THE NAVIGATOR

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OFAC AND TRAVEL INSURANCE

The Office of Foreign Assets Control (OFAC) of the US Department of the Treasury administers and enforces economic and trade sanctions based on US foreign policy and national security goals against targeted foreign countries and regimes, terrorists, international narcotics traffickers, those engaged in activities related to the proliferation of weapons of mass destruction, and other threats to the national security, foreign policy or economy of the United States. OFAC acts under Presidential national emergency powers, as well as authority granted by specific legislation, to impose controls on transactions and freeze assets under US jurisdiction. Many of the sanctions are based on United Nations and other international mandates, are multilateral in scope, and involve close cooperation with allied governments.

OFAC regulations generally apply to persons and companies subject to U.S. jurisdiction. This includes branch offices or subsidiaries of U.S. companies.

Travel-related transactions are permitted by general license for certain travel related to the following 12 categories of activities, subject to the criteria and conditions in each general license: family visits; official business of the U.S. government, foreign governments, and certain intergovernmental organizations; journalistic activity; professional research and professional meetings; educational activities; religious activities; public performances, clinics, workshops, athletic and other competitions, and exhibitions; support for the Cuban people; humanitarian projects; activities of private foundations or research or educational institutes; exportation, importation, or transmission of information or information materials; and certain authorized export transactions. Each person relying on a certain general authorization must retain specific records related to the authorized travel transactions. See §§501.601 and 501.602 of Reporting, Procedures and Penalties Regulations for applicable recordkeeping and reporting requirements.

Selling travel insurance is not permitted. Two recent decisions of OFAC are illustrative. On December 9th, 2019 OFAC announced a settlement with two travel insurers.

FIRM AND INDUSTRY NEWS

- **Rui Fernandes** received his FCIArb designation in January. The designation is bestowed by the Chartered Institute of Arbitrators, the world's leading qualifications and professional body for dispute avoidance and dispute management.

- **Cargo Logistics Conference**, February 4-6, 2020, Vancouver.

- **XXI International Congress of Marine Arbitrators,** March 7 to 14, 2020, Rio de Janeiro. **Rui Fernandes** will be presenting a paper on "Limitation of Liability and Arbitration in Canada". **Kim Stoll** will also be attending.

- **Marine Insurance London 2020**, March 20, 2020, London England.

Allianz Global Risks US Insurance Company ("AGR US") is a Chicago-based property casualty insurer and a wholly owned subsidiary of Allianz SE ("Allianz"), a German financial services provider organized under the laws of the European Union and Germany. AGR US operates AGR Canada ("AGR Canada") as a Canadian branch office in Toronto, Canada. AGR US agreed to remit $170,535 to settle its potential civil liability for 6,474 apparent violations of the Cuban Assets Control Regulations ("CACR"), 31 C.F.R. Part 515.

OFAC determined that AGR US voluntarily self-disclosed the apparent violations and that these apparent violations constituted a non-egregious case. The total base penalty amount for the apparent violations was $270,690.90.

The alleged violations involved transactions between August 20, 2010 and January 15, 2015. AGR Canada fronted travel insurance policies that included occasional coverage relating to Canadian residents' travel to Cuba. The insurance policies fronted by AGR Canada consisted of two types of insurance policies sold to Canadian citizens and residents covered by Canadian health plans: first, insurance coverage for an individual trip that would be in effect for 30 days for the specific trip (e.g., a single trip to Cuba), and second, insurance coverage that would be in effect for a full year and provide coverage for every trip taken during that time (e.g. covering multiple trips to several countries, including one or more trips to Cuba). The travel insurance policies covered reimbursement for eligible emergency medical expenses while out of country and non-refundable expenses resulting from trip cancellation, delay, or interruption due to specified categories of events.

In fact, the polices were underwritten, marked and serviced by a Canadian underwriting manager operating separately from AGR Canada. Neither the underwriting manager nor AGR Canada collected information regarding the travel destination upon policy issuance. A travel destination was only disclosed to the underwriting manager in instances where emergency medical assistance was required, a claim was submitted, or a coverage inquiry was received disclosing the destination. AGR Canada received only a quarterly summary premium and claims information. Travel destination information was not included in that summary.

AGR Canada became aware on one occasion that it had issued an insurance policy related to travel to Cuba. This practice continued for several years without AGR US or AGR Canada addressing its requirements to be in compliance with OFAC regulations.

Over the relevant time period, the policies resulted in the processing and reimbursement of 864 Cuba-related claims totaling CAD 532,200.35 (approximately $518,092), and the collection of CAD 30,599.61 (approximately $23,289) in premiums.

By insuring non-Cuban travelers to Cuba, AGR Canada enabled travel to Cuba by persons that might otherwise not have traveled to the country, thereby bringing revenue and funds to Cuba, including the Cuban government that may not have otherwise flowed at a time when such activity was prohibited and in so doing violated section 515.201 of the CACR. The CACR were amended on January 16, 2015 to authorize pursuant to § 515.580 the issuance of global travel insurance policies that include coverage for travel to and from Cuba.

The second decision of OFAC announced on December 9th, 2019 involved Chubb Limited as successor to the former ACE Limited.

ACE Limited ("ACE") was a Swiss company that provided insurance and reinsurance services for commercial and individual customers worldwide. In January 2016, ACE merged with Chubb Corporation to create Chubb Limited ("Chubb"), which is a Swiss holding company headquartered in Switzerland. Prior to the merger, ACE Group Holdings, Inc. was a

subsidiary of ACE, and an insurance holding company incorporated in the United States (U.S.). Through a series of intermediate corporate entities, ACE Europe was a subsidiary of ACE Group Holdings, Inc. ACE Europe was domiciled in the United Kingdom (U.K.), and conducted business in Europe. As a subsidiary of a U.S. company, ACE Europe was subject to the CACR. This was also a situation where ACE made voluntary self-disclosure and the settlement was for $66,212 to settle its potential civil liability for 20,291 apparent violations of the CACR. The total base penalty for the apparent violations was $183,923.52.

The alleged violations occurred during the period between January 1, 2010 and December 31, 2014. ACE Europe processed at 20,291 transactions totaling $367,847 in apparent violation of the CACR. This transaction total included 20,218 premium payments totaling $287,292 that ACE received for Cuba-related travel insurance coverage of insureds' travel to Cuba, as well as 73 Cuba-related claims payments paid out under these coverages totaling $80,555. OFAC noted that the apparent violations appear to have been caused by ACE's misunderstanding of the applicability of U.S. sanctions on Cuba with respect to this activity.

ACE provided customers with travel-related coverage via individual travel insurance policies issued to a specific traveler, group travel related policies issued to a group policyholder extending coverage to the group's individual members or employees, and travel insurance policies provided at No Additional Charge ("NAC") to a group policyholder to cover the group's individual members or customers. The coverages insured travel-related risks, including lost, damaged or delayed baggage or property, death benefits, medical expenses, repatriation of deceased, and trip cancellation or delay. The policies were sold through either direct sales by ACE or a third party.

ACE Europe also issued group travel policies to a European online travel agency ("European travel agency"), which sold global travel coverage to insureds. The insurance was provided through master agreements that ACE negotiated with European travel agencies, with the travel agencies' subsidiaries acting as group policyholders, and their travel clients acting as the individual certificate holders under the group policies. Under these arrangements, the European travel agencies dealt with customers directly, with a third party agent processing

claims. The agencies paid ACE Europe a pre-determined premium for each specific individual covered under the group policy. They offered separate travel insurance products that provided global travel coverage for flight or hotel cancellation that would include medical expenses or lost baggage as well as the loss of connecting flights.

While global in scope, these policies did not contain a sanctions exclusionary clause, which is often inserted in global insurance policies as an explicit exclusion for risks that would violate U.S. sanctions law.

OFAC noted that ACE Europe represented that it believed coverage could be provided if the risk of violating U.S. sanctions involved a *de minimis* portion of the portfolio, and the E.U.'s Anti-Blocking Regulation prevented enforcement of the U.S. sanctions regulations related to Cuba. OFAC also noted that by providing this coverage and engaging in these transactions, ACE appeared to have violated section 515.201 of the CACR, which prohibits persons subject to the jurisdiction of the United States from engaging in transactions in which Cuba or a Cuban national has an interest.

These enforcement actions draw particular attention to the importance of risk assessments in determining which financial products can be offered by persons subject to U.S. jurisdiction in the context of OFAC-administered sanctions programs. The enforcement actions also highlight the need for, and importance of, internal controls, policies, and procedures in detecting and preventing potential violations of this nature.

Anyone subject to US jurisdiction should ensure that they are familiar with the sanctions imposed by the US against Cuba and other sanctioned countries. These include the Balkans, Belarus, Central African Republic, Democratic Republic of the Congo, Iran, Iraq, Lebanon, Libya, Nicaragua, North Korea, Somalia, Sudan and Darfu, South Sudan, Syria, Ukraine/Russia related sanctions, Venezuela, Yemen and Zimbabwe.

Rui M. Fernandes

2. Keeping it Simple: Clarity and Plain English in Contracts

The recently published decision of the Ontario Superior Court in *McCallum v. Jackson* (*1) illustrates how clarity of the words used in a contract can be critical. A court may not enforce contract wording if plain English gives way to "legalese" and with the context and intent being unclear.

The Bicycle Race, the Passing Driver and a Complicated Contract

Kevin McCallum ("McCallum") was a cyclist in a race organized by Ironman Canada Inc., Triathlon Ontario, and World triathlon Corporation (hereafter collectively "Ironman"). Beatrice Jackson ("Jackson") was driving her motor vehicle on the roadway where the race was occurring. McCallum's bicycle came into contact with Jackson's motor vehicle as a result of which McCallum suffered injuries.

When registering to enter the race, McCallum electronically accepted a *Release and Waiver of Liability, Assumption of Risk and Indemnity Agreement* (the "Agreement") absolving Ironman together with certain third parties of liability for race mishaps.

The Agreement provided, in relevant part, (with key portions highlighted in bold) (*2):

> **WAIVERS**
>
> *I understand that by registering I have accepted and agreed to the waiver and release agreement(s) presented to me during registration and that these documents include a release of liability and waiver of legal rights and deprive me of the right to sue certain parties. By agreeing electronically, I have acknowledged that I have both read and understood waiver and release agreements presented to me as part of the registration process and accept the inherent dangers and risks which may or may not be readily foreseeable, including without limitation personal injury, property damage or death that arise from participation in the event.*
>
> *EVENT REGISTRATION, RELEASE AND WAIVER OF LIABILITY, ASSUMPTION OF RISK AND INDEMNITY AGREEMENT*
>
> *. . . competitive events and other activities take place indoors or outdoor in various locations in the Canada and can include but are not limited to: warm -up exercises; competitive swimming, cycling and running.*
> *. . .* ***cycling****, running and swimming risks. These include the risk of losing control and falling from the bike,* ***colliding with objects or people (including co-participants or spectators)*** *on land or in water, tripping or falling down or encountering other water/ road/trail hazards.*
> *. . . Risks regarding conduct. The potential that participant, co-participant and/or third party/s may act in a negligent or intentional manner. These and other risks may result in participants: falling partway or falling to the ground; being struck; colliding with objects, people or the bottom of a lake or other water body; experiencing bicycle or vehicle collision or rollover;*
>
> ***RELEASE AND INDEMNITY***
>
> ***PLEASE READ CAREFULLY. THIS RELEASE AND INDEMNITY SECTION CONTAINS A SURRENDER OF CERTAIN LEGAL RIGHTS. I HEREBY ACKNOWLEDGE AND ASSUME ALL OF THE RISKS OF PARTICIPATING IN THIS EVENT, AND AGREE AS FOLLOWS:***
>
> *• TO RELEASE AND NOT TO SUE THE WORLD TRIATHLON CORPORATION … EVENT SPONSORS, EVENT ORGANIZERS, … WHOSE PROPERTY AND/OR PERSONNEL ARE USED AND/OR IN ANYWAY ASSIST IN LOCATIONS WHERE THE ACTIVITIES TAKE PLACE …* ***AND ALL OTHER PERSONS OR ENTITIES ASSOCIATED OR INVOLVED***

WITH THE ACTIVITIES (INDIVIDUALLY AND COLLECTIVELY REFERRED TO IN THIS AGREEMENT AS "RELEASED PARTY" AND THE "RELEASED PARTIES"), WITH RESPECT TO ANY AND ALL CLAIMS, LIABILITIES, SUITS OR EXPENSES (INCLUDING ATTORNEYS FEES AND COSTS) (COLLECTIVELY REFERRED TO IN THIS AGREEMENT AS "CLAIM" OR "CLAIMS") *FOR ANY INJURY, DAMAGE, DEATH OR OTHER LOSS IN ANYWAY CONNECTED WITH MY ENROLLMENT OR PARTICIPATION IN THE ACTIVITIES …*

- ***TO DEFEND AND INDEMNIFY ("INDEMNIFY" MEANING PROTECT BY REIMBURSEMENT OR A PAYMENT) THE RELEASED PARTIES WITH RESPECT TO ANY AND ALL CLAIMS BROUGHT BY OR ON BEHALF OF ME, MY SPOUSE, A FAMILY MEMBER, A CO-PARTICIPANT OR ANY OTHER PERSON, FOR ANY INJURY, DAMAGE, DEATH OR OTHER LOSS IN ANY WAY CONNECTED WITH MY ENROLLMENT OR PARTICIPATION IN THE ACTIVITIES,*** *NEGLIGENCE, WHETHER PASSIVE OR ACTIVE, OF THE RELEASED PARTIES, ANY BREACH BY THE RELEASED PARTIES OF STATUTORY DUTY AND/OR USE OF ANY EQUIPMENT, FACILITIES OR PREMISES, HOWSOEVER CAUSED.*

THIS RELEASE AND INDEMNITY SECTION INCLUDES BUT IS NOT LIMITED TO CLAIMS FOR PERSONAL INJURY OR WRONGFUL DEATH (INCLUDING CLAIMS RELATED TO EMERGENCY, MEDICAL, DRUG AND/OR HEALTH ISSUES, RESPONSE, ASSESSMENT OR TREATMENT), PROPERTY DAMAGE, LOSS OF CONSORTIUM, BREACH OF CONTRACT OR ANY OTHER CLAIM, INCLUDING CLAIM/S RESULTING FROM THE NEGLIGENCE OF THE RELEASED PARTIES WHETHER PASSIVE OR ACTIVE.

The Court Action

McCallum sued Jackson for injuries sustained from the accident. This action gave rise to various claims between McCallum, Jackson and Ironman that would test the Agreement language.

The litigation involved some nuanced elements:

1. McCallum sued Jackson and Ironman for injuries sustained.

2. Ironman took the position that by the terms of the Agreement McCallum had waived any right to sue it.

3. Jackson brought a "crossclaim" against Ironman. The relevant element of the crossclaim for present discussion purposes concerned Jackson's assertion that, by virtue of the Agreement language, she could benefit as a "third party beneficiary" from McCallum's agreement to waive any right of claim.

4. Ironman also took the position that not only per point 2 above that McCallum had waived the right to claim against it, but that, by the Agreement's "Indemnity" wording, McCallum was obligated to indemnify Ironman and pay its costs in connection with Jackson's crossclaim against Ironman.

5. While McCallum would come to concede point 2 above – that he had waived his right to claim against Ironman – he argued that he never intended to assume any obligation to indemnify Ironman and that he did not intend to accept any such risk by participating in the bicycle race.

6. Ironman also argued that Jackson was a "third party beneficiary" under the Agreement's waiver provisions. While Jackson was not a party to the Agreement, Ironman argued that by its terms the waiver asserted at point 2 above also extended to Jackson. (This was a natural argument for Ironman to make: what better way to deal with Jackson's crossclaim against it than to establish that Jackson was impervious to any claim by McCallum in the first place, rendering the crossclaim unnecessary?)

Ironman applied to the Court for summary judgment for the early resolution of matters.

The Summary Judgment Application

The Court considered three discrete issues:

i) By the terms of the Agreement did McCallum waive his claims against Ironman?

ii) Was McCallum required to indemnify Ironman in respect of Jackson's crossclaim?

iii) By the terms of the Agreement did McCallum also waive his claims against Jackson?

The Court's analysis and disposition of the issues was as follows.

i) By the terms of the Agreement did McCallum waive his claims against Ironman?

Yes, he did. McCallum did not contest that, by accepting the Agreement, he waived the right to sue Ironman. The Court found the waiver language to be clear and that the circumstances were clearly caught by the Agreement language.

ii) Was McCallum required to indemnify Ironman in respect of Jackson's cross claim?

No. Things were not so straightforward on this issue. McCallum disagreed that, above and beyond his waiver of claims against Ironman, he had a duty to indemnify Ironman in circumstances where another party (such as Jackson) would bring a crossclaim against Ironman. He argued that his waiver of the right to sue Ironman was an entirely different from his having the obligation to *indemnify* Ironman.

The Court identified the core issues to address. The first was whether the indemnity language was sufficiently brought to McCallum's attention so as to be binding upon him. (as we will see, it was).

The second issue – which would prove to be Ironman's downfall on the point – was whether such language *effectively expressed such an intent* so as to enforceable by Ironman. (as we will see, it didn't).

Was the Indemnity Agreement Language Sufficiently Brought to McCallum's Attention?

It was. The Court considered the leading case law (*3) on when a party is bound by a release. A party is bound by a signed release unless one of the following circumstances exists:

> • "*Non Est Factum*" (*4) — The signer, through no carelessness on his or her part, is mistaken as to the document's nature and character or did not sign the document;
> • Fraud or Misrepresentation — The signer is induced to sign the contract by fraud or misrepresentation;
> • Objective Lack of *Consensus Ad Idem* (*5) — Where it is unreasonable for a person relying on the signed contract to believe that the signer really did assent to its terms;
> • Unconscionability— Was the contract formed in unconscionable circumstances;
> • Public Policy considerations — There is an overriding public policy that outweighs the very strong public interest in the enforcement of contracts.

McCallum did not plead *non est factum*, fraud or misrepresentation. He did not argue against the waiver of the right to sue but only that he had not expected "indemnification" to mean paying all Ironman's costs *if someone sued it*. McCallum argued that such an onerous and positive obligation should have been more prominently brought to his attention when he was presented with the Agreement wording.

The Court noted the following commentary from Professor Stephen M. Waddams:

> One who signs a written document cannot complain if the other party reasonably relies on the signature as a manifestation of assent to the contents or ascribes to

> words, he uses their reasonable meaning. But the other side of the same coin is that only a reasonable expectation will be protected. If the party seeking to enforce the document knew or had reason to know of the other's mistake the document should not be enforced.

Further, as noted by the Ontario Court of Appeal (*7):

> In modern commercial practice, many standard form printed documents are signed without being read or understood. In many cases the parties seeking to rely on the terms of the contract know or ought to know that the signature of a party to the contract does not represent the true intention of the signer, and that the party signing is unaware of the stringent and onerous provisions which the standard form contains. Under such circumstances, I am of the opinion that the party seeking to rely on such terms should not be able to do so in the absence of first having taken reasonable measures to draw such terms to the attention of the other party, and, in the absence of such reasonable measures, it is not necessary for the party denying knowledge of such terms to prove either fraud, misrepresentation or *non est factum*.

The Court also noted in *Karroll v. Silver Star Mountain Resorts Ltd.* (*8):

> It follows that Miss Karroll [the plaintiff in that case] who had signed the release would be bound by the release unless she could establish: (1) that in the circumstances a reasonable person would have known that she did not intend to agree to the release she signed; and (2) that in these circumstances the defendants failed to take reasonable steps to bring the content of the release to her attention.

The judge in the present McCallum case noted that “as a sometime consumer and non-reader of on-line waiver clauses” that she “could easily imagine the Plaintiff's astonishment that the release (which he had not read) imposed a positive obligation to indemnify as Ironman now asserts: would a racer likely expect such a term from his or her experience in races with waivers?*”.*

The judge found that McCallum understood that he would not be permitted to participate in the race unless he signed the Agreement and that he was aware of the general nature of the Agreement which was to exempt Ironman from liability. McCallum had asked no questions about the Agreement he signed. There was no way for Ironman to know that he had not read the documents.

The judge also noted that the indemnity in question appeared on the third page of the Agreement document, its importance having been emphasized by the capitalizing of the letters and beginning with the words "*RELEASE AND INDEMNITY PLEASE READ CAREFULLY. THIS RELEASE AND INDEMNITY SECTION CONTAINS A SURRENDER OF CERTAIN LEGAL RIGHTS*".

The internet, being the commonplace and accepted method of registering for the race (and with the emphasis given to the words of indemnification), assuming even that Ironman reasonably knew that a registrant would not intend to agree to such an unexpected waiver, the judge reasoned Ironman had done what it could to bring the onerous terms to the registrant's attention.

There was nothing in the circumstances that would cause a reasonable person to know that McCalllum did not intend to agree to the terms he signed.

The judge also took into consideration the use of capital lettering and words of warning in forming the view that Ironman had take steps to make someone in the position of McCallum aware that the relevant contract language existed.

Further, the Court found that the Agreement was not unconscionable, considering that McCallum

was well-educated. There was no inequality of bargaining power and McCallum was not preyed upon and, as races carry with them inherent dangers of which he should have been aware, it was in no way unreasonable for an organization to seek to protect itself against liability from suit for damages arising out of such dangers. It followed that there were no grounds of public policy on which the waiver clause should be struck down.

The judge concluded that an event organizer such as Ironman could limit risk by requiring participants to sign a release. The judge concluded that Ironman did that very thing without pressuring McCallum without burying the nature of the release in fine print and by giving emphasis to the significant terms. McCallum signed, giving no reason for Ironman to believe he was not intending to agree to the terms.

There was no argument that the collision that occurred was not covered by the Agreement. The risk of "losing control and falling from the bike, colliding with objects or people (including co-participants or spectators)" was specified. The Agreement language also provided that:

> "Risks regarding conduct . . . The potential that participant, co-participant(s) and/or third parties may act in a negligent or intentional manner. These and other risks may result in participants: falling partway or falling to the ground; Being struck; colliding with objects, people . . . experiencing bicycle or vehicle collision or rollover; . . . " The place is identified: "EVENTS MAY BE HELD OVER PUBLIC ROADS AND FACILITIES OPEN TO THE PUBLIC DURING THE EVENT AND UPON WHICH HAZARDS ARE TO BE EXPECTED".

Was the Indemnity Obligation Sufficiently Brought to McCallum's Attention?

McCallum argued that it would defy common sense to enforce an onerous positive indemnity obligation unless it was "front and center". The narrow question was whether the indemnity on page 3 was front and center enough.

McCallum submitted that Ironman had an obligation to ensure that he understood the legal effect of the Agreement prior to signing them. The judge rejected this submission, ruling that there is no independent obligation on a person seeking the benefit of a release to explain its legal effect to the signer of the release. It emerges from the authorities that there is no general requirement that a party tendering a document for signature to take reasonable steps to apprise the signing party of onerous terms or to ensure that he reads and understands them. It is only where the circumstances are such that a reasonable person should have known that the party signing was not consenting to the terms in question, that such an obligation arises. For to stay silent in the face of such knowledge is, in effect, to misrepresent by omission.

The above said, the judge however noted that "trying to work through the release document myself, through the structure of the document even with its emphasis, my difficulty was not that a reasonable person should have known that the party signing was not consenting to the terms in question but rather that the term in question does not adequately convey its meaning".

The judge noted that that the wording is dense legalese such that "by its prolixity it loses its quality of plain language. It is quite a slog, even for a legally trained reader, to wade through all the inclusions and qualifiers that are present, no doubt, to cover some avenue of defense". Like the rest of the Agreement, it is adequately highlighted that it is bringing "a surrender of certain legal rights", a phrase that itself sounds like waiver, but it failed to convey the essence of meaning when it came to the indemnity concept.

Asking herself whether the language conveyed meaning to the effect that "if anyone sues you connected with my participation in the race I will indemnify you including paying your legal fees" - the judge found that it did not.

The judge concluded that "a reasonable person should have known that the party signing was not consenting to the terms in question" because the terms in question had no discernable meaning.

In the result, while the Court found that the release aspect of the Agreement was valid and binding on McCallum and that he had waived the right to sue (as was conceded), the indemnity clause was not enforceable so as to bind McCallum to indemnify Ironman for a suit brought by someone such as Jackson in connection with the McCallum's participation in the race.

iii) By the terms of the Agreement did McCallum also waive his claims against Jackson?

Ironman argued that Jackson was in a place, doing an activity and constituting a risk anticipated in the Agreement and that the release language in the Agreement should accordingly be extended to Jackson based on the fact that she was a licensed driver.

As mentioned above, in addition to Ironman being released from liability the Agreement also extended a waiver of liability to certain third parties:

> **TO RELEASE AND NOT TO SUE** THE WORLD TRIATHLON CORPORATION (WTC), WEC, OAT, EVENT SPONSORS, EVENT ORGANIZERS, EVENT PROMOTERS, EVENT PRODUCERS, RACE DIRECTORS, EVENT OFFICIALS, EVENT STAFF, ADVERTISERS, ADMINISTRATORS, CONTRACTORS, VENDORS, VOLUNTEERS, AND ALL PROPERTY OWNERS AND PROVINCIAL, CITY, TOWN, COUNTY, AND OTHER GOVERNMENTAL BODIES, AND/OR MUNICIPAL AGENCIES WHOSE PROPERTY **AND/OR PERSONNEL ARE USED AND/OR IN ANYWAY ASSIST IN LOCATIONS WHERE THE ACTIVITIES TAKE PLACE**, AND EACH OF THEIR RESPECTIVE PARENT, SUBSIDIARY AND AFFILIATED COMPANIES, ASSIGNEES, LICENSEES, OWNERS, OFFICERS, DIRECTORS, PARTNERS, BOARD MEMBERS, SHAREHOLDERS, MEMBERS, SUPERVISORS, INSURERS, AGENTS, EMPLOYEES, VOLUNTEERS, CONTRACTORS AND REPRESENTATIVES **AND ALL OTHER PERSONS OR ENTITIES ASSOCIATED OR INVOLVED WITH THE ACTIVITIES** (INDIVIDUALLY AND COLLECTIVELY REFERRED TO IN THIS AGREEMENT AS "RELEASED PARTY" (emphasis in bold added)

Ironman asserted that Jackson, being the holder of a valid driver's license and thereby permitted to use the roadway where the incident occurred during the race, was included as a "released party" in the above language.

The judge noted that there could be many scenarios that arise where a person, licensed by government to do some activity or be in a particular location, may cause harm to others including the participants in a race: the nuclear plant licensed to be in the vicinity melts down causing harm to many, the licensed driver impaired by alcohol who drives through the race location without regard for anyone much less racers, the pedestrians licensed to be on the sidewalk adjacent to the race course who have bombs in their backpacks and terrorist intent. These examples are dramatic and perhaps remote but serve to demonstrate that it cannot be that the Agreement language deprives the registrants in this race of all rights in relation to all wrong-doers just because they are licensed to be in a location walking, driving or carrying on other activities that people generally have license to do.

The judge reasoned that there must be some parameters around who is intended to be included among the list as a "released party". In this regard the judge noted the plain words in the Agreement language cited above, that refers to people who have something to do with all the myriad of arrangements necessary to authorize and stage the race.

The Court accordingly found that motorists such as Jackson driving on roadways where the race

has been permitted to occur were not among the "Released Parties" caught by the above wording.

Accordingly Jackson's crossclaim was not dismissed and was allowed to continue to trial but McCallum would not be required to indemnify Ironman in respect of same.

Conclusion

The "take away" from this decision is the reminder that clarity in words and expression is critical to give effect to contracting intention. The Court accepted modern day contracting realities, in finding that an internet based electronic acceptance of a contract (which was not intended to be negotiated) could be valid and enforceable, being limited by its own terms. The question is whether the terms sufficiently express the intention.

Gordon Hearn

Endnotes

(*1) 2019 ONSC CarswellOnt 20160 Dec. 6, 2019

(*2) The Agreement wording was quite lengthy. Attempt has been made to capture the relevant wording for the purposes of the present discussion.

(*3) *Arif v. Li* 2016 ONSC 4579 (CanLII) para. 50.

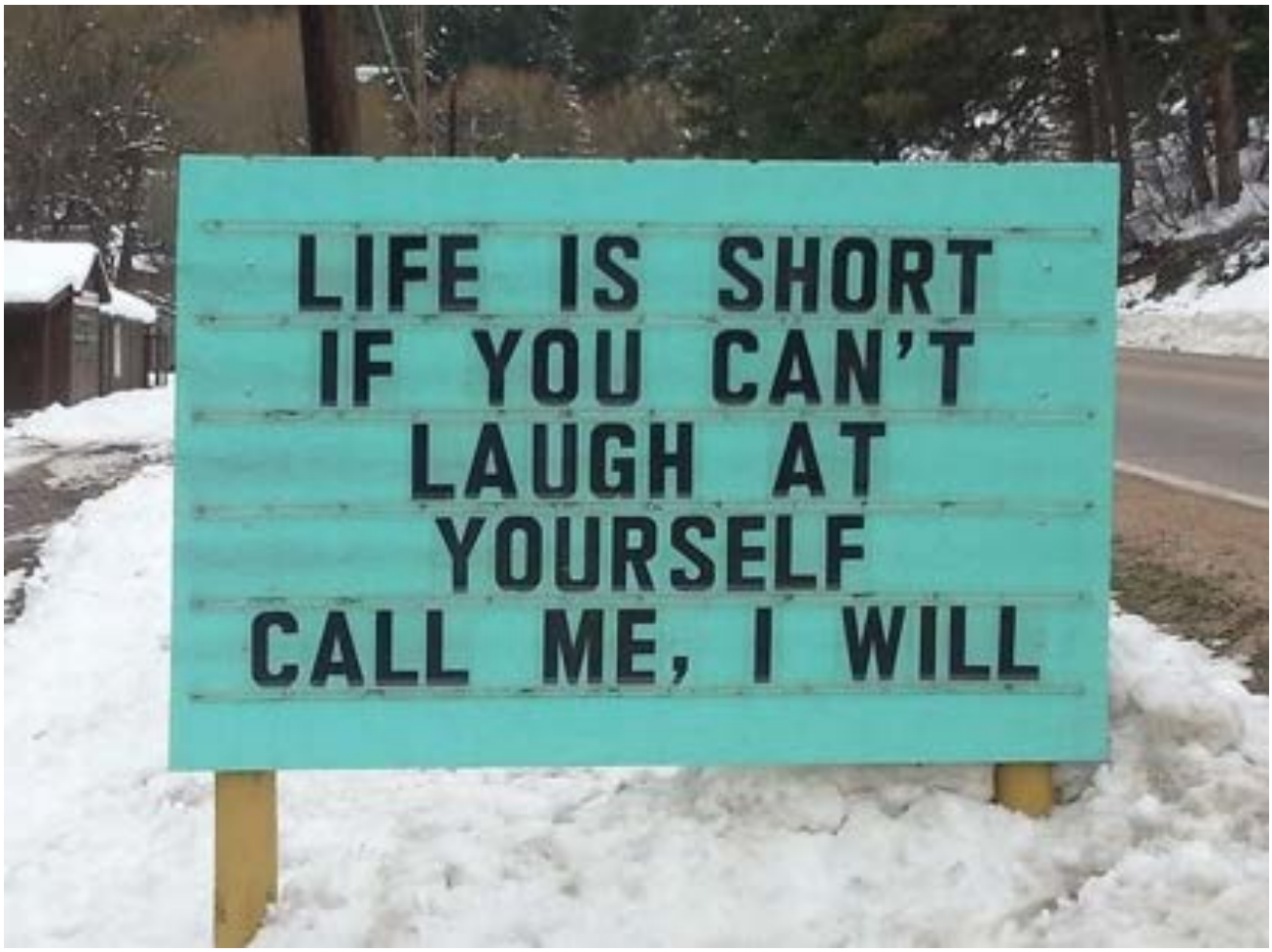
(*4) The latin term *non est factum* is a defence taken by a party who maintains that they did not sign the document in question.

(*5) The latin term *consensus ad idem* means that the two parties had a "meeting of the minds", that they were on the "same page" as concerns the existence of and meaning of a contract.

(*6) *The Law of Contracts*, 6th ed. (Toronto: Canada Law Book, 2010), at para. 318.

(*7) *Tilden Rent-A-Car Co. v. Clendenning* (1978), 1978 CanLII 1446 (ON CA), 18 O.R. (2d) 601.

(*8) (1988), 1988 CanLII 3094 (BC SC), 33 B.C.L.R. (2d) 160.



3. Workplace Harassment and Workers' Compensation

Today's employer understands only too well that ignoring workplace bullying or harassment, including sexual harassment, will lead to expensive consequences.

An employer's failure to provide a safe work environment, including an environment free from harassment as required by occupational health and safety legislation, can lead to a complaint with the applicable Ministry of Labour or, for federally regulated employers, Employment and Social Development Canada. The employer may be ordered to conduct a workplace investigation, at its expense, if it failed to do so already, or if the investigation conducted was not appropriate in the circumstances. An employer may also face fines for breaching occupational health and safety legislation.

Where workplace harassment is sexual or based on a prohibited ground under human rights legislation, an employer may be named in a human rights complaint in which a successful employee is entitled to lost income arising from the breach of human rights and damages for injury to dignity, feelings and self-respect and, where applicable, reinstatement if employment was constructively or wrongfully terminated.

Alternatively, an employer's failure to address workplace harassment may be viewed as a breach of the employment relationship, bringing employment to an end and providing the basis for a civil action for constructive dismissal, where the damages are equal to that in a wrongful dismissal action.

A recent decision of the Ontario Workplace Safety and Insurance Appeals Tribunal (the "Tribunal") in *Morningstar v. Hospitality Fallsview Holdings Inc. (Decision No. 1227/19)*(*1) introduces an interesting jurisdictional issue where workplace harassment has caused chronic mental stress, and the employer has worker's compensation ("WSIB") coverage or is required to have such coverage. In this case the Tribunal held that the employee's civil action for constructive dismissal was barred as her claim was based on mental stress caused by workplace harassment. In 2018 the *Workplace Safety and Insurance Act* ("WSIA") was amended by extending benefits to a worker for chronic or traumatic mental stress arising out of and in the course of the worker's employment. The worker is entitled to benefits as if the mental stress were a personal injury arising from an accident.

The Tribunal in its decision referred to the Workplace Safety and Insurance Board Operational Policy Manual ("Board Policy") for guidance. The Board Policy states that workplace harassment occurs when a person or persons, while in the course of employment, engage in a course of vexatious comment or conduct against a worker, including bullying, that is known or ought reasonably to be known to be unwelcome. It goes on to provide that a worker will generally be entitled to benefits for chronic mental stress if an "appropriately diagnosed mental stress injury is caused by a substantial work-related stressor arising out of and in the course of the worker's employment". A work-related stressor is considered substantial if it is excessive in intensity and/or duration in comparison to the normal pressures and tensions experienced by workers in similar circumstances (traumatic mental stress is addressed elsewhere in the policy, and is based on mental stress caused by a traumatic event or events, such as a criminal act or horrific accident). The Board Policy provides that workplace harassment will generally be considered a substantial work-related stressor. Finally, the Board Policy is clear that a worker is not entitled to benefits for chronic mental stress caused by the employer's decisions or actions relating to the worker's employment, including the decision to change the work to be performed or the working conditions, or to discipline the worker or terminate the worker's employment.

In this case Ms. Morningstar sued her employer, Hospitality Fallsview Holdings Inc. ("Fallsview"), for constructive dismissal, alleging that she was forced to resign due to harassment, bullying and abuse which resulted in mental distress. In her

court action Ms. Morningstar sued for not only wrongful dismissal damages but also for aggravated, moral and punitive damages. Fallsview, a Schedule 1 employer (*2), brought an application to the Tribunal seeking a determination that her right to sue it was barred because the civil action was essentially an allegation of chronic mental stress under WSIA. Ms. Morningstar argued that she has a claim for constructive dismissal even if she had not suffered mental distress. The Tribunal held that where the wrongful dismissal claim is "inextricably linked to the work injury", the right to bring a court action is removed by the WSIA. The Tribunal went on to state that Ms. Morningstar's claim was not for wrongful dismissal in the usual sense but for constructive dismissal, based on her employment being effectively terminated by the harassing and bullying conduct of her co-workers and management which caused her mental distress. Put another way, the Tribunal found that the factual basis for the constructive dismissal claim, as well as for the other damages sought in the court action, was the work accident alleged, being the harassment and bullying and the associated personal injury sustained as a result.

At first blush, this decision is good news for Schedule 1 employers as they may be able to avoid expensive litigation, and exposure to not only constructive dismissal damages in the context of workplace harassment, but punitive, moral and aggravated damages. However, WSIB claims based on chronic mental stress arising from workplace harassment may have a negative impact on an employer's rating, and employers who have failed to comply with the WSIA will have increased their exposure for an audit or investigation.

Carole McAfee Wallace

Endnotes
(*1) 2019 ONWSIAT 2324 (CanLII)
(*2) A "Schedule 1" employer is required to provide workers compensation coverage for employees.

4. Updates From Transport Canada and the Ministry of Transportation

Drones

In August of 2019, Transport Canada announced that it had fined an individual $2,750 for 11 violations of the Canadian Aviation Regulations (CARS) relating to the operation of a remotely piloted aircraft system (ie. a drone) over downtown Toronto during the Toronto Raptors' final game and the victory celebration. (*1)

Transport Canada's drone regulations came into effect in June of 2019 and can be found under Part IX of CARS. Transport Canada has confirmed that the individual has been charged with the following violations under CARS:

- s. 901.02 No person shall operate a remotely piloted aircraft system unless the remotely piloted aircraft is registered in accordance with this Division;
- s. 901.14(1) … no pilot shall operate a remotely piloted aircraft in controlled airspace;
- s. 901.26 … no pilot shall operate a remotely piloted aircraft at a distance of less than 100 feet (30 m) from another person, measured horizontally and at any altitude, except from a crew member or other person involved in the operation;
- s. 901.47(2) … no pilot shall operate a remotely piloted aircraft at a distance of less than (a) three nautical miles from the centre of an airport; and (b) one nautical mile from the centre of a heliport; and
- s. 901.54(1)(b) … no person shall operate a remotely piloted aircraft system under this Division unless the person holds either (i) a pilot certificate – small remotely piloted aircraft (VLOS) – basic operations issued under s. 901.55; or (ii) a pilot certificate – small remotely piloted aircraft (VLOS) – advanced operations issued under s. 901.64. (*2)

Toby Gu had come forward as the pilot of the drone in question. Mr. Gu had set up a go-fund me page in order to raise money to pay for the fines and his legal costs and Mr. Gu had raised $1,208. (*3)

Abandoned Vessels

In July of 2019, the *Wrecked, Abandoned or Hazardous Vessels Act* came into force. This statute makes it illegal to abandon boats, increases vessel owner liability, and allows the government to administer monetary penalties or prosecute owners who do not behave responsibly in disposing of their vessel. In September 2019, the Minister of Transport announced that a total of $1,174,139 would be provided to assess seven boat removal projects and to remove 34 boats in British Columbia. The recipients include Bowen Island Municipality, Salish Sea Industrial Services Ltd., and We are the change for humanity. (*4)

Rail Safety

In early January 2020, the Minister of Transport announced $225,330 in funding to educate communities and raise awareness about rail safety and the safe transportation of dangerous goods in Canada. Out of this funding, $219,750 will go to the Chemistry Industry Association of Canada to be spent on its Transportation Community Awareness and Emergency Response initiative (TRANSCAER). The remaining $5,580 will be received by Safe Rail Communities Inc. and is to be used to enhance their Rail Safety Toolkit. (*5)

E-Scooters

The Ontario Ministry of Transportation announced that effective January 1, 2020, a new 5 year pilot to permit Electric Kick Scooters (e-scooters) on Ontario's roads will be in place. Key elements of the pilot include but are not limited to: a maximum speed of 24 km/h; a minimum operating age of 16; no passengers are allowed; no cargo can be carried; bicycle helmets are required for operators under 18 years old; and the e-scooter must have a horn or bell. Municipalities still have the final say on whether to permit e-scooters, and, if so, Municipalities must pass by-laws to allow their use and determine where they can operate. (*6)

Andrea Fernandes

Endnotes

(*1) https://www.canada.ca/en/transport-canada/news/2019/08/transport-canada-fines-drone-pilot-over-two-incidents-in-toronto.html

(*2) Canadian Aviation Regulations (CARS) SOR/96-433

(*3) https://www.gofundme.com/f/raptors-drone-footage-legal-fund

(*4) https://www.canada.ca/en/transport-canada/news/2019/09/government-of-canada-supports-removal-of-34-additional-abandoned-boats-in-british-columbia-through-the-oceans-protection-plan.html

(*5) https://www.canada.ca/en/transport-canada/news/2020/01/government-of-canada-invests-in-rail-safety-improvement-in-canada.html

(*6) http://www.mto.gov.on.ca/english/vehicles/electric/electric-scooters.shtml and O. Reg. 389/19: Pilot Project – Electric Kick-Scooters.

5. Federal Court Rules that Reinstatement Is Not the Presumptive Remedy Following an Unjust Dismissal

Pursuant to the *Canada Labour Code* (the "*Code*") (*1), an employee of a federally regulated employer, who is not subject to a collective agreement and who has completed twelve consecutive months of continuous employment, may file an unjust dismissal complaint against the employer. Where there is a finding of an unjust dismissal, the *Code* affords adjudicators a wide array of options to remedy the dismissal. Such options include reinstatement of the employee, monetary compensation equivalent to the renumeration the employee would have received but for the unjust dismissal, and "any other like thing that is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal" (*2).

While adjudicators have, more often than not, ordered reinstatement of the unjustly dismissed employee, the Federal Court's decision in *Kouridakis v. CIBC* (*3) clarifies that reinstatement is not the standard, presumptive or required solution to remedy every unjust dismissal finding.

Facts

The employee was employed by CIBC for 16 years, during which time he received many certificates of appreciation, bonuses and pay increases. He also, however, received various letters and a disciplinary warning regarding his conduct in the workplace, which, according to his manager, included socializing during work hours and conducting personal business on company time.

In April of 2016, the employee had a disagreement with his manager regarding some suggestions she had made during a team meeting. Following the meeting, the employee approached the manager to further discuss his qualms. The discussion became heated, and the manager left in tears. The employee claimed that he then followed the manager to the elevator to apologize, and touched her arm saying that he wanted to talk to her. The manager loudly responded, "Don't touch me". The employee went on sick leave after this occurrence, which soon came to be known as the "Elevator Incident".

In May of 2016, the employee filed a bullying and harassment complaint against his manager, in which he claimed that he was "reprimanded, yelled at, humiliated" and "made to feel inadequate," and that his growing anxiety in what he perceived to be an unhealthy work environment reached its pinnacle following the Elevator Incident.

In June of 2016, the employee was terminated via a termination letter that was silent on the reasons for his dismissal. Shortly thereafter, the employee filed an unjust dismissal complaint against his employer.

The Arbitration

During the arbitration, CIBC argued that the dismissal was justified given the employee's unacceptable and insolent challenges to authority, inappropriate acts and lack of appreciation for consequences. The employee in turn argued that his past behavior had been tolerated or condoned by CIBC and that a one-month suspension without pay would have been a more appropriate and proportionate disciplinary measure. The employee further requested that the Arbitrator order reinstatement.

The Arbitrator determined that, while CIBC had not made out a case for dismissal for just cause, reinstatement was untenable, and it was necessary to remove the employee from the workplace in order to ensure a harmonious work environment. The Arbitrator determined that severance compensation was the appropriate remedy.

The employee subsequently brought an application for judicial review of the Arbitrator's decision and argued, amongst other things, that reinstatement was the norm and not the

exception; that the onus of proving that reinstatement was not the appropriate remedy was borne by the employer; and, that the Arbitrator was required to consider whether the employee could be reinstated into a different position.

The Federal Court's Decision

The Federal Court dismissed the employee's application for judicial review and agreed with the Arbitrator's finding that reinstatement would be inappropriate in the circumstances at hand. The Court further opined that the nature of the compensation ordered by the Arbitrator was reasonable, and that the *Code* did not afford the Arbitrator the discretion to order reinstatement to a position other than that held by the employee at the time of the dismissal (*4).

The Federal Court opined that there is not a burden of proof on the employer to show why reinstatement is not possible. The Court clarified that reinstatement is not a presumptive right, and stated as follows in this regard (*5):

> The fact that reinstatement may have been determined to be the appropriate remedy
> more often than not does not mean that it becomes the norm or somehow becomes the standard to be deviated from only in exceptional circumstances. I do not accept that, as a matter of law, reinstatement is the default position which should be ordered unless the employer shows, on the balance of probabilities, that such reinstatement is inappropriate. Reinstatement is but one of a number of remedies which, like any other, is open to the arbitrator to order either on its own, in conjunction with other monetary compensation, or not at all, even where the dismissal is found to be unjust.

The "Takeaway"

While *Kouridakis* is favourable decision for federally regulated employers, such employers ought to remain mindful of the risks that come with an unjust dismissal finding, which include the availability of reinstatement and full backpay as remedies under the *Code.* Employers in federally regulated industries are only permitted to terminate non-managerial employees with over one year of continuous service if just cause can be established of the position is legitimately being phased out.

Janice C. Pereira

Endnotes

(*1) *Canada Labour Code,* R.S.C., 1985, c. L-2 (the "*Code*")
(*2) The *Code* at section 242(4).
(*3) *Kouridakis v. Canadian Imperial Bank of Commerce*, 2019 FC 1226 ("*Kouridakis*").
(*4) *Kouridakis, ibid,* at paras 60-1.
(*5) *Kouridakis, ibid,* at para 45.

6. Supreme Court of Canada Re-Writes Courts' Review Powers

Courts supervise regulatory decision-making in a plethora of areas, from the granting of municipal taxicab licences to the use that can be made of hospital records, and everything in-between.

Recently, the Supreme Court of Canada changed the rules of the game for the judicial review of such administrative decision-making, following two appeals to Canada's highest court. The first matter – *Canada v. Vavilov* (*"Vavilov")* – concerned the citizenship status of the children of Russian spies.(*1) The other matter – *Bell Canada v. Canada* –concerned the power of the Canadian Radio-Television and Telecommunications Commission ("CRTC") to disallow the "simultaneous substitution" rule by which Canadian broadcasters play Canadian advertisements during their simulcasts of the SuperBowl.(*2)

For over a decade, the leading case concerning judicial review has been the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*. (*3) In *Dunsmuir*, the Court found that the prior existing framework was too complicated. It held that, going forward, there would be two standards of review: matters where the courts would be concerned with the "correctness" of the administrative tribunal's decisions, and matters where the courts should only ensure that the administrative outcomes were "reasonable".

Under *Dunsmuir*, the "correctness" standard applied to (i) constitutional questions concerning the division of powers amongst the federal government and the provinces, (ii) questions of jurisdiction, (iii) important matters that considered to be "of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise", and (iv) questions regarding the jurisdictional lines between competing administrative bodies. For all other matters, the "reasonableness" standard applied.

Dunsmuir also emphasized a preference for deference to certain types of administrative decision-making, particularly where the body had specialist's expertise in a given area. It also emphasized the usefulness of past jurisprudence. Thus, courts were directed to first determine whether case law had already established the appropriate level of deference in the circumstances. Second – if the first inquiry was not fruitful – then the court could consider how much deference was required.

When it was released in 2008, *Dunsmuir* was seen to have simplified an older system. However, in time, it also gave rise to difficult and competing lines of cases. Now, in *Vavilov*, the Supreme Court has explicitly indicated that Canadians require a more "holistic revision" and a "recalibration of the governing approach" to create "future doctrinal stability". *Dunsmuir* was simply too complicated. We are now in a "holistic" world.

Henceforward, the general standard of review will be "reasonableness" for all types of cases, unless there is clear legislative intent that another standard ought to apply. This new "reasonableness" standard applies both to outcomes and also to the reasoning process.

Courts may now generally only derogate from the "reasonableness" standard where (i) a piece of legislation provides for a different standard, (ii) the governing legislation includes a statutory right of appeal, (iii) there are constitutional questions, (iv) there are general questions of law that are of central importance to the legal system as a whole, or (v) questions regarding the jurisdictional boundaries amongst administrative tribunals. Future courts are theoretically entitled to derogate from the presumption of "reasonableness" in other special situations not as a matter of routine.

It is particularly noteworthy that appeals from administrative tribunals will now be subject to the ordinary standards of review for appeals – that is "correctness" for questions of law and "an overriding and pulpable error" standard for

questions of fact (or mixed-fact-and-law). This is a reversal of decades of jurisprudence.

In *Vavilov*, the applicant, Mr. Vavilov, was born in Canada in 1994 and always considered himself to be a Canadian citizen. However, as Mr. Vavilov had no connection to Russia, he sought to stay in the country. At particular issue was a provision in the *Citizenship Act* providing that the children of foreign government officials are not Canadians, even if born in Canada. He lost at first instance before the Registrar of Citizenship, lost again on review to the Federal Court (on "correctness" grounds) and won at the Federal Court of Appeal (on a "reasonableness" standard). The justices of the Supreme Court agreed that the new "reasonableness" standard ought to apply in the *Vavilov* case, but they were not unanimous in the outcome. The majority held that he was a Canadian citizen and allowed to stay.

In the *Bell Canada* matter, the Federal Court of Appeal was the first reviewing court, upon a statutory appeal. It upheld the CRTC's determination that it had jurisdiction to make orders concerning specific programming as being "reasonable". (It also applied a "correctness" standard to confirm that the decision was not contrary to the *Copyright Act* or international law.) Since there was a statutory appeal, the Supreme Court applied the "correctness" standard. The majority agreed with Bell and the NFL that the *Broadcasting Act* did not give the CRTC the power it thought it had. It found that the legislation only permitted the regulator or order cable companies to carry specific channels. It had no authority to micromanage specific programming, such as Super Bowl ads.

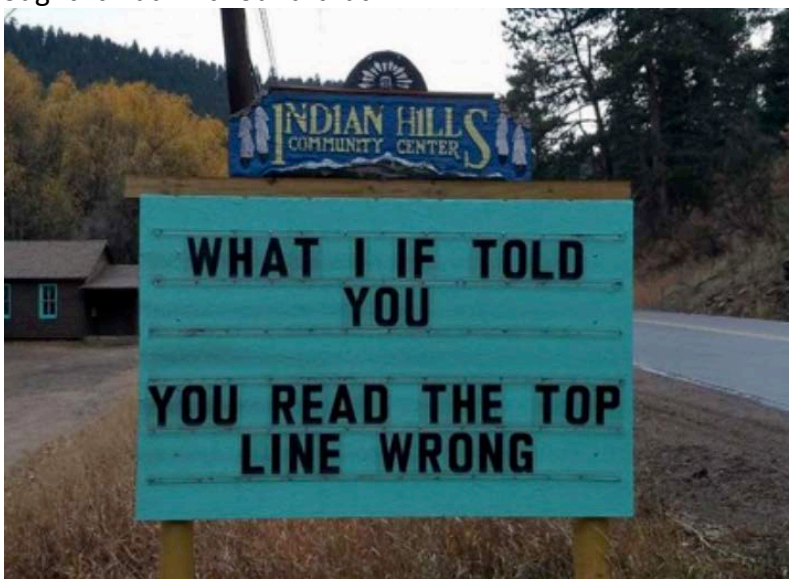
Justices Abella and Karakatsanis of the Supreme Court wrote "concurring" decisions, which might be interpreted as soft "dissents". They would have been more deferential than their colleagues to the expertise of various tribunals. They also would not have elevated "appeal" clauses to require "correctness" reviews. Finally, they were also troubled by their Supreme Court colleagues' willingness to disregard settled case law.

What does all of this mean to the average person? It is too early to tell. Courts now must sort out how they will apply the new "reasonableness" standard. In the short run, it is likely that a good amount of uncertainty will prevail. It is possible that in some cases, "reasonableness" will look a lot like "correctness" used to. In other cases, "reasonableness" may look a lot more like a general test of "fairness".

Stay tuned!

Alan S. Cofman

Endnotes
(*1) 2019 SCC 65.
(*2) 2019 SCC 66.
(*3) 2008 SCC 9.



7. Montreal Convention Limits of Liability Raised

The original Warsaw Convention of 1929 (*1) was, for a period, the predominantly governing international instrument that dealt with the unification of the rules of air carrier liability. The Convention however suffered from a fatal flaw that dictated that it would have to be rewritten or replaced.

Warsaw 1929 provided for firm limits to carrier liability in connection with passenger death or bodily injury; loss or damage to cargo and luggage; and delay to passengers, cargo and luggage. Although the limits were in 1929 contemporaneously modest, this was offset by the presumption of carrier liability with the burden resting with the carrier to disprove such presumptive liability coupled with support to develop the fledgling industry.

However, modest caps on liability in 1929, became nominal and eventually egregious as the value of the fixed limits deflated over time given progressive inflation of the cost of living. The unsustainability of the undervalued limits led to the disunification of the Warsaw System as certain States signed up to revisions to the Warsaw regime that *inter alia* increased the limits of liability, including the Hague Protocol of 1955 (*2) and Montreal Protocol #4 of 1975 (*3).

Even such endeavours failed to calm the clamour for a more robust regime of ensuring fair compensation to victims, particularly for fatal passenger claims. In 1992, Japanese air carriers agreed to waive limits of liability and to waive any defences to liability up to 100,000 SDRs. This gained more traction in 1996, when many major carriers aligned with the Japanese initiative under the auspices of the International Air Transport Agency ("IATA") Intercarrier Agreement.

When the international community gathered for a diplomatic conference at the International Civil Aviation Organization ("ICAO") in Montreal in 1999 to draft a fresh legal text that both modernized Warsaw 1929 and created a sustainable international framework, one pitfall that they had to avoid was the risk of repeating history by establishing liability limits that were relevant only to the present day.

So was born Article 24(1) of the Montreal Convention of 1999 (*4), which Convention is now the predominant (but far from the only) international framework in force today on air carrier liability. This is known as the escalator clause, and subjects all of the Convention's limits of liability, which are expressed in Special Drawing Rights ("SDRs") to revision every five years. If the States whose currencies form the basis for the value of the SDR have, on a weighted basis, seen inflation of 10% or more, then the monetary limits are to be accordingly revised.

At the second five-year review in 2009, ICAO implemented the first round of revisions to the limits of liability. In 2019, applying the rule of ten per cent since 2009, a further revision was made at the fourth review.

The evolution of the three limits provided for in the Montreal Convention is as follows:

	1999	**2009**	**2019**
Destruction, loss, damage or delay to Cargo	17 SDRs per kg	19 SDRs per kg	22 SDRs per kg
Destruction, loss, damage or delay to Baggage	1,000 SDRs per passenger	1,131 SDRs per passenger	1,288 SDRs per passenger
Delay in the carriage of persons	4,150 SDRs per passenger	4,694 SDRs per passenger	5,346 SDRs per passenger
Unbreakable limits for passenger injury or death	100,000 SDRs per passenger	113,100 SDRs per passenger	128,821 SDRs per passenger

For the purposes of cargo movements, the new limit is worth approximately $40 CAD/kg.

For the limits for passenger injury or death, the unbreakable limit against which carriers have no defences whatsoever for their liability is now 128,821 SDRs. There are very limited defences to carrier liability above this amount. Absent one of those defences applying, carrier liability is not limited and is to be evaluated in the normal course by the courts.

As concerns the victims of the recent Ukrainian International Airlines incident, including Canadian passengers, the applicable liability regime will depend upon their precise ticketing arrangements. Iran is not a signatory of Montreal 1999. However, Canada and Ukraine are signatories, and for a passenger's rights to be governed by Montreal 1999, their travels must start and end in a signatory State.

Since the overall itinerary is the reference point, passengers on roundtrip tickets starting in Ukraine, Canada or another State, and returning to that same location will be governed by Montreal 1999, and their survivors should expect to receive 128,821 SDRs or $233,000 CAD without dispute and possibly as an advance payment. Notwithstanding that the airline and its insurers may (or may not) argue absence of any fault as a defence to liability exceeding 128,821 SDRs, plaintiffs' lawyers will presumably raise an array of allegations of fault on the part of the airline including with respect to the fact of its very operations in the subject airspace given the prevailing regional tensions at the material time .

Mark Glynn

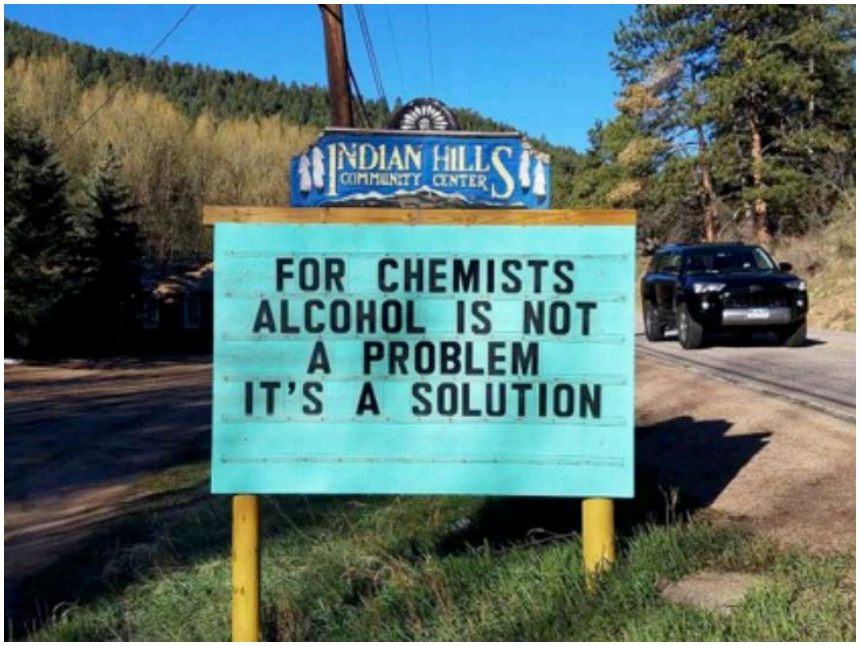
Endnotes

(*1) *Convention for the Unification of Certain Rules Relating to International Carriage by Air,* Signed at Warsaw on 12 October 1929

(*2) *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air*, Signed at Warsaw on 12 October 1929, Done at The Hague on 28 September 1955

(*3) *Additional Protocol No. 4 to Amend Convention for the Unification of Certain Rules Relating to International Carriage by Air* Signed at Warsaw on 12 October 1929, As Amended by the Protocol Done at the Hague on 28 September 1955, Signed at Montreal on 25 September 1975

(*4) *Convention for the Unification of Certain Rules for International Carriage by Air*, signed at Montreal on 28 May 1999



8. Claims in Canada: Problems with Suing in Federal Court

Like the United States, Canada has two-tiered constitution that divides authority between the Federal Parliament and provincial legislatures, and, in parallel, has separate court systems dedicated to administering each. For most parties with a claim, the decision of where to bring your action is a simple one; the Canadian provinces have broad jurisdiction over "property and civil rights," a subject area that covers most types of commercial dispute. The question becomes more complicated, particularly for parties in the transportation sector, because certain subject matters will fall either under the concurrent jurisdiction of both the federal and provincial courts, or even the exclusive jurisdiction of the federal court. Bringing a lawsuit in the Federal Court, necessary in some cases, can lead to some unfortunate jurisdictional challenges.

One illustration of this problem was recently seen in the Federal Court of Appeal's decision in *7744185 Ontario Incorporated v. Canada* (*1). This case involved a claim brought against the Government of Canada by Air Muskoka, a company operating a refueling business. Air Muskoka had made a number of improvements to its leased lands relying in part on representations that it would obtain a 20-year lease extension that would secure its position until 2043. In this case Air Muskoka found itself without an action in Federal Court, having wasted more than 2 years in time and associated court costs only to find instead that it had to re-start its action from square one in the province's Superior Court.

The facts

Air Muskoka's problems began when the Federal Government decided to privatize the Muskoka Airport in 1996, turning over its operations to the local municipality. In doing the Crown assigned its lease with Air Muskoka to the municipality and obtained an indemnity from the municipality for any claims that might in the future be made by Air Muskoka against it related to the lease. What followed was a litany of mismanagement by the municipality culminating in the municipality's refusal to renew Air Muskoka's lease, despite the fact that, prior to the handover, Air Muskoka had received assurances from Transport Canada that it would be able to extend to 2043.

Air Muskoka then sued the Crown under its lease for $5,000,000. The lease had a forum selection clause stating that the parties agreed to adjudicate their dispute in the Federal Court and the Minister of Transport had jurisdiction over matters related to the lease, which was a "Canadian aviation document" under the *Aeronautics Act*. Further, under the *Federal Courts Act*, the Federal Courts and the provinces had concurrent jurisdiction over relief claimed in relation to "aeronautics" (*2).

Federal Court Jurisdiction

Almost immediately, the Crown commenced a third-party claim against the Municipality of Muskoka under the indemnity agreement, alleging that it was responsible for the damages caused to Air Muskoka and had agreed to compensate the Crown in such circumstances. At the same time the Crown moved to stay Air Muskoka's action for lack of jurisdiction under a rather obscure provision of the *Federal Courts Act*. Under section 50.1, the court

> … shall, on application of the Attorney General of Canada, stay proceedings in any cause or matter in respect of a claim against the Crown where the Crown desires to institute a counter-claim or third-party proceedings in respect of which the Federal Court lacks jurisdiction (*3).

Initially, Air Muskoka was successful at keeping the matter in Federal Court. The prothonotary hearing the motion in first instance found that the municipality had essentially stepped into the shoes of the Crown by the assignment of the lease, such that the jurisdictional connections to aeronautics and the Federal Court were fully engaged. The decision was then appealed to a

judge of the Federal Court, and then finally to the Federal Court of Appeal. The prothonotary's ruling was reversed by the Federal Court judge hearing the appeal, and this year the Federal Court of Appeal dismissed Air Muskoka's appeal to that court. What went wrong?

In essence, the Federal Court and the Federal Court of Appeal determined that when an action will be stayed under this section is determined by what is "the essential nature of the third-party claim" (*4). While the subject matter had obvious connections to aeronautics, this association was not what was "essential to the disposition of the case," in the words of the governing Supreme Court of Canada authority (*4). In its third-party claim, the Crown was making fairly standard claims in contract and for negligence against the municipality. These matters fall fully within the sphere of "property and civil rights." Under Canada's Constitution such matters are squarely within the exclusive jurisdiction of the provincial courts.

The good news, if any, is that section 50.1 further provides that, when a Federal Court action is stayed in favour of an action in the province's Superior Courts, an action such as Air Muskoka's claim will not be in danger of being out of time for a new action to be commended in the proper court by virtue of the expiry of any statutory limitation period. This is because section 50.1 deems the time that the new action is started to be as if it had begun when the original Federal Court action was commenced. The time spent debating the issue in the Federal Court for over two years, was, however, unfortunately lost for good.

Conclusion

What could Air Muskoka have done differently? In hindsight the obvious answer would be to have consented to the Crown's original motion back in 2017. That is easy to see now, of course, but that it was not an easy question to answer should be equally clear from the fact that in the first instance the Federal Court got it "wrong." How can litigants avoid making the same mistake? They will need to hire counsel familiar with these jurisdictional questions so as to avoid falling into the same trap.

Oleg M. Roslak

Endnotes

(*1) 2020 FCA 1 [*Air Muskoka*].

(*2) *Federal Courts Act*, R.S.C., 1985, c. F-7, s. 23(b).

(*3) *Federal Courts Act*, R.S.C., 1985, c. F-7, s. 50.1(1).

(*4) *Air Muskoka* at para. 32.

(*5) *ITO – International Terminal Operators v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752.

DISCLAIMER & TERMS

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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 Feb. 10 2020 - for the first individual to email us the name of the location depicted in photograph on page 18. Email your answer to info@fhllp.ca with a subject line "Newsletter contest". First response with the correct answer wins.