THE NAVIGATOR

IN THIS ISSUE

Contents of Cockpit Voice Recorder Conditionally Released in Class Action Lawsuit

In *Canada (Transportation Safety Board) v Carroll-Byrne*, 2021 NSCA 34 ("*Carroll-Byrne*"), the Nova Scotia Court of Appeal upheld a lower court's decision which authorized the conditional release of the contents of the cockpit voice recorder ("CVR") to the parties to a class action. The Nova Scotia Court of Appeal affirmed the motion judge's holding that the public interest in the proper administration of justice outweighed the importance of the statutory privilege that attaches to the CVR.

Just after midnight on March 29, 2015, while attempting to land at Halifax International Airport, Air Canada Flight 624 hit the ground short of the runway before skidding along the tarmac and eventually coming to a stop.

A class proceeding was commenced on behalf of the passengers against Air Canada, Airbus S.A.S., NAV Canada, Halifax International Airport Authority, the Attorney General of Canada, and the pilot and first officer of the flight. The Transportation Safety Board (the "TSB") and the Air Canada Pilots' Association (the "ACPA") were granted intervenor status to oppose the disclosure motion. The class action was certified on December 14, 2016.

The TSB had carried out an investigation into the accident and prepared a report setting out its findings. The report included consideration of the contents of the CVR. The TSB's report findings are not binding, and the opinions of the TSB are not admissible in other legal proceedings by virtue of s. 7(4) and 33 of the *Canadian Transportation Accident Investigation and Safety Board Act* (the "*Act*").

A copy of the CVR was not provided, prompting the passengers, Airbus, the Halifax airport, and NAV Canada to bring a motion for the disclosure of the CVR. The motion judge authorized the conditional release of the contents of the CVR. The TSB appealed the decision, asserting that the motion judged erred, amongst other things, by:

FIRM AND INDUSTRY NEWS

- The Firm is pleased to announce that **James Manson** has been admitted to the partnership effective July 1, 2021. Congratulations James.

- At the **Canadian Maritime Law Association** Annual General Meeting on June 7, 2021, **Rui Fernandes** was elected as National Vice-President. Congratulations Rui.

- The **Transportation Lawyers Association** Annual Conference **/ Canadian Transport Lawyers Association** Midyear Meeting will take place in Lake Tahoe California June 23-26, 2021. **Gordon Hearn** will be chairing an "International Transportation Law Update" panel. **Kim Stoll** will be in attendance.

- The **International Conference on Admiralty and Maritime Law** will take place July 12-13, 2021 in Ottawa, Ontario.

- 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.

(1) failing to afford the TSB an opportunity to make private confidential representations with respect to the CVR in accordance with s. 28(6)(b) of the *Act*; and
(2) determining that the public's interest in the proper administration of justice outweighed the importance of the statutory privilege associated with CVR.

Section 28(2) of the *Act* prohibits the disclosure of the CVR or its contents except in accordance with that section. Section 28(6) of the *Act* allows a court to order the production and discovery of the CVR if the public interest in the proper administration of justice outweighs the importance of the statutory privilege attached to the CVR. Section 28(6) reads as follows:

> Power of court or coroner
> (6) Notwithstanding anything in this section, where, in any proceedings before a court or coroner, a request for the production and discovery of an on-board recording is made, the court or coroner shall
>
> (a) cause notice of the request to be given to the Board, if the Board is not a party to the proceedings;
>
> (b) *in camera*, examine the on-board recording and give the Board a reasonable opportunity to make representations with respect thereto; and
>
> (c) if the court or coroner concludes in the circumstances of the case that the public interest in the proper administration of justice outweighs in importance the privilege attached to the on-board recording by virtue of this section, order the production and discovery of the on-board recording, subject to such restrictions or conditions as the court or coroner deems appropriate, and may require any person to give evidence that relates to the on-board recording.

The TSB argued that s. 28(6)(b) of the *Act*, in its inclusion of the words "*in camera*", (that is, in a private forum) entitled it to make "*ex parte*" (or without the other side being present or having notice) submissions to the judge prior to any decision to release the contents of the CVR; that is, the TSB asserted that the motion judge should have allowed it to make submissions not only in the absence of the public (*in camera*) but also in the absence of any other adverse parties (*ex parte*).

The Nova Scotia Court of Appeal held that the TSB's interpretation was not correct. Section 28(6)(b) of the *Act* uses the words "*in camera*" and not "*ex parte*". This is a clear distinction, and Parliament is well aware of the different meanings of these Latin phrases. In other sections of the *Act*, Parliament does use the phrase "*ex p*arte" such as in s. 19(3). Parliament could have incorporated "*ex par*te" into s. 28(6)(b) but did not do so.

In addition, the Court held that on a plain reading of s. 28(6) of the *Act*, the section authorizes the Court – not the parties – to listen to the cockpit recorder *in camera*. The TSB – which is not a party in the ordinary sense – is then given an opportunity to make representations with respect to the recording – something which non-parties to a court action ordinarily cannot.

The TSB further argued that the motion judge erred by applying the analysis of a 2009 Ontario decision rendered by Justice Strathy in *Société Air France v Greater Toronto Airports Authority*, 2009 CanLII 69321 *("Air France"),* rather than the Federal Court's decision in *Wappen-Reederei GmbH & Co. KG v. Hyde Park (The),* (2006) 4 FCR 272 *("Hyde Park*").

The Nova Scotia Court of Appeal held that the motion judge had not erred in relying upon the *Air France* articulation of the applicable test. The motion judge adopted the analysis in *Air France*, which in turn had considered *Hyde Park*. The test outlined in *Hyde Park* did not persuade Justice Strathy (as he then was) in *Air France* nor did it persuade the motion judge in this case. The criteria in *Hyde Park*—looking at the subject matter of the litigation, the nature, necessity and probative value of the evidence, as well as alternative means of obtaining the same information—are all subsumed in the *Air*

France analysis. The only material distinction was *Hyde Park's* addition of "the possibility of a miscarriage of justice" as a required threshold for admitting the contents of the cockpit voice recorder—a test not described in legislation and not approved in *Air France*. *Air France* was affirmed by the Ontario Court of Appeal, (2010 ONCA 598).

Lastly, the TSB faulted the motion judge for failing to consider the nature and probative value of the CVR, how necessary it was and alternative sources of evidence. The appeal court found no error in the motion judge's assessment of the facts before him. The motion judge did not err in his assessment of the CVR's evidence in the context of the issues raised and other evidence available. In particular, the motion judge held, among other things, that:

(1) the contents of the CVR were both relevant and reliable. The conversation recorded did not contain private or scandalous material;

(2) the litigation was important and substantial both in personal and in monetary terms. It was important that the process of determining the claims was fair to all parties;

(3) the flight crew's discovery evidence showed gaps in their ability to provide facts about their conduct at material times in the flight, which could be filled by production of the CVR; and

(4) disclosure of the CVR under the stringent conditions proposed would not interfere with aviation safety, damage relations between pilots and their employers, or impede investigation of aviation accidents

The Nova Scotia Appeal Court found that the motion judge had properly weighed the public interest in the administration of justice against privacy/safety and concluded that the disclosure was warranted in this case and was entitled to deference.

Andrea Fernandes

2. Federal "Quarantine Hotel" Program is Constitutional: *Spencer et al. v. Canada*

The Federal Court has just released its decision in *Spencer et al. v. Canada*, 2021 FC 621, a sweeping, multi-party constitutional challenge to the Canadian federal government's controversial "quarantine hotel" program. Pursuant to the regulations promulgated in January 2021 (which have been amended several times since), travelers returning to Canada by air must stay at a federally-approved "quarantine hotel" – at their expense – while awaiting the results of a COVID-19 PCR test ("Impugned Measures"). If and when the test is returned negative, the traveler may proceed home where they must complete the balance of a 14-day quarantine.

Several travelers challenged the provisions, alleging numerous constitutional violations.

Writing for the Court, Chief Justice Paul Crampton upheld the regulations in their entirety. The Chief Justice found that none of the applicants' arguments had any merit. Indeed, at the end of his lengthy reasons for decision (stretching to 106 pages), the Chief Justice remarked that should it be necessary, His Honour was of the view that *even stricter* measures (for example, a longer period of quarantine at the hotel) would also likely pass constitutional muster.

His Honour concluded his reasons with the following remarks:

> I recognize that those who have second residences abroad or other good reasons to travel may not welcome such measures, particularly if they are required to pay for some of them. However, like times of war and other crises, pandemics call for sacrifices to save lives and avoid broad based suffering. If some are willing to make such sacrifices, and engage in behavior that poses a demonstrated risk to the health and safety of others, the principles of fundamental justice will not prevent the state from performing its essential function of protecting its citizens from that risk.

As the below paragraphs make clear, the Chief Justice was undoubtedly convinced, on the strength of the record before him, that the government's program is reasonable and that (apart from two discrete instances that one applicant encountered) citizens' rights are not violated by the scheme.

The "quarantine hotel" program is currently scheduled to expire on June 21, 2021. It is yet unclear whether it will be extended further.

The Applicants

Essentially, the proceeding before the Court was a consolidation of four separate applications involving fifteen separate applicants (the "Applicants"). For all intents and purposes, all the Applicants were international air travelers affected by the Impugned Measures.

The COVID-19 Pandemic

The following evidence was described in the decision as being presented by the government's witnesses, and was essentially uncontested by the Applicants:

- COVID-19 is a disease caused by a coronavirus known as SARS-CoV-2
- COVID-19 was first discovered in China in December 2019 and has since spread across the globe
- COVID-19 was declared a pandemic by the World Health Organization in March 2020
- The virus is reported to have infected more than 118 million people and is associated with more than 2.6 million deaths worldwide
- In the same period, there were 899,757 infections and 22,370 deaths resulting from COVID-19 in Canada
- The virus is spread through humans primarily through human-to-human

transmission, occurring through inhalation of respiratory droplets and aerosols

- Some infected individuals remain asymptomatic; however, according to the uncontested evidence presented by the government, such persons can still transmit the virus to others
- Individuals who are infected but have not yet begun exhibiting symptoms are known as pre-symptomatic carriers, and can also spread the virus
- The median incubation time for the disease is five days; however, it is believed that symptoms can appear for the first time up to 14 days from initial exposure
- The window of communicability is about 10 days
- Like all viruses, COVID-19 naturally mutates over time, and sometimes such mutations are of increased concern. As of January 2021, three so-called "variants of concern" had been identified
- As of February 2021, the Public Health Agency of Canada ("PHAC") was very concerned about increased transmissibility of those variants, and that they would lead to a significant increase in the number of hospitalizations and deaths, and to a potential reduction in the effectiveness of vaccines

In response to the above, beginning in January 2021, the Federal Cabinet imposed a series or orders, promulgated under the authority of the federal *Quarantine Act* (the "Impugned Orders"). The Impugned Orders have been amended several times since then, and have included various requirements, only some of which were challenged by the Applicants.

The provisions of the various Impugned Orders that were challenged by the Applicants included the following:

- A requirement to stay, at their own expense, at a "government approved accommodation" ("GAA") for up to 72 hours while waiting for the results of a PCR test taken upon arrival in Canada (described in the decision as the "Day 1 Test"
- A requirement to submit evidence electronically that they had pre-booked and prepaid for the GAA
- A requirement to provide such evidence upon entry into Canada
- A requirement to retain that evidence for 14 days following their return to Canada
- A requirement to include, in their quarantine plan, the address of the GAA where they plan to stay while they await the results of the Day 1 Test
- A requirement for travelers not eligible to stay in a GAA to quarantine at a "designated quarantine facility ("DQF")
- A requirement to provide pre-boarding evidence that they received either a negative PCR test taken within 72 hours prior to their scheduled departure time, or a positive test that was performed 14 to 90 days prior to that time

These provisions remained in force even though the various Impugned Orders were amended in March, April, and May 2021.

The Quarantine Act

The above orders and requirements were all made by the Federal Cabinet under s. 58 of the federal *Quarantine Act*, which allows for such orders in the event of an outbreak of a communicable disease that would pose a severe public health risk, in circumstances where the Cabinet is of the opinion that no reasonable alternative measures to prevent the introduction or spread of the disease are available.

Notably, the Applicants did not challenge the basic requirement of all travelers to self-isolate for 14 days upon arrival in Canada, to undergo a PCR test upon arrival and once again during the 14-day period of self-isolation.

The Charter Challenges

Collectively, the Applicants argued that the various Impugned Orders violated the following provisions of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"):

- Section 6 (the right to enter, remain in and leave Canada)
- Section 7 (the right to life, liberty and security of the person)
- Section 8 (the right to be secure against unreasonable search and seizure)
- Section 9 (the right not to be arbitrarily detained or imprisoned)
- Section 10(b) (the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right
- Section 11(d) (the right to be presumed innocent until proven guilty)
- Section 11(e) (the right not to be denied bail without just cause)
- Section 12 (the right not to be subjected to cruel and unusual punishment)

The Canadian Bill of Rights Challenge

One of the Applicants also argued that the various Impugned Orders violated section 1(a) of the Canadian Bill of Rights, which provides:

> It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
>
> (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

The "Ultra Vires" Challenge

The Applicants also argued that the Impugned Orders were improperly made because the government could not demonstrate that the requirements of s. 58(1) of the *Quarantine Act* had been met, i.e. that there were truly no other alternative measures available short of the Impugned Orders. As such, the Applicants argued that the Impugned Orders constituted an unreasonable exercise of authority and were therefore "*ultra vires*" (or, "beyond the power") of the government.

The "Division of Powers" Challenge

The Applicants also argued that the Impugned Orders were also *ultra vires* the authority of the federal government because they were an improper infringement on the exclusive jurisdiction of the provinces over public health.

Evidentiary Issues

The Court held that certain evidence filed by the Applicants was inadmissible as it constituted hearsay evidence. For example, various media reports submitted for the truth of their contents, and various academic articles attached as exhibits to affidavits sworn by the Applicants, also submitted for the truth of their contents, were ruled inadmissible.

The Court went on to observe, however, that even if it had ruled this evidence admissible, it would not have changed the Court's ultimate rulings on the merits.

The Decision

Essentially, the Court concluded that *none* of the Applicants' challenges were valid. In the Court's view, the Impugned Orders did not presumptively infringe or violate any of the *Charter* provisions listed above or section 1(a) of the *Canadian Bill of Rights*. Furthermore, the Court held that the federal government did indeed have the constitutional authority to enact the Impugned Orders.

The Charter of Rights Analysis

Section 6

Subsection 6(1) of the *Charter* states: "Every citizen of Canada has the right to enter, remain in and leave Canada."

The Applicants contended that the requirement to stay at a GAA constitutes an arbitrary impediment to the right of returning air travelers to freely enter Canada.

The Court disagreed. Citing the Supreme Court of Canada in *United States of America v. Coltroni*, [1989] 1 S.C.R. 1469, the Chief Justice observed that "the central thrust of s. 6(1) is against exile and banishment, the purpose of which is exclusion of membership in the national community." He concluded that the Impugned Measures simply do not encroach on air travelers' membership in Canada's "national community". Those travelers are not denied entry into Canada when they arrive from abroad. "Rather," continued the Chief Justice, "they are required to briefly quarantine or isolate *within* Canada."

One of the Applicants also argued that the Impugned Measures were unfair in that air travelers are treated differently than those who return to Canada by car. The Chief Justice also disagreed, noting that the differential treatment "is rooted in scientific data … indicating that a higher percentage of asymptomatic returning air travelers (1.7%) test positive for COVID-19 than is the case for asymptomatic returning land travelers (0.3%)."

Section 7

Section 7 of the *Charter* states: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

To demonstrate a violation of section 7, a claimant must establish (a) that the law in question infringes their right to life, liberty or security of the person, and (b) that the infringement is not in accordance with the principles of fundamental justice. This second step involves a consideration of whether a law is overbroad, arbitrary or has consequences that are grossly disproportionate to their object.

Here, the Applicants argued, first, that their "security of the person" was engaged by the risk of exposure to COVID-19 *while staying* at a GAA or DQF, the risk of assault and the risk of "severe psychological harm" caused by the prospect of having to stay at a GAA. The Applicants even cited an instance of sexual assault that had reportedly taken place at a GAA (although not to one of the Applicants themselves).

The Court disagreed. Chief Justice Crampton found that none of the Applicants had demonstrated that they had actually been physically harmed or infected by COVID-19 at a GAA or DQF. He was also of the view that the type of psychological stress and harm required to infringe s. 7 must of a much greater magnitude than that alleged by the Applicants in this case: e.g., restrictions on obtaining an abortion; preventing an individual from terminating their life at the time of their choosing, etc.

Second, the Applicants argued that their rights to "liberty" were also engaged. While the Court did accept this argument in broad terms, Chief Justice Crampton was of the view that the extent of the deprivation of liberty in this case was not serious. His Honour noted that none of the Applicants challenged the overall validity of the 14-day quarantine, merely the manner in which some of that period had to be spent. "In my view," wrote the Court, "this falls toward the lower end of the spectrum of encroachments on an individual's liberty interest that are contemplated by section 7."

Nonetheless, the Court was obliged to move to the second step of the s. 7 analysis and determine whether the Applicants' liberty rights were infringed "according to the principles of fundamental justice."

The Court was of the view that the Applicants' rights *were*, in fact, being limited according to the principles of fundamental justice.

The Court found that the Impugned Measures were not arbitrary. Chief Justice Crampton found that there was "cogent evidence" supporting the

decision to target returning air travelers with special measures. He once again noted that a higher percentage of asymptomatic air travelers test positive for COVID-19 (1.7%) than do asymptomatic land travelers (0.3%).

The Court also noted that it was "believed" by government science advisors that "variants of concern" were being introduced into Canada more by air travelers than land travelers.

Other rationale for imposing the Impugned Measures on air travelers included:

- People who tested positive on their Day 1 Test would likely modify their behavior and would be less likely to infect people in their homes
- The Impugned Measures help protect against the spread of "variants of concern"
- The Impugned Measures help to prevent asymptomatic individuals from immediately taking a domestic connecting flight, thereby potentially infecting others
- As a practical matter, there were no available hotels or other facilities at many of the 117 land crossings into Canada

Regarding arbitrariness, the Chief Justice, citing the Supreme Court of Canada in *Carter v. Canada (Attorney General)*, 2015 SCC 5 ("*Carter*"), observed that, in Canada, a law is only arbitrary "where there is no rational connection between the object of the law and the limit it imposes on life, liberty and the security of the person". In the Court's view, the various rationales provided by the government in support of the Impugned Measures "provide the requisite rational connection between the Impugned Measures… and the limits imposed on the Applicants' right to liberty."

Similarly, the Court observed, citing *Carter*, that a law is only overbroad when it "takes away rights in a way that generally support the objective of the law, but goes too far by denying the rights of some individuals in a way that bears to relation to that object." Where there is a rational connection between the effect on the individual in question and the measure's purpose, it will not be overbroad.

Thus, the Court held that the Impugned Measures were not "overbroad" for reasons similar to those discussed above, which had led the Court to also conclude that they were not "arbitrary".

While the Applicants had argued, among other things, that the Impugned Measures were overbroad because they also applied to vaccinated travelers, and also because they expose travelers to a greater risk of contracting COVID-19 by participating in the program rather than simply going directly home upon arrival, the Court found that the Applicants had not adduced evidence in support of those arguments.

Finally, the Court recognized that there is a high bar in Canada in order to show that a law is "grossly disproportionate" for purposes of s. 7. It is only applied in "extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure": *Canada (Attorney General) v. Bedford*, 2013 SCC 72. Again, the Chief Justice found the Impugned Measures rationally connected to the aim of protecting citizens from COVID-19; hence, they were not "totally out of sync" with that objective.

Section 8

Section 8 of the *Charter* states that "everyone has the right to be secure against unreasonable search or seizure."

However, the Court went on to observe that in Canada, section 8 is not engaged unless a claimant has a reasonable expectation of privacy in the place or item that is inspected or taken by the state. Moreover, this expectation of privacy must occur in the context of administrative or criminal investigation.

In this case, the Court concluded that the requirement to pay for a GAA booking did not engage the Applicants' s. 8 rights. There was no reasonable expectation of privacy in the money

they were required to pay in order to book a stay at a GAA. Moreover, there was no administrative or criminal investigation underway.

Section 9

Section 9 of the *Charter* provides: "Everyone has the right not to be arbitrarily detained or imprisoned."

To demonstrate a violation of s. 9, an applicant must first demonstrate that there has been a detention. If so, the detention must be arbitrary. Under existing Canadian jurisprudence, in assessing whether a detention is arbitrary, a 3-part test is applied: (a) whether the detention is authorized by law; (b) whether the law is arbitrary; and (c) whether the manner in which the detention is carried out is reasonable.

The Court ultimately held that the requirement to stay at a GAA was in fact a "detention"; however, the detention was not arbitrary. Using the 3-step process outlined above, the Court found that the detention was indeed "authorized by law." The Court also cited the same "rational connection" arguments, described above, to conclude that the law was not arbitrary.

Finally, the Court also held that the manner of detention was reasonable. He noted several similarities between the Impugned Measures and a normal stay in a hotel, including Wi-Fi access, access to takeout food and "a range of television and movie options". The Court held that travelers "are generally free to do as they please within the hotel room."

The Court also described various other measures that were designed to give screening officers the ability to take individual travelers' concerns into account.

Thus, the Court held that s. 9 was ultimately not engaged in this case, expect in one instance, where one of the Applicants was taken to a facility and not told where she was going beforehand. This was found to be a violation of s. 9; however, since that earlier practice was since amended, and since the particular Applicant had not asked for damages, the Court found that no remedy was required.

Section 10(1)(b)

Section 10(1)(b) provides that everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right.

Here, the Court agreed that Applicants' rights under section 10(1)(b) were engaged since they were being detained; however, he also found that only one of the Applicants had actually led sufficient evidence that her right, to be informed of the right to retain and instruct counsel *without delay*, was violated.

Thus, the Court did agree that in the case of the one Applicant, she did establish that her rights under s. 10(1)(b) had been violated.

Sections 11(d) and 11(e)

Sections 11(d) and 11(e) of the *Charter* provide that any person charged with an offence has the right… (d) to be presumed innocent until proven guilty… and (e) not to be denied bail without reasonable cause.

The Applicants attempted to argue that the Impugned Measures violated these sections; however, the arguments were a non-starter with the Court. These provisions simply were found not to apply since no Applicants were being charged with an offence.

Section 12

Section 12 of the *Charter* provides that everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

The Court also wasted little time with the Applicant's argument in this regard. The Court simply found that the Impugned Measures did not constitute "punishment". Even if they

constituted "treatment", such treatment did not rise to the level of "cruel and unusual".

The Section 1 Analysis

Having found that one of the Applicants' rights under section 9 (when she was not told where she was being taken) and section 10(1)(b) (when she established that she had not been told "without delay" of her right to retain and instruct counsel) had been violated, the Court proceeded to consider whether the government could justify such violations under s. 1 of the *Charter*, which provides that such rights are subject to such reasonable limits prescribed by law that are demonstrably justified in a free and democratic society.

In short, the Court concluded that the government could not justify violating the one Applicant's s. 9 and s. 10(1)(b) rights. The government did not demonstrate that it was reasonably necessary to not inform her where she was being taken upon her arrival in Canada, and to refrain from informing her of her right to counsel without delay.

The Canadian Bill of Rights Analysis

The *Canadian Bill of Rights* was enacted prior to the implementation of the *Charter* and has now largely fallen into disuse. However, section 1(a) of the *Canadian Bill of Rights* does contain additional language that is not contained in the *Charter*, namely the right to "enjoyment of property" and not to be deprived thereof except by due process of law".

In this case, the Court also quickly disposed of the argument, made by only one of the Applicants, that they were being deprived of "property" (i.e. money) by having to pay for their stay at a GAA. The Chief Justice found that, even if they were so deprived, the deprivation was done according to "due process of law", since the Impugned Orders were all found to have been constitutional with respect to that Applicant (the Applicant whose *Charter* rights had been violated did not base her argument on the *Canadian Bill of Rights*).

The "Ultra Vires" Analysis

Essentially, the Applicants argued that the government had not established that "no reasonable alternatives to prevent the introduction or spread of the disease are available", which is a requirement under s. 58 of the *Quarantine Act* before the government is empowered to make orders such as the Impugned Orders. The Applicants also argued that no explanation was provided as to why the measures that were in effect before the Impugned Orders came into effect were not sufficient.

Naturally, in contrast, the government argued that the record clearly demonstrated that the Impugned Orders were reasonable.

Employing administrative law principles and having regard to the evidence filed by the government and also the recitals and explanatory notes to the various orders making up the Impugned Orders, the Court ultimately was of the view that the federal Cabinet did reach the opinion that no reasonable alternatives to prevent the introduction or spread of COVID-19 were available. Hence, the Impugned Orders were not "*ultra vires*".

Moreover, the Court found that the Impugned Orders were also "not unreasonable". Citing the various justifications and rationales already mentioned above, the Court found that "collectively, these justifications provided a reasonable basis for the Impugned [Orders]. Those justifications are also appropriately transparent, intelligible, and based on an internally coherent and rational chain of analysis."

The "Division of Powers" Analysis

Here, the Court observed that the issue of whether a law falls within federal or provincial jurisdiction involved, first, an assessment of the "pith and substance" or "essential character" of the law. Then, that "essential character" is

classified according to the heads of power assigned to the federal and provincial governments in the Canadian Constitution.

In this case, the Applicants maintained that the Impugned Orders properly fell under the legislative jurisdiction of the provinces, which have the authority under sections 92(7), 92(13) and 92(16) of the Constitution to enact laws for:

- The Establishment, Maintenance and management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals (s. 92(7))
- Property and Civil Rights in the Province (s. 92(13))
- Generally, all Matters of a merely local or private Nature in the Province (s. 92(16))

In contrast, the government maintained that the Impugned Orders fell under the jurisdiction of the federal government, which has the authority under s. 91(11) of the Constitution to enact laws for:

- Quarantine and the Establishment and Maintenance of Marine Hospitals

Ultimately, the Court concluded that the "pith and substance" of the Impugned Orders was not the regulation of public health *per se*, but rather "reducing the introduction and further spread of COVID-19 and new variants of the virus into Canada by decreasing the risk of importing cases from outside the country". This purpose was consistent with the federal government's power to make laws concerning quarantines. Thus, the Impugned Orders were not *ultra vires* the federal government on a division of powers basis.

The Remedy

Essentially none of the Applicants' challenges were accepted by the Court. Accordingly, for the vast majority of the Applicants, there was no remedy necessary.

With respect to the Applicant whose s. 9 and 10(1)(b) *Charter* rights had been violated, the Court noted that the Applicant in question had not asked for a specific remedy. Accordingly, the Court did not grant one. The Court did note that the regime under which the Applicant had been taken to a facility without being informed where she was going was no longer in force. The Court also observed that with its ruling, the government was now aware of its obligation to inform travelers of their right to counsel without delay at the outset of detention.

Subject to that singular admonishment, the applications were all dismissed.

James Manson

3. Balancing Privacy Interests with The Open Court Principle

The Supreme Court of Canada recently released an important and much anticipated decision about the interaction of privacy interests and the open court principle (*1). The issues before the Court were "whether privacy concerns can amount to a public interest" in the open court principle and, if so, whether openness puts privacy at serious risk to justify granting sealing orders concerning certain probate files. (*2).

Background

The factual backdrop of the case was the unresolved double homicide of a prominent Toronto couple who were found dead in their home in December 2017. The couple's high profile, the circumstances surrounding their deaths, and the lack of arrests have generated intense public interest and media coverage. To keep the couple's estate-related matters outside of the public spotlight, the estate trustees (the "trustees") sought sealing orders of the probate files. The trustees argued that if the probate files were accessible to the public, "there was a real and substantial risk that the affected individuals would suffer serious harm from the public exposure of the materials…" (*3). The Ontario Superior Court of Justice granted the sealing orders.

The decision to seal the probate files was appealed by a Toronto Star journalist who had covered the couple's deaths. In an unanimous decision, the Court of Appeal for Ontario allowed the appeal and lifted the sealing orders. The Court of Appeal relied on leading judicial authority, known as the *Sierra Club* case, writing that, "…the kind of interest that is properly protected by a sealing order must have a public interest component. Personal concerns cannot, without more, justify an order sealing material that would normally be available to the public under the open court principle" (*4). With respect to the personal safety concerns raised by the trustees, The Court of Appeal found that the trustees had failed to lead evidence "that could warrant a finding that disclosure of the content of the estate files posed a real risk to anyone's personal safety" (*5). In the Court of Appeal's view, the Ontario Superior Court had erred on this issue and stated, "the suggestion that the beneficiaries and trustees are somehow at risk because the Shermans were murdered is not an inference, but is speculation. It provides no basis for a sealing order" (*6). Accordingly, the Court of Appeal allowed the appeal and set aside the sealing orders.

The Decision of the Supreme Court of Canada

The trustees appealed the Court of Appeal's decision to the Supreme Court of Canada. As previously noted, the issues before the Court were "whether privacy concerns can amount to public interest" in the open court principle, "and if so, whether openness puts privacy interests at serious risk" sufficient to justify sealing orders (*7). In a unanimous decision, the Court dismissed the appeal. In what will be seen as an important development in privacy law, the Court disagreed with how the Court of Appeal addressed the personal privacy concerns raised by the trustees. The Court recognized that "an aspect of privacy" such as "the public interest in protecting human dignity" may justify an exception to the open court principle (*8). In this case, however, the Court held that the trustees had failed to establish that the risks to privacy and physical safety were sufficiently serious to overcome the strong presumption in favour of the open court principle (*9).

The Court confirmed that the test for any discretionary orders (e.g., a sealing order, a publication ban, an order excluding the public, or a redaction order) limiting the open court principle is set out in the *Sierra Club* decision. Until this decision, the courts administered the *Sierra Club* test as a two-step inquiry involving the necessity and proportionality of the proposed order (*10). In *Sherman*, the Court has reframed the *Sierra Club* test around three prerequisites that an applicant asking the Court to grant a discretionary order (e.g., a sealing order) must establish: "1) court openness poses a serious risk

to an important public interest; 2) the order is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and 3) as a matter of proportionality, the benefits of the order outweigh its negative effects. Only where all three of these prerequisites have been met can a discretionary limit on openness– for example, a sealing order… properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*11). The Court has noted that the reframing of the *Sierra Club* test does not alter its essence. It is simply meant to clarify certain points of the *Sierra Club* test.

The Court noted that "by requiring the applicant to demonstrate the sensitivity of the information as a necessary condition to the finding of a serious risk to this interest, the scope of this interest is limited to only those cases where the rationale for not revealing core aspects of a person's private life, namely protecting individual dignity, is most actively engaged" (*12). This is a fact-specific threshold. The Court provided examples of sensitive personal information that, if exposed, could give rise to a serious risk, including information related to stigmatized medical conditions such as HIV, stigmatized work, or sexual orientation. In deciding whether the discretionary order must be granted, the courts may also consider the extent to which the sensitive personal information is already in the public domain (*13). The Court applied the *Sierra Club* test to the facts of this case and concluded that the trustees had failed to establish the first prerequisite, namely the serious risk to an important public interest threshold. The Court found that the information in the probate files was not highly sensitive that it could be said to affect the dignity of the affected individuals. As such, the Court rejected the trustees' argument that the privacy concerns raised a risk to an important public interest as required by the *Sierra Club* test.

In addition to showing that there is a serious risk to an important interest, the applicant seeking a discretionary order must show that the particular order is necessary to address the risk and that the benefits of the order outweigh its negative effects. As the Court explained, this balancing exercise informed by the open court principle serves as a final barrier to applicants seeking to limit public access to court records based on privacy concerns (*14). In this case, even if the trustees had established a serious risk to privacy, the Court was required to consider whether there were more reasonable alternatives to the requested order. The Court noted that a publication ban would have been a sufficient and more reasonable alternative to mitigate the risk to privacy interest (*15). However, to meet this final requirement of the *Sierra Club* test, the trustees would have had to demonstrate that the benefits of any discretionary order necessary to protect from a serious risk outweighed the harmful effects of the order on the open court principle. The trustees failed to establish a serious risk to their privacy or physical safety. Accordingly, the Court affirmed the Court of Appeal's decision to set aside the sealing orders.

Francisca Sotelo

Endnotes

(*1) *Sherman Estate v. Donovan*, 2021 SCC 25 [*Sherman*].
(*2) *Sherman* at para. 6.
(*3) *Sherman* at para. 11.
(*4) *Donovan v. Sherman Estate*, 2019 ONCA 376 [*Donovan*] at para.10
(*5) *Donovan* at para. 13
(*6) *Sherman* at para. 19
(*7) *Sherman* at para. 6.
(*8) *Sherman* at para. 7.
(*9) *Sherman* at para. 8.
(*10) *Sherman* at para. 38.
(*11) *Sherman* at para. 38.
(*12) *Sherman* at para. 76.
(*13) *Sherman* at para. 81.
(*14) *Sherman* at para. 106.
(*15) *Sherman* at para. 105.

4. Ontario Court of Appeal Confirms Test for Social Host Liquor Liability

***Jonas v Elliott* 2021 ONCA 124**

On February 25, 2021, the Ontario Court of Appeal heard an appeal of an order granting partial summary judgment, dismissing a court action against the defendant social host of a party, Carrie Goudy ("Goudy") and the City of Stratford which had rented the facility where the party was held and had granted permission to serve alcohol. During the party, the plaintiff, Richard Jonas ("Jonas"), was assaulted and injured by the defendant, Matthew Elliott ("Elliott"). On a motion for summary judgment brought by Ms. Goudy and the City, the motions judge found there was no legally enforceable "duty of care" on the part of the host and/or the City.

The *Occupiers' Liability Act* R.S.O. 1990 provides that a person or organization with physical possession and/or responsibility for and control over a property is required to take steps to ensure that all persons while on that property are reasonably safe. The Court of Appeal found that the duty was correctly articulated by the motion judge.

Further, the Court of Appeal confirmed that, to establish a duty of care, a relationship of proximity and foreseeable harm is required and this relationship must be examined in the context of each case.

The Court of Appeal reviewed the motion judge's findings regarding whether there was a relationship of proximity between the plaintiff and the social host/City. The motion judge held that there was proximity but that the altercation was not reasonably foreseeable for the following reasons:

> (a) Experienced and trained staff were hired to serve alcohol and a friend provided security at the door;
> (b) Both Jonas and Elliott had consumed alcohol before attending the party but neither exhibited prior signs of aggressive behaviour or conduct that would suggest they had consumed alcohol before they arrived;
> (c) Goudy was unaware of their prior alcohol consumption;
> (d) The incident was both sudden and brief;
> (e) There was only one other minor incident that evening involving an intoxicated patron who was appropriately removed from the party, placed in a taxi and taken home; and,
> (f) The fact that Jonas was let into the party by Goudy, was not the cause of the incident.

The Court of Appeal confirmed that the findings of facts about the activity at the party were sufficient to demonstrate that the harm was not reasonably foreseeable, and those findings of the motion judge were owed deference. Further there was no evidence that the altercation was caused or contributed to by intoxication.

The grounds for appeal were the motion judge's findings that the entrance was properly supervised and that the event was a modest sized gathering. The plaintiffs argued that, although those providing alcohol were properly certified, the person at the entrance to the party was a "friend" as opposed to a designated staff person. Further, the plaintiffs argued that there was witness testimony that there were over two-hundred people at the event, and it was, therefore, not a "modest" gathering.

The Court of Appeal found no merit to the plaintiffs' submissions as, even if accepted by the motion judge, these findings could not have been material to whether the altercation was reasonably foreseeable.

The motion judge further accepted that the plaintiffs had not demonstrated that there was an act or failure to act on the part of the either Goudy or the City that caused Jonas' injury. The assault by Elliott on Jonas was entirely unexpected and could not have been reasonably foreseen by the respondents. As such, the motion judge concluded that there was no genuine issue requiring a trial.

The Court of Appeal saw no error in the motion judge's finding that the harm was not reasonably foreseeable or the conclusion that Jonas' claim and Elliott's crossclaim against Goudy and the City should be dismissed.

The Court of Appeal also found that granting partial summary judgment was correct and which was both expeditious and cost-effective.

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5. Transport Canada Updates

1. Amendments to the Grade Crossing Regulations gave railway companies, public road authorities and owners of private crossings a deadline of November 28, 2021, to comply with the requirements for existing public and private crossings. On June 18, 2021, Transport Canada announced that a modification to the compliance deadline "in a manner that accounts for the economic realities of the COVID-19 pandemic.

The proposed amendments establish new compliance deadlines to meet the requirements of the Regulations based on the various levels of risks posed by grade crossings. This includes:

- a one-year extension for existing public grade crossings which present a higher risk;
- a three-year extension for all remaining public and all private grade crossings; and
- an exclusion from the construction and maintenance requirements for very low-risk grade crossings (such as field-to-field crossings with minimal train traffic).

2. On June 18, 2021, Minister of Transport The Honourable Omar Alghabra spoke at the 223rd Session of the ICAO Council. The Minister spoke about Canada's role in the Safer Skies. The work on Safer Skies began after January 8th, 2020, when the Islamic Revolutionary Guard Corps fired on a civilian aircraft, killing 176 innocent people, some of whom were children, including 55 Canadian citizens, 30 permanent residents and many more with ties to Canada, as well as Iranian, Ukrainian, British, Afghan, and Swedish nationals. He announced that Canada will host a second Safer Skies Forum in late 2021 or early 2022. The forum is open to all 193 ICAO member states. The work is designed "to safeguard civilian flight operations in and near conflict zones and prevent tragedies like PS752 and MH17 from happening again." For the full speaking notes see https://www.canada.ca/en/transport-canada/news/2021/06/speaking-notes-for-the-honourable-omar-alghabra-minister-of-transport-at-the-223rd-session-of-the-icao-council.html.

3. On June 14, 2021, Transport Canada announced that the CSA Group will become the second official certification body of electronic logging devices in Canada. As of June 12, 2021, Transport Canada requires all federally regulated commercial trucks and buses operating in Canada to be equipped with a certified electronic logging device to better track drivers' hours of driving, work, and rest. Progressive enforcement actions to comply with this mandate are now in effect, with no penalties, until June 12, 2022, by all provinces and territories. Enforcement mainly focuses on education and awareness for motor carriers and drivers.

4. On June 8, 2021, Transport Canada published the 4th Report to Canadians – a summary of the work accomplished to date through Canada's Oceans Protection Plan. The Oceans Protection Plan was launched in 2016. It is a five-year, $1.5 billion investment plan designed to protect Canada's coasts and waterways. Highlights of the 4th report include:

- Strengthening marine safety by creating the Marine Training Program on all three coasts. The introduction of this program has helped hundreds of underrepresented groups, including Indigenous Peoples, Northerners, and women begin careers in the marine industry.
- Preventing and responding faster to marine incidents by making the Canadian Coast Guard's Regional Operations Centres operational 24/7 and installing

new marine weather forecasting and radar coverage.

- Preserving and restoring 64 marine ecosystems on our three coasts through the Coastal Restoration Fund.
- Co-developing the Enhanced Maritime Situational Awareness system with Indigenous communities, which provides near real-time marine traffic and environmental data to help enhance local marine safety, environmental monitoring, and protection, and manage waterway activity across Canada.
- Funding over 300 projects to remove and dispose of abandoned or wrecked boats to reduce hazards to navigation in our waters across the country.
- Through the Multi-Partner Research Initiative, funded over 30 projects to improve oil spill response protocols and decisions that minimize the environmental impacts of oil spills.

The report can be accessed at https://tc.canada.ca/en/initiatives/oceans-protection-plan/report-canadians-investing-our-coasts-through-oceans-protection-plan

Rui M. Fernandes

6. New Statutory Holiday for Federally Regulated Workplaces

This September workplaces that are federally regulated, such as cross border or inter provincial trucking companies, will observe a new general holiday. The Government of Canada has announced that September 30th of each year will be Truth and Reconciliation Day. The holiday is one of the calls to action from the Truth and Reconciliation Commission of Canada. The objective of the holiday is to educate and remind Canadians about the history of residential schools and to honour the victims and survivors.

Truth and Reconciliation Day becomes the 10th general holiday under the *Canada Labour Code*. The Code sets out an employee's right to a day off with general holiday pay (usually 1/20th of wages, excluding overtime, earned in the previous 4 weeks). The Code also sets out an employee's entitlement to pay if they are required to work on the general holiday. This will depend on how the employee is usually paid as well as whether the employer is a continuous operation, but generally the employee who works on the general holiday will receive general holiday pay plus 1.5 times their regular rate of pay for the hours worked, or a substituted day for the holiday.

Carole McAfee Wallace

7. Important Update for Provincially Regulated Employers

The Ontario *Employment Standards Act, 2000* ("ESA") sets out the minimum terms or standards of employment that all employers must provide to their employees. An employer cannot contract out of the ESA.

If an employee's employment is terminated without cause (which under the ESA is defined as wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer) the employee is entitled to notice. Notice can be paid or satisfied through a working notice period. Generally, after 3 months of employment, an employee is entitled to a week of notice for each completed year of service up to 8 weeks for 8 or more years of service. After 5 years of service, an employee may also be entitled to severance pay under the ESA - an additional week of pay for each completed year of service up to a maximum of 26 weeks – if the employer's payroll is $2.5 million or more. The Ministry of Labour's policy guideline provides that only the employer's Ontario payroll is considered in determining whether the employee is entitled to severance pay. However, there have been a few court decisions which have included the employer's payroll in other

provinces, in determining the employee's right to severance.

Last week the Ontario Divisional Court put to rest any confusion about severance pay. In the case of *Doug Hawkes v. Max Aicher (North America) Limited* (*1) the court set aside a decision of the Ontario Labour Relations Board ("OLRB") and held that an employee's entitlement to severance pay is based on the size of the employer's *global* payroll.

The employer in this case was a wholly owned subsidiary of Max Aicher Gmbh & Co. KG ("MAG"), a steel company based in Germany. The OLRB relied on s. 4 of the ESA which provides that if associated or related activities or businesses are carried on by or through an employer and one or more other person, the employer and the other person(s) shall be treated as one employer for the purposes of the ESA. While the employer's Ontario payroll was less than $2.5, globally MAG's payroll was greater. The OLRB found that Mr. Hawkes was not entitled to severance pay because his employer's Ontario payroll was less than $2.5 million.

The Divisional Court found that the OLRB's decision was unreasonable as it was not based on internal coherence or a rational chain of analysis. The Court was critical of the OLRB's rejection of earlier case law which, while not binding, did contain a clear and thorough analysis of the purpose of severance pay and how that should inform the interpretation of payroll. The Court was also critical of the OLRB's failure to apply the modern principles of statutory interpretation: text, context and purpose. The Court stated that the OLRB failed to consider the purpose of severance pay, which is to compensate long standing employees who have developed employer-specific skills and substantial seniority and benefits, which are then lost.

This decision has financial implications for Ontario employers who also have operations outside of the province – if the employer's global payroll is $2.5 million or more, its employees are entitled to severance pay under the ESA.

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Endnotes
(*1) 2021 ONSC 4290

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