THE NAVIGATOR

IN THIS ISSUE

Supreme Court of Canada: Conduct of Parties Can Amount to a New Enforceable Contract

On October 23, 2020, the Supreme Court of Canada released its decision in *The Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corporation* ("*Crystal Square*"), 2020 SCC 29, an appeal about whether a pre-incorporation agreement was binding on the owner of an office tower. The SCC's ruling in *Crystal Square* clarifies the requirements for finding pre-incorporation contracts binding on corporations following incorporation, *i.e.,* the enforceability of post-incorporation contracts.

Facts

In March 1999 Crystal Square Development Corporation ("Crystal Development") entered into an air space parcel agreement ("ASP Agreement") with the City of Burnaby. The agreement contained provisions regarding the parking facility in the development of office and residential towers, hotel and retail complexes.

In 2002 Crystal Development sold the parking facility to Crystal Square Parking Corporation ("Crystal Square"). It assigned the ASP Agreement to Crystal Square. Strata Plan LMS 3905 ("Strata") was an owner of the office tower in the development. Strata was incorporated in May 1999 (several months after the ASP Agreement was entered into).

Strata's members used the parting facility and Strata paid parking fees at the ASP Agreement rate. A dispute arose as to fees. Strata launched a civil claim against Crystal Square seeking to invalidate the ASP Agreement's provisions on additional fees or a declaration that the ASP Agreement was unenforceable. It argued that it was not a party to the ASP Agreement since it pre-dated Strata's incorporation.

Finding

The Supreme Court of Canada held that the payment obligations in the ASP Agreement were enforceable against Strata on the basis that Strata demonstrated an objective intention to be bound by the terms of the ASP Agreement regarding the parking facility. After purchasing the parking facility, Crystal Square objectively manifested an intention to offer Strata a contract on the terms of the ASP Agreement by making valid parking passes available to Strata's members in a quantity which

FIRM AND INDUSTRY NEWS

• **Gordon Hearn** will be representing the Firm at the semi-annual meeting of the **Conference of Freight Counsel** on January 7, 2021.

• **Gordon Hearn** and **Kim Stoll** will be representing the Firm at the Chicago Regional Seminar held by the **Transportation Lawyers Association** on January 21 and 22, 2021.

• The **Fernandes Hearn LLP Annual Seminar** will be held on February 11th, 2021 virtually on the Zoom platform.

FIRM AND INDUSTRY NEWS

Fernandes Hearn LLP Annual Seminar – February 11, 2021
Theme: Back to Basics
RIBO Credits Applied For

8:30am – 8:45am	Signing In
8:45am – 9:00am	Welcome Remarks *Rui Fernandes*
9:00am -10:45am	Current Employment Issues and Recent Decisions *Carole M. Wallace, Janice Pereira*
9:45am – 10:30am	Contractual Indemnities *Gordon Hearn*
10:30am – 11:00am	Marine Insurance Coverage *James Manson*
11:00am – 11:15am	Coffee Break
11:15am – 12:00pm	Current Issues Faced by Freight Forwarders *Rui Fernandes*
12:00pm – 12:45pm	Update on Rail/Air/Trucking/Marine Cases *Andrea Fernandes* – Rail / Air *Alan Cofman* – Trucking /Marine
12:45pm – 1:15 pm	Lunch Break
1:45pm – 2:15pm	Motor Truck Cargo Insurance Coverage Issues *Kim Stoll*
2:15pm – 2:45	Warehouse Storage Issues *Oleg Roslak*
2:45pm – 3:45pm	Court System Mediation and Arbitration, Panel *Rui Fernandes* *Alan Cofman*

Registration:
When: Feb 11, 2021 08:30 Eastern Time (US and Canada)

Register in advance for this meeting:
https://us02web.zoom.us/meeting/register/tZUvdOuhpjgrH9FqfC4wWp263tjnTcTn0hkf

After registering, you will receive a confirmation email containing information about joining the meeting.

corresponded to their share of parking spaces under s. 7.5 of the ASP Agreement. As well, Crystal Square's maintenance and operation of the parking facility over the years would have required significant capital expenditures. The ASP Agreement in fact provided for such expenditures, which were factored into the parking fee paid by Strata. Strata's members ought to have known that valuable consideration was being rendered for their benefit with an expectation that they would pay for it on terms corresponding to those set out in s. 7.5 of the ASP Agreement. In turn, Strata objectively manifested an intention to accept Crystal Square's offer by paying the fees contemplated in the ASP Agreement, and its members exercised the rights corresponding to those payments by parking in the facility after Crystal Square became the facility's owner. The members, having either assented to the consideration or acquiesced in its being rendered, taking the benefit of it when it was rendered, should be taken impliedly to have requested its being rendered. Thus, a reasonable person in Crystal Square's position would consider that Strata's course of conduct constituted assent by Strata to the terms set out in s. 7.5 of the ASP Agreement. Strata's objective conduct evinced an intention to enter into a legally binding agreement on the terms set out in s. 7.5 of the ASP Agreement.

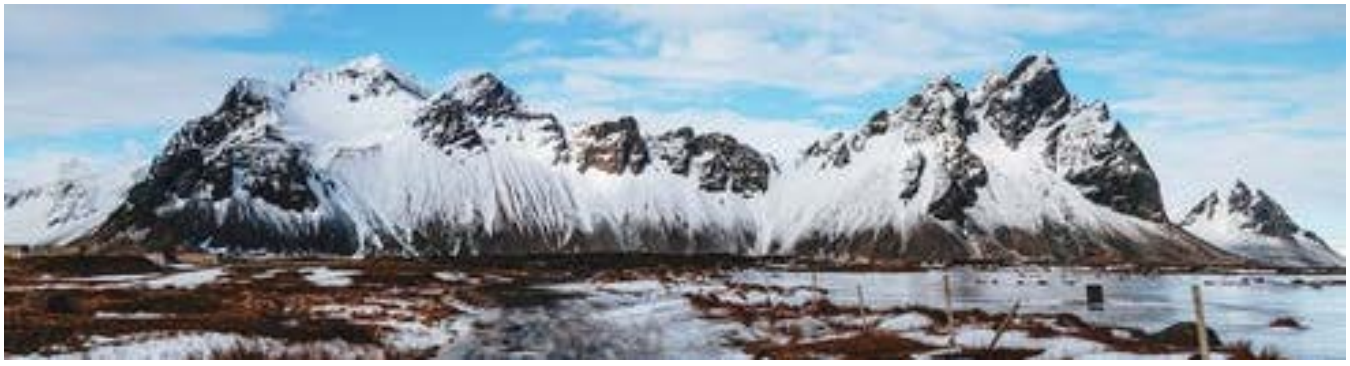
The Supreme Court held that although a corporation is not bound by a pre−incorporation contract, it may, after coming into existence, enter into a new contract on the same terms as those of the pre−incorporation contract. The applicable test for finding that a post-incorporation contract exists is the same as the one for finding that any other agreement exists at common law. The test is objective, and the offer, acceptance, consideration and terms may be inferred from the parties' conduct and from the surrounding circumstances. An outward manifestation of assent by each party such as to induce a reasonable expectation in the other is required, and an examination of how each party's conduct would appear to a reasonable person in the position of the other party is necessary.

Takeaway

The takeaway from this Supreme Court decision is that the traditional approach to contract formation applies to post-incorporation contracts. This means that a contract's elements – offer, acceptance, consideration, and terms – can be inferred from the conduct and circumstances surrounding parties' arrangements and conduct.

It is therefore important for any business to consider how their informal or ad hoc business arrangements and conduct when dealing with one or more other parties, could reasonably be perceived. Even if the business *subjectively* perceives some of their own business activities and arrangements as non-legally binding, a court could consider some or all aspects of them enforceable in the event of a legal dispute.

Rui M. Fernandes



2. Modernizing Litigation in Ontario: Changes to the *Rules of Civil Procedure* 2021

On November 30, 2020, the Attorney General of Ontario announced changes to the *Rules of Civil Procedure* that come into effect on January 1, 2021. These changes will make permanent many of the measures which the Court put in place during the COVID-19 pandemic.

For clients, these changes will potentially reduce legal fees and related costs. For lawyers, these changes give greater flexibility and eliminate some of the more archaic practices currently used.

Key changes include the following: 1) videoconferences are to be used unless there is a good case for an in-person hearing and cost consequences may be incurred if a party unreasonably objects to a proceeding by telephone or videoconference; 2) e-mail is an acceptable method for service of documents, other than originating documents; 3) service of documents by fax is no longer acceptable; and 4) virtual commissioning of affidavits is here to stay. A summary of some of the important changes can be found in the table below:

Old Rule Numbers	**Description of Changes**
1.08 and 1.08.1	• Rules 1.08 and 1.08.1 are revoked and substituted with a new Rule 1.08 which allows a party seeking a hearing or other step in a proceeding to specify the method of the hearing or step. The method can be in person, by telephone conference, or by video conference. • Rule 1.08 does not apply to proceedings in the Court of Appeal. • Case conferences will be held by phone unless the court specifies otherwise. • Objections to the proposed method must be delivered before the earlier of: (a) 10 days after the document specifying the method of attendance was served; and (b) seven days before the hearing or step. • Objections are to be dealt with through a case conference. At the case conference, the court shall decide the mode of the hearing or step by taking into consideration factors such as availability of telephone or video conference facilities, the general principle that evidence and argument should be presented orally in open court, the ability to make findings about a witness' credibility, the importance in circumstances of the case of observing the demeanor of a witness, and the balance of convenience between the parties. • If no objection is filed, parties are deemed to have agreed to the proposed method, unless the court directs otherwise. • Rule 1.08 applies with modifications to mediations and oral examinations for discovery.

4.01	• Rule 4.01 is revoked and substituted with a new Rule 4.01 which indicates that the text and character standards for paper documents apply to electronic documents. • Rule 4.01.1 is added which defines an "electronic signature" and permits the court, a registrar, a judge, or an officer to sign a document using an electronic signature.
4.02(3)(f), (g), and (h)	Amended by striking out reference to fax numbers on documents submitted to the court.
4.06(1)	The amended Rule now allows for the electronic commissioning of affidavits.
16.01(4)(b)(iv) and 16.05(1)(f)	These Rules are amended to allow for the service of documents (other than originating processes) to be performed via email without the need for the other party's consent or a court order.
16.05(1)(d), 16.05(3), 16.05(3.2), 16.06.1(1)(a)	References to service and delivery of documents by fax have been amended or revoked.
37.10.1(1)(b), 37.10.1(2)(b), 37.10.1(3)(b)	References to service and delivery of documents by fax have been amended or revoked.
37.12.1(4)	This Rule is amended to allow a moving party to propose that a motion be heard in writing without the attendance of parties even if the issues of fact and law is complex.
38.09.1(1)(c) and 38.09.1(3)(b)	References to service and delivery of document by fax have been amended or revoked.
57.01(1)	This Rule is amended by adding in a clause which states that cost consequences may be incurred if a party unreasonably objects to a proceeding by telephone or video conference.
37.03, 38.03(1.1), 50.05(1), 50.13(2), 76.05(2)	References to participation in person being required have been removed.

A full list of the upcoming changes can be found at O. Reg. 689/20: Rules of Civil Procedure.

Andrea Fernandes

3. The Case of the (Very) Oily Fish: *Cooke Aquaculture Inc. v. CNA Canada*

In a very recent insurance coverage case,(*1) Justice Andrew Pinto of the Ontario Superior Court of Justice awarded Cooke Aquaculture Inc. ("Cooke") summary judgment against its insurer, CNA Canada ("CNA") and ordered CNA to indemnify Cooke in the amount of $288,761.33.

Although CNA had sought summary dismissal of Cooke's coverage action, Justice Pinto instead turned the tables and granted Cooke all of the relief it sought from CNA. The decision represented a complete victory for Cooke.

James Manson of Fernandes Hearn LLP argued the motion on Cooke's behalf, with the assistance of Andrea Fernandes.

The Facts

Cooke is in the fish harvesting and processing business. This case related to some 240,000 pounds of fish that Cooke had harvested in the Atlantic Ocean. The fish were harvested from Cooke's sea pens and transported by vessel in refrigerated holds to Cooke's facilities on land for processing.

In this case, in the midst of processing operations, an oily smell was detected in the fish from the tub (containing fish) just before the fish were dumped onto the filleting line. These particular fish never made it to the filleting line.

The odour was a result of ice flakes being contaminated due to oil. Investigations revealed that the oil was introduced at the water supply to the ice-making machines at Cooke's own processing plant, which is essentially Cooke's home base of operations. The vessel would leave the plant, head to the fish pens, harvest the fish, and then return to the processing plant to process the fish. Once the fish were processed at Cooke's plant, the fish would then be shipped to various places for sale (grocery stores, etc.).

Ice that has been manufactured at the processing plant is used both on the vessel itself to cool the fish in the hold after harvesting, and also at Cooke's processing plant to keep the fish cool while processing operations are underway.

Thus, the contaminated ice was introduced to the harvested fish. Ultimately, 35,801 pounds of fish needed to be destroyed at a total cost of $298,876,11.

The Policy

At all material times, Cooke held a marine cargo policy with CNA. The policy was a "standard" cargo policy, providing coverage for "all risks of physical loss or damage".

The subject matter of the policy was:

> All goods and interests, including property of others which the Insured has a responsibility to insure, consisting primarily of, but not limited to frozen, fresh, dried, smoked, or canned fish products of all description, seafoods, machinery, equipment, spare parts, and packaging materials.

Thus, as Cooke's claim related to the shipment of contaminated fish, the subject matter was clearly insured.

The "voyage clause" of the policy provided:

> Cover to attach from the time the harvested subject matter is released onto vessels and/or when the Insured becomes at risk or assumes interest and continues while the subject matter is in transit, and/or in store including temporary or otherwise or wherever located within North America, while held as stock and/or undergoing processing, packaging and distribution including transshipment, interruption for the purpose of packing, consolidating and/or re-forwarding and until finally delivered to final destination as required, including the risk of loading

> and unloading, and/or until sold, or until the risk of the Insured ceases.

Thus, as can be seen, the policy was intended to cover the fish from the time the fish were harvested, through transit (including temporary storage), while held as stock and while undergoing processing, packaging and distribution. Essentially, the intent of the policy was to cover the cargo (*i.e.,* the harvested fish) from the point of harvest in the ocean, during processing operations and all the way to its final destination. Thus, the policy provided for a broader coverage than a "standard" cargo policy might provide.

In keeping with its intent to provide coverage while the fish were being processed, the Policy contained the following two relevant provisions for purposes of this case: (1) the "**Process Clause**", which was one of the General Conditions of the policy; and (2) Clauses 1 and 4.4 of the "Frozen Food Extension Clauses" *(i.e.,* the "**Fault in Preparation Clause**"), used in conjunction with the Institute Frozen Food Clauses (A) 1/1/86 and incorporated into the policy.

The Process Clause provided:

> 19. Process Clause
>
> This insurance remains in full force while the subject matter insured is under any process **but in no case shall extend to cover loss and/or damage thereto solely caused by such process** or resulting directly therefrom. [Emphasis added.]

The Fault in Preparation Clause provided:

> 1. Subject always to the goods being in sound condition at the time of attachment, this insurance covers, except as provided in Clauses 4, 5, 6 and 7 below, loss of, deterioration of, or damage to the subject-matter insured which shall arise during the currency of this insurance.
>
> 4. In no case shall this insurance cover
>
> […]
>
> 4.4 loss, damage or expense arising from bone taint, salmonella, infection prior to attachment of this insurance, **fault in preparation**, dressing cooling, freezing, wrapping or packing […]
>
> [Emphasis added.]

CNA's Denial of Cooke's Insurance Claim

Following the loss, Cooke submitted an insurance claim to CNA. CNA denied the claim, taking the position that the loss was excluded from coverage. CNA relied on both the Process Clause and the Fault in Preparation Clause in its denial.

Essentially, CNA's position was that the loss was "under process" when the loss took place. Relying on the words "solely caused by such process" in the Process Clause, CNA took the position that since the loss in this case was caused by the contaminated ice, and since the ice was part of Cooke's processing of the fish, coverage was therefore excluded.

CNA also relied on the Fault in Preparation Clause, arguing that since the loss was caused due to a "fault in preparation" (*i.e.,* the contaminated ice), coverage was also excluded on this basis.

Cooke disagreed with both of CNA's positions and commenced an action in the Ontario Superior Court of Justice, seeking a declaration that CNA was obligated to pay Cooke's insurance claim.

The Summary Judgment Motion

The case ultimately made its way to a summary judgment motion. CNA brought the motion, seeking a dismissal of the case on the basis of the above arguments. CNA argued that the

policy clearly excluded coverage by way of both the Process Clause and the Fault in Preparation Clause.

Cooke argued that CNA's position was incorrect. Cooke's position was that the words "but in no case shall extend to cover loss and/or damage thereto solely caused by such process" in the Process Clause could not reasonably be interpreted to mean that ***any*** loss that occurred during the processing operations was excluded from coverage. If it did, then there would be effectively no coverage at all during processing operations, which was clearly contrary to the words "This insurance remains in full force while the subject matter insured is under any process", which were also found in the Process Clause.

Rather, Cooke's position was that the exclusionary language ("but in no case shall extend to cover loss and/or damage thereto solely caused by such process") related only to loss or damage that was caused by intended and normal processing operations. In this case, since the contaminated oil was not part of Cooke's normal processing operation, the loss was fortuitous and therefore should be covered. Otherwise, the policy would not actually provide coverage during processing.

Cooke also argued that the Fault in Preparation Clause did not apply. In the first place, that clause only applies during "cargo movements" which was not applicable in this case. In the second place, the Fault in Preparation Clause similarly could not be interpreted so as to exclude fortuitous events like contaminated ice that take place during the "preparation" stage. Otherwise, as with the Process Clause, there would be no meaningful coverage during preparation.

The Decision

Justice Pinto agreed with Cooke on the above arguments. His Honour agreed that the case was appropriate for summary determination; however, he was of the view that Cooke should prevail rather than CNA.

First, the Court agreed that the Process Clause included both coverage and exclusionary language. As such, the coverage language in the Process Clause ("This insurance remains in full force while the subject matter insured is under any process") was to be interpreted broadly, while the exclusionary language ("but in no case shall extend to cover loss and/or damage thereto solely caused by such process") was to be interpreted narrowly.

The Court also observed that the "fortuity" principle must be borne in mind. As noted by the Supreme Court of Canada in *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada* (*2) at paragraph 47:

> Fortuity is built into the definition of "accident" itself as the insured is required to show that the damage was "neither expected nor intended from the standpoint of the Insured" This definition is consistent with this Court's core understanding of "accident": "an unlooked-for mishap or an untoward event which is not expected or designed" […] When an event is unlooked for, unexpected or not intended by the insured, it is fortuitous. This is a requirement of coverage; therefore, it cannot be said that this offends any basic assumption of insurance law.

Ultimately, the Court agreed with Cooke that in order for the policy to have a reasonable commercial meaning, the exclusionary words in the Process Clause must relate to the *ordinary* system of processing that has been devised by a particular insured with respect to the fish, and which happens in the ordinary course of an insured's processing operation. The exclusionary words *do not* include situations where external, fortuitous events arise that give rise to a loss – for example, the inadvertent ingress of oil into the ice wise for the fish. Only damage solely caused by (or resulting directly from) *the nature*

of the process itself is excluded. For example, if Cooke's processing operation involved leaving the fish in the sun for 6 hours, and the fish spoiled as a result, then the loss would be "solely caused by" the process. However, damage caused by external factors must be covered.

Justice Pinto observed that CNA's position with respect to the Process Clause did not make commercial sense, because if its position was correct than any fortuity whatsoever occurring during the processing phase would be sufficient to trigger the exclusion, which would then render the coverage grant meaningless.

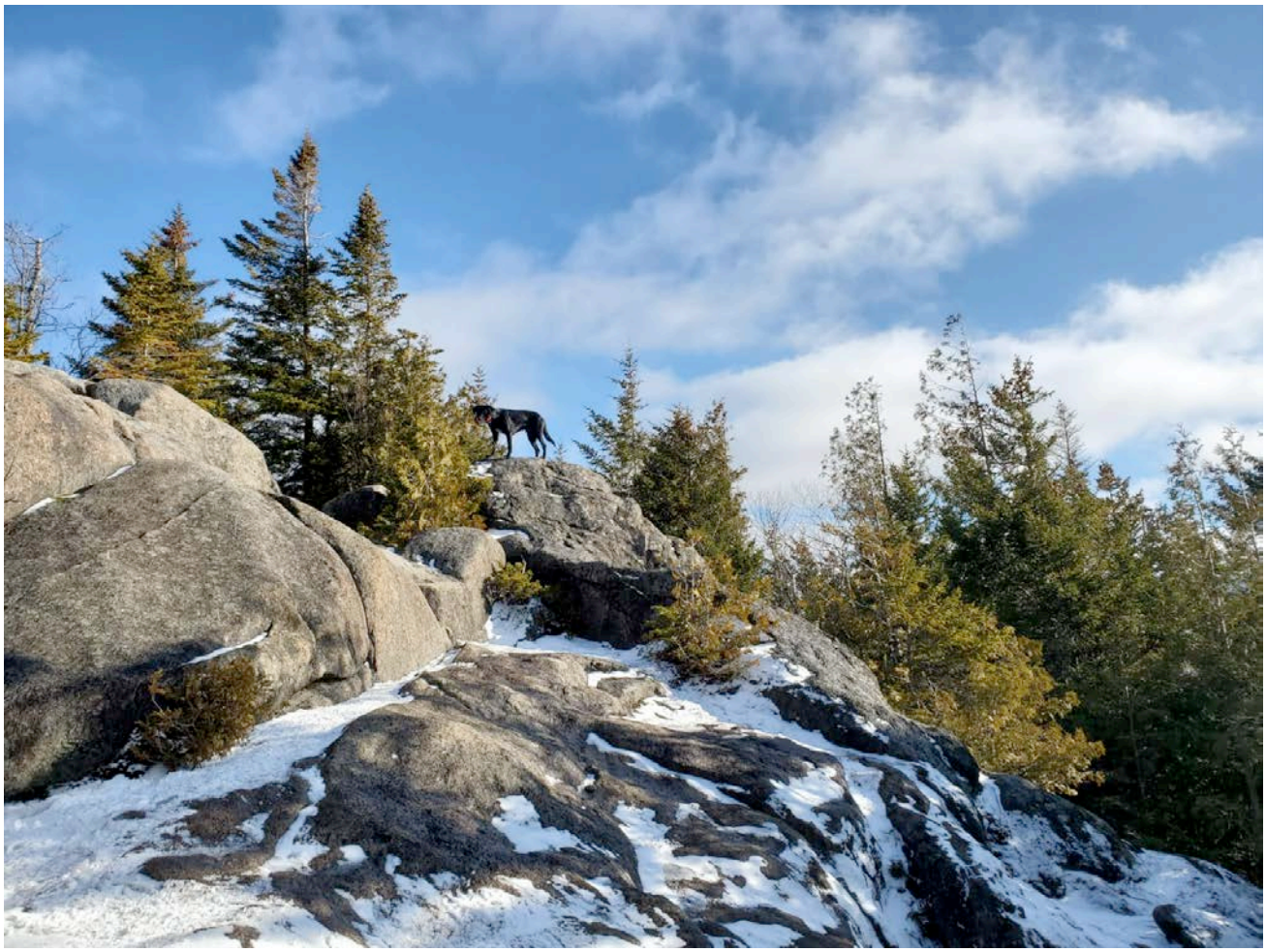
Justice Pinto also agreed with Cooke that the Fault in Preparation Clause also did not apply to exclude coverage. His Honour agreed that that clause only deals with cargo movements, which did not apply in this case.

Moreover, His Honour applied a similar reasoning to that employed with respect to the Process Clause: that is, in order for the coverage to have any meaning, the Fault in Preparation Clause cannot exclude coverage for loss caused by an accident or that is distinct from the regular or expected preparation of the product.

As both of CNA's grounds for denial of coverage failed, the Court concluded that CNA must extend coverage to Cooke in respect of the incident. The Court therefore issued the requested declaration to Cooke and ordered CNA to indemnify Cooke in the amount of $288,761.33, plus costs and interest.

James Manson

(*1) *Cooke Aquaculture Inc. v. Continental Casualty Company*, 2020 ONSC 7588 (SCJ)
(*2) *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2001 SCC 3 (SCC).



4. SCC: Duty of Honest Performance in Contract

In the recent decision of *C.M. Callow Inc. v. Zollinger* 2020 SCC 45 the Supreme Court of Canada incrementally expanded the duty of honesty in contractual performance. The Court affirmed that dishonesty giving rise to a breach of contract goes beyond outright lies and includes half-truths, omissions, and sometimes even silence.

A condominium corporation ("Baycrest") entered into a two-year winter maintenance contract with C.M. Callow Inc. ("Callow"). It also had a separate summer maintenance contract. Pursuant to the winter contract Baycrest was entitled to terminate that agreement if Callow failed to give satisfactory service in accordance with its terms. Clause 9 also provided that if, for any other reason, Callow's services were no longer required, Baycrest could terminate the contract upon giving 10 days' written notice.

In early 2013, Baycrest decided to terminate the winter maintenance agreement but chose not to inform Callow of its decision at that time. Throughout the spring and summer of 2013, Callow had discussions with Baycrest regarding a renewal of the winter maintenance agreement. Following those discussions, Callow thought that it was likely to get a two−year renewal of the winter maintenance contract and that Baycrest was satisfied with its services. During the summer of 2013, Callow performed work above and beyond the summer maintenance contract at no charge, which it hoped would act as an incentive for Baycrest to renew the winter maintenance agreement.

Baycrest informed Callow of its decision to terminate the winter maintenance agreement in September 2013. Callow filed a statement of claim for breach of contract, alleging that Baycrest acted in bad faith. The trial judge held that the organizing principles of good faith performance and the duty of honest performance were engaged. Her Honour was satisfied that Baycrest actively deceived Callow from the time the termination decision was made to September

2013, and found that Baycrest acted in bad faith by withholding that information to ensure Callow performed the summer maintenance contract and by continuing to represent that the contract was not in danger despite knowing that Callow was taking on extra tasks to bolster the chances of the winter maintenance contract being renewed.

The duty of honest performance in contract, formulated in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, applies to all contracts and requires that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. In determining whether dishonesty is connected to a given contract, the relevant question is whether a right under that contract was exercised, or an obligation under that contract was performed, dishonestly. While the duty of honest performance is not to be equated with a positive obligation of disclosure, in circumstances where a contracting party lies to or knowingly misleads another, a lack of a positive obligation of disclosure does not preclude an obligation to correct a false impression created through that party's own actions.

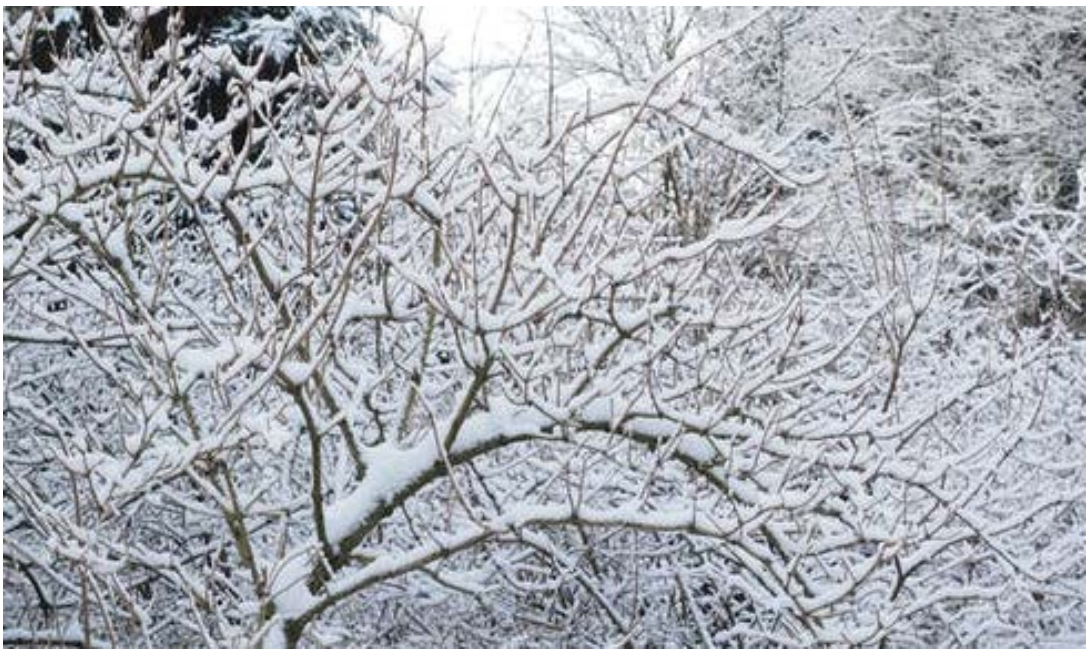
The Court noted that:

> Importantly, Callow does not seek to bar Baycrest from exercising the termination clause here; like in *Bhasin*, it only seeks damages flowing from the fact that the clause was exercised dishonestly. In other word, Callow's argument, properly framed, is that Baycrest could not exercise clause 9 in a manner that breached the duty of honesty, however absolute that right appeared on its face.

The decision continues the Court's incremental expansion of good faith in contract, specifically the duty of honest performance. It is clear that honesty cannot be narrowly construed as simply not lying; courts must engage in a fact-specific determination of whether the counter-party was misled by action or inaction, including half-truths, omissions, or silence.

The decision will not be the last word on good faith in contracting from the Supreme Court of Canada. A companion case, *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, which dealt with broader issues of the organizing principle of good faith in contracts was heard with the *Callow* appeal. However, the Court has not released the Wastech decision and it is expected in 2021.

Rui M. Fernandes



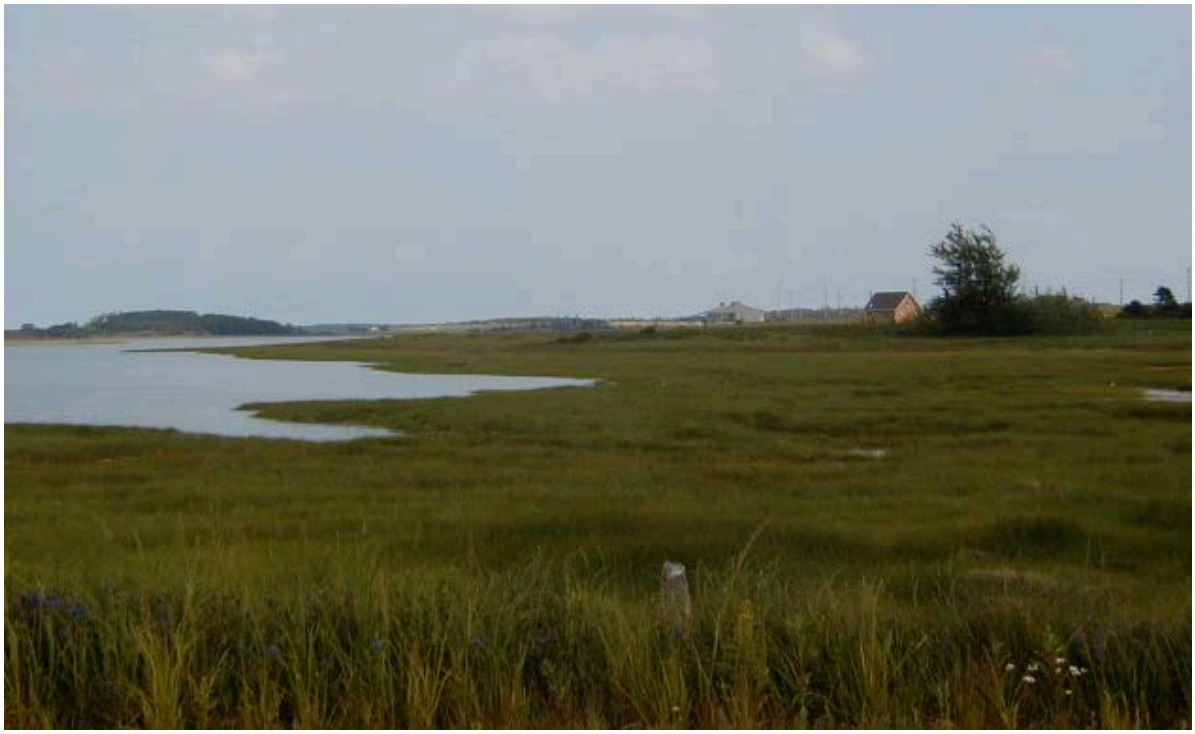
5. Infectious Disease Emergency Leave under the *Ontario Employment Standards Act*, 2000 – Extended to July 3, 2021

In the early days of COVID-19, many employers were ordered to close their businesses or, if they were able to continue operating, they often did not have enough work to keep all employees working at full capacity. If the employer reduced the hours and/or wages of an employee or put the employee on a temporary lay-off, the employer was exposed to a claim that the employee had been constructively dismissed, allowing the employee to sue for wrongful dismissal damages.

As we reported in our June, August and September 2020 newsletters, on May 29, 2020 the Ontario Government passed Ontario Regulation 228/20 *Infectious Disease Emergency Leave* under the *Employment Standards Act, 2000* ("ESA"), which impacted both temporary layoffs and the reduction in employee hours/wages. For non-unionized employees who were laid off or had their hours reduced or eliminated because of COVID-19 any time between March 1, 2020 and the date that is 6 weeks after the day that the state of emergency order is terminated (the "COVID-19 Period"), they are deemed to be on an Infectious Disease Emergency Leave ("IDEL") under the ESA. On December 17, 2020 the COVID-19 Period, which was set to expire on January 2, 2021, was extended to July 2, 2021.

If at the end of the COVID-19 Period, the employer cannot bring the employee back to work, it must either terminate employment, and provide the employee with the required notice and, if applicable, severance, or consider whether it can place the employee on a temporary lay-off under the ESA. As a reminder, even though the ESA provides for a temporary lay-off, the case law has held that unless (1) the employee's written employment contract includes the employer's right to impose a temporary layoff, or (2) the same is an implied term in the contract because it is a common practice in the particular workplace, then imposing a temporary layoff triggers the employee's right to claim constructive dismissal and seek damages, which damages are the same as wrongful dismissal damages. Likewise, if an employee is working reduced hours or for reduced wages, once the COVID-19 Period ends, the continued reduction to hours and/or wages may trigger a claim for constructive dismissal.

Carole McAfee Wallace



6. Customs Broker Found Not Liable to CBSA for the Payment of Importation Tariffs: *Landmark Trade Services*, 2020 CanLII 34719

Annually, thousands of Canadian importers deal with the Canada Border Services Agency ("CBSA"). Many of these importers use licensed customs brokers to assist them in clearing their shipments across the Canadian border. Linked to each such shipment is information such as its country of origin, destination, supplier, routing, intended use, and more importantly for customs brokers, tariff classifications.

Customs brokers will want to avoid inadvertently assuming liability for customs tariffs. They need to be mindful of the way in which they do business.

This was the issue in a recent case, *Landmark Trade Services*, 2020 CanLII 34719 ("*Landmark*") (*1). In *Landmark*, the customs broker Landmark Trade Services ("LIT") appealed to the Canadian International Trade Tribunal (the "CITT") the CBSA's decision to classify it as an "importer" of goods within the meaning of the *Customs Act*; this "importer" classification meant that LIT would have been liable for the payment of importation tariffs which it was not previously required to pay.

Background

In 2017, LIT was facilitating shipments into Canada of various e-commerce purchases of foodstuffs by individual customers (i.e. eggs, quinoa, freeze dried food, etc.) (the "Goods") using its "customs broker non-commercial imports" account with the CBSA.

In early 2018, the CBSA conducted a Trade Compliance Verification of LIT and found that all the transactions it examined with respect to the Goods had incorrect tariff classifications and that LIT was the "importer of record" for the Goods within the meaning of the *Customs Act*. The CBSA determined that therefore, LIT was to pay tariffs for importing the goods into Canada itself (*i.e.,* as opposed to just acting as an agent for individual customers).

Appeal to CITT

LIT appealed CBSA's "importer of record" classification to the CITT, arguing that it should not be deemed an "importer" within the meaning of the *Customs Act* for the following reasons:

(1) it was not the intended recipient of the Goods in Canada;

(2) it did not purchase the Goods, participate in structuring the sales transaction, receive the Goods, or benefit financially from the sale of the Goods, apart from a small customs brokerage fee; and

(3) at all times, it was acting as an agent of its customers; the use of its own "customs broker non-commercial imports" account to facilitate the shipments was not itself determinative.

Additionally, LIT argued that the CBSA should uphold its long-standing practice that it will not consider customs brokers liable for tariffs as the "importer". LIT further submitted that any customs broker liability arises only from penalties imposed in relation to its customs broker functions and liability for failure to pay duties is prescribed only against importers.

In response, the CBSA maintained its position that LIT's actions went beyond the "agent" role of a traditional customs broker and amounted to "importation". The CBSA further submitted that:

(1) LIT fit the definition of "importer" in the *Special Import Measures Act*, which states that an importer is "the person who is in reality the importer of the goods", and that this definition should be adopted by the CITT in this case;

(2) there was no evidence that the Canadian consumers purchasing the

Goods knew that they were being imported, and that LIT would account for the Goods on their behalf, or the duty or taxes that may be owed; and

(3) the evidence indicated that LIT was acting as more than a mere agent: it brought in the Goods through the CBSA "commercial stream", used its business account to account for the Goods and to pay duties, and did not have a valid agency agreement with individual Canadian consumers.

Finding

The CITT rejected the CBSA's arguments and found that LIT was not in reality the importer of the Goods. Overall, the CITT stated that the *substance* of the transaction, rather than some facts such as LIT being identified as "importer" on certain forms or using its business account to facilitate the shipment of the Goods, determined whether LIT was an "importer" within the meaning of the *Customs Act*.

Key facts that indicated to the CITT that the substance of LIT's work was not "importation" included that (1) LIT's forms for the shipments named the individual purchasing consumers, not LIT, as the consignees, and (2) LIT did not purchase the Goods nor take title or possession of the Goods at any time and had no involvement in the transactions themselves, understanding that these transactions were between a foreign merchant and a Canadian customer.

Implications

As an important point, the CITT stated in *Landmark* that "the default position remains that the identity of the importer is to be determined on the facts of each case" (*2). This case is therefore a reminder to customs brokers that the risk remains of being classified by the CBSA as an "importer" liable for importation tariffs if in reality they are acting more like a party to a shipment into Canada rather than an agent facilitating the shipment, despite what may be indicated in the paperwork.

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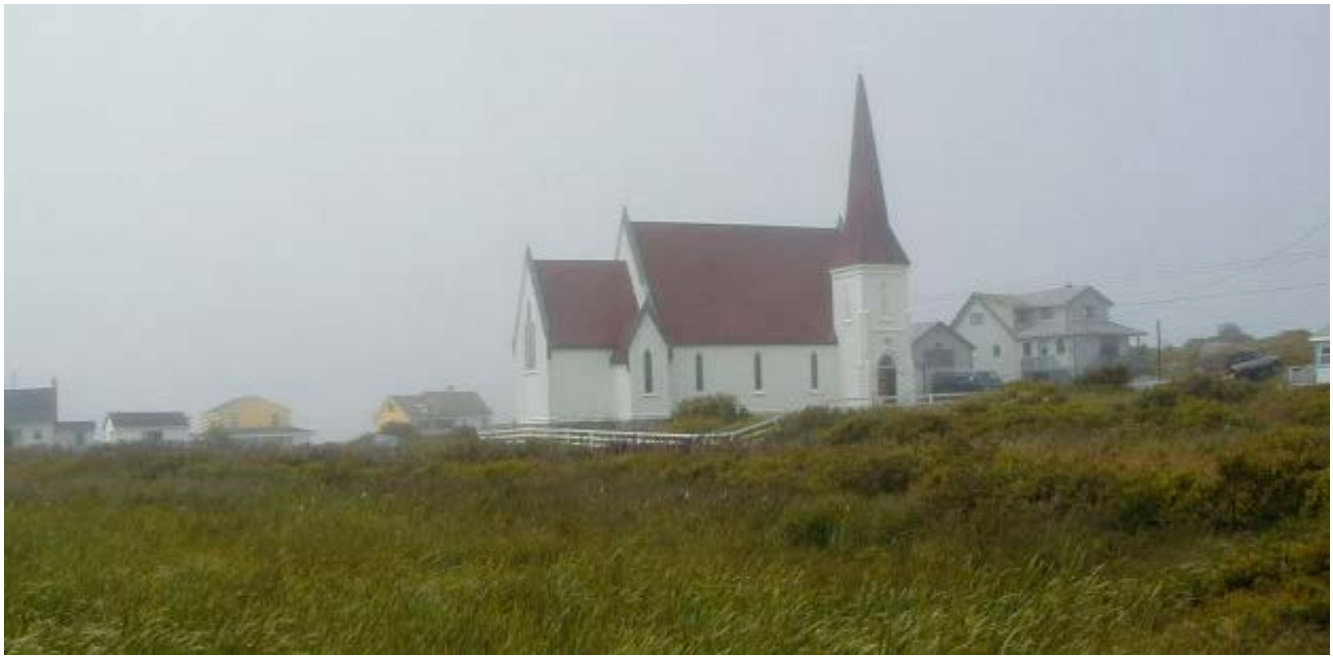
Endnotes
(*1) *Landmark Trade Services*, 2020 CanLII 34719 ("*Landmark*")
(*2) *Ibid* at para 51.



7. *Atlantic Owl (PAS) Limited Partnership v. The President of the Canada Border Services Agency*: A Comedy of Errors

In the very recent decision of the Canadian International Trade Tribunal, *Appeal No. AP-2018-029, Atlantic Owl (PAS) Limited Partnership v. The President of the Canada Border Services Agency* (*1), the presiding member rendering the decision suggested in his reasons that the history of the case leading to the appeal might be titled *A Comedy of Errors*. While the absurdity of the problem addressed by the Tribunal had certain comical aspects, it is unlikely that the appellant found the process remotely amusing. It would further inspire little confidence in one hoping that the Canada Border Services Agency ("CBSA"), following the rules in the *Customs Act* (*2), would be able to resolve a simple mistake in tariff classification in a manner that is either logical or efficient.

The Facts

From the perspective of Atlantic Owl, the owner of a multipurpose platform supply vessel, the *Paul A. Sacuta*, the issue was one of obtaining a reclassification for tariff purposes of two "remotely operated vehicles" ("ROVs") – robotic submersibles used to perform undersea inspections – that were fitted to and imported on its vessel, but that were owned by another company, Oceaneering International Ltd. To meet a deadline for customs clearance by March 24, 2017, Atlantic Owl's customs broker sought clarification from CBSA regarding the classification of the ROVs. CBSA responded that if the ROVs were installed to "functionally outfit" the vessel, then the vessel and the ROVs should be accounted for under one entry. If the ROVs were imported separately, however, they should each be accounted for under a separate entry.

As noted in the decision, for "reasons unknown," the *Paul A. Sacuta* was accounted for under a single classification with the ROVs, with the value of the ROVs included in the value of the vessel. Unfortunately for Atlantic Owl, if the ROVs were contracted for separately and would leave the country apart from the vessel carrying them, as in fact they were (a detail not communicated to the CBSA), they ought to have been separately classified as "industrial robots" that were not a permanent part of the vessel. If properly classified, the ROVs would have been duty-free tariff items.

Having learned of this after having classified the vessel for tariff purposes, Atlantic Owl applied for a refund request for overpayment of tariffs under section 74(1)(e) of the *Act* based on "tariff classification" (and not based on "origin" or "value for duty," as it also may have done). Atlantic Owl did not claim that the tariff classification of the vessel was mistaken, but only that the ROVs – which were not separately accounted for, but only as part of the ship – should be re-classified for tariff purposes and a refund provided on that basis. CBSA denied the refund both on an initial determination and a re-determination under the *Act*. CBSA's position was that, because the ROVs were not separately classified at the time of importation, but only as part of the ship, they could not be considered a separate importation, and that therefore a refund based on a different classification *for the ROVs* could not be granted. Atlantic Owl appealed the redetermination to the Canadian International Trade Tribunal (CITT).

The Appeal

On appeal, Atlantic Owl took the position that the "goods in issue" were the two ROVs – remotely operated submersible vehicles capable of performing underwater work. The CBSA, however, took the position that the only "good in issue" was the *Paul A. Sacuta*, the only item with a tariff classification, the ROVs having not been separately classified from the vessel when imported.

CBSA's position on appeal, which was ultimately upheld by the CITT, was that, since there was no deemed determination of the classification of the ROVs at the time the goods were accounted for on importation, but only of the vessel of which they were a part, it had no jurisdiction to either

to make a "re-determination" or a "further re-determination" of something that did not have a determination in the first place. For its part, the CITT held that, although it had authority under section 67 of the *Act* to "… make such order, finding or declaration as the nature of the matter may require" in respect of "a decision of the President of the CBSA," in this case there was no prior "decision." A "decision" would have to be either a "determination," a "re-determination," or a "further re-determination." As the only good properly imported for tariff classification was the ship, there could be no "decision" in respect of the classification of the ROVs. CITT consequently held that it had no jurisdiction to alter the classification of some particular imported good – that is, the ROVs - that had no distinct initial customs classification.

In denying Atlantic Owl's appeal the Tribunal expressed some sympathy for its position. The Tribunal noted that the problem with the tariff classification of the ROVs might have been avoided but for miscommunication between the customs broker and CBSA, leading to the initial mistake of classifying the ship and the ROVs together as one item. Despite this overt expression of sympathy, it seemed more like twisting the knife further where the Tribunal noted in conclusion that, had only Atlantic Owl made an original application for a refund for overpayment under section 74(1)(e) of the *Act* based on *value for duty* of the vessel, rather than based on *tariff classification*, it might have obtained relief. Noting that four years had not yet passed since the date of accounting (March 24, 2017), the Tribunal noted in closing that Atlantic Owl was still within time to make a new application for a refund on the alternative basis.

Comedy or Tragedy

While the Tribunal expressly likened the exchanges between CBSA and the customs broker relating to the classification of the ROVs as something from *A Comedy of Errors*, Atlantic Owl's navigation through the CBSA appeals process all the way up to the CITT appeal in its ultimately fruitless effort to obtain what seemed to be a simple tariff reclassification more closely resembles a Franz Kafka novel than Shakespeare. Whether it is the *Act* itself or its application by the relevant board or tribunal that was the true source of dysfunction was probably of little note to Atlantic Owl, which was now in the position of re-applying for a refund that it might have gotten had it applied for one on the correct basis in the first place. The chief lesson here is to make sure that goods are correctly classified for tariff purposes on initial importation, since it appears that, at least in some cases, there is no easy and efficient fix once the initial error has been made.

Oleg M. Roslak

Endnotes

(*1) *Appeal No. AP-2018-029, Atlantic Owl (PAS) Limited Partnership v. The President of the Canada Border Services Agency* (CITT), [2020] 24 T.T.R. (2d) 584 [*Atlantic Owl*].

(*2) R.S.C., 1985, c. 1 (2d Supp.) [the "*Act*"].

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CONTEST

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