THE NAVIGATOR

IN THIS ISSUE

Bonus and Incentive Payments May be Payable to a Dismissed

Employers have been bombarded with new employment laws this year. From amendments to employment standards legislation which address the impact of COVID-19 on the workplace, to the Ontario Court of Appeal's decision this past summer, reported in our July newsletter (*1) which called into question the enforceability of termination provisions in employment contracts. Earlier this month another important employment decision was released by the Supreme Court of Canada in the case of *Matthews v. Ocean Nutrition Canada Limited* (*2). This case sets out the test for an employee's entitlement to the payment of a bonus or incentive when employment has been terminated.

The plaintiff in this Nova Scotia case, David Matthews, started working for the defendant, Ocean Nutrition Canada Limited ("Ocean") as a chemist in 1997. As part of his terms of employment he was entitled to participate in a long-term incentive plan ("LTIP") which rewarded an employee for his or her previous contributions to Ocean and provided an incentive to the employee to continue contributing to the company's success. One of the terms of the LTIP was that if there was a "Realization Event", such as the sale of the company, this triggered a payment to the employee.

In 2007 Ocean appointed a new Chief Operating Officer and Mr. Matthews' experience at work changed dramatically. The trial evidence established that the new COO marginalized Mr. Matthews, limited his responsibilities, reduced the number of people reporting to him, and lied to him about his status and prospects. Mr. Matthews was left in a prolonged state of anxiety as a result of this treatment. Notwithstanding this, Mr. Matthews stayed on at Ocean because of the LTIP and the possible sale of the company. However, by June 2011, after 14 years of service, Mr. Matthews took a position at a new company and left Ocean.

Thirteen months after Mr. Matthews' departure, Ocean was sold for $540 million and the sale constituted a Realization Event under the LTIP. Ocean took the position that, because Mr. Matthews was not

FIRM AND INDUSTRY NEWS

- **Rui Fernandes** will be doing a presentation on November 5th, 2020 on "Passenger Transportation Issues During the Covid-19 Crisis," to the Passenger & Commercial Vessel Association Annual meeting and AGM.

- The **Transportation and Logistics Council** will be holding its virtual webinar "Contracting for Transportation and Logistics Services" on November 10, 12, 17th and 19th, 2020**.** **Registration Information**.

- **Gordon Hearn** will be presenting a paper on "*Contracting Considerations with Cross Border* Trade" at the **Transportation Law Virtual Institute** on November 12, 2020.

- **Gordon Hearn** will be participating in a **Stafford Webinar** presentation on "*Negotiating with Transportation Intermediaries in the U.S. and Canada by Land, Sea or Air"* on November 12, 2020.

- The **Canadian Defence Lawyers** will be holding a webinar on "Insurance Fraud in the Time of Covid-19 on November 13th, 2020. **Information on the Webinar**.

- **Fernandes Hearn LLP** continues its COVID-19 era series of complimentary client and industry webinar meetings with its presentation on November 20, 2020 at 10 am. Topics: Trucking Claims 101 / Worker Misclassification – Employees, Independent Contractors and Dependent Contractors. **Register** **here.**

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

actively employed on the sale date (a requirement under the LTIP), he was not entitled to the incentive payment. Mr. Matthews filed an application with the court claiming that he had been constructively dismissed by Ocean, that the dismissal was done in bad faith, and that he was entitled to the LTIP payment.

The trial court reviewed the law on constructive dismissal, which occurs when an employee's decision to leave their employment is based on one of two scenarios: the employer has substantially breached or altered an express or implied term of the employment contract; or, the employer's treatment of the employer made continued employment intolerable - where the employer's actions, over time, showed that it no longer intended to be bound by the employment contract. The court held that Mr. Matthews had been constructively dismissed, that he was entitled to 15 months' notice and that because the LTIP did not unambiguously limit or remove his right to common law damages, he was entitled to the incentive payment worth $1,086,893.36.

Ocean appealed, and the Nova Scotia Court of Appeal upheld the finding that Mr. Matthews had been constructively dismissed, was entitled to 15 months' notice, but found that he was not entitled to the LTIP payment. The Court of Appeal held that the trial judge failed to answer the proper question, which was whether Mr. Matthews qualified for the LTIP pursuant to the terms of the agreement, which provided, in their view, unambiguous language that required him to be employed at the time of the Realization Event.

Mr. Matthews appealed to the Supreme Court of Canada ("SCC") and the trial judgement was restored. The SCC clarified that, when assessing damages arising from an employer's breach to provide reasonable notice (either because of a termination or because the employer prompted the employee to leave), and whether that should include the payment of a bonus, a court should first consider the employee's common law rights and examine whether, but for the termination, would the employee be entitled to the bonus as part of their compensation during the reasonable notice period. If the answer is yes, the court should then consider whether the terms of the employment contract or bonus plan *unambiguously* take away or limit the employee's common law rights. In other words, the focus must be on what damages were appropriate and due to Mr. Matthews because of Ocean's failure to provide him with reasonable notice. For the purpose of calculating wrongful dismissal damages, the employment contract is not treated as terminated until after the reasonable notice period expires. It was uncontested that the Realization Event occurred during the reasonable notice period and therefore, but for Mr. Matthews' dismissal, he would have received the LTIP payment. In examining the second question, the SCC held that the LTIP did not unambiguously limit or remove Mr. Matthews' common law right to the bonus. Language in the bonus or incentive plan requiring an employee to be "full-time" or "active", similar to that in the LTIP in this case, is not sufficient to remove an employee's common law right to damages. This is because, had Mr. Matthews been given proper notice, he would have been "full-time" or "actively employed" throughout the reasonable notice period.

The SCC has provided clear direction on how to approach the assessment of damages during the reasonable notice period, including an employee's right to a bonus or incentive payment. This decision also reminds employers of the importance to ensure that all employment contracts and related incentive or bonus plan documents are clearly drafted and are in compliance with the most current state of the law.

Carole McAfee Wallace

Endnotes
(*1) *Waksdale v. Swegon North America Inc.* 2020 ONCA 391 (CanLII)
(*2) 2020 SCC 26 (CanLII)

2. New Year, New Harassment and Violence Prevention Regulations for Federally Regulated Workplaces

Earlier this summer, the federal government published Work Place Harassment and Violence Regulations (the "Regulations")(*1) under the *Canada Labour Code* (*2), which Regulations set out requirements for federally-regulated employers to meet in order to satisfy certain obligations under the *Code*.

These obligations include the employer's duty to address workplace violence and harassment, including sexual violence and sexual harassment, by conducting ongoing risk assessments of the workplace; creating prevention policies; training and supporting employees; implementing a resolution process in response to complaints of workplace harassment and violence; implementing corrective measures; and, recording incidents of harassment and violence. Some of the primary requirements under the Regulations are as follows:

Risk assessment: Employers, along with the "applicable partner" (i.e., the health and safety representative, the policy committee or the workplace committee) will be required to conduct risk assessments in the workplace, which include the identification of risk factors for harassment and violence both internal and external to the workplace. Within six months of identifying such risk factors, employers, jointly with the applicable partner, must develop preventative measures that mitigate the risk of harassment and violence in the workplace, and additionally develop an implementation plan for such measures. Such risk assessments must be updated and reviewed at least every three years.

Harassment and violence prevention policy: Employers, along with the applicable partner, are required to develop a workplace harassment and violence prevention policy that contains a number of elements including but not limited to: the employer's mission statement regarding protection against, and prevention of, workplace harassment and violence; a description of risk factors that contribute to harassment and violence in the workplace; a summary of training that will be provided to employees; and a description of any recourse available to those involved in any occurrences of workplace harassment or violence.

Resolution process: Employers are required to designate a person or work unit as the "designated recipient" to whom notice of an occurrence of workplace harassment or violence may be provided. The employer or designated recipient is required to respond within seven days of receipt of a notice of occurrence, and to regularly communicate with all involved parties. Parties may attempt to reach a resolution of the complaint by way of a negotiated conciliation if all parties agree to do so.

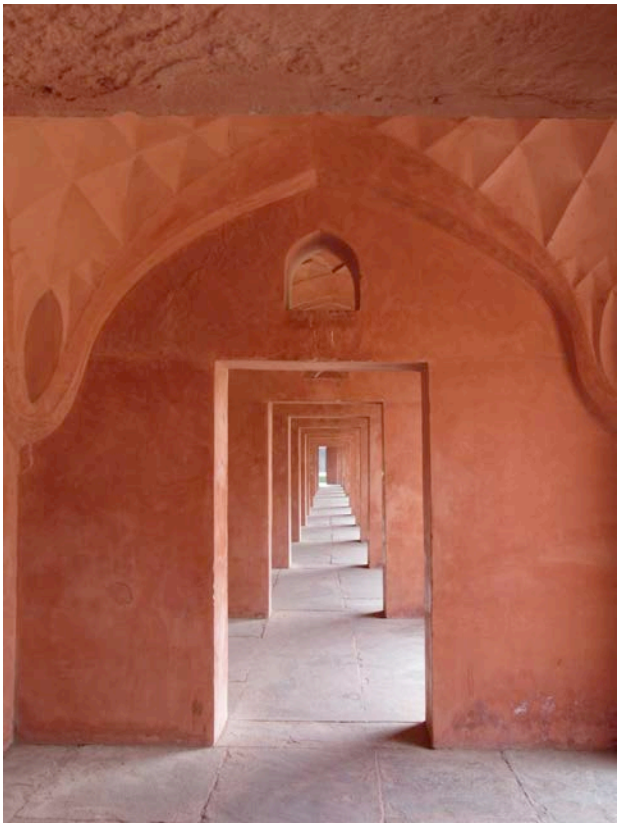
If the occurrence has not been resolved following such a conciliation, an investigation into the occurrence must be conducted in accordance with the Regulations. The Investigator must have a number of qualifications, including being trained in investigative techniques, and have knowledge, training and experience relevant to workplace harassment and violence. The investigator shall then produce a report setting out a general description of the occurrence, the conclusions of the investigation, and their recommendations to eliminate or minimize the risk of a similar occurrence in the workplace moving forward. The employer and applicable partner are required to then jointly determine which of the recommendations to implement in the workplace. The entire resolution process must be completed within one year after the day on which notice of the occurrence is provided.

Training: Employers and the applicable partner are required to jointly develop and implement training on the prevention of workplace violence and harassment. Employers, employees, and the designated recipient must receive such training within one year of the Regulations coming into force. Employees who are hired after the Regulations come into force must receive such training within three months of their start date. Employers together with the applicable partner must jointly review, and, if necessary, update the training at least once every three years and following any change to an element of the training.

The requirements under the Regulations, which come into force on January 1, 2021, are extensive and will likely require a complete overhaul of current workplace harassment and violence policies to ensure compliance and avoid sanctions. Federally-regulated employers would be wise to seek legal advice and guidance in determining how to best implement the requirements under the new Regulations, including the drafting of updated harassment and violence prevention policies.

Janice C. Pereira

Endnotes
(*1) SOR/2020-130 [the “Regulations”].
(*2) R.S.C., 1985, c. L-2 [the “*Code*”].



3. Bus Company Liable for Bicycle Damage

When a bicycle falls off a bus and is damaged beyond repair when the bus rolls over it, is there anyone to whom liability should attach? This is the question answered in *Heddon v. Halifax Regional Municipality* 2020 NSSM 20. The following is a summary of the decision.

On March 27, 2019 Mr. Heddon caught the Halifax Regional Municipality ("HRM") bus operating on Route 330 at the Albemarle stop. This bus travelled to Sheldrake Lake-Tantallon, and at some point travelled along Highway 103. Mr. Heddon secured his bicycle to the rack located at the front of the bus. The rack operates as follows. It has room for two bicycles. Mr. Heddon used the rack closest to the front of the bus. The rear wheel, located on the driver's side, fits into a slot. The front wheel, located at the passenger side, is secured with a lever that clamps down on the top of the front wheel close to the stem of the handle-bar. Mr. Heddon had performed this operation many times in the past, and on Route 330. He gave the bicycle a firm shake to ensure it was secure. It was. He then boarded the bus, which then departed.

A short time later the bus was travelling on Highway 103. There was a spot just before Exit 5 where the road surface had two bumps. These bumps have been there for some time—they were not new. The bus was travelling in the left lane at highway speed. After going over the two bumps the bus driver noticed that the rear wheel of the bicycle was leaning over. He began to move the bus over to the right-hand lane, intending to stop in order to re-secure the bicycle. However, before he could accomplish that plan the bicycle continued to lean over and then fell off the bus. The bus then ran over the bicycle. The bus came to a stop off the right lane with its four-ways flashing. Mr. Heddon got out, took some pictures of his bicycle and returned with it to the bus. The damage was severe enough to make the bicycle a write off.

The bus continued on to the Tantallon park and ride stop. There it was met by a supervisor, who inspected the damage and the bike rack. A few days later Mr. Kehoe, an experienced bus mechanic working for HRM, inspected the bike rack. His duties included inspection and maintenance of the bike racks on all HRM buses. His inspection report noted the following: "Found rubber bump stop was gone and a bolt with nuts installed in its place. This was causing bike rack to not stow properly. Removed nuts and installed rubber bump."

At the hearing Mr. Kehoe testified that these missing parts had nothing to do with the tension exerted by the rack on a stowed bicycle. However, he acknowledged in cross-examination that he did not know what the proper tension should be, and that he had no tool or equipment to measure whatever tension was being exerted.

There was nothing on the bus in question suggesting that use of the rack was at the owner's risk. Nor was there any such notice on the test rack that customers could use to learn how to use the racks on HRM buses.

In finding HRM responsible in contract and in negligence, the adjudicator noted:

> [HRM] owed a duty of care in negligence and in its contract of carriage to provide equipment that was reasonably fit for the purpose intended, which purpose included holding a properly secured bicycle securely while rolling over bumps at highway speed. Here bike racks were offered for use. Mr Heddon used the rack, securing the bicycle in the manner advised by the defendant. He secured it firmly. Mr Kehoe's testimony established that the racks were inspected and maintained by the defendant's mechanical staff. His report establishes that someone—who could only have been someone working for the defendant—substituted a bolt and nuts for the rubber stop that the manufacturer had made part of the rack. Moreover, this stopgap caused the rack "to not stow properly." Added to that is the fact that Mr Heddon was familiar with the use of the bike racks on HRM buses, had used them many times before, including on Route 330, and had never had any trouble before. The only conclusion I can come to based on such facts is that the stop-gap substitution of the bolt and nuts for the rubber stop rendered the bike rack susceptible to what happened—that is, a bicycle that would otherwise be secure coming loose when experiencing a bumpy ride.

Rui M. Fernandes

4. COVID 19: Sealing the Fate of Civil Juries?

The COVID 19 pandemic has been responsible for many things and one of the unexpected "silver linings" has been that the Canadian judicial system has been forced to embrace 21st Century technology. Within just a few months and without the (dubious) benefit of lengthy pilot projects, parties can file many more documents online and a variety of court proceedings (such as pretrials and Trial Scheduling Court sessions) are being conducted successfully using Zoom or similar technology. Mediations and discoveries are also now regularly conducted virtually. Each of these are more cost and time efficient for the benefit of parties and there should be a significant benefit regarding access to justice.

The Canadian judicial system, however, is struggling with some aspects. Trials are delayed, given the number of months that the courts were unable to conduct the proceedings. Certainly, criminal prosecutions are the main focus as the courts reopen since "unreasonable" delay may cause a dismissal of charges per *R. v. Jordan* (*1). Family law matters involving children are also, understandably, a priority.

The courts are also struggling with the effective use of juries in this age of COVID 19, with the challenges of safe jury selection and location for the trials, which must include physical distancing for the jurors, plexiglass barriers, handwash stations in the courthouse, enhanced cleaning and regular health screenings. The first jury trials conducted since the courts reopened have been criminal cases because the accused's liberty is at stake and there is right to a jury trial for some offences. The road has not been smooth, however.

On September 21, 2020, British Columbia announced an exceptional measure in response to the pandemic and in furtherance of access to justice. From September 28, 2020 to October 4, 2021, all civil jury trials in British Columbia will be conducted by judge alone, regardless of the parties' choice in the matter. Criminal jury trials resumed on September 8. 2020. Similar measures have been taken in Alberta and Saskatchewan.

Recently, Ontario's Attorney General, the Honourable Doug Downey, advised the legal profession that Ontario is considering elimination of juries in most civil matters.

In the US, some jurisdictions have held civil jury trials by Zoom and which have been met with mixed reviews, including concerns relating to jury members' attention and distraction when not in a court room.

The Choice of a Civil Jury Trial

While the choice of a trial by jury is a right in some criminal matters, there is no constitutional right to a jury for civil matters. In fact, a number of jurisdictions do not have a jury option for civil matters. Civil juries, some argue, do not decide the guilt of an accused which decision may affect that person's very liberty but rather civil juries are dealing with monetary disputes, which a judge could handle. However, those monetary disputes can be quite significant, and juries are trusted to ferret out the truth, impacting the amount awarded. For that reason, the appointment of juries is often strategically declined or attacked.

The appointment of a civil jury to a legal action as trier of fact is a tool in the arsenal of counsel. Both plaintiffs and defendants serve a Jury Notice when they estimate that a jury will be the best trier of fact for their case. This is a deliberate strategy and, in Ontario, is used frequently in personal injury matters, especially by the defence. Canadian civil juries are perceived to be more conservative and less generous with awards, unlike their US counterparts. (*3)

In Ontario, many civil matters claiming more than $200,000 in damages may choose to proceed by jury. (*2) Given the perceived COVID 19 delays of actions getting to trial and the

resulting backlog, also fueled by a long standing concern that the cost of jury trials coupled with the lack of public support regarding the burden of jury duty and lack of funding for jury compensation, has made the issue of the continued use of civil juries hotter than ever.

Applications or motions to a court to "strike" a jury notice have always been available but are not easily attainable. The complaints usually relate to whether a jury will understand a complicated matter but have recently centred on COVID 19 delays.

Applications to Strike

In *Belton v Spencer*, 2020 ONSC 5327, ("*Belton*") the personal injury plaintiff brought a court application to strike the jury notice on the grounds that, due to COVID 19, there were serious concerns that the trial would be delayed by as long as 18 months and that justice would not be served. Justice Sheard, in a decision dated September 4, 2020, found that the jury notice should be struck.

The action concerned an accident that happened on May 31, 2010. The Court listed a long history of the case and the various experts' reports served over a number of years. In November 2019, the matter was placed on the long trial sittings for hearing by a jury estimated to take six (6) weeks with a further pretrial scheduled for September 10, 2020. On June 19, 2020, counsel were advised by the Regional Senior Justice that, due to COVID 19 restrictions, civil jury trials were unlikely to take place in 2020 and would be delayed by one year to 18 months; however, if heard by judge alone, would proceed likely in late 2020.

Sheard J. stated that there were many concerns which included the ability to conduct jury matters given the need for physical and procedural changes to court houses including plexiglass barriers, seating allocations, cleaning stations, etc. as well as a need to find or create additional space for jury members to use during a trial. Also raised was the issue of whether there would be sufficient jurors to meet demand, including dismissing jurors regarding age or underlying health concerns, prospective jurors caring for or sharing a bubble with at risk persons, those who must be at home to supervise children who are not in school or daycare due to the pandemic. Further there would be concerns regarding what would happen if a juror became infected or exposed to COVID 19 and whether or not there would be a requirement for quarantine of all court staff and jury members possibly leading to a "mistrial". These concerns were all noted as very important, especially for a long trial.

The court reviewed the law. Section 108(3) of the *Courts of Justice Act* permits, a court on motion to order that issues of fact be tried or damages assessed, or both. without a jury. Rule 47.02 (2) of the *Rules of Civil Procedure* provides that a motion to strike out a jury notice may be made on the ground at the action ought to be tried without a jury. The test to strike the jury was related in *Rolley v MacDonell* 2018 ONSC 508 at paragraph 15, stating:

> a) The factors to be considered include the legal and/or factual issues to be resolved, the evidence at trial, and the conduct of the trial; and
>
> b) The overriding test is whether the moving party has shown that justice to the parties will be better served by the discharge of the jury.

Further, the Court confirmed that the Ontario Court of Appeal had addressed the manner in which a trial judge is to exercise his or her considerable discretion on a motion to strike the jury notice; that is, (i) the discretion must not be exercised arbitrarily or on the basis of improper principles; and (ii) the right to a jury trial is not to be taken away lightly.

Citing the case of *MacLeod v Canadian Road Management Company*, 2018 ONSC 2186, the Court noted that the basic principles were as follows:

> (a) the court must decide whether the moving party has shown the *(sic)* justice to the parties will be better served by the discharge of the jury;
>
> (b) the object of a civil trial is to provide justice between the parties, nothing more; and
>
> (c) the judge may strike a notice even before the trial has begun if the judge considers that there is no advantage to beginning the trial with the jury because the situation makes it apparent that the case should not be tried with a jury.

The Court considered *Hyrniak (*4),* the seminal case of the Supreme Court of Canada which provided that, to be just, a civil resolution of a dispute must not take either too long or be too expensive. At paragraph 18,

> - our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised;
>
> - undue process and protracted trials, with unnecessary expense and delay, can prevent the fair and just resolution of disputes; and
>
> - prompt judicial resolution of legal disputes allows individuals to get on with their lives. But, when court costs and delays become too great, people look for alternatives or simply give up on Justice.

Referring to the Ontario Court of Appeal's recent decision in *Girao v Cunningham* , Sheard J. stated, at paragraph 19, that the test was simply, "will justice to the parties be better served by dismissing or retaining the jury?", and quoted Lauwers J., "While I recognize that the right to a jury trial in a civil action has been recognized as fundamental, it is not absolute and must sometimes yield to practicality." (*5)

The Court went on to find that the Rules were not formulated with a pandemic in mind and are to be looked at in a "purposive manner", which is in keeping with the general principle in Rule 1.04(1), "These Rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits."

Sheard J. found that there had been delay by both parties and that the action was very old and found that the defendant's right to a trial by jury is outweighed by the need to provide the plaintiff with more timely access to justice. The additional COVID-19 challenge to ensuring access to justice "requires the court to strike the defendant's jury notice in order to do what is possible to ensure an earlier and more efficient and affordable trial." (*6)

The Appeal

The Ontario Court of Appeal heard the appeal of Justice Sheard's order by the respondent ("defendant") on September 29, 2020 by video conference. The trial was scheduled to proceed on October 5, 2020 by judge alone.

The defendant appealed seeking a stay submitting that the motion judge erred by permanently depriving the defendant of her substantive right to a trial by jury with little or no time remaining before the trial. The motion judge had, it was argued, further failed to recognize the importance of the defendant's substantive right to have a trial by jury by failing to properly balance that right with a proportionate concern for trial delay and the lack of prejudice to the plaintiff.

The Court of Appeal held that the right to a trial by jury in the civil context is limited and qualified. A party's right to trial by jury is subject to court's power to order strike that jury. The judge hearing such a motion has broad discretion to decide whether the interests of justice are better served with or without a jury and, so long as the discretion is not exercised arbitrarily or capriciously, and is not based upon a wrong or

inapplicable principle of law, an appeal court will not intervene. The Court of Appeal found that the motion judge considered the relevant and correct factors and saw no error, nor was the decision arbitrary or capricious.

On the issue of whether the defendant would suffer irreparable harm if the stay was not granted, the Court confirmed that consideration would go to the nature of the harm suffered rather than its magnitude. The defendant argued that the denial of the right to a jury trial constituted irreparable harm; however, since that right is not absolute, the court was not persuaded. Nor was the court convinced of the arguments that the appeal would be rendered moot if the stay was not granted and where the trial commenced, or regarding the alleged waste of judicial resources should the appeal ultimately be in the defendant's favour.

On the issue of balance of convenience, the issue was one of which party will suffer greater harm from the granting or refusal of the stay.

The fact that COVID 19 was necessitating a further 12-18 month delay, on top of an already decade-long process amounted to the Court being concerned that further unnecessary delay would be unconscionable. The balance of convenience was overwhelmingly in favour of the respondent-plaintiff. The Court was also not persuaded by the submission that the stay should be granted to permit a province wide approach to decisions in light of COVID 19, in that (i) any appeal involves the rights of the parties to that appeal, not the province as a whole; (ii) the pandemic evolves so rapidly that the time required to hear an appeal and develop an approach would likely render the plan inaccurate; and (iii) the resources available to each region of the province are vastly different and so developing a uniform approach would be impractical.

The defendant did not establish a "serious issue" to be heard on appeal, or that irreparable harm would be suffered and the Court found that the balance of convenience was in favour of the respondent-plaintiff. The motion for a stay of the Order was dismissed.

Other cases

It is of note that the Court of Appeal in *Belton* took the time to review the decisions in various cases around the provinces including three decisions in the East Region: *Louis v. Poitras*, 2020 ONSC 5301; *Coban v. Declare*, 2020 ONSC 5580; and *Higashi v. Chiarot*, 2020 ONSC 5523. In all three cases, the jury notices were struck out, in large part because it was not known when civil jury trials would resume in the East Region. In *Higashi*, the motion judge left it open for the parties to return before him if it became known when a jury trial might occur before the action proceeded to a judge alone trial. In *Coban*, the jury notice was struck but the trial was adjourned for six months to enable the defendant to obtain further responding medical reports.

A different result was reached in a fourth case, in the Toronto Region, *Jiang v. Toronto Transit Commission 2020 ONSC 572* In that case, Justice D. Wilson, on September 23, 2020, refused to strike the jury notice because Toronto was offering civil jury trials.

> [7] ….In all these decisions, the prejudice to the Plaintiff as a result of an undetermined delay had to be weighed against the right of the Defendant to have the action tried by a jury. In the case at hand, I do not have to consider these issues as there is no prejudice to the Plaintiff and no access to justice issue to be balanced since civil jury trials are available in Toronto.
>
> [8] Since Toronto is offering civil jury trials, there is no basis for the suggestion of counsel for the Plaintiff that this case will be adjourned and not heard for several years. I do not understand where the assertion that there is a "huge backlog" in the civil and criminal court system" emanates from
>
> [9] Furthermore, the submission that jurors would be biased against the Plaintiff because of having to take public transit is pure speculation and nothing more. Jurors may or may not take public transit to the

courthouse but in any event, there is absolutely no evidence that doing so would result in bias against the Plaintiff.

The Court of Appeal in *Belton* was correct when it said that the pandemic evolves rapidly, because on October 9, 2020 all jury selection in Toronto, Brampton and Ottawa was suspended for 28 days as the province moved into a modified stage 2. Similar restrictions were put in place for Newmarket Ontario on October 16, 2020. For non-jury matters, the number of people in the courtroom was limited to no more than 10 and trials have proceeded with a mix of live and zoom components.

Finally

Other provinces have suspended the right to have a civil matter tried by a jury, but Ontario has not as yet though it does seem that this is a hot issue with the recent suspensions. From a defence perspective, it does appear that the ability to maintain civil juries is directly dependent upon the courts' ability to continue to provide jury trials effectively. Unfortunately, it may simply be ultimately more expeditious in the long run to suspend this very effective tool for the next year, as has occurred in other provinces. If so, this will be a very great loss to parties who have faith in the jury system and a strategic setback for counsel.

Kim E. Stoll
Follow Kim on LinkedIn and at url: linkedin.com/in/kim-stoll-transportationlaw

Endnotes

(*1) *R. v. Jordan* 1 S.C.R. 631. The Supreme Court of Canada applied a presumptive ceiling of 18-30 months between the charges and the trial, depending on the charges in question. Failure to reach trial within the allotted time period results in a stay of those charges. The *Jordan* decision changed the way that cases were prosecuted. This includes the more frequent use of direct indictment which bring the case directly to trial before the preliminary inquiry is completed or when the accused has been discharged at the preliminary inquiry. The Crown prosecutors must conclude that there is a reasonable prospect of conviction and the continuation is in the public interest. See "Direct Indictments" Crown Policy Manual, Ministry of the Attorney General, www.attorneygeneral.jus.gov.on.ca/english/crim/cpm/2005/DirectIndictment.pdf

(*2) Juries are not available for all matters including Small Claims Court actions and claims against municipalities, amongst other actions. The Federal Court does not permit jury trials.

(*3) Damages for pain and suffering are limited by a cap on damages arising from a trilogy of cases. The absolute maximum fluctuates but is approximately $320,000 CAD. This avoids nuclear jury verdicts in Canada where the bulk of the award is for future losses regarding income and care.

(*4) *Hyrniak v Mauldin* 2014 SCC 7

(*5) 2020 ONCA 260 at para. 171

(*6) At para. 47

5. SCC Upholds Anti-Deprivation Rule in Bankruptcy and Insolvency Law: *Chandos Construction Ltd. v. Deloitte Restructuring Inc.*, 2020 SCC 25

The Supreme Court of Canada ("SCC") recently released its decision in *Chandos Construction Ltd. v. Deloitte Restructuring Inc.*, 2020 SCC 25 ("*Chandos"*). (*1)

In *Chandos*, the general contractor on a condominium project, Chandos, subcontracted work to a company called Capital Steel (the "subcontract"). A clause in the subcontract stated that in the event of its bankruptcy, insolvency, or ceasing of operations, Capital Steel would forfeit 10 percent of the total subcontract price as a fee to Chandos for the inconvenience or for monitoring the work (the "insolvency clause").

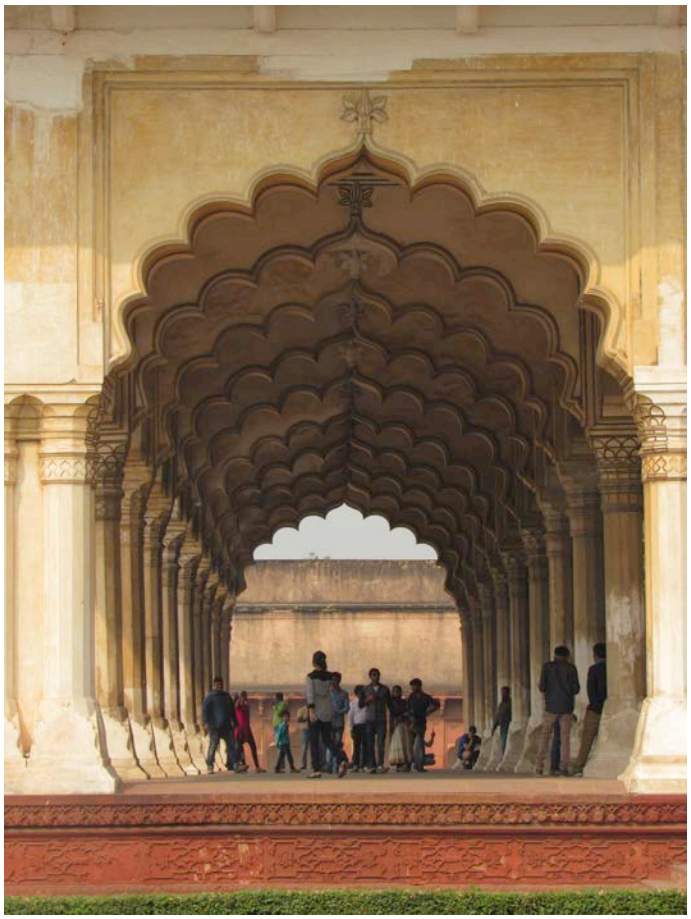
Capital Steel, having completed most of the work under the subcontract, filed for bankruptcy. Deloitte, Capital Steel's trustee in bankruptcy, sought to collect the balance owed under the subcontract from Chandos. In response, Chandos argued that via the insolvency clause, it was entitled to set-off ten percent of the total subcontract price against the balance due.

The Deloitte trustee applied to the court to determine whether the insolvency clause was enforceable.

Lower Court Decisions

At trial, the court found in favour of Chandos, holding that the insolvency clause was enforceable because it was made for bona-fide commercial purposes.

Conversely, on appeal, the majority of the Alberta Court of Appeal found the insolvency clause to be invalid, finding that it violated the "anti-deprivation rule", which is a common-law rule that prevents parties from removing property by contract from a bankrupt's estate that would have otherwise vested in the trustee upon bankruptcy. The dissenting judge found that the



insolvency clause was valid as it accorded with principles of freedom of contract.

Supreme Court of Canada ("SCC")

On further appeal, the majority of the SCC upheld the Alberta Court of Appeal's decision, concluding that the insolvency clause was valid. The Court confirmed that the anti-deprivation rule continues in the common law.

The Court noted that there is a two-part test to determine if the anti-deprivation rule has been breached:

1. the relevant clause must be triggered by an event of insolvency or bankruptcy; and
2. the effect of the clause must be to remove value from the insolvent's estate.

The Court also stated that the effects-based approach in this test is more appropriate than an intent-based approach, as the latter would leave courts guessing as to parties' contractual intentions. In this case, the Court found that the *effect* of the insolvency clause was to create a debt from Capital Steel to Chandos that would not exist had it not been for Capital Steel's insolvency. The Court found that this was a direct violation of the anti-deprivation rule.

Implications

For parties who enter into commercial contracts, *Chandos* confirms that including clauses that have the effect of entitling one contracting party to payment on the insolvency of another removes monetary value from the insolvent party's estate and thereby violates the anti-deprivation rule.

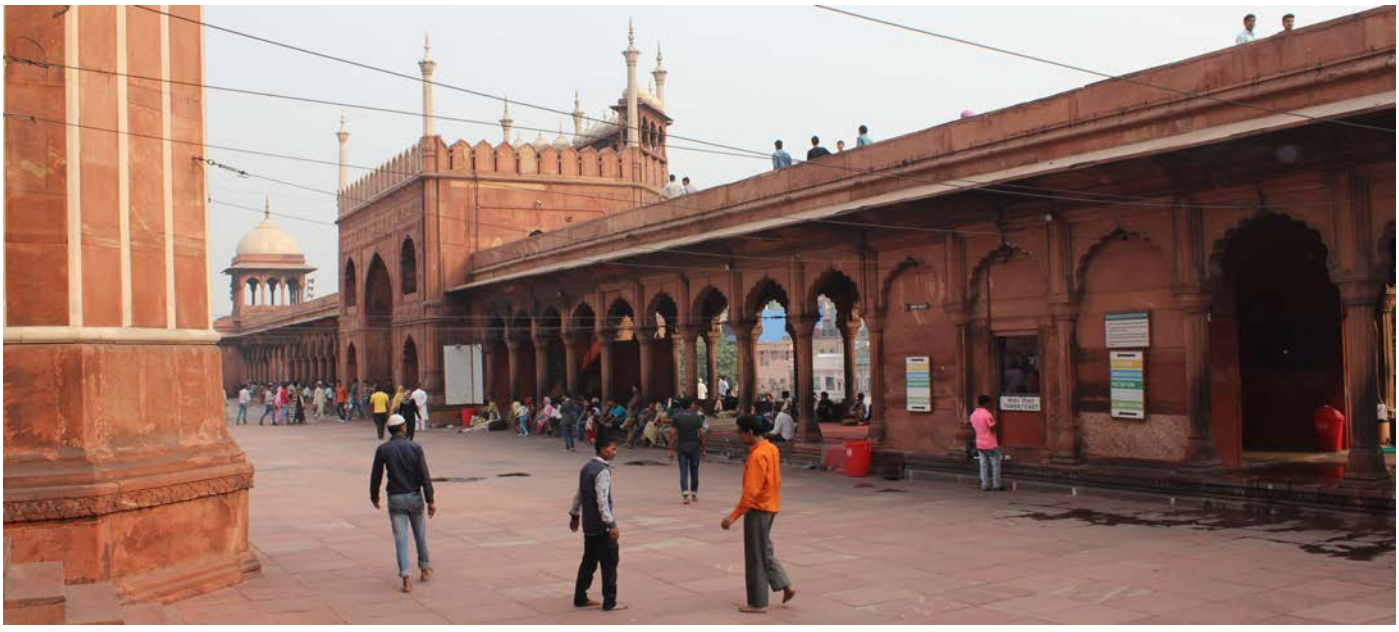
For creditors of companies, the decision in *Chandos* helps maximize recovery in accordance with the priority rules in the *Bankruptcy and Insolvency Act* by preserving value that could be taken away from a bankrupt's estate through a contract.

It is important to consult a lawyer if you are entering into a commercial contract and you are concerned that, in the event of the other party's bankruptcy, insolvency, or dissolution, you may end up either not being paid or being paid less than any amounts owed.

Haadi Malik, Student-at-Law

Endnotes

(*1) *Chandos Construction Ltd. v. Deloitte Restructuring Inc.*, 2020 SCC 25 ("*Chandos*").



6. Interprovincial Travel Restrictions and the Charter During COVID

In a recent and very interesting case out of Newfoundland, which is destined to be but one of many such legal challenges, we learned that Canadians face an uphill battle in seeking relief from the courts to the hardships imposed on them as a result of the recommendations of our various public health authorities. In the Supreme Court of Newfoundland and Labrador's mammoth 140-page decision in *Taylor v. Newfoundland and Labrador* (*1), dealing with interprovincial travel, the chief take-away is that even fundamental rights under the *Charter* appear to carry little weight during a declared public health emergency. What remains to be seen is whether the decision in *Taylor* is an aberration or marks the beginning of a trend.

The Application

The decision in *Taylor* dealt specifically with an application brought by Kimberley Taylor, a Canadian citizen born and raised in Newfoundland but resident in Halifax at the time of the application. Ms Taylor's mother had passed away in Kilbride on May 5, 2020, and Ms Taylor immediately applied to the government of Newfoundland for an exemption to the general travel restrictions imposed through a Special Measure Order made under the authority of Newfoundland's recently enacted *Public Health Protection and Promotion Act* ("*PHPPA*") (*2) in order that she be able to attend her mother's funeral. Among other things, the *PHPPA* permitted Newfoundland's Chief Medical Officer of Health to make an order "restricting the travel to or from the province or an area within the province" (*3). Ms Taylor had to apply for a special exemption because the order recently put in place limited travel to the province to residents only, except in special circumstances. Her request for an exemption was initially rejected on May 8, 2020. Ms Taylor submitted a reconsideration request, and on May 16, 2020, her request for an exemption was finally granted.

Notwithstanding that she was ultimately permitted to travel to attend her mother's funeral, Ms Taylor brought an application in the Supreme Court of Newfoundland and Labrador challenging the constitutionality of section 28.1(h) of the *PHPPA* as contrary to her rights under the *Canadian Charter of Rights and Freedoms*. Although challenged under several provisions of the *Charter*, including liberty rights under section 7 and the right to "move to and take up residence" in a province under section 6(2), the only challenge given any serious consideration by the court was that advanced under section 6(1), which provides that: "Every citizen of Canada has the right to enter, remain in and leave Canada" (*4). The driving force behind Ms Taylor's application was the Canadian Civil Liberties Association ("CCLA"), which was granted public interest intervenor status to challenge the constitutionality of Newfoundland's public health order.

The key government restriction being challenged in the application appeared in Special Measures Order (Amendment No. 11). Coming into effect on May 4, 2020, it prohibited all but the following from entering Newfoundland: a) residents; b) asymptomatic workers and individuals to an Exemption Order from 14-day isolation; and c) persons permitted entry due to "extenuating circumstances".

The court in *Taylor* clearly wanted to be thorough given the importance of the issue, as the length of the reasons attest. The court went to considerable length in addressing the separate constitutional argument, unrelated to the *Charter* argument, that it was not within Newfoundland's legislative competence to restrict *inter*provincial travel. The issue of whether that is properly provincial jurisdiction at all could itself be the subject of a separate lengthy analysis. The court's finding that the challenged provision was in essence public health legislation is certainly debatable on the merits, but here we deal only with how the court answered the question of whether Ms Taylor's mobility rights guaranteed by the *Charter* were infringed, and, if so, whether such infringement was justified.

Mobility Rights

On the preliminary question of whether Ms Taylor's rights to travel freely within Canada had been violated, the court had no difficulty finding that they had been. Although this is not immediately clear from the plain meaning of the words in section 6(1), the court nevertheless concluded that the right to "remain in" Canada necessarily includes the right to travel across provincial boundaries. Citing a host of both pre- and post-Charter Canadian decisions on mobility rights, the court's reasoning could be distilled down to the finding that a right to "remain in" Canada would be rendered nonsensical if this right could be limited to remain only in one particular *part* of Canada. The right to "remain in" Canada thus necessarily implied a right of free travel *between* provinces (*5).

Unfortunately for those hoping that Canadians' constitutionally guaranteed mobility rights might be spared from the new rules of the pandemic, the court had just as little difficulty finding that the restrictions imposed through Newfoundland's public health orders were justifiable as "reasonable limits" of Ms Taylor's mobility rights under section 1 of the *Charter*. On this question, CCLA argued that the provincial measures limiting travel were over-restrictive; that is, because the policy goal of maintaining a low level of cases in Newfoundland, and thus "flattening the curve," had been largely achieved by the time Ms Taylor wanted to travel, the restrictions on entering the province were unnecessary for the preservation of public health. Ms Taylor was, for instance, prepared to abide by the province's requirement that persons entering Newfoundland self-quarantine for a period of 14 days, and her mother's funeral was even scheduled to account for this additional time.

As against this, the province argued, and the court ultimately agreed, that the expert evidence on the effects of travel bans, including evidence of the effects of such bans shown by models presented by epidemiological experts, showed that such bans played a role in limiting contagion. In addition to the large volume of expert evidence on a new phenomenon which, by its

nature, was difficult to contradict, the court also indicated that deference needed to be shown to the Chief Medical Officer of Health on such questions, whose relative expertise on questions of this nature was not challenged. Taken together, this was viewed as justifying the court's conclusion that:

> While restrictions on personal travel may cause mental anguish to some, and certainly did so in the case of Ms. Taylor, the collective benefit to the population as a whole must prevail. COVID-19 is a virulent and potentially fatal disease. In the circumstances of this case Ms. Taylor's Charter right to mobility must give way to the common good (*6).

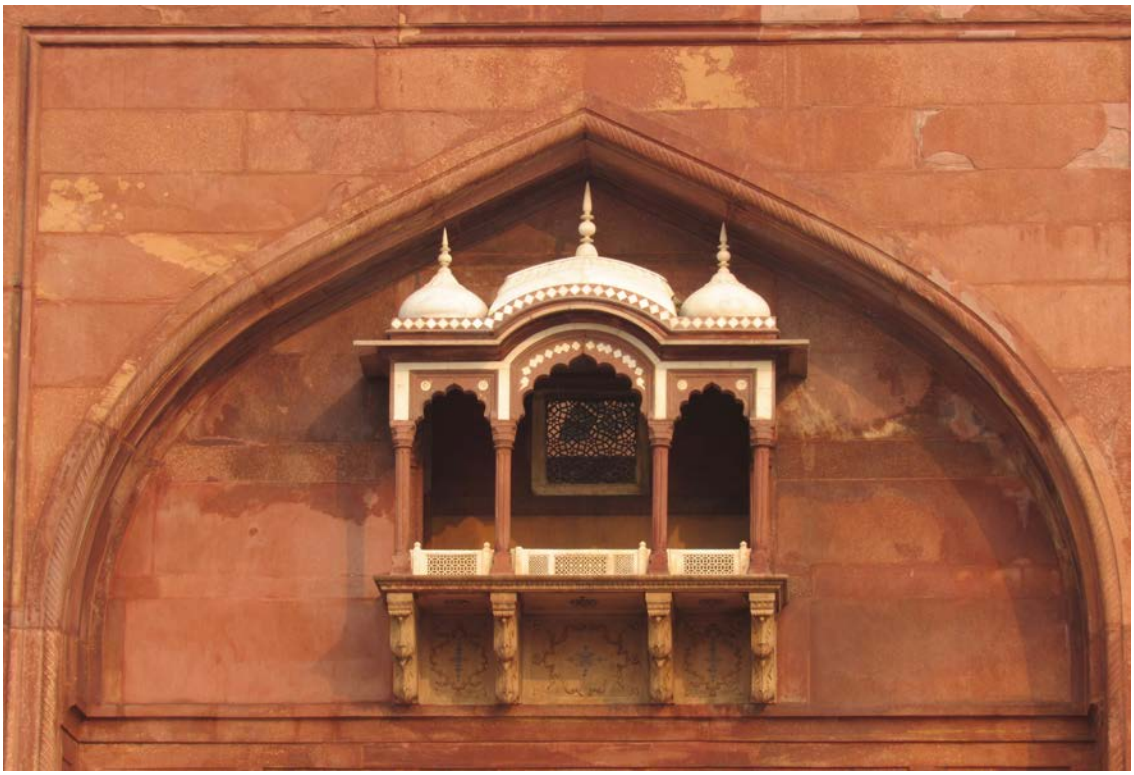
Conclusion

If this first major decision on the interplay between the *Canadian Charter of Rights and Freedoms* and various emergency public health orders is anything to go by, then the prospects for ordinary civil liberties holding up during the pandemic look decidedly bleak. For the moment at least, this chapter is not entirely closed, since the CCLA will be appealing the decision. Further, Ms Taylor's case may not have been the best one on the facts for opposing travel restrictions, since the court noted the limits placed on Ms Taylor's freedom to go to Newfoundland were only "fleeting." Nevertheless, on the evidence of this case, it does not appear that the courts will be taking the lead in policing the boundaries of emergency public health restrictions. Those decisions for now will be left to the realm of politics. Meanwhile, it appears that freedoms we all recently enjoyed will for a time be limited to those that can demonstrate that their activities are "essential."

Oleg M. Roslak

Endnote

(*1) 2020 NLSC 125 [*Taylor*].
(*2) S.N.L. 2018, c. P-37.3.
(*3) *Public Health Protection and Promotion Act*, S.N.L. 2018, c. P-37.3, s. 28(1)(h).
(*4) *Canadian Charter of Rights and Freedoms*, s. 6(1), Part 1 of *the Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.
(*5) *Taylor* at para. 148.
(*6) *Taylor* at para. 492.



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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 of the fort depicted in the photograph on page 2. Email your answer to info@fhllp.ca with a subject line "Newsletter contest". First response with the correct answer wins.