# THE NAVIGATOR


## IN THIS ISSUE



MEMBER OF GLOBALAW THE INTERNATIONAL LAW GROUP

## TRUCK DRIVERS TO MAINTAIN HEALTH INSURANCE IN USA DURING COVID-19 CRISIS

In recent days, many truck drivers received messages from their insurers that their health insurance and/or life insurance coverage outside of Canada was cancelled because of a policy exclusion when there is a travel advisory. Coverage would continue only within Canada.

Although employee drivers would continue to have some measure coverage under their provincial health insurance schemes – such as Ontario's WSIB system – they would not have the same level of protection that they otherwise would have. In fact, if they were found to have done anything to take themselves out of the course of employment, they might even lose that coverage.

True independent contractors might not even have anything like WSIB coverage.

This issue has now been resolved in the truck drivers' favour, in most cases. On March 19, 2020, the Canadian Life and Health Insurance Association – which represents most insurers – put out a press release, relaxing the exclusion for out-of-country travel under group insurance policies:

> Today, after hearing from its members, the Canadian Life and Health Insurance Association has confirmed that commercial truckers with group insurance coverage will continue to have coverage for emergency out-of-country medical expenses as they bring goods across the US-Canada border.
>
> With restrictions to non-essential travel beginning in the coming days, Canada's insurers want to be clear that commercial truckers will not lose their group out-of-country medical coverage due to recent travel restrictions," Stephen Frank President and CEO of CLHIA said. "The commercial trucking industry is providing crucial services to support Canadians with goods at all times, but particularly now.

Despite the foregoing, individuals – especially those with insurance policies beyond what their employers provide – ought to review their policy language and seek legal advice if necessary.

## FIRM AND INDUSTRY NEWS

- The health and welfare of the Fernandes Hearn LLP team, our clients and of our community is our highest priority and foremost in our thoughts as we actively monitor and address the COVID-19 pandemic. The Firm has business continuity plans and protocols in place that allow us to operate and to continue to serve our clients. The lawyers at Fernandes Hearn LLP wish you and your families good health.

- **Resources on Covid -19**

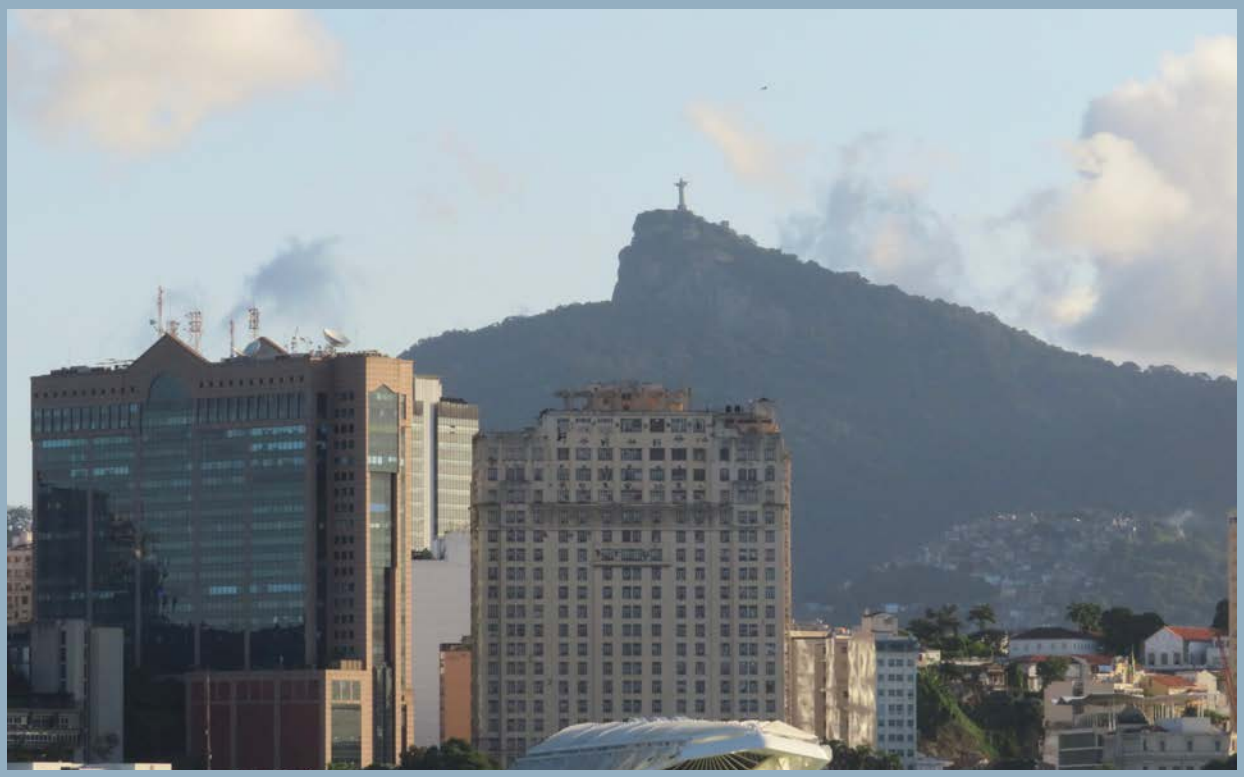
Ontario Ministry of Health https://www.ontario.ca/page/2019-novel-coronavirus

Government of Canada https://www.canada.ca/en/public-health/services/diseases/coronavirus-disease-covid-19.html

Updates on the law and legal services from Steps to Justice https://stepstojustice.ca/covid-19

Considerations for Boards https://www.icd.ca/Resource-Centre/News-Publications/Director-Lens/COVID-19-concerns-and-considerations-for-boards.aspx

- Fernandes Hearn LLP is a proud new member of Globalaw™, a top tier international affiliation of over 100 law firms. As a member of Globalaw™, Fernandes Hearn LLP will now have networking access to over 4500 attorneys in 85 countries which promises to enhance our transportation, trade law and business practice.



*Alan S. Cofman*

*Endnotes*
(*1) Available online: https://www.clhia.ca/web/clhia_lp4w_lnd_webstation.nsf/page/CFFEDC1596D8CBEB85258530006AC333!OpenDocument

**2. Review of Principles Set Out in the National Standard of Canada Entitled Model Code for the Protection of Personal Information**

Many companies and organizations ("Service Providers") provide services and conduct business transactions with customers, consumers or other service providers (the "End Users") over the internet. In many instances, Service Providers may collect the personal information of End Users over the internet and store such personal information on a database.

The *Personal Information Protection and Electronic Documents Act (*S.C. 2000, c. 5) ("PIPEDA") (the "Act") supports and promotes "electronic commerce by protecting personal information that is collected, used or disclosed in certain circumstances, by providing for the use of electronic means to communicate or record information or transactions…"

According to the Act, personal information means information about an identifiable individual ("Personal Information").

Personal Information that is stored on a database could be accessed as a result of data breaches or due to the mishandling of such information. Therefore, it is incumbent for Service Providers that collect, use or disclose Personal Information to establish policies and procedures that govern the handling of Personal Information.

Service Providers should prepare and implement privacy policies for End Users and policies for any employee, contractor, affiliate or supplier of the Service Providers or any other Service Providers (such as Service Providers that store and manage data on behalf of such Service Providers) that have access to the Personal Information of End Users.

Schedule One of PIPEDA provides the Principles Set Out in the National Standard of Canada Entitled Model Code for the Protection of Personal Information (the "Code"). The Code addresses (1) how Service Providers collect, use, disclose and protect Personal Information and (2) how individuals should be able to access and correct Personal Information collected by Service Providers.

The Code is comprised of the following 10 principles;

1. Accountability
2. Identifying Purposes
3. Consent
4. Limiting Collection
5. Limiting Use, Disclosure and Retention
6. Accuracy
7. Safeguards
8. Openness
9. Individual Access

These principles should be considered for privacy policies and notices that are established by Service Providers. The Code should be followed by any type of Service Provider that collects and handles Personal Information. For the purposes of this article, the focus is on Service Providers that collect and handle Personal Information online. This article provides a brief summary of each principle of the Code.

*Accountability*

Service Providers are responsible for how they handle Personal Information that is in their possession. Service Providers should appoint an individual or a group of individuals who will be accountable for the Service Providers' compliance with the Code, such as a Privacy Officer. Such individuals should be easily identified and accessible to anyone who has an interest in or who is affected by the Service Providers' Personal Information handling practices.

Service Providers may remain liable for Personal Information that has been transferred to a third party for processing. Prior to engaging a third party to process Personal Information, the

Service Providers should cause such third party to agree to provide a level of protection for such Personal Information that is similar to or more advanced than the protective measures implemented by the Service Providers.

*Identifying Purposes*

Service Providers should clearly set out their reasons for collecting Personal Information. Such reasons can be disclosed on their websites. Further, any person or entity that collects Personal Information on behalf of Service Providers must be able to clearly explain why they are collecting Personal Information. The Service Providers should only collect Personal Information that is necessary to satisfy their reasons for collecting Personal Information.

*Consent*

Before the Service Providers collects End Users' Personal Information, End Users should be able to review and accept the Service Providers' reasons for collecting their Personal Information, and consent to the collection and use of their Personal Information. However, in some instances, Service Providers may have collected the End Users' Personal Information prior to receiving consent to use such Personal Information, which can occur if a Service Provider initially collects Personal Information for a particular reason then subsequently changes the reason. In such instances, Service Providers should receive the End Users' consent before it continues to use or disclose the Personal Information for the new reason.

The procedures and processes that Service Providers exercise to establish the End Users' consent should consider the sensitivity of the Personal Information that will be collected. For instance, the consent mechanism for medical and income records may not be as stringent as the mechanisms for collecting information to register for online gaming. If the Personal Information is deemed sensitive, Service Providers should seek express consent. Although, express consent is preferred in every instance, implied consent may be acceptable when the information is not sensitive.

There are a few circumstances that may require the collection, use, or discloser of Personal Information without the knowledge and consent of the End Users. Those circumstances include, legal, medical, or security reasons, information that is collected for the detection and prevention of fraud or for law enforcement, consent of a minor (requiring the consent of a parent or guardian), or from an individual who is seriously ill or mentally incapacitated (requiring the consent of an individual with power of attorney over the affairs of such ill or mentally incapacitated individual).

End Users should be able to withdraw consent, subject to legal or contractual restrictions. The Service Providers shall inform End Users about the implications that may arise from withdrawing consent.

*Limiting Collection*

Service Providers should not collect Personal Information indiscriminately. Consent to collect, use and disclose Personal Information must not be obtained by deceiving End Users. Personal Information should be collected by fair and lawful means that prevents Service Providers from misleading or deceiving End Users about the reasons that their Personal Information is being collected.

*Limiting Use, Disclosure and Retention*

Personal Information should only be retained for as long as it is necessary to fulfil the purpose that it was collected for. Service Providers should develop guidelines and implement procedures with respect to the retention of Personal Information. These guidelines should include minimum and maximum retention periods. However, certain laws and regulations such as tax laws and occupational health and safety laws, may require Service Providers to retain records that include Personal Information for minimum periods of time. The Service Providers should consult an attorney regarding

the minimum retention periods for the Personal Information that it collects.

The Service Providers should destroy, erase or make anonymous Personal Information that is no longer required to fulfill the reasons that it was collected for. Service Providers should develop and implement guidelines and procedures to govern the destruction of Personal Information that should not be retained.

*Accuracy*

Personal Information should be accurate, complete, and up-to-date in order to prevent the Service Providers from making decisions about End Users based on inaccurate information. End Users should have the opportunity to access their Personal Information and to correct any inaccuracy or challenge the accuracy of its Personal Information. If an End Users' information is inaccurate, the Service Providers should correct such information, and cause those whom it has shared the End Users' Personal Information with to correct the information in the same manner that it was corrected by the Service Providers.

If a dispute regarding the inaccuracy of an End Users' Personal Information is not resolved, the substance of the dispute shall be recorded by the Service Providers, and the Service Providers should notify third parties who have access to the End Users' Personal Information about the dispute.

*Safeguards*

Service Providers should implement security safeguards to protect Personal Information. The level of protection that safeguards provide may vary due to the sensitivity of the Personal Information, and the volume and format of the Personal information. Security safeguards should protect Personal Information against loss or theft, as well as unauthorized access, disclosure, copying, use, or modification. Service Providers can use passwords and encryptions to secure Personal Information that it collects online, and employees and contractors of Service Providers should be required to abide by policies that are created to secure the confidentiality of Personal Information.

*Openness*

End Users should be able to easily access and review the policies and practices that govern the Service Providers' management of Personal Information. Such information should be readily accessible on the Service Providers' website.

The information that End Users should be able to access and review includes, (a) the name or title and the address of the person who is accountable for the Service Providers' policies and practices and the individual that complaints or inquiries can be forwarded to, (b) the means that End Users have to access Personal Information held by the Service Providers, (c) a description of the type of Personal Information held by the Service Providers, which includes a general account of the Personal Information used by the Service Providers, (d) a copy of any other source of information that explains the Service Providers' policies, standards or codes, and (e) the Personal Information that Service Provider make or have made available to its associates, affiliates and subsidiaries.

*Individual Access*

Upon the receipt of a request from an End User, the Service Providers should disclose the existence, use and disclosure of the End User's Personal Information.

If an End User makes a request to a Service Provider for an accounting of the organizations that such Service Provider has shared the End User's Personal Information with, the Service Provider should disclose such accounting to the End User.

The Service Providers shall respond to each End Users' Personal Information disclosure request within a reasonable amount of time and at a minimal or at no cost to the End Users. Further, the information that is disclosed to the End Users must be easy to understand.

If a Service Provider is not able to disclose all of the Personal Information that an End User requests, the reasons for not disclosing such Personal Information should be provided to the End User. In some instances a Service Provider may not be able to disclose Personal Information because it is prohibitively costly to provide Personal Information to the End User, the Personal Information contains references to other individuals, the Personal Information cannot be disclosed for legal, security, or commercial proprietary reasons, or the Personal Information is subject to solicitor-client or litigation privilege.

*Challenging Compliance*

A Service Providers' compliance with this Code may be challenged by an End User. Such challenge can and should be raised with the designated individual or individuals who are accountable for the Service Providers' compliance. Each challenge and complaint should be addressed by the Service Provider, and if the challenge or complaint is justified the Service Provider shall exercise the steps that are necessary for it to satisfy the challenge or complaint, such as amending its policies and procedures.

Service Providers must implement practices and procedures for receiving and responding to complaints or inquiries about their Personal Information handling policies and practices. Service Providers shall also inform their End Users about alternative complaint processes, such as processes established by regulatory bodies that govern the personal-information handling practices of organizations.

Service Providers should investigate all complaints. If a complaint is justified, the Service Providers should take appropriate measures to satisfy such complaint, which may include amending its policies, practices or procedures.

*Conclusion*

Operating an online business allows Service Providers to collect the Personal Information of its End Users in many digital forms. Service Providers should be mindful of how they collect, use and disclose Personal Information and their End Users and employees should be clearly aware of same. Service Providers should retain a lawyer to assist them with preparing and keeping its policies up to date in order to remain in compliance with the Act and the Code, and they should implement practices and procedures that enforce compliance with their privacy policies, the Act and the Code.

*Wayne Lewis*

**3. Insurance Broker Liability: How Far Can You Rely on Your Broker?**

When purchasing insurance, it is common practice to look to your insurance broker to provide advice on the most appropriate form of insurance coverage for your circumstances. Partly for this reason, insurance brokers are held to a fairly exacting legal standard for giving accurate advice to their customers and can face serious consequences in the event that they get it wrong. As with all things, however, broker liability has its limits. In the very recent decision in *2049390 Ontario Inc. v. Leung* (*1), the Ontario Court of Appeal has confirmed that simply having an insurance broker recommend insurance does not necessarily mean you can look to your broker for compensation if it turns out you were under-insured.

*The facts*

The numbered company appellant in this case owned a property at 369 Queen Street West, Toronto. The property was destroyed by fire in 2012. The appellant's insurer would not cover the cost of rebuilding the destroyed building. Instead, it paid its insured the limit under the policy for the value of the building, and even charged its insured a "co-insurance penalty" because the value of the building exceeded coverage by more than 10%.

The appellant building owner then sued its insurance broker both for breach of contract, alleging that the broker had promised to provide adequate coverage, and for negligently under-insuring the property. The building owner's action was dismissed at trial, and the building owner appealed. The Court of Appeal dismissed the appeal.

*An insurance broker is not an "everything" expert*

Both at trial and on appeal, the court affirmed that the duty of care of an insurance broker was to provide clients with information and advice regarding "which forms of coverage they require to meet their needs" and about the limits of that coverage (*2). Significantly, both the plaintiff's and defendant's experts agreed on the standard of care of an insurance broker. The Court of Appeal agreed with and affirmed the trial judge's conclusions on the standard of care, summarizing them as follows:

> … an insurance broker must (i) advise clients of the importance of having insurance to protect the full value of the property, (ii) advise that the broker is not qualified to provide advice on the value of the property, and (iii) recommend that clients retain an reconstruction cost consultant qualified to provide an accurate estimate (*3)

The trial judge had further found, and the Court of Appeal agreed, that the appellant's broker had met this standard of care by: (a) providing a cost estimate for repair consistent with industry standards; (b) advising of the importance to insure the full value of the building; (c) *confirming that she was not qualified to provide accurate advice on property values*; and (d) recommending that the insured consult a reconstruction cost expert or other professional qualified to give an accurate estimate of such costs.

The Court of Appeal also echoed the trial judge's skepticism as to whether the appellant had genuinely relied on the broker's alleged expertise as to value of the property, given that that the owner of the appellant had significant involvement in supervising renovations to the building, and thus was aware of the costs, and further had prior experience as a mortgage broker. It also was of no help to the appellant's case that its owner had declined to renew a policy of insurance with its former insurer in 2009, which offered a significantly higher coverage limit, and failed to disclose this fact to his new broker when obtaining replacement insurance.

The Court of Appeal similarly agreed with the trial judge that there was no breach of contract. The appellant argued that it was part of the

agreement with its broker that the latter would help it to obtain "adequate insurance." The court quoted the terms of the contract, which stated that the broker would "strive to provide to you insurance products and services that are suitable, affordable and adequate" (*4). The Court of Appeal agreed that the broker had complied with this term, noting that "striving to provide" suitable insurance is not the same as guaranteeing that insurance would be adequate. The broker satisfied this term by providing a quote that complied with industry standards *and* advising the client to retain an appropriate expert to provide an "accurate" estimate of the building's replacement cost.

*Conclusion*

The result in the case provides valuable information to both insurance customers and to brokers regarding their duties to their clients. The facts in this case underline that, for customers in the market for insurance, that they must listen carefully to and heed the advice of their brokers as to what opinions they are qualified to give, and, where a broker specifically recommends retaining properly qualified experts on value, that it is their responsibility to get such additional advice. Conversely, insurance brokers should similarly be mindful that, where they do give an estimate of value, their opinions need to be qualified and proper recommendations given where their estimates are outside the range of their expertise. Where both insurance customers and brokers both understand their rights and obligations fewer cases will wind up in court over the question of inadequate coverage.

*Oleg M. Roslak*

*Endnotes*
(*1) 2020 ONCA 164 [*Leung*].
(*2) *Leung* at para. 29.
(*3) *Leung* at para. 35.
(*4) *Leung* at para. 41.

**4. Limitation Periods Suspended Indefinitely in Ontario**

On Wednesday, March 17, 2020, the government of Ontario declared an emergency under the *Emergency Management and Civil Protection Act*. (*1)

On Friday, March 20, 2020, by an administrative order under section 7.1 of the Act, the government took the extraordinary step of suspending all limitation periods in Ontario, retroactive to Monday, March 16, 2020.(*2)

The order also suspends all procedural deadlines in courts and administrative tribunals, subject to the discretion of the presiding decision-maker.

In effect, no court action will be time-barred if it is within a provincial power. For example, if a business had missed the two-year deadline to sue a debtor for liquidated damages on an unpaid invoice, dated March 17, 2028, it may still do so today.

Similarly, no ordinary procedural deadlines will be presumptively enforceable. For example, if a person was served with a Statement of Claim in the Ontario Superior Court of Justice more than three weeks ago, and she had missed the twenty-day period in which to defend, she will not be prejudiced. She may still file that defence today.

Importantly, the order has no sunset clause. Thus, its application will be unlimited until another order is made or until 90 days pass without a renewal. However, renewals can be made indefinitely.

This step does not affect any substantive law within the purview of the federal government. Thus, for example, it does not affect any deadline under the *Bankruptcy and Insolvency Act*. However, it does affect procedural matters in bankruptcy insofar as that federal legislation is administered by the Ontario Superior Court of Justice.

*Alan S. Cofman*

*Endnotes*

(*1) R.S.O. 1990, c. E.9. Available online: <<https://www.ontario.ca/laws/statute/90e09#BK23>>.

(*2) Online: << https://www.oba.org/getmedia/31b388c7-2b5b-4193-b338-52d573c0c2aa/EMCPA-Order-eng-fr>>

**5. Arbitration Pre-Empted by Limitation Period**

In *Glen Schnarr & Associates Inc. v. Vector (Georgetown)* Limited (*1) the Court of Appeal asserted jurisdiction to decide a claim's viability rather than defer the decision to an arbitrator as mandated by section 7(1) of the *Arbitration Act, 1991, SO 1991, c 17* and by *Dell Computer Corp. v. Union des Consommateurs.*(*2)

The Court concluded that it can pre-empt an arbitrator's competence-competence to determine jurisdiction if it can decide that an applicable limitation period has expired.

The claimants commenced an action for breach of a cost sharing agreement against seven defendants, some eleven years after the event. The defence asserted a limitation period defence. The trial judge held that the plaintiffs had failed to commence litigation on time and were also estopped by their conduct and laches [delay].

On appeal, the plaintiffs argued that the matter should have been referred to the arbitration tribunal. They submitted that the motions judge erred in failing to exercise his discretion under s. 106 of the *Courts of Justice Act* to stay the proceedings and direct the parties to arbitration as required by the terms of the agreement. The defendants submitted that a court must first consider the threshold issue of the limitation period to determine whether a stay of proceedings is appropriate. The Court of Appeal agreed.

The Court of Appeal acknowledged the decision in *Haas v. Gunasekaram* (*3) and confirmed that "the law favours giving effect to arbitration agreements and this is evident from both the applicable legislation and jurisprudence." However, the Court of Appeal pointed out that exceptions exist. It noted the exception mentioned in the Dell decision involving challenges based solely on a question of law or mixed fact and law requiring only a superficial consideration of the documentation evidence in the record. In Dell the Court noted at paragraphs 84 and 85*:*

> First of all, I would lay down a general rule that in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator. A court should depart from the rule of systematic referral to arbitration only if the challenge to the arbitrator's jurisdiction is based solely on a question of law. This exception is

justified by the courts' expertise in resolving such questions, by the fact that the court is the forum to which the parties apply first when requesting referral and by the rule that an arbitrator's decision regarding his or her jurisdiction can be reviewed by a court. It allows a legal argument relating to the arbitrator's jurisdiction to be resolved once and for all, and also allows the parties to avoid duplication of a strictly legal debate. In addition, the danger that a party will obstruct the process by manipulating procedural rules will be reduced, since the court must not, in ruling on the arbitrator's jurisdiction, consider the facts leading to the application of the arbitration clause.

If the challenge requires the production and review of factual evidence, the court should normally refer the case to arbitration, as arbitrators have, for this purpose, the same resources and expertise as courts. Where questions of mixed law and fact are concerned, the court hearing the referral application must refer the case to arbitration unless the questions of fact require only superficial consideration of the documentary evidence in the record.

The Court of Appeal reviewed the record and upheld Gibson J.'s decision to dismiss the claim on the basis of a limitation period and further held that there was "no need to consider" the alternative arguments related to estoppel and laches.

Before protecting the arbitrator's competence-competence to determine jurisdiction to resolve the dispute, the Court affirmed that courts can pre-empt that determination by deciding the viability of the claim on a limitation period.

*Rui Fernandes*

*Endnotes*
(*1) 2019 ONCA 1012
(*2) 2007 SCC 34 (CanLII)
(*3) 2016 ONCA 744

**6. Canada's COVID-19 Economic Response Plan includes support for Canadian workers**

On March 18, 2020, Prime Minister Justin Trudeau announced a number of economic measures to help stabilize the economy and support Canadian workers and businesses during these challenging times. Some of these measures are as follows.

*Wage Subsidies for Small Businesses*

To support businesses that are facing revenue losses and to preempt lay-offs, the government has proposed to provide small employers with a temporary wage subsidy for a period of three months. Employers who stand to benefit from the wage subsidy program include non-profits, charities and those eligible for the small business deduction.

While details are still to be finalized, the subsidy will amount to the equivalent of 10% of renumeration paid to employees during the three-month period, up to a maximum of $1,375.00 per employee and $25,000.00 per employer.

*Temporary Income Support for Workers and Parents*

The Government has proposed support for Canadians without access to paid sick leave or similar workplace accommodation who are sick, quarantined or forced to stay home to care for children in light of school and daycare closures.

Such support includes waiving the one-week waiting period for those in imposed quarantine that claim Employment Insurance (EI) sickness benefits. Also waived is the requirement to provide a medical certificate in order to access EI sickness benefits.

The Government has further introduced the Emergency Care Benefit to provide income support to workers (including the 15% of Canadians who are self-employed) who do not qualify for EI sickness benefits and who are quarantined, sick with COVID-19, or are caring for a family member who is sick with COVID-19. Parents with children who require care or supervision due to school closures, and are unable to earn employment income, will also receive the Emergency Care Benefit.

*Long Term Income Support for Workers*

The EI Work Sharing Program provides benefits to workers whose normal working hours are reduced as a result of developments outside of their employer's control. Employees being proposed for a work-sharing agreement must, in order to be eligible, be "core employees"-- that is, year-round, permanent full-time or part-time employees who are required to carry out the everyday functions of normal business activities. Eligible employees must additionally agree to a reduction of their normal working hours. Temporary (term or contract) employees are only eligible to participate if they are not employed on a seasonal basis and have maintained work hours similar to a permanent part-time or full-time employee within the last 12 months.

In order for employers to be eligible for this benefit, they must have been in business in Canada for at least two years, and must be a private business, a publicly held company or a not-for-profit organization. Employers must also demonstrate that the work shortage is temporary, out of their control and not a cyclical or recurring slowdown. A recent decrease in business activity of at least 10% must also be demonstrated. Employers are further required to submit and implement a recovery plan designed to return the work-sharing units to normal working hours before the end of the work-sharing agreement. There must be a reasonable expectation that recovery-- i.e., a return to normal work hours for all participating employees-- will be achieved by the end of the agreement.

Under the EI Work Sharing Program, an employee's work schedule can be reduced between 10% to 60%, that is, one half day, up to three days. The work reduction can vary in any given week depending on the availability of work. The work-sharing agreement must have a minimum duration of six weeks, while the maximum initial agreement duration is 26 weeks with a possible extension of up to 12 weeks.

Canadian workers and employers should stay tuned for further details from the Federal Government as the circumstances surrounding COVID-19 unfold over the coming weeks and months.

*Janice C. Pereira*

## 7. Transport Canada's "Regulatory Sandbox" on Electronic Shipping Documents For Dangerous Goods Shipments

Transport Canada has issued a "Notice to Interested Parties" (*1) of its launch of a "regulatory sandbox" project on electronic shipping documents for the carriage of dangerous goods. The "regulatory sandbox" term refers to a testing context or paradigm, allowing for the testing of innovative products, services, and business models in a live market environment, while ensuring that appropriate safeguards are in place.

The intent of this project is to evaluate the feasibility of permitting electronic shipping documents (referred to as "e-shipping" documents) as an alternative to the physical paper shipping documents presently prescribed by the federal *Transportation of Dangerous Goods Regulations* (*TDGR*).

The TDGR regulates aspects of the labeling, offering for transport, handling and carriage of prescribed dangerous goods together with related documentation, record keeping and training requirements.

An underlying principle of the TDGR is that dangerous goods in transport must be accompanied by physical documentation that provides basic facts about them. Part 3 of the TDGR sets forth documentary requirements and what must be prepared by the consignor before the carrier takes possession of the dangerous goods (that is, before they are in transport). This includes the requirement that a physical paper shipping document accompany most dangerous goods during transit, providing a summary of the dangerous goods being transported such that first responders can access essential information to develop a response plan should an incident take place involving the goods.

*An Impetus for Change*

As the transportation sector continues to evolve in line with technological advancements, Transport Canada is undertaking a concerted effort to modernize the framework of the TDGR with a view to increasing Canada's competitiveness and to foster innovation, while at the same time maintaining the safety of Canadians.

The goal of the regulatory sandbox is to evaluate whether an equivalent or greater level of safety can be achieved with e-shipping documents and if so, to determine the appropriate conditions. This project is not a regulatory amendment, nor a regulatory proposal. The current use of paper documentation remains in effect. The intent with the study would be to provide a thorough analysis of potential impacts on Canadians, including the associated benefits, costs, and performance of e-shipping documents.

The use of e-shipping documents from point of origin to final destination in different modes (road, rail, air, marine) will be evaluated from multiple perspectives with a focus on emergency response. This project will also consider rural and urban environments, including areas with limited or no Internet or cellular coverage.

Transport Canada will not be removing paper shipping documents, nor is there an intent to create a central database or online system of shipping documents. The aim of this initiative is to assess the viability of e-shipping documents as an option for companies.

No specific technology or system will be imposed in this project, as TC is interested in evaluating a variety of platforms and technologies.

*Potential Benefits*

Potential benefits of using e-shipping documents have been identified as follows:

- Improved legibility and accuracy of information related to shipments;

- Prevention of risk associated with the possible loss or destruction of paper documents;

- A simplified process for updating information on a shipping document;

- Quicker sharing of information with emergency responders during an incident;

- Integration of shipping documents with other fully digital business processes;

- Alignment with international regulations, such as the International Maritime Dangerous Goods Code (IMDG Code) and the International Civil Aviation Organization's (ICAO) Technical Instructions for the Safe Transport of Dangerous Goods by Air, which currently accept electronic transport documents for international shipments; and

- Greater flexibility and the opportunity to give Canadian businesses a competitive edge.

*Project overview*

Key aspects of Transport Canada's strategy to evaluate the performance, impacts, costs, and benefits of e-shipping documents include the following (*2):

- the issuance of "equivalency certificates" that will allow the use of e-shipping documents instead of paper shipping documents to selected businesses who meet specific safety requirements. Authorization will only be granted for the duration of the project (2020 to spring 2022), which will allow TC to assess the performance of e-shipping documents.

- A series of exercises will be designed to test the effectiveness of e-shipping documents in emergency response situations. These simulations will focus on the communication of shipping document information.

- there will be engagement with stakeholders, including emergency response personnel, industry representatives, law enforcement personnel, and Transport Canada's provincial, territorial, and regional counterparts, through a combination of focus groups, interviews, questionnaires, working groups, and various social media platforms, to keep Transport Canada apprised of potential issues and benefits associated with e-shipping documents.

- there will be engagement with international partners such as the United States Department of Transport to determine how e-shipping documents can be used for cross-border transportation and to better understand practices in countries where e-shipping documents are permitted.

Upon the completion of the regulatory sandbox, Transport Canada will publish a final report on the feasibility and effectiveness of e-shipping documents, including recommendations on the use of e-shipping documents in the TDGR.

*Seeking Participation*

The success of the regulatory sandbox project will depend heavily on the participation and contribution of stakeholders. Transport Canada is seeking shippers, carriers, first responders, enforcement personnel, and other government agencies to participate in this project.

Stakeholders can participate by applying for an equivalency certificate to use e-shipping documents and/or by submitting comments and feedback to Transport Canada throughout the study. Canadian consignors, shippers, or carriers that are already equipped with a system for communicating shipping documents to first responders and enforcement officers without delay, and that are interested in replacing paper shipping documents with an electronic equivalent, are encouraged to apply for an equivalency certificate by submitting an application through a Transportation of Dangerous Goods Approval website.

**Participation Conditions**

If an application is approved (*3), the equivalency certificate will be valid until March 31, 2022.

Specific performance requirements will then be as follows:

- The shipping document information will have to be communicated within five minutes of receiving a request;

- Each company must have a point of contact who can provide shipping document information while the dangerous goods are in transport;

- Registration with the Canadian Transport Emergency Centre (CANUTEC) will have to be done by providing CANUTEC with the point of contact who can provide shipping document information while the dangerous goods are in transport or provide another way for CANUTEC to access the information on shipping documents;

- Each company will be responsible for providing their staff with adequate training on all conditions listed in the equivalency certificate;

- Road vehicles will have to display a sign advising that e-shipping documents are being used. These signs will be provided by Transport Canada;

- The company will need to consent to provide Transport Canada with information related to the use of e-shipping documents. This could include the impacts or benefits on operational activities, training, equipment, and administrative activities, as well as feedback throughout the study;
And

- Every six months, a report must be sent to Transport Canada that describes any incidents that have occurred. At a minimum, the report must indicate i) the time of incident, ii) the time taken for the requestor to receive the shipping document upon making the request, iii) the requester of the information (first responder, CANUTEC, dispatcher, etc.), and iv) for every occasion that the requester did not receive the information within five minutes, an evaluation to determine why the information was not available including details of the corrective action being taken to prevent the situation from recurring.

The application process will remain open for the duration of the project, until spring 2022. Transport Canada will review applications and if a company is approved, it will be issued an equivalency certificate permitting the use of e-shipping documents until spring 2022.

*Future opportunities to comment*

Comments are welcome from industry stakeholders throughout the duration of this project, until spring 2022. Specific questionnaires will also be distributed to different stakeholder groups as another way for Transport Canada to fully understand the issues surrounding e-shipping documents.

*Gordon Hearn*

*Endnotes*

(*1) Canada Gazette, Part I, Volume 154, Number 7: GOVERNMENT NOTICES February 15, 2020
(*2) (https://www.tc.gc.ca/en/services/dangerous-goods/regulatory-sandbox-electronic-shipping-documents.html)
(*3) An application can be obtained by sending an email request to "*TDGEShipping-ExpeditionETMD@tc.gc.ca*

**8. Provincial environment laws do not offend "inter-jurisdictional immunity", "paramountcy" doctrines: *R. v. Great Lakes Stevedoring Company Ltd.*, 2019 ONCJ 895**

Recently, a stevedoring outfit on the Welland Canal in the St. Lawrence Seaway was charged with violating two sections of Ontario's *Environmental Protection Act*, R.S.O. 1990, c. E.19 (the "*EPA*"). Prior to trial, the defendants argued that the impugned provisions should not be applied because they offended two constitutional principles: (1) the doctrine of interjurisdictional immunity; and (2) the doctrine of federal paramountcy.

The presiding judge, Justice De Fillipis of the Ontario Court of Justice, disagreed with the defendants' arguments and sent the case forward to trial.

*Facts*

It was alleged that stevedores engaged by one of the defendants unloaded dry bulk goods from a foreign ship at a terminal owned by the federal Crown. The dry bulk goods in question was "cement clinker", a solid that his highly caustic when wet and can burn the eyes and skin.

It was alleged that some of the clinker was discharged in such a manner that it fell on residential properties in the adjacent neighbourhood, depositing dust on the surfaces of homes, patio furniture and cars in a way that prevented normal use of personal property.

The Charges

The defendants were accordingly charged under the following sections of the *EPA*:

> 14(1) Subject to subsection (2) but despite any other provision of this Act, a person shall not discharge a contaminant or cause or permit the discharge of a contaminant into the natural environment, if the discharge causes or may cause an adverse effect.
>
> 92(1) Every person having control of a pollutant that is spilled and every person who spills or causes or permits a spill of a pollutant shall forthwith notify the following persons of the spill, of the circumstances thereof, and of the action that the person has taken or intends to take with respect thereto, […] (a) the Ministry.

As noted by the Court, the St. Lawrence Seaway is governed by various statutes, including the federal *Canada Marine Act*. The preamble to the Act refers to making "the system of Canadian ports competitive, efficient and commercially oriented" and for "the commercialization of the St. Lawrence Seaway." In addition, section 4 of the Act provides:

> In recognition of the significance of marine transportation to Canada and its contribution to the Canadian economy, the purpose of this Act is to…
>
> (d) provide for a high level of safety and environmental protection;
>
> (e) provide a high degree of autonomy for local or regional management of components of the system of services and facilities and be responsive to local needs and priorities;
>
> (f) manage the marine infrastructure and services in a commercial manner that encourages, and takes into account, input from users and the community in which a port or harbour is located;

*The Argument*

Seeking to beat the charges without a trial, the defendants argued, first, that sections 14(1) and 92(1) of the *EPA* engaged the doctrine of "interjurisdictional immunity" and accordingly did not apply to them in the case.

"Interjurisdictional immunity" is a doctrine that protects the various "heads of power" that are assigned to the federal and provincial governments. Essentially, the doctrine provides that one order of government cannot enact a law that impairs the core of a head of power assigned to the other order. The key word is "impairs"; for example, a provincial law that incidentally affects a federal head of power will not be found in violation of the doctrine. Rather, "impairment", according to the Supreme Court of Canada:

> […] suggests an impact that not only affects the core federal power but does so in a way that seriously or significantly trammels the federal power. In an era of co-operative, flexible federalism, application of the doctrine of interjurisdictional immunity requires a significant or serious intrusion on the exercise of the federal power. It need not paralyze it, but it must be serious.(*1)

The defendants argued that sections 14(1) and 92(1) of the *EPA* impaired activities that are governed by two federal heads of power: (a) navigation and shipping; and (b) federal public property. Under Canada's Constitution, the federal government has the right to establish legislation in these areas.

*Navigation and Shipping*

First, the Court agreed with the defendants that the doctrine of interjurisdictional immunity was engaged in this case, since stevedoring activities are caught under the federal "navigation and shipping" head of power.

However, the Court disagreed that the federal government's power to legislate with respect to navigation and shipping was "impaired" by sections 14(1) and 92(1) of the *EPA*. The defendants argued that the provincial government was imposing regulations on the way in which the terminal unloaded foreign ships on federal property, and dictated the terms on which it could provide stevedoring services. It claimed that, as such, the provincial authorities directed significant operational changes that ultimately undermined stevedoring activities, resulting in impairment of a protected core of federal authority.

The Court was of the view that sections 14(1) and 92(1) of the *EPA* do not intrude on any matter that is indispensable for the defendants to load and unload cargo from ships, or to remove cargo from a port. All the defendants were required to do was load and unload the cargo in a manner that does not result in the cargo being discharged into the environment, and to report such discharges if they occur. This was not sufficient to warrant the application of interjurisdictional immunity.

*Federal Public Property*

The defendants similarly argued that the impugned *EPA* sections impaired the federal government's ability to legislate with respect to federal public property – in this case, the terminal.

The Court again disagreed, holding that the use or management of the terminal was not restricted by the *EPA* sections, beyond the general environmental requirements imposed on activities that take place on the land. The impugned provisions did not regulate how the land is to be used.

Accordingly, the Court found that the doctrine of interjurisdictional immunity did not apply in this case.

*Federal Paramountcy*

The doctrine of federal paramountcy arises where a federal law and a provincial law are both validly enacted, yet are inconsistent. "Inconsistent" means either that (a) compliance with both laws at the same time is impossible; or (b) the effect of a provincial law frustrates the purpose of a federal law. In such a case, the federal law will prevail, to the extent of the inconsistency. (*2)

In this case, the defendants argued that the impugned sections of the *EPA* frustrated the purpose of the federal *Canada Marine Act*. Essentially, the defendants argued that the *Canada Marine Act* enacted a "balancing exercise" between economic interests, safety and environmental concerns. This "balancing exercise" was frustrated by the outright prohibition on adverse environmental effects as set out in the provincial legislation.

Ultimately, the Court disagreed and held that the doctrine of federal paramountcy was not engaged in this case. The Court was of the view that the mere fact that federal authorities permit an activity (i.e. economic development of the St. Lawrence Seaway) does not mean that actors are excused from compliance with valid provincial legislation. There is no conflict, even if the provincial law is more restrictive than the federal law, unless the latter confers a positive right.

The Court also noted that the Supreme Court of Canada has held that in the absence of "very clear" statutory language to the contrary, courts should not presume that Parliament intended to "occupy the field" and render legislation in relation to the subject inoperative. (*3)

The Court agreed that the purpose of the *Canada Marine Act* is to balance the promotion of trade and commerce with other interests, including environmental concerns. However, the expression of this purpose did not reflect a firm intention by the federal government to oust provincial jurisdiction over the environment. Such an intention would require stronger statutory language.

Accordingly, the defendants' application was dismissed in its entirety and the matter was set to proceed to trial on the merits.

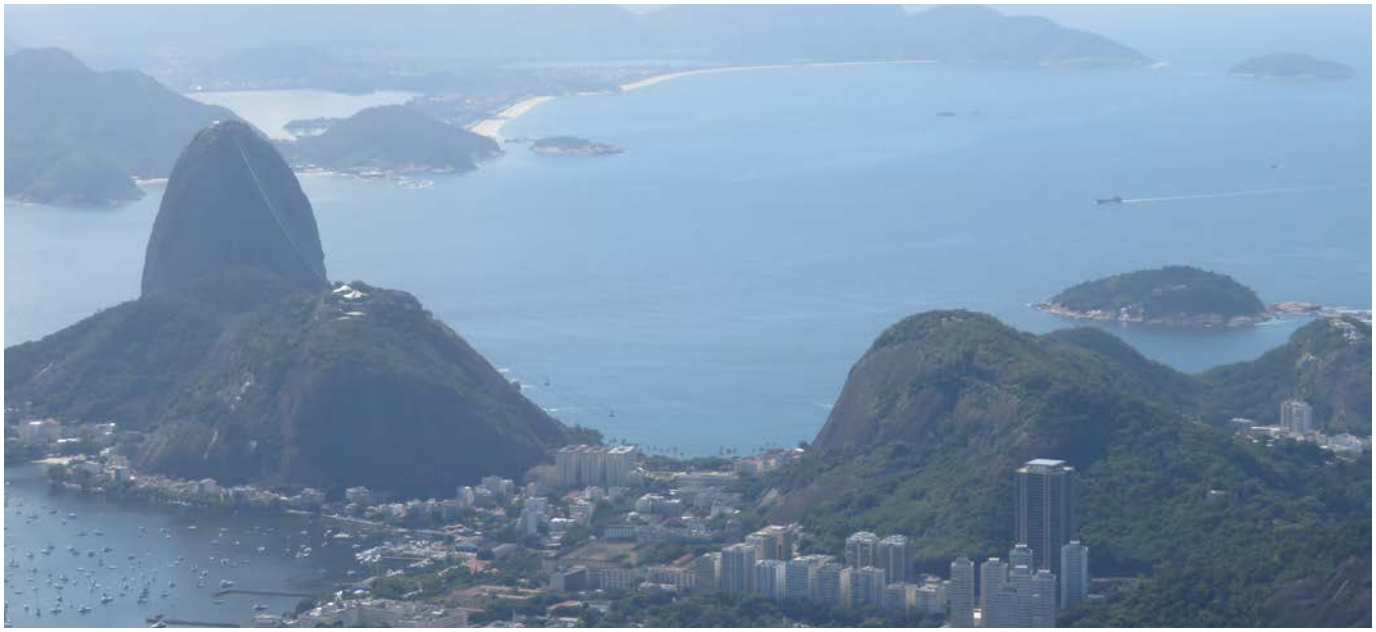
*James Manson*

*Endnotes*

(*1) *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, [2010] 2 S.C.R. 86 (SCC), paragraph 49.

(*2) *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5 (SCC).

(*3) *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, [2015] 3 S.C.R. 419 (SCC) at para. 27.



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**CONTEST**

This month we are giving away a complimentary ticket for attendance at our annual seminar day on Feb. 11th, 2021 in Toronto - for the first individual to email us the name of the airport depicted in photograph on page 10. Email your answer to info@fhllp.ca with a subject line "Newsletter contest". First response with the correct answer wins.