold freight charges in trust for the carrier. (*4)

Stay Tuned

Next month, Part 2 will consider personal liability of officers and directors for freight charges, whether such debt survives bankruptcy and whether parties can contract out of the HTA trust obligation.

Kim E. Stoll
Follow Kim on LinkedIn and at url: linkedin.com/in/kim-stoll-transportationlaw

Endnotes

*(*1) R.S.0 1990 c. H8, as amended*

(*2) R.S.0 1990 c. T. 22, repealed January 1 2006

(*3) It is also interesting to note that the Court did not accept the proposition that a computerized accounting system was sufficient to provide certainty of subject matter required for a common law trust. While the "segregated" aspect of a statutory trust is clear in the legislation, we have no guidance as to whether one separate bank account will suffice to ensure all carrier freight amounts are considered segregated or whether multiple accounts are required to be delineated by carrier.

(*4) It should be noted that, while there is no obligation for a load broker in the province of Québec to hold freight charges "in trust", such intermediaries must still register with the Commission des transports du Québec. The Commission maintains a list of "approved" intermediaries.

3. New Hague Convention on Enforcement of Foreign Judgments Concluded

In July of this year, the Hague Conference on Private International Law rather quietly announced the conclusion of a new international convention, the (somewhat wordy) *Hague Convention on the Recognition of Foreign Judgments in Civil or Commercial Matters*. Forgettable name aside, it nevertheless holds out great promise for facilitating cross-border business. While its impact depends on the number of and rate at which contracting states adopt it, its potential for easing barriers to enforcing legal rights across borders is difficult to understate.

This new Hague Convention is a complementary convention to the earlier *Hague Convention on Choice of Court Agreements* of 2005. The theoretical scope of the new convention is extremely broad. It covers "judgments," which are defined simply as a "decision on the merits given by a court." These include a decision on costs (if the principle judgment for which costs were awarded is similarly enforceable). Further, of those judgments included in the convention, a review on the merits of the foreign judgment will not be permitted in the state in which it is to be enforced.

As a convention ostensibly on "commercial" rights generally, it is not perfect, however, containing some important exclusions, some of which are a little surprising. Notable among them are the following:

- Subject matter exclusions: among these, judgments for the carriage of goods, relating to intellectual property, insolvency, defamation, privacy, and certain anti-trust matters
-wills and succession, family law, and maintenance obligations
- arbitration decisions
-"non-compensatory" judgments (*e.g.* judgments that include "punitive"

damages) *might* not be enforced by a ratifying state

The convention also excludes judgments rendered by a court where the proceeding was the subject of a forum selection clause. These, however, fall within the complementary convention mentioned above.

A key plus of the convention is that it would appear to reduce the administrative costs of enforcing foreign judgments. In Ontario; for example, one must still commence a proceeding to enforce a judgment of a foreign court. Although there is a strong bias towards recognizing and enforcing foreign judgments, the process remains time consuming, and potentially costly if contested. The new convention promises to streamline this process by eliminating this procedural step.

The instances in which a judgment can be challenged are also significantly narrowed under the new convention. These include only where the defendant was given insufficient or ineffective notice, in cases of fraud, where the judgment is contrary to a choice of court agreement (that is, contrary to the complementary choice of law convention), or contrary to a prior judgment in the state where enforcement is sought. Otherwise, broadly where a judgment in enforceable in the requesting state, it shall be enforceable in the state where judgment is requested.

Despite the huge potential benefits of this convention, it is too early to predict what impact it will actually have. As suggested, a lot will turn on how many states adopt it, and how soon. Also, the convention permits contracting states to apply the convention non-reciprocally; for example, contracting states, relying on Article 18, can exclude matters from enforcement where the state has a “strong interest” in not applying the convention to that matter.

So far, and so early in the game, only Uruguay has signed on to the new convention. If the Choice of Court Convention is any guide, moreover, adoption may be slow. Since it came into force in 2015, only the EU, Mexico, Montenegro and Singapore have ratified the complementary Choice of Court Convention. However, since its potential for having a real positive effect on international trade and commerce is much greater than with its predecessor, the history of earlier conventions may tell us little about whether countries that stand to benefit from the new judgments convention will be as slow to adopt it. Definitely one to keep an eye on.

Oleg M. Roslak

4. The Incoterms® 2020 Are Here

The "Incoterms®" are a standardized set of essential contract terms for the international sale of goods. These terms are published by the International Chamber of Commerce (the "ICC") providing critical guidance in the attribution of transit risk, costs and delivery obligations as between a buyer and a seller.

Since its founding in 1919, the ICC has been committed to facilitating international trade. Over time it became clear that, as there are different trading practices and legal interpretations between countries, buyers and sellers of goods would benefit from a standardized set of trading terms. The ICC published the first set of Incoterms® rules in 1936. "Incoterms®" is an acronym for "international commercial terms". They feature abbreviations, such as the conventional FOB ("Free on Board") and EXW ("Ex Works") terms, which specify rules informing the relative risks and obligations between a buyer and a seller in the international trade of goods.

Since 1936 the Incoterms® have evolved to reflect commercial trends and realities. On September 10, 2019 the ICC published the most recent edition being the Incoterms® 2020 which will come into effect January 1, 2020.

The Incoterms® 2020 address the following key contractual elements in the international sale of goods:

Obligations: who does what as between the seller and buyer, e.g. who organizes carriage or insurance of the goods, or who obtains shipping documents and export and import licenses.

Risk: where and when the seller "delivers" the goods; that is, when the risk transfers from seller to buyer.

Costs: which party is responsible for which costs; for example, transport, packaging, loading or unloading costs, and checking or security related costs.

The Incoterms® are not intended in of themselves to be a contract of sale. Rather, they are intended to inform or to facilitate the same by addressing key risk identification and allocation factors. Buyers and sellers can "pick and choose", modify or alter such terms but it is recommended that, if and when they invoke any terms for use, or amend the same, they be deliberate and clear as to their intentions lest the casual use of a term (or a deviation from same) lead to confusion or unintended consequences.

There will be a total of 11 different standard trading terms with the Incoterms® 2020 being as follows:

Rules for any mode or modes of carriage

EXW ("Ex Works")

FCA ("Free Carrier")

CPT ("Carriage Paid To")

CIP ("Carriage and Insurance Paid To")

DAP ("Delivered at Place")

DPU ("Delivered at Place Unloaded")

DDP ("Delivered Duty Paid")

Rules for Sea and Inland Waterway Transport

FAS (Free Alongside Ship)

FOB (Free On Board)

CFR (Cost and Freight)

CIF (Cost Insurance and Freight)

The above 11 terms reflect a range where one can plot progressive burden(s) from the perspective of the buyer or seller in terms of transit risk, costs, and obligations. The EXW term can be considered "seller friendly" insofar as its

delivery point is an agreed point for the collection of the goods by the buyer, regardless of the destination to which the buyer will take them. At the other end of the range, DAP, DPU and DDP (collectively, the "D" terms) reflect "buyer friendly" terms, whereby the delivery point is the same as the destination point to which the seller or its carrier will carry the goods. With EXW, risk transfers from the seller to the buyer before the "transport cycle" starts. On the other extreme, with the aforesaid "D" terms, risk transfers towards or at the end of the "transport cycle". As to which term is employed is a matter of contract negotiation between the seller and the buyer. The remaining "F" and "C" terms listed above provide a range of relative risk and cost obligations, lying in between EXW and the aforesaid "D" terms.

As to which term is suitable for a particular purchase of goods is the subject of serious study and calls for business and legal planning taking into consideration the countries of origin and destination, the nature of the goods and applicable customs laws, to name only certain considerations. The nature and intent of this article is only to provide an overview introduction to the Incoterms® 2020. It is not intended to direct or dissect when and where any one Incoterm might be preferable over another.

Highlights on the Changes with Incoterms® 2020 from the 2010 Edition.

The Incoterms® 2020 are more intuitively structured relative to the 2010 Edition for increased clarity and to facilitate risk analysis. The general rule with the Incoterms remains with the point of delivery of the goods being the important discerning point as to who is responsible for costs incurred in transit. The new 2020 rules provide further details concerning the specific allocation of costs between a buyer and a seller and reflect an evolutionary improvement over the 2010 rules in that regard.

The main substantive changes are as follows:

1. *Change in the 2010 DAT (Delivered at Terminal) to DPU*: Under the 2010 DAT Incoterm, the seller delivered the goods once unloaded from the arriving means of transport into a "terminal", whereas in the 2010 DAP ("Delivered at Place") Incoterm the seller delivered the goods when the goods were placed at the disposal of the buyer on the arriving means of transport. With the 2020 Incoterms, DAT has been changed to DPU ("Delivered at Place Unloaded") to emphasize the reality that the place of destination could be any place and not only a "terminal".

2. *Changes to the Insurance Placement Obligations under CIP:* The maritime trade focused CIF ("Cost Insurance and Freight") and its neutral modal equivalent CIP ("Carriage and Insurance Paid to") address certain obligations on a shipper to place insurance on cargo. The requirement concerning the placement of insurance on the new CIP term has changed. The CIF term continues to require the seller to place insurance on the goods for the buyer with at minimum Institute Cargo "C" Clauses coverage. The CIP term will however now call for the placement by the seller of the Institute Cargo "A" Clauses coverage. As CIF is more often used in the carriage of bulk commodities, with CIP more commonly used with the carriage of manufactured goods the thinking was that the "A" coverage – being significantly more comprehensive than the "C" coverage - would be more meaningful in terms of insurance risk management.

3. *Transport Security Risk*: The 2020 rules give new prominence to the responsibility over transport security such as the mandatory screening of containers. This is cost / risk factor involving increasing potential logistical issues and related risk of delay. While the subject of brief discussion in the 2010 version of the Incoterms®, greater detail for the responsibility for costs is found in the new 2020 Edition.

4. *A Buyer or Seller Might Actually Perform the Transit of Goods*: Prior versions of the Incoterms® resting with the 2010 Edition only contemplated

the carriage of the goods being performed by a third party carrier not being related to the seller or buyer. The new 2020 FCA, DAP, DPU and DDP terms address the possibility that a party to a sales contract may actually perform the carriage. As such we now see the delivery requirement that a seller or a buyer will "contract *or arrange* at its own cost for the carriage of the goods from the named place of delivery".

5. *Bills of Lading with an on-board notation and the FCA Incoterms rule*: where goods are sold on FCA terms for carriage by sea, sellers or buyers (or more likely their banks where a letter of credit is in place) might want a bill of lading with an "on-board" notation. Delivery under the FCA rule is however completed before the loading of the goods on board the vessel. It will not be certain that the seller can obtain the on-board bill of lading from the carrier. Rather, that carrier will under the relevant contract of carriage likely be bound and entitled to issue an on-board bill of lading only once the goods are actually on board the vessel. To address this situation, the 2020 terms now provide for an additional option whereby a buyer and a seller can agree that the buyer will instruct its carrier to issue an on-board bill of lading to the seller after the loading of the goods on the vessel, the seller then being obliged to tender that bill of lading to the buyer, typically through the established banking channels.

Gordon Hearn

5. Employer Obligations on Election Day

Employers ought to review their statutory obligations to employees in light of the upcoming federal general election on October 21, 2019.

Under the *Canada Elections Act* (*1), every employee who is eligible to vote is entitled to have three consecutive hours off during voting hours on polling day for the purpose of casting their ballot. Voting hours across Canada are as follows (*2):

Time Zone	Voting hours (local time)
Newfoundland Time	8:30 a.m. – 8:30 p.m.
Atlantic Time	8:30 a.m. – 8:30 p.m.
Eastern Time	9:30 a.m. – 9:30 p.m.
Central Time*	8:30 a.m. – 8:30 p.m.
Mountain Time*	7:30 a.m. – 7:30 p.m.
Pacific Time	7:00 a.m. – 7:00 p.m.

*In Saskatchewan, if the polling day falls during a time of the year when the rest of the country is observing daylight saving time, voting hours are from 7:30 a.m. to 7:30 p.m. local time in the case of an electoral district in the Central time zone, and from 7:00 a.m. to 7:00 p.m. local time in the case of an electoral district in the Mountain time zone (*3).

For example, an employee in Vancouver who is scheduled to work a 9:00 a.m. to 5:00 p.m. (PDT) shift on election day would be entitled to a change in their schedule to allow for three consecutive hours off within which to vote. The three consecutive hours allowed to the employee is at the employer's convenience (*4). In the above scenario, the employer can choose between allowing the employee to begin their shift an hour later at 10:00 a.m., end their shift an hour early at 4:00 p.m., or, have three hours off in the middle of the day to allow the employee three consecutive hours to cast their vote.

Further, employers cannot deduct the pay of an employee or penalize an employee in any way for their absence from work for the purpose of voting. Employers are prohibited from interfering with an employee's right to three consecutive hours for voting, whether by intimidation, undue influence or otherwise (*5).

All employers – whether provincially or federally regulated – are required to give their employees time off to vote. However, given the time-sensitive nature of the transportation industry, this requirement does not extend to certain employees within that industry. An employer's obligation to provide employees three consecutive hours to vote does not apply to an employee of a company that transports goods or passengers by land, air or water who is employed outside of their polling division in the operation of a means of transportation, if the additional time off cannot be allowed without interfering with the transportation service (*6).

Janice C. Pereira

Endnotes
(*1) *Canada Elections Act,* SC 2000, c 9 ("*CEA*") at s. 132(1).
(*2) *CEA* at s. 128(1).
(*3) *CEA* at s. 128(2).
(*4) *CEA* at s. 132(2).
(*5) *CEA* at s. 133(1); s. 134.
(*6) *CEA* at s. 132(3).

6. Quebec Superior Court Clarifies Standard of Care Owed by Customs Broker and Scope of Contractual Exclusion of Liability Under Industry Standard Terms

The plaintiff corporation, Élégance Colonial Inc. ("Colonial"), operated in the field of processed wood products. In its operations, Colonial imported aluminum extrusions. In 2008, the Canada Border Services Agency ("CBSA") undertook an inquiry into such extrusions originating from China, and subsequently determined that these should be subject to additional duties pursuant to the Special Measures Imports Act ("SIMA") (*1).

SIMA applies punitive duties to goods which are deemed to be dumped into the Canadian market. This occurs when goods are sold by importers at lower prices than in their home markets or at a loss. This causes harm to domestic producers in Canada since the artificially deflated pricing of the importer(s) precludes domestic manufacturers from being able to compete with the imports. In the case of aluminum extrusions, SIMA duties were up to 119% of import price.

Colonial asked its customs broker, the defendant UPS SCS Inc. ("UPS"), for an opinion as to whether it would be subject to SIMA antidumping duties if it imported aluminum extrusions from China. The margin between aluminum extrusions subject to the punitive SIMA duty rate and similar goods unaffected was very minor and notably difficulty to identify given that the key factor for determining extrusions subject to SIMA was the process for manufacture rather than the final product.

UPS brought an application on behalf of Colonial to the CBSA for a preliminary ruling as to the Harmonized System ("HS") code applicable to the extrusions for import. The HS code ruled as applicable by the CBSA was not one of the codes for the extrusions typically subject to the punitive SIMA duties. On the strength of this, UPS advised Colonial that the goods would not be subject to SIMA duties and Colonial began importing the goods from China in 2009.

In 2011, the CBSA determined that the Colonial goods were in fact subject to SIMA. This led to Colonial being charged over $2m in SIMA duties. In addition, Colonial spent over $100,000 in unsuccessfully contesting the CBSA decision. Colonial brought a civil claim for indemnity from UPS on account of purported errors and omissions.

Kalichman J.C.S. for the Quebec Superior Court dismissed the claim against UPS (*2). The court first addressed the question of whether there had been malpractice on the party of UPS. The duty of care owed by a customs broker to its client was judged to be one of means rather the one of result, therefore the burden fell upon Colonial to prove fault on the part of UPS.

Contrary to the position advocated by Colonial, Kalichman J.C.S. was not of the opinion that UPS had failed to meet the standard of a diligent and prudent customs broker. The professional at UPS who had provided the opinion to Colonial had not fundamentally misunderstood the application of SI A duties. He had rather reached a different opinion from that of the CBSA with respect to which goods were subject to the punitive duties, he was not the only person who had reached different informed opinions from the determinations made by CBSA, and moreover Colonial had reiterated the UPS opinion in its unsuccessful efforts to challenge the CBSA ruling. This was excusable given the uniquely complex reasoning behind the SIMA determination for the extrusions that was process rather than product driven.

Notwithstanding that UPS had not alerted Colonial that there was a possibility that the CBSA could reach a different final determination, this was not representative of fault on the part of the customs broker. The fact the opinion was premised as the broker's position in this regard, was indicative that there was a risk that the Agency could reach a different conclusion from that advanced by UPS.

The issue of whether or not the defendant was also protected by its standard terms and conditions ("STCs") was moot based on the determination of the judge that the broker was not at fault. However, Kalichman J.C.S. addressed the issue in any event. The court took note that the STCs are those advanced by the Canadian Society of Customs Brokers, and that they are broadly used in the industry in Canada.

The court refuted the position of Colonial that the consulting opinion provided by UPS was a service beyond the scope of the STCs. The court found on the basis of expert evidence that it was typical for customs brokers to provide advice to their clients concerning import and export of goods, even without charging for those services. As such, the court was comforted that the opinion provided by UPS fell within the range of services covered by the STCs. The provisions of the STCs stipulating blanket immunity from liability for the broker in the event of errors and omission was found to have been enforceable if the court had in fact found any error on the part of the broker.

Based on all of the foregoing, the issue of damages was also moot; although the court also made comments in this regard. The judge found that if there had been liability, UPS would only have been liable for the duties arising out of 2009 shipment since it could not be expected indefinitely to shoulder risk on the part of its customer even if it gave a wrong opinion. The court also held that the plaintiff would have had the burden of proving its actual damages based on its own hypothesis that it would have imported the product from a third country had it been aware of the exposure to SIMA duties. The plaintiff had failed to bring evidence of alternative acquisition costs from Vietnam.

The decision is very helpful broadly for customs brokers and should be the source of some comfort as to the industry's exposure to customers. It is important that professionals not be held to an impossible standard of perfection in providing opinions in a field where some subjectivity of opinion will prevail and even an informed and diligent professional may reach a different conclusion from the governmental agency. Given the widespread use of the CSCB standard terms, their application, even in *obiter*, will be welcomed by the industry.

The court also gave useful guidance on the use of expert opinion; the court refuted the utility of the evidence of the duty of care expert put forward by Colonial, who was clearly biased as exemplified by his reference to plaintiff's counsel as his "boss".

Mark Glynn

(*1) *Special Import Measures Act* (R.S.C. , 1985, c. S-15)
(*2) Élégance Colonial inc. c. UPS SCS inc., 2019 QCCS 3512

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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 town where the structures depicted in photographs on page 10 and 11 are located. Email your answer to info@fernandeshearn.com with a subject line "Newsletter contest". First response with the correct answer wins.