FERNANDES HEARN LLP NEWSLETTER JULY 2020

THE NAVIGATOR

IN THIS ISSUE

Supreme Court of Canada Releases Decision in *Uber Technologies Inc. v. Heller* 2020 SCC 16

The Supreme Court of Canada ("SCC") has confirmed that the mandatory arbitration clause in Uber's driver contracts is unenforceable.

The Court had to decide if a dispute resolution clause requiring mediation and arbitration in the Netherlands was unconscionable. In an 8-1 decision, the SCC upheld the Ontario Court of Appeal's decision. Mr. Heller was a food driver with Uber Eats. He sought leave to file a class action against Uber in Ontario alleging violations of employment standards legislation. His contract with Uber stipulated mediation and ICC arbitration in the Netherlands. The administrative and filing fees associated with the process were $14,500. The fees represented a significant portion of Mr. Heller's annual income of $30,000.

The Ontario Court of Appeal had held that the clause was unconscionable due to the inequality of bargaining power and the cost of the arbitration. The SCC found that a person in Mr. Heller's position could not be expected to appreciate the financial and legal implications of the arbitration clause. The majority of the SCC further held that the arbitration clause was improvident because the arbitration process required $14,500 in administrative fees. As a result, the SCC held that the arbitration clause was unconscionable. Through this ruling, the Court has allowed a proposed $400 million class action lawsuit by Uber and UberEATS drivers to proceed. This decision will have wider implications for standard form contracts and arbitrations.

The majority's decision has settled the elements of the doctrine of unconscionability, rejecting the four-part test under prior Ontario appellate jurisprudence and siding with unconscionability now having only two requirements:

1. Inequality of bargaining power; and
2. An improvident bargain.

This test does away with other requirements inserted by prior Ontario Court of Appeal cases, such as an "overwhelming" imbalance of

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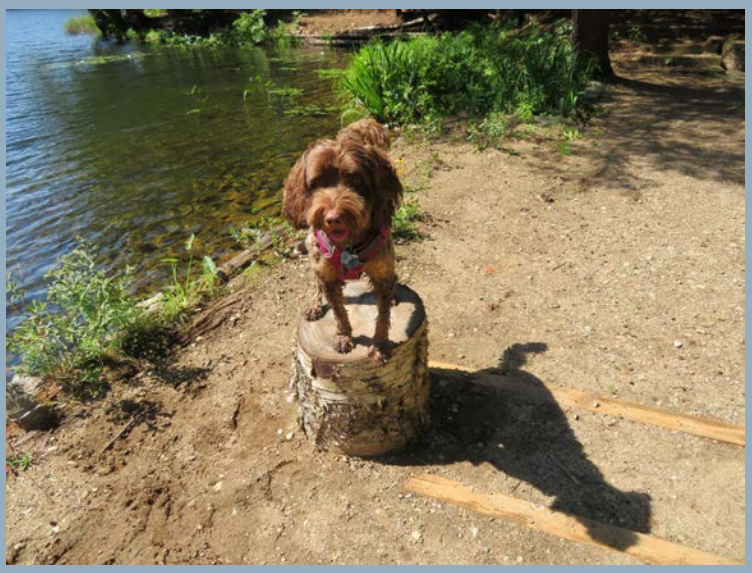
- **Fernandes Hearn LLP** continues its COVID-19 era series of client and industry **webinar** meetings with its presentation on **August 21 2020.** Topics include a discussion of a new employment law decision, and contract language and considerations brought on by the advent of COVID-9. An email will be sent out a week before advising of registration details.

- **Transportation: Operational and Cyber Risk Management and the Impact of COVID 19,** Webinar, August 26, 2020. **Kim Stoll** will be speaking. Please contact Kim for registration details.

- **Rui Fernandes, Gordon Hearn** and **Kim Stoll** have once again been included in the Who's Who Legal in Shipping and Transport.



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bargaining power, a "grossly unfair" transaction, one party knowingly taking advantage of the other's vulnerability, and the weaker party's lack of independent legal advice. The new test broadens both requirements of unconscionability, giving judges greater discretion to set aside contractual provisions.

The inequality of bargaining power was described by the SCC as "the presence of a bargaining context where the law's normal assumptions about free bargaining either no longer hold substantially true or are incapable of being fairly applied." The question is whether the potential for undue advantage or disadvantage created by the inequality of bargaining power has been realized. Although one party knowingly taking advantage of another's vulnerability may provide strong evidence of inequality of bargaining power, it is not essential for a finding of unconscionability. Unconscionability does not require that the transaction was grossly unfair, that the imbalance of bargaining power was overwhelming, or that the stronger party intended to take advantage of a vulnerable party.

Surprisingly, the SCC went on to cite examples. These included when a weaker party signs a contract out of necessity to prevent negative consequences or where only one party can fully understand and appreciate a contract's terms, possibly due to dense, difficult contractual language.

With respect to an improvident bargain, the second requirement of the test, the SCC stated that this must be determined contextually. "In essence, the question is whether the potential for undue advantage or disadvantage created by the inequality of bargaining power has been realized. An undue advantage may only be evident when the terms are read in light of the surrounding circumstances at the time of contract formation, such as market price, the commercial setting or the positions of the parties."

The SCC's decision has implications for businesses that use contracts of service to hire independent contractors and especially those businesses with mandatory arbitration or forum selection clauses in their contracts of service. Those businesses should re-assess any mandatory arbitration or forum selection clauses and consider whether they might be unconscionable. In light of the SCC's decision, clauses mandating prohibitively expensive dispute resolution mechanisms as part of an unnegotiated standard form contract may be unenforceable.

The SCC also dealt with the "competence-competence " principle in arbitrations: that is, when an arbitration clause exists, arbitrators should first answer challenges to their own jurisdiction. Previously the SCC had set out two exceptions to this rule in *Dell Computer Corp v. Union des consommateurs* 2007 SCC 34 and *Seidel v. TELUS Communications Inc*. 2011 SCC 15. Courts may rule on arbitral jurisdiction for: 1) pure questions of law; or 2) questions of mixed fact and law requiring only "superficial consideration" of the evidentiary record.

In *Heller,* the Court added an additional exception: courts must not set aside challenges to an arbitrator's jurisdiction when there is a "real prospect that doing so would result in the challenge never being resolved." For Mr. Heller, the majority ruled that the expensive, up-front cost to initiate arbitration supported the real prospect that the arbitration clause's validity could not be resolved without a court decision.

Lastly, the SCC dealt with the issue of what arbitration legislation applied. Uber argued that the Ontario *International Commercial Arbitration Act* applied, and Mr. Heller argued that the Ontario *Arbitration Act* applied. Whether the *International Commercial Arbitration Act* governs depends on whether the arbitration agreement is international and commercial. The SCC noted that the agreement in question was international. However, it held that labour or employment disputes are not the type that the *International Commercial Arbitration Act* is intended to govern. The *Arbitration Act* therefore governed.

Rui Fernandes

2. Employment Contract Termination Provisions – They May No Longer Be Enforceable

The Ontario Court of Appeal recently released its decision in *Waksdale v. Swegon North America Inc.* (*1), sending employers scrambling to review their employment contracts in order to determine whether their termination provisions are still enforceable.

Employment contracts often include termination provisions that limit the employee's entitlements when terminated without cause to only the minimum notice and other minimum entitlements under the *Employment Standards Act, 2000* ("ESA"), such that the employee is not entitled to the more generous common law notice. If the termination provision provides for anything less than the minimum requirements under the ESA, it will be rendered void, and the employee will be entitled to common law notice.

At issue in this case was the enforceability of the termination clause in Mr. Waksdale's employment contract. Mr. Waksdale's employment was terminated without cause after 18 months and he was paid 2 weeks' notice in accordance with the ESA. He sued his employer Swegon North America Inc. ("Swegon" or the "Employer") for wrongful dismissal. Mr. Waksdale (the "Employee") took the position that the termination provision in his employment contract was void because it attempted to contract out of the minimum standards of the ESA. What is interesting in this case is that the provision which offended the ESA was the termination "for cause" provision, and the Employee was terminated "without cause". The Employer conceded that the "for cause" provision offended the ESA but argued that the severability provision in the employment contract could be relied on to save the "without cause" provision, which clearly complied with the requirements of the ESA.

The "for cause" provision contained 14 subparagraphs each describing conduct that the Employer considered would constitute cause. While there was no discussion in the decision as to why the "for cause" provision offended the ESA, it is important to understand that there is a distinction between the common law definition of "for cause", which disentitles the employee to common law notice, and the ESA which provides that an employee is not entitled to notice (or severance if applicable) where the employee is "guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer". Only if the employee's conduct meets this narrower definition of misconduct will the employee not be entitled to notice. The Employer's termination "for cause" provision included conduct that clearly did not meet this more stringent test and therefore violated the ESA.

The Court of Appeal last reviewed termination provisions in employment contracts in the 2017 decision of *Wood v. Fred Deeley Imports Ltd*. (*2). Two key points from that case were relied on in the *Waksdale* decision. First, the ESA is remedial legislation, intended to protect employees. Courts should encourage employers to comply with the ESA and extend its protections to as many employees as possible. Second, termination provisions should be interpreted in a way that encourages employers to draft agreements that comply with the ESA. If the only consequence for not doing so is that the employer must comply with the ESA, there will be little or no incentive to draft a lawful termination clause.

Further, the enforceability of a termination provision must be determined as at the time the agreement was executed and the court should consider only its wording in determining whether it breaches the ESA and not what the employer actually does at the time of termination.

The issue in *Waksdale* is whether the two termination clauses ("for cause" and "without cause") should be considered separately or whether the illegality of the "for cause" provision impacts the enforceability of the "without cause" provision. Not surprisingly, the

Employer argued that they are two discrete provisions that apply to different situations and if the court is satisfied that they are not entangled, there is no reason why one should impact the enforceability of the other. While the motions judge sided with the Employer, the Court of Appeal did not and held that the "correct analytical approach is to determine whether the termination provisions in an employment agreement read as a whole violate the ESA." This is due to the power imbalance between employer and employee and the remedial protections under the ESA. The court also said that it is irrelevant whether the termination provisions are found in one place in the contract or are separated, or whether they are linked. They must be read as a whole and not piecemeal.

The fact that the Employer did not rely on the "for cause" provision is also irrelevant, given the court's obligation to determine the enforceability of termination provisions at the time the contract is entered into. The "mischief" of including an illegal termination provision in a contract is that an employee many not be familiar with their rights under the ESA and by signing a contract with an unenforceable for cause provision, may incorrectly believe that they have to behave in a certain way in order to avoid termination for cause. By striving to comply with the illegal term the employer benefits, even if the employee is ultimately terminated without cause.

The court refused to apply the severability clause, stating that a severability clause cannot have any effect on clauses of a contract which have been made void by statute. As a result, the entire termination provision, including the "without cause" provision was rendered void and the employee was entitled to common law damages (the quantum of which is to be determined by the motions judge).

The termination for cause provision in this case was unusually detailed and broad. However, given the narrow circumstances under which an employee is not entitled to notice under the ESA, even a provision that provides that the employee may be "terminated immediately for cause, and without notice or pay in lieu thereof" may violate the ESA. What is clear from the *Waksdale* case is that the severability clause will not save a legal termination provision, where another section of the termination clause violates the ESA. It is this development that has employers reviewing and updating their employment agreements. Where an employer might have had comfort that it could rely on its termination provision, and limit its exposure on termination of employment to providing ESA amounts only, there is now significant risk that an employer will be liable for common law notice.

Carole McAfee Wallace

Endnotes
(*1) 2020 ONCA 391 (CanLII)
(*2) 2017 ONCA 158 (CanLII)

3. The Good Faith Performance Requirement in Contracts

In 2014 the Supreme Court of Canada issued its landmark decision of *Bhasin v. Hrynew* (*1) which establishes that the parties to a contract are required to employ good faith in the performance of their contractual obligations. This duty extends to the requirement to act in good faith when the consent of one party is necessary before the other can take a certain step or pursue an option. The rather lofty notion of "good faith" seems abstract. Outside of the fiduciary obligation context, as a general rule freedom of contract and commerce "reign supreme". One party should be able to benefit by the agreed upon terms of a contract and to require compliance by the other in accordance with its terms. While the *Bhasin* decision lays down basic cardinal principles, it is clear that each case is to be assessed on its unique facts.

What is also clear is that the duty of good faith contractual performance is here to stay: as of the date of this article, the *Bhasin* decision has been cited and considered in *616* different court cases in Canada.

So, what is the duty of "good faith" performance? This article provides a brief review of the core principles from *Bhasin*, and reviews a practical context in which they were applied in the recently published Ontario Court of Appeal decision in *Quickie Convenience Store Corp. v. Parkland Fuel* Corporation case ("*Quickie*")(*2)

The Core Bhasin Principles

Highlights taken from the Bhasin decision are as follows:

i) parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily.

ii) in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner. While "appropriate regard" for the other party's interests will vary depending on the context of the contractual relationship, it does not require acting to serve those interests in all cases. It merely requires that a party not seek to undermine those interests in bad faith. This general principle has strong conceptual differences from the much higher obligations of a fiduciary. Unlike fiduciary duties, good faith performance does not engage duties of loyalty to the other contracting party or a duty to put the interests of the other contracting party first.

iii) the "good faith" argument may be invoked by a party to a contract in widely varying contexts which calls for a highly context-specific understanding of what honesty and reasonableness in performance require so as to give appropriate consideration to the legitimate interests of both contracting parties.

iv) the principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest. In commerce, a party may sometimes cause loss to another — even intentionally — in the legitimate pursuit of economic self-interest. Doing so is not necessarily contrary to good faith and in some cases has actually been encouraged by the courts on the basis of economic efficiency.

v) parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance.

iv) the duty of honest performance should not be confused with a duty of disclosure or of fiduciary loyalty. A party to a contract has no general duty to subordinate his or her interest to that of the other party. However, contracting

parties must be able to rely on a minimum standard of honesty from their contracting partner in relation to performing the contract as a reassurance that if the contract does not work out, they will have a fair opportunity to protect their interests. That said, a dealership agreement is not a contract of utmost good faith (*uberrimae fidei*) such as an insurance contract, which among other things obliges the parties to disclose material facts. A clear distinction can be drawn between a failure to disclose a material fact, even a firm intention to end the contractual arrangement, and active dishonesty.

A Recent and Practical Application of the Bhasin Principles

The Ontario Court of Appeal published its decision this month in the *Quickie* decision. It is helpful to review a practical application of the above principles in a specific setting.

Quickie Convenience Stores Corp. ("Quickie") owns and operates a chain of 52 convenience stores in Ontario and Quebec. 22 of these stores have gas stations. Parkland Fuel Corporation ("Parkland") is a large fuel supply company. Parkland provides the fuel to Quickie for 15 of its 22 gas stations. This lawsuit concerned a dispute over these 15 stations (hereafter, the "stations").

The stations and their fuel supply are governed by various lease and sublease agreements. These stations are on land that is either owned or leased by Quickie. The land for most of the stations is leased by Quickie to Parkland, which then sub-leases it back to Quickie.

In addition to these leases, the appellant and the respondent are also parties to number of credit/ debit card agreements.

Quickie wanted to put the stations up for sale. The completion of this sale required that Quickie would be able to assign the leases and credit/ debit card agreements in question. Parkland refused to consent to the assignments. Quickie commenced litigation in the Ontario Superior Court, seeking a declaration that Parkland had "unreasonably" refused its consent.

The leases contained an assignment clause. Many of these terms were identical, or substantially similar, in wording. In all but one case, the leases required the Parkland's prior written consent in order to be assigned. In the case of 12 of the 15 sites, the leases provided that Quickie "shall not assign [the] lease without the prior written consent" of the respondent and "cannot assign [the] sublease nor sub-sublet the Leased Premises" without the respondent's "prior written consent". In one instance, the lease expressly provides that consent to the assignment "may not be unreasonably withheld".

When Quickie decided to sell the stations, it notified Parkland of the sales process, as it was contractually bound to do. Parkland expressed a willingness to waive its rights of first offer to purchase, and its consent to Quickie's assignment of the agreements. However, Parkland made this waiver and consent contingent on Quickie agreeing to a five-year extension to the existing leases and credit/debit card agreements. Quickie declined to provide that extension.

As the sale process progressed in January 2018, Quickie received an offer to purchase the stations from a prospective purchaser. Quickie advised Parkland of this offer, who maintained its refusal to consent to the assignment of the leases and the credit/debit card agreements.

Quickie then brought an application in the Ontario Superior Court of Justice in which it sought:

(i) a declaration that Parkland had unreasonably withheld its consent to the Quickie's assignment of its rights, interests, title, benefits, burdens and liabilities under the Lease and Sublease Agreements and the Credit/Debit Card Agreements; and

(ii) an order compelling Parkland to consent to the Quickie's assignment of its rights, interests, title, benefits, burdens and liabilities under the said Agreements.

The application judge dismissed Quickie's application. In those reasons, the application judge made various findings including that:

(i) Parkland's notice of refusal to consent to the proposed assignment of leases and subleases was a prohibited attempt to obtain benefits exceeding its rights in those contracts, such as a five-year extension of all category of contracts or the right to purchase the assets of five sites; and

(ii) it did not thereby act reasonably as a contractual party pursuant to the common law duty to act in good faith as to the leasing contracts.

However, the application judge then considered the impact of certain choice of law and forum selection clauses in the various agreements, finding that at least in respect of some of the agreements that Quickie was required to have commenced the subject litigation in the Quebec courts. Consequently, the application judge held that he could not grant the relief sought.

Quickie filed an appeal of the above decision to the Ontario Court of Appeal, which found that the original "application" judge erred both in his analysis of the issues that were before him and in his conclusion.

At the Court of Appeal

The Court of Appeal ruled that the judge should have considered the commercial reality of the situation – some agreements having stipulated Ontario forum and choice of law, others Quebec – in accepting jurisdiction to adjudicate over the dispute. The Court of Appeal also noted that the contemplated transaction was for the sale of all of the stations as a whole. Requiring the parties to litigate the same issue twice, in two different courts, would not advance commercial reality.

The Court of Appeal accordingly addressed the merits of the dispute concerning the *credit/debit card agreements*. (It had noted that original judge had adjudicated in respect of the *lease agreements* only). As noted above, the agreements on point contained a clause that said that Quickie could not assign the agreement without Parkland's prior written consent. Parkland submitted that absent an express provision in the credit/debit card agreements providing that "consent cannot be unreasonably withheld", that it was entitled to withhold its consent in this case. Quickie in turn submitted that a prohibition on the unreasonable withholding of consent should be implied into the credit/debit card agreements based on the principles of good faith bargaining, as set out in *Bhasin*.

The Court of Appeal considered whether an agreement that requires consent to be assigned carries with it an *implicit* understanding that consent to an assignment will not be withheld unreasonably. The Court agreed with Quickie on this point, concluding that a provision in a contract that requires one party to consent to the assignment of the contract by the other party, has implicit in it the requirement that the party, whose consent is necessary, will not withhold that consent for an improper or ulterior purpose. The Court held that the imposition of a good faith obligation, on the decision whether or not to consent, was consistent with the approach to be taken to contracts generally, as enunciated in *Bhasin*.

Citing the *Bhasin* decision, the Court of Appeal noted that parties to a contract are to act honestly in the performance of their obligations and establishes certain duties that rest on parties to a contract, including:

(i) they generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily; and

(ii) they should have appropriate regard to the legitimate contractual interests of the contracting partner.

The original application judge had found that Parkland's refusal to consent to the assignment of the leases was "a prohibited attempt to obtain benefits exceeding its rights in those contracts" and that it was attempting to leverage its refusal to consent to force Quickie to agree to a five year extension of the contractual arrangements. The application judge did not make a separate finding regarding the Parkland's reasons for refusing to consent to the assignment of the credit/debit card agreements, but the Court of Appeal found that the same conclusion should follow regarding the Parkland's motive, regarding the credit/debit card agreements. Parkland's objective, in withholding its consent, was the same concerning the leases as it was concerning the credit/debit card agreements. Parkland's objective was to extract an extension of the existing contractual arrangements, something to which it was not otherwise entitled. The same conduct that underpinned the trial judge's findings about the Parkland's dealings in relation to the leases accordingly applied to its dealings in respect of the credit/debit card agreements. This reflected bad faith dealing, not unlike the impugned conduct being the subject of the *Bhasin* case.

The Court of Appeal found that Parkland's refusal to consent to the assignment of the credit/debit card agreements was as unreasonable or improper as was its refusal to consent to the assignment of the leases. It was inconsistent with the duty of good faith that Parkland owed to Quickie. It was also inconsistent with giving appropriate regard to Quickie's legitimate contractual interests, that is, its legitimate interest in wishing to sell the gas stations. Quickie was entitled to expect that the respondent would act fairly and honourably in deciding whether to consent to the assignment of these agreements as part of a sale of the appellant's businesses to a third party. On that point, the Court of Appeal noted that there was no evidence that the prospective purchaser's performance of the leases and the credit/debit card agreements would pose any financial or other risk to Parkland.

There was accordingly no principled basis for the Parkland's refusal to consent to the assignment of the leases or the credit/debit card agreements.

Accordingly, the Court of Appeal allowed Quickie's appeal and granted an order providing the it with the declaratory relief that it sought in its original application. This relief involved a declaration that Parkland was acting unreasonably in withholding its consent, in effect requiring Parkland to consent to the proposed assignment by Quickie of the lease and credit debit card agreements in question.

Gordon Hearn

Endnotes
(*1) 2014 SCC 71
(*2) 2020 ONCA 453

4. *Arc-En-Ciel Produce Inc. v. MSC Belle (Ship*) et al. 2020 FC 23

Overview

The plaintiff Arc-En-Ciel Produce Inc. ("Arc") began an action against The Ship "MSC Belle", the owners and all others interested in The Ship "MSC Belle", Belle Inc., and Great White Fleet ("GWF") for the recovery of damages in respect of a cargo of cassavas and eddoes to be shipped from Costa Rica to Ontario.

Arc also began a separate action against The Ship "BF Leticia", the owners and all others interested in The Ship "BF Leticia", BF Leticia Foroohari Schiffs, and GWF for the recovery of damages in respect of a cargo of produce to be shipped from Costa Rica to Ontario.

GWF brought a motion to stay both actions in favour of proceedings to be instituted in the United States District Court, Southern District of New York.

GWF's motions were dismissed. Arc showed a "strong cause" for the denial of the motions for a stay.

The Facts

Arc and GWF entered into a Service Contract dated June 30, 2017. On December 15, 2017 and January 28, 2018, the cargo was loaded on board the "MSC Belle" and the "BF Leticia" respectively. The cargo was carried under some form of Bills of Lading. The cargo was discharged and stored at the Port of Puerto Barrios, Guatemala before being loaded onto a new vessel. The transport continued to Wilmington, United States where it was transferred into trucks and carried by road to Etobicoke, Ontario. Arc claimed that both shipment of cargo arrived in damaged condition.

The Position of GWF

GWF's position was that the contractual arrangements with Arc did not constitute a "contract for the carriage of goods by water" within the scope of section 46 of the *Marine Liability Act*, S.C. 2001, c. 6 (the "*Act*").

Section 46(1) of the *Act* may be engaged when contractual documents refer to jurisdiction other than Canada. Subsection 46(1) of the *Act* provides as follows:

> Claims not subject to Hamburg Rules
>
> 46 (1) If a contract for the carriage of goods by water to which the Hamburg Rules do not apply provides for the adjudication or arbitration of claims arising under the contract in a place other than Canada, a claimant may institute judicial or arbitral proceedings in a court or arbitral tribunal in Canada that would be competent to determine the claim if the contract had referred the claim to Canada, where
>
> (a) the actual port of loading or discharge, or the intended port of loading or discharge under the contract, is in Canada;
>
> (b) the person against whom the claim is made resides or has a place of business, branch or agency in Canada; or
>
> (c) the contract was made in Canada.

GWF argued that the transportation of the goods was subject to a Service Contract. A term of the Service Contract referred to a Bill of Lading as follows "…[t]he Carrier's bill of lading is incorporated into this contract and will determine the terms and conditions of shipment…"

GWF claimed that the cargo on both ships was subject to unsigned non-negotiable Express Release Bills of Lading~~s~~. The terms and conditions of GWF's standard Bill of Lading, specifically clauses 4, 22, and 23, provide for as follows:

> 4. CLAUSE PARAMOUNT (a)(i) During Ocean Carriage, this Bill of Lading and the Carrier's liability and obligations while acting in any capacity whatsoever, including but not limited

> to a Carrier, bailee, agent or supplier of a Container, shall be governed by the *United States Carriage of Goods by Sea Act*, 1936 (COGSA)....
>
> 22. JURISDICTION All claims by the Carrier or causes of action against or disputes with Carrier arising out of and/or by reason of this Bill of Lading and/or relationships created thereby or in connection with the Shipment shall be brought by or against the Carrier exclusively in the United States District Court, Southern District of New York in accordance with the laws of the United States.
>
> 23. APPLICABLE LAW All rights, duties and/or obligations not specifically otherwise described or incorporated herein shall be determined according to the laws of the United States, or, where there is no governing federal law, according to the laws of the State of New York.

GWF submitted that the Service Contract, incorporating the terms and conditions of its Bill of Lading, is not a "true" bill of lading since it does not fulfil the usual elements of a bill of lading, that is: as evidence of the contract of carriage; a receipt of the goods to be carried; and as a document of title to the goods.

GLW reasoned that in the absence of a Bill of Lading, there was no "contract for carriage of goods by water," within the scope of the *Act*. GWF submitted that the transportation of the cargo was governed by the Service Contract, with the result that effect should be given to the jurisdiction clause in clause 22 of the terms and conditions of the Bill of Lading.

The Position of Arc

Arc argued that the Bills of Lading were incorporated by reference in the Service Contract and that the Bills of Lading were sufficient to characterize transportation of the cargo as a "contract for carriage of goods by water." Arc further argued that it would be prejudiced if the actions were stayed and it were required to continue proceedings in the United States because it was out of time to institute proceedings there.

The Decision

The Court found that s. 46(1) of the *Act* can be engaged when contractual documents refer to a jurisdiction other than Canada provided that, among other things, the defendant has a place of business or an agency in Canada. The Court found that the defendant had an agent in Canada, and thus s. 46(1)(c) of the *Act* was satisfied.

The Court held that the Service Contract was "a contract for the carriage of goods by water", and, in the absence of the Hamburg Rules having in force in Canada, s. 46 of the *Act* applied. The Court noted however that the existence of a jurisdiction clause does not automatically mean a stay will be granted, as the Court retains discretion under s. 50 of the *Federal Courts Act* to stay a proceeding or not. The affidavit evidence filed in the matter did not address the location of the witnesses or the application of American law, should the stay be granted. Therefore, the Court held the plaintiff had shown a "strong cause" for denial of the stay motion.

Andrea Fernandes

5. Importance of Maintaining Corporate Records: The Minute Book

As corporate lawyers, we act for purchasers and sellers of businesses. When a corporate lawyer represents a purchaser, particularly in share purchase transactions, the due diligence phase of the transaction usually involves reviewing the corporate records that are contained in the minute books of the target corporation. The corporate records are reviewed to determine the status of the corporation and the corporate transactions that the target corporation has historically been involved in. If a minute book is non-existent or not accurately updated, a purchaser may leverage these discrepancies to negotiate the purchase price downward. It is very important for a corporation to keep their corporate records updated. Certain corporate records are also important to financial institutions. It is common for individuals to incorporate companies themselves and forgo organizing or maintaining corporate records (despite advice from their accountants or lawyers to do so), or the minute book organization documents have been prepared by the corporation's law firm (such as organization resolutions and by-laws), but the client delays signing such documents. On many occasions there are frantic phone calls or emails from clients who advise that their bank will not proceed to authorize a financial facility for such client's corporation without the client first presenting them with a copy of an authorized borrowing by-law or some other constating document.

The corporate records are generally held in a minute book along with the minutes and resolutions of directors and shareholders. Section 139(1) of the *Business Corporation Act* (Ontario) (the "Act") provides that corporate records can be bound in a "loose leaf book or may be entered or recorded by any system of mechanical or electronic data processing or any other information storage device." (*1)

Section 140(1) of the Act provides that a corporation shall prepare and maintain at its registered office or at such other place in Ontario (such as the corporation's law or accounting firm),

a) the corporation's articles and the by-laws and all amendments to such articles and by-laws, and a copy of any unanimous shareholder agreement known to the corporation's directors,

b) minutes of directors and shareholders meetings and resolutions of directors and shareholders,

c) a register of directors, and such register should set out the names and residence addresses of each director. The director's register may include each director's e-mail address, if one is provided. The register shall set out all persons who are or have been directors of the corporation with the several dates on which each became or ceased to be a director,

d) a securities register, and

e) a register of ownership interests in land. (*2)

The requirement for an Ontario Corporation to maintain a register for the ownership interest in land was introduced by the *Forfeited Corporate Property Act* (Ontario), which came into force on December 10, 2016. The register of ownership interest in land shall identify each property owned by the corporation and include the date that the corporation acquired such property. If applicable, the register shall also provide the date that the corporation disposed of such property. (*3) Further, this register should also include a copy of all deeds, transfers or any other similar documents that contain the municipal address of each corporate property, the registry or land titles division for any such property, the property identifier number, each property's legal description and the assessment roll number, if any. (*4)

It is very important for a corporation to maintain a register of securities in its minute books. A security is a share of any class or series of shares or a debt obligation of a body corporate, and a security certificate (e.g. share certificate) is a certificate evidencing a security. (*5)

The corporation's securities register shall record the securities issued by it in registered form, and with respect to each class or series of securities, it shall provide the names of persons who, (i) are or have been within six years registered as shareholders of the corporation, the address including the street and number, if any, and an e-mail address if one is provided, of every such person while they are a holder of shares in the corporation, and the number and class of shares registered in the name of such shareholder, (ii) are or have been within six years registered as holders of debt obligations of the corporation, the address including the street and number, if any, and an e-mail address if one is provided, of every such person while a holder of such debt obligations, and the class or series and principal amount of the debt obligations registered in the name of such holder, or (iii) are or have been within six years registered as holders of warrants of the corporation, other than warrants exercisable within one year from the date that such warrant is issued, the address including the street and number, if any, and an e-mail address if one is provided, of every such person while a registered holder of warrants, and the class or series and number of warrants registered in the name of such holder. (*6) The security register shall also provide the date and particulars for each security or warrant that was issued. (*7)

A warrant is a certificate or any document that is issued by a corporation, which evidences conversion privileges or options or rights to acquire securities of the corporation. (*8)

The minute book should also keep a record of any transfer of securities by the corporation or amongst its shareholders, which register of transfer should include the date of each transfer and other particulars of such transfer, such as the name of the recipient of such transfer (if not the corporation) or the party transferring such securities (if not the corporation). (*9) The minute book shall also include the original, or if any shareholder requires an original share certificate, at least a copy of the share certificate that has been transferred to any such shareholder.

Similar to the requirements of the directors register, the minute book should also include a register of the corporation's officers, which sets out the names, residence and email address of each officer of the corporation, and the officer's register shall list all persons who are or have been officers of the corporation along with their designated officer titles and the dates that any such person became or ceased to be an officer of the corporation.

The corporate records should also include the corporation's updated accounting records, and all records that contain minutes of meetings and resolutions of directors, shareholders or committee members of the corporation. (*10)

Generally, the directors of a corporation are required to call an annual meeting of shareholders no later than 18 months after the corporation comes into existence and subsequently not later than 15 months after holding the last preceding annual meeting. (*11) The matters that are typically addressed at each annual meeting of shareholders include the election of directors, the consideration or approval of the corporation's annual financial statements and the appointment of an auditor, unless the corporation is exempt from appointing an auditor.

Each Ontario corporation is required to file an initial return within 60 days after the date of incorporation, amalgamation or continuation of the corporation. (*12) The initial return must include, (i) the name of the corporation, (ii) the Ontario corporation number of the corporation, (iii) the date of its incorporation or amalgamation, whichever is the most recent, (iv) the names and addresses for service of the corporation's directors, including municipality, street and number, if any, and postal code, (v) the date on which each director became a director and, where applicable, the date on which a director ceased to be a director, (vi) if the corporation is a corporation with share capital, a statement as to whether each director is or is not a resident Canadian, (vii) the names and addresses for service, including municipality, street and number, if any, and postal code, of the corporation's five most senior officers, (viii) The date on which each of the five most senior officers became a senior officer, and where applicable, the date on which a person ceased to be a senior officer, (ix) the address of the corporation's head or registered office, including municipality, street and number, if any, and postal code, (x) whether the language of preference for communication with the corporation is English or French. (*13)

Record book maintenance includes subsequent filings that result from any changes to the information that was filed with the initial return. The corporation must file a notice of change for every change in such information within 15 days after the change takes place. (*14) However, it is not necessary to file a notice of change in respect of a director's retirement and subsequent re-election for the next term of office. (*15) Further, a corporation incorporated under the laws of Ontario that only changes its name does not need to file a notice of change. (*16) A corporate name change would be processed and filed by articles of amendment with the Ministry.

A corporation's record keeping habits could be deemed by third parties as a reflection of the business acumen of its principals. A corporation once retained me to review and update their minute book after an accredited investor had reviewed it. The accredited investor was interested in subscribing for shares in this corporation's company. We discovered many discrepancies throughout the corporation's minute book. All the necessary filings were not completed, shares were not issued, there were no shareholder ledgers or share certificates, the original directors and officers had resigned and such resignations and new appointment of officers and election of directors were not recorded in the minute book, which meant that the directors and officers that were no longer involved with the corporation were still listed as the current directors and officers, and accounting records were not readily available. The principals of the corporation were unprepared for the accredited investor's subscription offer.

Seemingly, the accredited investor's review of the corporation's minute book gave him the perception that the principals of the corporation were disorganized and inexperienced (although the business operations were relatively solid). As a result, the investor (unsuccessfully) attempted to take advantage of the corporation's principals and offered to purchase the shares of the corporation below market value.

Record book maintenance is indeed an arduous but a very necessary task that could ease the corporation's activities in various business engagements such as mergers and acquisition transactions, financing or capital raises. Up to date corporate records should set out a clear picture of the corporation's current and historical corporate dealings. When the corporate records are incomplete, non-existent or if they carry many discrepancies, a transaction can be delayed or set aside due to the time and expenditures that are required to update the corporate records, or due to the time required to locate pertinent information that the parties require for a transaction. Further, unkempt corporate records may indicate to a third party that the corporation is disorganized, carries risks and that its principals are inexperienced, which could weaken the principal's bargaining position in a purchase and sale transaction or limit the corporation's access to capital.

If you require any assistance with your corporate records, please do not hesitate to contact our office for assistance.

Wayne O. Lewis

Endnotes

(*1)*Business Corporations Act,* R.S.O. 1990, c. B. 16 at section 139(1).
(*2) *ibid*. at section 140(1).
(*3) *ibid*. at section 140.1(2).
(*4) *ibid*. at section 140.1(3).
(*5) *ibid*. at section 1(1).
(*6) *ibid*. at section 141 (1)(a).
(*7) *ibid*. at section 141 (1)(b).
(*8) *ibid*. at section 1(1).
(*9) *ibid*. at section 141 (2).
(*10) *ibid*. at section 140(2).
(*11) *ibid*. at section 94.(1)(a).
(*12) *Corporations Information Act*, R.S.O. 1990, c. C.39 at section 2(2).
(*13) R.R.O. 1990, Regulation 182: General under *Corporations Information Act*, R.S.O. 1990, c. C.39 at Section 1.1(1).
(*14) *Corporations Information Act*, R.S.O. 1990, c. C.39 at section 4(1).
(*15) *ibid*. at section 4 (3).

6. Distracted Driving Update

Distracted driving is now under more scrutiny than ever. A recent decision of the British Columbia Court of Appeal has confirmed that holding a cellphone while driving is an offence even when it is disabled or turned off.

In *R. v. Tannhauser* (2020 BCCA 155), Mr. Tannhauser received a ticket because he was holding his cellphone at the top of his steering wheel while driving on the TransCanada Highway. He testified that he was not "using" the cellphone but rather relocating it from the passenger seat to access papers. Mr. Tannhauser's cellphone was also disabled by an app that engaged while he was driving. At most, he was only holding a cellphone that wasn't working.

At the first hearing, the Judicial Justice sided with Mr. Tannhauser. The Crown then appealed to the British Columbia Supreme Court, where the presiding Judge also agreed that a disabled phone was really no different than a brick or a cup of coffee or any other object in the vehicle. Because it could not be used, the judge stated that a disabled cellphone was not an electronic device under S. 214.1(a) of BC's *Motor Vehicle Act*, which prohibits "holding the device in a position in which it may be used." An "electronic device" is defined as including a "hand-held cell telephone or another hand-held electronic device capable of transmitting or receiving electronic mail or other text-based messages."

The Crown then applied for leave to appeal to the BC Court of Appeal. This rare request for a further review was granted because it was important that drivers know (1) whether a disabled phone (or one turned off for that matter) was considered an "electronic device"; and (2) whether they were committing an offence by "using" their cellphone merely by holding it while driving.

The BC Court of Appeal decided that a disabled cell phone is only temporarily disabled (whether by an app or because it is turned off) and that such cellphones are still "electronic devices". A turned off lamp is still a lamp. Only if it no longer had any capacity to make calls or send electronic data would a disabled cellphone no longer be an electronic device. This being the case, holding such an electronic device while driving, was an offence. The Appeal Court reasoned that if the BC legislature had wanted to create an exception for non-functioning devices, the law would have specifically said so, since other exceptions are contained with the *Motor Vehicle Act*.

It is clear that distracted driving is a very serious offence and that permitted use of cellphones while driving is very restricted and that the law will be interpreted strictly.

What does this mean for Ontario? The *Highway Traffic Act* has a similar wording that does not have an exception for non-functioning devices. The Act says in s 78.1 that "No person shall drive a motor vehicle on a highway while **holding** or using a hand-held wireless communication device… that is **capable of** receiving or transmitting telephone communications, electronic data, mail or text messages." (emphasis added) While it may be clear that "holding" the phone is an offence in Ontario, it is also clear that a non-functioning phone will also be enough to constitute an offence.

Multi-tasking is a real no-no and getting caught is expensive. Remember that for classes A-G and M licences, there is:

(a) a fine of $615 for a first-time offence (increases to $1000, if you fight the ticket and lose) plus 3 demerit points and 3-day licence suspension;
(b) a fine of $615 for the second offence (increases to $2,000 if you fight the ticket and lose) plus 6 demerit points and licence suspension for 7 days.
(c) a fine of $615 for a third offence (increases to $3,000 if you fight the ticket and lose) plus 6 demerit points and suspension for 30 days.

Novice drivers face longer suspensions though no demerit points: (1) 30 days on first conviction; (2)

90 days on second conviction; and (3) cancellation and removal from the Graduated Licensing System for the third conviction.

If you endanger other people because of distracted driving of any kind (includes hands free devices), you could be charged with careless driving and, if convicted, penalties include 6 demerit points, fines up to $2000 and/or a jail term of 6 months/licence suspension up to 2 years. If charged with the criminal offence of dangerous driving, penalties include a jail term up to 10 years for causing bodily harm or up to 14 years for causing death.

A further reminder for truckers and others driving commercial vehicles, the CVOR Holder can also be charged for offences committed by drivers operating those vehicles exposing them to points accumulation. Points are assigned depending upon the charge and conviction under various legislation. Moving violations generally have 5-point penalties. Too many CVOR points may trigger audits and possibly more charges under various headings putting the CVOR Certificate at risk.

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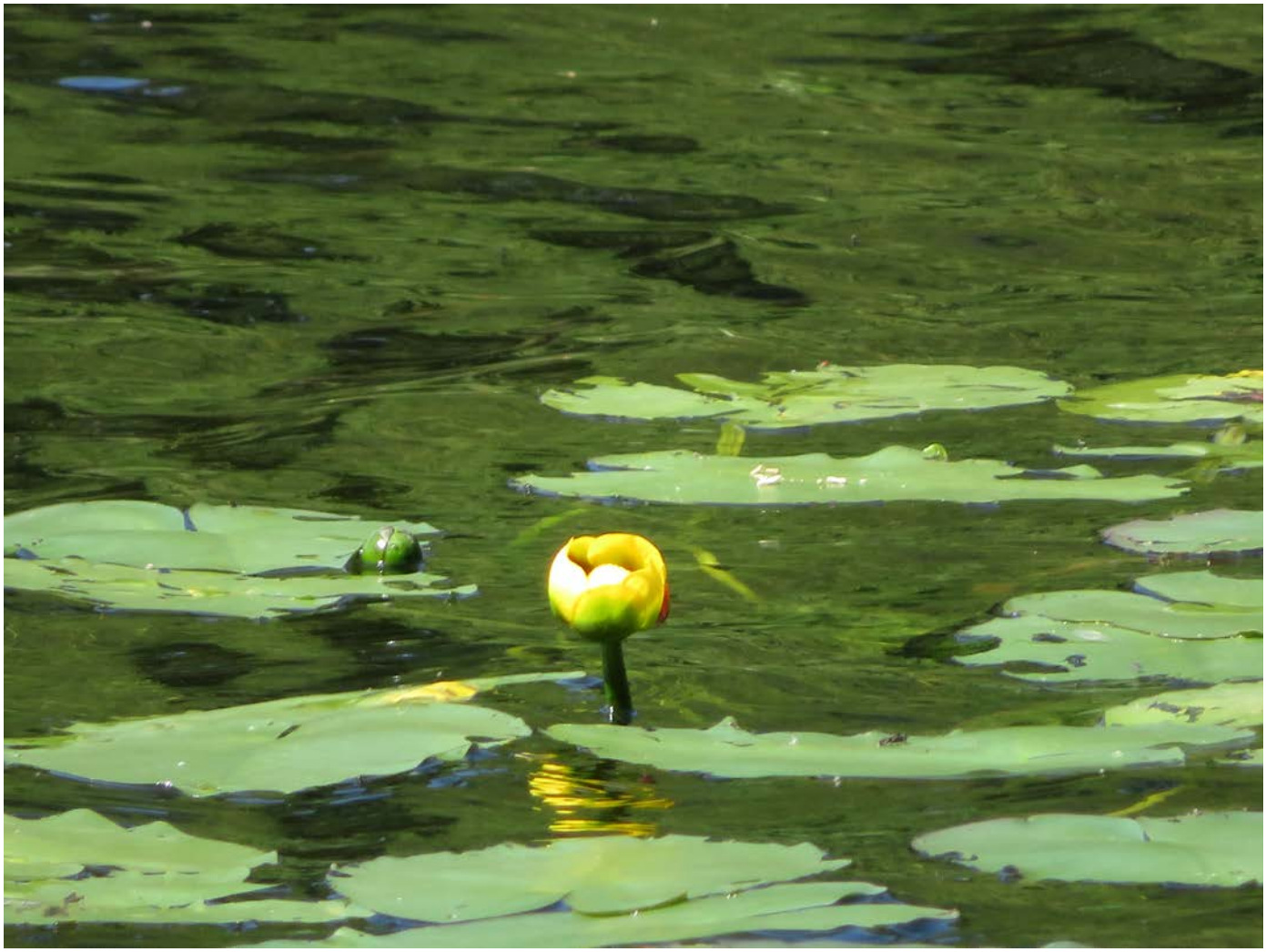

7. Ontario Court of Appeal Says That Shareholders Can Sometimes Sue Wrongdoers Directly for Damages Caused to the Value of their Shares

Our law is replete with archaic references. One of those is known as "the rule from *Foss v. Harbottle*", a case decided by the House of Lords in London in 1843.(*1) It holds that, where damage is alleged to have been done to a company, then the proper claimant is the company itself and not its shareholders or proprietors. In other words, courts are required to respect the separate legal personality of corporations, as distinct from their shareholders.

The rule from *Foss v. Harbottle* has been affirmed many times in Canadian law, including by the Supreme Court of Caanda in *Hercules Management v. Ernst & Young*.(*2)

By implication of the rule, if companies can sue to protect their own rights, then shareholders must be barred from suing for a diminution in the value of their shares, which might have resulted from some sort of damage inflicted upon the corporation. Rather, the company is expected to make suit against the guilty party and to recover the loss, such that the value of its shares will be returned to their original strength.

Over time, some exceptions to the rule have been recognized. For example, where corporate directors fail to take action to protect a corporation, minority shareholders are entitled to seek "leave" (*i.e.* judicial permission from a court) to make a "derivative claim" to right the wrong. Often, the folks in control are the alleged wrongdoers.

Another exception arises from another "rule" pronounced by the House of Lords, known as "the second proposition in *Johnson*". In *Johnson v. Gore Wood & Co.*(*2), the Court found that a shareholder can claim for diminution in share value where the wrong was done to the shareholder and the shareholder owns a cause of action in its own right (as opposed to the corporation).(*3)

In *Sang Thi Tran et al. v. Bloorston Farms Ltd.*, the Ontario Court of Appeal has recently clarified the boundaries of the rule. A panel of three appeals judges unanimously affirmed the applicability of the second rule from *Johnson* as good law in Ontario.(*4)

The complainant, Sang Thi Tran, was the sole shareholder of 1835068 Ontario Ltd., through which she ran a restaurant, located in a commercial property owned by Bloorston Farms. Although the numbered company-restaurant operated out of the leased space, Tran was the named tenant on the lease. There was never technically any assignment or sublease from Sang to the corporation.

Bloorston was not Sang's original landlord. Rather, it had purchased the property mid-way through the tenancy. Shortly after taking title, it e-mailed an architect's certificate to Sang, alleging that the premises were actually somewhat larger than what was described in their lease agreement; and it demanded that she pay additional consideration in respect of it. Sang refused to comply and Bloorston locked her out.

At first instance, a judge on a "summary judgment" motion (made by Bloorston) had found that the termination was wrong, and that it had destroyed the restaurant business and caused Sang's share value to become worthless. (*5) Consequently, the Court awarded damages against Bloorston, which appealed to the Ontario Court of Appeal.

The Court of Appeal recognized the importance of the rule from *Foss v. Harbottle*, identifying that the separate legal personality of a corporation is a two-way street (insofar as corporations enjoy both the benefits and the burdens of legal liability); and that the rule prevents a multiplicity of proceedings.

Despite the foregoing, the Court found that the rule had its limitations, including where shareholders have separate, free-standing causes of action against the wrongdoer in their own

right; and where a shareholder – rather than the corporation – is the only one with a legal entitlement to sue in the first place.

The Court found that, in this case, the numbered company had no privity of contract with the landlord. In other words, the company had no right to sue because it was not a party to the lease. Only Sang did; and, so, the rule in *Foss v. Harbottle* was not engaged.

Although the second proposition from *Johnson* is a somewhat narrow exception to the rule from *Foss v. Harbottle*, its affirmative inclusion in Ontario law is welcome to ensure that losses are recoverable. However, it cannot be taken as a "given" that shareholders will have the right to sue simply because the corporation is neutered by the circumstances. As much as anything else, the *Sang* case is a reminder that the facts always matter.

Alan S. Cofman

Endnotes

(*1) (1843), 67 E.R. 189 (H.L.), online: < http://www.worldlii.org/uk/cases/EngR/1843/478.pdf >.
(*2) [1997] 2 S.C.R. 165, online: < https://www.canlii.org/en/ca/scc/doc/1997/1997canlii345/1997canlii345.html >.
(*2) 2000 UKHL 65, online: < https://www.bailii.org/uk/cases/UKHL/2000/65.html >.
(*3) The first proposition is that, where a company suffers a loss caused by a breach of duty owed to it, only the company may sue in respect of the loss, and not the shareholder. The third proposition is that, where duties are owed separately to both a company and its shareholder, they may each sue in respect of the breached duty owed to it, but they may not recover for the breach committed against the other. See *Sang*, *infra* note 4 at para. 45, paraphrasing *Johnson*.
(*4) 2020 ONCA 440, online: < https://www.ontariocourts.ca/decisions/2020/2020ONCA0440.pdf >.
(*5) 2019 ONSC 4639, online: < https://www.canlii.org/en/ca/scc/doc/1997/1997canlii345/1997canlii345.html >.

8. *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*: A Summary

On July 21, 2020, Bill 195, known as the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020* received Royal Assent. The new Act will take effect on a day to be proclaimed of the Lieutenant Governor of Ontario. Its purpose is essentially to rescind the province-wide state of emergency that was declared on March 17, 2020 in response to the COVID-19 pandemic, while at the same time continuing many of the emergency orders made during the state of emergency. The new Act also gives the government the power to amend (and expand) such continued orders by cabinet order. These powers can be extended for successive periods of 30 days, also by cabinet order. The new Act is supposed to end one year from the date it takes effect, but it can also be extended for successive periods of up to one year.

The new Act has proven to be quite controversial and has been opposed by several civil liberties and other groups, such as labour groups in the health sector. It is expected that the constitutionality of the new Act will be challenged on several grounds. The main challenge will be to the power given by the new Act to the government to continue to exercise extraordinary powers normally only justifiable during a declared state of emergency in circumstances where that state of emergency is rescinded and hence no longer exists. Normally, when a state of emergency is rescinded, the orders made under that state of emergency will cease to apply. However, the new Act explicitly maintains many such orders. The obvious question is that if continued emergency orders appear to be required, why then has the state of emergency been revoked at all? Or, if the state of emergency no longer exists, why do any emergency orders need to be continued at all?

One might argue that by rescinding the state of emergency yet at the same time extending many of the emergency orders (and giving the provincial cabinet the power to amend those orders almost without limitation), the current government has empowered itself to impose potentially sweeping limitations on Ontarians' personal and collective rights without the justification of a state of emergency. On the other hand, the continuing uncertainty with respect to the COVID-19 pandemic may also be seen as justification for the government's need to act quickly and decisively.

Time will tell whether the new Act is in fact challenged; it will be interesting to chronicle any such challenges and their outcomes. Until then, at the very least a basic understanding of the new Act is useful. What follows is a brief summary of the new Act's provisions.

Termination of State of Emergency

The new Act provides that the state of emergency declared on March 17, 2020 in response to the COVID-19 pandemic is revoked. (*1)

Continuance of Orders Made under Emergency Management and Civil Protection Act

Despite the termination of the state of emergency, the new Act declares that many of the orders made by the government during the state of emergency under the authority of the *Emergency Management and Civil Protection Act* (the "*EMCPA*"), are nonetheless continued as valid and effective orders, even though they cease to be valid and effective orders under the *EMCPA*. (*2) Such orders will continue to be valid and in force for 30 days; however, the Lieutenant Governor in Council (i.e. the cabinet) may extend the orders for additional periods of 30 days, at its discretion. (*3)

Importantly, although cabinet cannot make wholly new orders under the new Act, cabinet has broad authority amend any of the newly-continued orders.(*4) Any such amendments are valid as long as they either:

> (a) relate to one or more of the subject matters listed below; or

(b) require people to comply with any advice, recommendation or instruction of a public health official. (*5)

Valid subject matters that can result in amended existing orders are:

(a) closing or regulating any place, whether public or private, including any business, office, school, hospital or other establishment or institution

(b) providing for rules or practices that relate to workplaces or the management of workplaces, or authorizing the person responsible for a workplace to identify staffing priorities or to develop, modify and implement redeployment plans or rules or practices that relate to the workplace or the management of the workplace, including credentialing processes in a health care facility.

(c) prohibiting or regulating gatherings or organized public events.(*6)

The new Act contains a list of fourteen orders that may not be amended.(*7) However, the new Act clarifies that any amendments to the existing orders that can be amended may:

(a) impose more onerous or different requirements, including in different parts of the province; and

(b) extend the application of the order being amended, including the geographic scope of the order and the people it applies to.(*8)

Further, amendments to existing orders may be given retroactive effect, as far back as the date on which the new Act itself came into force.(*9)

Cabinet may also revoke an order continued under the new Act.(*10)

New Act to Expire in One Year but Can be Renewed by Resolution of Legislature

The new Act provides that the powers to (1) extend orders for additional 30-day periods and (2) amend existing orders as described above expires one year after the new Act takes effect. (*11) However, the legislature by resolution may extend this time limit for additional periods of up to a year at a time.(*12)

Enforcement

The new Act provides that any person who contravenes an order continued under the new Act may - upon application without notice by the Crown - be "restrained" by order of a judge of the Superior Court, and such order may be enforced in the same manner as any other order of a judge of the Superior Court.(*13)

The new Act also provides that any person who fails to comply with a continued order or who interferes with or obstructs the exercise of a power or the performance of a duty conferred by such an order is subject to a fine of up to **$100,000 and/or imprisonment for up to one year**. If the person is a director or officer of a corporation, the maximum fine increases to **$500,000**. If a corporation is found to have violated a continued order, the corporation is subject to a fine of up to **$10 million**.(*14)

The new Act also provides that a person is guilty of a separate offence on each day that that person violates a continued order.(*15)

Further still, any fine imposed under the new Act may be increased beyond its maximum limit by the amount equal to the financial benefit that the offending person acquired as a result of the commission of the offence.(*16)

Reporting Requirements of the Government

The new Act requires the Premier or a delegated Minister to appear before a standing committee appointed by the Legislature, at least once every 30 days, and report to the committee concerning (a) orders that were amended under the new Act; (b) orders that were extended under the new Act; (c) the rationales for those amendments and extensions.(*17)

There are also additional similar reporting requirements in the event the new Act is extended beyond one year.(*18)

Further Provisions

The new Act also incorporates section 11 of the *EMCPA*, which provides that no action or other proceeding may be commenced against a government official or public servant acting pursuant to the new Act. Further, it incorporates section 13.1 of the *EMCPA*, which provides that no actions taken under the new Act will constitute expropriation and there will be no compensation payable by the government in the event of a loss, including the taking, of any personal or real property.(*19)

James Manson

(*1) Section 17.
(*2) Section 2.
(*3) Section 3.
(*4) Section 4(1)(a).
(*5) Section 4(2).
(*6) Section 4(3).
(*7) Section 4(5).
(*8) Section 4(6).
(*9) Section 4(7).
(*10) Section 5.
(*11) Section 8.
(*12) Section 8.
(*13) Section 9.
(*14) Section 10(1).
(*15) Section 10(2).
(*16) Section 10(3).
(*17) Sections 11 and 12.
(*18) Section 13.
(*19) Sections 14 and 15.

9. Another Episode in the Ongoing Series, "Where to Sue"

With the continued growth of international agreements and trade between parties located in various jurisdictions, our courts are increasingly called upon to decide not just who should prevail in a commercial dispute, but also to decide where that decision should even be made. Yet another of a growing list of examples of such cases can be found in the decision of the New Brunswick Court of Queen's Bench in *Jamer Materials Limited v. U.S. Concrete, Inc.* (*1). The decision is another cautionary tale, as if more were needed, of the importance of parties to a contract making specific allowance for where they will want any future dispute between them settled.

The facts

The plaintiff, Jamer Materials Limited, is a New Brunswick corporation that owns and operates a granite quarry in Bayside, New Brunswick. Jamer is a subsidiary of a Virginia company. The defendants, U.S. Concrete, Inc. and Eastern Concrete Materials Inc. are, respectively, a Delaware company with principal business operations in Texas and a New Jersey company operating principally in that state. In early 2016 Jamer had entered into a non-binding letter of intent whereby U.S. Concrete was to purchase the assets of Jamer. Although that asset purchase ultimately fell through, as part of the letter of intent U.S. Concrete agreed separately to purchase aggregates from Jamer for its New York City operations until the proposed sale was completed. The agreement did not contain a choice of law or jurisdiction clause.

Before the proposed sale finally collapsed Jamer Materials invoiced Eastern Concrete for certain of its inventory, which invoices were paid by Eastern still in 2016. However, the paid for inventory was at all times stored at Jamer's quarry in Bayside. In 2019 Eastern discovered that the inventory it had paid for was either moved from the quarry to another location or used by Jamer as part of its operations or sold to another party. Eastern therefore sued Jamer in New Jersey alleging "theft of aggregate materials owned by Eastern Concrete." Jamer brought a motion in New Jersey to dismiss the New Jersey action for lack of jurisdiction and, at the same time, started its own action in New Brunswick against U.S. Concrete and Eastern for breach of their agreement related to the letter of intent. When served with the New Brunswick claim, the defendants brought a motion in New Brunswick to dismiss or stay the action in favour of the New Jersey action. By the time the defendants brought their motion, however, the New Jersey courts had already ruled that that the action filed against Jamer there could proceed.

The motion to dismiss

As in most motions of this nature, the New Brunswick Court of Queen's Bench was called upon to address two questions: 1) first, whether New Brunswick *could* assert jurisdiction; and 2) secondly, if it found it had jurisdiction, whether it *ought* to assert jurisdiction given the specific facts in this case. The moving American defendants argued before the New Brunswick courts that the governing authority in such cases was the Supreme Court of Canada's decision in *Club Resorts Ltd. v. Van Breda* (*2). As established in *Van Breda*, a Canadian court could assert jurisdiction over a matter if it could find one of four "connecting factors" linking the dispute to the province: a) the defendant is domiciled in the province; b) the defendant carries on business in the province; c) the tort was committed in the province; or d) a contract connected with the dispute was made in the province (*3). In addition, a court has the ability to "look to connections that give rise to a relationship with the forum that is similar in nature to the ones that result from the listed factors" (*4).

The New Brunswick court swiftly rejected the defendants submissions on the fundamental issue of whether it had jurisdiction, noting, among other things, that the disputed agreement was to purchase assets located in New Brunswick, and that the defendants had conducted due diligence there. Moreover, the inventory in dispute had never left the province.

Having disposed of that preliminary question, the court went on to consider whether New Brunswick was the most convenient forum for the hearing of the parties' dispute, and thus whether, despite having jurisdiction, it should decline to hear the matter in favour of some other forum. The decision of the Supreme Court in *Van Breda* makes it clear that, in such cases, it is the moving parties' obligation to demonstrate both that New Jersey has a similar "connecting factor," or factors, to the dispute, and further that the New Jersey court should be preferred.

Ultimately, the court sided with the U.S. defendants, granting their motion. The factors weighing on the New Jersey side of the ledger cited by the court included the following: 1) That the contract was negotiated entirely in the United States by the parties' U.S. counsel; 2) the agreement was for the supply of aggregate for the New York market; and 3) the defendants were domiciled in the United States. Also, while loss of a "judicial advantage" might be a factor weighing in favour of New Brunswick, the court on this motion saw no disadvantage to Jamer resulting from the fact that New Jersey permits civil jury trials, noting that, if that were a reason to reject jurisdiction, then Ontario actions would therefore always have to be stayed in favour of New Brunswick actions, all other factors being equal. Whether witnesses needed to travel was another factor to consider, but there the court simply noted the obvious; specifically, that witnesses would have travel from one country to another regardless of the court in which the case would be tried.

Crucially, however, and most important to the analysis, was the fact that New Jersey had already separately asserted jurisdiction over a parallel dispute, and that the claims and counterclaims advanced in the New Jersey action were very similar to those being advanced in New Brunswick. This was probably the most important factor in the courts reasoning, since it would be extremely wasteful and contrary to the interests of justice for two proceedings on the same issue to proceed in different jurisdictions, possibly leading to different results on the same facts. As noted by the court, then, by declining jurisdiction it would avoid "the possibility of conflicting judicial decisions regarding the same subject matter and a duplication of legal/judicial resources" (*4).

Conclusion

The result in this case was largely predictable, and it therefore seemed somewhat a waste of effort on the part of Jamer to resist the motion brought by the U.S. defendants, particularly after the New Jersey court refused its earlier motion to dismiss the claim there. The lesson from this case is a simple one. As noted by the court in its decision, the parties had failed to include any choice of law or choice of forum clause in their contract, despite being very commercially sophisticated parties. A great deal of unnecessarily wasted time and expense is easily avoided by the use of such clauses in contracts, whether one is choosing the court of one country to decide any dispute, or choosing to settle a dispute by private arbitration, naming the location and law by which it is to occur. Such clauses allow parties to bypass purely technical questions and thus get quickly to the heart of finally settling any commercial dispute.

Oleg M. Roslak

Endnotes

(*1) 2020 NBQB 090 [*Jamer Materials*].
(*2) 2012 SCC 17 [*Van Breda*]
(*3) *Jamer Materials* at para. 20; *Van Breda* at para. 90.
(*4) *Jamer Materials* at para. 44.

DISCLAIMER & TERMS

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CONTEST

This month we are giving away a complimentary ticket for attendance at our annual seminar day - in Toronto Feb. 11 2021 - for the first individual to email us the name of the location depicted in photograph behind the tug on page 20. Email your answer to info@fhllp.ca with a subject line "Newsletter contest". First response with the correct answer wins.