THE NAVIGATOR

IN THIS ISSUE

"Advantage: Prosecution"- *R. v. Becker Brothers Trucking Inc.*

Introduction

The Ontario Court of Appeal has recently released its decision in *R. v. Becker Brothers Trucking Inc.*, 2021 ONCA 654. In its ruling, the Court allowed an appeal lodged by the Crown against Becker Bros. Trucking Inc. ("Becker"), a trucking company operating in Ontario. The effect of the Court's ruling was to reinstate a conviction originally entered against Becker for violating section 84 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "HTA") ("operation of an unsafe commercial vehicle"). The conviction had previously been overturned by a judge of the Ontario Court of Justice on appeal; that appeal decision being reversed by the Court of Appeal in this decision.

This case is important to the trucking industry generally because of the Court's consideration of s. 210(7) and s. 216.1(5) of the HTA. These sections both deal with how courts can receive Ministry of Transportation ("Ministry") records into evidence during trials of offences committed under the HTA.

Section 210(7) deals with how evidence may be tendered at trial (almost always by the prosecution) when that evidence consists of records kept by the Ministry in its database - for example, vehicle ownership/registration documents - or statements containing information from such records. Section 210(7) effectively introduces a "shortcut" mechanism that allows the Crown to bypass the traditional rules of evidence, where the author of a given record must usually attend in Court to authenticate it and verify that the information it contains was accurately obtained and transcribed into the record.

Section 210(7) provides as follows:

> (7) A copy of any document filed in the Ministry under this Act, or any statement containing information from the records required to be kept under this Act, that purports to be certified by the Registrar under the seal of the Ministry as being a true

FIRM AND INDUSTRY NEWS

- The firm is pleased to announce that **Rohan Mathai** will join the firm as an associate lawyer on November 1, 2021. Mr. Mathai is a 2016 Ontario call and comes to the firm from the Ship-source Oil Pollution Fund.

- **Carole McAfee Wallace** was elected President of the Canadian Transport Lawyers Association at its Annual General Meeting on October 22, 2021. **James Manson** has been elected as a Director for Ontario of the Association.

- **Gordon Hearn** will be representing the Firm at the Transportation Law Institute annual meeting being held in Cleveland, Ohio on November 11-12, 2021. **Kim Stoll** will be in attendance at the Transportation Lawyers Association Executive Committee meeting in her capacity as Representative-at-Large.

- 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.

> copy of the original shall be received in evidence in all courts without proof of the seal, the Registrar's signature or the manner of preparing the copy or statement, and is proof, in the absence of evidence to the contrary, of the facts contained in the copy or statement.

In this case, the records forwarded by the Ministry to the Crown (and upon which the Crown relied as proof that Becker owned the vehicle in question) were at issue. The Ministry's current procedure (which was also employed in this case) is to forward a given record to the Crown prosecutor, and to attach to it a generic cover sheet (referred to as a "certificate"), often by way of a staple. This procedure is not expressly authorized by the HTA, and defence counsel often object to its use, arguing that it is not sufficient for the Ministry to simply attach generic cover sheets to alleged records without providing some reliable link or connection (i.e. more than just a staple!) between the two documents to ensure that the correct certificate goes with the correct record. Becker similarly objected to this procedure at trial.

Section 216.1(5) is another "shortcut" mechanism (again almost exclusively used by the prosecution) that also allows documents to be admitted at trial without the usual process of authentication, but in a different way. Under s. 216.1(5), photocopies of documents taken at the roadside, made by an inspector, and certified by the same inspector, can be admitted into evidence at trial without the inspector appearing in court to testify to the authenticity of the documents. The language, however, of s. 216.1(5) is different than that of s. 210(7):

> (4) An officer obtaining a document under subsection (3) may take the document for the purpose of making a copy of it, but the copying shall be done as quickly as reasonably possible and the document copied shall be promptly returned.
>
> (5) Any copy made as provided in subsection (4) and certified to be a true copy by the person making it is admissible in evidence in any proceeding as proof, in the absence of evidence to the contrary, of the original document and of the contents of the original document.

In this case, certain photocopies made by an inspector of the documents taken from the driver at the roadside were also at issue. The Crown also sought to rely (as back-up) on those documents as proof that Becker owned the vehicle in question. Becker argued that the photocopies were also inadmissible despite s. 216.1(5), for various reasons.

As discussed below, the Court disagreed with Becker on all issues in this case. With its decision, the Court of Appeal has at least tacitly approved of the way the Ministry of Transportation produces records for use at trial against defendants for alleged HTA violations.

The Takeaway

The takeaway? *Advantage: prosecution*. This decision shows that lower courts may give the Ministry significant leeway concerning the way it produces records to the Crown for use as evidence at trial.

Essentially, the Court of Appeal's ruling turned largely on the idea that these "shortcut" provisions in the HTA are not absolute. Rather, where the Crown seeks to avail itself of an evidentiary "shortcut" like s. 210(7) or s. 216.1(5), the facts contained in the produced record are taken to be true *only in the absence of evidence to the contrary*. If the defendant does lead any such contrary evidence, the presumption that the information contained in the record is true is displaced.

Therefore, in HTA cases, the onus going forward will certainly be on defendants to disprove information contained in such records. Defendants who want to dispute such information should be prepared to do so. It will

likely not be a good strategy for a defendant or its counsel to sit back and rely on technical arguments that the Ministry did not comply with the requirements of s. 210(7) and hence has not proven its case "beyond a reasonable doubt".

The Facts

The underlying facts are not very complicated. On October 4, 2017, Ministry of Transportation inspectors on duty at a truck inspection station on Highway 401 near the Town of Lakeshore stopped and inspected a commercial tractor-trailer vehicle.

During the inspection, the inspectors observed significant issues with the vehicle's brakes, which rose to the level of "critical defect" under regulations made pursuant to the HTA.

One of the inspectors, Officer Campeau, requested several documents from the truck driver, including the truck permit, trailer permit, registration certificate, driver's log, and vehicle inspection report. Officer Campeau made photocopies of those documents.

Thereafter, charges were laid against both Becker and the driver under s. 84 of the HTA for operating a vehicle in a dangerous or unsafe condition.

The Trial

A trial was held before Justice of the Peace Jafar of the Ontario Court of Justice. Becker (alleged to be the owner of the tractor-trailer) was linked to the vehicle in two ways:

> (a) by documents received from the Ministry and tendered by the Crown under s. 210(7); and
>
> (b) by the photocopies made by Officer Campeau of the documents received from the driver at the roadside.

The documents received from the Ministry purported to be "certified" copies of Ministry records, in compliance with s. 210(7) of the HTA. These copies were stapled to cover sheets that displayed the Ministry's seal, the signature of the Registrar of Motor Vehicles, the date, and the following recital:

> "I hereby certify that the paper or papers annexed hereto constitute the true statements containing information from the records of the Ministry of Transportation required to be kept under the Highway Traffic Act."

Again, the "shortcut" mechanism provided by s. 210(7) means that in the absence of proof to the contrary, if the Crown enters records into evidence at trial in compliance with this section, then the facts contained in such records are "deemed" to be true. This is a significant advantage for the Crown, since it will then not need any further evidence to prove whatever facts are contained in the records.

At trial, Becker objected to the admission of the first record so tendered by the Ministry, which was the permit information for the commercial motor vehicle itself (the Crown was attempting to lead this document to show that Becker was the owner of the vehicle). Becker's counsel argued that it was insufficient to simply staple a generic cover sheet to the alleged record, since there was no reliable link between the alleged record and the cover sheet. How could the Court be sure that it was the correct record? How could the Court be sure that the Ministry had made the necessary certification in connection with the record? With nothing but a staple linking the two documents, counsel argued that the Court could not be sure of either.

The Justice of the Peace overruled Becker's objection, however, and admitted the Ministry record. The Court was therefore satisfied that the Ministry record did prove that Becker was the owner of the commercial vehicle.

Meanwhile, the photocopies of the documents taken by Officer Campeau at the inspection station were also entered as exhibits at trial. Officer Campeau verbally identified the

documents while she gave testimony on the stand. No objection was made to this at trial.

Finally, no evidence was adduced by the defence to contradict, rebut, or call into doubt the accuracy of the Ministry records or the photocopies of the documents taken at the roadside by Officer Campeau.

Ultimately, Becker was convicted of the offence along with the driver.

The First Appeal (in the Ontario Court of Justice)

Becker appealed its conviction to a judge of the Ontario Court of Justice. On appeal, Justice Hornblower ruled that the so-called "certified" records from the Ministry were inadmissible. He found that s. 210(7) had not been complied with.

In particular, His Worship found that it was not enough for the generic "certificate" (i.e. the cover sheet stapled to the alleged Ministry document) to simply use general terms when referring to the documents attached to it. He commented:

> "In order to meet the statutory requirement in s. 210(7) that the copy of the document purports to be certified by the Registrar as being a true copy, the certificate needs to state the nature of the document, in this case, a vehicle record. Simply referring to the paper or papers attached is too vague to comply with the statutory requirement. The statute not having been complied with, the certificate should not have been admitted into evidence."

Justice Hornblower also ruled that the copies of the documents received by Officer Campeau were not admissible against the respondent for the truth of their contents. In so doing, His Worship relied on earlier case precedent in this area (*1) that stands for the proposition that such records, when taken from the side of the road, cannot be used for the truth of their contents against the owner of a vehicle since they constitute inadmissible hearsay.

Justice Hornblower, however, did not refer to section 216.1(5) of the HTA in the course of his decision. This section was not raised by either the Crown or the defence, whether at trial or on appeal.

Thus, Justice Hornblower allowed Becker's appeal and quashed the conviction against Becker, having found that there was no admissible evidence showing that Becker was the owner of the vehicle in question.

The Second Appeal (in the Court of Appeal)

Ultimately, the Court of Appeal allowed the Crown's appeal and reinstated the conviction. The Court held that Justice Hornblower erred in both of his conclusions.

First, the Court of Appeal noted that s. 210(7), which essentially says that a document that "purports to be certified" by the Ministry, does not actually specify the exact form of certification required.

The Court went on to note that s. 210(7) also refers to both "records" and "statements containing information from the records". The Court observed that the legislation thus contemplates proof both by certified records or certified statements containing information from the records, and that, "Had the certification, including the Registrar's signature and the Ministry Seal, been placed directly on the first page of each photocopy, those documents would clearly have been "certified" copies of Ministry documents."

However, the Court then held that it did not need to decide whether the documents tendered at trial (and attached to the cover sheets by only a staple) were sufficient to be considered properly "certified" records under s. 210(7). This was because the Court concluded that the documents from the Ministry were

without question certified "statements" within the meaning of s. 210(7). The Court held:

> Without question, a typed document duplicating the content of a Ministry document would have qualified as a "statement". It would be illogical if a document that states that appended photocopies are from the Ministry records did not similarly qualify as a "statement containing information from the records". That is what was offered into evidence in this case.

The Court also noted that s. 210(7) also only made such documents *presumptively admissible*. The section clearly says that the documents are admitted into evidence for the truth of their contents *in the absence of any evidence to the contrary*. Thus, the Court held that an accused person was protected from incorrect information (whether it was a "record" or a "statement") by this ability to lead contrary evidence. The Court observed that the defence had not tendered any such evidence at trial.

Second, the Court also held that the photocopies made by Officer Campeau should also have been admitted and could be relied on for the truth of their contents. The Court held that Justice Hornblower did not refer to s. 216.1(5).

Becker argued that the different wording of this section (as compared with the wording of s. 210(7)) (*2) meant that photocopies made by inspectors, if certified, would still *not* be admissible at trial for the proof of the underlying facts contained in those documents. Rather, Becker argued that s. 216.1(5) simply relieved the inspector who made the photocopies from having to attend in court to authenticate them in person - i.e. the certification process by the officer would be enough to authenticate them by itself.

Becker also argued that in this case, Officer Campeau had not actually signed the photocopies or done anything to "authenticate" them. Thus, s. 216.1(5) was not even triggered.

The Court disagreed. First, the Court ruled that since Officer Campeau was in court and gave evidence about the photocopies directly, the documents could be seen to have been sufficiently "certified".

Next, and in any event, the Court was of the view that the photocopies were admissible for the truth of their contents (despite the differently worded sections between s. 210(7) and s. 216.1(5), and despite the earlier case precedents, which the Court held were distinguishable on their particular facts) since they fell into "an exception to the hearsay rule" - because they were all documents required by the HTA to be carried in the vehicle. Thus, the photocopies constituted reliable evidence of the ownership of the vehicle - absent evidence to the contrary.

Again, the Court observed that there had been no evidence to the contrary offered by the defence.

In the result, the Crown's further appeal was allowed, and Becker's conviction was reinstated.

James Manson

Endnotes

(*1) See, e.g. *R. v. Swish Maintenance Limited*, [2005] O.J. No. 3958 (OCJ) and *R. v. 2934752 Canada Inc. (c.o.b. Highland Transport)*, (1997) 17 MVR (4th) 48 (OCJ).

(*2) Consider the wording of each section:

> 210(7) A copy of any document filed in the Ministry under this Act, or any statement containing information from the records required to be kept under this Act, that purports to be certified by the Registrar under the seal of the Ministry as being a true copy of the original shall be received in evidence in all courts without proof of the seal, the Registrar's signature or the manner of preparing the copy or statement, and <u>is proof, in the absence of evidence to the</u>

> contrary, of the facts contained in the copy or statement.
>
> …
>
> 216.1(5) Any copy made as provided in subsection (4) and certified to be a true copy by the person making it is admissible in evidence in any proceeding as proof, in the absence of evidence to the contrary, of the original document and of the contents of the original document.

It was argued before the Court of Appeal that the language used in s. 210(7) creates a different meaning (and result) than that used in s. 216.1(5). In s. 210(7), the provision states that the evidence is proof "of the facts contained in the copy or statement", that is, of the information contained in the document (or statement) itself.

For example, if a record from the Ministry, tendered under s. 210(7), indicates that Mickey Mouse owns a given vehicle, then a court would be entitled to "deem" or simply take that information as true without making any further inquiry.

In contrast, s. 216.1(5) only provides that the copy is proof "of the original document and of the contents of the original document". This arguably means something different - that is, the copy is taken to be the same as the original, and that both are equally authentic; however, the facts contained therein are not taken to be true.

Thus, if a photocopy of the same record as above were tendered under s. 216.1(5), then the court would only be allowed to recognize that the photocopy "says what it says", and that it's the same as the original document found in the vehicle by the inspector. However, the section does not give the court the ability to simply "deem" that Mickey Mouse in fact owns the vehicle. That fact may or may not be true, and the court would be entitled to consider the information contained in the photocopy in the course of deciding whether the suggested allegation (i.e. that Mickey Mouse owns the vehicle) is true or false. The court could rule that that information is in fact true on the strength of the information in the record and perhaps the absence of contrary evidence or the presence of other corroborating evidence; however, the fact is not "deemed" to be true from the outset.

As indicated in the body of this article, however, the Court of Appeal sidestepped this issue and concluded that the photocopies of the records made by Officer Campeau were in fact admissible in any event for the truth of their contents since these documents fell under an exception to the traditional hearsay rule, since accurate records are required to be kept in a commercial vehicle.

2. Force Majeure Clauses: Give Them the Attention They Deserve!

The terms and conditions of a written contract are critical in governing the rights and obligations of the parties. One common term is the so-called "Force Majeure" clause, where the parties might agree on how and when an unforeseeable and unpreventable event might excuse one or both of them from having to perform their obligations. Circumstances may arise during the life of the contract such that a Force Majeure clause might thus "excuse" a contracting party from performance.

Alternatively, the clause could have the unintended paradoxical effect of actually *binding* a party to contractual performance during the "new" circumstances, perhaps on account of the limited scope or imprecision of the language used (i.e. the clause "not going far enough"), or perhaps by way of positive language that a duty to perform will survive those circumstances (i.e. "in the event this or that happens, you will still have to do this or that"). In these respects, a carelessly drafted Force Majeure clause may be problematic for the unwary. While at common law, a party might be released from a contract on the basis that the very purpose of the contract has from an objective point of view been "frustrated", this relief might be trumped or ousted by the language of a Force Majeure clause.

The recent decision of the Ontario Superior Court in *Braebury Development Corporation v. Gap (Canada) Inc*. (*1) illustrates the conflict that can arise when a party seeks relief from contractual performance on the basis of its being "frustrated" on the basis of circumstances contemplated by a Force Majeure clause in the contract.

The Facts

Gap (Canada) Inc. ("Gap") operated a retail clothing store from premises leased from a landlord, Braebury Development Corporation ("Braebury") at 230-234 Princess Street in downtown Kingston. The lease term was to end on 31 December 2020.

On 17 March 2020, in response to the COVID-19 pandemic, the Government of Ontario declared a provincial state of emergency. On 24 March, the government ordered all non-essential businesses to close to limit the spread of COVID-19. As a result, Gap was required to shut down its store located at the leased premises and was unable to reopen until the shutdown restrictions were lifted on 19 May 2020.

Gap did not pay rent for April or May 2020, and only made partial rent payments from June 2020 to September 2020. Gap unilaterally closed the store and vacated the lease premises in September 2020.

Braebury sought to recover arrears of rent from Gap totalling $208,211.85. Gap refused to pay, taking the position that it was relieved of the obligation to pay the arrears of rent because the purpose of the lease was frustrated by the COVID-19 pandemic, the resulting public health restrictions having significantly impeded its ability to operate its business such that it was no longer reasonable, practical or commercially viable for it to do so.

The Court Action

Braebury commenced an action in the Ontario Superior Court for the payment of the arrears and asked the Court to address the situation on a motion for summary judgment.

The summary judgment motion raised two issues:

a) Whether a Force Majeure clause contained in the lease governed the circumstances and, if so, its effect on the defendant's obligation to pay rent; and

b) If the Force Majeure clause did not apply, whether the doctrine of frustration of contract applied to relieve the defendant of its obligation to pay the rent claimed.

The Lease Force Majeure Clause

The lease contained a Force Majeure clause which provided as follows:

> 24.01 **Force Majeure.** *In the event that either party hereto shall be delayed or hindered in or prevented from the performance of any act required hereunder by reason of strikes, lock-outs, labour troubles, inability to procure materials, failure of power, restrictive governmental laws or regulations*, riots, insurrection, war, military or usurped power, sabotage, unusually severe weather, fire or other casualty or other reason (but excluding inadequacy of insurance proceeds, financial inability or the lack of suitable financing not attributable to any of the foregoing) *of a like nature beyond the reasonable control of the party delayed in performing work or doing acts required under the terms of this Lease* (herein called "force majeure"), *the performance of such act shall be excused for the period of the delay and the period for the performance of any such act shall be extended for a period equivalent to the period of the delay. The provisions of the preceding sentence however shall not excuse Tenant from the prompt and timely payment of the Rent as and when the same is due under this Lease except when (i) the Commencement Date of the term is delayed by reason of force majeure, or (ii) such payment is excused pursuant to other provisions of this Lease.*
> *(italicized emphasis added)*

As explained in *Atlantic Paper Stock Ltd. v. St. Anne-Nackawic Pulp and Paper Company Limited* (*2). Force Majeure clauses are contractual provisions designed to "…discharge a contracting party when a supervening, sometimes supernatural, event, beyond the control of either party, makes performance impossible. The common thread is that of the unexpected, something beyond reasonable human foresight and skill".

The Force Majeure clause in the lease excused the parties from performance of certain of their obligations in the event that the party was prevented from doing so or hindered by "restrictive governmental laws or regulations" or other reason "of a like nature" beyond the party's control. The lease however also provided that if the Force Majeure clause was triggered, it did not excuse the Gap from the prompt and timely payment of rent.

Braebury argued that the Force Majeure clause in the lease demonstrated that the parties contemplated at the time of the formation of the lease contract circumstances such as those arising out of a pandemic. It asserted that government restrictions, including those enacted in response to a pandemic, qualified as "restrictive government laws or regulations". Alternatively, the government's COVID-19 restrictions were "of a like nature" to the list of events in the Force Majeure clause that triggered its application.

Since the Force Majeure clause applied and explicitly did not excuse Gap from the prompt and timely payment of rent, Braebury asserted that it had to satisfy its rent obligations.

Gap in turn responded with the argument that the pandemic and resulting government restrictions were *not* contemplated by the parties when the lease was entered and, hence, did not trigger the lease's Force Majeure clause.

To determine whether an event has triggered a Force Majeure clause and, if so, its impact on the parties' contractual obligations, the court must interpret the particular clause contained in the lease. The lease should "be read as a whole, giving the words used their ordinary and grammatical meaning": *Windsor-Essex Catholic District School Board v. 231846 Ontario Limited* (*3) ("*Windsor-Essex"*).

The Court identified three questions that need to be addressed when addressing the effect of a Force Majeure clause: (a) what are the triggering events under the clause; (b) what is the required impact on the party invoking the clause; and (c) what are the consequences of that impact on the invoking party's contractual obligation.

The Triggering Event

The "trigger" in the subject lease would be engaged when the reason for a party's inability to

perform its obligations was "restrictive governmental laws or regulations…or other reason…of a like nature beyond the reasonable control of the party delayed in performing work or doing acts required under the terms of this Lease…"

Gap argued that the pandemic and government restrictions were not covered by the listed events triggering the Force Majeure clause and were not of a "like nature". Specifically, it argued that the clause did not refer to public health measures, pandemics or epidemics, or health emergencies. Since these types of events were absent from the list, the government's COVID-19 restrictions were thus not "of a like nature".

Braebury replied that the government's COVID-19 restrictions aimed at reducing the transmission of COVID-19 fell under "restrictive governmental laws or regulations" or were "of a like nature" such that the Force Majeure clause was in fact triggered.

The issue of whether the government's COVID-19 measures, and specifically the shutdown of non-essential facilities in the spring of 2020 fell under the event of "restrictive governmental laws or regulations" in a lease's Force Majeure clause had been earlier addressed in the above mentioned *Windsor-Essex* court decision. In that case, two school boards leased recreational space. Due to COVID-19 restrictions, neither school board was permitted to access the recreational space it had leased. They had identical leases with the landlord, which provided for a rent abatement if the landlord was unable to provide access to the facilities for any of the reasons listed in the Force Majeure clause. The two school boards applied to the Court for a declaration that the Force Majeure clauses applied and abated the rent owed while they were unable to access the leased space during the shutdown periods.

The lease in *Windsor-Essex* included "restrictive government laws or regulations" in its list of triggering events. The judge ruling in that case held that the pandemic itself was not the triggering event, but, rather, it was the government's laws and regulations that were implemented in response to the pandemic that prevented the lessor from providing access to the recreational space.

The terminology contained in the subject lease referring to restrictive governmental laws or regulations being identical to the terminology in the leases at issue in the *Windsor-Essex* case, the judge hearing the summary judgment motion in the present case likewise found that the Force Majeure clause in the parties' lease *was* triggered by the government's COVID-19 restrictions.

Required Impact

The required impact pursuant to the lease was "… that either party hereto shall be delayed or hindered in or prevented from the performance of any act required under the lease by reason of…"

Gap did not pay rent as required under the lease for the months of April and May when it was prohibited by the government's COVID-19 restrictions from opening its retail space, and only made partial payments thereafter while certain COVID-19 restrictions remained in place.

The Consequence on Contractual Obligations

If triggered, the Force Majeure clause excused both parties from their obligations under the lease, but as mentioned above it did not "excuse Tenant from the prompt and timely payment of the Rent as and when the same is due".

While in the *Windsor-Essex* case the effect of the Force Majeure clause was to provide the tenants with a rent abatement, the Force Majeure clause in the subject lease had the precise opposite effect. The payment of rent being an "act under the lease", Gap, while relieved of other obligations under the lease, was expressly *not excused* from paying rent despite its ability to operate its business being significantly impeded.

Frustration of Contract

Gap argued that the legal doctrine of "frustration of contract" applied to excuse it from paying rent while the government restrictions prevented it from operating its store at the leased premises, asserting that the lease was frustrated because (1) the government's COVID-19 restrictions "made the Lease radically different from that which was undertaken under the Lease when it was signed", and (2) performance of the lease became impossible as a result of the government's COVID-19 restrictions.

Braebury took the position that because the Force Majeure clause was applicable, Gap could have no recourse to the doctrine of frustration, since it only applies to situations that were not contemplated by the parties at the time of the making of the contract. Braebury asserted that the existence of an applicable Force Majeure clause necessarily means that events covered by it were contemplated by the parties at the time the contract was made.

The Court noted the decision in *Naylor Group Inc. v. Ellis-Don Construction Ltd.* (*4) where the Supreme Court of Canada stated at para. 53: "Frustration occurs when a situation has arisen for which the parties made no provision in the contract and performance of the contract becomes "a thing radically different from that which was undertaken by the contract".

When the doctrine of frustration applies, "the court is asked to intervene … to relieve the parties of their bargain because a supervening event … has occurred without the fault of either party.": *Naylor*, at para. 55.

Gap's position was that the unforeseen supervening event was the government's COVID-19 restrictions, which prohibited it from operating its store during the government's shutdown of non-essential retail businesses.

Taking the approach articulated in the *Naylor* case, the question was whether the COVID-19 restrictions radically altered the terms of the lease. While this event did prohibit Gap from operating its retail store temporarily between March 2020 and May 2020, and then at reduced capacity until September 2020, it was not clear to the Court that this would have been sufficient to engage the doctrine of frustration. To radically alter the terms of the lease, the supervening event must not merely increase the burden of satisfying the contractual obligations, but must "affect the nature, meaning, purpose, effect and consequences of the contract so far as concerns either or both parties." (*5)

Gap asserted that the purpose for entering the lease was to operate the premises as a retail store. However, under the terms of the lease, Gap was not in fact required to do so at all times. Clause 3.01 of the lease related to the use of the premises and states:

> "The Premises may be used for any retail purpose or purposes. Tenant shall have no obligation to operate any business nor conduct any business nor conduct any use in the premises either initially or at any time during the terms of this lease…"

Given that Gap was not required to operate its retail store under the lease, its inability to do so could not be said to have radically altered the lease's terms, turning it into something completely different than what was intended by the parties entering the lease. By contrast, if Gap had been required under the lease to operate the premises as a retail store, its inability to do so by a supervening event may have risen to the level of radical change required to engage the doctrine of frustration.

The Court cited cases suggesting that to frustrate a contract, a supervening event must be a permanent, as opposed to a temporary, setback: see *Manufactures Life Insurance Co. v. Huang & Danczkay Properties*. (*6) In this regard the Court noted that while some COVID-19 restrictions remained in place throughout the remaining lease term, that non-essential retail locations were only ordered to shut down between 24 March 2020 and 26 May 2020. At all other times, Gap would have been able to operate its store subject to remaining public

health measures. While this would not have been an insignificant disruption to Gap's retail operations, it did not appear to the Court that those disruptions occurred to the extent that the lease was frustrated.

As the parties had turned their minds in the lease wording to what their respective responsibilities would be in the circumstances that evolved, and as the doctrine of frustration of contract was inapplicable the Court ruled in favour of Braebury, granting it judgment against Gap for the amount of arrears of rent owing.

Conclusion

As this decision indicates, the courts place an extremely high premium on parties being held to the terms of negotiated contracts. It is critical that parties play close attention in the drafting of each and every contract term. While this decision involves the leasing context, the legal principles articulated are by no means restricted to leasing situations and they permeate all areas of commerce involving where written contracts.

All too often Force Majeure clauses are regarded as standard "boilerplate" provisions with little, if any review and study. As this case indicates, nuances in language can fundamentally affect a party's rights.

Gordon Hearn

Endnotes
(*1) 2021 ONSC 6210 (CanLII)

(*2) [1976] 1 S.C.R. 580, at p. 583

(*3) 2021 ONSC 3040
(*4) [2001] 2 S.C.R. 943

(*5) *Wilkie v. Jeong*, 2017 BCSC 2131, quoting *Folia v. Trelinski* (1997), 14 R.P.R. (3d) 5 (B.C.S.C.) at para. 18.

(*6) [2003] O.T.C. 717 (Ont. S.C.), at paras. 45-46

3. Distracted Driving Update 2021

The Courts across the country are getting increasingly intolerant of distracted driving. The following is an update on key highlights.

British Columbia

In the July 2020 edition of *The Navigator*, the author commented on *R. v. Tannhauser* (2020 BCCA 155), a decision of the British Columbia Court of Appeal, which confirmed that holding a cellphone while driving is an offence even when it is disabled or turned off. On July 27, 2021, the same Court handed down another decision in *R. v. Rajani* 2021 BCCA 292. This case went further by extending "use of" or "holding" an electronic device under BC's *Motor Vehicle Act* ("MVA") to include more than holding the cell in one's hands.

Under the BC's MVA s. 214.2 (1), cellphones or other handheld electronic devices include a cell function or that are "capable of transmitting or receiving electronic mail or other text-based messages". "Use" is defined as "holding the device in a position in which it may be used".

In 2020, in *R. v. Tannhauser*, Mr. Tannhauser received a ticket because he was holding his cellphone at the top of his steering wheel while driving on the TransCanada Highway. He testified that he was not "using" the cellphone but rather relocating it from the passenger seat to access papers. Mr. Tannhauser's cellphone was also disabled by an app that engaged while he was driving. At most, he testified, he was only holding a cellphone that wasn't working.

The BC Court of Appeal decided that a disabled cell phone is only temporarily disabled (whether by an app or because it is turned off) and that such cellphones are still "electronic devices". A turned off lamp is still a lamp. Only if it no longer had any capacity to make calls or send electronic data would a disabled cellphone no longer be an electronic device. This being the case, holding an electronic device while driving, was an offence. The Appeal Court reasoned that if the BC legislature had wanted to create an exception for non-functioning devices, the law would have specifically said so, since other exceptions are contained with the *Motor Vehicle Act*.

In 2021, in *R. v. Rajani*, Mr. Rajani had been issued a ticket in 2019 for using an electronic device contrary to the MVA. At trial, Mr. Rajani admitted that his cellphone was wedged between his right thigh and his car seat, and that he was charging it. At trial, the Provincial Court Judge found that Mr. Rajani was still "using" the device even though it was wedged and was being charged, The Judge stated, "in the event of a driver making an evasive action to avoid a collision," a phone placed "precariously beside [Mr. Rajani's] lap" could be "dislodged and cause the driver to be distracted." Mr. Rajani appealed to the BC Supreme Court.

Supreme Court Justice Heather MacNaughton disagreed with the Provincial Court's decision confirming that "The MVA does not prohibit the presence of an electronic device in a vehicle solely on the possibility that its mere presence may be a distraction. The prohibition is against the use of an electronic device, including a cellphone."

Justice MacNaughton, however, still found Mr. Rajani guilty of the offence confirming that "holding" means physically grasping, carrying, or supporting something and that the offence relates to "holding a device in a position in which it may be used." The Judge reasoned that, if this was not the case, then drivers would be allowed "to operate their vehicles with electronic devices in their laps, between their thighs, tucked under their arms or chins, or supported by other parts of their bodies."

Mr. Rajani appealed again to the BC Court of Appeal; however, he was again unsuccessful. The Court of Appeal agreed with Justice MacNaughton and dismissed his appeal. The Appeal Court further found that the word "holding" was not restricted just to the use of a person's hands but included a variety of devices not just handheld devices but also GPS and televisions etc. Also, a broad definition of "holding" really was what the BC Legislature was trying to achieve – capturing distracted conduct

thereby preventing death and injuries associated with distracted driving.

Nova Scotia

Recently, the Nova Scotia Utility and Review Board approved the Facility Association's rate filing which included a substantial increase to 25% from 15%, as a surcharge on insurance premium for the first major conviction and with further surcharges of 25% for each subsequent major conviction. The Facility Association has applied to treat a distracted driving conviction ("using a handheld wireless communication/entertainment device") as a major conviction. This punitive measure is expected to translate to insurers and insurance throughout Canada if it has not already. (*1)

Ontario

In Ontario, the *Highway Traffic Act* ("HTA") has a similar wording that does not have an exception for non-functioning devices. The HTA states in s 78.1 that "No person shall drive a motor vehicle on a highway while **holding** or using a hand-held wireless communication device… that is **capable of** receiving or transmitting telephone communications, electronic data, mail or text messages." (emphasis added) While it may be clear that "holding" the phone is an offence in Ontario, it is also clear that a non-functioning phone will also be enough to constitute an offence.

Getting caught multi-tasking is expensive. For classes A-G and M licences in Ontario, the fines are the highest in Canada, including:

(a) a fine of $615 for a first-time offence (increases to $1000, if the ticket is fought unsuccessfully) plus 3 demerit points and 3-day licence suspension;
(b) a fine of $615 for the second offence (increases to $2,000 if the ticket is fought unsuccessfully) plus 3 demerit points and 3-day licence suspension; plus 6 demerit points and licence suspension for 7 days; and
(c) a fine of $615 for a third offence (increases to $3,000 if the ticket is fought unsuccessfully) plus 3 demerit points and 3-day licence suspension; plus 6 demerit points and suspension for 30 days.

Novice drivers face longer suspensions though no demerit points: (1) 30 days on first conviction; (2) 90 days on second conviction; and (3) cancellation and removal from the Graduated Licensing System for the third conviction.

If other people are endangered because of distracted driving of any kind (including use of hands-free devices), charges may include careless driving and, if convicted, penalties include 6 demerit points, fines up to $2000 and/or a jail term of 6 months/licence suspension of up to 2 years. If charged with the criminal offence of dangerous driving, penalties include a jail term up to 10 years for causing bodily harm or up to 14 years for causing death.

Finally

Truckers and trucking companies should recall that the CVOR holder can also be charged for offences committed by drivers operating those vehicles thereby exposing them to points accumulation. Points are assigned depending upon the charge and conviction under various legislation. Too many CVOR points may trigger audits and possibly more charges under various headings putting the CVOR Certificate at risk.

It is clear that distracted driving is a very serious offence and that permitted use of cellphones while driving is very restricted. The law, understandably, will continue to be interpreted strictly with very little "wiggle room" and premiums are increasing accordingly.

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Endnotes
(*1) Meckbach, Greg, "How insurers are changing their treatment of distracted driving*", Canadian Underwriter*, www.canadianunderwriter.ca, October 12, 2021.

4. Supreme Court of Canada Upholds Limited Liability Clauses in Quebec

In the recent decision of *6362222 Canada Inc. v. Prelco Inc.* 2021 SCC 39 the Supreme Court of Canada considered a clause in a contract that limited the liability of a contractor that provided software and professional services to the amount of any fees paid in relation to the delivery of unsatisfactory services.

At issue was the question of whether a non-liability clause in a contract is valid in respect of a breach of a fundamental obligation in Quebec civil law. The trial judge had found that an exoneration clause or limitation of liability clause is without effect if it relates to the very essence of an obligation. The trial judge applied the "doctrine of breach of a fundamental obligation." The trial judge and the Quebec Court of Appeal found that despite the fact that the limitation of liability clause was in a freely negotiated contract for services between the appellant, 6362222 Canada inc. ("Createch"), and the respondent, Prelco inc. ("Prelco'), it was inoperative based on the doctrine.

The facts giving rise to the action were straightforward. Prelco engaged Createch to improve the company's business processes relating to customer service. A number of projects for that purpose were carried out in 2007 and 2008, and all of them met Prelco's expectations. While doing this work, Createch informed Prelco that its computer systems were not particularly efficient, as they were composed of a large number of programs whose databases functioned autonomously. Prelco asked Createch's advice on this. Createch agreed to conduct a summary analysis of the systems in question. Upon the completion of that analysis, Prelco invited Createch, in late February or early March 2008, to present a proposal for the supply of software and professional services in order to implement an integrated management system in its business.

When the system was implemented, numerous problems arose: inconsistent invoices sent to customers, errors in putting orders into production, shipping delays, and inefficiency of the planning and production system, which was slow. Faced with these recurring problems, Prelco terminated its contractual relationship with Createch in the spring of 2010 and then engaged another firm, Irisco, to make the integrated management system functional. After Irisco had resolved the problems, the integrated management system functioned properly. Prelco was able to use the system and to manage its production, although it did not benefit from all the expected advantages. Prelco brought an action against Createch for over six million dollars. The price of the contract was approximately just over six hundred thousand dollars.

In this case, the trial judge found that Createch breached its fundamental obligation under the contract, namely, to inquire into Prelco's specific operating needs and requirements and to propose an approach to implementing an integrated management system that would be capable of satisfying them. The trial judge concluded that Createch could not rely on the clause in question in order to limit its liability for material injury it had caused to Prelco. The Court of Appeal confirmed that conclusion, explaining that the doctrine (noted above) accepted by the trial judge exists in Quebec law and that it applied in this case. (*2)

The Supreme Court of Canada noted that there are two possible legal bases for the existence of the doctrine and for applying it to this case, and they do not have the same justification. The Court noted that the first is that a non-liability clause relating to a fundamental obligation is inoperative if it is contrary to a rule of public order that limits freedom of contract. The second is that a non-liability clause is inoperative if it releases the debtor from all obligations to the creditor, because the clause thereby deprives the creditor's correlative obligation of its cause and is therefore incompatible with the very existence of the fundamental obligation flowing from the contract as a "synallagmatic" act. In other words, each party to that contract was bound to provide something to the other. These two bases —

public order and absence of an objective cause of the obligation — were central to the dispute between the parties. (*1)

The Supreme Court of Canada allowed the appeal, finding that neither of the legal bases for the doctrine sufficed to negate the non-liability clause to which the parties freely consented to in the case at bar, as neither public order nor the non-existence of the obligation could be successfully argued.

The Court stated at paragraph 5:

> While it is true that the first basis for the doctrine does apply in certain specific situations provided for in the *Civil Code of Québec* ("*C.C.Q.*" or "*Code*"), public order does not have the effect, generally, of rendering a non-liability clause relating to a fundamental obligation in a contract by mutual agreement inoperative. The opposite conclusion would be contrary to the scheme of the *Code*. The legislature, by addressing clauses that are inconsistent with higher values it intentionally associated with public order, has allowed sophisticated parties to agree to the allocation of risk in contexts to which the *Code* does not explicitly refer. As to the second basis, the clause at issue does not deprive the obligation of its objective cause. It is common ground that the prestation agreed to is due from the debtor, Createch, even if the sanctions for nonperformance of the agreement are undermined by the effect of the non-liability clause. The creditor, Prelco, in fact concedes that it gave Createch a [translation] "chance to correct its errors and make specific performance" (R.F., at para. 121). An effective sanction, namely specific performance and agreed damages for unsatisfactory services, is still possible. This sanction reflects an obligation that has a cause — Createch's contractual counterprestation — an obligation whose existence is not open to question.

The Court was of the view that that the clause should be found to be valid despite the breach of a fundamental obligation alleged against Createch. First, clauses like this one are permitted by the *Code* (*3), and none of the circumstances in which the legislature has provided that such a clause would be invalid on the basis of public order — what is known as "legislative" or "formal" public order — apply in this case.

The Court also found that the clause did not negate all of the debtor's obligations, deprive the correlative obligation of its cause and impair the reciprocal nature of the contractual relationship. The clause was not akin to a no obligation clause and did not trigger article 1371 of the *Code.*(*4) The clause did not exclude "everything one of the parties is normally required to do to ensure that the contractual transaction is carried out." The Court noted " …in this case, cl. 7 is not a no obligation clause that would exclude the reciprocity of obligations. Despite the wording of cl. 7, Createch owed substantial obligations to Prelco, which Prelco does not deny." (*5)

The appeal was allowed. The Court concluding that "…[the] clause is not ambiguous, and the trial judge could not annul it. The will of the parties had to be respected. Nor could the concept of cause of an obligation justify the decision of the courts below in this case."

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Endnotes

(*1) Para. 3 2021 SCC 39.

(*2) Interestingly, the trial judge found that Createch's mistakes could not be characterized as intentional fault or gross fault. He also found that the contract, having resulted from discussions between the parties, could not be characterized as a contract of adhesion. It was a synallagmatic contract — more precisely a time and materials contract for services — under which Createch had an obligation of means. Having been negotiated by mutual agreement between sophisticated legal persons, the contract was not subject to consumer protection legislation. Note also that the SCC referred to the clause as a non-liability

clause, a clause that can be an exoneration clause or a limitation of liability clause.
(*3) *Civil Code of Quebec.*
(*4) Article 1371 affects the validity of an obligation where the contract clause deprives an obligation of its cause.
(*5) Para. 94.

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