THE NAVIGATOR

IN THIS ISSUE

Purchasers May Have Trouble Walking Away From Their Agreements in the Age of Covid

In a recent decision of the Ontario Superior Court of Justice, called *Fairstone Financial Holdings Inc. v. Duo Bank of Canada*, Justice Koehnen was asked to grapple with a share-purchase agreement gone wrong.(*1) The purchaser, Duo Bank of Canada ("Duo Bank"), sought to walk away from an agreement to buy Fairstone Financial Holdings Inc. ("Fairstone") and its subsidiaries for approximately $1 billion. It argued that the contract was void because Fairstone had breached two relatively common clauses, amongst others. Of interest, it alleged that Fairstone breached a "material adverse effect" clause (the "MAE Clause") and a covenant to carry on business in the ordinary course.

Rather than suing for damages, Fairstone made an application to the court for "specific performance", *i.e.* an order that Duo Bank comply with its contractual obligation to complete the transaction.

The MAE clause was designed to protect Duo Bank from an adverse event that might occur between the negotiation of the agreement and the closing date. In this case, it included a carve-out or exception for certain types of events, including a failure by the target company to meet forecasts, including local economic and regulatory conditions, and including changes in the market.

The Court held that, since Duo Bank had not repudiated the agreement prior to closing, the proper date of analysis for the MAE Clause was the intended closing date. If it had terminated the agreement beforehand, then the proper date for the analysis would have been the date of termination. Duo Bank proceeded this way because it wanted to maintain the ability to close, should it lose the litigation.

Relying heavily on US authority, the Court held further that Duo Bank had to meet a three-part test: was the material adverse event (i) unknown at the time of finalization of the agreement, (ii) a threat to the overall earnings potential, and (iii) of "durational" significance. While the parties knew about Covid at the time they entered into their agreement, the Court found that the effect of the pandemic had been

FIRM AND INDUSTRY NEWS

- **Lawyers Worldwide Awards Magazine - Innovative Lawyers 2021** has awarded the firm recognition as Shipping and Maritime Law Firm of the Year. The Lawyers Worldwide Award Magazine *Innovative Lawyers 2021* is created via a thorough, global poll of the readership, which asks the voting readers to put forward their nominations for those Advisors who are, in their opinion, 'Innovative Lawyers' within their chosen area of specialization.

- Fernandes Hearn LLP has been awarded the **2021 Corporate Intl Global Award** for Transportation Law – Law Firm of the Year in Canada – 2021.

- Mark your calendars. The next **Fernandes Hearn LLP Annual Seminar** will take place on February 10, 2022. Send us an email to info@fhllp.ca to let us know what topics you would like us to cover.

- **Rui Fernandes** and **Gordon Hearn** have been ranked by Martindale-Hubbell as AV Preeminent (Peer Rated for Highest Level of Professional Excellence) for 2021.

- **Capital Link's 15th Annual International Shipping Forum – "Sailing into Recovery"** – March 2nd, 2021. See http://forums.capitallink.com/shipping/2021newyork/index.html

- **IUMI** Webinar – Flexitanks Transports – A Critical Assessment. March 3, 2021. See https://iumi.com/mailshot/5ffef5e2a8630

- **CBMU/AIMU Joint Webinar: Comparing and Contrasting the Canadian and US Cargo Markets.** March 8, 2021.

- **Kim Stoll** as WISTA Canada VP Central Region will be co-hosting the **WISTA Canada** National Webcast Celebration of **International Women's Day** March 8, 2021.

- **Kim Stoll** will be speaking at the **Fleet Safety Council Toronto Chapter Webinar** on March 18, 2021 on "Hot Button Legal Topics" to the membership.

unknown and so the first part of the test was met. It was also found to be detrimental to Duo Bank's economic interest; and since the end of the pandemic is not yet in sight, it was found to be problematic for a sufficient duration. Thus, the MAE Clause was held to have application at "first blush".

Despite the foregoing, the Court read the MAE carve-outs generously for Fairstone and found that they applied in the circumstances. For example, even though the agreement did not specifically mention "pandemics", the Court found that the Covid situation met the agreement's definition of an "emergency", coming within the scope of the carve out. Accordingly, Duo Bank was not entitled to refuse to close on the basis of the MAE Clause.

With respect to the agreement's covenant to carry on business, the parties' intention was to ensure that the target business would be run normally after execution of the agreement so that it would not be damaged or lessened in value by the time of closing. Duo Bank said that Fairstone breached its obligation for various reasons, including with respect to its operations, collections, employment policies, expenditures, and accounting methods.

The Court held that Fairstone's actions in responding to the Covid crisis were in keeping with its practices in other extraordinary events, such as the 2008 recession. Thus, it downplayed the fact that it had, in fact, made the alleged changes. In any event, the Court found alternatively, that, if Fairstone was in technical breach, it was permitted to seek Duo Bank's consent, which Duo Bank was not permitted to unreasonably withhold under the terms of the agreement.

Interestingly, regarding interpretation of the agreement, the Court specifically commented that the more general covenant to carry on business should not be used to override the MAE Clause.

Thus, Duo Bank was found to be obligated to close the share purchase. No appeal appears to have been taken.

While this case – like almost all contractual disputes – is relatively specific to its facts, the tenor of the decision suggests that courts may be wary of voiding purchase agreements on the basis of a material adverse event clause or a covenant to carry on business in the ordinary course, unless the language of the agreement is extremely buyer-friendly. In this case, the result was clearly to the benefit of Fairstone.

Alan S. Cofman

Endnote

(*1) 2020 ONSC 7397 (Commercial List), https://www.canlii.org/en/on/onsc/doc/2020/2020onsc7397/2020onsc7397.pdf.

2. Transport Canada News Update

Transport Canada announced the following initiatives in February:

- Following a comprehensive investigation, Transport Canada has issued fines to two individual passengers for $10,000 and $7,000 respectively, for presenting a false or misleading COVID-19 test and for making a false declaration about their health status. In both cases, the individuals knowingly boarded a flight to Canada from Mexico on January 23, 2021, after having tested positive for COVID-19 only a few days before their flight.

Under *Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19*, travellers must obtain a negative result on a COVID-19 molecular test within 72 hours of boarding any flight inbound to Canada or a proof of a positive test result within at least 14 days and no more than 90 days prior to arrival, and present the results to the air crew prior to boarding their flight. Passengers are also prohibited from knowingly providing false or misleading COVID-19 test documentation. Any passenger failing to comply with the Interim Order could be subject to fines of up to $5,000 per violation.

- Transport Canada announced the 2021 measures to protect North American right whales. To help prevent collisions with vessels, Transport Canada will be re-implementing its 2020 season measures, including a restriction on vessel speed throughout much of the Gulf of St. Lawrence to protect areas where whales are detected, and issuing fines to those who are not compliant with these measures. In addition to these measures, Transport Canada will introduce the following modifications this year:

  A) the mandatory restricted area in and near the Shediac Valley will be refined by size, location, and duration to better protect right whales when they are anticipated to be present in greatest numbers;

  B) the speed limit exemption in waters of less than 20 fathoms will be expanded to all commercial fishing vessels.

These combined measures with the work already underway by the Government of Canada on extensive right whale monitoring and surveillance program with aerial and on-the-water vessel surveillance, underwater stationary and mobile hydrophones, will further protect our marine environment and the navigational safety of all mariners.

- Transport Canada announced 2021 initiatives to receive funding for the assessment, removal and disposal of abandoned boats in Canadian waters. Under the Abandoned Boats Program, $1,692,079 is being provided to assess 44 boat removal projects in British Columbia and Newfoundland and Labrador, and to remove 51 abandoned boats in British Columbia and Nova Scotia.

These announcements follow the coming-into-force of the *Wrecked, Abandoned or Hazardous Vessels Act* on July 30, 2019. The Act makes it illegal to abandon boats, increases vessel owner liability, and strengthens the Government of Canada's response in cases where owners do not behave responsibly in disposing of their vessels at the end of their useful life.

- Transport Canada announced two new Interim Orders, which prohibit pleasure craft in Canadian Arctic waters and cruise vessels in all Canadian waters until February 28, 2022.

- Transport Canada approved the proposed purchase of Transat A.T. Inc. by Air Canada

Rui Fernandes

3. Common Law Notice Periods and the Pandemic

An employee who is not a party to an enforceable employment contract with a termination provision that limits their entitlements on termination without cause to the statutory minimum (or some other predetermined amount) is entitled to common law notice. What constitutes reasonable notice at common law is based on the *Bardal* factors (*1): (i) the employee's age; (ii) length of service; (iii) character of employment; and (iv) the availability of similar employment having regard to the employee's experience, training and qualifications. Common law notice is always greater than the statutory minimum notice, often significantly.

Three recent cases have considered the impact of COVID-19 on the assessment of reasonable notice at common law.

In the Ontario case of *Yee v. Hudson's Bay Company* ("HBC") (*2), the plaintiff's employment was terminated on August 28, 2019 after 11.65 years of service. Mr. Yee was 62 years of age and held the position of Director, Product Design and Development. HBC provided 11 months' notice and Mr. Yee, who was entitled to common law notice, sued seeking 18 months' notice. Mr. Yee started applying for jobs in February 2020 and, at the time of trial, in December 2020, he was still unemployed. Mr. Yee, focusing on the fourth *Bardal* factor, asked the Court to consider the pandemic and resulting significant difficulty he had in finding comparable work. He had applied for 90 positions but was unable to secure a new job. HBC argued that the large number of job postings post February 2020 proves that there are available jobs and therefore the pandemic was not a factor. The Court relied on the principles in two 2015 decisions in its consideration of this issue. First, the principle that economic factors, such as a downturn in the economy or in a particular industry, indicating that an employee may have difficulty finding a new position *may* justify a longer notice period. Second, that notice is to be determined by the circumstances existing at the time of termination and not by the amount of time it takes the employee to find a new comparable job. The Court held that a termination that occurred before the pandemic, and its effect on employment opportunities, should not attract the same consideration as a termination that occurs after the beginning of the pandemic and its negative effect on finding comparable employment. The court awarded Mr. Yee 16 months' notice.

The Supreme Court of British Columbia, in *Mohammed v. Dexterra Integrated Facilities Management* (*3), also considered the impact of the pandemic on common law notice. Mr. Mohammed worked as a supervisor of cleaning staff at a shopping mall. He was employed from June 22, 2018 until November 11, 2019 (which period included 4 weeks working notice). He started a new job immediately, but it only lasted until January 13, 2020 and at the time of the trial, in December 2020, Mr. Mohammed was still unemployed. He sued his former employer for common law notice and claimed that COVID-19 impacted his ability to find new work. The Court considered BC case law that set out the principles applicable to the issue in this case. First, notice is determined as at the date of termination and not by subsequent events. Second, economic circumstances at the time of termination may be a factor but should not attract undue influence. Third, that circumstances that arise post-termination, such as the pandemic, can be relevant to mitigation if they impact the availability of equivalent employment. The Court, relying on the *Bardal* factors, determined that Mr. Mohammed, who was 51 years of age, had been employed for 17 months, and who did not hold a managerial position, was entitled to 5 months of notice. The Court appeared to focus on Mr. Mohammed's age and short service and did not find that COVID-19 influenced the length of notice. In assessing Mr. Mohammed's mitigation efforts, the Court did consider the pandemic and found that he had discharged his duty to find new work.

This month, the Ontario Superior Court of Justice released its decision in *Iriotakis v. Peninsula Employment Services Limited* (*4). Mr. Iriotakis was terminated from his employment at the start of the pandemic, on March 25, 2020. He was 56 years of age and had worked for the defendant for 2 years and 4 months. He found new work approximately 7 months later. Once again, the Court considered the *Bardal* factors when assessing the reasonable common law notice period to which Mr. Iriotakis was entitled. The Court also considered the impact of COVID-19 on the job market and the time it took Mr. Iriotakis to find new employment. While the Court acknowledged that the pandemic no doubt had some influence on Mr. Iriotakis' job search, it was important to keep in mind that the impact of the pandemic on the economy in general, and on the job market specifically, in late March 2020 was highly speculative and uncertain both as to degree and to duration. The Court relied on the principle that reasonable notice is not a guaranteed bridge to alternative employment in all cases, and that it is dangerous to apply hindsight to measuring reasonable notice at the time when the decision was made to terminate Mr. Iriotakis' employment. The Court held that Mr. Iriotakis was entitled to three months' notice. As in the *Yee* and *Muhammed* cases, the pandemic was relevant to the assessment of Mr. Iriotakis' mitigation efforts. The employer did not dispute that Mr. Iriotakis had discharged his duty to mitigate but asked the court to take into account the Canada Emergency Response Benefit ("CERB") payments received by Mr. Iriotakis during the notice period. The Court found that CERB could not be considered the same as Employment Insurance benefits when calculating damages for wrongful dismissal. CERB was an *ad hoc* program, not one that the employer or employee paid into, or earned an entitlement to. In this case the benefit paid, being $2,000 a month, was considerably below the base salary Mr. Iriotakis earned. Based on these facts the Court held that it would not be equitable to reduce the amount awarded to Mr. Iriotakis by the CERB payments he received.

What is clear from all of these cases is that the assessment as to what constitutes reasonable notice at common law~~,~~ is assessed as at the date on which the employee is terminated. For those employees terminated during the pandemic, the length of the notice period will likely be increased. Having said that, what constitutes reasonable notice is not necessarily the period of time that it takes the employee to secure new work. As a result, it remains to be seen just how much the pandemic will influence the calculation of what constitutes reasonable notice. What is also clear from older case law~~,~~ is that the employer's financial health is not a factor in assessing reasonable notice, and so an employer who is struggling financially because of the pandemic, will not get any "breaks" or discounts when it comes to determining the quantum of notice. Finally, in each of these cases, the employer could have avoided the uncertainty and cost of common law notice if the employee was party to an enforceable employment contract with a clear termination provision.

Carole McAfee Wallace

Endnotes

(*1) *Bardal v. Globe & Mail Ltd.*, 1960 CanLII 294, 24 D.L.R. (2d) 140 (Ont. H.C.)

(*2) 2021 ONSC 387 CanLII

(*3) 2020 BCSC 2008

(*4) 2021 ONSC 998 CanLII

4. New ArriveCan Rules Uncertain for Cross-Border Truck Transportation

In the summer of 2020, the federal government released its "ArriveCAN" application and website, which permitted truck drivers and others to voluntarily input information before arriving at the border. It was a way to speed up any issues with exemptions under the *Quarantine Act* or various emergency orders.

On February 12, 2021, the Public Health Agency of Canada ("PHAC") issued a press release, stating that, as of February 22, 2021, all travellers arriving in Canada by land or air would be required to submit information electronically through ArriveCAN before being allowed to cross the border.(*1). It implied that there would be no exemptions. The same day, the Canadian Border Services Agency ("CBSA") put out a statement that "Some travelers, like commercial truckers, will [continue to] be exempt from these measures."(*2)

On February 14, 2021, the federal government issued an order in counsel pursuant to the *Quarantine Act* which was somewhat more equivocal than the PHAC statement but less clear than the CBSA comment. It said that generally anyone crossing the border must provide proof of a negative Covid test, a quarantine plan, and some basic personal information such as travel information, name, address and birthdate. (*3) Section 1.1(2)(n) clearly exempts truck drivers from having to produce a negative Covid-19 test result, and other sections largely nullify any obligation to produce a quarantine plan.(*4) However, there is no obvious reporting exemption for truck drivers, regarding their travel history and personal information. Also, there is no express obligation to use the ArriveCan application before arrival at the border.

On February 18, 2021, the Canadian Trucking Alliance, the Private Motor Truck Council of Canada ("PMTC"), and others put out a "call to action" that the Order in Council must fully exempt truckers.(*4). They fear that the slowdown will have a serious detrimental impact, including because a significant number of drivers do not have access to smartphones.

On February 19, 2021, industry groups were told by CBSA that it would implement stop-gap measures to assist drivers without access to technology, including permitting oral declarations at the border in the short-term and to allow pre-trip reporting.(*5). However, no such policy guidance has been formally published.

Thus, for the time being, it is relatively clear that truck drivers must submit the required information, including travel history and personal information, no matter that they may be entitled to cross the border as "exempt" essential workers. They would be well advised to make best efforts to submit their information electronically before arrival at the border, notwithstanding goodwill advice from CBSA in the short term.

One presumes that these rules will be applied equally to American drivers and Canadians, but that remains to be seen.

Alan S. Cofman

Endnotes

(*1) https://www.canada.ca/en/public-health/news/2021/02/government-of-canada-expands-restrictions-to-international-travel-by-land-and-air.html.

(*2) https://www.cbsa-asfc.gc.ca/services/covid/menu-eng.html.

(*2) PC No. 2021-0075, https://orders-in-council.canada.ca/attachment.php?attach=40249&lang=en.

(*3) See *ibid*., *Minimizing the Risk of Exposure to COVID-19 in Canada Order*.

(*4) See *e.g.* "Trucking Associations Question New Covid-19 Requirements at Border", TruckNews.com, *https://www.trucknews.com/transportation/trucking-associations-question-new-covid-19-requirements-at-border/1003149072/*, and "CTA: Mandate for Arrive CAN App Must Not Come Into Force for Trucking Industry", http://cantruck.ca/cta-mandate-for-arrivecan-app-must-not-come-into-force-for-trucking-industry/.

(*5) See "CTA: CBSA Issues Policy Direction on ArriveCan", http://cantruck.ca/cta-cbsa-issues-policy-direction-on-arrivecan/.

5. What Happens in Arbitration Stays in Arbitration: *United Mexican States v. Burr*

A very recent decision of Ontario's Court of Appeal has helped to further underscore the general reluctance of the courts to involve themselves in matters where the parties have agreed to commercial arbitration. In the case of *United Mexican States v Burr* (*1) an arbitration was initiated under the provisions of the North America Free Trade Agreement ("*NAFTA*"), now the United States-Mexico-Canada Agreement. While the parties appeared to consent to arbitration, issues were raised by the Mexican government as to whether the claimants had properly complied with the requirements to bring the matter to arbitration. The application to Ontario's Superior Court of Justice and the subsequent appeal to the Court of Appeal help illustrate how difficult it is to involve the courts on almost any question related to arbitration once the arbitration has been commenced.

The Jurisdiction of the Arbitrator

The dispute arose when a group of Mexican companies and their U.S. investors sought to arbitrate a claim under *NAFTA* relating to the closure of a number of casinos operated in Mexico by the claimants. As a result of the closure, the US investors sought damages in the amount of USD $100 million under the provisions of *NAFTA* (*2). Although the arbitration was commenced before a 3-person panel of arbitrators (the "Tribunal") to which all parties consented, the respondent Mexican government raised numerous technical questions both over whether the parties had properly consented to arbitration and whether the investor complainants had otherwise properly complied with other timing requirements necessary for the commencement of arbitration.

The Tribunal ruled by a majority that it had jurisdiction over all the U.S.-national investor claimants and all but one of the Mexican companies on whose behalf they had raised their claims. The Mexican government then brought an application to Ontario's Superior Court to challenge the jurisdictional ruling decided by the Tribunal as a "preliminary question" as it was entitled to do under section 11 of the *International Commercial Arbitration Act, 2017* (Ontario) ("*ICAA*") (*3). It argued that technical non-compliance with the notice requirements under Article 1119 of the *NAFTA* was sufficient to deprive the arbitration panel of jurisdiction.

On the hearing of the application the presiding judge ruled that the Court only had jurisdiction to review the Tribunal 's decision on whether the parties had given consent to arbitration, which was itself a jurisdictional question. Other rulings of the Tribunal regarding whether the notices were compliant with the *NAFTA*, by contrast, were questions of *admissibility*, not jurisdiction, and therefore the Superior Court lacked jurisdiction to review the Tribunal's findings on these issues. The Superior Court found that the Tribunal's decision that the parties had consented to arbitration was in fact correct, interestingly, even though Canada and the United States, as intervenors in the application, argued with Mexico that a strict formal compliance with Article 1119 was required for an arbitrator to have jurisdiction. Mexico then attempted to appeal the application judge's decision to the Court of Appeal for Ontario.

The Appeal of the Ruling on Jurisdiction

In a much shorter decision than delivered by the trial court, Ontario's Court of Appeal, on the motion of investors in the arbitration to quash the appeal, allowed the motion. The motion decision highlights just how difficult it is to attempt to use the courts to put an end to or otherwise interfere with a commercial arbitration.

The issue before the Court of Appeal on the motion was whether in fact Mexico even had the right to appeal the application judge's decision. This turned on whether the Tribunal's decision in the arbitration was governed by article 16 of the *UNCITRAL Model Law on International Commercial Arbitration* ("Model Law"), which is incorporated by reference into the *ICAA*, or by

article 34 of the Model Law. While article 34 is silent on the question of appeals, article 16(3) states:

> (3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, [the Ontario Superior Court of Justice] to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award. [Emphasis added.] (*4)

The words underlined above were specifically given emphasis in the Court of Appeal's decision. In short, it saw no merit to the appeal. It further gave prominence in its decision on the motion quashing the appeal that there was little question that the arbitration panel had not yet proceeded to considering the merits of the case before it, but was only making an initial jurisdictional ruling. Quoting the Tribunal's decision in its ruling, the Court of Appeal noted that the Tribunal was expressly deciding only "three *preliminary* issues" (*5). It was also a problem for Mexico's appeal, as noted by the Court of Appeal, that it had raised no argument as to the application of article 34, which does not preclude appeals, on the original application.

Conclusion

Both the original application and the recent unsuccessful appeal by Mexico in this case are but one example of the high degree of deference our courts now give to the commercial arbitration process. Once commenced, an arbitration is difficult to stop, and the law as it has developed as well as specific statutory provisions generally side with limiting judicial intervention either during the arbitration process or in a final award. In this case, the Model Law, which forms a part of the *ICAA*, expressly provides that there will be no further appeal from a court's decision where it had only reviewed preliminary jurisdictional questions. Given that proceeding through the courts has become increasingly burdensome on parties and, most recently, even more fraught with delays, it should give comfort to commercial parties that, once an arbitration has been commenced, there is little opportunity for parties that subsequently become unhappy with the process to call upon the courts to interfere.

Oleg M. Roslak

Endnotes

(*1) 2021 ONCA 64 [*Burr*].

(*2) *United Mexican States v. Burr*, 2020 ONSC 2376, at para. 4.

(*3) Curiously, although this was a dispute essentially between U.S. and Mexican parties, and the Tribunal heard submissions in Washington D.C., an application for review was subject to the courts in Ontario because the International Centre for the Settlement of Disputes (ICSID), where the request for arbitration was filed, chose Toronto as the seat of arbitration.

(*4) *Burr* at para. 9.

(*5) *Burr* at para. 13 (emphasis added).

6. Insurance Coverage Focus: Policy and Endorsements Must be Read Together

On February 11, 2021 the Supreme Court of Canada dismissed the Application for Leave to Appeal (*1) from the decision of the Ontario Court of Appeal in *Le Treport Wedding & Convention Centre Ltd. v. Co-operators General Insurance Company* (*2), which reminds parties of the basic tenets of how insurance policies should be reviewed and interpreted.

Facts

On July 8, 2013, the Greater Toronto Area experienced an unprecedented rainstorm in which 90 mm of rain fell in less than two hours, resulting in flooding of the road adjacent to the banquet hall of Le Treport Wedding & Convention Centre Ltd. (the "Insured") and, amongst other things, the filling of a neighbouring ditch. The Insured suffered a catastrophic entry of water into the banquet hall facility through its doors and roof, and up through its floor drains.

The Insured made a claim for its significant losses resulting from the rainstorm and flooding. The insurer advised of necessary steps to be taken to properly mitigate its loss, including a shut-down of operations to allow for repairs. The Insurer paid for some repairs and also provided a quotation from its appointed contractor for the full replacement cost of $105,533.94. The insured declined to accept this amount stating it was too low to justify shutting down its business. Instead, the Insured continued operations while repairs were underway. The insurer provided and then paid actual cash value of the repairs of $79,150.45. The Insured obtained its own quote of $681.869.99 for repair costs.

Given the large gap between the two, the Insured triggered the appraisal process under its policy (noted below) and the *Insurance Act*. (*3) The appraisal Award provided that the value of the damage to the building at a replacement cost was $591.552.00 and the replacement cost value of contents/equipment was $337,777.18 with an actual cash value of $253,332.89.

The Insured was insured by a Co-operator's General Insurance Company ("Cooperators") "all-risks" Commercial Broad Form policy ("Policy"). The Policy excluded coverage for flood including flood by surface water, so the Insured purchased coverage for flood via a Flood Endorsement. Because the Flood Endorsement excluded coverage for sewer back up, the Insured then purchased a Sewer Back Up Endorsement.

The Sewer Back Up Endorsement, with a limit of $500,000, was fully paid out to the Insured though not until about four (4) years post loss.

There were other coverages in the Policy that were declined by the Insurer, including: (1) claims under the Flood Endorsement; (2) a claim for indemnity for business interruption under the Profits Endorsement Form because the Insured had continued to operate post rainstorm; (3) for extra-contractual damage for delay in payment; and (4) compensation for professional fees incurred to establish quantum of business interruption under the Commercial Plus Endorsement of the Policy.

Post appraisal, the Insured commenced action against the Insurer for coverage and indemnity on all bases that were denied by the Insurer.

At Trial

Justice Gray, the Trial Judge, found for the Insurer finding that only the Sewer Back-Up Endorsement applied, for which the Insurer had fully paid its limit of $500,000. His Honour dismissed the balance of the claims for indemnity under the Policy.

The Insured appealed the trial decision regarding the dismissed claims.

Ontario Court of Appeal

The Court of Appeal found that the Trial Judge made an error when importing the Policy's exclusion of "Surface Water" into the reading of the Flood Endorsement. By doing so, the flood

coverage was effectively nullified, unless an insured building was right on the edge of a body of water.

The Court of Appeal also found that the Trial Judge erred in the conclusion that the event was not a "flood" within the meaning in the Flood Endorsement.

In this case, the intruding water was described as a "massive, forceful, and fast-moving flow of water" that would fall under the ordinary meaning of "flood".

Further the situation had been in part caused by a catastrophic failure of all water channeling systems both man-made and natural in the area, including a creek and the public stormwater management system.

Flood Endorsement

The Trial Judge found that the Flood Endorsement did not apply because (1) the "Surface Water" exclusion in the Policy applied and (2) because the subject event did not meet the definition of "flood" in the Endorsement.

Lauwers J. A. found that the importation of the "surface water" definition was inappropriate as the Endorsement was not an insurance policy on its own and must be read together with the policy to which it is attached. The Flood Endorsement essentially displaced the flood exclusion in the Policy and endorsements were comprehensive on the subject of the particular coverage in the particular endorsement. (*4)

In finding that the influx of water into the Insured's banquet hall fell within the meaning of "flood" in the Flood Endorsement, Lauwers J. A. focused on the "strong sense of unexpected and significant water movement" and stated that such a scenario fell "well within the words" of the Flood Endorsement, being:

> "the rising of, the breaking out or the overflow of any body of water, whether natural or man-made and includes waves, tides, tidal waves and tsunamis". (*5)

His Honour distinguished cases where "flood" had involved the overflow of a pre-existing body of pooled water, seeping into a property noting that creeks and ditches while dry before a rainstorm may then overflow and would still be considered a "body of water". Lauwers J.A. found that the Flood Endorsement in no way required a permanently existing body of water and reinforced that limitations on apparent coverage in an endorsement should be set out in the Endorsement itself and that provisions granting coverage should be construed broadly.

In finding that the Trial Judge erred, His Honour confirmed, at paragraph 53, that the "burden is on the insurer to demonstrate that its interpretation would not nullify the coverage for most risks or run counter to the reasonable expectations of the ordinary person who purchased the coverage." The Court bluntly noted that insurer's counsel struggled in his submissions to provide a situation where the Flood Endorsement otherwise would ever benefit the Insured if the facts of the case at bar did not satisfy the definition of flood in the Flood Endorsement.

At paragraph 57, The Trial Judge's interpretation of the Flood Endorsement was found to have "effectively nullified coverage for the 'obvious risks' identified in the Endorsement and belied reasonable expectations of the appellant in purchasing that coverage. He also made a palpable and overriding error in failing to find on the evidence that there was a flood within the meaning of the Flood Endorsement."

On this ground, the Court of Appeal found for the Insured ordering payment of $429,329.18 with prejudgment interest and costs.

Other Grounds of Appeal

The Court of Appeal dismissed the remaining grounds of appeal.

Regarding the business interruption claim, the Court of Appeal did not disturb the Trial Judge's finding that there had been no decreases in revenue in the year after the flood and the Insured had not proven any lost profits. An adjustment to costs was found to be properly made at trial to account for the delay in payment.

The Insured's own insistence on continuing to operate also contributed to the delay in remediation and it was the author of its own misfortune and so no extra-contractual damages were payable.

The final ground of appeal relating to professional fees was also dismissed because the expert's fee was incurred for the purpose of trial expert evidence and not for the determination or assessment of damages.

The Supreme Court of Canada, in dismissing the Application for Leave to Appeal, found no reason to disturb the Court of Appeal's findings.

Finally

The insurance broker in this case did a good job of ensuring that the right insurance was purchased to avoid a gap in coverage. The policy, of course, must be interpreted every time a claim is made as each case is fact specific; however, this case confirms that, when interpreting policies of any kind a court will *always* find coverage where the wording could reasonably provide for same. Exclusions will *always* be construed narrowly. The insured paid for "something" and the interpretation of clauses must *always* be reasonable and should *never* result in nullification of the very coverage purchased.

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

Endnotes
(*1) 2021 CanLII 8836 (SCC)
(*2) 2020 ONCA 556
(*3) This provision was contained in the policy under Statutory Condition 11 of the Policy and S. 128 of the *Insurance Act* R.S.O. 1990 c. I.8.
(*4) at para. 32-33
(*5) at paras. 50-51

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