FERNANDES HEARN LLP NEWSLETTER NOVEMBER 2020

THE NAVIGATOR

IN THIS ISSUE

The Duty of Care for Pure Economic Loss: Another Lesson to be Learned from the 2008 Maple Leaf Foods Outbreak Employee

It has been twelve years since the widely publicized listeria outbreak at Maple Leaf Foods Inc.'s facility. Twenty-three people died; fifty-seven others became very ill. A tragic event that put Maple Leaf Foods Inc. ("Maple Leaf") in line for the corporate slaughterhouse. The outbreak, and the way that Maple Leaf navigated through it, have been the subject of countless news articles, conferences, and webinars. Many lessons have and can still be learnt from the outbreak, the latest of which is the extent of the duty of care for pure economic loss.

On November 6, 2020, the Supreme Court of Canada released a 5-4 decision in *1688782 Ontario Inc. v Maple Leaf Foods Inc. et al.* (*1), ruling in favour of the defendant Maple Leaf. The decision confirms: 1) that pure economic loss (a loss not associated with or accompanied by personal injury or property damage) may be recoverable in certain circumstances, but there is no general right of claim that may be grounded by a plaintiff for a tort claim protecting a plaintiff against the negligent or intentional infliction of pure economic loss, and 2) the circumstances in which pure economic loss may be recovered remain limited.

The Facts

Maple Leaf was the supplier of ready-to-eat meat menu items served in all Mr. Sub restaurants. Mr. Sub franchisees (the "Franchisees") were required to purchase these products exclusively from Maple Leaf. This relationship was governed through a franchise agreement between Mr. Sub (the "Franchisor") and the Franchisees, and a supply agreement between the Franchisor and Maple Leaf. Although the Franchisees had an exclusivity arrangement through the franchise agreement, they purchased the Maple Leaf products through distributors and had no direct contractual relationship with Maple Leaf.

Following the outbreak, Maple Leaf recalled some of the ready-to-eat meat products used by the Franchisees. As a result, the Franchisees

FIRM AND INDUSTRY NEWS

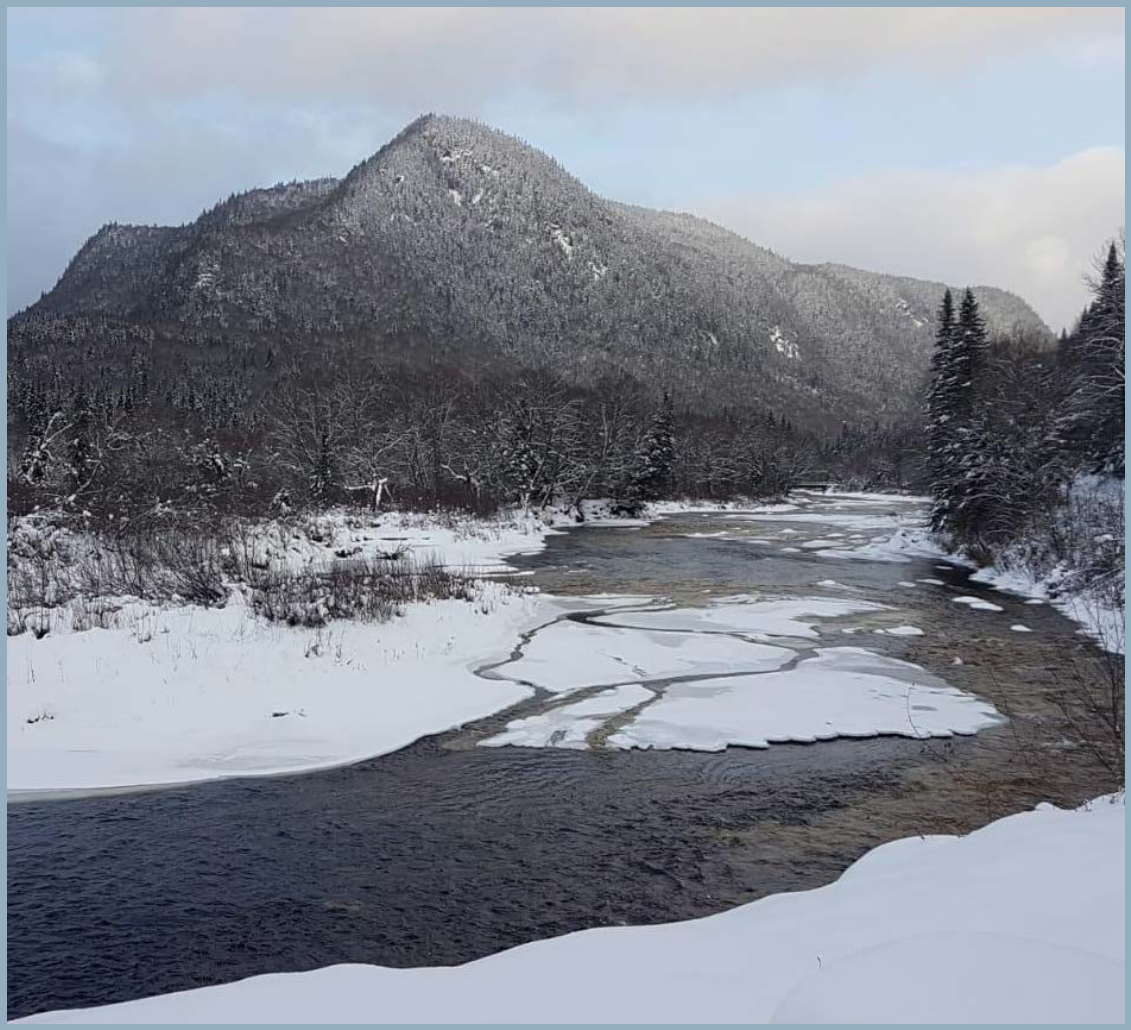
- At the **Canadian Transport Lawyers Association's** annual conference on October 23, 2020, **Carole McAfee Wallace** moderated the Labour and Employment Panel discussion on system human rights discrimination and worker classification issues.

- At the **Canadian Transport Lawyers Association's** AGM held on October 23, 2020, **Carole McAfee Wallace** was appointed Vice President & Secretary

- **Rui Fernandes** will be participating in a webinar for the **Canadian International Freight Forwarders Association** on November 30, 2020 on insurance issues.

- **Canadian Board of Marine Underwriters** fall conference 2020 – December 1, 2020 – Virtual conference.

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



experienced a product shortage, which they alleged caused them economic loss and reputational injury.

The terms of the franchise agreement prohibited the Franchisees from suing the Franchisor for the supply shortage. So instead, the Franchisees sued Maple Leaf in negligence seeking compensation for lost past and future sales, past and future profits, capital value of the franchises, and goodwill. The Franchisees alleged that Maple Leaf, as a manufacturer, owed a duty to the Franchisees to supply a product fit for human consumption, and that Maple Leaf had been negligent in its discharge of that duty. Maple Leaf denied that it owed a duty of care to the Franchisees for pure economic losses, and it brought a motion for summary judgment. Maple Leaf was successful.

The Majority's Decision

Pure economic loss is economic loss that is unconnected to a physical or mental injury to the plaintiff's person, or physical damage to property. (*2) To recover for economic loss, a plaintiff must prove all the elements of the tort of negligence: 1) that the defendant owed the plaintiff a duty of care; 2) that the defendant's conduct breached the standard of care; 3) that the plaintiff sustained damage; and 4) that the damage was caused, in fact and in law, by the defendant's breach.

In order to prove the first element that there is a duty of care, there must be sufficient relevant proximity between the parties, and the injury must be foreseeable.

A proximate relationship can be established in one of two ways: 1) by establishing that the facts fall within, or are analogous to, a previously recognized category of proximity; and 2) if no such category exists, a plaintiff may seek to establish a novel duty of care through what is known in the legal world as the Anns/Cooper test.

In assessing proximity under the Anns/Cooper test, the analysis requires consideration of the expectations, representations, reliance, and the property or other interests involved, as well as any other considerations going to whether it would be just and fair, having regard to the relationship between the parties, to impose a duty of care.

In this case, the Franchisees argued that the circumstances of their claim fell within two previously recognized categories of proximity with respect to economic loss: 1) negligent misrepresentation or performance of a service; and 2) the negligent supply of shoddy goods or structures. In the alternative, they argued, a novel duty of care should be recognized.

The Court confirmed that for cases of negligent misrepresentation or performance of a service, two factors are determinative of whether proximity is established: the defendant's undertaking, and the plaintiff's reliance. The proximate relationship is formed when the defendant undertakes responsibility which invites reasonable and detrimental reliance by the plaintiff upon the defendant for that purpose. It is the intended effect of the defendant's undertaking upon the plaintiff's autonomy that brings the defendant into a relationship of proximity with the plaintiff. Where that effect works to the plaintiff's detriment, it is a wrong to the plaintiff entitling it to its pre-reliance circumstance. The Court accepted that Maple Leaf had undertaken to provide ready-to-eat meats fit for human consumption. However, the Court held that the undertaking was made to end consumers for the purpose of assuring them that their interests were being kept in mind, and not to commercial intermediaries such as the Franchisees. The business interests of the Franchisees lay outside of the scope and purpose of the undertaking. The majority also found that the Franchisees had not relied on the undertaking in any event.

As for the Franchisees' argument that their claim fell within the category of negligent supply of shoddy goods or structures, the Court

disagreed. The duty of care under this category is based on the presence of danger and the need to avert it. The point of this category is that the law views the plaintiff as having sustained actual injury to its right in person or property because of the necessity of taking measures to put itself or its other property outside the ambit of perceived danger. The recovery is for the cost of averting the real danger. Where the goods can be easily disposed of, the only possible recovery for pure economic loss is for the costs of disposal. The majority also held that this category of duty did not arise in this case because any physical danger posed by the products was only to the end consumer, rather than the intermediary Franchisees.

Concluding that the Franchisees' claims did not fit into an existing analogous category, the Court undertook a full proximity analysis of the relationship between the Franchisees and Maple Leaf under the Anns/Cooper test.

The Court focused on the chain of contracts between the Franchisees, the Franchisor, and Maple Leaf. Where the parties are linked by way of contracts with a middle party that, taken together, reflect a multipartite allocation of risk, courts must be cautious about allowing parties to circumvent that allocation by way of tort claims for negligence.

When conducting the proximity analysis under the Anns/Cooper test, the Court considered the fact that the Franchisees could have protected their interests under a direct contract with Maple Leaf, but did not do so. The Franchisees were not consumers, but commercial actors whose choices to enter into the franchise agreement with the Franchisor who had the supply arrangement with Maple Leaf substantially informed the expectations of the relationship. The Court qualified this, however, in stating that contractual silence on a matter will not automatically foreclose the imposition of a duty of care. Contractual silence on certain matters is inevitable, since it is impractical for even the most sophisticated parties to bargain about every foreseeable risk. The point was rather that in the case of defective goods and structures, commercial parties between or among whom the product is transferred before it reaches the consumer will have had a chance to allocate risk and order their relationship via contract. In assessing the proximity of relationship among those parties, ie. in evaluating their expectations, representations, reliance, and the property or other interests involved, courts must be careful not to disrupt the allocations of risk reflected, even if only implicitly, in relevant contractual arrangements.

Further and in any event, the Court noted that the Franchisees did have the contractual means to avoid the risk of interrupted supply by seeking out alternative sources of supply, which could be done upon obtaining the permission of the Franchisor.

Conclusion

The Supreme Court of Canada found in favour of Maple Leaf, holding that the Franchisees were not in a relationship of proximity, and so under the circumstances, Maple Leaf did not owe them a duty of care for their pure economic loss.

Andrea Fernandes

Endnotes

(*1) 2020 SCC 35

(*2) *Martel Building Ltd. v Canada*, 2000 SCC 60.

2. Ontario's Bill 218: The *Supporting Ontario's Recovery Act, 2020*

In an attempt to stem a potential flood of lawsuits arising from businesses continuing to operate in the Province of Ontario during the coronavirus pandemic, the provincial legislature has recently introduced its Bill 218 (*1), which, in part, proposes new legislation titled the *Supporting Ontario's Recovery Act, 2020*. As infection rates climb and the risk of exposure to COVID-19 increases, the possibility that individuals and incorporated businesses might be held liable for negligence by exposing a contact or customer to an infection grow with them, whether such infection was inadvertent or not. The purpose of the new Act is to protect those engaged in lawful business from the further risk of claims made by persons with whom they have to deal, particularly if the result is very serious illness or even death.

Key features of the Supporting Ontario's Recovery Act, 2020

The proposed *Supporting Ontario's Recovery Act, 2020* would put in place fairly broad protections against claims made by infected individuals who are alleging their infection resulted from the negligence of another individual or company. Its fundamental features are as follows:

1. No legal action can be pursued against a "person" (including a company) as "a direct or indirect result of an individual being or potentially being infected with or exposed to coronavirus (COVID-19)";
2. The Act would apply to all such exposure events *retroactively* to March 17, 2020;
3. The protection from liability will apply to a person against whom the claim is made if that person was acting, or making a "good faith effort" to act, in accordance both with: a) applicable public health guidelines related to COVID-19; and b) applicable federal, provincial, or municipal law related to COVID-19; and
4. The protection applies if the acts that may have caused infection did "not constitute gross negligence."

The proposed Act also would provide, if the conditions of good faith compliance with laws and guidelines were met, that no compensation would be payable to any person making a claim based on an exposure to infection. Additionally, an individual or business could rely on their good faith efforts as a defence even where there is some conflict or inconsistency between the various laws or public health guidelines related to COVID-19 which they attempted to follow.

Also, on the second reading in the Legislature, Bill 218 was revised to expand the protection to persons "vicariously liable" for exposure to infection. In other words, the new Act would protect employers from lawsuits that arose from the allegation of an infection caused or potentially caused by one of its employees (*2). An important exception, however, is that the protections in the proposed Act would *not* apply to any person or company which continued to operate in business at a time when ordered to be closed (*3).

It is encouraging to see that Ontario appears prepared to institute very broad protections from claims against businesses that may have resulted from the pandemic. This Act, if it comes into force, will at least relieve businesses from the additional burden of having to deal with COVID-19 related negligence claims on top of the crushing weight of economic dislocation already caused by government COVID-19 restrictions. Not only does it put an end to all future proceedings, but it has the effect of dismissing all existing actions commenced since March 17, 2020.

The proposed legislation has a welcome breadth in that the exclusion of liability applies in the

case of "good faith efforts." The proposed Act defines "good faith effort" as "honest effort, whether or not that effort was reasonable." While the meaning of good faith in this context is likely to be debated in legal proceedings, the scale has certainly been tipped in favour of the respondent by not requiring proof that one's efforts were "reasonable." This legislation would thus be more generous protection than found in current British Columbia regulations, which require businesses to have a "reasonable belief" that they were following public health guidelines in order to exclude liability.

Limitations

Despite the welcome broad protections, the proposed legislation nevertheless limits these protections in important ways that should be noted. As already mentioned, those who operate in contravention of ordered business closures, or that make no effort to adhere to public health guidelines, would not have the benefit of the Act's safeguards. A further important limitation is in the employment context. Generally speaking, the proposed Act deals with contacts between businesses and individuals and their customers and other members of the public. It is *not* applicable to cases where an employee contracted COVID-19 as a result of conditions in the workplace or the acts of his or her employer (*4). Employer obligations in respect of ensuring worker safety in relation to COVID-19 exposure are both onerous and complex, and one should seek appropriate legal advice if concerned about what an employer can and cannot do with respect to its workforce in Ontario during the public health crisis.

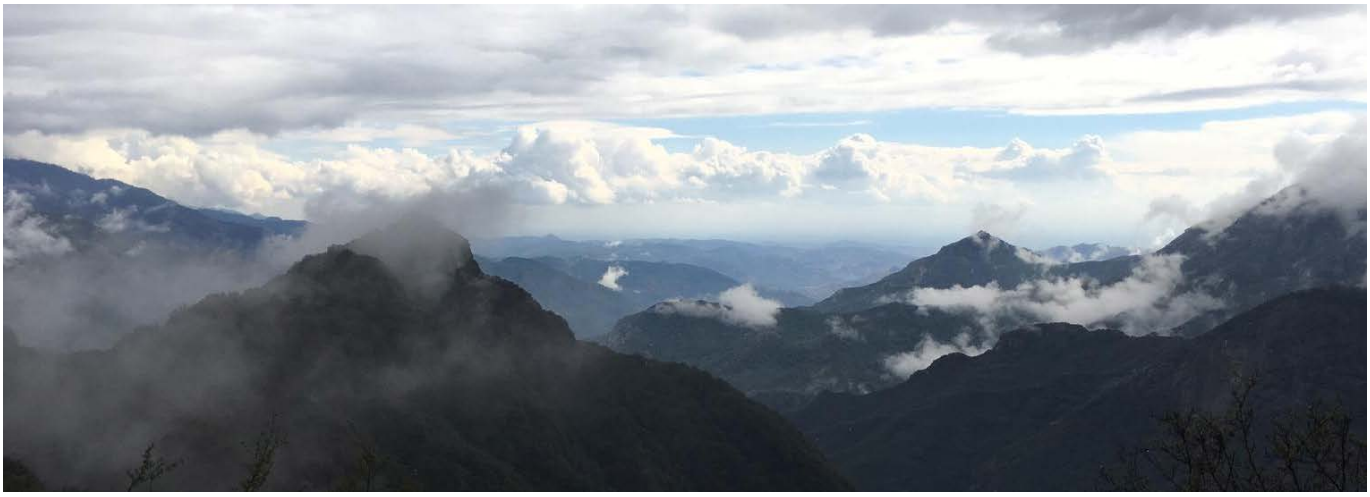
Conclusion

Assuming that the *Supporting Ontario's Recovery Act, 2020* comes into force, then, Ontario businesses will see at least some welcome relief from legal claims, reducing the already substantial burden they face from the other restrictions imposed in response to the coronavirus pandemic. The rather generous relief from liability should assist businesses, and their insurers, in coping with already difficult circumstances in the struggle to remain viable.

Oleg M. Roslak

Endnotes

(*1) Bill 218, *An Act to enact the Supporting Ontario's Recovery Act, 2020 respecting certain proceedings relating to the coronavirus (COVID-19), to amend the Municipal Elections Act, 1996 and to revoke a regulation*, 1st Sess., 42nd Leg., Ontario, 2020 (2nd Reading, October 27, 2020) [Bill 218].
(*2) Bill 218, cl. 2(8).
(*3) Bill 218, cl. 3.
(*4) Bill 218, cl. 4(2).



3. Electronic Logging Devices Update

Transport Canada issued the following news release on October 26, 2020:

The Government of Canada is committed to improving road safety in Canada by taking measures to reduce commercial driver fatigue, which is why it has mandated the use of electronic logging devices.

Today, the Minister of Transport, the Honourable Marc Garneau announced that FPInnovations has been accredited as the first third-party organization to certify electronic logging devices. This is a critical step that ensures an electronic logging device is safe, reliable, and approved for use in Canada.

Electronic logging devices are tamper-resistant devices that are integrated into commercial vehicle engines. They are intended to ensure that commercial drivers stay within their daily driving limit and accurately log their working hours.

In 2019, Transport Canada announced that all federally regulated commercial trucks and buses operating in Canada would need to be equipped with a certified electronic logging device to better track drivers' hours of driving, work, and rest.

Transport Canada, in partnership with the Standards Council of Canada, worked diligently to develop a plan to allow for third-party testing and certification. Only certified electronic logging devices will meet federal requirements.

Prior to mandating the use of electronic logging devices, the department worked closely with industry to determine an effective implementation timeline. Transport Canada is committed to meeting the coming-into-force timelines for electronic logging devices, which remains June 12, 2021.

Canada's electronic logging device requirement is the result of longstanding collaboration among all levels of government and industry partners. It also addresses a Saskatchewan Coroners Service recommendation following the tragic collision involving the Humboldt Broncos junior hockey team.

Best practices have shown that third-party certification for electronic logging devices will ensure a consistent, reliable, and accurate certification process. FPInnovations has a specialized expertise in this area. By having the highest quality certification process possible, Transport Canada will ensure that devices are tested and certified to be in full compliance with the regulations.

4. New ICC Arbitration Rules for 2021

On January 1, 2021 the International Chamber of Commerce will apply its new Arbitration Rules to all cases registered after this date. The new Rules are designed to make international arbitration more efficient, flexible and transparent. The revision cannot be described as radical. Rather it is an evolution in the time of Covid-19.

Some of the significant changes of the new Rules are as follows.

1. Consolidation

The new Rules allow for consolidation of disputes arising from mirroring arbitration agreements between different parties. Under the previous Rules consolidation of cases with different parties was only possible if the claims were made under the same arbitration agreement.

2. Joinder of Cases

The new Rule (an addition to Article 7) makes it easier for third parties to enter arbitral proceedings after the confirmation or appointment of an arbitrator. The prior rule did not allow this unless all parties otherwise agreed. The concern was that the additional party joining at this later stage would be deprived of the opportunity to take part in the formation of the Tribunal and therefore their involvement in the process would not be entirely consensual. The new Rule allows the tribunal to admit a Request for Joinder, without the consent of all other parties, if the third-party agrees to the constitution of the Tribunal and the Terms of Reference.

3. Third Party Funding Disclosure

There is now an express obligation of all parties to disclose the existence and identity of any non-party which has entered into an arrangement for the funding of claims or defences and under which it has an economic interest in the outcome of the arbitration. The new Rule is in line with the IBA Guidelines on Conflicts of Interest in International Arbitration, which consider third-party funders as parties with a "direct economic interest in the award," and thus require disclosure of third-party funding arrangements in the context of arbitrators' impartiality and independence. Indirect funders such as those who provide insurance for dispute resolution may not be caught by the new Rule.

4. Conflicts of Interest

The new Rule provides that if a party appoints a new representative, after an arbitrator was named, and the two are in a conflict of interest situation, the 2021 Arbitral Rules give the Tribunal the express power to take any measure necessary to avoid the conflict of interest, including the exclusion of the new party representatives.

The new Rule is designed to solve the question of what is more important: ensuring the right of the party to choose its own representative or the need to preserve the appointed Tribunal. Because the arbitrator, in this hypothesis, is appointed before the representative, it was decided that the representative would be the person to leave, instead of the arbitrator.

5. Virtual Meetings

The new Rules now provide for the Tribunal to organize hearings via videoconference, telephone or other means of distance communication. Article 26 now provides that:

> The arbitral tribunal may decide, after consulting the parties, and on the basis of the relevant facts and circumstances of the case, that any hearing will be conducted by physical attendance or remotely by videoconference, telephone or other appropriate means of communication.

6. ICC Appointment of the Entire Tribunal

Article 12(9) now allows the ICC to appoint the entire Tribunal, regardless of parties' choices, in exceptional circumstances, in order to avoid "a significant risk of unequal treatment and unfairness that may affect the validity of the award".

The new Rule may give rise to litigation in the future on the meaning of "unfair and unequal treatment."

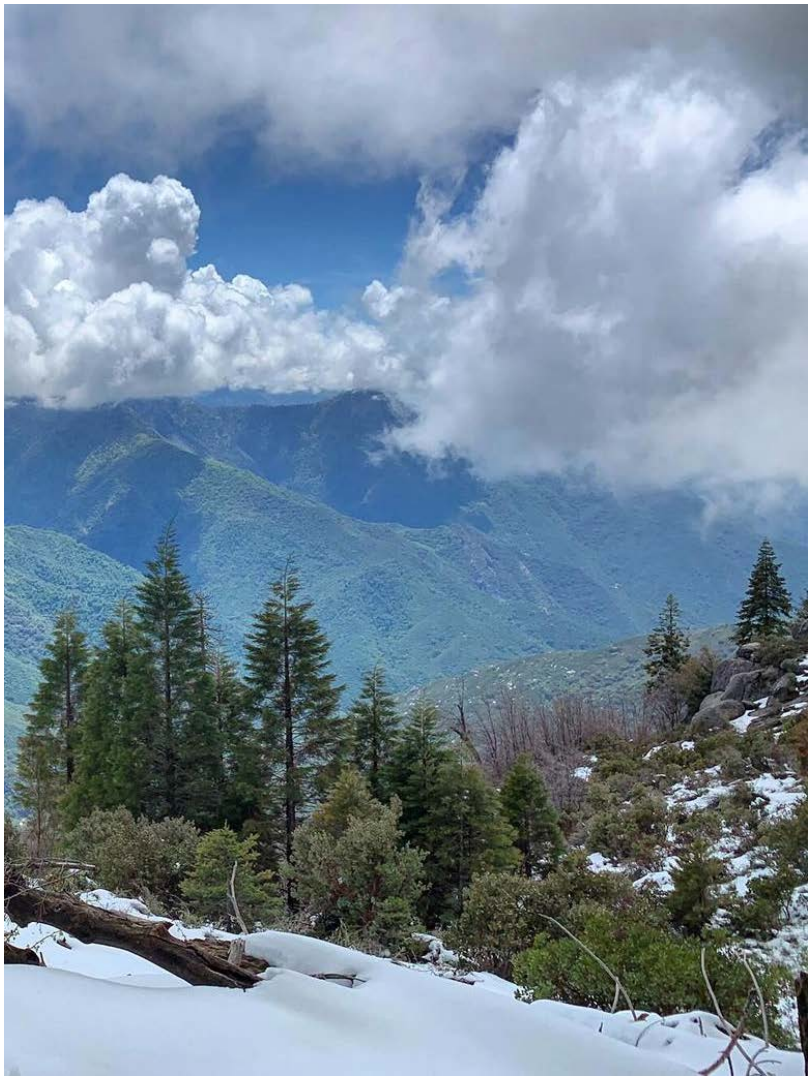
7. Expansion of Expedited Procedure

The new Rules provide that all disputes with a value of USD $3 million (currently $2 million) or less will be dealt with under the expedited procedure, unless the parties have opted out of it in their agreement or the ICC Court decides otherwise (Article 30 and Appendix VI). It also provides for the appointment of a sole arbitrator, even where the arbitration agreement specifies three.

Conclusion

The ICC revisions demonstrate the organization's focus on flexibility and transparency. ICC arbitration is increasingly favoured by states and state-owned enterprises. ICC arbitration is most suited for large scale arbitrations and the need for the observance of fairness, flexibility and transparency in proceedings is of increasing importance. The new Rules are a step in this direction.

Rui Fernandes



5. Navigation Safety Regulations, 2020

Transport Canada issued the following news release on October 28, 2020:

The Government of Canada has reached another milestone in its commitment to keep improving the safety of Canada's transportation sector by modernizing legislation and regulations.

The Minister of Transport, the Honourable Marc Garneau, today announced that the Government of Canada has published the new Marine Navigation Safety Regulations, 2020, which now apply to commercial vessels of all sizes, including fishing vessels, workboats, water taxis and ferries.

The new regulations, which reflect extensive consultation with Canadians and the marine industry, represent a consolidation of nine existing sets of marine safety regulations into a single one that:

- *provides clearer and more up to date language on required navigational safety equipment;*
- *requires vessel owners to have equipment to help reduce the risk of collisions that could cause pollution, like oil spills, and threaten endangered marine life, such as whales;*
- *requires lifesaving equipment that will send emergency signals and provide the vessel's location.*
- *applies to over 23,000 commercial vessels of all sizes; and*
- *better aligns with international marine safety standards such as the International Convention for the Safety of Life at Sea.*

The Marine Navigation Safety Regulations, 2020, also include enhanced requirements to address important safety issues highlighted by serious marine occurrences, such as the fatal capsizing of the Leviathan II in 2017, after which the Chief Coroner, the Transportation Safety Board of Canada, and the Auditor General all made key safety recommendations. These include requirements for commercial vessels to have equipment on board to help improve search and rescue efforts as well as for collision avoidance.

While some of the requirements take effect immediately, others will take effect over the coming years: Automatic Identification Systems requirements will take effect in April 2021; Electronic Chart Display Information Systems in October 2021; and Bridge Navigational Watch Alarm Systems in January 2022.

6. Official Marks in Canadian Trademark Law

In *Quality Program Services Inc. v. Ontario (Minister of Energy)* 2020 FCA 53, the Federal Court of Appeal held that an official mark does not confer any special protections against claims of infringement, nor against any other claims available under the *Trademarks Act*.

Official marks are a unique feature of Canadian trademark law. They include any "badge, crest, emblem, or mark" ("OM") that has been adopted and used by a public authority in Canada and for which public notice of its adoption and use has been given by the Registrar of Trademarks. An official mark prohibits others from adopting or registering a trademark that is identical or so nearly resembling as to be mistaken for ("similar to") an official mark, irrespective of its associated products or services.

Only a public authority, such as any government organization or agency or any quasi-governmental organization at the federal, provincial, or municipal level will be able to obtain the publication of an OM that it has adopted and used as an official mark. An example of an official mark owned by a government organization is coat of arms of Canada.

In *Quality Program Services Inc. v. Ontario (Minister of Energy)* the Federal Court of Canada and Federal Court of Appeal held that the *Trademarks Act* does not preclude any claim of infringement when an official mark infringes a registered trademark. The *Act* simply allows holders of official marks to seek recourse against parties that infringe on official marks. "A public authority that chooses to use a mark that is confusing to a registered trademark does so at its peril."

Quality Program Services Inc. ("QPS") was filed a trademark application in April 2013 for the use of "Empower Me" in connection with energy awareness, conservation and efficiency services. In November 2013 the Ontario Ministry of Energy announced that it was launching a website with the name "emPOWERme", which it described as intended to help energy consumers in Ontario take charge of the power they use by better understanding the province's electricity system.

Ontario subsequently sought official mark status for "emPOWERme", by writing to the Registrar on December 19, 2016, requesting that the Registrar give public notice of adoption and use by the Ministry of Energy of "emPOWERme" as an official mark pursuant to s 9(1)(n) of the *Act*. The Registrar gave such public notice on January 10, 2018.

QPS brought an action against Ontario claiming damages and other relief for trade-mark infringement, passing off and depreciation of goodwill under the *Trade-marks Act.* At the trial(*1), Justice Southcott found in favour of QPS and awarded damages of $10,000.00. Justice Southcott commented on whether the Registrar should have declined to give public notice given that the mark could be confusing with QPS's mark, stating:

> I accept that the jurisprudence is clear that the fact a public authority's mark may be confusing with another party's mark is not a basis for the Registrar to decline to give public notice and thereby confer official mark status upon the authority's

mark, nor does such confusion present a basis to challenge the Registrar's decision to give public notice. However, I agree with the position of QPS that this principle is conceptually distinct from the question whether a public authority's adoption and use of an official mark which is confusing with a prior registered trade-mark may nonetheless constitute infringement under s 19 or 20 of the *Act* or support a claim for passing off or depreciation of goodwill under the *Act*.

The Federal Court of Appeal affirmed the decision. The application for leave to appeal to the Supreme Court of Canada was dismissed on October 8, 2020 (*2).

Rui Fernandes
Endnotes
(*1) 2018 FC 971
(*2) 2020 CanLII 74020

7. Changes to Pleasure Craft and Operator Licensing

Transport Canada (TC) Office of Boating Safety (OBS) wants to hear from stakeholders, especially those with a particular interest in pleasure craft, on the changes under consideration to the Pleasure Craft Licensing Program and the Pleasure Craft Operator Competency Program.

Who can participate?

TC is inviting members of the boating community to provide feedback on the proposed changes to the Pleasure Craft Licensing and the Pleasure Craft Operator Competency Programs on the Let's Talk Transportation consultation webpage. The forum will remain open until January 15, 2021.

Stakeholder input and comments submitted through the Let's Talk Transportation webpage will be considered in the development of the regulatory amendments.

Pleasure craft licensing considerations for pleasure craft owners

TC OBS is considering changes to the Pleasure Craft Licensing Program to increase safety, environmental protection and improve service delivery through the following regulatory amendments to the Small Vessel Regulations (SVR):

- bringing grandfathered pleasure craft licenses (with no expiry date) into a five-year validity regime
- reducing the ten-year validity period for licenses (PCLs) to five years ensuring that ownership information is updated more often
- expanding the application of the SVR to include:
    - all pleasure craft equipped with motors of 10 horsepower (7.5 kilowatts) or more, including personal watercraft, which are principally maintained or operated in Canada; and
    - all pleasure craft (including all power-driven and sail-alone vessels) above 6 metres in length, with the exception of human-powered vessels (e.g. kayak, canoe).
- reducing the timeframe for vessel owners to report a name or address change from 90 days to 30 days, and specifying 30 days for the buyer to notify a sale or transfer of a vessel ensuring that updated information is available in the same boating season
- providing TC the authority to cancel a PCL if the licence holder does not comply with regulatory requirements.
- introducing a service fee of $15 for pleasure craft licenses thereby reducing the cost borne by taxpayers for providing this service.

Pleasure Craft Operator Competency Program considerations for course providers

TC OBS is considering changes to the Pleasure Craft Operator Competency Program through amendments to the Competency Operator Pleasure Craft Regulations (COPCRs) to ensure that course providers continue to provide excellent boating safety training to recreational Canadian boaters. The proposed changes include:

- strengthening course accreditation requirements
- setting course accreditation to a five year renewal period
- providing TC the authority to suspend or revoke course accreditation if a course provider does not comply with regulatory requirements
- providing TC the authority to cancel a Pleasure Craft Operator Card if it is deemed to have been obtained under fraudulent circumstances
- repealing the provision for the Rental Boat Safety Checklist as being accepted as proof of competency
- introducing a $5,000 accreditation fee to course providers every five years and a test materials access fee of $8.50 for each Plea

8. Signed Release – Not a Bar to an Unjust Dismissal Complaint

Employers in federally regulated industries (such as inter-provincial or cross border trucking) must comply with the *Canada Labour Code* ("CLC"). These employers can only terminate the employment of a non-managerial (non-unionized) employee, who has at least 12 months of service, if there is just cause or if there is a *bona fid*e shortage of work or elimination of the position. An employee who believes that they have been unjustly dismissed can bring an unjust dismissal complaint under the CLC, provided they do so within 90 days of termination. These complaints are now heard by the Canada Industrial Relations Board (they used to be referred to an adjudicator) with broad powers to order compensation and reinstatement to the successful employee. An employee does not require a lawyer to launch an unjust dismissal complaint and does not face any cost consequences if unsuccessful.

Many employers faced with a termination will offer to pay the employee additional notice or severance in excess of what is required by statute, in exchange for a full and final release, confident that if the employee signs the release the matter is at an end. The recent Federal Court of Appeal decision in *Bank of Montreal v. Li* (*1) reminds federally regulated employers that this may not be the case.

Ms. Li's employment as a financial planner with the Bank of Montreal ("BMO") was terminated after 6 years due to her inability to meet performance requirements. She was offered a lump sum payment equal to 18 weeks of her wages (more than what was required under the CLC) if she agreed to release BMO from "any and all claims arising out of the termination of her employment". Ms. Li agreed, signed the release, received the lump sum payment and then commenced an unjust dismissal complaint. BMO requested a preliminary hearing as it objected to the adjudicator's jurisdiction to hear the complaint, given the signed release agreement.

The adjudicator relied on a 1997 decision of the Federal Court of Appeal in *National Bank of Canada v. Canada (Minister of Labour)* (*2) which held that a settlement and signed release agreement is not a bar to an unjust dismissal complaint. This is because s. 168(1) of the CLC prohibits employees from contracting out of their statutory right to bring an unjust dismissal complaint.

BMO sought judicial review of the adjudicator's jurisdiction, lost and appealed that decision to the Federal Court of Appeal. On the appeal, BMO argued that the *National Bank* decision should no longer be followed for policy reasons. It argued that the decision was a disincentive for employers to settle termination disputes with employees. In particular, employers would not be inclined to offer the employee anything over and above the statutory minimums during the 90 days following dismissal (the period in which an unjust dismissal complaint can be filed), which is a time during which the dismissed employee is most vulnerable.

The Federal Court of Appeal acknowledged BMO's policy argument and agreed that settlement agreements are to be encouraged; however, the court returned to s. 168(1) of the CLC and the clear statutory prohibition against contracting out of statutory rights and found that any change to the law based on policy choices must be left to Parliament. The Federal Court of Appeal also acknowledged that if an arbitrator finds that an employee has been unjustly dismissed, they must take the settlement agreement into account when considering the appropriate remedy.

Federally regulated employers face statutory hurdles when it comes to the termination of an employee. The CLC limits the circumstances in which certain employees can be terminated without cause, and this recent Federal Court of Appeal decision confirms that even if the employee agrees to settle the terms of termination, this may not be the end of the matter, at least not until the 90 day period for filing an unjust dismissal complaint has elapsed.

Carole McAfee Wallace

Endnotes
(*1) 2020 FCA 22 (CanLII)
(*2) 1997 FC 5297 (CanLII), aff'd 1998 FCA 8077 (CanLII)

9. Alberta Court Rules that Virtual Discoveries in the Age of COVID-19 Not a Deprivation of a Fundamental Right

Virtual questioning as a safe and reliable practice

An Alberta court recently confirmed in *Mostafa Altalibi Professional Corporation et al. v. Lorne S. Kamelchuk Professional Corporation et al.* (*1) that conducting examinations for discovery by videoconference is a stable and reliable practice, and one less subject to the ebbs and flows of the coronavirus pandemic as daily case numbers fluctuate throughout the country.

The underlying dispute in *Mostafa* pertained to two orthodontists and the financial consequences arising from the separation of their practices. The plaintiff in *Mostafa* brought an application for an order directing that discoveries in the action proceed by way of videoconference. The defendant opposed the application. The defendant's counsel argued that his client had a fundamental right to in-person questioning and attempted to minimize the actual risks involved with COVID-19 and in-person discoveries.

Master Farrington of the Alberta Court of Queen's Bench made the observations that COVID-19 case numbers were once more on the rise, and that restrictions on social interaction appeared to correlate with decreases in case numbers. In recognition of this, Master Farrington opined that the Court had conducted many matters by way of videoconference, and that he understood the role of this approach to be "*grounded in a respect for society, and a desire to not promote the spread of the coronavirus more than necessary, but also in recognition of the importance of the legal system for everyone that needs to have their matters considered by the Court. The Court system must function on an ongoing basis and provide a reliable means for the resolution of disputes"* (*2).

Commenting further on the backlog that would result should the Court postpone discoveries indefinitely until such a time where in-person discoveries could be safely conducted, Master Farrington went on to distinguish between discoveries and a trip to the grocery store: unlike the latter, in-person discoveries often involve confining parties and their counsel to relatively small spaces for hours on end and often on multiple consecutive days. The end result of discoveries was also to be considered: what is generated from a discovery is a transcript, irrespective of the manner in which the discovery proceeds. Those who would eventually read the transcript would not see the demeanor of the witness. The Court disagreed with the defendant's submission that the deprivation of the right to conduct in-person discoveries amounted to a deprivation of the defendant's fundamental rights and ordered that discoveries in the action proceed remotely as requested by the plaintiff. Master Farrington did, however, concede that there may be certain cases in which remote questioning would be inappropriate.

"*It's 2020*"

The issues raised in *Mostafa* have also been considered by Ontario courts. In *Arconti v. Smith* (*3), some of the parties to the litigation objected to having an examination of a witness proceed virtually rather than in person. The concerns that they raised about videoconferencing included that they needed to be with their lawyers to assist with documents and facts during the examination; that the lack of physical presence in a neutral setting deprives the occasion of solemnity and a "morally persuasive environment", and that they did not trust the litigants adverse in interest to not engage in "sleight of hand" to abuse the process.

Justice Myers for the Ontario Superior Court recognized that a witness sitting in their favourite chair at home on video may not feel the same pressures as those sitting directly across from an adversarial lawyer in a more formal setting such as in an examiner's chambers. Nevertheless, Justice Myers stated that the simplest answer to the issues raised by the parties objecting remote questioning was, "It's 2020*."* He observed that evidence is no longer recorded using quill and ink, and that "we apparently do not even teach

children to use cursive writing in all schools anymore. We now have the technological ability to communicate remotely effectively. Using it is more efficient and far less costly than personal attendance. We should not be going back." (*4). Justice Myers ultimately ordered that the examinations in that action proceed by videoconference.

Takeaways

During the first wave, the pandemic more or less grounded the wheels of justice to a halt across Canada with court closures, backlogs, and suspensions of litigation deadlines and limitation periods. However, it now appears that the global health crisis is helping to steer the justice system and legal profession towards a more modern, technologically savvy cultural reboot. Litigants and lawyers may face some delay to allow for those involved in proceedings to become acquainted with unfamiliar surroundings and to obtain the training, education and practice necessary to become technologically competent.

While there are undoubtedly many obstacles ahead for the profession, as stated by Justice Myers, it is unlikely that "anything will be lost that is not more than offset by the proportionality of proceeding efficiently and affordably" with the help of technology (*5).

Janice C. Pereira

Endnotes
(*1) 2020 ABQB 673 ["*Mostafa*"].
(*2) *Ibid* at para 9.
(*3) 2020 ONSC 2782 ["*Arconti*"].
(*4) *Ibid* at para 19.
(*5) *Ibid* at para 44.

10. When the Chips are Down, Can You Ignore a Contract?

Can a sawmill that has promised the supply of wood chips to a buyer be excused from that obligation on account of the mill being destroyed by fire? As indicated in the recently published decision by the British Columbia Supreme Court in *Interfor v. Mackenzie Sawmill Ltd.* (“*Interfor*”) (*1), as in all contractual disputes, it all depends on the wording.

The *Interfor* case illustrates the uncertainty and related grief that may result from a contractual “force majeure” clause lacking a clearly defined trigger event or factual context. A “force majeure” clause is a common feature in commercial contracts, inserted to protect one or both of the parties in the event that a part of the contract cannot be performed due to specified events and/or general circumstances being outside the control of the parties which cannot be avoided by the exercise of reasonable care.

Background

In 2006 Mackenzie Sawmill Ltd. ("MSL") entered into a “Chip Supply Agreement” (the "CSA") with Interfor Corporation ("Interfor") to supply it wood chips from MSL’s sawmill in Surrey, British Columbia (the "Mackenzie Mill"). Interfor in turn was contractually committed to supply wood chips purchased from MSL to Catalyst Paper Corporation ("Catalyst") for use in its pulp mill. The recitals to the CSA referred to Interfor's obligation to sell chips produced at the Mackenzie Mill to Catalyst, stating that:

> Interfor has requested and MSL has agreed to enter into this Agreement to sell and supply Chips produced at the Mill to Interfor, on the basis herein provided, so that Interfor may sell and supply such Chips to Catalyst under the Catalyst Agreement.

A series of fires occurred between 2010 and 2014 at the Mackenzie Mill causing it to stop production as a result of which MSL stopped providing wood chips to Interfor. Following the first two fires in 2010 and 2011, MSL delivered a notice on February 11, 2011 to Interfor stating the following:

> As per … the Chip Supply Agreement between MSL and Interfor … please accept this letter as notification that MSL will be curtailing their supply of wood chips to Interfor for a yet to be determined period of time. This curtailment is due to MSL experiencing downtime due to a small fire at the mill on November 12, 2010 followed by a second fire at the mill on January 25, 2011 in which we suffered severe damage. As time and future events dictate, MacKenzie will continue to provide updates as to the time status of our chip supply curtailment.

Notwithstanding the above advice, MSL did not notify Interfor of the decision to demolish the Mackenzie Mill following the last of the series of fires in 2014 or that other parties were building a new mill at the same address.

The Force Majeure clause

The CSA contained a “force majeure” clause, which stated:

> If, at any time while this Agreement is in force, MSL shuts down or curtails the operation of the Mill due to fire, strike or other labour disruptions, lockout, sabotage, shipwreck, riot, war, flood, extraordinary breakdown, laws or regulations, Court order, act of any government body or agency, act of God, blockade, civil commotion or disobedience (lawful or unlawful) or as a result of Interfor reducing or discontinuing its purchases of Chips under this Agreement, or for any reason whether similar or dissimilar to the foregoing and which MSL considers sufficient to justify curtailing or shutting down its operations, then MSL, without liability, may discontinue or curtail the production and delivery of Chips to Interfor.

As mentioned above, MSL did not rebuild the Mackenzie Mill. It was rebuilt by another company associated with MSL's owner. When the new sawmill began operations, its owners began selling wood chips produced from the new mill's operations to third parties, at higher prices than those provided under the CSA.

The Dispute

When Interfor learned of the foregoing, it objected and commenced a lawsuit, maintaining that the CSA continued in force following the fires, that MSL had breached its CSA obligations and that the new mill's owners were "alter egos" of MSL, accordingly being bound by the terms of the CSA.

The defendants in turn sought a court order that on account of the fires that MSL was discharged from its obligations under the CSA on the basis of the force majeure clause or alternatively that the Agreement had had come to end by virtue of the legal doctrine of "frustration of contract". Interfor disagreed.

The Court identified two issues:

> 1. Were MSL's obligations under the CSA permanently discharged pursuant to the force majeure clause?
>
> 2. Was the CSA "frustrated" by the fires that ruined the Mackenzie Mill, bringing MSL's obligations under the contract to an end?

Were MSL's obligations under the CSA permanently discharged pursuant to the force majeure clause?

The Court ruled that they were not. The Court analyzed the CSA wording and the context in getting to this result.

The court identified the following key principles of contract interpretation as laid down by case law authority at the outset of its analysis. In finding meaning and how to apply a contract term:

a) The contract must be read as a whole;

b) The contract must be read in the light of the surrounding circumstances, known to the parties at the time of contracting;

c) What must be determined is what the parties intended by the words they used. Contextual evidence must not be permitted to overwhelm the wording of the agreement;

d) However, words in isolation do not have an immutable or absolute meaning. They often take their meaning from the context;

e) It is important to consider the purpose of the agreement and the nature of the relationship established by the agreement; and

f) What is required is a practical, common-sense approach not dominated by technical rules of construction.

The Court noted that by its wording the clear purpose of the CSA was for the provision of wood chips to Interfor for an indefinite duration, for it to in turn fulfill its supply obligation to Catalyst. The Court took into consideration the defendants' argument that the force majeure clause contemplated either a *temporary* or a *permanent* termination of its obligation to deliver chips under the CSA, depending on the circumstances. The Court also had to consider on the other hand Interfor's argument that the force majeure clause only contemplated a *suspension* of MSL's obligation to deliver chips.

As noted above, force majeure clause provided:

> If, at any time while this Agreement is in force, MSL shuts down or curtails the operation of the Mill due to fire, strike or other labour disruptions, lockout, sabotage, shipwreck, riot, war, flood, extraordinary breakdown, laws or regulations, Court order, act of any government body or agency, act of God, blockade, civil commotion or disobedience (lawful or

> unlawful) or as a result of Interfor reducing or discontinuing its purchases of Chips under this Agreement, or for any reason whether similar or dissimilar to the foregoing and which MSL considers sufficient to justify curtailing or shutting down its operations, then MSL, without liability, may discontinue or curtail the production and delivery of Chips to Interfor.

The Court concluded that MSL's obligations under the CSA were not permanently discharged under the force majeure clause. The judge reasoned that while MSL was not obliged to operate the Mill and generate chips, that, if it did, until such time that the CSA was terminated in accordance with its express provisions on point, it had to sell the chips to Interfor. In reaching this conclusion the judge made the following key findings based on the wording of the CSA:

a) The CSA was an agreement of indefinite duration to secure for Interfor a supply of chips generated by the Mackenzie Mill's operations, so that Interfor may fulfill its own obligation to supply chips to Catalyst;

b) The force majeure clause was concerned with the operations of the Mackenzie Mill, not MSL's business as a whole. As such, the defendants' protest that the fires affected the MSL *business* did
not speak to or address the factual question as to whether the Mill itself could be rebuilt with operations recommencing at a future point;

c) The force majeure clause contemplated temporary suspensions of operations and the delivery of chips by MSL to Interfor; and

d) The CSA language distinguished between the *suspension* of the obligation to supply or purchase chips as expressed in the force majeure wording, compared with specific rights of contract *termination* as found elsewhere in the Agreement.

The defendants submitted that the CSA did not impose on MSL an obligation to rebuild the Mackenzie Mill and to start producing chips again following the fires. While the court agreed with this argument it took the view that the real question was whether the contractual obligation persisted where there was or could be a *new* "Mackenzie Mill" to which the CSA would apply. However, the question of whether a *new* mill at the same address as that of the former Mackenzie Mill would be one to which the CSA applies was not referred to the court – nor was the question as to whether there was a termination of the CSA in accordance with its relevant provisions on point.

Accordingly, the force majeure clause lacked a decisive trigger event that had been established on the facts of the case. The Court refused to give the relief asked for by the defendants, that its obligations under the CSA were permanently discharged pursuant to the force majeure clause. The Court's concern was that the defendants' argument presupposed that some fires triggering the operation of the force majeure clause would be so serious as to give rise to permanent consequences and a termination of the contract, while the effects of other fires might be merely temporary. The defence position invariably led to a quandary of contractual imprecision: how can there be an effective force majeure clause "trigger" where one might distinguish a fire in a broom closet that shut down operations for a month from the fires that ruined the Mackenzie Mill in this case? The Court found that there was nothing in the force majeure clause wording to support the proposition that the legal effect of the clause is different in the case of more and less serious fires, with no guidance being provided from the CSA wording as a whole as to where the line would be drawn.

The Court reasoned that the difference between the parties' positions only mattered if the Mackenzie Mill could be rebuilt (or a new mill that would constitute the "Mill" under the CSA can be built in its place). On any view of the matter, MSL would only be obliged to deliver chips it has produced from the Mackenzie Mill. If the Mill cannot be rebuilt, MSL's obligation to perform under the CSA would be permanently

suspended, and there would be no practical difference between a permanent suspension and a termination of the contractual obligation. In the case where the Mill could be rebuilt it would be difficult to see how the suspension of the obligation under the force majeure clause would provide a right to MSL to terminate the contract.

Accordingly, taking a practical and common sense approach, the Court ruled that the force majeure clause only provided only for the suspension, and not for the termination, of MSL's contractual obligations under the CSA. In the circumstances the defendants could not rely on the force majeure clause to release MSL from its contractual obligations.

Was the CSA frustrated by the fires that ruined the Mackenzie Mill, bringing MSL's obligations under the contract to an end?

The defendants also argued that if the force majeure clause was not applicable to excuse MSL from performance in light of the fires destroying the Mackenzie Mill, that the doctrine of "frustration of contract" applied to excuse it from contract performance. They argued that the Mackenzie Mill was the foundation or very "root" of the contractual obligation undertaken by MSL in this case. They argued that MSL's CSA obligations were frustrated – that is, that the contract effectively ceased having any purpose calling for performance - when the Mill was destroyed. They compared this case to the fact pattern than existed in the old case of *Taylor v. Caldwell* (*2) in which a contract to rent a music hall for four concerts was found by a court to have been "frustrated" when the hall was destroyed by fire. In that decision the court held that:

> . . . in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.

For its part, Interfor argued that the modern legal test of frustration was not to be taken from the *Taylor v. Caldwell* decision but from a more modern line of judicial reasoning found in the case of *Naylor Group Inc. v. Ellis-Don Construction Ltd.* (*3) Accepting that an inquiry into the purpose of the contract is relevant, Interfor accordingly asserted that the correct legal question is whether the fires fundamentally changed the nature of the obligation imposed on MLS under the CSA. Interfor argued in this regard that MSL's obligation to supply chips had merely been suspended and had not been terminated, and could be revived.

In the *Ellis-Don* decision, the Supreme Court of Canada held that frustration results when a situation has arisen for which the parties have made no provision in the contract and performance has become "a thing radically different form that which was undertaken by the contract".

In effect, in order to find that the contract at issue has been frustrated the following criteria would have to be satisfied. The event in question must have occurred after the formation of the contract and cannot be self-induced. The contract must, as a result, be totally different from what the parties had intended. This difference must take into account the distinction between complete fruitlessness and mere inconvenience. The disruption must be permanent, not temporary or transient. The change must totally affect the nature, meaning, purpose, effect and consequences of the contract so far as concerns either or both parties. Finally, the act or event that brought about such radical change must not have been foreseeable.

The Court ruled that the contractual obligations under the CSA were not frustrated by the fires that ruined the Mackenzie Mill, and that the fires did not bring MSL's contractual obligations to an end. The destruction of the Mackenzie Mill by fire did not totally affect the nature, meaning, purpose, effect, and consequences of the CSA for the parties. The contract was to secure for Interfor a supply of chips generated by the

Mackenzie Mill's operations, to the extent that chips were generated. MSL's obligations were suspended, but not terminated, while the Mackenzie Mill was shut down. There remained the possibility that the Mill might be rebuilt.

The possibility of fires damaging the Mackenzie Mill was foreseeable in this case, and was expressly contemplated in the force majeure clause. The possibility that fires might not only damage the Mill but completely ruin or destroy it was obviously foreseeable. What happened in this case is not a different kind of event from that expressly contemplated by the force majeure clause.

MSL was not obliged to rebuild the Mill, but if it did, the revival of the obligation to supply to Interfor chips from the restored operation would not work hardship on MSL. Far from imposing on MSL an obligation that was radically different from that undertaken under the CSA, the revived obligation would be the same as before. The circumstance of having rebuilt the Mill would not render the obligation to supply chips to Interfor fundamentally more onerous.

Accordingly, the Court found that the CSA was not frustrated by the fires that ruined the Mackenzie Mill.

Conclusion

The Court accordingly ruled that the fires did not bring MSL's obligations under the contract to an end on the basis that:

a) MSL's obligations under the CSA were not permanently discharged under the force majeure clause by the fires that ruined the Mackenzie Mill, and

b) The CSA was not frustrated by the fires that ruined the Mackenzie Mill.

Gordon Hearn

Endnotes

(*1) 2020 BCSC 1572

(*2) (1863), 122 E.R. 309 (Eng. Q.B.)

11. A Matter of Interest

Contractual interest provisions in the transportation industry can often be critical, because often the amount of interest claimed by a company (according to the rate indicated on its invoice or some other document) far exceeds the amount of the actual debt owing by the defendant. Many companies issue invoices containing terms that look something like this:

Payment terms Net 30 Days From Date of Invoice.
Past Due Accounts will be Charged Interest at 2% per Month.

Yet, despite this apparently clear language, one must be aware that in the event of non-payment of invoices by a customer, it might not be possible, in a lawsuit against the customer for breach of contract, to actually *recover* interest at 2% per month.

This is due to (1) basic principles of contract law; and also (2) operation of Canada's federal *Interest Act*, R.S.C., 1985, c. I-15, as discussed below.

Contract Law Principles

One contract law principle states that parties must agree on all of the terms of a contract for that contract to be binding. Another related principle is that if one party wants to hold another party to a certain term (for example, in the event of non-payment of an invoice, then interest will be charged at the rate of 2% per month), then both parties need to agree on that term before the contract is agreed to and performed.

This means that if the parties do not actually agree on interest at 2% per month *before* the work is done and the invoice is sent out, it could be difficult to convince a judge to award that amount at trial.

Some might argue that they send out multiple invoices to a customer over many months, and that those invoices all have the same language concerning interest at the bottom of the invoice. They might argue that the customer received hundreds of such invoices and never complained or challenged the language, so the customer should be held to it. This argument, that a *course of conduct* between the parties can result in acceptance of a given term, is often advanced by a party seeking to enforce that term. That argument can succeed; however, it does not guarantee success.

Moreover, the wording of the "fine print" is also critically important, even for seemingly straightforward terms like entitlement to interest. Consider the impact of the above example if one changes "Past Due Accounts <u>will</u> be Charged Interest…" to "Past Due Accounts <u>may</u> be Charged Interest". The change of "will" to "may" results in a totally different meaning. In fact, in one case, the court disallowed interest entirely because the word "may" had been used, but in fact the evidence was that the company had not in fact overtly charged any such interest on the customer's overdue account.

Courts generally consider all of the circumstances of a case when deciding whether to award interest at the rate shown on an invoice. This will involve considering the facts of the case and the nature of the business relationship between the parties. However, even where there is an established relationship, it might not be appropriate to infer the existence of an agreement between the parties to the application of any particular interest rate.

Remember the Interest Act!

Yes, there is such a thing. The federal *Interest Act*, R.S.C., 1985, c. I-15, provides at section 4:

> 4 Except as to mortgages on real property or hypothecs on immovables, whenever any interest is, by the terms of any written or printed contract, whether under seal or not, made payable at a rate or percentage

> per day, week, month, or at any rate or percentage for any period less than a year, no interest exceeding the rate or percentage of five per cent per annum shall be chargeable, payable or recoverable on any part of the principal money unless the contract contains an express statement of the yearly rate or percentage of interest to which the other rate or percentage is equivalent.

What this section means is that if someone wants to charge interest, they must set out a yearly interest rate in addition to the monthly interest rate. So, it's not enough for an invoice to simply provide that interest is payable at 2% per month; the invoice also must say that interest is also payable at the rate of 24% per year. The fact that such a calculation is simple for the customer to make is irrelevant.

Importantly, the *Interest Act* also provides that, if the yearly interest rate is not provided, then interest will only be payable at 5% per year. This is, of course, much lower than 24%!

Hence, it would be far better for the example above to contain the following additional language:

Payment terms Net 30 Days From Date of Invoice. Past Due Accounts will be Charged Interest at 2% per Month or 24% per annum.

The Bottom Line

The bottom line? Companies must not assume that they will be entitled to interest at a certain rate, even if it is indicated on the invoice(s). In order to maximize the chance of recovering that amount, consider taking the following steps:

1. Be clear at the beginning of the relationship (before any loads are moved) that interest (at whatever rate) will be charged on overdue accounts. A signed acknowledgement from the customer would be ideal. Failing that, an e-mail acknowledgement would also help. At the least, consider putting boilerplate language to this effect in employee e-mail signatures.

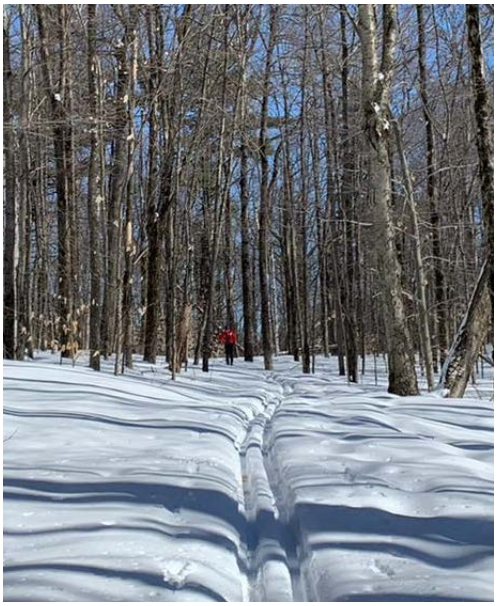
2. Ensure that the interest provision states that interest "will" be charged (and not "may" be charged).

3. Also ensure that any interest provisions on any invoices or elsewhere also stipulate the yearly interest payable (and not just the monthly or weekly percentage, etc.)

4. In the event of non-payment of an invoice, actually charge the customer. Present an invoice or statement of account reflecting the amount of interest that is due. This does not mean one needs to actually collect in the event that the customer pays the invoice late; however, it will certainly help if later it must be shown to a judge that a plaintiff company should be entitled to the interest.

Taking these steps will go a long way to ensuring that interest is actually recovered at the end of a lawsuit.

James Manson



DISCLAIMER & TERMS

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CONTEST

This month we are giving away a complimentary ticket for attendance at our annual seminar/ webinar day - in Toronto Feb. 11 2021 - for the first individual to email us the name locations depicted in the photographs on page 10, 15 and 22. Email your answer to info@fhllp.ca with a subject line "Newsletter contest". First response with the correct answer wins.