THE NAVIGATOR

IN THIS ISSUE

Short Line Railway Demurrage Decision

In the recent appeal decision of *G.E.X.R. v. Shantz Station and Parrish & Heimbecker*, 2020 ONCA 560, the Ontario Court of Appeal upheld the trial decision (2019 ONSC 1914) of Justice Braid who had dismissed the demurrage claim of a short line railway ("GEXR").

In the trial decision Justice Braid started her reasons as follows:

> "Time is money", the old adage goes. This is certainly so in the transport sector, which has developed the legal concept of "demurrage". In short, demurrage is a charge levied when it takes longer than anticipated to load or unload goods in transit.

Parrish and Heimbecker Limited ("P&H"), entered into an agreement with Canadian National Railway ("CN") to ship grain by rail from Western Canada to Ontario. CN carried the grain for much of the rail journey. Pursuant to an agreement CN had with GEXR, GEXR carried the grain on its final leg, along the GEXR operated Guelph Line to a facility ("the Shantz Station") where it was unloaded. The Shantz Station is owned by the respondent Shantz Station Terminal Ltd. ("SSTL"), a subsidiary of P&H.

GEXR asserted it had the right to charge demurrage to P&H in accordance with its published tariff for the delayed unloading of railcars at the Shantz Station Terminal. P&H refused to pay the charges on the basis that, in the absence of a contract between them, GEXR had neither the contractual right nor the legislative authority to exact demurrage. P&H was always prepared to pay demurrage at Shantz Station, but subject to the invoices coming from CN and not GEXR.

P&H had negotiated a Memorandum of Understanding with CN. P & H were concerned about locating the grain terminal (the Shantz Station Terminal) on a "short line" and did not want to have difficulties if the short line had financial difficulties. In the negotiated deal with CN, CN assured P&H that only CN would invoice P&H for demurrage and that CN standard demurrage practices would be applied. CN drafted a Memorandum of Understanding, which was the agreement between

FIRM AND INDUSTRY NEWS

- **Fernandes Hearn LLP** is a member of **Globalaw™**, a top tier international affiliation of over 100 law firms. As a member of **Globalaw™**, Fernandes Hearn LLP has networking access to over 4500 attorneys in 85 countries, enhancing our transportation, trade law and business practice.

- **Rui Fernandes** will be a presenter at the **Fleet Safety Council Annual Education Conference** webinar on October 2nd 2020. **Register here.**

- **Women's Trucking Federation Canada**, *Bridging the Barriers Webinar Series,* October 19th at 11 am. **Kim Stoll** and **Alan Cofman** will be speaking on *Legal Issues Facing Trucking Today*. Please contact Kim or Alan for details regarding registration.

- **Fernandes Hearn LLP** continues its COVID-19 era series of complimentary client and industry webinar meetings with its presentation on October 30th, 2020. Topics: Logistics Contracts 101 / New Developments in Freight Forwarding. **Register here.**

- **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.

- Chambers & Partners has issued its **Chambers Canada 2021** guide to top lawyers and law firms in Canada. **Rui Fernandes** is listed for Maritime Law and for Transportation Law**, Gordon Hearn** for Transportation Law and **Kim Stoll** for Maritime Law. The guide provides the following comments:

According to commentators, Rui Fernandes "provides stellar advice to his clients." He is well known in the market for his handling of cases involving the shipping and trucking industries, with particular expertise in related insurance matters.

Gordon Hearn is "an excellent communicator," according to one source, who added: "He is a very practical lawyer with a deep understanding of the trucking industry." He represents shippers, receivers and their insurers in cases involving the transportation of goods domestically and internationally.

Kim Stoll is a transportation law practitioner based out of Toronto who specializes in maritime law. She is an experienced litigator and mediator, with experience covering insurance coverage disputes.

CN and P&H. Based on the Memorandum, P&H agreed to build a terminal on the Guelph Line.

Justice Braid relied on the Supreme Court of Canada decision in *Sattva Capital Corp. v. Creston Moly Corp*. 2014 SCC 53 to allow evidence of the surrounding circumstances for the interpretation of the Memorandum, stating (at p. 33) "The evidence of the surrounding circumstances, including the genesis and business purpose of an agreement, is admissible when conducting contractual interpretation. This should consist only of objective evidence of the background facts at the time of the execution of the contract and includes anything that would have affected the way in which the language of the document would have been understood by a reasonable person."

Justice Braid went on to find that the Memorandum was contrary to CN's agreement with GEXR as it related to GEXR's ability to bill accessorial charges. This agreement, the "Guelph Line Operating, Marketing and Interchange Agreement", provided that GEXR was the exclusive operator of the Guelph Line. P&H was not a party to this agreement. The agreement stated that CN would continue to market the services on the Guelph Line. CN would continue to be the carrier shown in rates, routes and divisions, and to quote freight rates, publish tariffs, enter into contracts, and collect for its own account all related revenues and applicable freight subsidies for traffic to and from stations on the Guelph Line which will travel over CN lines. It was further agreed that GEXR would have the exclusive right and responsibility to publish tariffs and enter into contracts governing the handling of intra-line traffic as well as collect for its own account only all related revenues, including any applicable subsidies The agreement further stated that CN would pay GEXR a haulage fee. GEXR would be responsible for paying for all car hire charges on individual freight cars in its possession, and CN would pay a reclaim of the car hire in accordance with the agreement. Notably, the agreement stated that GEXR "is responsible for invoicing customers for demurrage."

There was a significant difference in the CN and the GEXR tariffs. The CN tariff was more beneficial to P&H. In an arbitration involving only CN and GEXR, the arbitrator determined that in the Memorandum P&H and CN agreed that only CN would bill P&H for demurrage. He also found that CN had breached its Memorandum and its promise that CN would be the only carrier that would charge demurrage in connection with the traffic to the terminal during the term of the Memorandum. On August 9, 2018, the arbitrator awarded damages

to P&H against CN for the breach of CN's promise that it would be the only carrier that would charge demurrage in connection with the terminal. The quantification of damages has been adjourned until after the completion of the trial before Justice Braid.

As a result of the arbitration ruling, and in an effort to discharge its obligations as set out in that award, CN sent an invoice to P&H dated June 13, 2018, for demurrage charges.

Justice Braid found the following:

1. GEXR was not a subcontractor of CN.
2. Common law principles now apply to railway companies (since deregulation).
3. A railway's relationship with a customer is a contractual one.
4. Section 113 of the *Canada Transportation Act* ("CTA") imposes certain "common carrier obligations" on railway companies, requiring them to take, carry, and deliver traffic on "payment of the lawfully payable rate." A railway sets the rate for the movement of the traffic; once a customer has agreed to pay the rates, the railway must deliver the cars to the destination specified in the contract
5. Section 118 of the CTA states that a railway company shall, at the request of a shipper, issue a tariff in respect of the movement of traffic on its railway. Section 119 of the CTA directs that a railway company that proposes to increase a rate in a tariff shall publish a notice of the increase and shall charge the rates in that tariff.
6. Section 87 of the CTA defines "tariff" as "a schedule of rates, charges, terms and conditions applicable to the movement of traffic and incidental services." "Demurrage" is not a defined term under the CTA.
7. The CTA and the Certificate of Fitness issued to GEXR do not contain explicit language stating precisely who is liable for demurrage. The legislation is silent regarding on to whom a railway may impose tariffs such as demurrage. The CTA does not go so far as to empower a railroad to unilaterally impose penalties on parties with whom it has no contractual relationship.
8. A contract of carriage that incorporates tariff terms is necessary between two parties for the railway to levy demurrage charges. The railway may not charge demurrage to a party with whom it has no contract.
9. The mere provision of services, even under the structure of the CTA, does not create a contract.
10. There was no implied contract to pay GERX demurrage. "There cannot be an implied contract where there is a clear, express intention to the contrary" (p. 116).
11. P&H were not unjustly enriched. P&H were willing to pay charges for demurrage that CN rendered in accordance with the Memorandum.

On appeal, GERX argued that the trial judge was wrong to require a contract between it and P&H. It submitted that a railway is entitled to charge demurrage to a shipper that detains its railcars, in the absence of any agreement. Alternatively, GEXR argued that the trial judge erred in failing to find an implied contract or to give relief under the doctrine of unjust enrichment.

The Court of Appeal dismissed the appeal. The Court found that a contract, express or implied, between a railway and a shipper is the required basis for a claim for demurrage. There was no express contract between P&H and GEXR. Furthermore, in light of the parties' conduct – including the contract between P&H and CN to which GEXR was not privy, the contract between CN and GEXR to which the respondents were not privy, and P&H's repeated statements to GEXR that it would not honour any of GEXR claims for demurrage was sufficient for the trial judge to find there was no implied contract. The Court stated:

> [72] There were thus two *express* contracts in place, one between CN and P&H to which GEXR was not a party, and one between CN and GEXR to which neither respondent was a party. In my view, the trial judge did not

> commit an extricable error of law when she refused to also *imply* a further contract between GEXR and the respondents.

The Court of Appeal also determined that the elements of a claim for unjust enrichment were not established by GEXR stating:

> [88] I agree with the trial judge that the evidence does not establish such a claim, because it does not establish any enrichment of the respondents or corresponding deprivation of GEXR, let alone one that occurred without juristic reason. GEXR carried grain to the Shantz Station pursuant to its agreement with CN in exchange for haulage fees from CN. To be sure, the Interchange Agreement gave GEXR the opportunity to contract with interline customers for payment of demurrage, but GEXR failed to contract with the respondents for such payments.
>
> [89] Whether that was due to a failure by CN to honour its arrangements with GEXR by making contradictory arrangements with P&H in the MOU, or a failure of GEXR to appropriately structure its arrangements with CN so that it could refuse service to any interline customer that was not prepared to commit to pay it demurrage, matters not. The circumstances fall well outside the notion that some benefit was conferred on the respondents "which justice does not permit one to retain", the notion that lies at the heart of the doctrine of unjust enrichment: *Moore v. Sweet*.

Rui M. Fernandes

2. Limits on "Additional Insured"

In *Sky Clean Energy Ltd. (Sky Solar (Canada) Ltd.) v. Economical Mutual Insurance Company,* 2020 ONCA 558, the Ontario Court of Appeal looked at a common coverage situation in the construction industry.

Sky Clean Energy Ltd. ("Sky"), a developer of solar energy projects, including rooftop solar systems that supply electricity to the power grid entered into contracts with Marnoch Electrical Services Inc. ("Marnoch"), an electrical contracting company. Sky entered into contracts with Marnoch for the construction of two solar projects. On completion of the projects, Sky sold them to Firelight Solar Limited Partnership ("Firelight").

Under the contracts, Marnoch agreed to indemnify Sky against Marnoch's failure to perform its contractual obligations and for the negligent acts of Marnoch, its subcontractors, or other parties for whom it was liable. Marnoch also agreed to name Sky as an insured under its comprehensive general liability insurance policy with Economical Mutual Insurance Company ("Economical"), but "only with respect to liability, other than legal liability arising out of [Sky's] sole negligence, arising out of the operations of [Marnoch] with regard to the *Work*."

Fires occurred at both installations. They originated in the electrical transformers and resulted in damages to both transformers. As a result of these events, Sky incurred liabilities to Firelight for remediation costs and loss of revenue. It settled with Firelight and then sought to recover those damages, first against Marnoch, then against Economical.

Sky commenced an arbitration against Marnoch, as required by their contract. The claim was based on both the contractual indemnity and on warranties given by Marnoch. The arbitrator, C.C. Lax, Q.C., dismissed Sky's claims. He found that the transformers had been selected by Sky and that Marnoch had played no role in the choice of either the supplier of the transformers or the transformers themselves: "Marnoch's role was simply to implement Sky's decision." The arbitrator dismissed Sky's warranty claims for similar reasons: Sky did not rely on Marnoch's skill and judgment with respect to the suitability of the transformers and "Sky cannot hold Marnoch responsible or liable for the consequences of Sky's own decisions." An appeal to the Superior Court from the arbitration award was dismissed.

Sky then commenced an action against Economical. The trial judge dismissed Sky's claim against Economical. He found that the design of the solar systems, including the wiring and the choice of equipment, was Sky's responsibility. Marnoch played no role in the decisions to purchase or install the transformers used at the two project locations. He concluded that Sky's liability did not "arise out of the operations" of Marnoch. The trial judge also found that Sky had breached Condition Four of the insurance policy by settling with Firelight without Economical's consent and that Sky was not entitled to relief from forfeiture.

The Court of Appeal dismissed Sky's appeal. The Court noted that the interpretation of a standard form insurance contract (such as this one) is a question of law and is subject to the correctness standard of review, per *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, at para. 4.

The Court also noted that the inclusion of the owner under the contractor's commercial general liability policy is an efficient and cost-effective way of allocating risks that arise out of the contractor's operations under the contract. Being named as an additional insured allows the owner to claim under the insurance policy irrespective of the contractor's potential breach of the policy conditions. This is accomplished through a "separation of interests clause" or "severability of interest clause", as there was in this case, providing that the insurance applies as

if each named insured were the only named insured.

> [63] If a third party claim arises, the owner can obtain a defence and indemnity under the contractor's policy, eliminating the need to claim under its own liability insurance. Both parties can be defended by the same insurer against third party claims arising out of the contractor's operations. This avoids disputes and potential litigation between the owner and the contractor and allows them to proceed with the construction work without interruption or disruption of their commercial relationship.

The Court added that conflicts may occur because the contractor obtained insurance that does not track the language of the contractual indemnity. The wording of the insurance policy may either be broader or more restrictive than what the contractor agreed to obtain. Another source of conflict may arise when the additional insured fails to obtain and read the policy of insurance and simply relies on the receipt of the insurance certificate, which simply confirms that the contractor has insurance without providing evidence of the terms that protect the owner. An owner who expects to be an additional insured should obtain a copy of the insurance policy and the endorsement to ensure that the appropriate coverage has been obtained.

In dismissing the appeal, the Court concluded that the trial judge applied the correct approach to the issue of whether Sky's liability to Firelight arose out of the operations of Marnoch. The Court concurred with the approach set out by the trial judge and British Court of Appeal in *Vernon Vipers Hockey Club v. Canadian Recreation Excellence (Vernon) Corp.*, 2012 BCCA 291, 352 D.L.R. 57. "Arising out of" means more than simply a "but for" test and requires an "unbroken chain of causation" and "a connection that is more than merely incidental or fortuitous." Marnoch's connection with the failure of the transformer and the fire at the was "merely incidental". Sky had failed to establish that its liability to Firelight fell within the grant of coverage under the Additional Insured Endorsement.

The Court of Appeal reviewed how the principles involved in interpreting insurance contracts evolved and specifically the terms "arising out of" and "arising from". The Court also reviewed the meaning of "Operations". It "is a word of sufficiently broad meaning as to include the creation of a situation, or circumstance, that is connected in some way to the alleged liability. It does not necessarily imply an active role by the named insured in creation of the liability event."

In conclusion the Court stated:

> I agree with the trial judge that Marnoch's connection with the failure of the Marcus transformer was "merely incidental". The trial judge found that the fire was caused by the failure of the Marcus transformer. The fire would not have occurred but for the fact that Marnoch ordered and installed the transformers "in the course of" Marnoch's operations under its contracts with Sky. But *Vernon* requires a stronger connection. Marnoch's operations under the contracts did not require it to select the transformers to be installed in the projects. That was up to Sky. And Sky chose the Marcus transformers that failed.

The case provides a good history and analysis of insurance coverage in Canada and is worthwhile reading for all counsel and their clients.

Rui M. Fernandes

3. Supreme Court of Canada Clarifies Statutory Test for Anti-SLAPP Motions

1704603 Ontario Ltd. v. Pointes Protection Association, 2020 SCC 22 and *Bent v Platnick,* 2020 SCC 23.

It is of no surprise to the ordinary person that so-inclined powerful parties may use lawsuits as scare-tactics against those whose public speech negatively impacts them. Such lawsuits are often termed "gag proceedings", or more commonly, strategic lawsuits against public participation ("SLAPPs").

SLAPPs are defined as "lawsuits initiated against individuals or organizations that speak out or take a position on an issue of public interest."(*1) Generally, SLAPPs are used like a trojan horse; they are not initiated as a direct tool to vindicate a *bona fide* claim, but rather as a vehicle to limit the expression of others. In SLAPPs, the lawsuit itself is merely a facade used to manipulate the court system; it is an attempt to limit the amount and effectiveness of the opposing party's free speech and to deter the opposing party and other potentially interested parties from engaging in public affairs. (*2)

Ontario, and some other Canadian provinces, have addressed the issue of SLAPPs through legislative reform. In 2015, Ontario introduced the *Protection of Public Participation Act*, *2015*, S.O. 2015, c. 23 (the *"Act*") which amended the *Courts of Justice Act*, R.S.O. 1990, c. C−43 ("*CJA*")(*3) by introducing s. 137.1, which allows a defendant to bring a motion to dismiss the proceeding on the basis that the proceeding is a SLAPP ("anti-SLAPP motion").

The Supreme Court of Canada ("SCC") clarified the test for anti-SLAPP motions in s. 137.1 *CJA* (*5) in its recent decisions *1704603 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 ("*Pointes*") (*4) and *Bent v Platnick,* 2020 SCC 23 ("*Bent*").

In *Bent* (*6), the defendant lawyer was elected president of the Ontario Trial Lawyers Association ("OTLA"). OTLA's members represent people who are injured in car accidents. The plaintiff ~~is~~ a doctor who was hired by insurance companies to examine medical reports on insureds' accident injuries and provide a second medical opinion to the insurers. The insurers would use the plaintiff's opinion as a basis to evaluate coverage. In 2014, the defendant emailed OTLA's mailing list complaining about the plaintiff's medical reports. In the email the defendant stated that the plaintiff had misrepresented and changed the treating doctors' reports to make the insureds' injuries look less serious to their insurers, thereby unduly reducing insurance company payouts. Unbeknownst to the defendant, this email was published in an insurance industry magazine. This led to the plaintiff suing the defendant and her law firm for defamation, claiming $16 million in damages. The defendant countered with an anti-SLAPP motion, which was initially successful before the motions judge, but failed at the Ontario Court of Appeal.

In *Pointes*, the defendant non-profit organization and six of its members had been sued for $6 million by a land developer. The defendant had appealed a city council decision to allow the plaintiff's development project to move forward to the Ontario Municipal Board ("OMB"), and also sought judicial review of the decision. In the course of litigation, the parties reached a settlement agreement which, among other things, limited the way the defendant's members could conduct themselves in public in relation to the plaintiff's proposed development (i.e. limiting what they could and could not publicly say about it). At an OMB Hearing, the defendant's president testified that the plaintiff's proposed development would result in ecological damage to wetlands. The plaintiff claimed that this testimony was a breach of the settlement agreement and filed a lawsuit. This defendant brought an anti-SLAPP motion which was dismissed by the motions judge, but then granted on appeal to the Ontario Court of Appeal.

Both *Pointes* and *Bent* were appealed to the SCC, which used them to clarify the requirements set out in s.137.1 of the *CJA* for a plaintiff to successfully defend an anti-SLAPP motion.

The Components of an Anti-SLAPP Motion

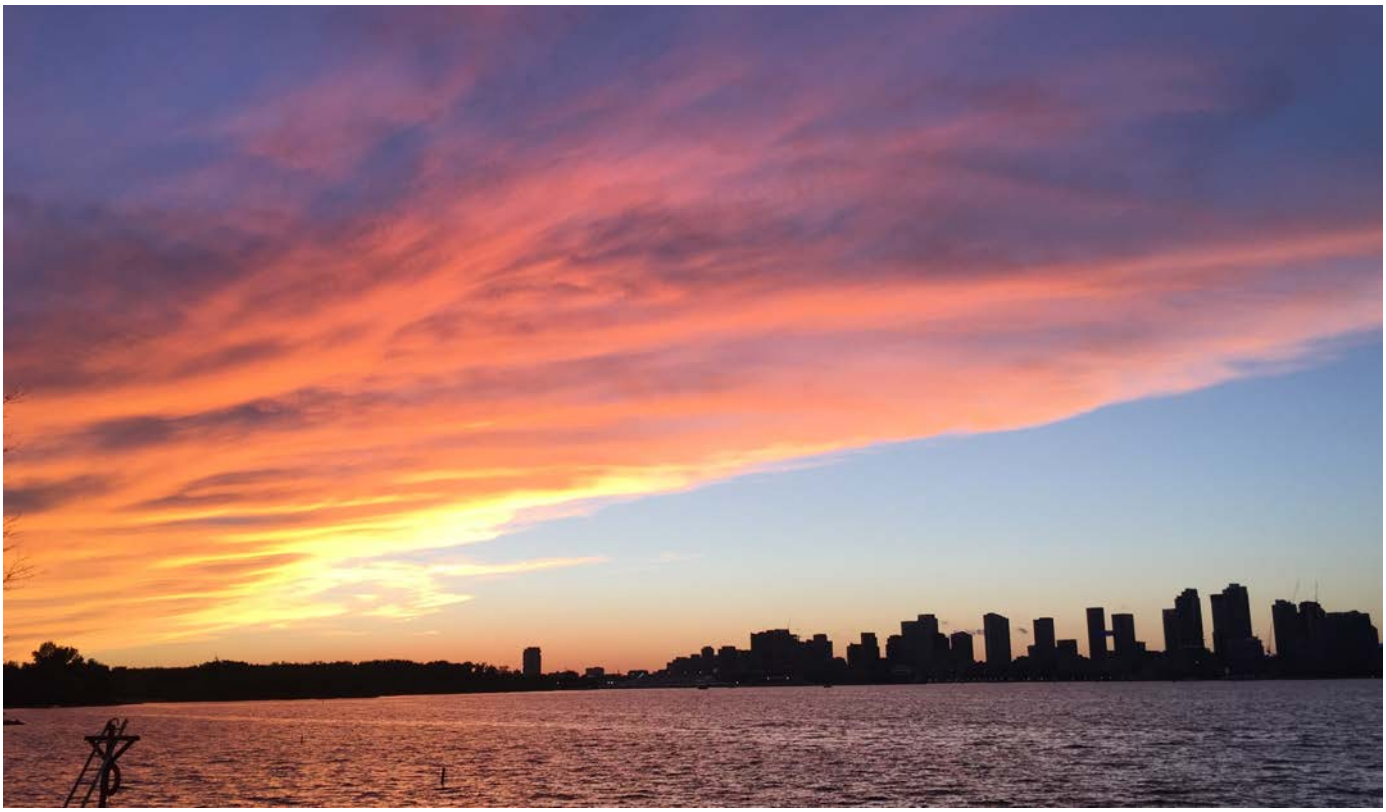
Per s.137.1(3) *CJA*, a defendant may move at any time after a proceeding is commenced for an order dismissing the proceeding, and the motions judge must dismiss the proceeding if satisfied, on a balance of probabilities, that the proceeding arises from an expression on a matter of public interest. (*7) The defendant must pass this threshold in order to move on to s.137.1(4) of the *CJA*, which shifts the onus to the plaintiff to demonstrate that there are grounds to believe that:

> 1. the proceeding has substantial merit;
> 2. the moving party has no valid defence in the proceeding; and
> 3. the harm likely to be or to have been suffered by the plaintiff is sufficiently serious such that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression in issue. (*8)
>
> (emphasis added)

Pointes and *Bent* clarify that a defence is "valid" within the meaning of s.137.1(4) of the *CJA* if it has a "real prospect of success." To have a "real prospect of success", a defence must be legally tenable, supported by evidence that is reasonably capable of belief, and have a prospect of success that, while not amounting to a demonstrated likelihood of success, tends to weigh more in favour of the person-sued. (*9)

Findings

The SCC dismissed the anti-SLAPP motion in *Bent* in a 5-4 split. The majority concluded that the defendant's defences of justification and qualified privilege were not valid defences with a "real prospect of success". The minority was convinced and would have granted the appeal and dismissed the plaintiff's claim.



Conversely, the SCC unanimously dismissed the plaintiff's case in *Pointes*, finding that the action lacked substantial merit and that the plaintiff did not demonstrate that the public interest was weighed in its favour. (*10)

Implications

Pointes and *Bent*, in addition to providing clarity regarding anti-SLAPP motions to Ontario and other provinces, also have important implications for potential litigants. Plaintiffs bringing claims against defendants for their public expression (e.g. alleging defamation) face a real possibility of having to respond to an anti-SLAPP motion. On the flip side, defendants who are sued for their expression on a matter—or those who are threatened with litigation because of their expression—now have more clarity on how they may use an anti-SLAPP motion to defend themselves.

However, *Pointes* and *Bent* do not give a clear answer as to how anti-SLAPP motions will be dealt with by judges in future cases. The strong divide between the majority and minority (a 5-4 split) in *Bent* indicates that the granting of an anti-SLAPP motion may be strongly dependent on judicial discretion. As there is more litigation on this matter, it will be interesting to see what the interplay will be between anti-SLAPP motions and traditional defences to defamation (e.g. fair comment), as well as what other legal context anti-SLAPP motions are brought in (aside from defamation or breach of contract).

When seeking to sue someone for the impacts of their public expression, or perhaps being sued yourself for such, it is important to consult a lawyer to determine whether an anti-SLAPP motion may be a relevant issue.

Haadi Malik
Student at Law

Endnotes
(*1) *1704603 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 ("*Pointes*") at para 2.
(*2) *Ibid* at paras 2-4, 20-21, 37, 49-67, 71-82.
(*3) *Courts of Justice Act*, R.S.O. 1990, c. C−43 ("*CJA*") at s.131.1.
(*4) *Pointes*, *supra* note 1.
(*5) *Bent v Platnick,* 2020 SCC 23 ("*Bent*").
(*6) *Ibid* at paras 1-6.
(*7) *Pointes*, *supra* note 1 at paras 2-4.
(*8) *Ibid* at paras 32-82.
(*9) *Ibid* at paras 49-60.
(*10) *Ibid*.

4. "Time is of the Essence" Contract Clause Upheld by Ontario Court of Appeal

The recent decision of the Ontario Court of Appeal in *Grasshopper Solar Corporation v. Independent Electricity System Operator* (*1) highlights the need for careful contracting. A "time is of the essence" provision was upheld by the Court in the context of a commercial dispute. The case also emphasizes the importance of properly drafted "entire agreement" and "waiver" clauses. In the event of a contractual dispute, these clauses may limit judicial analysis of the meaning and effect of a contract to the specific written words chosen by the parties – a dynamic often referred to as "keeping things to the four corners of the document".

Background

In 2016 an entity known as the "Independent Electricity System Operator" ("IESO") entered into a series of contracts with various renewable energy companies (*2) for the construction of solar facilities that would provide energy to the Ontario electricity grid.

The contracts required the energy companies (referred to in the contracts, and hereafter, as the "Suppliers") to achieve commercial operation for the facilities they were building by a specified Milestone Date for Commercial Operation (MCOD), which was in August or September 2019. The contracts each included the following provisions:

> 2.5 (a) The Supplier acknowledges that time is of the essence … with respect to attaining Commercial Operation of the Facility by the Milestone Date for Commercial Operation set out in Exhibit A. The Parties agree that Commercial Operation shall be achieved in a timely manner and by the Milestone Date for Commercial Operation.
>
> (b) The Supplier acknowledges that even if the Facility has not achieved Commercial Operation by the Milestone Date for Commercial Operation and this Agreement is not terminated in accordance with section 9.2 as a result of such failure, the term shall nevertheless expire on the day before the twentieth or fortieth anniversary (as applicable) of the Milestone Date for Commercial Operation, ….
>
> [Underlined Emphasis added]

Contract termination and default were addressed in Article 9 of the contracts, which provided:

> 9.1 Each of the following will constitute an Event of Default by the Supplier (each, a "Supplier Event of Default"):
>
> …
>
> (b) The Supplier fails to perform any material covenant or obligation set forth in this Agreement … if such failure is not remedied within 15 Business Days after written notice of such failure from the Sponsor (*3), provided that such cure period shall be extended by a further 15 Business Days if the Supplier is diligently remedying such failure and such failure is capable of being cured during such extended cure period.
>
> …
>
> (j) The Commercial Operation Date has not occurred on or before the date which is 18 months after the Milestone Date for Commercial Operation, or otherwise as may be set out in Exhibit A.
>
> …
>
> 9.2 (a) If any Supplier Event of Default … occurs and is continuing, upon written notice to the Supplier, the Sponsor may terminate this Agreement.

Termination pursuant to a Supplier Event of Default under s. 9.2 is significant in that it does not require the IESO to pay damages (in respect

of project costs incurred) to the Suppliers for ending each arrangement.

The various energy projects commenced. Delays were incurred in the course of performance.

The 2019 Warning Letter

On March 29, 2019, the IESO sent the following letter to the Suppliers:

> *This notice is to remind you that the Milestone Date for Commercial Operation … is September 8, 2019. As of the date of this letter, the Facility has not yet attained Commercial Operation. As you are aware, the failure to attain Commercial Operation by the Milestone Date for Commercial Operation (the "MCOD"), as required by Section 2.5 … is a breach of, and constitutes a Supplier Event of Default under, Section 9.1(b) ….*
>
> ***PLEASE NOTE** that except as expressly provided in the [Contract], the MCOD will not be extended. Failure to attain Commercial Operation by this date will constitute a Supplier Event of Default, for which the IESO will terminate the [Contract] pursuant to s. 9.2(a).*
>
> *It is the IESO's intent to strictly enforce its rights and remedies … and the Supplier may not rely on any of the IESO's past practices, waivers, statements or any actual or perceived indulgences regarding the achievement of the MCOD, whether with respect to this or any other contract, as a waiver of any of the IESO's rights or remedies …. For greater certainty, the IESO hereby specifically revokes its communication dated June 17, 2013 (*4) referencing a previous approach to project delays and potential Events of Default, and retracts any past waivers of its right to terminate contracts for failure to achieve Commercial Operation by the MCOD.*
>
> *…*
>
> *The IESO reserves all rights and remedies … including the right to exercise any rights and remedies at any time and from time to time including its right to terminate the [Contract] under Section 9.2(a).*
>
> *…*

The June 2013 Bulletin

A bulletin published by the Ontario Power Authority (OPA) in June, 2013 – referred to in the above Warning Letter - was cited and relied upon by the Suppliers in the dispute described below as evidence of a waiver by the IESO of its contract termination rights or a signalling that it would not be enforcing them to the full extent of the contract "letter". The Ontario Power Authority ("OPA") was the body responsible for power system planning and procurement of new power generation until 2015, when it amalgamated with the IESO and continued operations under that name. The OPA published the following bulletin on its website in June 2013, prior to the formation of the contracts with the Suppliers. The bulletin, entitled "*Approach to project delays and potential Events of Default*" provided as follows:

> *In response to a number of questions the OPA has received regarding project delays and potential Supplier Events of Default, the OPA has developed the following approach to such delays. Please note that the information provided here is meant for informational purposes only and shall not be relied on by Suppliers*.
>
> *Suppliers will be sent a letter should they fail to meet their Notice to Proceed (NTP) Request date and/or their Milestone Date for Commercial Operation (MCOD). The letter will advise that the OPA will not act upon its termination rights arising under Sections 9.2(a) of the FIT Contract for those Suppliers that have not provided the OPA with a completed NTP Request in compliance with Section 2.4(c) of the FIT Contract and/or have not attained Commercial Operation of the Contract Facility on or before the MCOD pursuant to*

Section 2.5 (or Schedule 2 Special Terms and Conditions (Launch Applications)) of the FIT Contract.

This information does not constitute a waiver of any actual or potential default, nor does it amend the FIT Contract. The FIT Contract remains in full force and effect. For clarity, it shall remain a Supplier Event of Default (and the OPA maintains its right to terminate the Supplier's FIT Contract) if the Commercial Operation Date has not occurred on or before the following…. the date which is 18 months after the Milestone Date for Commercial Operation pursuant to 9.1(j) of the FIT Contract.

Questions about this approach to delays and potential Events of Default should be directed to your contract analyst.

The Initial Court Application

The Suppliers commenced a court application in July 2019 for a determination of their contractual rights in light of the 2019 Warning Letter. They maintained that the IESO was required on termination to compensate them for their construction costs. In turn the IESO maintained that the circumstances permitted it to terminate the contract without the payment of any costs or damages.

The judge ruled that IESO had the right to terminate the contracts without paying damages.

The application judge began with section 2.5(a) of the contract, which stated that time is of the essence with respect to achieving commercial operation. He noted that "time is of the essence" clauses require strict compliance and that the failure to meet a timeline in a contract with such a clause entitles the other party to terminate the contract, citing the case of *Di Millo v. 2099232 Ontario Inc.* (*5). The application judge noted, further, that s. 2.5(b) specifically referred to IESO's right to terminate the contract in accordance with s. 9.2 for failure to achieve commercial operation by the MCOD, and that the definition of MCOD in the contracts defined the MCOD as the date "by which the facility is required to attain Commercial Operation". The application judge concluded that the obligation to achieve commercial operation by the MCOD was a "material covenant or obligation" to which section 9.1(b) applied.

The application judge rejected the appellants' submission that the failure to achieve commercial operation by the MCOD was not an Event of Default because it was not specifically listed in s. 9.1. The application judge acknowledged that s. 9.1(j) refers to a termination 18 months following the MCOD, but he interpreted this provision as a "long-stop termination right" – a hard stop deadline with no cure period that applied if the IESO waived its right to terminate the contract under s. 9.1(b) for failing to meet the MCOD. Thus, s. 9.1(b) was not inconsistent with s. 9.1(j).

Certain of the Suppliers raised the question whether the ISEO had was legally "estopped" (that is, prohibited on grounds of fairness) from terminating the contracts, assuming that it was otherwise entitled to do so. The Suppliers cited the June 2013 Bulletin. They argued there had long been a shared assumption that the ISEO would not terminate the contracts unless commercial operation was not achieved within 18 months of the MCOD. The application judge applied the relevant "estoppel by convention" doctrine as outlined by the Supreme Court of Canada in *Ryan v. Moore* (*6) setting forth the following principles:

- The parties' dealings must have been based on a shared assumption of fact or law: estoppel requires manifest representation by statement or conduct creating a mutual assumption. Nevertheless, estoppel can arise out of *silence* (impliedly).

- A party must have conducted itself, i.e. acted, in reliance on such shared assumption, its actions resulting in a change of its legal position.

- It must also be unjust or unfair to allow one of the parties to resile or depart from

> the common assumption. The party seeking to establish estoppel therefore has to prove that detriment will be suffered if the other party is allowed to resile from the assumption since there has been a change from the presumed position.

The application judge found that there was no shared assumption that the respondent would not terminate the contracts for failure to achieve commercial operation by the MCOD. The IESO never waived its rights of termination. The judge noted that the June 2013 bulletin stated specifically: 1) that the ISEO had the right to terminate under s. 9.2(a) for failure to reach commercial operation by the MCOD; 2) that it was "*for informational purposes only and shall not be relied upon by suppliers*"; and 3) that the information provided in the bulletin "*does not constitute a waiver of any actual or potential default, nor does it amend the FIT [Contracts]. The [Contracts] remain in full force and effect*".

The application judge found that the bulletin was simply an announcement of the IESO's approach to project delays – how it intended, at the time, to approach breaches with respect to the requirement to achieve commercial operation by the MCOD. The application judge stated that IESO was free to change its approach provided that it gave reasonable notice of its intention to do so, and that the Warning Letter, giving six months' notice prior to the MCOD, provided reasonable notice.

Finally, the application judge concluded that an "entire agreement" clause in the contract language precluded the June 2013 Bulletin and any past practice on the part of the IESO from amending the terms of the contract. The judge also noted that a "waiver" provision in the contract - which requires waiver of contractual terms to be executed in writing - prevented the Suppliers from relying on "estoppel by convention" arising out of previous contractual waivers by the IESO.

Accordingly, it was held that the IESO was within its rights to terminate the contracts without any damages or payments owing to the Suppliers.

The Appeal to the Ontario Court of Appeal

The Suppliers appealed to the Ontario Court of Appeal, raising two issues:

First, did the application judge err in concluding that the contracts could be terminated by the IESO if the appellants failed to achieve commercial operation by the Milestone Date? Second, if the contracts permitted the IESO to terminate on this basis, did the application judge err in finding that it was not estopped (that is, prevented by principles of fairness) from doing so?

The Court of Appeal concluded that the application judge did not err in finding that the IESO had the right to terminate the contracts without paying damages and in finding that it was not legally "estopped" from terminating the contracts. IESO was entitled to terminate the contracts pursuant to section 9.2 as a result of the appellants' failure to achieve commercial operation by the MCOD.

The Court of Appeal placed significance on section 2.5(a):

> *The Supplier acknowledges that time is of the essence to the Sponsor (i.e. IESO) with respect to attaining Commercial Operation of the Facility by the Milestone Date for Commercial Operation … The Parties agree that Commercial Operation shall be achieved in a timely manner and by the Milestone date for Commercial Operation.*

The Court noted that this provision makes plain not only that the parties agreed that commercial operation was to be achieved in a timely manner, and in any event by the MCOD, but also that time was of the essence. "Time is of the essence" is a term with a clearly defined and well understood meaning. In short, and as the application judge noted, strict compliance with the MCOD was required. The failure of a supplier to establish commercial operation by the MCOD gave rise to the respondent's right to terminate the contract.

Section 9.1(j) must be understood not as addressing the failure to achieve commercial operation on the timely basis required by s. 2.5

but, instead, the failure to achieve commercial operation within 18 months of the MCOD. As the application judge concluded, s. 9.1(j) establishes a "hard stop" – a clearly defined deadline for completion of the project. Thus, s. 9.1(j) is relevant only if commercial operation has not been achieved by the MCOD *and* the IESO had chosen not to terminate the contracts on that account.

The breach in this case occurred when the Suppliers failed to achieve commercial operation by the MCOD. The respondent had the right to terminate the contract if the appellants failed to cure the breach in accordance with s. 9.1(b).

Did the application judge err in concluding that the IESO was not estopped from terminating the contract?

The Court of Appeal noted that the doctrine of estoppel cannot vary the terms of a contract. It may operate to prevent a party from relying on the terms of the contract to the extent necessary to protect the reasonable reliance of the other party. Thus, the doctrine has the potential to undermine the certainty of contract and must be applied with care, especially in the context of commercial relationships between sophisticated parties represented by counsel. (*7)

"Estoppel by convention" is a relatively rare form of estoppel that may arise when both parties to a contract act based on a shared assumption concerning circumstances relevant to their contract. If it would be unfair to allow a party to resile from the assumption, the doctrine operates to provide a remedy for detrimental reliance on the assumption by the other party. In effect, the estoppel operates to "circumscribe the factual context in which the contract exists, thus affecting the obligations that the contract contains". (*8) Estoppel by convention requires a "manifest representation" of a shared assumption, which may arise out of a statement or conduct but may also arise from silence. Regardless of how an assumption arises, it must be clear and it must be shared. There is no room for doubt about the nature of an assumption that gives rise to the estoppel.

The Court of Appeal noted that the June 2013 Bulletin said to give rise to the shared assumption is qualified by language that can only be understood as designed to preclude reliance on it. This is plain from the first line in the bulletin, which emphasized that it was for "*informational purposes only and shall not be relied on by Suppliers*". The Bulletin also contained language which was categorical in reserving the IESO rights under the contracts:

> *This information does not constitute a waiver of any actual or potential default, nor does it amend the [Contract].*

The Court of Appeal found that on any objective analysis it could not be said that the IESO intended the June 2013 Bulletin to be relied on as though it were a promise. At the very least, the bulletin was insufficiently clear as to constitute a promise. The Court noted that even assuming that it could constitute a promise, it was not a promise made to the Suppliers: it was directed to suppliers holding contracts in 2013, prior to the Suppliers entering into their contracts with IESO. Thus, the claim that IESO was estopped from asserting its rights was unsuccessful.

The Entire Agreement Clause / Waiver Clause in the Contracts

Further and in any event the Court of Appeal noted that the "Entire Agreement" and "Waiver" clauses in the contracts prevented the Suppliers from relying on any past practices on the part of IESO. The alleged waiver of legal rights was not in writing. The "Waiver" clause provided that any alterations had to be in writing and signed by the parties to be of any effect. As to the effect of the "Entire Agreement" clause, the Court of Appeal cited its decision in *Soboczynski v. Beauchamp* (*9). In that case, the purpose and effect of "Entire Agreement" clauses were reviewed, with the holding that, in general, such clauses were to be considered to be retrospective rather than prospective in nature, operating to exclude from the contract interpretation process statements made *before* the contract came into existence.

Accordingly, the Suppliers could not rely on either the June 2013 bulletin or any alleged practice by IESO of waiving breaches by other suppliers that occurred *before* the execution of the Suppliers' contracts.

Accordingly, the appeal was dismissed. IESO was permitted to terminate the contracts with the Suppliers without paying any costs or damages.

Conclusion

As noted at the outset, parties negotiating the terms of a contract must be very careful in identifying that their business plan, risk appetite, and intentions are given proper effect in the contract words chosen and that the contract will be enforceable in the event of a dispute. "Time being of the essence" clauses deserve deliberate and careful study.

Gordon Hearn

Endnotes

(*1) 2020 ONCA 499 (CanLII)

(*2) The companies were as follows:
Grasshopper Solar Corporation, GSC Solar Fund I Inc., One Point Twenty One Gigawatts Inc., Egerton Polar Power LP, and MPI GM Solar 1 LP, KL Solar Projects LP, Highlands Solar Projects LP, Madawaska Solar Projects LP, McNab Solar Projects LP, PB Solar Projects LP, Ramara Solar Projects LP, Sudbury Community Solar Projects LP and Sustainable Ottawa Projects LP

(*3) The "Sponsor" being for all essential purposes the Independent Electricity System Operator.

(*4) See "The June 17, 2013 Bulletin" narrative below

(*5) 2018 ONCA 1051, 430 D.L.R. (4th) 296, at para. 31

(*6) 2005 SCC 38, [2005] 2 S.C.R. 53, at para. 59

(*7) "*Estoppel is a fact-specific doctrine and are to be received with caution and applied with care".* See: *Harper v. Cameron* (1892), 2 B.C.R. 365 (Div. Ct.) at p. 383.

(*8) Bruce MacDougall, *Estoppel*, 2nd ed. (Toronto: LexisNexis Canada, 2019), at s. 1.14.

(*9) 2015 ONCA 282, 125 O.R. (3d) 241, at paras. 43-53

5. Changes in Ontario's Employment Realm: What You Really Autumn Know

This fall season has brought with it some noteworthy changes to various employment regulations in the province.

Ontario's minimum wage increase
Effective October 1, 2020, Ontario's minimum wage will increase by $0.25 per hour for a majority of employees across various types of employment as follows:

Type of minimum wage	Rate from January 1, 2018 to September 30, 2020	Minimum wage effective October 1, 2020 to September 30, 2021
General	$14.00	$14.25
Student	$13.15	$13.40
Liquor Server	$12.20	$12.45
Homeworker	$15.40	$15.70

Extension of IDEL Regulation

On May 29, 2020, the provincial government issued the Infectious Disease Emergency Leave regulation (*1) (the "IDEL Regulation"), which permitted employers – for reasons related to the COVID-19 pandemic – to temporarily reduce a non-unionized employee's hours or wages, or temporarily lay them off altogether, without triggering constructive dismissal concerns under the *Employment Standards Act, 2000* ("*ESA*") (*2). Under the IDEL Regulation, employees who were temporarily laid off after March 1, 2020 are deemed to be on leave, rather than on a layoff.

In our August 2020 edition of *The Navigator*, we noted that the IDEL Regulation was set to expire on September 4, 2020, and that if an employer continued to keep an employee on a temporary layoff after this date, this could, in certain situations, amount to a constructive dismissal, which would terminate the employment relationship and require that a termination package be paid to the employee.

On September 3, 2020, a day before the IDEL Regulation was scheduled to expire, the Ontario government announced that it would be extending the IDEL Regulation until January 2, 2021. As a result of this extension, the status quo will remain in effect at least until January 2, 2021: employers will be permitted to keep non-unionized employees on leave for reasons related to the pandemic without attracting the usual termination and severance rules under the *ESA*.

The interaction between the IDEL Regulation and the common law has yet to be tested at this time. Further, with COVID-19 numbers on the rise once more, employers will need to decide how to deal with employees whom they may not be in a position to recall by January 2, 2021. Therefore, if you are an employer who has needed, or will need, to rely on the IDEL Regulation, we encourage you to seek legal advice in order to carefully consider how to address such ongoing employment issues in your workplace.

Janice C. Pereira

Endnotes
(*1) O. Ref. 228/20: *Infectious Disease Emergency Leave* regulation ["IDEL Regulation"].
(*2) S.O. 2000, c. 41 ["ESA"].

6. The Duty to Defend Comes in from the Cold

A recent case heard by the Court of Appeal of Alberta, *Intact Insurance Company v. Clauson Cold & Cooler Ltd.* (*1), helps to illustrate the very broad duty of insurers to defend claims made against their insureds. In this case, the insured, a cold storage facility, was sued by two of its customers for losses from food thawing at the insured warehouse due to an equipment breakdown, causing the food to spoil. The decision of the Court of Appeal, ultimately in the storage company's favour, confirmed that the policy wording was broad enough to cover the claims made against the insured, and that the insurer had a duty to defend its insured under the policy wording. It further reinforced the basic principle that, in answering the question of whether an insurer will have the duty to defend its insured, the claim made against the insured will be read as generously as possible when determining whether it is covered by the policy.

The Policy

In appealing the findings of the lower courts made in favour of Clauson, the insurer, Intact Insurance Company ("Intact"), advanced two main arguments: 1) that the wording in the policy requiring it to defend its insured was limited to three sections of its Commercial General Liability (CGL) form, and did *not* extend to the entire policy; and 2) that the exclusions in the policy limited coverage to Clauson's *own* losses, and did not extend to losses suffered by its customers which had sued it for damages. It is worth pausing here to note that Clauson's insurance policy comprised 20 forms adding up to around 150 pages in total.

The Court of Appeal rejected Intact's first argument, remarking that all the parts of the policy had to be read as one whole by the clear words of the insurance contract. It pointed specifically to the language stating that "Policy Declarations together with the Supplementary Declarations, Policy Conditions, forms, riders and endorsements, if any, issued to form a part thereon, completes the Policy" (*2). Relying on this language, the Court reasoned that the capitalized word "Policy," which appeared both in the CGL form and also in the definitions in the declarations page, must therefore refer to all the forms in the policy, and not just the CGL form. As the duty to defend language in the CGL form referred that duty to the terms of the "Policy" (capitalized), it had to apply to the policy's other forms, including the Equipment Breakdown Coverage – Standard Comprehensive (BM31) and the Equipment Breakdown Coverage – Consequential Damage (BM35).

As to the second argument, the Court of Appeal was equally dismissive. Here, it noted that the first party coverage under the policy expressly included property "of others" as part of this coverage. It also quoted the specific language where it was stated to apply to:

> … physical loss or damage to property of the 'Named Insured' *and to the property of others in the care, custody or control of the 'Named Insured' for which the 'Named Insured' is legally liable*, arising directly from an 'Accident'. . . (*3)

To the Court of Appeal, this language unambiguously afforded coverage for third party losses to Clauson.

At the end of its reasons, the court couldn't resist further remarking that its interpretation was consistent with the commercial reality of Clauson's business. It thus observed that it would have been distinctly odd if a company in the business of providing freezer storage had not, somewhere in the 150 pages of its insurance contract, provided coverage for the most common type of risk it was likely to face; that is, a claim of a customer that its product had not been kept frozen.

Conclusion

This case illustrates how the law builds in strong presumptions in favour of an insured when interpreting whether it will have coverage under

a policy of insurance. This further shows how a bias in the law preferring one party actually evolved as a means of preserving overall fairness. While insurance is a necessary means for businesses to manage risk, business owners are only really experts in their own business, and not in the art of interpreting insurance language. A bias towards the insured would therefore level this particular playing field. This is why the principle exists that places the burden on the insured only to first demonstrate the claim made against it broadly falls within the coverage provided. Once this low bar is met, the burden then shifts to the insurer to prove that a policy exclusion applies that would permit it to deny coverage.

The duty to provide a defence, however, is broader still. For this, the insured need only show that the claims made against it, when read generously, *arguably* fall within the coverage afforded by the policy. Despite all these protections, however, it is still important to make sure you have the coverage for the risks you anticipate. In this case, it was important to Clauson's freezer business that it be insured not just for its loss when equipment breaks down, but also for the losses of its customers. Fortunately, the policy had specific language that would cover this risk.

Oleg M. Roslak

Endnote
(*1) 2020 ABCA 161 [*Clauson*].
(*2) *Clauson* at para. 25.
(*3) *Clauson* at para. 30.

7. COVID-19 Litigation Update

We are now six months past that fateful week of March 9th when everything changed for Canadians and we headed into the pandemic shutdown. Though we recently progressed to further freedoms, we are now facing a return to some restrictions. On September 25, Ontario Premier Doug Ford announced, amongst other measures, the prohibition of the sale of alcohol at restaurants, bars and clubs after 11 p.m. This would appear to be just the beginning of how Ontario handles the "Second Wave", which is now upon us.

Of course, there is much to report (and which we do not attempt to cover here) about what has changed in our personal and business lives and, for those in the transportation world, the truly "tectonic shifts" in every sector. This article will provide an update on the litigation and a test case conducted in the UK on business interruption coverage.

Litigation Update

In previous editions of *The Navigator*, we have written about the various class actions and other litigation that have been commenced or are on the horizon. These actions have included claims against insurers for denied business interruption coverage claims; public interest organizations suing municipalities for deplorable conditions in the shelter/respite systems; price gouging claims; ticket holders suing airlines/hotels/travel agencies for failure to refund ticket prices; prisoners suing prisons for living and work conditions during the pandemic; dismissal of employees during the shutdown; cruise line passengers suing cruise lines; and students bringing actions against universities/colleges for failure to provide the promised experience and curriculum. There has been recent consideration of whether schools and those operating at-home "pandemic pods" could be at risk of legal action in the event of an outbreak. There is also a case involving anti-vaccination groups' claims under Canada's *Charter of Rights and Freedoms* against the government's allegedly extreme and unjustified response to the pandemic, including compulsory face masks, social distancing and closure of businesses.

The larger class action lawsuits have arisen out of the claims against long term care facilities and retirement homes including a $50-million class action lawsuit in Ontario and a $25-million class-action lawsuit in Alberta. These suits are brought on behalf of victims' families against retirement homes and long term care facilities and allege that those entities were negligent, did not follow proper protocols to prevent an outbreak of COVID-19 and/or failed to isolate those confirmed to have the virus and/or failed to take victims to hospital. Most recently, a class action against Altamont Care Community was filed for $20 million in respect of the 50 residents who died and for those still resident in the facility.

There has been speculation that there will be new legislation that may be on the horizon in Ontario and other provinces that might affect some of these actions. The legislation may provide some measure of civil immunity with regard to claims against people and businesses that, despite all efforts, were, through no fault of their own, unable to prevent the spread of COVID 19, which may have caused harm to others. However, this would not likely shield such people and businesses from liability for negligence or a failure to act in good faith. There would likely still be liability where the named actor was negligent or grossly negligent, reckless or irresponsible.

To date, there has been no such legislation passed in Ontario. (*1).

There has also been no movement regarding possible legislation to retroactively require insurers to cover pandemic COVID 19 business interruption claims despite exclusions in policy wording, unlike in the United States, where there have been bills proposed that would not allow insurers to deny claims for loss of use and occupancy in cases where the claim involves (i) a virus (even where there is an exclusion); (ii) no physical damage to insured property; or (iii)

because of acts of civil authority or decisions of a government entity.

Business Interruption Litigation Update: UK Test Case

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

In the UK, a test case seeking judicial determination of the scope and meaning of sample insurance wordings was brought to help clarify uncertainty regarding business interruption coverage. Several insurers (some who also write in the Canadian market) participated in the case brought by the UK's Financial Conduct Authority ("FCA"). There were 21 different sample policy wordings from eight different insurers considered. The FCA represented the interests of policy holders, for the most part medium sized businesses.

The High Court of England and Wales released its decision on September 15, 2020, *The Financial Conduct Authority v Arch and Others* (*2). This decision will no doubt have impact on Canadian cases as Canadian courts will consider UK decisions though same are not binding; however, this test case did not deal with the issue of physical loss or damage as noted to be of concern above. This is because there is essentially market agreement as to how those cases should/will be handled. It will take private litigants and their cases to impact interpretation in due course. (*3)

The Court dealt with business interruption coverage centring on "Restriction to Access" clauses, and "Disease Clauses" and those that combined both or hybrid clauses.

Disease Clauses

Many of the policies examined in the test case contain extensions for defined "notifiable" diseases, which coverage provided indemnification in respect of interruption or interference with the insured business during a specified indemnity period following a disease occurrence within a delineated geographical area of the premises insured (such as 25 miles). The insurers argued that such coverage was limited to local occurrences of the disease and was not a "check box" for coverage for larger or pandemic occurrences.

The FCA, in contrast, argued that the discrete occurrence of the disease within the defined radius triggered cover and was not severable from the pandemic as a whole. Therefore, business interruption resulting from the pandemic and related government restrictions was caused by the triggering occurrence.

The Court found that as soon as the disease could be diagnosed the coverage was triggered whether there was symptomatic disease or actual diagnosis. The proximate cause of the business interruption was the outbreak, even if, for the policy geographical area, the disease outbreak was not serious or did not directly cause the loss. At the end of the day, there was no express wording limiting coverage to outbreaks within the defined geographical area in the policy. As a result, coverage under such clauses would seem to be available to those insureds suffering a provable loss, having to prove only one diagnosable case within the defined geographical area noted in the subject policy.

The Court also considered and ruled more narrowly upon two other policy wordings, which required damages to be "in consequence of" certain "events".

Restriction to Access Clauses

The Court reviewed policy wordings providing coverage for the increased cost of working in situations where access to the insured's premises was restricted as a result of a public authority heath order or action arising out of an emergency

that was considered likely to endanger life or property.

The FCA argued that such restriction or prevention of access impacted the insured's intended business, aim or purpose, whether partial or total and that an insured's resulting inability to use the premises could be caused by such restrictions imposed directly on them or their business, customers or others who were required to attend the premises if such business was to function for its intended purpose The FCA argued that such interruption to the insured need not be a complete cessation of their activity. Rather an interruption to an insured's activities was accomplished if there was a "material" prevention of use of the premises.

In this regard, the Court would not rule on whether such clauses would read the way that the FCA suggested, but rather noted that such coverage determinations are fact driven and specific, impacting interpretation and outcome. Also, some of the policy wordings reviewed required that such restriction or prevention to access would require an order issued with the force of law, whereas in some circumstances coverage would not be triggered because the subject government action was advisory not mandatory, as may be required under certain wordings.

The Court did note that the full cessation of any insured business was a prerequisite to coverage, but also noted that more than a mere hindrance or disruption of the insured's use would likely be required to trigger coverage. The facts of each case and the impact on a particular business would have to be reviewed (to see if the appropriate standard was met regarding the restriction to access) in each case as some businesses are/were able to continue working in a reduced or altered capacity (such as restaurants moving to delivery or take out or where coverage might be more readily available where restaurants could not transform meaningfully in this respect).

Other Issues

Regarding hybrid policies, the Court took a broad approach of when the defined disease occurred and the cause of the restriction to access, but terms like "inability to use" were to be construed narrowly and the factual matrix would be front and centre.

The Court also considered issues surrounding the calculation of the loss involving "Trends Clauses." Such clauses are drafted to take into account outside factors and market forces (such as recessions) when calculating business interruption losses such as what would have occurred had the loss not happened. Essentially, the insurers argued that the losses resulted from the insured events alone and not the widespread economic downturn that resulted from the pandemic, which would make the calculable losses and valuations far lower. The Court did not agree stating that the very insured peril of COVID-19 caused business interruption could not then be used to limit or downwardly adjust coverage.

The decision has been appealed on an expedited basis.

Finally

The UK test case may have an effect on Canadian case law as Canadian courts start to grapple with the cases brought before them. There are also procedural factors that will affect the hearing of these cases and will be reviewed in future editions of *The Navigator*. Insurers will be reviewing and refining wordings and the appropriate coverage for each business must be examined with extreme care. We will continue to keep you apprised.

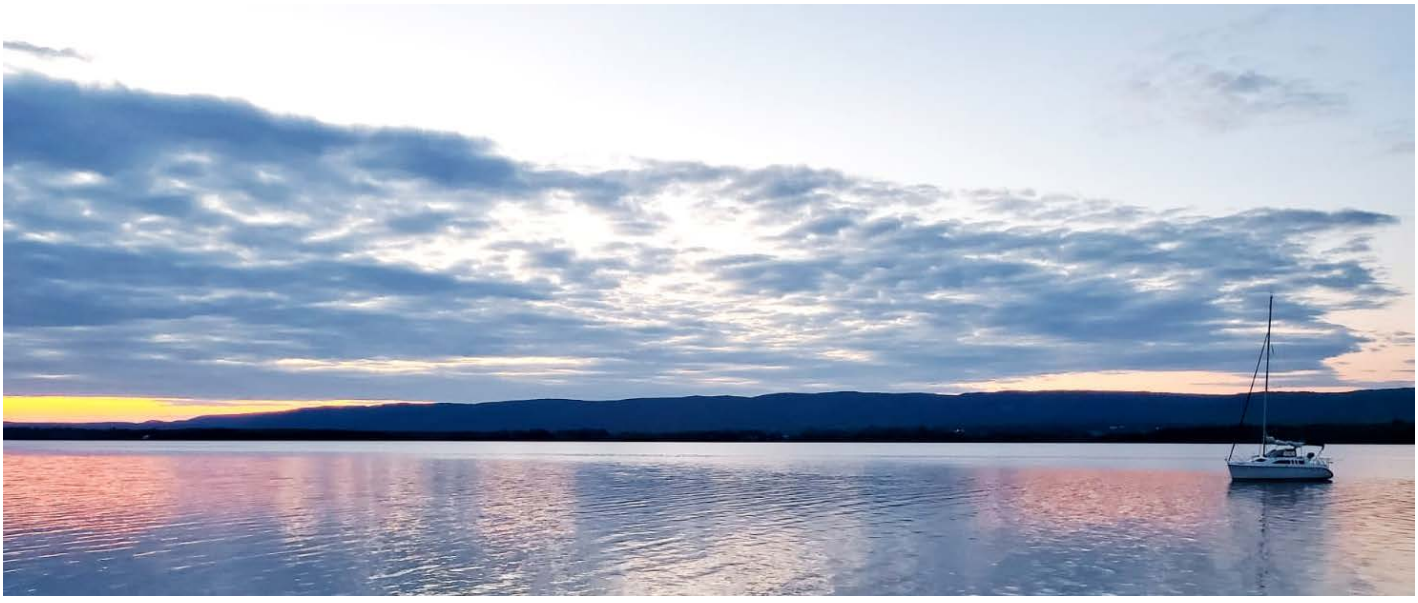
Kim E. Stoll
Follow Kim on LinkedIn and at url: linkedin.com/in/kim-stoll-transportationlaw

Endnotes

(*1) To read our review of the situation in British Columbia and the United States in this regard, please see the June 2020 edition of *The Navigator^*, available on the Fernandes Hearn LLP website at www.fernandeshearn.com

(*2) [2020] EWHC 2448 (Comm)

(*3) Generally speaking, so far US cases seem to be supporting that COVID 19 situations do not contain a physical component; however, there are some precedents that come to the opposite conclusion. In the May 2020 edition of *The Navigator*, we examined the US approach to that date and also reviewed *MDS Inc. v Factory Mutual Insurance Company (FM Global)* 2020 ONSC 1924. Justice Wilson in the Ontario Superior Court held that, under an all-risk policy, the "physical damage" requirement for coverage may be satisfied by a loss of use; however, we noted that *MDS* is not a COVID 19 case and involved a particular and unique set of facts and specific policy wording and, further, the case was about the application of an exclusion not regarding the coverage grant. We will report on further cases as more are heard.



8. Medical Cannabis and the Duty to Accommodate in a Safety Sensitive Workplace; showing undue hardship is harder than you think

A worker who uses medical cannabis to treat a disability, and who is employed in a safety-sensitive workplace, is entitled to be accommodated by his or her employer to the point of undue hardship. Until recently, the case law provided that the absence of a scientific and reliable method of measuring impairment from the use of medical cannabis amounts to undue hardship for the employer in a safety-sensitive workplace. As a result, the employer can refuse to employ the worker. This summer, the Court of Appeal of Newfoundland and Labrador in *International Brotherhood of Electrical Workers, Local 1620 v. Lower Churchill Transmission Construction Employers' Association Inc.* (*1) overturned this decision.

The worker in this case applied to work at a construction site. As part of his pre-employment drug screening he disclosed his authorization for medical cannabis which he used for pain management. He did not pass the drug test and the employer refused to hire him. His union put forward a grievance. The arbitrator found that, while the worker was discriminated against, the employer could not accommodate him without undue hardship.

There was no dispute that this was a safety-sensitive position and workplace, and that impairment or the adverse effects of drugs or alcohol could result in risk of injury or incident in the workplace. The arbitrator found that refusing to hire the worker did amount to discrimination, and so the accommodation process was engaged. An employer has the duty to accommodate a worker to the point of undue hardship. With respect to accommodation, the arbitrator held that the use of medical cannabis created a risk of impairment on the jobsite and the employer could not readily measure impairment from cannabis based on the available technology and resources. The inability to measure and manage that risk of harm constituted undue hardship for the employer. The union sought judicial review of the arbitrator's decision, which was dismissed, and so it appealed that decision to the Court of Appeal.

The majority of the Court of Appeal held that, in order for the employer to discharge its duty to accommodate the worker to the point of undue hardship, it was necessary for the employer to consider an *individualized* assessment of the employee, rather than relying on the absence of a test or standard. In other words, the employer should have considered other options or alternatives to a scientific or medical standard such as a functional assessment of the worker before each shift, or some other means of assessing his ability to perform the job safely. If the employer had considered other options or alternatives, the employer would then need to demonstrate why they were rejected in favour of a scientific or medical standard.

The Court of Appeal held that the employer failed to provide evidence necessary to discharge the onus of demonstrating that accommodation of the worker on an individual basis would result in undue hardship. The Court of Appeal also held that, until the additional component of the analysis, being the individual assessment, has been completed, it was not possible to determine whether the worker should or would have been hired. As a result, the matter was remitted for a determination of whether there was another means of individual assessment of the worker's ability to perform the job safely, which would provide an option for accommodation without undue hardship.

Interestingly, the dissenting judgment would have upheld the arbitrator's decision. Justice Hoegg stated that the employer had demonstrated the risk that the worker could be impaired on the job due to use of medical cannabis. The employer then established, through witnesses and documentary evidence, that there was no way to reasonably evaluate whether the worker was impaired when he reported for work each morning. The practical effect of the majority's reasoning is that the

employer should give the worker the chance to work on site to see if he can perform the job safely. To cause the employer to take safety risks to see if the worker can work without causing an accident amounts to undue hardship.

Lessons for Employers

First, ensure that your workplace has a "Fit for Duty" policy which includes the obligation on an employee to self-disclose a medical cannabis authorization where the position and/or workplace is safety sensitive. The policy should also include privacy safeguards and a clear statement of the employer's duty to accommodate to the point of undue hardship.

Second, ensure that the accommodation process is followed and that it includes individualized assessment of accommodation.

And third, only after conducting such individualized assessment of accommodation should an employer conclude that undue hardship exists, if the evidence supports this; this is the employer's onus should there be a human rights complaint.

Carole McAfee Wallace

Endnotes
(*1) 2020 NLCA20 (CanLII)

9. Can a Private Consultant be Deemed a Dependent Contractor? It Depends. Case study: *Jack Ganz Consulting Ltd. v. Recipe Unlimited Corporation*, 2020 ONSC 3319

In Canadian employment law, employers are required to give the employees whom they terminate without cause reasonable notice of termination or pay in lieu of notice, among any other applicable payments and entitlements (i.e. severance pay). Employers are not required to give such notice to any independent contractors they may hire.

In many cases, the line between whether a worker is an independent contractor or an employee can appear to be unclear. There have been several lawsuits in which a contract worker, who has been hired as an "independent contractor", claims that he/she is effectively the hiring company's employee, or alternatively, a "dependent contractor" (an intermediate category). As stated above, if a court deems such a worker to be an *employee*, the worker will have access to all the legal entitlements an employee would normally have upon termination (i.e. notice or pay in lieu, vacation pay, other applicable benefits). If deemed by a court to be a *dependent contractor*, Ontario courts have found that the worker would be entitled to reasonable notice or pay in lieu thereof. (*1)

Recently, the Ontario Superior Court of Justice heard *Jack Ganz Consulting Ltd. v. Recipe Unlimited Corporation*, 2020 ONSC 3319 (*"Jack Ganz*"), a case involving a dependent contractor claim by a company's long-time consultant. (*2)

In *Jack Ganz*, the plaintiff consultant was retained in 2006 by the defendant company pursuant to a consulting agreement that had a term of three years with the option of renewal; it was renewed several times. The parties' professional relationship ended in conflict in the fall of 2014. As a response, the plaintiff initially sued for breach of contract, and later amended his Statement of Claim to include a claim for common law reasonable notice on the basis that he was a dependent contractor.

To determine whether the plaintiff was indeed a dependent contractor, the court applied the leading test from *McKee v. Reid's Heritage Homes Limited*, 2009 ONCA 916.(*3) ("*McKee*") First, this test asks whether the worker is an employee or contractor, in light of the following factors:

1. whether or not the agent was limited exclusively to the service of the principal (if so, the agent is more likely to be an employee);
2. whether or not the agent is subject to the control of the principal, not only as to the product sold, but also as to when, where and how it is sold (if so, the agent is more likely to be an employee);
3. whether or not the agent has an investment or interest in what are characterized as the "tools" relating to his service (if so, the agent is more likely to be a contractor);
4. whether or not the agent has undertaken any risk in the business sense or, alternatively, has any expectation of profit associated with the delivery of his service as distinct from a fixed commission (if so, the agent is more likely to be a contractor); and
5. whether or not the activity of the agent is part of the business organization of the principal for which he works. In other words, whose business is it? (the more the agent is part of the business organization, the more likely he or she is an employee). (*4)

Next, if the worker is found by the Court not to be an employee but rather a contractor, the test asks whether the employee is a dependent or independent contractor. A contractor will be considered "dependent" if he/she works exclusively for the hiring company, and/or is economically dependent on the hiring company.

The Court in *Jack Ganz* applied the *McKee* factors and found that the plaintiff was <u>not</u> a dependent contractor and thus was not entitled to pay in lieu of notice. The Court noted that the plaintiff did

not amount to an employee or dependent contractor of the defendant company because:

- He was not economically dependent on the company, as he was free to take other consulting jobs (there was no relationship of exclusivity);
- He was free to hire his own employees or subcontract services;
- He had significant sources of income other than from the defendant company and therefore was not economically dependent on the defendant company;
- There was not much evidence of 'control': the defendant company did not decide the methods the plaintiff used to do his job, require him to report to them, direct his work, require him to follow any codes of conduct or discipline him; and
- When given the option at that the start of the parties' business relationship, the plaintiff actively chose to enter into an agreement with the defendant as a consultant on contract rather than as an employee, stating that he preferred to work as an independent. (*5)

All these factors indicate that there was no evident dynamic of exclusivity, control, and permanence between the plaintiff worker and the defendant company that normally warrants a finding by the Court that the worker is an employee or dependent contractor.

Implications

Jack Ganz is one of the most recent examples of how a determination of whether a worker is an employee or a contractor will be heavily fact specific. The case is also a reminder that the relatively new class of worker as a dependent contractor continues to be recognized by the courts. Notably, this case involved a more economically powerful plaintiff whose relationship with the defendant company looked more like a partnership than the typical dynamic of subjugation between an employee and their employer. Furthermore, this case demonstrates that economic dependence is a key factor in classifying a worker as a dependent contractor.

For businesses, particularly start-ups, it is very important to understand the relationship the business has with the contractors they work with, and whether it is more or less likely that a court may deem them as employees or dependent contractors. For workers entering into exclusive relationships with businesses as "contractors", it is important to be alert to the nature of their relationship with that business and what rights are or may be attached to it.

Unfortunately, this issue generally tends to be litigated only once an agreement between a business and worker goes sour. As such, it may be prudent to consult an employment lawyer when entering into a business relationship involving the provision of a party's services, so that an appropriate contract can be prepared and the risks of worker misclassification can be avoided.

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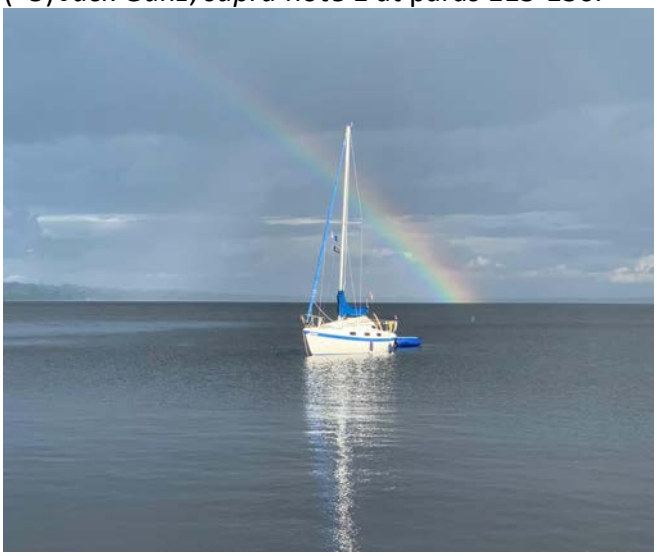
Endnotes

(*1) *McKee v. Reid's Heritage Homes Limited*, 2009 ONCA 916 ("*McKee*")
(*2) *Jack Ganz Consulting Ltd. V. Recipe Unlimited Corporation*, 2020 ONSC 3319 (*"Jack Ganz*").
(*3) *McKee*, *supra* note 1.
(*4) *Ibid* at para 39.
(*5) *Jack Ganz*, *supra* note 1 at paras 113-136.



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