FERNANDES HEARN LLP NEWSLETTER MAY 2020

THE NAVIGATOR

IN THIS ISSUE

ARBITRATION DECISION UPHELD: SCC DISMISSES APPEAL IN *INSTRUBEL*

In the July 2019 issue of The Navigator we advised that the Supreme Court of Canada granted leave to appeal for a decision of the Quebec Court of Appeal involving the judicial recognition of an international arbitration award.

Canada's legal landscape is "arbitration friendly". All eyes were on the Supreme Court to see just how arbitration friendly Canada is. On December 11, 2019 the Supreme Court of Canada dismissed the appeal. Justice Cote dissented. The dissenting reasons were issued May 1, 2020. See *International Air Transport Association v. Instrubel, N.V.* 2019 SCC 61.

The case involves Instrubel n.v. ("Instrubel"), a Dutch company, seeking to enforce two international arbitration awards against the Republic of Iraq. After discovering that Iraq may have significant assets in Quebec, Instrubel began judicial proceedings in the Quebec courts for recognition and enforcement of the awards. Specifically, the International Air Transport Authority ("IATA"), whose headquarters is in Montreal, collects and remits fees from international airlines for use of airspace on behalf of airports and aviation authorities like the Iraqi Civil Aviation Authority ("ICAA"). Instrubel sought and obtained from the Superior Court of Quebec a writ of seizure before judgment by way of garnishment against IATA with respect to funds it collected and held for the ICAA. After learning that the funds in question were in fact located in IATA's bank account in Switzerland, the Republic of Iraq brought a motion to quash the writ on various grounds, including a challenge to the territorial jurisdiction of the Quebec courts to issue and enforce the writ.

A judge of the Superior Court of Quebec granted the motion to quash in part, finding that the writ of seizure was invalid insofar as it related to property located outside the province. The Quebec Court of Appeal set aside that decision, reinstated the writ of seizure in full, and dismissed the motion to quash, finding that the Quebec courts had jurisdiction to issue and enforce the writ.

FIRM AND INDUSTRY NEWS

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In the Supreme Court of Canada the majority of the court dismissed the appeal (from the bench orally) substantially for the reasons of the Court of Appeal, save for some matters addressed in *obiter.* See the July 2019 article in The Navigator for an analysis of the Court of Appeal reasons. (*1) Justice Cote dissented and found that the appeals should be allowed, and the judgment of the Superior Court reinstated. The reasoning was based on the fact that since the property in dispute was located outside Quebec, the Superior Court did not have jurisdiction to issue the writ of seizure before judgment by garnishment.

The Supreme Court of Canada has helped to ensure that Canada remains an arbitration-friendly jurisdiction, including with respect to the enforcement of international arbitral awards.

Rui Fernandes

Endnotes:
(*1) https://www.fernandeshearn.com/newsletter-2019-july/

2. *ING Bank v. Canpotex Shipping*: The Sequel

The Federal Court of Appeal recently released its decision in *ING Bank N.V. v. Canpotex Shipping Services Limited*, 2020 FCA 83. This was the second time in the course of this litigation that the Federal Court of Appeal was asked to review the lower court's decision. The first appeal was determined back in 2017 and was reported at 2017 FCA 47. We reported on that decision in the March 2017 edition of this newsletter.

As we reported earlier, in its 2017 decision, the Federal Court of Appeal allowed the appeal and referred the case back to the lower court judge for reconsideration in light of its reasons. The lower court judge then released a second decision on September 28, 2018. This decision deals with an appeal of the judge's second decision.

As we wrote previously, this case was about a marine fuel bunker delivery; essentially, two competing parties (one, a middleman; the other, the actual fuel supplier) each claimed they were entitled to be paid by the customer for the same delivery.

In its initial decision back in 2015, the lower court made its determination and ultimately ordered the customer to pay the fuel supplier most of the money in dispute (but ruled that the middleman could keep the mark-up it had charged the customer).

However, on appeal, Justice Nadon found that the lower court judge should never have accepted certain key oral evidence from one of the witnesses, because this violated what is known as the "parol evidence" rule. Accordingly, the Court allowed the appeal and referred the matter back to the lower court judge for reconsideration.

The lower court took up the case again, and, as a matter of contractual interpretation, still found that the fuel supplier was entitled to be paid, and that the middleman could keep its mark-up.

The middleman, still disgruntled, launched another appeal. This time, however, the appeal was dismissed and the fuel supplier got to keep its money.

The Facts

The facts of the case, stripped to their essentials, are fairly simple. In February 2014, two parties, Canpotex Shipping Services Limited ("Canpotex") and O.W. Supply and Trading A/S ("OW S&T"), entered into a fixed price trading agreement (the "Fixed Price Agreement") governing Canpotex's purchase of marine fuel bunkers in respect of vessels chartered by Canpotex. The purpose of the agreement was so that Canpotex would have the option of purchasing bunkers at a set price over a set period when market rates were favourable. However, because Canpotex never viewed the market conditions as favourable during the relevant period, it never "locked in" the price of bunkers; thus, no purchases were ever made pursuant to the terms of the Fixed Price Agreement.

Importantly, the Fixed Price Agreement contained a number of Schedules. One of them, Schedule 3, was entitled "*Terms and Conditions of sale for Marine Bunkers*".

In October 2014, however, Canpotex did place an order for marine fuel bunkers to be delivered to two of its chartered vessels: the M.V. *Star Jing* and the M.V. *Ken Star*. There was no dispute that these purchases were <u>not</u> made under the terms of the Fixed Price Agreement, but were rather "spot purchases".

Canpotex ordered the bunkers from an entity known as O.W. Bunkers (UK) Limited ("OW UK"), one of OW S&T's subsidiaries. In turn, OW UK sent Canpotex two sales order confirmations, which provided that the purchases were subject to <u>OW S&T's General Terms and Conditions</u>. These terms and conditions *differed* from the language of Schedule 3 as found in the Fixed Price Agreement.

In particular, the relevant terms in each of the impugned documents contained the following differences:

Fixed Price Agreement, Schedule 3

> L.4 a) These Terms and Conditions are subject to variations in circumstances where the physical supply of the fuel is being undertaken by a third party. In such circumstances, these terms and conditions shall be varied accordingly, and the Buyer shall be deemed to have read and accepted the terms and conditions imposed by the said third party on the Seller.

OW UK's General Terms and Conditions

> L.4 a) These Terms and Conditions are subject to variation in circumstances where the physical supply of the Bunkers <u>is being undertaken by a third party which insists that the Buyer is also bound by its own terms and conditions. In such circumstances, these Terms and Conditions shall be varied accordingly, and the Buyer shall be deemed to have read and accepted the conditions imposed by the said third party.</u>

[Emphasis added.]

The OW UK order confirmations also indicated that OW UK had arranged for a fuel supplier in British Columbia, Marine Petrobulk Ltd. ("Petrobulk") to physically deliver the bunkers in Vancouver.

Petrobulk then confirmed with OW UK that it was prepared to deliver the bunkers. Petrobulk indicated in its order confirmation form that, as between Petrobulk and OW UK, Petrobulk's own Standard Terms and Conditions would apply:

> The acceptance of this Confirmation and Marine Petrobulk's Standard Terms and Conditions shall be deemed final unless objected to by Buyer within three business days of receipt of this Confirmation.

On October 27, 2014, Petrobulk delivered the fuel bunkers to the two vessels at the Port of Vancouver. Petrobulk then invoiced OW UK in the amount of USD$648,917.40, and OW UK (after its mark-up) in turn invoiced Canpotex in the amount of USD$654,493.15.

All in all, this was a fairly straightforward transaction, featuring a buyer, a seller, and a middleman who connected the dots and charged a few thousand dollars for doing so.

Unfortunately, this is where things turned sour. OW UK went bankrupt and ultimately failed to pay Petrobulk, who then turned directly to Canpotex for payment. In addition, Petrobulk asserted a contractual lien and a statutory maritime lien against the two ships, which would allow Petrobulk to arrest the vessels.

In addition, all of OW UK's receivables in respect of fuel bunker sales were assigned to receivers in the UK. The receivers also turned to Canpotex for payment.

In short, Canpotex was asked to foot the bill twice; once to the bankrupt middleman's receivers, and once to the unpaid fuel supplier. Obviously, it would not be fair for Canpotex to pay twice; the question was, who should be paid what?

The Action

Canpotex commenced an interpleader proceeding, whereby the court was asked to rule on which competing claim to money should succeed. Canpotex obtained leave to deposit the disputed funds into its lawyers' trust account.

Canpotex then filed a summary judgment motion, seeking judgment from the Court as to which entity was entitled to be paid the disputed funds: Petrobulk or the OW UK receivers. These parties filed similar summary judgments, seeking judgment in respect of their respective unpaid invoices.

Justice Russell of the Federal Court heard the motions. In the course of his decision, His Honour considered whether the terms of Schedule 3 of the Fixed Price Agreement between Canpotex and OW UK governed in the circumstances, or whether OW UK's standard terms, as relayed to Canpotex in the order confirmations, governed instead.

Russell J. ultimately determined that Schedule 3 governed the parties' contractual relationship in this case. As a result, His Honour concluded that Petrobulk was entitled to be paid USD$648,917.40 for the fuel delivery. The OW UK receivers, meanwhile, were entitled to be paid the value of their mark-up (USD$5,575.75) for the service OW UK provided to Canpotex.

The First Appeal

Ultimately, the OW UK receivers appealed. As we reported in March 2017, the Federal Court of Appeal allowed the appeal and returned the matter to Justice Russell for reconsideration. Ultimately, the main issue on the first appeal (*1) centred around the lower court's acceptance of the testimony of Mr. Keith Ball concerning which of the two sets of terms and conditions applied. The lower court accepted Mr. Ball's evidence and as a result, concluded that Schedule 3 applied.

The Court therefore concluded that Justice Russell should never have accepted Mr. Ball's evidence. More particularly, his evidence should not have been used to, in effect, replace the words of the contract used by the parties. The Court held that Schedule 3 of the Fixed Price Agreement, in fact, did not apply to the subject transaction. Consequently, the applicable terms were those found in OW UK's Terms and Conditions.

The Court stopped short of interpreting OW UK's Terms and Conditions, however, and instead sent the matter back to Justice Russell for reconsideration.

The Reconsideration

Essentially, since the Federal Court of Appeal had already ruled that the OW UK's Terms and Conditions applied, the reconsideration was a matter of interpreting those terms and deciding the case based on that interpretation.

Again, Justice Russell was faced with the following term:

> L.4 a) These Terms and Conditions are subject to variation in circumstances where the physical supply of the Bunkers is being undertaken by a third party which insists that the Buyer is also bound by its own terms and conditions. In such circumstances, these Terms and Conditions shall be varied accordingly, and the Buyer shall be deemed to have read and accepted the conditions imposed by the said third party.

Thus, this (very odd) clause requires a third party (in this case, Petrobulk) to "insist" that the Buyer (in this case, Canpotex) was to be bound by its own terms and conditions. If so, then the Buyer would be bound.

Ultimately, His Honour determined that in this case, the sales order confirmations provided by Petrobulk contained the required "insistence", as follows:

> The acceptance of this Confirmation and Marine Petrobulk's Standard Terms and Conditions *shall* be deemed final unless objected to by Buyer within three business days of receipt of this Confirmation. [Emphasis added.]

Thus, because Petrobulk's Standard Terms and Conditions also provided that Canpotex (as a "Customer") would be jointly and severally liable with OW UK to pay the price of the bunker, the lower court held that Canpotex was obligated to pay Petrobulk.

Thus, Justice Russell's original decision did not really change - other than the method in which His Honour arrived at it.

The Second Appeal

Essentially, although its decision is lengthy and somewhat complicated, the decision is straightforward. The Court, in short, upheld the lower court's reconsideration and dismissed the appeal.

First, the Court reviewed the lower court's interpretation of section L.4 of OW UK's Standard Terms and Conditions, and was not persuaded that the lower court had made any error in construing the word "insists" in section L.4, and also that Petrobulk had indeed "insisted" through the language in its Confirmation, which, again, provided:

> The acceptance of this Confirmation and Marine Petrobulk's Standard Terms and Conditions *shall* be deemed final unless objected to by Buyer within three business days of receipt of this Confirmation. [Emphasis added.]

Next, the Court also agreed with the lower court that Petrobulk's Standard Terms and Conditions made Canpotex jointly and severally liable to pay its invoice for the bunkers.

Accordingly, the Court found that Canpotex was liable to pay Petrobulk and hence, dismissed the appeal.

The Oddity in this Case

The "oddity" in this case is that because of a strange provision in the contract terms between Canpotex and OW UK, which provided that if a third party "insisted" on having its own terms and conditions apply, then Canpotex would be bound by those terms, the situation arose where Petrobulk, a third party to the contract between Canpotex and OW UK, was able to bind Canpotex to its terms without directly negotiating with Canpotex.

The Court got around this odd situation by finding (correctly) that, in this case, Canpotex agreed to this (odd) arrangement in the first place. Justice Gauthier for the majority wrote at paragraph 88:

> I conclude that the Federal Court did not err when it found that there was no need for direct negotiation between Canpotex and Petrobulk to be bound to Petrobulk. Canpotex agreed and accepted to be bound by the third party STCs. […]

James Manson

Endnotes

(*1) The Court also considered other issues on appeal, of a more technical nature. One such issue raised was whether this particular case was suitable for the interpleader mechanism in the first place. Essentially, Justice Russell held that it was. On appeal, the Court agreed, up to a point. It held that the contractual issue of who, as between Petrobulk and OW UK, was entitled to be paid for the fuel delivery, was a proper matter to be settled by the interpleader proceeding. However, the Court held that Petrobulk's statutory maritime lien claim (which, it argued, it had against Canpotex by virtue of it being a supplier of goods to the foreign vessels) fell outside the contractual dispute. Thus, in the event that Petrobulk ultimately lost the interpleader action, it could still advance its lien claim. Thus, the Court held that Petrobulk's maritime lien should not have been extinguished along with the contractual claims in the interpleader action. Rather, it remained a "live" issue, to be litigated if necessary at a later date.

3. Conflicts of Law: Enforcing "Foreign" Court Judgments and Arbitral Awards in Ontario

Introduction

The expansion of cross-border trade necessitates at least a minimum degree of cooperation between countries and provinces concerning the enforcement of court judgments and arbitral awards. Can a judgment issued or an arbitral award granted against a defendant in one jurisdiction be enforced against it in another? Assets are mobile. They may be transferred from one jurisdiction to another. A defendant who is ordered to pay a plaintiff monetary damages from a court award issued in one jurisdiction may have more significant assets in another. Can a successful plaintiff "follow the money" to enforce a monetary judgment awarded in one jurisdiction in another?

The Standard "Two-Step" Process: Recognition and Registration /Enforcement

As a general rule most countries recognize the need for "judicial comity", that is, subject to certain checks and balances, the courts of one jurisdiction might enforce court judgments of another. The former jurisdiction will wish to offer certain cooperation in recognizing the judgments of the latter: someday, the tables might be turned. As such, "judicial comity" has come to be recognized as an important hallmark of the legal system of many countries. For the most part, this involves what is, in Canada, a two-step process. The first step to enforce a foreign judgment would be to file an application in a Canadian court to "recognize" the foreign judgment. With this step, the Canadian court would satisfy itself of matters such as whether the foreign court had the necessary jurisdiction to issue the award or judgment in question, whether there was "due process" in accordance with the rules of the foreign court (i.e. was the defendant properly notified and given a chance to defend the matter) or whether the enforcement of an award is inconsistent with Canadian public policy. Subject to these "gatekeeper" considerations, a foreign court or arbitral award might then come to be "recognized" and in turn "registered" with a Canadian court. This second next step involves the registration and eventual steps towards the usual enforcement of the judgment against a defendant and its assets, as would be the case upon the securement of a domestic or "local" judgment.

The Inter-Provincial Statutory "Fast Track" to Registration and Enforcement of Outside-of-Province Judgments or Awards

The provinces of Canada have enacted legislation to expedite the process whereby a judgment from a court in one province may be enforced in another province – without the requirement of taking the first formal "recognition" step noted above. Essentially, this can be considered to be a "fast track" to enforcement whereby an application is made to "register" the original judgment in Ontario. Once registered, the original judgment or order could then be enforced in Ontario.

The notion is that the provinces of Canada should presumptively accept that there is inherent credibility in the courts of another province. As a result of provincial legislation in Ontario and the other provinces to facilitate the process, certain monetary awards issued in one province can be more readily enforced in another. This said there remain certain "checks and balances" in terms of preconditions.

The Ontario response has been with the enactment of the *Reciprocal Enforcement of Judgments Act,* R.S.O. 1990, c. R.5 ("REJA"). This statute provides as follows:

> s. 2.(1) Where a judgment has been given in a court in a reciprocating state, the judgment creditor may apply to any court in Ontario having jurisdiction over the subject-matter of the judgment, or despite the subject-matter, to the Superior Court of Justice at any time within 6 years after the date of the judgment to have the judgment registered in that court, and on any such

application the court may, subject to this Act, order the judgment to be registered.

Mention was made above of certain "checks and balances". One such measure in the Ontario legislation is as follows:

(2) Reasonable notice of the application shall be given to the judgment debtor in all cases in which the judgment debtor was not personally served with the process in the original action and did not appear or defend or otherwise submit to the jurisdiction of the original court, but in all other cases the order may be made without notice.

Other "checks and balances", or conditions precedent to the "fast track" registration of an "out of Ontario" judgment or court award, are prescribed as follows:

3. No judgment shall be ordered to be registered under this Act if it is shown to the registering court that:

(a) the original court acted without jurisdiction; or

(b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit during the proceedings to the jurisdiction of that court; or

(c) the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, despite the fact that the judgment debtor was ordinarily resident or was carrying on business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court; or

(d) the judgment was obtained by fraud; or

(e) an appeal is pending, or the judgment debtor is entitled and intends to appeal against the judgment; or

(f) the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason would not have been entertained by the registering court; or

(g) the judgment debtor would have a good defence if an action were brought on the original judgment.

Section 4 addresses the effect of registration:

4. Where a judgment is registered under this Act:

(a) the judgment is, as from the date of the registration, of the same force and effect and, subject to this Act, proceedings may be taken thereon as if it had been on a judgment originally obtained or entered up in the registering court on the date of the registration;

And

(b) the registering court has the same control and jurisdiction over the judgment as it has over judgments given by itself; and …

The mechanisms at play are illustrated in the recently published court decision by the Ontario Court of Appeal in the case of *H.M.B. Holdings Limited v. Antigua and Barbuda* (*1). This case also nicely illustrates the current judicial trend in analyzing what is required for a party to be found to have been "doing business" in a given jurisdiction.

From Antigua to British Columbia to Ontario: The H.M.B. Holdings Case

Antigua and Barbuda (Antigua) expropriated property owned by H.M.B. Holdings Limited (HMB). HMB commenced litigation and was

awarded a damage award by the Judicial Committee of the Privy Council (*2) which ordered Antigua to compensate HMB for the expropriation (the "Privy Council judgment").

Two key steps then happened in the narrative.

1. HMB brought a lawsuit in the courts of British Columbia to enforce the Privy Council judgment. (Evidently the judgment was not to be satisfied in Antigua and certain Antiguan assets were located, or understood to be located in British Columbia). Antigua was served with the British Columbia court action but did not appear in that action or otherwise submit to that jurisdiction. Following related proceedings, the British Columbia Supreme Court granted HMB's action to recognize the Privy Council judgment (the "British Columbia judgment").

2. Then, HMB sought to register its British Columbia judgment in the Ontario Courts under the provisions of *REJA*. (Evidently there were not enough Antiguan assets located in British Columbia and it was understood that asserts were located in the province of Ontario).

The Application to Register the British Columbia Judgment in Ontario Pursuant to REJA

The matter was presented to an Ontario judge for consideration. Could the Privy Council judgment, now the subject of a British Columbia judgment, simply be registered in Ontario, without more? The judge seized of the matter determined that the key issue involved consideration of s. 3(b) from REJA, which, as noted above, stipulates that:

> 3. No judgment shall be ordered to be registered under this Act if it is shown to the registering court that:
> …..
> (b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit during the proceedings to the jurisdiction of that court; or

As Antigua did not appear in the British Columbia litigation or otherwise submit to the jurisdiction of the British Columbia court the critical pre-condition to registration then concerned whether Antigua "was carrying on business or ordinarily resident" in that province.

The judge reviewed the evidence on point as to what, if any, presence Antigua had in British Columbia. Antigua's connection with British Columbia was limited to the former's sponsorship of a certain "Citizenship by Investment program" (CIP) which was aimed to encourage investments in real estate, businesses and other ventures in Antigua by its offering citizenship for such investments. Antigua engaged certain authorized representatives to facilitate introductions to potential investors. Antigua had four such authorized representatives in British Columbia at the material time. These representatives were however found on the evidence to not have been agents of Antigua. They had no authority to review or approve a citizenship application. Their function was simply to disseminate information on the CIP program to potential investors. Antigua did not maintain an office in British Columbia. It did not have agents or employees there. Antigua did not contract with potential investors in British Columbia, did not trade goods there or engage in advertising of services there.

On the basis of the foregoing the Ontario judge ruled that Antigua had not been carrying on business in British Columbia so as to "pass muster" with section 3(b) of REJA. The judge ruled that "For a party to be seen to have carried on business in a jurisdiction, he or she must have a meaningful presence in the province and the presence must be accompanied by a degree of business activity over a sustained period of time. This requires some form of actual, not only virtual, presence in the jurisdiction such as maintaining an office there or regularly visiting the territory of the particular jurisdiction. On the facts of the case, Antigua was not "carrying on business in British Columbia". In this regard the

judge citing leading case law which he found to govern the "carrying on business" test. (*3)

Accordingly, the judge dismissed HMB's application to register the British Columbia judgment in Ontario. (*4)

On Appeal to the Ontario Court of Appeal

A majority of two of three judges of the Ontario Court of Appeal rejected the appeal. They deferred to the factual findings of the Ontario judge who was initially seized of the matter, who ruled that Antigua was not carrying on business in British Columbia. The third judge of the Court of Appeal would have allowed the appeal, finding that the initial judge had made an error in ruling that Antigua was not carrying on business in British Columbia. This judge was of the view that "the conduct of Antigua easily satisfies the requirement for carrying on business in British Columbia" in view of the fact that the purpose for the CIP program was to "generate monies for Antigua".

In the result HMB was not able to register the British Columbia judgment in Ontario the purposes of enforcing the original Privy Council Judgment.

Gordon Hearn

Endnotes

(*1) 2020 ONCA 12 (CanLII)

(*2) The Judicial Committee of the Privy Council is the highest court of appeal for certain British territories (such as Antigua), some Commonwealth countries and a few UK bodies

(*3) See *Chevron Corp. v. Yaiguaje* 2015 SCC 42 and *Club Resorts Ltd. v. Van Breda* 2012 SCC 17

(*4) With this, we see an important element of restraint in *REJA*. The Ontario courts are not permitted by that statute to automatically fast-track towards registration *any* out-of-province award or judgment: there must have been a fair and logical nexus between the court issuing the award or judgment sought to be registered and the judgment debtor.

4. Business Interruption and COVID 19 Litigation Update

COVID 19 Litigation Update

The COVID 19 pandemic litigation landscape continues to grow with new actions just recently issued and more to come, despite the fact that the courts over the country are in flux with each jurisdiction handling re-opening and re-scheduling differently. There are already hundreds of lawsuits filed in the US and there is every reason to think that it will be the same in Canada. So far, we have seen the following actions launched or threatened to be launched:

1. a national class action out of Saskatchewan against indemnity insurers in Canada alleging that the insurers are not paying business owners under business interruption/all risks coverage for losses accumulated due to the COVID-19 pandemic. Similar activity in the US as well;

2. individual claims by insureds against their insurers including a dental clinic in Quebec against its insurer after a denial of Business Interruption coverage for losses sustained, where policy wording is said to cover the loss of business income "actually sustained and directly resulting from the necessary reduction or interruption of the Insured's activities caused by an insured peril that has affected the insured property" and where there is no clause in the policy to indicate the exclusion of a pandemic, virus, or a health crisis. More on the business interruption issues below;

3. a $50-million class action lawsuit in Ontario and a $25-million class-action lawsuit in Alberta on behalf of victims' families against retirement homes and long term care facilities alleging that those entities were negligent, did not follow proper protocols to prevent an outbreak of COVID-19 and/or failed to isolate those confirmed to have the virus and/or failed to take victims to hospital;

4. public-interest organizations against the City of Toronto (or similarly in other cities) over "deplorable" conditions in the Toronto's shelter/ respite system during the COVID-19 pandemic;

5. price-gouging claims against Amazon, Costco and others;

6. ticket holders against major airlines and travel companies and hotels for issuing credits and vouchers instead of refunds for flights and vacations cancelled due to the COVID-19 pandemic. (*1);

7. in the United States, Missouri's Attorney General has filed the first state claim in US federal court against the People's Republic of China and the Chinese Communist Party for "an appalling campaign of deceit, concealment, misfeasance and inaction by Chinese authorities that unleashed this pandemic.";

8. an inmate at the federal women's prison in Joliette, Quebec for damages after she contracted COVID-19, which alleges that Correctional Service Canada and federal prison officials failed to implement timely protective measures at its correctional facilities. The plaintiff alleges that she was exposed to the COVID 19 while she was cleaning the facility without personal protective equipment and after her request for same was denied. There are also claims involving a failure to process early release quickly enough where eligible inmates were particularly vulnerable;

9. a class action by employees against a fitness business over its termination of more than 1,000 employees in the wake of the COVID-19 pandemic and failure to provide notice damages, including allegations that the business had planned to downsize before the COVID 19 pandemic using it as an excuse to avoid paying the employees as required. There will be other actions involving human rights, constructive dismissal and others;

10. passengers against cruise lines for negligence in their response to the COVID-19 outbreak;

11. students against universities and colleges for partial tuition and campus fees refunds on the basis of that online courses are not what they were promised.

The list will continue to grow including disparate areas such family law disputes arising out of changed circumstances to contractual disputes involving defences of force majeure, for example. As the feeling of "fighting this together" recedes into the background once the COVID 19 pandemic itself "disappears" or a vaccine arrives and once minds return to self- interest, litigation will, no doubt, be in the forefront.

Business interruption

For business interruption coverage claims, most policies require direct physical loss or damage to tangible covered property from a covered cause before there will be coverage for resulting losses including loss of use of the premises. The issue is now squarely whether particular results of the COVID 19 pandemic constitute physical loss or damage to property. Businesses that do not have specific pandemic coverage may face an uphill battle, in this regard. trying to fit their insurance policy wordings to the COVID 19 pandemic situation. (*2)

It will take significant time before any business interruption coverage cases will get before the courts and even more time before we have court decisions. The first case of purported relevance is *MDS Inc. v Factory Mutual Insurance Company (FM Global)* ("*MDS*"). (*3) On March 30 2020, Justice Wilson in the Ontario Superior Court held that, under an all-risk policy, the "physical damage" requirement for coverage may be satisfied by a loss of use; however, *MDS* is not a COVID 19 case and involved a particular and unique set of facts and specific policy wording and the case was about the application of an exclusion not regarding the coverage grant. It remains to be seen what effect *MDS* will have if any on COVID 19 business interruption claims and litigation.

Facts

MDS Inc. ("MDS") purchased radioisotopes from Atomic Energy of Canada Limited's Nuclear Research Universal Reactor ("NRU"). MDS then processed and sold the radioisotopes, which were used in medical products. In 2009, MDS's nuclear facility experienced a leak of heavy water containing radioactive material and there was venting of radioactivity into the air and there was also unanticipated corrosion. MDS voluntarily shut down expecting that shut down to last 36 hours, but, unfortunately, the shutdown lasted 15 months. MDS incurred losses of over $128 million.

MDS had purchased a worldwide all-risks policy which covered property damage. At para 180, the Court summarized the policy as follows:

> According to Section B(1), the Policy insures Real Property, Personal Property (to the extent of the Insured's interest in such property), and the interests of contractors and subcontractors in insured property, unless otherwise excluded, located at an Insured Location or within 1,000 feet thereof. Insured Location is defined as "a location 1) listed on a Schedule of Locations attached to this Policy. 2) covered as a Miscellaneous Unnamed Location. 3) covered under the terms and conditions of the Automatic Coverage or Errors and Omissions Provisions.

Section C in the policy covered Time Element losses, including loss of profits to the insured MDS "flowing from physical damage to a supplier 'directly resulting from physical loss or damage of the type insured by this Policy' to a maximum of US$25,000,000.00", subject to exclusions.

Section C(3) extended Time element coverage "to situations, such as losses incurred when a civil authority has prohibited access to property, service interruption loss under certain conditions, and losses incurred for reasonable delays to the start-up of business operations".

The insurer acknowledged coverage for loss of profits, but subject to the wordings and exclusions for corrosion or nuclear radiation.

The term "physical damage" was not defined in the policy. At para 437, the Court quoted the exclusions under review as follows with emphasis in the original judgment (*4):

> C. This Policy excludes the following, but, if physical damage not excluded by this Policy results, then only that resulting damage is insured: ...
>
> 3) deterioration, depletion, rust, corrosion or erosion, wear and tear, inherent vice or latent defect.

Trial Decision

Justice Wilson held that the corrosion exclusion was not applicable, within the facts of that case, finding:

> [415] I conclude considering the reasonable objective expectation of the parties in light of the factual context of this case that coverage should be available for losses caused by the leak of heavy water at J-41 resulting in a shutdown of the NRU. The cause of the fortuitous corrosion was triggered by an unanticipated and unpredicted microscopic attack of the Calandra wall due to the presence of an aggressive agent, or contaminant, probably chlorine, that caused a through wall leak. I refer to my findings of fact and conclusions as to the quality of the water leaking from the reflector to the J-rod annulus confirming the probable presence of chlorine as well as other contaminants [para 150 to 162].
>
> [416] I have defined corrosion in the Policy as "the anticipated and predictable process of corroding, esp. of a rusting metal." "Corrode" is defined as "wear away, esp. by chemical action."
>
> [417] Applying this definition to the facts of this case, I conclude that the Insurer has not met the burden of proof that the corrosion exclusion applies to this fortuitous, unanticipated and unpredictable corrosion found at J-41. Hence, I conclude that the corrosion exclusion does not apply.

Her Honour went on to find that, if the corrosion exclusion did apply, the exception to that exclusion for resulting "physical damage" applied to exempt the insured's loss of use of the isotopes from that exclusion. Exclusions are to be interpreted narrowly and any exceptions are to be interpreted broadly. The Court stated:

> [445] The question is:
>
> To qualify as resulting physical damage under the Policy does there have to be actual tangible damage to the J-rod annulus caused by the leak of heavy water? (the Insurer's position) or
>
> Does resulting physical damage in this Policy include loss of use of the NRU as a consequence of the leak of heavy water? (the Plaintiffs' position)

The Court noted the conflicting case law on the interpretation of "physical damage" in an all-risks policy and, because "physical damage" was not a defined term in the policy, Section C of the Policy was held to be ambiguous. Further, "all-risks" policies provide a special coverage for risks not covered under other types of insurance policy.

The Court held that a complete shutdown of the NRU in response to the leak was required to avoid a catastrophe. The Court concluded that a broad definition of “resulting physical damage” should be applied, including “loss of use” of physical property without the need for actual physical damage. Consequently, Section C of the Policy applied to MDS's loss of profits that resulted from the shutdown:

> [515] A broad interpretation of resulting physical damage to include impairment of use confirms the principle that exceptions to exclusions should be interpreted broadly. 140
>
> [516] The Policy must be considered as a whole. The other provisions of the Policy including the loss of use exceptions, and the Contingent Time Coverage provisions, with specific regard to the period of liability when read with the resulting physical damage exception, all appear to confirm that loss of use of the NRU caused by the

> leak of heavy water would constitute resulting physical damage. The effect of the leak of heavy water rendered the NRU inoperable until the safety concerns and protocol imposed by the CNSC had been met.
>
> [517] In assessing the objective reasonable expectation of the parties as to the meaning of physical damage, it makes common sense that if the unanticipated leak of heavy water from the Calandra precipitates the shutdown of the NRU ordered by the CNSC to study and rectify the problem causing the leak, that this circumstance rendering the NRU inoperable would constitute resulting physical damage.
>
> [518] Applying the principles of *Ledcor* to interpret the meaning of resulting physical damage, I conclude that a broad definition of resulting physical damage is appropriate in the factual context of this case to interpret the words in the Policy to include impairment of function or use of tangible property caused by the unexpected leak of heavy water.
>
> [519] This interpretation is in accordance with the purpose of all-risks property insurance, which is to provide broad coverage. To interpret physical damage as suggested by the Insurer would deprive the Insured of a significant aspect of the coverage for which they contracted, leading to an unfair result contrary to the commercial purpose of broad all-risks coverage.
>
> [520] For these reasons, I conclude in the facts of this case that the Plaintiffs have met their onus of proving that the leak of heavy water from the Calandra to the J-rod annulus was resulting physical damage and that if the corrosion exclusion applies then the exception provisions of resulting physical damage apply allowing coverage for the Plaintiffs losses.

The Court held that the resulting physical loss from the leak included the profit loss flowing from the disruption of the supply of MDS's isotopes.

MDS is under appeal.

Finally

What constitutes "physical damage" or “property damage” will depend on the type of insurance policy and wordings in question including exclusions and the Court’s review and application of doctrines of interpretation including that of reasonable expectations.

Where a term is defined, coverage will be determined based on the meaning of the words used within the definition and in the context of case law and, specifically, the particular facts in play within the claim. If the term is not defined, then the Court’s examination may include an even broader review.

In *MDS,* the policy was a global all-risk policy, which was said to be purchased to protect a business in case of unforeseen circumstances and was a “broad” coverage. Justice Wilson interpreted "physical damage" in the exclusion broadly in the context of a loss arising out of a physical event that halted production of a product and that the policy contemplated loss of business income from the failure of a third-party supplier to produce a product.

This decision may have relevance to business interruption claims due to the COVID-19 pandemic, where businesses have been forced to shut down by government order similarly as occurred in *MDS.* Where government orders are short of a shut down but effectively cause that result, the similarity is not as clear and a court may require nothing less than a full shut down to come to a similar conclusion.

For COVID 19 cases, the threat of the presence of a virus or the actual presence of a virus will be treated differently. An actual virus contamination, for example, may be considered to be a change of material dimension determined to be a physical alteration caused by the presence of the virus thereby causing “physical damage” until a cleanup can be completed. The threat of contamination may be covered if “inevitable” or “imminent”.

There have been cases in both the US and Canada involving leaks or fumes which "physically damaged" the contents of a business as the business could not continue (*5); where gas leaks threatened destruction and were considered to be physical damage based on loss of use (*6); and E-coli in a house was considered to be "physical loss or damage" to the structure causing inhabitability and eliminated functionality (*7). In New Jersey, a case held that, where there was asbestos in the air, the associated structure was physically damaged without a structural alteration as it was uninhabitable and unusable (*8). Whether or not Canadian courts will make this same leap for the COVID 19 virus cases where there is no physical alteration to a covered property remains to be seen.

It is clear that securing business interruption coverage without actual, tangible physical damage under a policy will be difficult at best. Each judgment will be examined carefully and there will be no "one size fits all" result. The policy wordings and specific circumstances will continue to dominate any determination and parties will continue to look to the US for cases that contain broader interpretation.

It is time for insurers to revisit wordings and for claimants to obtain legal advice about any potential claim.

A Note on Government Intervention

There is a movement in the US that seeks to put pressure on governments to pass statutes that grant various companies protection against liability claims for inadequate care of their residents. This would include a protection from civil liability for nursing homes, airlines, cruise lines and the service industry as was done for airlines after 9/11 in the US.

There are also pressures to include viral threats as part of "conflagration" or other catastrophes in Civil Authority endorsements, which cover loss sustained as a result of "damage" caused by "order of civil authority" to "retard or prevent" a "conflagration or other catastrophe". Conflagration is usually defined as a significant natural event such as a fire.

There is also a movement to pressure governments both in the UK and in the US into retroactively requiring insurers to cover pandemics/COVID 19 business interruption claims

despite policy wording. There have already been bills proposed in US states which would not allow insurers to deny claims for loss of use and occupancy because the claim involves (i) a virus (even where there is an exclusion); (ii) no physical damage to insured property; or (iii) because of acts of civil authority or decisions of a government entity.

It goes without saying that this type of "reimagination" of coverage - whether by compelling expansion of definitions or somehow retroactively amending insurance contracts - would have a devastating impact on insurers and reinsurers, who clearly did not intend to cover such losses.

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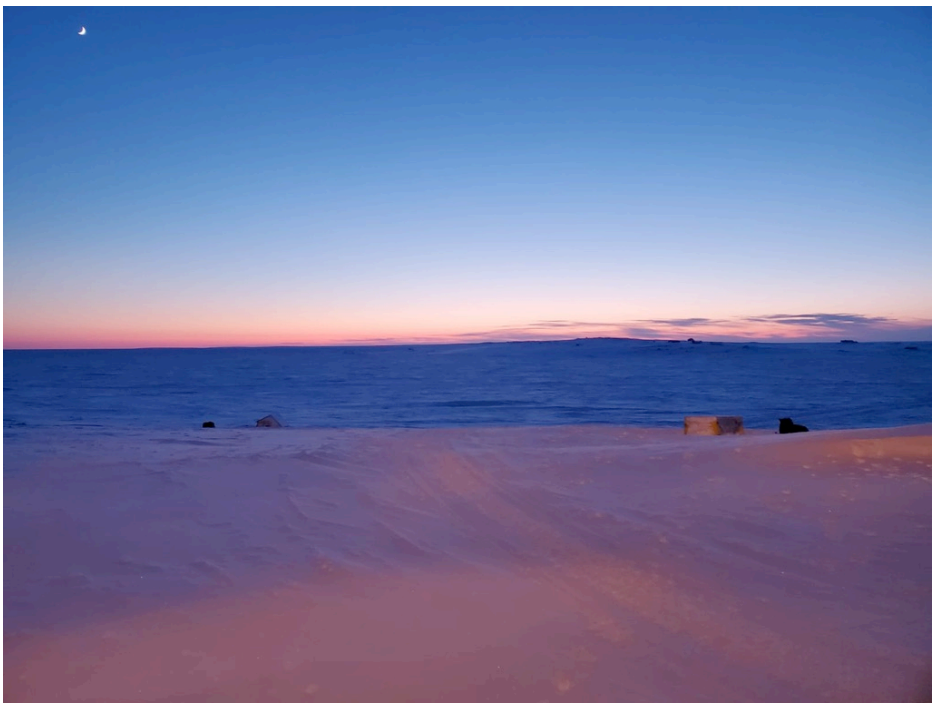
Endnotes
(*1) Prime Minister Trudeau has advised the public that there will be discussion with the airline industry regarding this situation and will attempt to balance the interests of Canadians and the health of the airlines coming out of the COVID 19 pandemic. Airlines have advised those seeking a refund that, while in the normal course refunds would be issued, the COVID 19 pandemic is not in the regular course (as reported by *CP 24 News* May 21, 2020).
(*2) The Wimbledon organizers had been paying millions for specific pandemic coverage for years. It has been reported that organizers will recover about 60% of their losses and their risk assessment team no doubt continues to celebrate their decision to purchase that coverage.
(*3) 2020 ONSC 1924
(*4) The insurer also cited and the Court considered a Nuclear Radiation Exclusion; however, the Court held that the Nuclear Radiation Exclusion was unambiguous but did not apply to this case. The purpose of the Nuclear Radiation Exclusion was to exclude damage from large nuclear events, not the day-to-day operational activities and this was in line with the parties' expectations in this case.
(*5) *Jessy's Pizza v Economical Mutual Insurance Co.* 2008 NSSM 38
(*6) *Western Fire Insurance Co. v. First Presbyterian Church* 165 Colo. 34, P. 2d 52 (Colo 1968)
(*7) *Motorist Mutual Insurance Co. v. Hardinger*, 131 F. App. 823 (3rd Cir. 2005)
(*8) *Gregory Packaging Inc. v. Travelers Prop. Cas. Co. of Am. No. 2:* 12-cv-04418 (D.N.J. Nov. 25, 2014.



5. *Forum Non Conveniens*: International Claims in Canadian Courts

A recent Superior Court decision in Ontario reminds us that the place where you choose to commence a court proceeding will depend on more than just where the complaining party would prefer to have it heard. Central to the decision in *Beijing Hehe Fengye Investment Co. Limited v. Fasken Martineau Dumoulin LLP* (*1) was what the *forum conveniens* — that is, the appropriate, or "convenient" court — for the dispute in question should be. Often cases with an international element can be heard in more than one jurisdiction, having strong connections with more than one. Nevertheless, as the result in *BHF* shows, there is a minimum requirement of connectedness with a national court necessary before a court will recognize that it in fact has authority over the matter the parties are fighting over.

The Facts

The corporate plaintiff in this case, Beijing Hehe Fengye Investment Co. Limited ("BHF Investment"), was a Chinese company dealing mainly in real estate development and the mining industry. Around 2015 it retained the law firm of Fasken Martineau DuMoulin ("Fasken") to provide advice and other services in a bid to acquire an interest in a public company, Eastern Platinum Ltd. ("Eastern Platinum"). Eastern Platinum was a Vancouver-based mining company listed on the TSX with principal operations in South Africa. BHF Investment also retained the defendant Fasken Business Consulting (Asia) Inc. ("Fasken Consulting"), in connection with the planned acquisition. The personal defendant Lei Huang was an employee of Fasken Consulting and the principal contact with this defendant, working out of its Beijing and Hong Kong offices. Fasken Consulting was a wholly owned subsidiary of Faskens.

The main allegation in the claim was that BHF Investment and its principal, the plaintiff Rong Kai Hong, had disclosed confidential information to Mr. Huang of Fasken Consulting in connection with the planned acquisition. At the same time, as the plaintiffs alleged, Fasken and Fasken Consulting were also advising a competitor of the plaintiffs, the defendant Ka An Development Co. Limited ("Ka An Development") and its principal, Chang Yu Liu, who were also simultaneously seeking to obtain control of Eastern Platinum. Neither Mr. Liu nor Ka An Development carried on business nor had any offices or assets in Ontario.

The plaintiffs also alleged that the Fasken defendants had, at several meetings, promoted the sale of shares by Eastern Platinum to Ka An Development while discouraging a sale to the plaintiffs, in a clear conflict of interest. The defendant Ka An Development eventually purchased a 23.89% stake in Eastern Platinum, becoming its largest shareholder, for a price of $24.5 million. Fasken acted for Ka An Development on the purchase transaction. The plaintiffs also alleged that Liu and Ka An Development knew that Fasken owed fiduciary duties to the plaintiffs and assisted Fasken in breaching those duties. Fasken had also assisted Ka An Development in a proxy battle with the plaintiffs and succeeded in getting Ka An Development's nominees on the board of directors to give it effective control of Eastern Platinum.

The plaintiffs sued Ka An Development, its principal, Mr. Liu, and the Fasken defendants for $225 million for breach of fiduciary duty, knowing assistance of breach of fiduciary duty, negligence, and misuse of confidential information. Ka An Development was served with the Statement of Claim by a copy being left in the Hong Kong office of the company. Mr. Liu was never served with the claim. Ka An Development disputed that it was properly served, as service ought to have been made under the *Hague Convention*, and refused to attorn to the courts in Ontario. Counsel for the plaintiffs then had Ka An Development noted in default.

Ka An Development and Liu then brought a motion to have service of the Statement of Claim and the noting in default of Ka An Development

set aside and also to stay or dismiss the action against these defendants on the grounds of the court lacking jurisdiction, or alternatively relying on the doctrine of *forum non conveniens*; that is, that there was another more appropriate forum to bring an action against them for the matters complained of.

The motion to dismiss the action

The first issue, which the court disposed of easily, was whether service of the Chinese defendant company should be set aside. Under Ontario law, you can serve foreign defendants without leave where the facts disclose a connection with Ontario, but, even where this is established, service of foreign defendants is often governed by the *Hague Convention*, an international treaty regarding service to which China is a signatory. This convention prescribes different rules for service of a country's own nationals according to the parts of the convention adopted by each signatory state. The specific rule applicable to Hong Kong is that service is only effective if made through Hong Kong's central authority. As this was not done, the court set aside service of the claim and the noting in default of Ka An Development.

The more central issue was whether the court even had jurisdiction to adjudicate a claim against these defendants. In this case the Chinese defendants challenged both the Court's general jurisdiction over the subject matter—known as jurisdiction *simpliciter*—and disputed that this was the appropriate court to hear a case involving these defendants. In other words, that it was not *forum conveniens*, and that China was the more appropriate jurisdiction.

The Court agreed with the Chinese defendants on both counts. Jurisdiction *simpliciter* over a foreign defendant is established when: a) the foreign defendant has a presence in Ontario and service is effected here (presence-based jurisdiction); b) the foreign defendant acknowledges, or "attorns" to, the jurisdiction of the Ontario courts; or c) there is a "real and substantial connection" between Ontario and the dispute involving the foreign party. The connection here can be established various ways. It exists where: a) a contract between the parties was made here; b) the tortious conduct occurred in Ontario, or c) the defendant carries on business in Ontario, with the specific qualification that such presence be actual, and not "virtual."

Here the plaintiffs sought to establish jurisdiction *simpliciter* on the basis that Liu and his company retained Ontario lawyers and that they had purchased shares in a company listed on the TSX. This was insufficient in the view of the Court, which noted that neither Ka An Development nor Mr. Liu were based in Ontario, had assets in Ontario, or had any employees in Ontario. Mr. Liu did not even travel regularly to Ontario. Also, the alleged misuse of confidential information by the Chinese defendants, if it occurred at all, must have occurred in China, not Ontario. Finally, although the share purchase agreement between Ka An Development and the vendors was governed by Ontario law, the Court noted that *that* contract did not involve the plaintiffs, and therefore it did not connect their claim to Ontario as a proper jurisdiction.

Having not found jurisdiction *simpliciter*, although it was unnecessary for it to go any further, the Court also gave reasons as to why Ontario would not have been the appropriate forum for this claim either. In its decision, the Court set out a useful recitation of the factors to be considered in determining the appropriate court to hear a matter. Had the Court found for the plaintiffs on the fundamental jurisdictional question, it could still have declined to hear the matter based on the *forum non conveniens* doctrine, which brings into play various practical considerations that would lead one to prefer one jurisdiction over another. These include: a) where most of the parties are located; b) where witnesses and evidence are located; c) contractual provisions that specify a particular law of the contract; d) the need to avoid multiple proceedings; e) what law applies to the dispute; f) geographical factors suggesting a "natural" forum; g) juridical advantage (meaning whether declining jurisdiction would deprive a plaintiff of a

legitimate advantage obtained through the choice of court); and h) the existence of a default judgment in another jurisdiction.

On this analysis, the plaintiffs were also seen to fail to establish Ontario was *forum conveniens*. The essence of the dispute was that the plaintiffs and defendants had hired the same lawyer, a Chinese lawyer not licensed to practice law in Ontario, and who operated out of Hong Kong as an employee of the Faskens defendants. As all of the witnesses and evidence would be there, and not in Ontario, Ontario was found not to be the appropriate forum for the court to assert its jurisdiction in this case.

Conclusion

While the facts of the matter here made this case a relatively simple one for the court to decide, there were hints in the decision in *BHF* that pointed to the questions of jurisdiction *simpliciter* and *forum conveniens* being increasingly difficult to determine in modern commercial disputes. For example, with the evolution and growth in electronic commerce, the question of whether a "virtual" presence is sufficient presence to establish a "real and substantial connection" will become increasingly less clear. In the decision the court quoted the Supreme Court of Canada's 2012 decision in *Club Resorts Ltd. v. Van Breda* (*2), where the Court appeared to struggle with the question of "when e-trade in the jurisdiction would amount to presence in the jurisdiction" (*3). While "actual presence" is still the governing rule, changes in the nature of business may require the courts to revisit this question in the near future. In the present case, also, the court did note that while determining where the misuse of confidential information occurred here pointed strongly towards Hong Kong, that nevertheless this would not always be so obvious in different circumstances (*4).

All of this is to say that in complex international transactions one cannot assume that a claim can be commenced in one's preferred jurisdiction against foreign defendants and that this will always go unchallenged. Such questions will only become increasingly more complex in a more interconnected world, and sound professional advice on where to commence an action will therefore become all the more important.

Oleg M. Roslak

Endnote
(*1) 2020 ONSC 934 [*BHF*].
(*2) 2012 SCC 17 [*Van Breda*]
(*3) *Van Breda* at para. 87.
(*4) *BHF* at para. 83.

6. Work Refusals in the Time of COVID-19

Employers have a duty, under occupational health and safety legislation, to provide a safe and healthy workplace. They are required to implement measures to ensure that workers are not exposed to harmful workplace conditions. Employees have the right to refuse unsafe or dangerous work. How does this right play out during the current pandemic, as businesses reopen, and workers return to the workplace? Can a worker refuse to work because of a concern that the workplace is unsafe? Or because they have a general fear about taking public transit or coming into contact with someone with COVID-19?

Statutory right to refuse to work - Ontario

Subject to a few exceptions applicable to certain categories of worker, under the Ontario *Occupational Health and Safety Act* ("OHSA") a worker has the right to refuse work that he or she believes is unsafe. The worker must report the refusal to his or her supervisor or employer. The worker may also report the refusal to the worker safety representative or joint health and safety committee (if the workplace has 20 or more workers). The employer/supervisor is required to investigate the refusal, in the presence of the worker safety representative. If the issue is resolved, the worker returns to work. If the worker has reasonable grounds to believe that work is still unsafe, and continues the work refusal, the worker or employer must contact the Ministry of Labour who will investigate the work refusal and if they determine that the workplace is safe, the employee must return to work. If the Ministry determines that the workplace is not safe, they will order that the employer take remedial measures, and once the employer complies, the worker is required to return to work. No employee can be subject to a reprisal or negative treatment for asserting this statutory right.

Statutory right to refuse to work – federally regulated employers

Under the *Canada Labour Code* an employee has the right to refuse dangerous work so long as they have reasonable cause to believe that it presents a danger. The employer is then required to conduct an investigation in the presence of the employee (or person designated to represent the employee). The employer must investigate even if the employee chooses not to be present. Once the investigation is completed the employer must prepare a written report of the results. If the employer agrees that a danger exists, it must take immediate action to address the danger and also inform the workplace safety committee or representative of the situation and the action taken. If the employee does not agree with the employer's decision, the employee can continue to refuse to work and this is reported to the workplace committee or representative, who must immediately investigate the continued refusal. A written report of the results of the investigation and the recommendations, if any, is provided to the employer. If a danger exists the employer is required to take immediate action to resolve it, following which the employee is to return to work. If danger does not exist, the employer notifies the employee who must then return to work. If the employee disagrees with the employer's decision and continues to refuse to work the employer must inform the Minister of Labour who will investigate the continued refusal, unless the Minister determines that the refusal is trivial, frivolous, vexatious or made in bad faith (in which case this will be set out in writing and the employer will not be entitled to refuse to work). If the Minister confirms that danger exists, the Minister shall issue appropriate directions and the employee can continue to refuse to work until the directions are complied with. If no danger exists, the Ministry will provide its decision in writing and the employee is not entitled to refuse to work. No employee can be subject to a reprisal or negative treatment for asserting this statutory right.

Government Guidelines for workplace safety

As businesses reopen, and more employees return to the workplace, employers should undertake an assessment of their workplaces to

ensure that they have implemented sufficient controls and measures to prevent the spread of COVID-19. Both the provincial and federal governments have published guidelines to help employers carry out their duty to provide a safe and healthy workplace.

The Province of Ontario worked closely with four health and safety associations to develop guidelines specific to certain industries and sectors, including a specific guideline geared to the transportation industry: https://www.ontario.ca/page/resources-prevent-covid-19-workplace

Transport Canada collaborated with the Public Health Agency of Canada and Employment and Social Development Canada (ESDC) to develop guidelines specific to the trucking industry, to protect drivers and employees working in commercial vehicle operations: https://www.tc.gc.ca/eng/motorvehiclesafety/federal-safety-guidance-protect-drivers-limit-spread-covid-19-commercial-vehicle-operations.html

While the Ontario and Federal guidelines are just that, guidelines and recommendations and not laws, employers should review these guidelines and implement them where appropriate, as we can anticipate that any investigation into a work refusal under the applicable health and safety legislation will refer to the government guidelines.

Refusing to work due to COVID-19 fears

Many Canadian workers are refusing to return to work because they are concerned about using public transit or because of a fear of being exposed to COVID-19. Generally, these concerns or fears do not excuse an employee's absence from the workplace, and an employee's failure to return to work when required by the employer may amount to a resignation or abandonment of their position.

Employers should be mindful of certain statutory job protected unpaid leaves of absence that employees may request if eligible. In Ontario the Declared Emergency Infectious Disease Emergency Leave under the *Employment Standards Act, 2000* may apply to an employee who is unable to return to work because they need to care for a child due to school or day care closures. This leave may also be available to an employee who is providing care or support to certain family members because of a matter related to COVID-19. The Ministry of Labour's interpretation guide provides that in order to qualify for the leave on this ground, the absence must be required because of the relative's illness and that there be a connection between the illness and COVID-19. A refusal to work because one's parent may be vulnerable will not be sufficient to qualify for this leave.

The *Canada Labour Code* was recently amended to provide an unpaid leave of absence of up to 16 weeks for an employee who is "unable or unavailable to work for reasons related to COVID-19". The employee must provide written notice to the employer of their intention to take this leave, the reason for the leave and the length of the leave.

Employers should also be aware that some work refusals may trigger a duty to accommodate, to the point of undue hardship, under applicable human rights legislation, on the basis of family status, if the reason relates to caring for a family member, or disability, in the case of an employee who may have a medical condition that would put them at risk if they become sick because of COVID-19. The employer and employee must work co-operatively during the accommodation process in order to arrive at the appropriate form of accommodation – the employee's preferred form of accommodation (such as staying home) may not necessarily be what is appropriate or required.

Carole McAfee Wallace

7. Rectification of Contract Available on Implied Terms

The Ontario Court of Appeal has recently provided guidance with respect to its power of "rectification". That is the power to correct a document to accord with the intentions of the parties. In theory, the power of rectification cannot be used to re-write an agreement in order to achieve a party's desired result. Rather, its purpose is to correct a problem in the written document.

As recently as 2016, the Supreme Court of Canada has said:

> Rectification is limited to cases where the agreement between the parties was not correctly recorded in the instrument that became the final expression of their agreement. It does not undo unanticipated effects of that agreement. While, therefore, a court may rectify an instrument which inaccurately records aa party's agreement respecting what was to be done, it may not change the agreement in order to salvage what a party hoped to achieve …."(*1).

In *2484234 Ontario Inc. v. Hanley Park Developments Inc.*, the Appellant had wanted to build an access road for a proposed new subdivision.(*2) The Respondent agreed to transfer, and provide an easement over, certain lands which were necessary for the purpose.

The parties' written agreement in the *Hanley Park* matter said that the Respondent would convey "Parts 1, 2, 3, and 4" noted on a reference plan, together with a temporary easement. Unfortunately, there was a narrow sliver of land, noted as Part 5 on the plan, which was necessary for the proposed road to terminate where it was intended. The Respondent refused to add Part 5 to the transfer. The Appellant sought an order that the contract be corrected, together with an order requiring the Respondent to close the deal as amended.

The Ontario Court of Appeal reviewed the test as laid down by the Supreme Court of Canada for rectification:(*3)

(i) the parties had reached a prior agreement whose terms are definite and ascertainable,
(ii) the agreement was still effective when the instrument was executed,
(iii) the instrument fails to record accurately that prior agreement, and
(iv) if rectified as proposed, the instrument would carry out the agreement.

In the case of a unilateral mistake, the Supreme Court added that the court must also be satisfied that:

(v) the party resisting rectification knew or ought to have known about the mistake, and
(vi) permitting that party to take advantage of the mistake would amount to "fraud or the equivalent of fraud"(*4).

At first instance before a superior court judge, the Respondent had been successful. The applications judge effectively found that the problem was a "unilateral mistake" of the Appellant, as the Respondent had been aware of the Part 5 issue all along. The Appellant failed on grounds (iii) and (v). Her Honour also found that the Appellant was not entitled to the relief sought because it had breached some technical parts of the agreement (such as obtaining certain approvals, restoring municipal services, and missing deadlines). If it did not have "clean hands", then it would not get the benefit of rectification.(*5)

Both the applications judge and the Court of Appeal were content that there was a prior agreement, although the applications judge did not explain what it was. The Court of Appeal aided the Appellant by finding that a "without prejudice" letter outlining the original purpose of the proposed transfer was sufficient. It said that this was justified because "for the purposes of rectification, the antecedent agreement need not

be a binding agreement or contain all of the relevant terms of a complete agreement".(*6) Rather, it need only "express the parties' agreement on specific terms, and do so in a way which is definite, ascertainable and continuing, even if the antecedent agreement is intended to be preliminary to a more formal agreement".(*7)

The Court of Appeal went so far as to criticize the applications judge, who had found that the same letter was not sufficient, finding instead that the Respondent never had a subjective intention to part with Part 5. The Court of Appeal held that the principles of contractual interpretation may never include consideration of a party's subjective intention in determining whether the parties had reached an agreement.(*8). The Court also noted that the law prefers avoiding any interpretation of a commercial contract that would result in a "commercial absurdity"(*9)

In the end, a three-judge panel of the Court of Appeal found that Part 5 was an implied term in the antecedent "without prejudice" letter.(*10). Accordingly, it found that all of the elements of the test for rectification were made out. The Court also held that the applications judge's finding that the Appellant had "unclean hands" was an "unreasonable reading of the terms of the agreement.(*11)

This case is interesting because the only prior agreement in evidence was a "without prejudice" letter that did not explicitly say that Part 5 would be included. Thus, in effect, the rectification was based on an implied term from extrinsic correspondence. The Court was satisfied that such an implied term was sufficiently "definite and ascertainable" for the purposes of the test. One wonders if a different panel of judges would have found that the Appellant was simply trying to re-write the agreement to correct its oversight.

Alan S. Cofman

Endnotes

(*1) *Canada (Attorney General) v. Fairmont Hotels* at para. 3, cited in *2484234 Ontario Inc. v. Hanley Park Developments Inc.*, 2020 ONCA 273 at para. 35.
(*2) *Ibid.*
(*3) See *ibid*.
(*4) *Ibid*.
(*5) The Court relied on the principle that "rectification" is an "equitable" remedy deriving from the historical courts of equity, which were distinct from the king's courts of common law. It is a principle that he who seeks equity must do equity. In other words, a person with "unclean hands" will not get the benefit of an equitable remedy.
(*6) *Hanley Park*, *supra* note 1, at para. 46.
(*7) *Ibid*.
(*8) See *ibid.* at paras. 47-54.
(*9) *Ibid.* at para. 64.
(*10) See *ibid.* at para. 72.
(*11) *Ibid*. at para. 89 *et seq.*

8. Your Business and EBITDA: What is EBITDA?

The Canadian government reacted to the deadly COVID 19 virus by implementing sanctions to restrict physical distancing amongst individuals. These sanctions include restrictions to businesses deemed non-essential by the government, and restrictions on traveling by air or across borders unless such travel is deemed essential. Some businesses have closed down their operations. If businesses that have shut or slowed down operations are fortunate, their landlords will defer rent or their creditors will defer payments on their outstanding debts. A few businesses may prosper, but many businesses will suffer a significant reduction of cash flow from business operations. The overall reduction in a business's cash flow will have a negative impact on the valuation of the business. The valuation of a business is considered by financial institutions that have been engaged to establish credit facilities for businesses or to finance an acquisition. Parties to a merger and acquisition transaction may determine the purchase price of a business based on its valuation. A poor valuation of a business may limit the amount of funds that a financial institution is willing to advance to a business, and it can be used as leverage for a purchaser to negotiate the purchase price of a target business downwards.

There have been many articles written about COVID 19 and the effect that it will have on a business's valuation; in particular, the effect that COVID 19 will have on a business's EBITDA. Many readers may not know nor understand what EBITDA is, but this metric is commonly used to calculate the valuation of a business. This document explains what EBITDA is and how it is adjusted for valuation purposes.

EBITDA means, earnings before interest, taxes, depreciation and amortization. It is a measure of the operating cash flows of a business before changes in the business's net working capital. EBITDA reflects the operating cash flow of a business before financing, income taxes or capital expenditure requirements are considered (*1).

For the purposes of understanding the definition of EBITDA, depreciation means, the systemic assignment of the cost of tangible assets to expense (*2); amortization means, the systemic assignment of the cost of intangible assets to expense (*3); and working capital means, the amount by which a business's current assets exceed current liabilities.

To be clear, there is some degree of subjectivity to calculating the valuation of a business. Therefore, valuations can be treated as estimates of a business's performance.

The valuation of a business is estimated by applying a valuation multiple to normalized EBITDA, but what is normalized EBITDA? (*4)

Normalized EBITDA takes into account the historical or current operating results of a business. Since, valuations may be used to forecast future earnings, it may be necessary to adjust historical or current operating results to exclude the impact of revenues and costs that an arm's length buyer would not be expected to incur on a year to year basis. (*5)

Normalized EBITDA represents the amount of operating cash flow the business is expected to generate year over year. The concept of normalized EBITDA assumes that the business will have (i) a constant or average level of EBITDA generated each year in perpetuity, or (b) there will be a base level of EBITDA that grows at a consistent rate in perpetuity. (*6)

To determine normalized EBITDA, establish the actual EBITDA for a fiscal period. First review the business's income statement. Start with line item - Income before taxes - as it is reported on that income statement ("**Income**"). Income is the pre-tax income of the business. Add interest expenses back to Income. Interest expenses are added back to Income because the enterprise value of a business is independent of how such business is financed. The enterprise value of a business represents the total operating value of a business despite how such business is financed. Therefore, financing costs are set aside to

address the operating value of the business. Depreciation and amortization expenses are added back to Income because they represent non-cash charges, such as depreciation on fixed assets or the amortization of intangible assets. Other non-cash expenses or income that are identified by your accountant in the business's income statement may be added back to or deducted from Income. Adding back interest, depreciation and amortization and other non-cash items back to Income quantifies the actual EBITDA for the business. (*7)

If normalized adjustments are not applied to EBITDA, the valuation of EBITDA may not accurately reflect the business's normal year to year cash flow from operations. For instance, if a company that is not in the business of research and development by chance invents a widget and sells such widget for an amount that increases its Income for such year by 10 times any previous year; when determining EBITDA, the business's accountant or valuator may suggest that such amount be deducted from EBITDA since such a windfall of cash will not likely occur in the future, and its operation cash flow would generally be lower. On the other hand, if a business incurs a substantially large and final legal expense that the business has never endured in any previous fiscal years, its accountant or valuator may suggest that such expense be added back to EBITDA since such expense does not reflect the business's normal operation cash flow, and its operation cash flow would generally be higher. Normalization adjustments to EBITDA include:

1. Adjustment due to compensation and benefits that are disproportionally above or below fair market rates. If compensation and benefit draws are excessively high, EBITDA should be adjusted upwards by the difference to the fair market rate since there would be less cash reflected in the operating cash flow of the business if not for the excessive drawing. If the compensation and benefit draws are excessively low, EBITDA should be adjusted downwards by the difference to the fair market rate since there will be more cash reflected in the operating cash flow of the business. (*8)

2. If the business engages in non-arms-length transactions at non-commercial rates, such as doing business with related parties at rates that are below fair market value, EBITDA should be adjusted upward by the difference between the non-commercial rates and the fair market rates. (*9)

3. Discretionary expenses are costs that a business does not need to incur, such as personal trips that were paid by the business. Discretionary expenses should be added back to EBITDA since they reflect a return on capital as opposed to an economic expense that the business needs to incur. (*10)

4. Unusual and non-recurring items; to the extent that a business incurred expenses or generated income in the past that are unusual or non-recurring, such expenses or income should be added back to or deducted from EBITDA because they are not expected to occur regularly in the future. For instance, due to COVID 19 many businesses are incurring a degree of expenses and sources of income that historically are neither usual nor recurring for the business. Some businesses have been incurring more than usual costs to purchase hygienic products, temporarily investing in remote working locations for their employees, have increased gas consumption due to delivery demands that they may not have offered before, and increased operation expenses due to supply chain disruptions, which expenses may all need to be added back to EBITDA if such expenses will not continue in the business's future. On the other hand, businesses could incur a cash benefit under the government's economic response plan to COVID 19 (*11). Such businesses may be required to reduce EBITDA by the amount of such cash benefits since they will not continue to be a factor of the business's operation cash flow in the future. Keep in mind that in some instances, new unusual expenses or income may become the new normal for some businesses, and in such cases should not be added back to or deducted from EBITDA. For instance, businesses that have not incurred expenses for remote access platforms that are used by its employees may

discover that the business benefits by continuing to provide its employees with the flexibly to work remotely. Therefore, if such business continues to maintain remote access platforms, the business may not add such expenses back to EBITDA since that expense will recur for future fiscal years. (*12)

Income may also be adjusted by the amount of income or expenses derived from redundant assets. Redundant assets are assets that are not required for the ongoing operations of a business, such as vacant land that is owned by the business and rented to a third party. The revenue stream from a redundant asset is unrelated to the operation of the business and should be removed from the business's Income. When a purchaser or vendor of a business is calculating value of the business, in order to determine an accurate valuation for the business, they should not include the cash flow from assets that have no effect on the operation cash flows of the business. (*13)

A valuation multiple is applied to normalized EBITDA to determine the enterprise value of the business (*14). Multiple means, the reciprocal of the capitalization rate (*15). Capitalization rate means, the rate of return, generally expressed as a percentage, that is used to convert a point estimate of cash flow into value (*16). In other words, an EBITDA multiple is the inverse of a rate of return on capital before income taxes and capital expenditure requirements are considered. For example, if the rate of return for a business is 20%, the EBITDA multiple for such business will be 5x. Whereas, the rate of return 20% divided by 100 equals 0.2, which equals 20/100, the inverse of 20/100 is 100/20 which equals the multiple of five. Multiplying the normalized EBITDA by the EBITDA multiple results in the enterprise value of the business. The multiple of a business may also be determined by dividing the enterprise value by normalized EBITDA. Multiples may be adjusted up or down depending on the value of the business to the entity relying on the multiple for a particular transaction. Some businesses utilize multiples that are standard for their particular industries. For each particular transaction that is dependent on a business valuation, an accountant or valuator should be retained to recommend the multiple that a business of a particular industry should apply to its normalized EBITDA.

To summarize, Income plus interest expense, plus depreciation and amortization expenses, plus or minus other non-cash expenses/income equals the business's actual EBITDA, which reflects the operating cash flow of the business; add to or deduct from actual EBITDA – the normalization adjustments, which equates to normalized EBITDA. Establish the business's standard

multiple by determining the inverse of the business's capitalization rate and multiply the normalized EBITDA by such multiple, or such other multiple suggested by the business's accountant or valuator. The result shall be the enterprise value of the business.

There are many other metrics that can be used to determine the value of a business, such as fair market value. The services of an accountant or valuator should be utilized to determine the most effective valuation methods for a business, and if the valuation method chosen is a multiple of normalized EBITDA; to effect the calculations that are necessary to determine the enterprise value of the business.

Wayne O. Lewis

Endnotes

(*1) Howard E. Johnson, *Business Valuation* (Library and Archives Canada Cataloguing in Publication, 2012). Page xxxv.
(*2) *ibid*. at page xxxiv.
(*3) *ibid*. at page xxxi.
(*4) *ibid*. at page 131.
(*5) *ibid*. at page 132.
(*6) *ibid*.
(*7) *ibid*. at page 133.
(*8) *ibid*. at page 134.
(*9) *ibid*.
(*10) See *ibid*.
(*11) *ibid*. at pages 134 – 135.
(*12) *ibid*. at page 135.
(*13) *ibid*. at page 131.
(*14) *ibid*. at page xli.
(*15) *ibid*. at page xxxii.
(*16) "Lexology" The Potential Impact of the COVID-19 Coronavirus on EBITDA and Financial Covenant Calculations in Loan Agreements, accessed April 14, 2020. https://www.lexology.com/library/detail.aspx?g=ce5d6af1-c252-491b-9f30-e9c101b78c9c

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CONTEST

This month we are giving away a complimentary ticket for attendance at our annual seminar day - in 2021 in Toronto Feb. 11 2021 - for the first individual to email us the name of the location depicted in photograph on page 3. Email your answer to info@fhllp.ca with a subject line "Newsletter contest". First response with the correct answer wins.

AND FINALLY,

See if you can figure out what these seven words all have in common before you look at the answer?

1. Banana
2. Dresser
3. Grammar
4. Potato
5. Revive
6. Uneven
7. Assess

Are you peeking or have you already given up?
Give it another try....
Look at each word carefully. You'll kick yourself when you discover the answer. This is so cool.....
No, it is not that they all have at least 2 double letters....

Let me know if you found the answer - I didn't!

Answer is below!

Answer:
In all of the words listed, if you take the first letter, place it at the end of the word, and then spell the word backwards, it will be the same word. Did you figure it out? No? Then send this to more people and stump them as well. Then, you'll feel better too.