FERNANDES HEARN LLP NEWSLETTER JULY 2021

THE NAVIGATOR

IN THIS ISSUE

CHANGES TO ONTARIO'S BUSINESS CORPORATIONS ACT

On July 5th, 2021 two notable amendments to the *Ontario Business Corporations Act* ("OBCA") came into force:

1. The elimination of the director Ontario residency requirement; and
2. The introduction of more flexible rules regarding the approval of written shareholder resolutions.

The amendments were provided for in *Bill 213, Better for People, Smarter for Business Act, 2020* and is welcome news to Ontario corporate law practitioners and many of their clients. This legislative change aligns with the corporate law requirements in many of Canada's largest provinces and several international financial hubs and is expected to encourage economic growth in Ontario.

Historically, under the OBCA at least 25 percent of the directors of a corporation had to be resident Canadians. This requirement often presented challenges to foreign businesses seeking to incorporate in Ontario. Many corporations have incorporated in other provinces (e.g. British Columbia, Nova Scotia, New Brunswick, Prince Edward Island, Quebec, Yukon, The Northwest Territories and Nunavut) which had previously removed directory residency requirements. Corporations incorporated under the federal *Canada Business Corporations Act* will still have to meet the 25 percent Canadian resident director requirement.

For the time being, Ontario corporations will still be required to include data regarding Canadian resident directors in their articles of incorporation and in mandatory corporate information filings. This ongoing requirement is intended facilitate data collection in connection with the upcoming launch of a new online Ontario Business Registry, slated for later this year.

With respect to the introduction of more flexible rules regarding the approval of written shareholder resolutions, currently under the OBCA written ordinary resolutions must be signed by all of the shareholders

FIRM AND INDUSTRY NEWS

- **Rui Fernandes** will be a panelist discussing "USMCA: What Motor Carriers Need to Know" on the **American Trucking Association Law Review Webinar**, on August 18th, 2021.

- The **Women's International Shipping & Trading Association (Wista)** AGM & Conference will take place in person and virtually from October 12- 15, 2021 in Hamburg, Germany. **Kim Stoll** will be in attendance virtually in her role as Wista Canada VP Central Region.

- The **Canadian Transport Lawyers Association** AGM and Conference will take place virtually from October 21-23, 2021. Vice President **Carole McAfee Wallace** and **Kim Stoll** will be in attendance.

- The **International Maritime Law Seminar** will take place October 28, 2021 in London England.

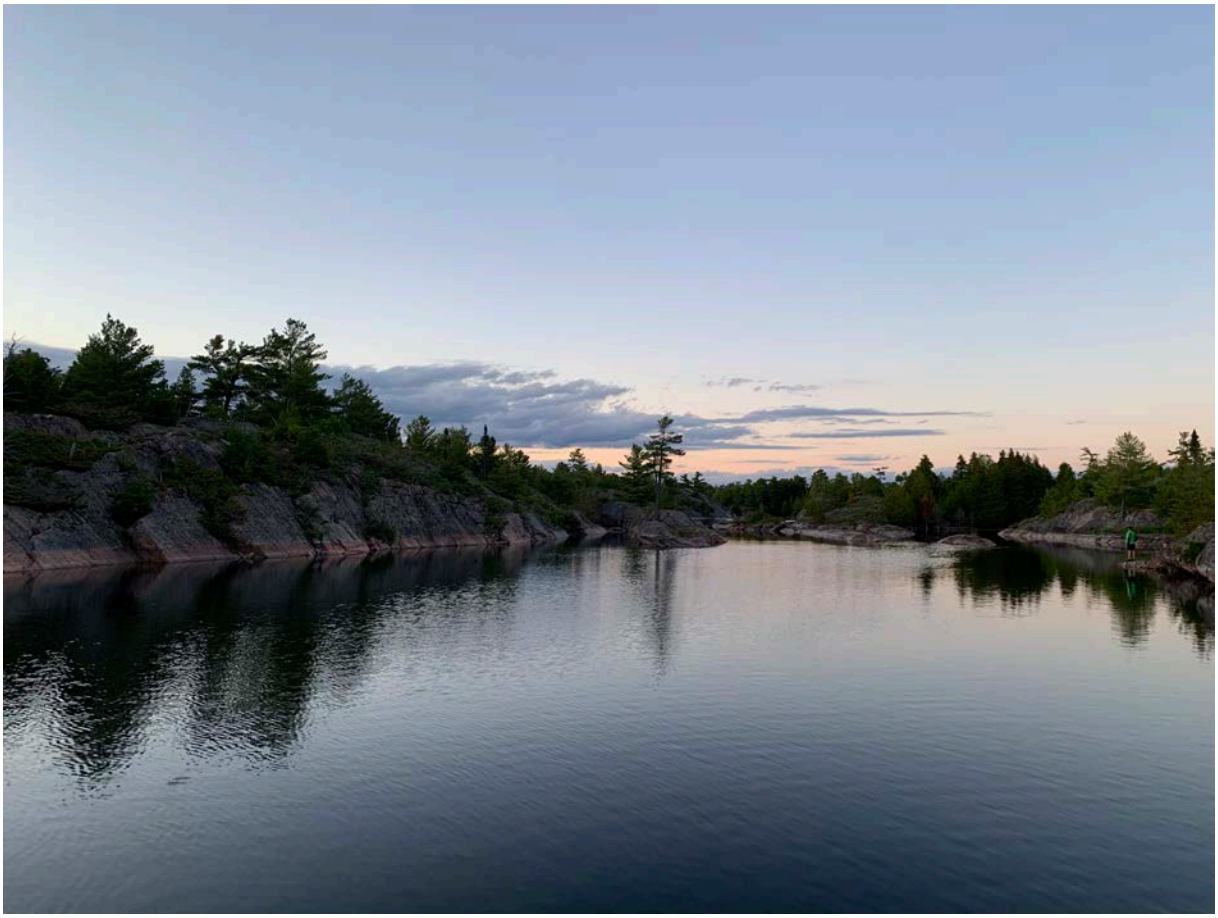
- Mark your calendars. The next **Fernandes Hearn LLP Annual Seminar** will take place on February 10, 2022. Send us an email to info@fhllp.ca to let us know what topics you would like us to cover.

entitled to vote on the resolution at a meeting of the shareholders. This meant that unanimous shareholder approval was required in order for a corporation to pass a written ordinary resolution in lieu of a meeting. If a corporation was unable to obtain the signature of any one unresponsive or uncooperative shareholder, they were required to call and hold a shareholder meeting in order to vote on and try to pass the resolution.

The amendment lowers the approval threshold for written ordinary resolutions of private corporations from unanimity to a majority of the shareholders entitled to vote on the resolution at a meeting of the shareholders. The new approval threshold will make it easier for shareholders to approve corporate actions requiring an ordinary resolution, that is, a resolution passed by a simple majority of the votes cast. This includes matters such as adopting new by-laws, appointing an auditor, and electing directors. Any voting shareholders that did not sign a written resolution must be provided with notice of the resolution within 10 days following the passing of the resolution. The notice must include the text of the resolution and a statement that contains a description of and the reasons for the business dealt with by the resolution. Where a corporation's articles or a unanimous shareholder agreement require a greater number of votes of shareholders to effect a particular action by ordinary resolution, the number required under the corporation's articles or unanimous shareholder agreement will prevail.

We recommend that Ontario corporations review their articles, by-laws, shareholder agreements and other constating documents to consider whether reconstituting the board of directors would be desirable in the absence of the Canadian director residency requirement and how the governance process can be more efficient for passing written ordinary resolutions of the shareholders.

Rui M. Fernandes



2. Ontario's IDEL as a Defence to Constructive Dismissal Claims: *Coutinho* and *Taylor* Courts Clash

In earlier editions of *The Navigator*, we had written in depth about Ontario's *Infectious Disease Emergency Leave* regulation ("IDEL") (*1) under the *Employment Standards Act, 2000* (the "*ESA*")(*2), which came into effect in May 2020. IDEL is retroactively applicable from March 1, 2020, and was recently extended to remain in place until September 25, 2021.

To recap, unless the employer has the contractual right to lay the employee off, a lay-off will generally constitute a dismissal at common law. IDEL is geared towards providing employers with temporary relief from certain legal obligations as the regulation permits employers, for reasons relating to the COVID-19 pandemic, to temporarily reduce a non-unionized employee's hours or wages, or temporarily lay off a non-unionized employee altogether, without triggering the *ESA* lay-off and constructive dismissal provisions.

While IDEL provides some relief for employers forced to cut hours or wages, or place an employee on a temporary leave due to workplace slowdowns and closures, the regulation has caused some confusion in the employment law world regarding whether IDEL restricts an employee's common law right to pursue a civil claim against their employer for constructive dismissal when temporarily laid off pursuant to IDEL—*i.e.*, where the employee is non-unionized and is temporarily laid off between March 1, 2020 and September 25, 2021, for reasons relating to the pandemic.

On April 27, 2021, the Ontario Superior Court of Justice ruled in *Coutinho v. Ocular Health Centre Ltd.* (*3) that a temporary layoff under IDEL does not preclude an employee from bringing an action against their employer for constructive dismissal. In arriving at this conclusion, the Court relied on section 8(1) of the *ESA*, which provides that the *ESA* does not preclude an employee's right to pursue a civil remedy against an employer. The Court thus held that IDEL, a regulation made pursuant to the *ESA*, cannot oust an employee's right to pursue a constructive dismissal claim at common law against the employer.

Shortly following the release of the *Coutinho* decision, a different judge of the Ontario Superior Court of Justice arrived at the opposite conclusion. In *Taylor v. Hanley Hospitality Inc*. (*4), the employee was placed on a temporary lay-off in March 2020 following a pandemic-related closure of the employer's workplace. As a result, the employee commenced an action against her employer for constructive dismissal. The employer argued that considering IDEL, the employee was deemed to be on infectious

disease emergency leave rather than on a lay-off, and that the temporary reduction of her duties and hours of work did not amount to a dismissal at common law.

The *Taylor* Court ultimately disagreed with the analysis in *Coutinho* and found that the employee had not been constructively dismissed. According to the decision in *Taylor*, *Coutinho* improperly interpreted section 8(1) of the *ESA* to mean that the *ESA* could not oust the common law. Rather, the Court in *Taylor* found that statutes enacted by the legislature could displace the common law. In these circumstances, the legislature created the "problem" when it triggered the Ontario-wide state of emergency which required employers to cut back or cease their operations entirely, thus forcing employers to lay-off employees or reduce their hours and exposing employers to constructive dismissal claims. To remedy this "problem", the legislature amended the *ESA* to create IDEL and insulate employers from exposure to such claims where they were forced to lay employees off due to the pandemic. The Court found that the legislature's intention in enacting IDEL was "obvious to the world," and that if it did not take such an action, constructive dismissal claims, such as the one at hand, would only serve to worsen the economic crisis and fallout from the pandemic.

While *Taylor* offers some relief and peace of mind for employers that have relied upon IDEL to reduce their employees' hours or wages, the state of the law pertaining to constructive dismissal claims in light of IDEL remains unsettled. We can likely expect to see one or both of the *Taylor* and *Coutinho* decisions being appealed to the Court of Appeal for Ontario so that the ambiguity surrounding IDEL and constructive dismissal claims can be clarified. In the meanwhile, unless IDEL is further extended, employers ought to turn their minds to the possibility of recalling laid-off employees on or shortly after September 25, 2021, being the date on which IDEL is scheduled to expire.

Janice C. Pereira

Endnotes
(*1) O. Reg. 228/20.
(*2) S.O. 2000, c. 41.
(*3) 2021 ONSC 3076 ("*Coutinho*").
(*4) 2021 ONSC 3135 ("*Taylor*").

3. Suing Out of Province Defendants in Ontario: *Ontario's "Long Arm" Jurisdiction*

Upon certain conditions being satisfied an Ontario plaintiff may commence a legal action against an out of province defendant. This ability has given rise to what is often referred to as Ontario's "long arm" court jurisdiction. In *Van Breda v. Village Resorts Ltd.* (*1) the Supreme Court of Canada clarified the law relating to the assumption and exercise of jurisdiction by a court over a foreign (or, out of province) based defendant. If an out of province defendant is sued in an Ontario court action and wishes to challenge the plaintiff's choice of Ontario to wage battle, the first question the Ontario court must decide is whether it is open for it to assume jurisdiction on the basis that there is a "real and substantial connection" between the facts giving rise to the claim and the province. If there is no such connection the court will "stay" the action, stopping it "in its tracks".

If the Ontario court can assume jurisdiction on the basis of a sufficient connection, a second question may be raised as to whether the court should decline to exercise its jurisdiction under the principles of *forum non conveniens*: is there another court venue elsewhere being substantially more convenient and appropriate for the adjudication of the matter? (*2).

When will an Ontario court assume jurisdiction over a claim against an out of province defendant?

The *Van Breda* case established a list of "connecting" factors, the presence of which creating a presumption of jurisdiction in "tort" cases, where an Ontario plaintiff asserts negligence (or some other actionable "wrong") in connection with some injury against an out of province defendant. This test has been applied by analogy in claims for breach of contract brought by an Ontario plaintiff. (*3) for considering the legal framework for determining whether a court has jurisdiction over a claim brought against an out of province defendant. The three-part test is as follows:

a. First, the court must determine whether there is a presumptive connecting factor between the claim and the jurisdiction. In the context of a tort action, the Supreme Court identified the following presumptive factors:

i. The defendant is domiciled in the province;

ii. The defendant carries on business in the province;

iii. The tort was committed in the province; or

iv. A contract connected with the dispute was made in the province.

b. Second, if there is no presumptive connecting factor, the court is to determine whether a new presumptive connecting factor should be recognized. The Court identified the following relevant considerations to this determination:

i. Similarity of the connecting factor with the recognized presumptive connecting factors;

ii. Treatment of the connecting factor in the case law;

iii. Treatment of the connecting factor in statute law; and

iv. Treatment of the connecting factor in the private international law of other legal systems with a shared commitment to order, fairness and comity.

c. Even if there is a presumptive connecting factor, the defendant can rebut the presumption by establishing facts "which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them."

The second "connecting factor" listed above – whether the target defendant "carries on business" in Ontario – can be a vexing factual issue that has been the topic of debate in many

cases. The other principal factors listed above tend to be more factually grounded and thus less open to argument or interpretation. What however constitutes "carrying on business" in Ontario in this day and age where businesses maintain a virtual internet presence and sell products and services across borders? A recent decision by the Ontario Divisional Court in the case of *Pourshian v. Walt Disney Company* (*4) addressed these issues in the context of a claim for breach of copyright.

Carrying on business in Ontario in the context of a claim for breach of copyright

In *Pourshian v. Walt Disney Company* Damian Pourshian brought an action against various Walt Disney related corporate entities for copyright infringement. He claimed that the 2015 film "Inside Out" produced and distributed by the various Walt Disney defendants was based on a film also titled "Inside Out" he made around 2000 while a student at Sheridan College.

The defendants brought a motion to stay the action on the basis that Ontario did not have jurisdiction over the claim against them, with the one exception of the defendant Disney Shopping Inc., for whom it was conceded that Ontario did have jurisdiction because that entity had directly sold *INSIDE OUT* merchandise to people in Ontario (*5). The motion was initially heard by a Master of the Ontario Superior Court who issued a ruling that Ontario was also able to take jurisdiction over certain of the other Disney entities named in the lawsuit, but not all, on the basis of various factors, including the "carrying on business" consideration. An appeal was taken by both sides to the Ontario Divisional Court – the plaintiff wanting to also proceed with the action against other named Disney defendants, with the Disney companies (other than Disney Shopping Inc.) in turn wanting to be removed from the Ontario litigation. The resulting decision from the Divisional Court outlines important principles in the assessment of whether an out of province entity is carrying on business in Ontario. That the case involved breach of copyright, film production and distribution would naturally raise interesting issues as the related activities transcend jurisdictional borders.

In its decision, the Divisional Court reviewed the governing "reasonable and substantial connection" principles including the following caution articulated by the Supreme Court in the *Van Breda* case about overextending the "carrying on business" presumptive connecting factor:

> Carrying on business in the jurisdiction may also be considered an appropriate connecting factor. But considering it to be one may raise more difficult issues. Resolving those issues may require some caution in order to avoid creating what would amount to forms of universal jurisdiction in respect of tort claims arising out of certain categories of business or commercial activity. Active advertising in the jurisdiction or, for example, the fact that a Web site can be accessed from the jurisdiction would not suffice to establish that the defendant is carrying on business there. The notion of carrying on business requires some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there or regularly visiting the territory of the particular jurisdiction… (*6)

The Divisional Court cited the following "doing business" analysis from the Master from whom the appeal was taken, who had formed the following view that certain Disney defendants were in fact doing business in Ontario:

> Even considering the matter with the caution mandated by *Van Breda*, the release of a film in Canada, which would include Ontario, presumably so that people would go to a movie theatre and pay to see it, is precisely the sort of actual presence in the jurisdiction contemplated by the Court. Pourshian's pleading that Walt Disney Pictures Inc. released *INSIDE OUT* in Canada creates a "good arguable case" that that defendant carried on business in

> Canada in relation to the subject matter of the action.
>
> Similarly, Pourshian pleads in paragraph 30 of the statement of claim that the defendants Pixar [Animation Studios] and Walt Disney Pictures Inc. are the producers of *INSIDE OUT*. The court can reasonably infer that these defendants made the film in the expectation that people would pay to see it, which required that it be shown in movie theatres. Pixar, by releasing *INSIDE OUT* to be shown in theatres in Ontario, even if through another entity, was in substance offering it for sale to the province's movie-going public, thus creating at least a "good arguable case" that Pixar was carrying on business in Ontario.
>
> Accordingly, by producing *INSIDE OUT* and releasing it for distribution to Ontario movie theatres, the defendants Pixar and Walt Disney Pictures Inc. were carrying on business in Ontario. The presumptive connecting factor of carrying on business in Ontario is therefore established.

The Master ultimately held that there were no factors connecting the claim to any of the other defendants who were disputing the Ontario jurisdiction other than Walt Disney Pictures Inc. and Pixar Animation Studios, concluding as follows:

> In summary, the production of *INSIDE OUT* by Pixar and Walt Disney Pictures Inc., in part for the purpose of carrying on business in Ontario, and the release of *INSIDE OUT* by Walt Disney Pictures Inc. for distribution to theatres in Canada, do create a good arguable case of a real and substantial connection between the claims against those defendants and Ontario…

The Divisional Court found that the Master made certain legal errors in reaching the foregoing conclusion, including the finding that Pixar and Walt Disney Pictures Inc. had been carrying on business in Ontario based only on allegations in the statement of claim that Pixar produced *INSIDE OUT* and that Walt Disney Pictures Inc. distributed it. The Divisional Court noted that there was no analysis of what "carrying on business" in Ontario means or how that phrase had been interpreted in other cases.

In argument before the Divisional Court on this point counsel for Mr. Pourshian relied on the decision of the Court of Appeal for British Columbia in *Equustek Solutions Inc. v. Google Inc.* (*7), to argue that it is sufficient for a party to "target customers in a jurisdiction" for a finding that the party carried on business in the jurisdiction. The Divisional Court did not accept the comparison. The *Equustek* case dealt with the scope and reach of Google's online activities. The court in that case had conducted a detailed analysis in support of its finding that Google carried on business in British Columbia, including a factual finding that Google entered into advertising contracts with British Columbia residents and that it gathered information through proprietary software in British Columbia. On that basis, the Court found that Google carried out "key" parts of its business in British Columbia. In this case, there had been no similar analysis by the Master who had failed to properly heed the caution in *Van Breda* about the need for there to be an actual presence in Ontario to support a finding that a party was carrying on business in the province.

According to the Divisional Court, the fact that Pixar Animation Studios and Walt Disney Pictures Inc. produced and distributed a film that ended up being viewed in Ontario *might* be relevant to other connecting factors (the discussion of which being beyond the scope of this article) but it was not sufficient in and of itself for the making a finding that they were carrying on business in Ontario.

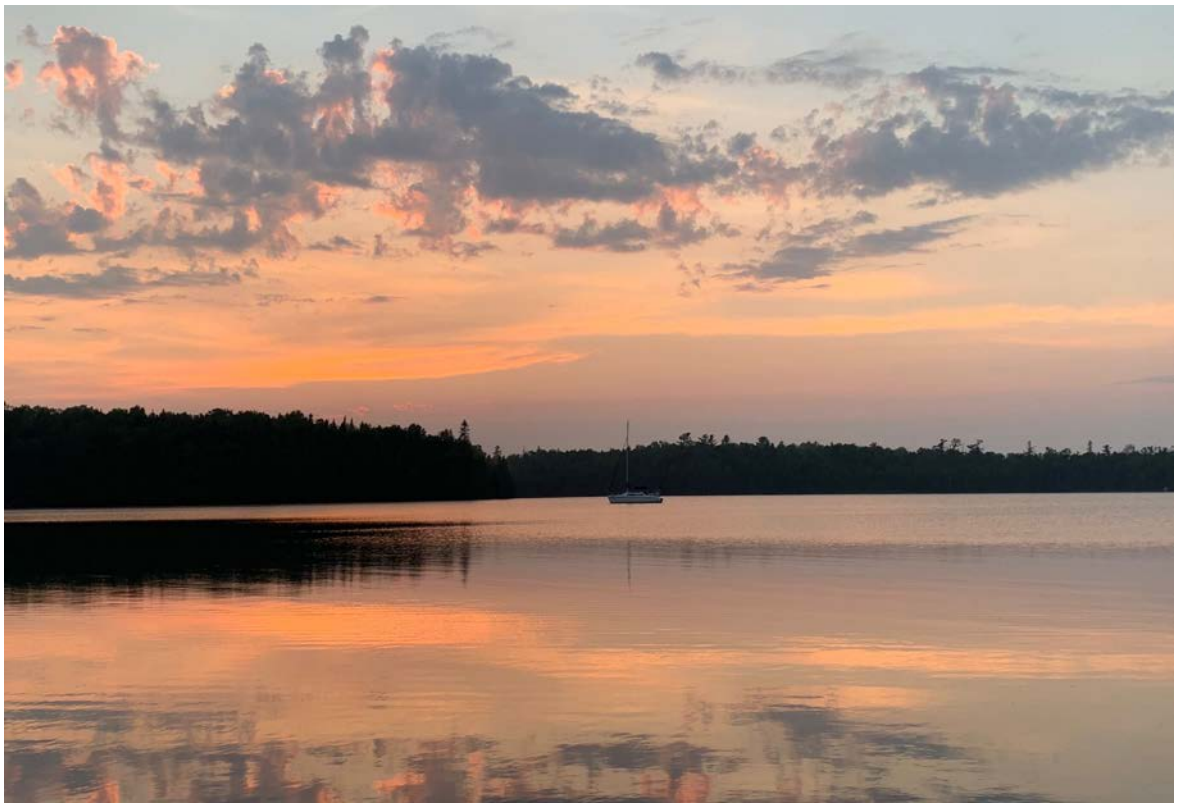
The Divisional Court reckoned that the real complaint of Pixar Animation Studios and Walt Disney Pictures Inc. on the appeal was that they played no role in the distribution or dissemination of *INSIDE OUT* into Ontario. Their position was that, unless a defendant has directly participated in the sale or distribution of *INSIDE OUT* in

Ontario, the Ontario court does not have jurisdiction. The Divisional Court demurred on the point, noting that while the position of Pixar Animation Studios and Walt Disney Pictures Inc. *might* support a finding that they were not carrying on business in Ontario, that their argument still did not address the issue of whether either or both played a role in *authorizing* the "transmission" or distribution of *INSIDE OUT* into Ontario so as to in and of itself and in any event form the basis for a breach of copyright action in Ontario. Recall from the *Van Breda* list of presumptive connecting factors, that another basis – beyond "doing business in Ontario" - for an Ontario court to assume jurisdiction over a claim relates to whether a "tort was committed" in Ontario. Thus, while upholding the general proposition that a court cannot simply "assume" business activity as a connecting factor without a factual analysis on the business activity, the Divisional Court found it necessary to delve into the nuances of copyright law as to whether a breach of same may have happened in Ontario, and, with that, a "good arguable case" having been sufficiently pleaded in the statement of claim – the discussion of which being beyond the scope of this article. The Divisional Court ended up ruling that there *was* a basis for the Ontario courts to take jurisdiction over this claim, on the basis of *other* connecting factors (i.e. other than the "doing business" consideration) including the "breach within Ontario" consideration.

The above all said, the "take away" for the purposes of this article remains clear: where a plaintiff relies on the out of province defendant "doing business in Ontario" as a connecting factor, it must be prepared to lead sufficient evidence on point and the court will need to undertake a proper analysis of same on a jurisdiction challenge by the defendant. The reviewing court simply cannot infer that there was the conduct of business in Ontario as a matter of mere pleading by a plaintiff, inference or the use of logic.

Conclusion

Cross-border litigation calls for strategic planning. A plaintiff will want to be both efficient and effective in its choice of a forum. All things equal,



it will want to litigate in its "home base" based on familiarity of the court system and perhaps legal counsel. On the other hand, there is an advantage in taking suit against an out of province defendant in its home territory: should there be a need to enforce a judgment it will usually be more efficient to have a judgment capable of ready enforcement where the defendant has its assets. A plaintiff may also want to litigate in a certain jurisdiction on account of being able to more readily plead and rely on favourable laws of that jurisdiction.

There are thus a host of considerations in cross-border litigation involving out of province defendants. Risk and litigation management accordingly range from planning a court venue selection at the time of contract drafting through to the selection of a venue in which to take suit in terms of having regard to any required "connecting factors".

Gordon Hearn

Endnotes

(*1) 2012 SCC 17

(*2) A discussion on "*forum non conveniens*" is beyond the scope of this article. Even though an Ontario court may have jurisdiction over a claim, on application by the non-Ontario defendant the court may still choose to "stay" the matter in favour of another court elsewhere.

(*3) Parties to a written contract often agree on a court venue or jurisdiction where matters are to be referred in the event of a dispute. Pursuant to Canadian case law precedent the Canadian court that a matter has been "contractually" chosen by the parties shall assume jurisdiction over the claim unless the litigant challenging the referral of the matter to that court jurisdiction can show "strong cause" why agreement on point should not be enforced. A written agreement on a court venue choosing Ontario for the resolution of disputes thus presents an intrinsic "connecting factor" for a court to assume jurisdiction over an out of province defendant.

(*4) 2021 ONSC 4840 (CanLII)

(*5) Giving effect to the obvious notion that in actually maintaining a "bricks and mortar" presence and/or sales force in the province will constitute "doing business" there.

(*6) at p. 87.

(*7) 2015 BCCA 265, affirmed by the Supreme Court at 2017 SCC 34

4. *CNWA* Reviews Are Subject to Procedural Fairness Rules

The *Canadian Navigable Waters Act* ("CNWA") came into force about two years ago. Like its predecessor legislation, it is designed to protect and regulate "navigability". Transport Canada's "Navigation Protection Program" ("NPP"), which administers the Act, appears to have the intention to regulate with a heavy hand. In some cases, they appear to have done so without permitting stakeholders to know the extent or the reasons that they have been investigated by NPP officers, or any particulars of the officer's rationale for it.

As a case in point, Fernandes Hearn LLP on behalf of a client recently obtained an order against the NPP, overturning its decision to effectively shut down a water ski school in Ontario. The Honourable Madam Justice Strickland of the Federal Court of Canada found that the process was so problematic that she would not even consider the intentions and arguments presented by the NPP. Rather, she ordered the NPP to reconsider its investigation on an expedited basis, which it did. Although the NPP ultimately reversed its decision, the process remains opaque and concerning, and ripe for further court challenges.

In *McClintock's Ski School & Pro Shop Inc.*, the NPP received complaints by a local resident of a lakefront property who was upset with the very existence of the water ski school ("MSSP"). (*1) The complaints triggered an investigation by an NPP officer, who began to make information requests of the ski school. Those complaints were never shared with the MSSP.

The MSSP – a family-run business – had existed on Puslinch Lake, Ontario since about 1950. It predated almost all of its neighbours on the water and it even predated the *CNWA* and its predecessor legislation. It operated three courses, none of which had been altered for many decades. Each course was essentially constructed of under-water cabling attached to cement blocks on the lakebed. At the start and end of the season, MSSP would put out, or take in, rubber buoys attached to the cables, as well as two wooden jumps. The permanent components of the course predated the polio vaccine, the reign of Queen Elizabeth II, and the Toronto Maple Leafs' last five Stanley Cup victories. The buoys and jumps were seasonal.

Notwithstanding its long heritage on the lake, in late 2020, an NPP officer directed the MSSP to make application under section 10 of the *CNWA* for permits for each of its three courses. Eventually two of the three were denied. Without conducting any on-site visit, the NPP sent vague letters, explaining that its decision was predicated on its judgment that the courses were too close to shore and the principle that the interests of multiple lake users and riparian owners had to be balanced. No explanation was given about the distance requirements or how the balance was to be achieved amongst lake users. The letters did not indicate where the NPP drew the line between navigability and the regulation of lake traffic.

Ironically, even without the permits, one could continue to water ski without restriction. The only effect of the orders was that the permanent cabling systems – or the placement of buoys and jumps – was deemed offside the legislation.

The Ski School argued that the lake had not been "navigable" under the common law. In effect, it was argued that the MSSP had never had an obligation to obtain anything in the nature of a permit. The point was conceded that the lake was like "navigable" under section 2 of the *CNWA*, which now defines navigability extremely broadly. Since the legislation is less than two-years old, there is only one case on point – an Ontario decision called *Blackwell v. Genier*, which found that Parliament had intended to increase the number of bodies of water subject to the legislation (*2). That issue was not addressed by the Madam Justice Strickland in her reasons.

Further to the foregoing, the Ski School also argued that there was no obligation under the new legislation to make any application for a

permit. The *CNWA* only required a permit under section 10, where the owner proposes to "construct, place, alter, rebuild, remove or decommission a work … in, on, over, under, through or across" navigable waters – in other words, to change something. It was argued that placing the rubber buoys on the water could not possibly trigger the application of the Act. If that were so, the owner of a bridge would have to get the government's permission every time it wanted to change a light bulb!

In argument, the NPP's lawyer agreed that semi-seasonal permits were not required for the start and end of the season, every time the buoys and jumps went in and out. Rather, the NPP argued that a permit was required one time.

Section 7 of the Act allows the NPP to investigate a work – even after the fact – if the NPP considers it to have been subject to section 10. However, section 7 contains requirements that the NPP give notice of that investigation and to follow certain rules. No such notice was ever given in compliance with section 7.

Under section 13 of the Act, the NPP did have authority to investigate if it considered the works to have interfered more with navigation now than when they were constructed, or if its alteration would be in the public interest, amongst other things. However, it chose not to proceed under that section.

The Ski School argued that – even if the NPP had proceeded under sections 7 or 13 – it would have been required to comply with the ordinary rules of administrative law, including to give notice and particulars of its investigation; and to give the MSSP a fair opportunity to respond.

The NPP decided not to tender evidence. Rather, it argued that the decision was simply the function of a mathematical formula regarding the safe distance from shore for a water ski course. It had since been disclosed to the court that the NPP officer had taken the figures from an unpublished, internal Transport Canada guideline pamphlet applying it to the recommended clearances for waterways with two-way traffic and large vessels, such as ferry traffic; and to obscure non-governmental publication from the United States giving recommendations to course designers about the distances that they should factor into their courses. The NPP officer then simply added the two numbers together – the guideline amount plus the US recommendation – to come up with the distance that was required for the MSSP. Those calculations had never been provided to the MSSP. No explanation was ever

given why the two numbers would be added together, since they were apparently designed to do the same thing.

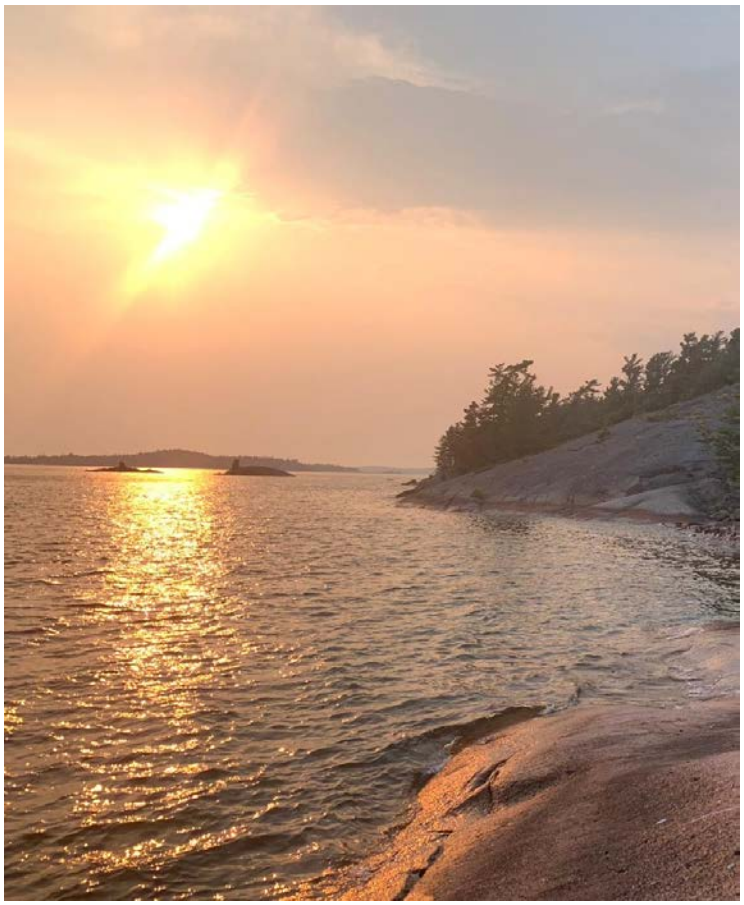
In the end, the Court held that the NPP had authority to give notice of an investigation under section 7, since it was of the opinion that section 10 applied; however, its investigation contravened the principles of procedural fairness set out in *Canada v. Vavilov* (*3). Her Honour found that, if the officer would not visit the Puslinch Lake in person, they should at least have raised their concerns with the MSSP so that they could respond. It was wrong to base their decision upon the correspondence of the original complainant and his supporters, and then to buttress it with undisclosed calculations.

The Court concluded, "I have difficulty with the suggestion that the Officer could simply demand removal of the courses without affording the Applicant some form of procedural fairness". (*4) The Court was also troubled that the officer had failed to follow the advice of an internal peer review "that the Officer put her findings to the Ski School to attempt to find [a] solution before the Officer rendered a final decision" (*5).

On further review, the NPP reconsidered its decisions and the MSSP had a happy ending. Thankfully, its 2021 season is now underway. However, the cloud of possible further investigations remains, both over the MSSP and other owners of infrastructure across the country, including in bodies of water that were not previously regulated. Thus, upon first contact from an NPP officer in relation to the *CNWA*, it would be advisable to consult a lawyer.

Alan Cofman

Endnotes
(*1) 2021 FC 471.
(*2) 2020 ONSC 1170.
(*3) 2019 SCC 65.
(*4) *Supra* note 1 at para. 88.
(*5) *Ibid*. at paras. 90-91.



5. "Have I said too much?": The law on limitation periods and signatures

A recent decision from Ontario's Divisional Court may have wide-ranging implications for settling two common legal questions: 1) When does a limitation period to bring an action for a legal remedy expire; and 2) what is sufficient to satisfy the legal requirement of a "signed" document. In the decision of the Divisional Court in *1475182 Ontario Inc. o/a Edges Contracting v. Ghotbi* (*1), the court heard an appeal from a Small Claims Court action in which it considered the issues of what constitutes an "acknowledgment" of a debt for the purpose of Ontario's *Limitations Act* (*2) as well as what might satisfy a requirement that the acknowledgment be "in writing and signed by the person making it …" (*3) for the purpose of potentially extending a limitation period to bring an action. For each of these questions, the answer returned by the Court was somewhat surprising.

The facts

A dentist, Dr. Benjamin Ghotbi, hired contractors operating under the name Edge Contracting to make leasehold improvements to his leased premises for his dental practice in January 2015. Edge Contracting delivered several invoices for its work performed over the following 12 months, all of which Dr. Ghotbi paid in full, save for the last invoice dated January 19, 2016. Dr. Ghotbi paid only $62,489 of this invoice on March 11, 2016, leaving an outstanding balance of only $24,521 owing, claiming that the work was deficient.

Critically, Dr. Ghotbi and the principal of Edge Contracting, Sonny Lupo, engaged in the following text message exchange regarding the unpaid invoice on June 2, 2016, almost 3 months after Dr. Ghotbi short paid Edge Contracting on its final invoice:

Mr. Lupo: Hello. We can be there in an hour to inspect what was already looked at and passed by the city. We will stop in only if you are in the office and have a cheque as discussed numerous times. This payment is months past due and we have completed plenty of extras without receiving a penny. Will you be there with our payment?

Dr.Ghotbi: The balance will be paid once everything is completed as per your agreement. No payment will be made until everything is clear. I'm going to hire a third-party inspector and their fees will be deducted from your payments too (*4).

Edge Contracting remained unpaid following this and commenced a Small Claims Court action on May 30, 2018, for the outstanding balance. Edge Contracting obtained judgment on its claim at the end of a trial held late in 2019. Dr. Ghotbi appealed the decision to the Divisional Court mainly on the issue of whether the Edge Contracting's action ought to have been barred for being out of time; that is, for having been commenced more than 2 years after Edge Contracting's cause of action against Dr. Ghotbi arose.

The limitation period

Ontario's *Limitations Act* provides, as the default rule, that an action must be commenced within 2 years of a "claim" having been "discovered' by the claimant (*5). Dr. Ghotbi had taken the position that the date on which Edge Contracting discovered its claim was the day on which he made partial payment of its final invoice; namely, March 11, 2016. If he prevailed at trail, that would have meant that Edge Contracting's action was commenced more than 2 years and 2 months following the time it "discovered" its claim, and thus would have been dismissed for being out of time.

Edge Contracting, however, successfully relied on a provision in the *Limitations Act* which can function to "restart" the limitations clock. Section 13 of the *Limitations Act* provides that, where a person "acknowledges liability" for payment of a

liquidated amount, in that case the ordinary 2-year limitation period begins running from the date of the acknowledgment. It can in fact further "restart" the limitation period multiple times with each such successive "acknowledgement." This applies, moreover, even where the person making the acknowledgment "refuses or does not promise to pay" (*6).

A claimant must satisfy certain conditions to take advantage of this section, however. One is that the acknowledgment must be made "in writing and signed by the person making it or the person's agent" (*7). Further, Ontario decisions applying this section have also held that the "acknowledgement" must be in "clear and unequivocal language" (*8). On the appeal, Dr. Ghotbi submitted that neither of these requirements were met.

The Divisional Court held that the trial judge's finding ought to be given deference despite the trial judge's reasons not specifically noting the requirement that acknowledgments be "clear and unequivocal." For one, the Divisional Court referred to earlier case law which held that an acknowledgment does not have to confirm the exact amount owing to be effective for the purpose of this section (*9). Further, the trial judge *did* in fact note that the text messages were "fairly clear," indicating that he had at least turned his mind to the question (*10). This may strike some people as somewhat surprising, since it one could just as easily read Dr. Ghotbi as having denied liability in his text message to Edge Contracting by the language he used.

Signatures

The next and more difficult issue for the Divisional Court was whether the text message acknowledgment of the debt by Dr. Ghotbi met the requirement under the *Limitations Act* of being "signed." Here, too, the Divisional Court sided with Edge Contracting. The court noted how the concept of a "signature" has been steadily evolving. For instance, it is now generally accepted that one's name appearing at the end of an email is acceptable as a "signature" where one is required as a matter of law (*11).

Finally, the Divisional Court observed that, although as a general matter a signature requirement in the law fulfils the purpose of establishing the authenticity of a document, it could not simply rely on this principle, since the statute contained an express requirement for a "signature." Again, invoking the evolution of this concept in the electronic age, the Divisional Court was prepared to accept that a unique "International Mobile Equipment Identifier (IMEI)" connected with Dr. Ghotbi's mobile device, for example, might be sufficient to satisfy this requirement, since the *Limitations Act* did not specify any particular *type* of signature (*12).

Conclusion

The *Ghotbi* decision yields two important lessons for potential litigants, both somewhat surprising. The less surprising result relates to the nature of a "signature," or "signed" document at law. With the rapid evolution of electronic communication and commerce, including the emergence of dedicated electronic signature services such as DocuSign, the finding that a mobile text message might be considered a "signed" document in a contract dispute should at least seem not entirely unexpected.

More surprising is just how liberal the court was prepared to be in considering the content of the particular text message in *Ghotbi* to be an "acknowledgment" under the *Limitations Act*. This should be the more significant takeaway, as what seemed a rather straightforward refusal to pay due to the belief that a contractor's work was deficient was nevertheless found to be a sufficient "acknowledgment" of a debt to recommence the running of a 2-year limitation period, thereby extending the period of exposure to legal liability. Parties disputing invoices should therefore exercise extreme caution in how they communicate with possible claimants after a dispute has arisen, since it appears that even seemingly innocuous statements of fact may function to prolong the period of future risk of legal action.

Oleg M. Roslak

Endnotes

(*1) 2021 ONSC 3477 [*Ghotbi*].
(*2) *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B.
(*3) *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, s. 13(10).
(*4) *Ghotbi* at para. 9.
(*5) *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, s. 4.
(*6) *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, s. 13(8)
(*7) *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, s. 13(10).
(*8) *Ghotbi* at para. 23.
(*9) *Ghotbi* at paras. 35-36.
(*10) *Ghotbi* at para. 40.
(*11) *Ghotbi* at para. 45, citing *Lev v. Serebrennikov*, 2017 ONSC 2093.
(*12) *Ghotbi* at para. 50.

6. Waiver & Estoppel: Should Knowledge of Breach be Imputed to Insurers? Supreme Court of Canada to Weigh In

Bradfield v. Royal Sun Alliance insurance Company of Canada 2019 ONCA 800

Application for Leave by the plaintiff (respondent) to the Supreme Court of Canada from this decision of the Ontario Court of Appeal was granted on April 23, 2020. The Court of Appeal had set aside the trial judge's order that Royal SunAlliance ("RSA") was responsible to provide insurance coverage to its insured, Steven Devesceri's estate. This appeal argument was heard before the Supreme Court of Canada on May 17, 2021, with judgment reserved, which is expected at any time. What follows is a review of the trial decision and the Court of Appeal decision as we wait for the ultimate decision.

Facts

On May 29, 2006, Jeffrey Bradfield, Paul Latanski and the late Steven Devecseri were riding their motorcycles with Devecseri in front. Unfortunately, Devecseri drove onto the wrong side of the road and collided with Jeremy Caton's automobile. Bradfield's vehicle did not hit Caton's automobile though he was injured and Devecseri was killed.

Devecseri was insured by RSA under a standard motor vehicle policy with a $1 million limit. Devecseri had an M2 driver's licence, which prohibited him from operating a motorcycle with any alcohol in his bloodstream. If he did, a policy breach would result.

RSA's witness testified that, as part of its investigation, RSA had obtained all information regarding the accident from the police, who had concluded that "excessive speed was a major contributing factor in the collision" but made no mention of alcohol. None of the parties obtained a copy of the coroner's report.

Before 2009, Bradfield's insurer received hearsay information that drinking was involved, but did not advise RSA's adjuster. RSA's adjuster had interviewed Bradfield and Latanski as part of the RSA investigation, but neither of them told the adjuster that Devecseri had been drinking before the accident.

In 2008, Caton (the automobile driver) brought a claim for damages against Bradfield, Latanski and Devecseri's estate. RSA defended on behalf of the Devecseri estate. RSA did not provide a reservation of rights letter or require that a non-waiver agreement be signed. (*1)

In June 2009, Latanski advised for the first time in his Examination for Discovery that Devecseri and Bradfield had been drinking beer shortly before the accident.

One year after the claim was brought and two weeks after Latanski's testimony at Examination for Discovery, RSA advised the parties that it was taking an "off-coverage position" because alcohol imbibement was a breach of Mr. Devecseri's insurance policy given his M2 motorcycle licence. RSA also did not provide Devecseri's estate any notice in writing that it was waiving the policy violation, as required in s. 131(1) of the *Insurance Act R.S.O.1990 as amended.* RSA added itself as a statutory third party under the *Insurance Act.*

Two Trials

In 2012, in the liability trial, the jury awarded Caton $1.8 million holding Bradfield 10% at fault and Devecseri's estate 90% at fault. Bradfield was indemnified against Devecseri's estate and obtained judgment on his crossclaim against the estate.

In the coverage trial that followed, the trial judge was asked to determine whether RSA was entitled to take an off-coverage position and reduce the Devecseri estate's policy limit from $1 million to $200,000 after it learned that Devecseri had been drinking before the accident, contrary to the terms of his insurance policy. (*2)

In the coverage action, Bradfield sought a declaration of entitlement to recover judgment against RSA for the remaining $800,000 available in Devecseri's policy pursuant to s. 258 of the *Insurance Act* ($200,000 had already been paid out). Bradfield took the position that RSA had waived the policy breach and/or was estopped from denying Devecseri's estate insurance coverage. Further, Bradfield argued

that there was prejudice and detrimental reliance upon RSA's decisions and actions.

RSA took the position that it had no actual knowledge of the breach until 2009, at which point it denied coverage and, therefore, it did not waive the policy breach. RSA argued that actual knowledge was required and that there was no prejudice as the litigation administrator for Devecseri's estate would not have taken different steps had RSA defended directly rather than as a statutory third party.

The trial judge found that RSA had waived its right to rely on Devecseri's policy breach because RSA had taken its off-coverage position too late. Justice Sosan, in the trial decision dated July 25,2019 (*3), held that Bradfield was entitled to recover judgment in the amount of $800,000 against RSA.

Sosan J. drew his conclusions for the following reasons:

1. RSA did not obtain the coroner's report after Devecseri's fatal accident in 2006, which stated that Devecseri had alcohol in his system at the time of death. This report included the routinely available information about alcohol levels, was clearly relevant to Devecseri's blood alcohol level and had been available three years before discoveries. RSA had failed to obtain it and provided no explanation for its failure to do so.
2. Having alcohol in his system was contrary to the terms of Devecseri's M2 licence and his insurance policy;
3. Securing a copy of the Coroner's report would not be a non-mandatory item on a list of suggested areas to investigate;
4. Knowledge of the policy breach was imputed at the time that the coroner's report was available to RSA in 2006; and
5. RSA's failure to take an off-coverage position after June 2006, its defence of the claim in 2008, and continuing such defence until discovery in 2009, amounted to a waiver by conduct of Devecseri's breach. Having found waiver, the Court did not consider the issue of estoppel.

Therefore, the trial judge imputed knowledge of the breach of policy condition by Devecseri to RSA on the basis that the evidence was available to RSA, had it obtained the coroner's report. Having decided to defend, RSA waived its right to rely on the breach of policy to deny coverage.

Ontario Court of Appeal

RSA appealed submitting that the trial judge erred in holding that: (1) RSA waived its right to deny coverage to Devecseri's estate; and (2) the issue of estoppel was moot.

The central issue was what constitutes "knowledge" as a prerequisite to a finding of waiver and/or estoppel.

The Court examined waiver and promissory estoppel and confirmed, at para. 31, that the principle underlying both doctrines is that a party should not be allowed to resile from a choice when it would be unfair to the other party to do so. "Knowledge" of the policy breach is required for both doctrines.

Waiver

Waiver by conduct will be found where the party had (1) full knowledge of the deficiency that might be relied upon; and (2) the unequivocal and conscious intention to relinquish the right to rely on the contract or obligation. Knowledge can be inferred from conduct, but the Court found, at para. 33, that conduct must give evidence of an unequivocal intention to abandon rights known to the party waiving the right. If an insurer has all requisite information in its possession, it will waive a policy breach if it does not appreciate the significance of those facts before it defends. (*4)

In this case, however, the Court of Appeal held that RSA had no actual knowledge that Devecseri breached the policy by consuming alcohol before driving until discoveries in 2009.

Further, the Court of Appeal held that knowledge of a policy breach could not be imputed, as RSA did not have all the material facts necessary to determine that there was a policy breach. RSA was not guilty of failing to appreciate the significance of information, but, rather, it did not have the information that Devecseri had imbibed alcohol in breach of the terms of the policy.

The Court of Appeal also found that there was no evidence to support Bradfield's assertion that RSA knew of the policy breach but chose not to get the information. No legal authority had been provided to the Court to support the assertion that an insurer must obtain the coroner's report. Although blood alcohol content information was in the coroner's report, there was no evidence that RSA knew this and had purposely chosen not to obtain the coroner's report. Rather, had RSA obtained the report, it would not have expended monies conducting further investigation and defending the claim.

Lastly, the Court found that there was no written waiver of the breach on the part of RSA, as required under the *Insurance Act* to demonstrate a clear intention to waive the policy breach.

The Court of Appeal found that RSA had not waived its right to refuse coverage for breach of the terms of the insurance policy. It then turned to look at estoppel.

Estoppel

The trial judge did not consider estoppel, but the Court of Appeal did and confirmed, at para 42, that the essential elements of estoppel are: (1) the insurer must have knowledge of the facts that support a lack of coverage; and (2) unlike waiver, there must be "a course of conduct by the insurer which the insured relied upon to its detriment.

The Court of Appeal found that RSA was not estopped from asserting a breach of the policy, as it had found that RSA had no knowledge of the breach until 2009. Further, there was no evidence of detrimental reliance by the Devecseri estate. RSA had expended time, effort and money to investigate and defended the action until July 2009. There was no evidence that any of the steps taken by RSA to defend the case operated to prejudice the Devecseri estate. On the contrary, the litigation administrator for the Devecseri estate and Caton's counsel had agreed there was no difference in the defence of the action whether RSA added itself as a statutory third party or was a defendant in the action. Thus, even if Bradfield's submission that prejudice should be presumed was correct, such presumption was rebutted and no detrimental reliance was found.

Decision

The Court of Appeal found that RSA did not waive its right to rely on the policy breach nor was it estopped from relying on the breach and it set aside the trial judgment, awarding costs to RSA.

The Court of Appeal found that the required "knowledge" to find waiver or estoppel is established where the insurer has *actual* knowledge of the material facts constituting a policy breach, whether or not the insurer appreciates the significance of those facts to its obligation to defend. RSA did not have actual knowledge of the policy breach until June 2009, and it took immediate steps to deny coverage.

The Court of Appeal also found that such knowledge could not be imputed. The knowledge requirement was not whether the insurer *could* obtain the material facts but whether they *did* have the material facts necessary to enable them to know of the policy breach. RSA was not in possession of any evidence that Devecseri had been drinking before the accident until discoveries in 2009. RSA also did not express a clear intention to waive its right to deny coverage nor was there any prejudice to RSA's insured.

While information confirming the policy breach could have been obtained earlier through further investigation, RSA did not actually have such information until after discoveries. No legal authority was provided which confirmed that an insurer is required to investigate every reasonable possibility that a policy was breached.

Finally

Defence counsel and insurers alike were satisfied with the Court of Appeal's decision in that it confirmed the generally held view that actual knowledge/possession of information was required and that insurers were not required to turn over every stone. The fact that the Supreme Court of Canada, however, chose to hear Bradfield's appeal, is cause for discomfort, given that Canada's top court hears very few cases and even fewer in the insurance field. Once the Supreme Court of Canada's decision is released, look for an update in *The Navigator*.

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Endnotes
(*1) If coverage is questionable, when the insurer is investigating a claim, the insurer should advise the insured at once. In the absence of a non-waiver agreement or of an adequate reservation of rights letter, an insurer defends the claim at its own risk.
(*2) The amount of $200,000 is a statutory minimum under s. 251 of the *Insurance Act*
(*3) 2018 ONSC 4477
(*4) *Logel Estate v. Wawanesa Mutual Insurance Company* 2009 ONCA 252

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