THE NAVIGATOR

IN THIS ISSUE

MEMBER OF GLOBALAW THE INTERNATIONAL LAW GROUP

Railway Limitation for Damage to Cargo Inapplicable Due to Negligence

The Federal Court of Canada has recently released its decision in *ABB Inc. v Canadian National Railway Company and CSX Transportation, Inc.* (*1) clarifying the legal framework for carriage by rail and confirming that the federal legislation must be read against the backdrop of private law, in this case Quebec contract law.

Limitations of liability are commonplace in the transportation industry. In December 2011, the plaintiff ABB Inc. ("ABB") and the defendant Canadian National Railway Company ("CN") signed a "Confidential Transportation Agreement" (the "2011 Agreement") which limited CN's liability in respect of the carriage of "dimensional" (being very large in size) loads. The relevant part of this agreement reads as follows:

> For each and every haulage of Dimensional Loads requested by Shipper from CN during the term hereof, CN's liability for any loss or damage to the said Dimensional Loads, or any part thereof, shall be limited to USD $25,000, unless negligence is proven.

In July 2014, ABB contracted with CN for the transportation of an electrical transformer from ABB's plant in Varennes, Quebec, to its customer's facility in Kentucky, United States. The transformer was a dimensional load as it was larger and heavier than a typical carload shipment moved by rail.

CN issued a "Dimensional Services Proposal" which included the following term "For Limited Liability of $USD 25,000.00." In March 2015, ABB issued a purchase order to CN referencing the price quoted by CN in the July 2014 proposal, thereby forming a contract with CN for the carriage of the transformer (the "2015 Agreement"). On October 7, 2015, five days after taking possession of the electrical transformer, CN issued a tariff which stated, "Rate includes limited liability coverage of $25,000 USD while handled by Carriers shown in route."

As CN's network did not extend to Kentucky, CN retained the services of the defendant CSX Transportation, Inc. ("CSXT") for the American leg of the journey. ABB, however, only dealt with CN. It did not have direct

FIRM AND INDUSTRY NEWS

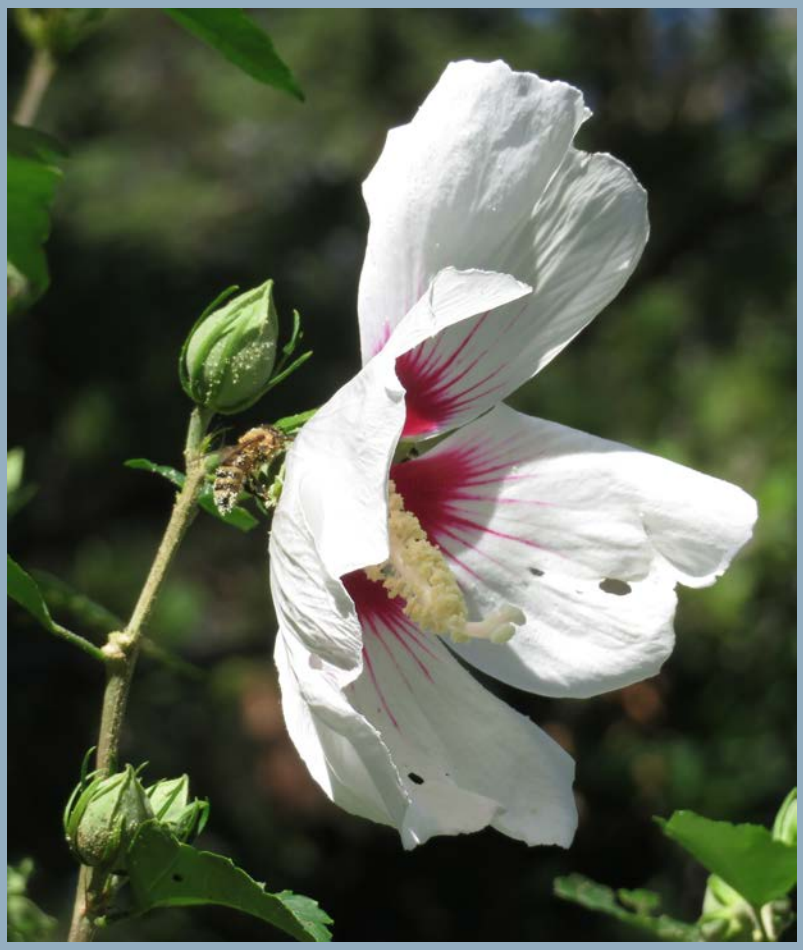
- **Fernandes Hearn LLP** is a member of **Globalaw™**, a top tier international affiliation of over 100 law firms. As a member of **Globalaw™**, Fernandes Hearn LLP has networking access to over 4500 attorneys in 85 countries, enhancing our transportation, trade law and business practice.

- **Women's Trucking Federation Canada**, *Bridging the Barriers Webinar Series,* September 14-17, Kim Stoll and Alan Cofman will be speaking on *Legal Issues Facing Trucking Today* on September 15, 2020. Please contact Kim or Alan for details regarding registration.

- **Fernandes Hearn LLP** continues its COVID-19 era series of complimentary client and industry webinar meetings with its presentation on September 11, 2020. Topics include a discussion of a new employment law decision, and contract language and considerations brought on by COVID-19. **Register here.**

- The 15th Edition of ***The Best Lawyers™*** *in Canada* for 2021 was published on August 27th 2020. Four firm members were included in the current listings. **Rui Fernandes** (Maritime Law / Transportation Law)**, Gordon Hearn** (Maritime Law /Transportation Law)**, Kim Stoll** (Maritime Law) and **Carole McAfee Wallace** (Transportation Law)**. Gordon Hearn** was also recognized as Lawyer of the Year – Transportation Law – Toronto.

- **Fernandes Hearn LLP** is pleased to welcome **Hero Salih** to the firm as a senior associate practicing in the corporate commercial area.



communications with CSXT with respect to this shipment.

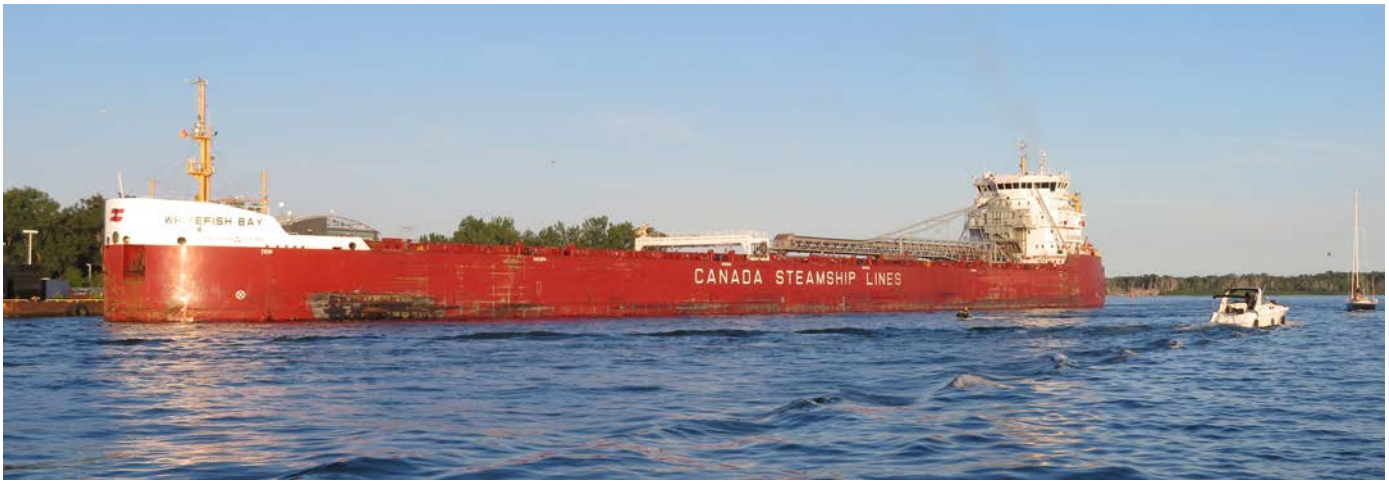
Both CN and CSXT performed a clearance check to ensure that the dimensions of the transformer would not exceed the available clearance of various obstructions along the proposed route. The transformer was cleared by both carriers for transport. While being carried by CSXT, the transformer hit a bridge and was severely damaged. CSXT's software failed to identify the insufficient height of that bridge.

ABB sued both CN and CSXT for damages, which were agreed to be $1.5 million. Both defendants, however, argued that ABB agreed to a limitation of liability. What was at stake in this case was not the existence of a limitation of liability, but its scope.

ABB argued that the relevant limitation of liability was found in the 2011 Agreement. CN and CSXT, on the other hand, argued that the relevant limitation was found in the 2015 Agreement and the Tariff, which does not refer to such an exception. In order to determine which limitation was applicable, the Court first had to determine the legal framework for carriage by rail.

The Court determined that the rules governing carriage by rail are derived from several sources. Interprovincial and international carriage by rail is a matter that comes under Parliament's jurisdiction, according to sections 91(29) and 92(10)(a) of the *Constitution Act, 1867*. In the exercise of that jurisdiction, Parliament enacted the *Canada Transportation Act* (the "*Act*") (*2), which regulates air and railway transportation. The enactment of federal legislation under that head of jurisdiction does not exclude the application of provincial legislation, specifically that which relates to property and civil rights modernly referred to as private rights. Rather, the application of provincial private law (in this case the Quebec Civil Code) supplements the provisions of the federal legislation that resort to private law concepts.

As railway companies are capable of unilaterally controlling the means of transporting goods to the market, the *Act* attempts to even the playing field between railway companies and shippers. Sections 117, 118, and 119 of the *Act* provide that railway companies must publish their tariffs and that they cannot charge rates other than those set out in these tariffs. As set out in section 87 of the *Act*, a tariff may include rates and also terms and conditions of carriage. Section 113 of the *Act* requires railway companies to accept to transport all traffic



offered for the carriage on the railway. Section 126 of the *Act* allows shippers and railway companies to conclude confidential contracts governing the terms of carriage of goods between them. According to section 117 of the *Act*, these confidential contracts supersede the provisions of any tariff.

A party's failure to perform its obligations under a contract gives rights to contractual liability. Section 137 of the *Act* empowers the Canada Transportation Agency (the "Agency") to make regulations that will govern, absent an agreement, liability issues between a shipper and a railway company. The Agency made the Railway Traffic Liability Regulations (the "Regulations") (*3). Under section 4 of the Regulations, a railway carrier is liable for any loss or damage to goods in its possession. Section 8 of the Regulations deals with the issue of liability when goods are transported by successive carriers.

Section 137 of the *Act* also allows a shipper and a railway company to agree to a different liability regime provided that they do so in compliance with subsection 137(1) of the *Act* which reads as follows:

> 137. (1) Any issue related to liability, including liability to a third party, in respect of the movement of a shipper's traffic shall be dealt with between the railway company and the shipper only by means of a written agreement that is signed by the shipper or by an association or other entity representing shippers.

Thus, the Court reiterated that a railway company may limit its liability, however it cannot do so unilaterally by inserting a term to that effect in its tariff. It must obtain a "written agreement that is signed by the shipper".

The Court found in favour of ABB saying that the 2011 Agreement, instead of the 2015 Agreement and Tariff, governed the relationship between ABB and CN. The parties intended that the limitation of liability have an exception for cases of negligence. ABB and CN did not intend to displace the 2011 Agreement. By entering into the 2011 Agreement, the parties set certain terms of their future contractual relationships and defined the parameters of the limitation of liability. If the 2015 Agreement and Tariff were to be accepted, ABB would have been deprived of the protection afforded by section 137 of the *Act*.

The Court further found that CSXT was clearly negligent, and that CN was liable for CSXT's negligence under section 8(1) of the Regulations, which reads as follows:

> 8. (1) Where the transportation of goods involves more than one carrier, the originating carrier shall be liable for any loss of or damage to the goods or for any delay in respect of the goods while the goods are in the possession of any other carrier to whom the goods have been delivered.
>
> (2) The onus of proving that any loss of or damage to goods or any delay in respect of goods was not caused by or did not result from any act, negligence or omission of any other carrier to whom the goods have been delivered shall be on the originating carrier.
>
> (3) The originating carrier is entitled to recover from any other carrier referred to in subsection (1) the amount paid by the originating carrier in respect of liability for loss of or damage to the goods while those goods were in the possession of the other carrier.
>
> (4) Nothing in this section limits or in any way affects any remedy or right of action a person may have against any carrier

In the alternative, and in any event, the Court determined that article 2049 of the Quebec Civil Code would allow ABB to sue CN for damage to the goods while carried by CSXT.

Lastly, the Court found that CSXT was directly liable to ABB by virtue of a mechanism of

contractual extension set forth in Quebec's Civil Code making CSXT bound to the contact between ABB and CN. The *Act* and Regulations do not state explicitly that the shipper has a direct claim against a connecting carrier. Nor do they state the contrary, they are simply silent on the issue. Subsection 8(4) of the Regulations preserves the rights that a shipper may have against a carrier which must contemplate recourses against a connecting carrier with whom the shipper had no direct dealings. Thus, subsection 8(4) of the Regulations invites in this case the application of Quebec private law.

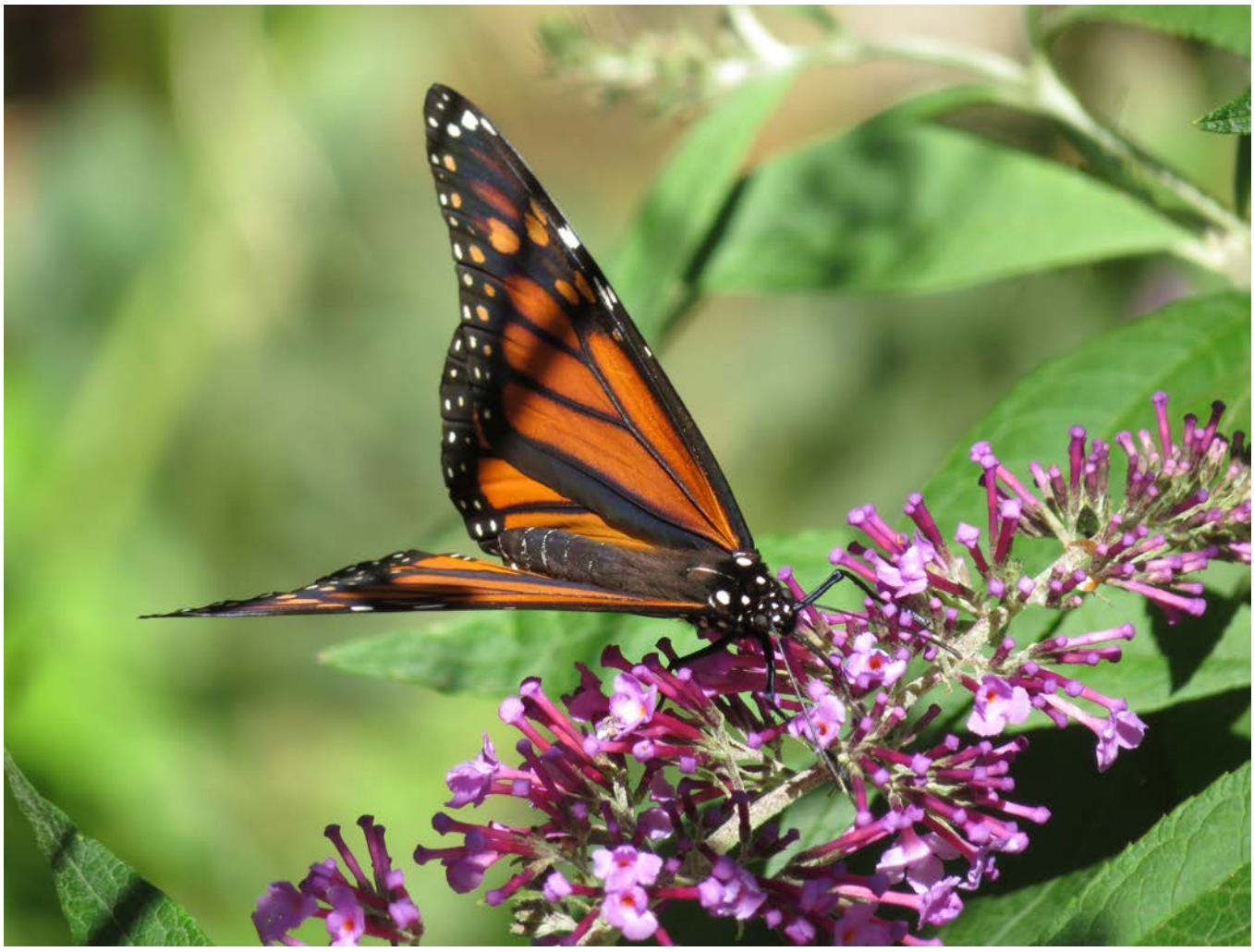
Articles 2031, 2035, and 2051 of the Quebec Civil Code deem the connecting carrier a party to the contract between the shipper and the originating carrier. The shipper may bring the action against the carrier with whom the contract was made or the last carrier. Thus, CSXT became a party to the contract CN had concluded with ABB, including the term that the limitation of liability was subject to the exception of negligence.

Both CN and CSX were accordingly found jointly and severally liable to ABB for $1.5 million as a result of the damage to the transformer.

Andrea Fernandes

Endnotes
(*1) 2020 FC 817
(*2) SC 1996, c 10
(*3) SOR/91-488

[Editor's Note: Rui Fernandes and Andrea Fernandes argued this case in Federal Court]



2. The End of IDEL Could Mean the End of the Employment Relationship: Considerations in Calculating a Fair Termination Package

On May 29, 2020, the provincial government issued the *Infectious Disease Emergency Leave* regulation (*1) (the "IDEL Regulation"), which is geared towards providing employers with temporary relief from certain obligations under the *Employment Standards Act, 2000* ("*ESA*"). Pursuant to the IDEL Regulation, employers are permitted, for reasons related to the COVID-19 pandemic, to temporarily reduce a non-unionized employee's hours or wages, or temporarily lay-off a non-unionized employee altogether, without triggering the *ESA* lay-off or constructive dismissal provisions.

The temporary relief under the IDEL Regulation is limited to the "COVID-19 period", which runs from March 1, 2020 until 6 weeks after the expiry of the provincial declaration of emergency (the "Emergency Declaration").

On July 24, 2020, Ontario's Emergency Declaration came to an end, meaning that absent any further amendments or new regulations, the temporary relief afforded to employers pursuant to the IDEL Regulation will end on September 4, 2020.

If an employer continues to keep an employee on reduced hours or wages after September 4, 2020, this may, in certain situations, amount to a constructive dismissal, which would terminate the employment relationship. Therefore, the expiration of the relief afforded under the IDEL Regulation will force some employers to made the tough decision to let go of some of their employees, which raises the question of how much termination pay the employer is obligated to provide and the employee, entitled to receive.

The "default" guidelines for a termination package usually come from employment contracts with valid termination clauses that provide a roadmap for how an employee's entitlements on termination are to be calculated.

Such "default" guidelines cannot apply if the employment contract is either a) silent on the question of how payments on termination are to be calculated; or b) contains an invalid provision regarding payments on termination (for example, where the provision stipulates an amount payable on termination that is lesser than the amount that the employee would be entitled to receive under the *ESA*). In such

situations, the employee might be entitled to something called "common law reasonable notice of termination," which is based on the principle that an employee is entitled to a period of notice of termination that is equivalent to the amount of time that it would take for the employee to find similar employment.

In a landmark decision by the Supreme Court of Canada in 1960 (*1), the Court stated that "there can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of notice must be decided with reference to each case…". Accordingly, what constitutes "reasonable notice" can vary greatly on a case-by-case basis, with regard to certain considerations widely known as the "Bardal Factors," which include the character of employment; the employee's length of service; the employee's age; and, the availability of similar employment, having regard to the experience, training and qualifications of the employee.

The Bardal Factors represent the starting point in determining the reasonable notice period. Since the Supreme Court's decision in *Bardal*, there have been thousands of rulings that expressly demonstrate how the Bardal Factors have been applied within the factual matrix of a given case. In addition to the Bardal Factors, the courts have also assessed the reasonable notice period through the lens of various other considerations such as the employee's salary; whether the employer induced the employee away from previous employment or made promises to the employee of long-term, stable employment; the economic situation at the time of termination, including both wide-scale downturns as well as industry-specific recessions; and, whether the employee is bound by a non-competition or non-solicitation clause that would make it all the more difficult for the employee to secure comparable employment.

Once the appropriate reasonable notice period is determined, the employee usually receives a lump sum payment, subject to deductions made in the ordinary course, as termination pay in lieu of notice of the employee's termination.

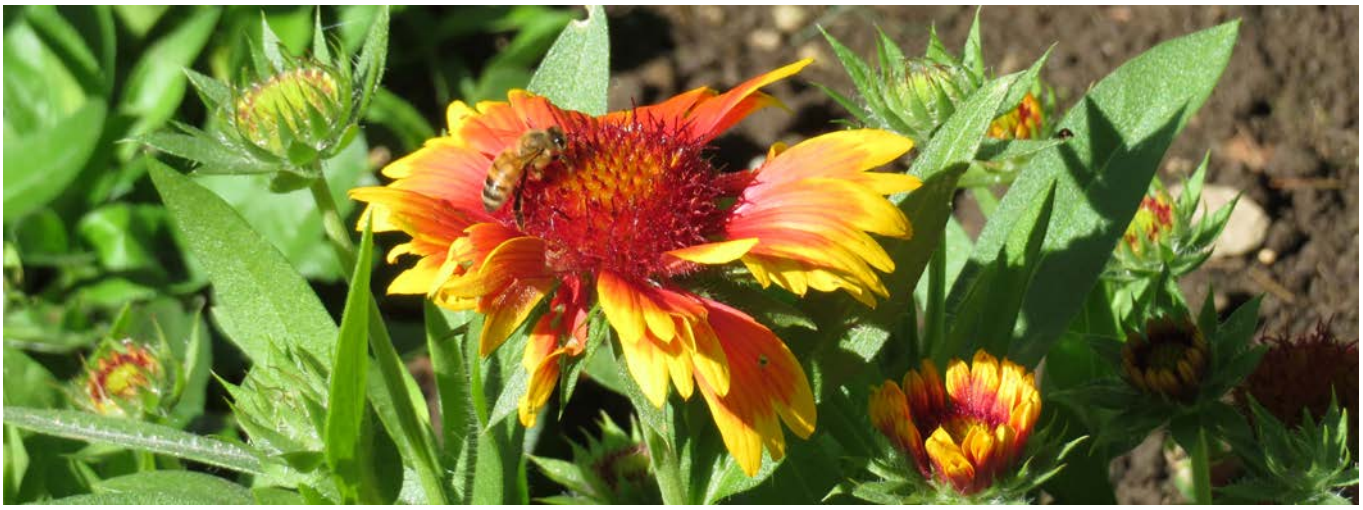
Fernandes Hearn LLP routinely advises both employers and employees on their obligations, rights and responsibilities at law. If you are considering terminating an employee, or if you have been terminated and are uncertain whether the severance package offered to you is appropriate, we encourage you to contact our firm for a consultation.

Janice C. Pereira

Endnotes

(*1) O. Ref. 228/20: *Infectious Disease Emergency Leave* regulation ["IDEL Regulation"].

(*2) *Bardal v. Globe & Mail Ltd.* (1960), 24 DLR (2d) 140 ["*Bardal*"].



3. Forwarder Not Entitled to Safeguard Order in Quebec Proceeding

In *FLS Transportation Services Limited v. Fuze Logistics Services* 2020 QCCS 2604 the claimant FLS Transportation Services Limited ("FLS") sought a safeguard order against its competitor Fuze Logistics Services ("Fuze"). A safeguard order is a decision of the court on an urgent matter that cannot await the stage of provisional measures or of the final trial.

FLS is a company operating in the fields of customs brokerage, international freight forwarding and ground transportation. Fuze is engaged in similar activity.

On July 1, 2020, a statutory holiday, FLS received a flurry of resignations beginning at 7 a.m., with a cascade of e-mails attaching very similar letters from employees announcing their immediate departure. In all, approximately a dozen would tender their resignations within the space of a few days.

Over the course of the following weeks, FLS learned that virtually all of those former members of its staff were now in the employ of Fuze. LinkedIn accounts and e-mails from customers sent inadvertently to FLS revealed that some employees had seamlessly continued their service to clients under the auspices of their new employer, in at least one case using FLS's price quotation material to which the logo of Fuze was affixed to an otherwise identical document.

On July 21, 2020, FLS launched legal proceedings against Fuze, as well as the former employees, originally twelve in number, later thirteen. The basis of those proceedings was the presence of restrictive covenants in certain of the employment contracts, notably in the form of obligations not to compete, not to solicit customers and, to a lesser extent, not to solicit employees, coupled with their general duty of loyalty set out in the *Civil Code of Québec* at article 2088.

Article 2088 of the *Code* provides:

> The employee is bound not only to perform his work with prudence and diligence, but also to act faithfully and honestly and not use any confidential information he obtains in the performance or in the course of his work. These obligations continue for a reasonable time after the contract terminates and permanently where the information concerns the reputation and privacy of others.

On July 22, 2020, FLS obtained a provisional injunction from Justice St–Pierre. Fuze did not appear at the hearing as it had been served only the day prior. Justice St-Pierre's order compelled compliance with the non-competition and non-solicitation obligations, in addition to addressing matters having to do with confidential information and the return of company property.

Over the next few days Fuze retained counsel and filed affidavits in response. The Court noted: that the affidavit evidence filed by the Fuze "painted asserted an unflattering picture of the manner in which FLS's Montreal branch was operated. In short, the affidavits set out that, since the share purchase in 2016, there had been massive instability in FLS's staffing personnel involving several with seemingly capricious dismissals and many voluntary departures."

The following assertion was made in the sworn statement of Mr. Di Girolamo, who referred to the FLS pre- and post-share purchase as "Original FLS" and "New FLS" respectively:

> "32. In total, some 254 employees of New FLS were terminated or quit their employment during the period from February 2016 to July 6, 2020, out of just over 300 employees at the time of the acquisition of Original FLS by New FLS."

The Court noted that "the employees' affidavits spoke generally of a "toxic" work environment, but also provided specific details giving–gave

credence to the presence of a generalized feeling of discomfort and insecurity flowing from the movement of personnel and, from what some perceived as a short-sighted approach focused on cutting costs, to the potential detriment of the future viability of the business."

Under Quebec law, more specifically under article 2095 of the *Civil Code of Québec*, the enforceability of otherwise valid restrictive covenants can be compromised if the employer terminates an employee without a serious reason or, more relevantly, if he himself has given the employee a serious reason to leave. This is true not only of non−competition, but also of non-solicitation clauses

The next phase of the hearing took place before Justice Gouin. Given article 2095, Justice Grouin was faced with having to balance two competing factors.

First, the need, at the safeguard order stage, to issue the order in the presence of an "apparent" right — doubtful though it may be — provided that the other criteria for issuance of the order have been met, deferring to the merits examination of litigious points that can only be decided on the basis of a complete evidentiary record.

Second, the need not to defer for too long a period of time the resolution of the malaise alluded to in the former employees' sworn statements.

Faced with that dilemma, and lacking sufficient time for a lengthy hearing, Justice Gouin ordered that FLS's local branch director provide an affidavit setting out the reasons for the high turnover of personnel.

An affidavit from the Montreal branch director was provided. Unfortunately, despite having a total of 42 paragraphs, it contained only one short paragraph directly addressing the concerns raised in Justice Gouin's order.

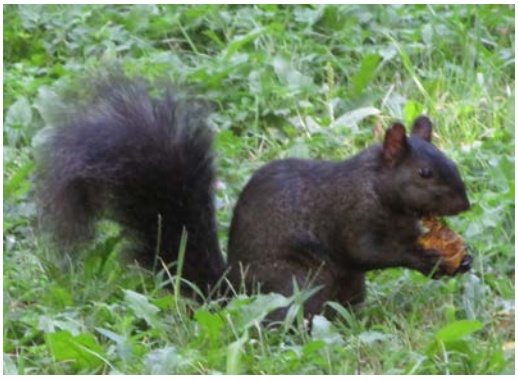
On August 20, 2020, at the final hearing in the saga, Justice Mark Phillips found that FLS's response to Justice Gouin's order was inadequate and the affidavit failed to comply with the order of Justice Gouin.

Justice Gouin's order effectively put FLS on notice that, absent cogent, detailed and compelling explanations for the high level of attrition, enforcement of the restrictive covenants would be on very shaky ground. In that context, Justice Phillips found that "the Court can accept nothing less than precise explanations of the utmost candour. It cannot content itself with a few dismissive words. In the view of the Court, the affidavits provided by Plaintiff made light of Justice Gouin's order."

Justice Phillips held that, in responding to Justice Gouin's order as it had done, FLS failed to provide candid and precise explanations. In so doing, it forfeited its right to obtain a further extension of the orders previously issued. The application for a safeguard order was therefore dismissed.

All that said, Justice Phillips noted that the Court's dismissal of the application for a safeguard order should not be taken as an endorsement of Fuze's conduct. Justice Phillips also noted that if FLS acts on its stated intention to pursue indemnification in the form of damages, it may perhaps turn out that, following a trial on the merits, certain of the restrictive clauses could prove to be enforceable and be shown to have been infringed, the whole resulting in rights to disgorgement of ill−gotten gains and other remedies.

Rui Fernandes



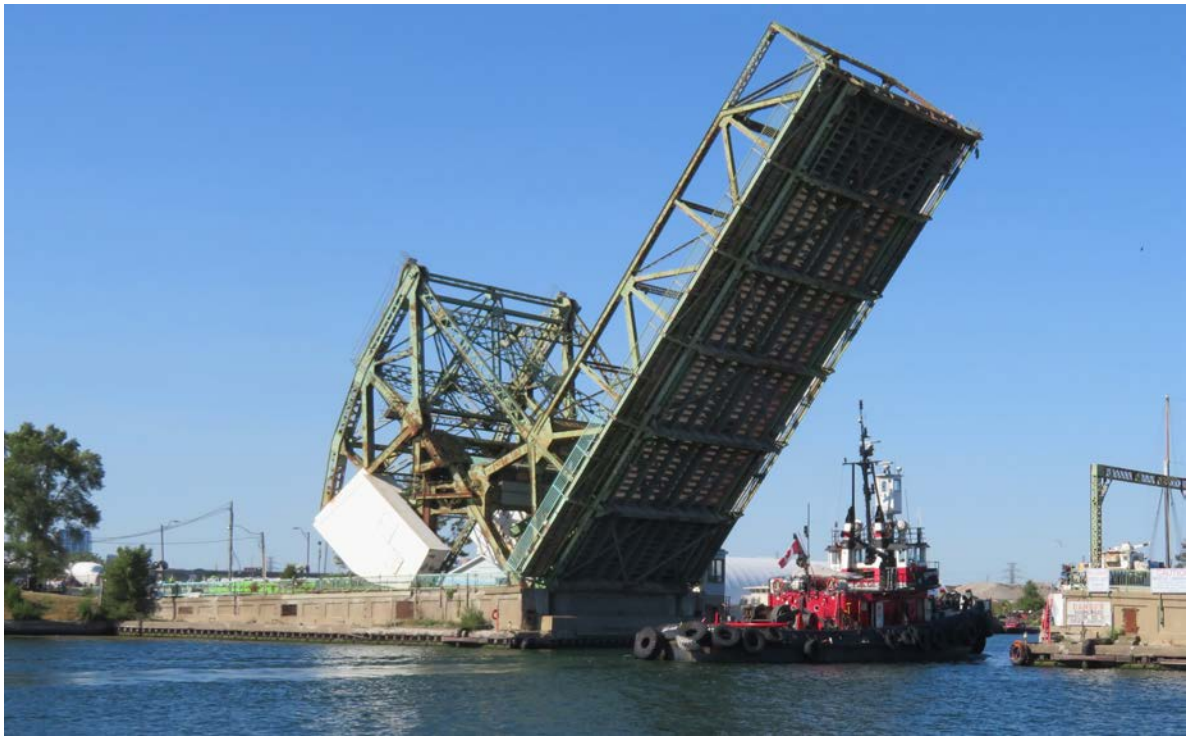
4. *Jazz Aviation LP v Canadian Flight Attendant Union*, 2020 CanLII 57429 (CA LA)

This labour arbitration concerned the entitlement of flight attendants who were in receipt of a notice of layoff to severance pay. The layoffs were necessitated by the devastating effect the COVID-19 pandemic has had on the airline industry.

It was the position of the Canadian Flight Attendant Union (the "union") that Article 12.05 (e) of the collective agreement requires the payment of severance pay. It was the position of the employer that severance pay is only available if the conditions under Article 12.13 are met, namely that the layoff is due to technological change, base closure, complete company closure or for medical reasons ("the enumerated reasons"), none of which apply on the facts in this case.

The relevant provisions of the collective agreement are as follows:

> **ARTICLE 12-REDUCTION IN FORCE**
> …
> 12.05 A Flight Attendant, in receipt of [*sic*] lay-off notice, will be laid-off at the base of their last permanent assignment unless they exercise their seniority to:
> …
> (e) Accept a severance in accordance with Article 12.13.
> …
> 12.12 Flight Attendants' rights under this Article shall terminate at the end of five (5) years from the effective date of lay-off or immediately upon the acceptance of severance in accordance with Article 12.05(e). The Flight Attendant on lay-off status shall be deemed severed from the employ of the Company, unless re-employed with the company within this period.
>
> 12.13 Should the services of a Flight Attendant who has completed one (1) year of employment be terminated due to technological change, base closure, complete Company closure or for medical reasons, the Flight Attendant will be entitled to a severance package equivalent to two (2) weeks' pay per year of Company service or pro-ration thereof. This amount will satisfy any requirements for severance payments provided for under the Canada Labour Code.



The union argued the following points:

a) The union argued that the language of Article 12.05 is clear that a Flight Attendant in receipt of a layoff notice is entitled to severance in accordance with Article 12.13. In the union's submission, the reference to Article 12.13 is a reference to the formula by which severance is calculated in Article 12.13, namely two weeks per year of service for employees who have completed one year of employment.

b) The union noted that Article 12 is a comprehensive article to deal with reduction in the workforce by providing various options to mitigate the impact of a reduction in the workforce. The union vigorously argued that Article 12.05 deals with layoffs and does not deal with termination of employment which is explicitly the content of Article 12.13.

c) The union argued that, since Article 12.05(e) is in the layoff article, it follows therefore that it must contemplate layoff for some reason other than the four enumerated grounds set out in Article 12.13. The union asked rhetorically that, if Article 12.05 (e) does not provide for severance in these circumstances, then why is it even in the collective agreement?

d) The union noted that if the employer's argument was accepted then Flight Attendants laid-off for any reason other than the enumerated reasons in Article 12.13 would never receive any severance under the collective agreement.

e) The union asserted that the fallacy in the employer's argument was that it equates layoff and termination which are clearly different concepts giving rise to different treatment under the collective agreement.

The employer argued the following points:

a) The employer argued that the language of the collective agreement is clear and unambiguous. Article 12.13 explicitly limits the payment of severance pay to instances of termination of employment as a result of one of the enumerated reasons. The employer asserted that there are no other circumstances in which severance is payable under this provision of the collective agreement.

b) The employer asserted that the reference in Article 12.05(e) to severance "in accordance with Article 12.13" means that a Flight Attendant in receipt of a layoff notice is entitled to severance only if both eligibility requirements under Article 12.13 are met, namely the Flight Attendant must have completed one year of employment and the layoff was as a result of one of the four enumerated reasons.

c) The employer argued that its interpretation was consistent with the approach that arbitrators take to the interpretation of collective agreements that:

> "…the words used must be given their plain and ordinary meaning unless it is clear from the structure of the provision read in context that a different or special meaning is intended, or the plain and ordinary meaning result would be illegal or absurd. All words must be given meaning, different words are presumed to have different meanings and specific provisions prevail over general provisions Both the words that are there and the words that are not there may be significant… particularly when the parties … are sophisticated users of language ."[*Bruce Power LP v Society of United Professionals*, 2019 CanLII 24930 (ON LA)(Surdykowski) (*Bruce* Power) at para. 23]

d) The employer argued that the argument of the union was inconsistent with the language of the collective agreement in that the union only agreed that one of the eligibility conditions (employment for one year) applied and not the other eligibility requirement (enumerated reasons for layoff). The employer argued that if the intention of the parties in Article 12.05(e) was that only parts of Article 12.13 were to apply then it would have been a simple matter to have said so explicitly.

The arbitrator held that the grievance be dismissed accepting the employer's arguments.

Rui Fernandes

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FERNANDES HEARN LLP

155 University Ave. Suite 700

Toronto ON M5H 3B7

416.203.9500 (Tel.) 416.203.9444 (Fax)

CONTEST

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