THE NAVIGATOR

IN THIS ISSUE

Waiver & Estoppel: Should Knowledge of Policy Breach be Imputed to Insurers?

Bradfield v. Royal Sun Alliance insurance Company of Canada 2021 SCC 47

The July 2021 edition of *The Navigator* reported on the Court of Appeal's reversal of the trial judge's order that Royal SunAlliance ("RSA") was responsible to provide insurance coverage to its insured, Steven Devesceri's estate. The issue was whether the insurer was estopped from denying coverage by its conduct before the insurer had actual knowledge of material facts relating to the breach of the subject insurance policy.

The plaintiff settled with RSA after leave to appeal was granted by the Supreme Court of Canada. The Trial Lawyers Association of British Columbia requested and was granted permission to be substituted as the appellant. The Supreme Court of Canada felt it necessary to comment despite the issue being moot for the original parties.

Facts Review

On May 29, 2006, Bradfield, Devecseri, and Latanski and others were riding motorcycles when Devecseri rode into oncoming traffic, colliding with a car being driven by Jeremy Caton. The collision killed Devecseri and injured both Caton and Bradfield. At the time, Devecseri had alcohol in his system, in contravention of his motorcycle license making him in breach of the RSA standard motor vehicle insurance policy.

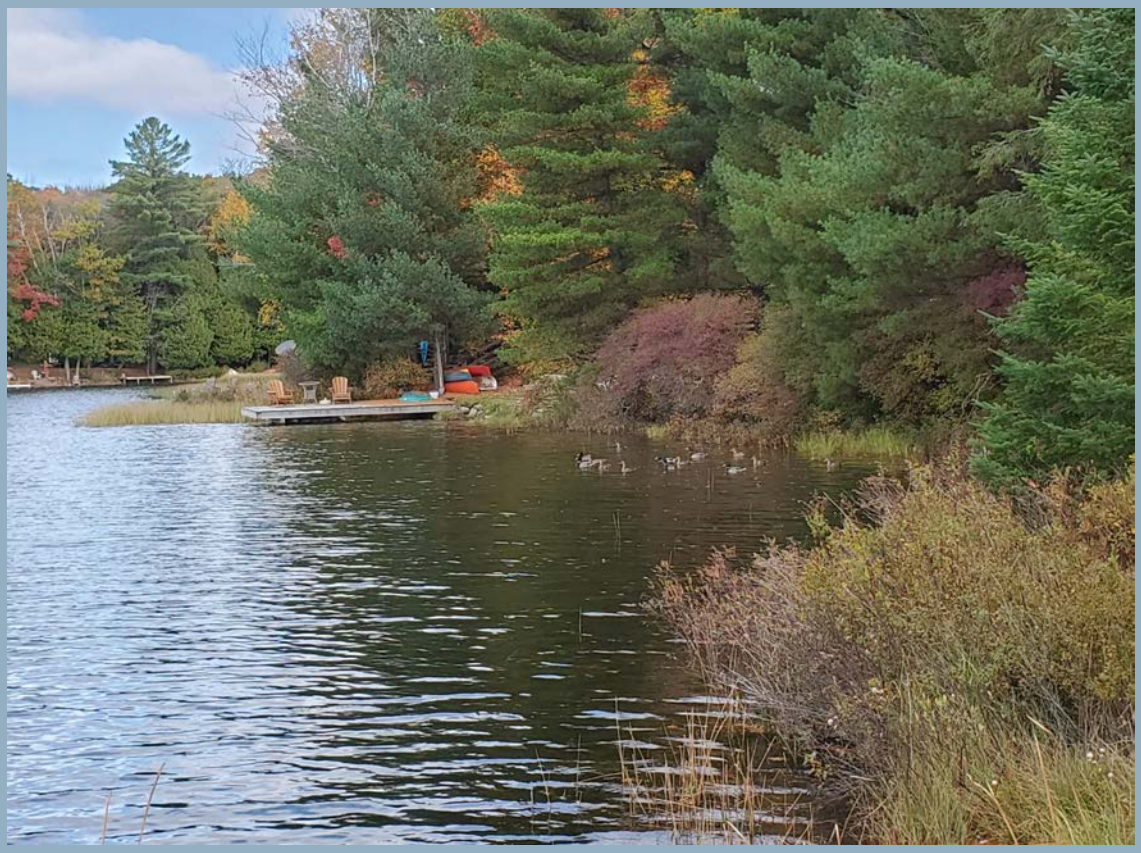
As part of its investigation, RSA's witness testified that RSA obtained all information regarding the accident from the police, who had concluded that "excessive speed was a major contributing factor in the collision" but made no mention of alcohol. None of the parties obtained a copy of the coroner's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

Before 2009, Bradfield's insurer received hearsay information that drinking was involved, but did not advise RSA's claims adjuster. RSA's claims adjuster had interviewed Bradfield and Latanski as part of the

FIRM AND INDUSTRY NEWS

- **Gordon Hearn** and **Carole McAfee Wallace** will be representing the Firm at the Transportation Lawyer's Association's *Chicago Regional Seminar* being held on January 20-21, 2022.

- 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.



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 at 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 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

As there were issues concerning insurance coverage that could not proceed before a jury (RSA's decision to deny coverage was in dispute) the matter was required to have two trials. The first was before a jury on the issue of liability proper to determine who was at fault and the percentage of that fault, and the quantum of damages. A second trial was held after the liability trial before a judge to determine the coverage issues.

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* (which reduced the amount payable to $200,000 being the maximum payable in the face of a breach and which 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 denied waiver of the policy breach taking the position that it had no actual knowledge of the breach until 2009, at which point it denied coverage in a timely manner. RSA argued that *actual* knowledge was required and that there was no prejudice because 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.

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. (*4)

Ontario Court of Appeal 2019 ONCA 800

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 of Appeal examined waiver and promissory estoppel and confirmed, at para. 31 of that judgment, 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.

The Court of Appeal allowed RSA's appeal rejecting Bradfield's waiver argument, in part because, at that time, s. 131(1) of the *Insurance Act* precluded recognition of waiver by conduct as the section required actual notice in writing of a waiver of any breach by the insurer.

Bradfield's promissory estoppel argument failed because RSA lacked knowledge of the policy breach and such knowledge could not be imputed to RSA. Therefore, Bradfield was unable to establish any detrimental reliance in that there was no evidence that any of the steps taken by RSA to defend the case operated to prejudice the Devecseri estate.

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. The Court found 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 legal 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 simply chose not to further investigate to obtain the information such as ordering the coroner's report. No legal authority had been provided to the Court to support the assertion that an insurer was required to 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.

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.

Supreme Court of Canada

The plaintiff appealed the Court of Appeal's decision to the Supreme Court of Canada. The Trial Lawyers Association of British Columbia replaced the plaintiff as appellant, who had settled with RSA.

The Supreme Court of Canada dismissed the appeal.

By the hearing, the appellant had conceded that waiver by conduct was precluded by statute at the time leaving only the issue of promissory estoppel. The Supreme Court agreed with the Court of Appeal that RSA could not have intended to alter its legal relationship with Bradfield because it lacked knowledge of the facts which demonstrated (or otherwise put RSA on notice) of Devecseri's policy breach.

The Supreme Court went on to say that, in any event, the Court would have serious reservations about the availability of any estoppel argument on the facts of the case. Whether and to what extent Ontario's *Insurance Act* permits third parties like Bradfield to assert estoppel arguments, including on behalf of a first-party insured, raised issues that the Court felt compelled to comment upon.

At paragraph 15 of the judgment, the Supreme Court confirmed that the equitable defence of promissory estoppel requires that (1) the parties be in a legal relationship at the time of the promise or assurance; (2) the promise or assurance be intended to affect that relationship and to be acted on; and (3) the other party in fact relied on the promise or assurance.

In the insurance context, estoppel arises most commonly where an insurer, having initially taken steps consistent with coverage, then denies coverage because of the insured's breach of a policy term or its ineligibility for insurance in the first place. The insured then argues that the insurer is estopped from changing its coverage position based on its prior words or conduct.

The Court held that the appellant's argument regarding promissory estoppel failed as RSA gave no promise or assurance intended to affect its legal relationship with Bradfield. RSA lacked knowledge, at the time it provided a defence to Devecseri's estate, of Devecseri having breached the policy by consuming alcohol. Even if constructive knowledge of the facts demonstrating a breach were sufficient for purposes of estoppel (which the Court found that they were not) RSA could not be fixed with constructive knowledge of such facts in the circumstances of the case. RSA was under a duty to Devecseri to investigate the claim against him "fairly", in a "balanced and reasonable manner", which it did. The Court found that RSA was under no additional duty to Bradfield or other third-party claimants to investigate policy breaches at all, much less on a different and more rigorous standard than that which it owed to its insured.

The Court went on to examine the additional challenges regarding use of the promissory estoppel defence for similar plaintiffs.

In terms of intention, it was conceded that RSA did not know about Devecseri's alcohol consumption. The issue was whether, in any event, RSA could be held to an assurance, by words or conduct, that it would not deny coverage on the basis of this policy breach. RSA's lack of knowledge in this regard was fatal to the appellant's estoppel argument.

Promissory estoppel requires that a promise or assurance must be *intended* to affect the parties' legal relationship and the promisor must know of the facts that are said to give rise to that legal relationship, and of the alteration thereto — in this case, that Devecseri would be covered to the full policy limits despite his having breached the policy. The significance of intention depends entirely on what the promisor knows. A promisor cannot intend to alter a relationship by promising to refrain from acting on information that it does not have.

Regarding imputed knowledge, the appellant sought to broaden the concept by arguing that constructive knowledge arising from a breach of a duty to investigate is enough. The Supreme Court did not agree stating that, to hold otherwise, would be unwise and "would unnecessarily undermine the existing duty on insurers owed to insureds (and not third parties) to investigate liability claims fairly, in a balanced

and reasonable manner". The Court confirmed that RSA lacked knowledge of the facts demonstrating Devecseri's breach and so the appellant's argument failed. This was not a case where RSA had the information but had failed to appreciate its legal significance or had not turned its mind to denial. In such a case, the trier of fact can conclude that the insurer knew of its right to deny coverage while intending to assure the insured that it would not act on that right.

As RSA was not in possession of the fact of the alcohol use, knowledge of the facts demonstrating Devecseri's breach could not be imputed to RSA. Therefore, RSA could not be taken to have intended to assure his estate, or Bradfield, or anyone else, that it would not be relying upon that breach to deny coverage.

The Court went on to state that there is no basis in law for a third-party claimant such as Bradfield to be able to ground an estoppel argument in any alleged breaches of an insurer's duty to its insured. At para 35, "the duty to investigate fairly, in a balanced and reasonable manner, is owed only to the insured, not third parties. Were such a duty owed to third parties, it would sit uneasily, and indeed would undermine, the duties of utmost good faith and fair dealing that govern the relationship between the parties to an insurance contract." This is because "the obligations between the insurer and the insured are reciprocal; while the insurer has the aforementioned duty to investigate fairly, in a balanced and reasonable manner, the insured is also under a reciprocal duty to disclose facts material to the claim."

The Court went on to state at para 36:

> "This reciprocity of obligation is worth stressing. This Court has taken care to strike a careful balance in stating and developing the duty of utmost good faith and fair dealing between insurer and insured with a view to facilitating the honest, fair, and expeditious resolution of insurance claims. Here, RSA owed Mr. Devecseri a duty to investigate the claims against his estate fairly, in a balanced and reasonable manner, and without being zealous or relentless in its search for policy breaches. Had he survived, Mr. Devecseri would have owed a reciprocal duty to disclose any information in his possession which might have voided his coverage — in particular, that he had consumed alcohol. If, after having received this disclosure, RSA had continued to provide a defence, Mr. Devecseri could have relied on that continued defence as an assurance of coverage that could prevent RSA from later changing positions. Had, however, Mr. Devecseri failed to disclose to RSA the fact of his having consumed alcohol, the breach of his duty to disclose would foreclose any later assertion by him and against RSA of estoppel."

The Court was also not persuaded to allow third parties to "piggy-back" on the relationship between the insured and insurer, being one of utmost good faith and fair dealing and dependent upon mutuality. Such an extension would lead to an absurdity in that it would require a duty upon the insurer to investigate for facts while the third party would have no obligation to provide the insurer with any known facts in the third party's possession. Therefore, there could be no mutuality.

At para 38, the Court stated that allowing third parties to piggy-back would "effectively mean that a contract of liability insurance provides greater protection to, and imposes fewer (indeed, no) obligations upon, third parties like Bradfield than it provides to and imposes upon the first-party insured. This result effectively runs contrary to the clear expression of legislative intent in s. 258(11) of the Insurance Act, which provides that an insurer is entitled to assert any defences against the claimant as it could raise against the insured."

Finally

Insurers must be sure to consider all facts within their knowledge and appreciate the legal

significance of same within the context of the subject action and take timely steps and separate coverage advice as soon as facts of policy breaches are discovered. Insurers are not to specifically engage in fact finding missions to uncover policy breaches and should keep in mind their duty to investigate fairly, in a balanced and reasonable manner.

Kim E. Stoll

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) For a fuller review of the trial decision, please access the July 2021 edition of *The Navigator.*

2. Landlords, Tenants and Warehouses: Things Logistics Service Providers Should Know

An important component of any supply chain is the warehouse operator. Freight moved through the supply chain must spend time in warehouses at multiple points in any transportation mandate. Also, not surprisingly, it can be crucial for logistics companies to be able to access stored goods on tight deadlines to provide satisfactory service for their customers. It is also common for the warehouse service provider not to own the storage space that it supplies, leasing either an entire building or just some part of it from the owner. Because of this, logistics companies can sometimes face the unpleasant surprise of being denied access to their own customers' property when a serious dispute erupts between a warehouse owner and a warehouser tenant or tenants that have breached the terms of their lease.

The following is a short summary of the rights of the innocent logistics service providers that may happen to be caught in the middle of such a dispute. Freight companies are often in a stronger position than they realize in such cases, and thus recognizing their rights with respect to warehoused goods may lead to a speedier resolution of the problem of held up shipments where an irate landlord may have interposed itself between the warehouser and its customer.

Rights of third parties in landlord-tenant disputes

Although any number of lease breaches may cause a landlord's dispute with a tenant to spillover adversely affecting third parties, the most typical dispute involving a warehouse would, as with any tenant, be over non-payment of rent. Where there are arrears of rent owing, the landlord would have the special legal remedy of "distress", which involves seizing and selling a tenant's goods to pay the arrears. Under the common law, a landlord could "levy distress" against any goods contained within a defaulting tenant's leased premises. In modern times, however, legislation, such as Ontario's *Commercial Tenancies Act*, has sensibly prohibited landlords from exercising distress rights against "the goods and chattels of any person except the tenant or person who is liable for the rent, although the same are found on the premises" (*1). The statutory exemption from distress further applies to any goods leased by the tenant, except in certain cases of lease-to-own where title may effectively have passed to the tenant. It is also limited to goods having value up to the amount of rent in arrears, and, importantly, is *not* a remedy available in the case of any other breaches of a commercial lease.

The significance of the limits on landlord rights in these situations is often underappreciated. Usually, the first notice that any warehouse customer will have of such a dispute is arriving at a closed facility with a notice affixed to the door indicating that the landlord has taken control of the premises. In fact, the act of changing the locks, which landlords often hire licensed bailiffs to do on their behalf, is usually a sign that landlord has escalated against the tenant by terminating the lease. In such cases, the landlord loses even those distress rights it might have had as against the tenant's own property.

Solutions

One point that can easily be overlooked is that a party with warehoused goods that requires access where a landlord may have locked its warehouser out of the premises is often in a better position than it might be if the tenant were still in control. Unpaid storers have statutory lien rights against goods in the case of unpaid storage costs under legislation such as Ontario's *Repair and Storage Liens Act* (*2), and further may negotiate this right by contract as well. While the storer's statutory rights, too, are limited to the goods having value up to the amount of unpaid storage charges, these rights at least can create the foundation of a legitimate dispute which might result in the unwelcome detention of freight by the warehouser.

By contrast, a landlord that has taken control of a leased premises has no rights as against warehoused goods that are not the property of

the tenant, and, where it has locked out the tenant and effectively terminated the lease, no rights as against any goods on the premises whatsoever, whether or not the tenant's property. This has the effect of making most landlords more compliant in respect of releasing goods into the possession of a carrier with as little delay as possible than a warehouser tenant.

Additionally, logistics service providers might also find that a landlord has taken possession of a premises due to the insolvency of a warehouser. In many such cases experienced bailiffs are also used to ensure that the landlord has not overstepped its rights. These can often also help coordinate the retrieval of third party goods. Just as often, moreover, landlords will also by this point have retained counsel who have advised them of their obligations to respond promptly to requests for access. Being mindful of exposure to claims for losses for delay as a result of detaining property in which they have no right has the practical effect of making landlords in possession highly responsive to warehouse customer requests for access.

Conclusion

Landlords have powerful self-help remedies in the form of the right of distress and re-entry upon a tenant default, and for obvious reasons, where warehouses are involved, the exercise of these rights might well disrupt the smooth running of supply chains. Logistics service suppliers who find themselves in the predicament of being, at least temporarily, delayed in retrieving warehoused goods because of landlord-tenant disputes should consult a lawyer, since resolving the problem may quicker, easier, and cheaper than you think.

Oleg M. Roslak

Endnotes
(*1) *Commercial Tenancies Act*, R.S.O. 1990, c. L.7, s. 31(2).
(*2) *Repair and Storage Liens Act*, R.S.O. 1990, c. R.25.

3. The M.V. ZIM KINGSTON General Average Declaration

The M.V. ZIM KINGSTON

The M.V. ZIM KINGSTON was sailing on a voyage from various Asian ports of loading to Vancouver with container cargo on October 22, 2021 when it is reported to have incurred "heavy weather" 70 kilometers west of the Juan de Fuca Strait. This event is said to have caused a stack of containers on deck to collapse, ultimately resulting in 106 containers being lost overboard with other containers containing toxic chemicals catching fire. Salvage companies have been contracted to extinguish the fire and to deal with the situation. In addition to the direct loss of cargo lost overboard and the shipowner incurring significant response related expenses, the incident is said to have resulted in substantial damage to some cargoes and ocean containers on account of fire damage and/or seawater exposure.

As a result of the expenditures incurred and which are still anticipated the owner of the M.V. ZIM KINGSTON has declared "general average" (defined below) and an "average adjusting" firm has been appointed. The adjusting firm has been instructed to arrange for the collection of "general average security" from the shipping interests having cargo in the containers. As a result, consignees who were expecting the delivery of cargo at various points in Canada have either already faced or are now facing the unwelcome surprise of not only incurring delay in the receipt of cargo (if at all, in light of the losses occurring) but having to address demands for the provision of security against which their cargoes will be released to them by the shipowner. This process will either involve their marine cargo insurers posting security for the shipowner's claim for general average (if such insurance is in place) or the cargo interest itself having to post money as security (if there is no cargo insurance in place).

General Average – Background

"General Average" is not something that you forgot from your high school math class. Nor is it a relative of Colonel Mustard from Clue™ Fame. Rather, general average is a principle of maritime law whereby sacrifice or expenditure made or incurred in a situation of danger during a voyage for the sake of all the property interests concerned is to be replenished by a general contribution by those property interests whose property has been thereby brought to safety.

Situations of danger during a voyage are not uncommon, although it is not every day that a situation gives rise to a general average "declaration". Situations that might involve a general average declaration could be a ship fire, or a mechanical breakdown incapacitating a ship or a vessel running aground. These incidents might then involve unplanned expenditures such as the use of fire-fighting services, the engagement of salvage / towing services or the ship having to call at a port of "refuge". One might also see a situation where a sacrifice is involved to one or more of the property interests involved in the voyage. One such example concerns a case where cargo is "jettisoned" overboard for purposes of refloating, balancing or stabilizing a ship undergoing a navigation peril.

With a general average event, that is, an expenditure of costs and/or sacrifice of property, (assuming that the constituent elements of a proper declaration are satisfied) then the parties interested in cargo on the vessel will be expected to contribute funds depending on the net landed value of their cargo at destination as relates to the collective value of property involved on the voyage (comprised of the ship and all other shipments on board). The liability to pay rests on the cargo owner and not on any third party intermediary, such as a freight forwarder who does not have an ownership interest.

General average covers only direct losses linked to the material value of the cargo carried or of the ship. It does not cover indirect losses arising from a delayed voyage, including loss of

market and certain environmental risks as touched on below.

The following factual elements must exist for a valid general average declaration to be made by an affected shipowner or cargo owner:

i) the expenditure or sacrifice must have been extraordinary and intentionally incurred or undertaken as a result of the peril in question.

ii) the peril must involve a "grave and substantial, but not necessarily imminent danger" being averted.

iii) the expenditure or sacrifice must have been incurred for the common good of the voyage and not solely for one isolated or individual interest in the voyage, and

iv) the property interests from whom contribution is sought must have been "saved". That is, the costs incurred or sacrifice made must have saved the interest of the parties intended to contribute from the peril in question.

v) a shipowner may not be able to recover contribution in the event it declares a general average event where there is an "actionable fault" on its part in having breached terms of the relevant contract of carriage, including failing to exercise due diligence to make the ship seaworthy in respect of the peril at issue prior to or at the commencement of the voyage. Accordingly there may be litigation involved in revisiting the facts of a given case to determine the shipowner's entitlement to recover contributions should any other interest mount a challenge to same.

As a rule, the concept of General Average and its associated rules of application and contribution calculation (codified by a set of guidelines known as the *York-Antwerp Rules*) are incorporated into ocean contracts of carriage. Standard wording is along the lines of what is found in the Mediterranean Shipping Company bill of lading, being one example:

22. GENERAL AVERAGE AND SALVAGE

General Average shall be adjusted, stated and settled at any port or place at the Carrier's option according to York - Antwerp Rules 1994 except Rule XXII and, as to matters not therein provided for, according to the laws and usages at any port or place at the Carrier's option. General Average on a Vessel not operated by the Carrier shall be adjusted according to the requirements of the operator of that Vessel. Average agreement or bond and such cash deposit (payable at Carrier's option in United States currency) as the Carrier may require as additional security for the contribution of the Goods and salvage and special charges thereon, shall be furnished before delivery or forwarding.

There are different editions of the *York-Antwerp Rules* (the 1994 version being in popular use), which have undergone recent amendment in 2016. The particular contract of carriage terms will have to be analyzed and the appropriate wordings consulted for certain possible nuances, however the general effect of the Rules can be summarized as follows:

i) only those losses, damages or expenses which are the direct consequence of the general average act are to be allowed as general average;

ii) there is not to be any allowance in general average for losses, damages or expenses incurred in respect of damage to the environment or in consequence of the escape or release of pollutant substances from the property involved in the common maritime adventure. This said, the cost of measures undertaken to *prevent or minimize* damage to the environment *shall* be allowed in general average when incurred in a limited set of circumstances, namely, a) pursuant to a salvage operation performed whereby a salvage reward would have been earned under general maritime salvor reward principles, b) as a condition for the ship to enter or leave a port of refuge, c) as a condition of remaining at a port or place (provided that measures taken to address the

actual escape of pollutant substances will not be included in general average) and d) where necessarily incurred with the discharging, storing or reloading of cargo, when the cost of those operations is otherwise to be included as general average.

iii) Demurrage, loss of market, and any loss or damage sustained or expense incurred by reason of delay, whether on the voyage or subsequently, and any indirect loss whatsoever shall not be included in general average.

General Average – The General Average Declaration and the Immediate Aftermath

Consistent with standard practice following a declaration of general average, the shipowner of the *M.V. ZIM KINGSTON* has engaged an average adjuster being a firm familiar with general average and marine insurance practice. Acting independently and impartially, this adjuster will be required to calculate and determine the contribution each party must pay. The appointed adjuster has either already asked or is in the course of asking each cargo owner to provide initial cargo information and details, related paperwork and security. If a cargo owner demonstrates that it has cargo insurance, then that owner will be required to submit an "Average Bond", being an undertaking signed by the cargo owner that it will pay its contribution upon the completion of the adjustment process and an "Average Guarantee", being the surety that the insurer will pay the established contribution amount. (In practice, it is the insurer who then pays the adjusted contribution amount).

If the cargo owner does not have marine insurance, then a cash deposit will have to be provided to be placed as security into a trust account to the credit of the average adjustment, which is calculated as a percentage of the value of the cargo owner's goods. The cargo owner will be required to submit other information in the nature of commercial invoices and packing lists to assist the average adjuster in the calculation of this security amount as well as the eventual contribution assessment process.

If third party salvage services are required, the adjuster will also collect salvage security from the cargo owners, or where there is cargo insurance in place, a "Salvage Guarantee" signed by the insurer.

In accordance with the usual practice, the following steps will then take place in connection with the *M.V. ZIM KINGSTON* matter:

i) when all bonds/securities have been collected, the cargoes will be released to those entitled to possession.

ii) the average adjuster will then start to calculate the general average contribution for each party, making allowances for sacrifices and expenses.

iii) after the final calculations are completed, the adjuster will then collect and distribute the determined amounts among the parties involved, thereby completing the general average process.

The Fall Out – What Will Happen Next?

Cargo owners, importers and exporters will be affected in various ways:

i) they might end up with damaged cargo or no cargo at all, if lost.

ii) even if their cargo is safe, they have to deal with what might be extreme delays. Delays affect businesses in many ways. They can result in the imposition of fines/penalties from customers. There may also be issues concerning detention charges on ocean containers.

iii) If their cargo is safe, cargo owners are, as mentioned above, obliged to post an Average Bond, without which cargo won't be released. If there is no marine cargo insurance in place the average bond is calculated as a function of the CIF (cost, insurance and freight**)** value of the cargo. In the result if a deposit is required for a large consignment the amount can be significant.

iv) if container(s) involve a "*Less than Container Load*" shipment, if just one cargo owner fails to provide the required Average Bond and security, the entire consignment may not be released by the shipowner.

One of the Many Benefits of Marine Cargo Insurance

In addition to the primary purpose of providing coverage for loss or damage caused by marine perils during shipment, cargo policies as a rule cover general average and salvage charges deemed payable as adjusted contributions and related security requirements. The standard coverage grant language (such as that found in the *Institute Cargo "A", "B" and "C" Clauses* provides coverage for general average contributions "… *adjusted or determined according to the contract of carriage and/or the governing law and practice incurred to avoid or in connection with the avoidance of loss from any cause except for as excluded from coverage therein".*

Whether involved with the *M.V. ZIM KINGSTON* or as simply as a general rule cargo owners having marine cargo insurance should notify their insurer immediately following a general average declaration to ensure that the required Average Guarantee is provided by that insurer.

Gordon Hearn

4. Transport Canada: Interim Order 7 Respecting Passenger Vessel Restrictions Due to the Coronavirus Disease 2019 (COVID-19)

Whereas the Minister of Transport believes that the annexed *Interim Order No. 7 Respecting Passenger Vessel Restrictions Due to the Coronavirus Disease 2019 (COVID-19)* is required to deal with a direct or indirect risk to marine safety or to the marine environment;

And whereas the provisions of the annexed Interim Order may be contained in a regulation made pursuant to subsection 120 (*1) and paragraphs 136(1)(f) (*2) and (h) (*2) of the *Canada Shipping Act, 2001 (*3)*;
Therefore, the Minister of Transport, pursuant to subsection 10.1(1) (*4) of the *Canada Shipping Act, 2001 (*3)*, makes the annexed *Interim Order No. 7 Respecting Passenger Vessel Restrictions Due to the Coronavirus Disease 2019 (COVID-19)*.

Ottawa, October 30 , 2021

Omar Alghabra
Minister of Transport

See

https://tc.canada.ca/en/ministerial-orders-interim-orders-directives-directions-response-letters/interim-order-no-7-respecting-passenger-vessel-restrictions-due-coronavirus-disease-2019-covid-19

Highlights:

1. Beginning November 1 2021 Canadian vessels with 12 or more crew members are required to have a vaccination policy, and to ensure every person on board a vessel is vaccinated.

2. Beginning November 15th 2021 every vessel operated in Canadian waters must ensure that the pilot on board must be vaccinated.

3. Beginning November 1 2021 every cruise ship that is a Canadian vessel must comply with the vaccination policy and vaccination requirements set out above. For foreign cruise ships the Minister of Transport must be notified when the cruise ship is scheduled to be in Canadian waters at least 60 days before that date. Crew members must be vaccinated unless there is a medical or religious exemption.

4. Canadian vessels must provide weekly reports to the Minister of Transport.

5. Got Carrier Issues? The CTA May Be Able To Help

Do you ship goods by water? Are you concerned, as a cargo interest, that the fees charged by a Port Authority, a resupply marine carrier, bridge corporation, or shipping conference were too high?

What about by rail? Is there a concern there was insufficient access to competing railways, or problems with the rate, route, and terms of service? Or perhaps that the level of service seemed inadequate?

If so, it may be worthwhile to notify or launch a complaint with the Canadian Transportation Agency (CTA).

Case Study: CTA Resolves Embargo Issues in Vancouver Area

In December 2018 and early January 2019, various shippers associations informed the CTA of the potential level of services issues surrounding freight service in the area of Vancouver. (*1) In particular, that BNSF Railway Company (BNSF), Canadian Pacific Railway Company (CP), or Canadian National Railway Company (CN) were imposing unwarranted embargoes.

The CTA decided that this would be worth investigating and, with the authorization of the Minister of Transport, (*2) commenced an investigation later on in January of 2019.

On April 15, 2019, the CTA determined that CN, but not BNSF or CP, had breached its level of service obligations. In particular, that:

> CN breached its level of service obligations when it announced its intention to impose embargoes on wood pulp shipments in September 2018, several months before rail transportation challenges emerged in the Vancouver area, and then imposed those embargoes in December 2018, rather than making every reasonable effort to deal with those challenges before unilaterally restricting the receipt, carriage, and delivery of traffic. (*3)

The CTA ordered CN to:

> 1.Develop a detailed plan, each year for the next three years, to respond to surges in traffic that occur in the Vancouver area towards the end of the calendar year with a view to avoiding or minimizing the use of embargoes and maintaining the highest level of service reasonably possible, as required by the CTA. The plan … should include a list of all embargos imposed by CN for traffic within, or destined to, their Vancouver area rail network in the preceding year;
>
> 2.Only resort to embargoes on an exceptional basis where factors beyond its control make the timely carriage and delivery of traffic difficult and all reasonable alternatives to address those challenges have been attempted and found to be insufficient; and
>
> 3.Only implement embargoes that are targeted to address specific and actual challenges, are designed to minimize impacts on traffic carriage and delivery while in place, and are temporary and lifted at the earliest reasonable opportunity. (*4)

CN sought leave to appeal the decision, which the Federal Court of Appeal granted. In its appeal, CN argued that the CTA had breached its duty of procedural fairness, made its finding without sufficient evidence, and erroneously assumed that a railway company could both meet its service demands and breach its level of service obligations. (*5) In August of this year, the Federal Court of Appeal dismissed the appeal and upheld the determination of the CTA. (*6)

Conclusion

This case is an example of the many disputes that the CTA has resolved. Each year, the CTA deals with hundreds of disputes involving Canada's national transportation system. From 2020 to 2021, they issued 1,118 orders, permits, determinations, or decisions. (*7) Many of their decisions are made in 20 days or less. (*8)

If you are having an issue with your rail or marine carrier, the CTA may be able to help you get the remedy you seek.

Rohan Mathai

Endnotes

(*1) Canadian Transportation Agency, *Letter Decision No. CONF-9-2019*, https://www.otc-cta.gc.ca/node/568575, para. 12.

(*2) Under subsection 116(1.11) of the *Canada Transportation Act*, the Agency needs ministerial authorization to investigate for this matter.

(*3) Canadian Transportation Agency, *Letter Decision No. CONF-9-2019*, https://www.otc-cta.gc.ca/node/568575, para. 3.

(*4) Canadian Transportation Agency, *Letter Decision No. CONF-9-2019*, https://www.otc-cta.gc.ca/node/568575, para. 3.

(*5) *Canadian National Railway Company v. Canada (Transportation Agency)*, 2021 FCA 173, para 38.

(*6) *Canadian National Railway Company v. Canada (Transportation Agency)*, 2021 FCA 173.

(*7) Canadian Transportation Agency, *Statistics 2020-2021*, https://otc-cta.gc.ca/eng/statistics-2020-2021.

(*8) Canadian Transportation Agency, *Service standards of the Agency*, https://otc-cta.gc.ca/eng/service-standards-agency.

6. The Supreme Court Has Narrowed Government Immunity for Negligence in *Nelson (City) v. Marchi*

The Supreme Court of Canada's recent decision in *Nelson (City) v Marchi* (*1) should serve as a warning to municipalities and companies fulfilling government contracts as well as their respective insurers that the common law defences available against personal injury claims have narrowed. While this case dealt with a municipality's snow clearing practices and policies, it is not difficult to imagine other areas where its impact will be felt.

The facts of the case are straightforward. Following a heavy snowfall, employees of the city of Nelson, British Columbia undertook snow clearing operations in accordance with the city's standard practices, consisting of both written policies and unwritten practices. The city plowed a row of angled parking spaces in the downtown, creating a continuous snowbank between those parking spaces and the sidewalk. After parking in one of the angled spaces, Ms. Marchi found her path blocked by the snowbank she decided to cross it. Upon stepping on the snowbank, Ms. Marchi's leg dropped through the snow and she landed in a way that bent the ball of her foot upward, seriously injuring her leg.

Ms. Marchi sued the city of Nelson for $1 million in damages. At trial, the judge concluded that the city did not owe a legal "duty of care" to Ms. Marchi as the city's snow clearing policies were core policy decisions and were therefore immune from liability in negligence. Alternatively, he found that there had been no breach of care, if one had existed, and that in any event Ms. Marchi was the author of her own misfortune. The British Columbia Court of Appeal reversed all three of the trial judge's conclusions, faulting his conclusion that the snow clearing policy amounted to a "core policy" decision and ordering a new trial. The city appealed to the Supreme Court of Canada.

The Supreme Court

For decades, the regime governing liability for governments has been subject to the decision in *Just v. British Columbia*. (*2) In the *Just* case, the Supreme Court of Canada ruled that public authorities are subject to a duty of care for personal injury unless there are statutory provisions exempting a public authority from liability or there is immunity for "true" policy decisions.(*3) If either of those conditions are satisfied, the government actor will not be bound by a duty of care for personal injury and will be immune from liability.

The Supreme Court took the opportunity in *Marchi* to "clarify how to distinguish immune policy decisions from government activities that attract liability for negligence." (*4) The former are what the Court terms "core policy decisions" and *Marchi* lists four factors to guide judges in determining which policies will benefit from the resulting "core policy immunity":

1. the level and responsibilities of the decision-maker;
2. the process by which the decision was made;
3. the nature and extent of budgetary considerations; and
4. the extent to which the decision was based on objective criteria. (*5)

With respect to the first factor, the Court indicated that the higher the position of the decision-maker in the hierarchy, their proximity to elected officials, and the degree to which their responsibilities involve the "balancing of public policy decisions", the more likely their decisions will be found to attract immunity. (*6)

For the second factor, the Court found the likelihood of immunity increased the more the decision-making process "was deliberative, required debate (possibly in a public forum), involved input from different levels of authority, and was intended to have broad application and be prospective in nature." (*7)

The third factor relates in large measure to high level budgetary considerations made for departments and agencies of government, the Court cautioned that the "day-to-day budgetary

decisions of individual employees" will be less likely to attract that immunity. (8*)

Fourth, those decisions weighing competing interests and requiring value judgments will be more likely to attract immunity, where those based on "technical standards or general standards of reasonableness" will not. (*9)

The Court concluded that "protecting the legislative and executive branch's core institutional roles and competencies necessary for the separation of powers" was the underlying rationale that should guide judicial decision making in rendering determinations on "core policy immunity." (*10) This establishes a substantial hurdle to clear in order to qualify as a core policy decision. The Court appears to limit such immunity to high level policy decisions, particularly those made by or in conjunction with elected officials. The reference to "budgetary considerations", arguably speaks to decisions about whether and how much to fund a program or policy rather than the distribution and allocation of those funds at an operational level.

The Court concluded that the city of Nelson had "not shown that the way it plowed the parking stalls was the result of a proactive, deliberative decision, based on value judgments to do with economic, social or political considerations" and was not therefore subject to core policy immunity. (*11) It is a fair assumption that this passage will generate no small amount of legal argument about the sort of considerations that will bring decisions out of the operational category and into core policy going forward.

In the end, the Supreme Court ruled that the city of Nelson's snow clearing "policy" was not a policy for the purposes of core policy immunity, warning that labelling something a "policy" will not change the considerations at play. The Court rejected the city's arguments that either the written or unwritten policies snow clearing policies qualified as such for the purposes of this decision. (*12) The net effect of this decision is to shift a substantial proportion of government policy decisions into operational ones and so deny them recourse to the defence.

Implications for Governments, Contractors and Insurers

This case comes on the heels of a decision from the Ontario Court of Appeal in March 2021 taking issue with Ontario's efforts to extend near-blanket immunity to government decisions. The legislation seeks to expand the definition of policy found in *Just v British Columbia*, to cover virtually all operational decisions made by the provincial Crown. The *Crown Liability and Proceedings Act, 2019*, ("*CLPA*") provides that no liability will flow to the Crown in negligence for decisions "respecting a policy matter" which the Act defines in part as "the manner in which a program, project or other initiative is carried out". (*13)

This legislation would effectively render the operational implementation of policy indistinguishable from policy decisions themselves for the purposes of liability. In *Francis v Ontario*, a case dealing with the use of administrative segregation in Ontario's jails, the Court of Appeal concluded that s. 11(5)(c) of the *CLPA* lacked the "clear and unequivocal expression of legislative intent" required to alter the common law and would not affect the scope of government immunity for policy decisions. (*14) It appears likely that the *CLPA* has failed in its aim to collapse the distinction between policy decisions and operational decisions in Ontario and that *Marchi* will set the terms in Ontario notwithstanding the operation of the *CLPA*.

Along with *Francis v Ontario*, the Supreme Court's decision in *Marchi* substantially truncates the scope of immunity from negligence for government decisions. In turn, it does the same for those contracted to provide services on behalf of government. Whatever liability flows to a municipal or provincial government will affect those acting in its place. This will be particularly problematic for municipal governments who provide the sort of day-to-day services likely to attract claims for personal injury and where there is substantial scope for lower-level decision making.

Of course, government contractors have never been immune from negligence claims on the basis of policy immunity alone, however, where they were following policy guidelines provided by government and were not otherwise negligent in their own right, contractors previously found themselves under the umbrella of that government's immunity. With *Marchi's* considerable contraction of "policy" decisions, there is much less shelter now and while precisely how much less remains to be seen, many decisions that might have been understood as policy decisions are now to be viewed as operational ones and therefore open to liability.

Given the narrow scope for policy left open by this case, it will be difficult for governments and their contractors to avail themselves of a policy immunity defence in most instances. It remains to be seen if municipal governments will make efforts to download their liability onto contractors through hold harmless agreements and indemnification clauses. Insurers providing policies for municipalities and their contractors should be wary of these new considerations and mindful that an important tool is now missing from their kit.

Conal Calvert

Endnotes
(*1) 2021 SCC 41
(*2) [1989] 2 SCR 1228
(*3) *Nelson (City) v Marchi*, 2021 SCC 41 at para 24.
(*4) *Ibid* at para 3.
(*5) *Ibid* at para 56.
(*6) *Ibid* at para 62.
(*7) *Ibid* at para 63.
(*8) *Ibid* at para 64.
(*9) *Ibid* at para 65.
(*10) *Ibid* at para 73.
(*11) *Ibid* at para 85.
(*12) *Ibid* at para 73.
(*13) SO 2019, c 7, Sched. 17, ss. 11(4)-(5).
(*14) *Francis v Ontario*, 2021 ONCA 197 at paras 127-9.
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DISCLAIMER & TERMS

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Officer 2: The officer told me that you stole this car and murdered the owner.
Woman: Murdered the owner?
Officer 2: Yes, could you open the trunk of your car, please. The woman opens the trunk, revealing nothing but an empty trunk.
Officer 2: Is this your car, ma'am?
Woman: Yes, here are the registration papers. The officer is quite stunned.
Officer 2: The officer claims that you do not have a driver's license. The woman digs into her handbag and pulls out a clutch purse and hands it to the officer. The officer snaps open the clutch purse and examines the license. He looks quite puzzled.
Officer 2: I must admit, ma'am, that I'm confused; the officer told me you didn't have a license, that you stole this car, and that you murdered the owner.
Woman: I suppose the liar told you I was speeding, too.