THE NAVIGATOR

IN THIS ISSUE

SPOLIATION OF EVIDENCE

You're involved in a lawsuit. You discover that the other side has disposed of a document that you consider to be relevant. You suspect that it was not retained because it may not have helped the other side's cause. How will the Court adjudicating the matter deal with the situation?

Of course, this can "cut both ways". Have *you* lost or disposed of something along the way that an opposing party may consider relevant to the lawsuit?

The recent decision of the Ontario Superior Court in *Trillium Power Wind Corp. v. Ontario* (*1) revisits the law of the "spoliation of evidence" and the judicial treatment of such a situation.

Spoliation of Evidence – Background

The general principles governing the doctrine of "spoliation of evidence" were summarized by the Alberta Court of Appeal in the decision of *McDougall v. Black & Decker Canada Inc.* (*2):

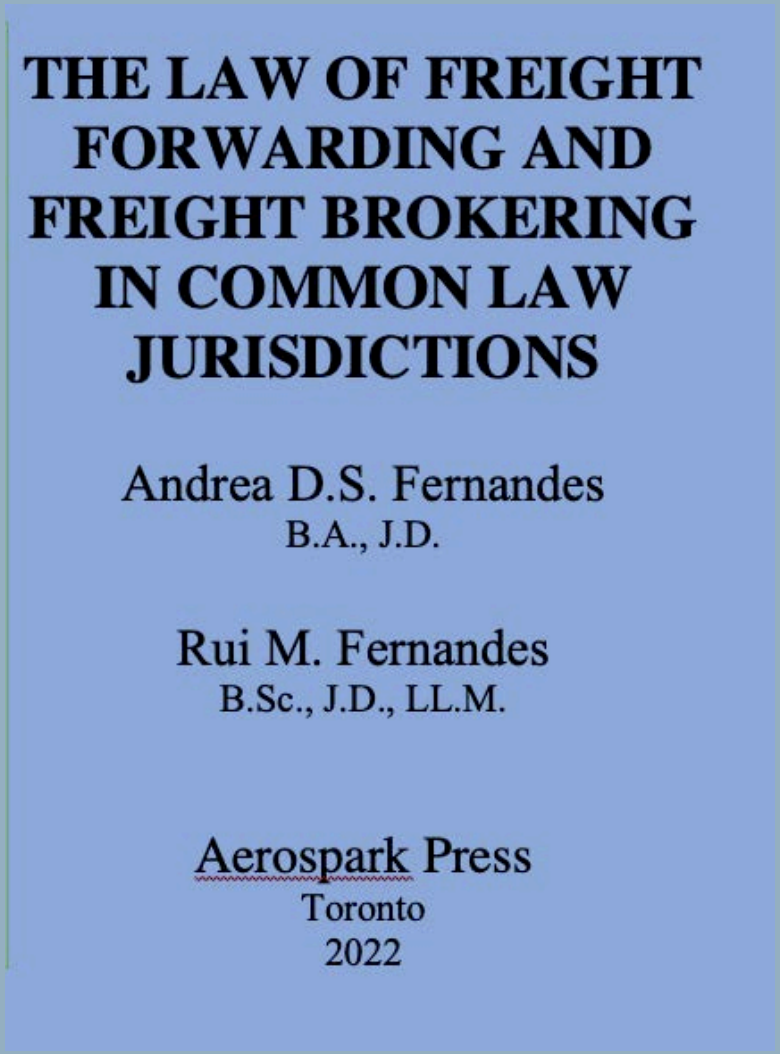
> 1. "Spoliation" refers to the intentional destruction of relevant evidence when litigation is existing or pending.
>
> 2. The principal remedy for spoliation is the imposition of a rebuttable presumption of fact that the lost or destroyed evidence would not assist the "spoliator". The presumption can be rebutted by evidence showing the spoliator did not intend, by destroying the evidence, to affect the litigation, or by other evidence on point.
>
> 3. Outside this general framework other remedies may be available — even where evidence has been unintentionally destroyed. Remedial authority for these remedies is found in the court's rules of procedure and its inherent ability to prevent abuse of process, and remedies may include such relief as the exclusion of expert reports and the denial of costs.

FIRM AND INDUSTRY NEWS

- Aerospark Press has just published the legal text "The Law of Freight Forwarding and Freight Brokering in Common Law Jurisdictions" by **Andrea Fernandes** and **Rui Fernandes.**

- 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 register.

- **Gordon Hearn** will be participating in the "*Innovating Your Freight Brokerage Against Potential Risk*" panel discussion at the *Transportation Intermediaries Association* Capital Ideas 2022 Conference on April 8, 2022 in San Diego, California



FIRM AND INDUSTRY NEWS

Fernandes Hearn LLP Annual Seminar – February 10, 2022

Theme: Supply Chain in 2022

Tentative Agenda	RIBO Credits Applied For
8:30am – 8:45am	Signing In
8:45am – 9:00am	Welcome Remarks *Rui Fernandes*
9:00am -10:00am	Nuclear Verdicts in the U.S. / Verdicts in Canada *Kim Stoll, Donna Burden (Burden, Hafner & Hansen, LLC)*
10:00am – 10:45am	Legal Update US & Canadian Vaccine Mandates/ Impact on Employment Agreements and Overall Supply Chain *Carole McAfee Wallace, Rohan Mathai*
10:45am – 11:00am	Ontario Bill 27 – Non-Compete Agreements/Disconnect Rules *Carole McAfee Wallace*
11:00am – 11:15am	Coffee Break – Sponsored by AON
11:15am – 12:00pm	Freight Forwarders/Load Brokers – Principal v. Agent Carrier Selection and Vetting *Rui Fernandes, Andrea Fernandes*
12:00pm – 12:45pm	Cargo Claims – Rejection of Cargo / Fear of Adulteration Arising Contract Issues in Carriage of Cargo *Gordon Hearn*
12:45pm – 1:15 pm	Lunch Break
1:45pm – 2:15pm	Supply Chain Issues Port Congestion Issues / Demurrage / Storage Costs Warehouse Capacity *Oleg Roslak, Conal Calvert*
2:15pm – 2:45	Supply Chain – Flexible Contracts *Rui Fernandes*
2:45pm – 3:30pm	Trends Impacting Global Supply Chains in 2022 and Minimizing Impact *Gordon Hearn, Jerome Tirion (KPMG)*

> 4. The courts have not yet found that the intentional destruction of evidence gives rise to an intentional tort (*3), nor that there is a duty to preserve evidence for purposes of the law of negligence, although these issues, in most jurisdictions, remain open.
>
> 5. Generally, the issues of whether spoliation has occurred, and what remedy should be given if it has, are matters best left for trial where the trial judge can consider all of the facts and fashion the most appropriate response.
>
> 6. Pre-trial relief may be available in the exceptional case where a party is particularly disadvantaged by the destruction of evidence. Generally, this is accomplished through the applicable rules of court, or the court's general discretion with respect to costs and the control of abuse of process.

It accordingly follows that "spoliation" does not occur merely because evidence has been destroyed. Rather, it occurs where a party is found to have *intentionally* destroyed evidence relevant to ongoing or contemplated litigation, in circumstances where a reasonable inference can be drawn that the evidence was destroyed to affect the litigation. When the destruction is not intentional, it is not possible to draw the inference that the evidence was destroyed because it would have been damaging to the litigant, but other remedies may be available. Remedial authority for these remedies is found in the court's rules of procedure and its inherent ability to prevent abuse of process. Remedies may include such relief as the exclusion of expert report(s) that may relate to the lost item and the denial of an award of legal costs that the spoliator might have in the normal course of events otherwise been entitled to.

As noted above, once it is demonstrated that the spoliation of evidence was intentional, a presumption arises that the evidence would have been unfavourable to the party destroying it, which is rebuttable (i.e. can be displaced or offset) by other evidence through which the alleged spoliator might prove that his actions, although intentional, were not aimed at affecting the litigation.

The danger of a presumption that is not rebutted is that it may lead to a negative finding of fact against the "spoliator".

The above principles have been adopted in Ontario. As noted in the decision of *Nova Growth v. Kepinski* (*4) the following four elements must be established on a "balance of probabilities" (*5) by the party complaining of missing evidence:

> 1. The missing evidence must be *relevant*;
> 2. The missing evidence must have been destroyed *intentionally*;
> 3. At the time of destruction, *litigation* must have been *ongoing or contemplated*; and
> 4. It must be *reasonable* to infer that the evidence was destroyed *in order to affect the outcome of the litigation.*

The following passage from the *Nova Growth* decision elaborates on how *specific evidence* must be said to be missing (*6)

> The inference requested by the plaintiffs is that some destroyed document would have helped the plaintiffs' case. Speculating about what might have been destroyed is not good enough for an inference to be raised. There must be a particular piece of evidence that has been destroyed that is relevant. Without knowing that it would not be possible to make any meaningful inference.

Trillium Power Wind Corp. v. Ontario: Spoliation and the Current Treatment by the Courts

The recently published decision in *Trillium* provides an interesting – and well publicized –

example of a "spoliation" debate in the context of a lawsuit. Trillium Power Wind Corp. ("Trillium") brought a lawsuit against the Ontario government, claiming various damages in connection the Province's termination of the project described below. In the course of the lawsuit, Trillium applied for "summary judgment" for a finding that the Province had spoiled evidence.

As noted by the Court issuing this decision:

> This case plumbs the depths of certain much criticized policies by the former provincial government of Premier Dalton McGuinty.

The McGuinty government, during its second term in office, implemented a policy of approving and subsidizing wind power projects across the province. One such program involved an "offshore windfarm program" (the "Program"). Several years later the provincial government recognized the economic turmoil created by its wind power policy by abruptly cancelling the Program. This cancellation, however, was done without any advance coordination or consultation with certain affected parties. One such party was Trillium, who had invested significantly in the approval process to participate in the Program.

During its third term in office, the McGuinty government carried out a policy of deleting email accounts and destroying handheld communication devices issued to senior staff of the Premier's Office making it difficult to recreate the internal communications leading up to the decisions to terminate the Program.

The *Trillium* case involved a variety of claims by Trillium, including a claim for monetary damages. The claim was commenced in 2011. In 2013, the Ontario Court of Appeal dismissed much of the claim, significantly paring down the remaining claims that could proceed. (*7). As detailed below, the portion of the claim that was allowed to proceed gave rise to an interesting spoliation of evidence issue.

The Spoliation of Evidence Issue: Government E-mails

The date of the Ontario government's announcement of the termination of the Program coincided with the closing date for the Plaintiff's financing of its proposed participation in same. As a result of the change in the government policy and the public announcement of that change just prior to the financing transaction's closing, the Plaintiff's financial institution, Dundee Corporation, did not close with the financing for the Plaintiff as was scheduled. The Plaintiff thereby lost the financing that it had been anticipating.

While the Court of Appeal had as noted earlier ruled that much of the Plaintiff's claim against the government could not proceed, a "narrow window" remained in which Trillium could proceed with its claim that Ontario's decision and the termination were specifically targeted to stop Trillium's offshore wind power project before it had the financial resources to litigate the Government's decision to cancel the wind projects in Ontario. In essence, Trillium's claim going forward was that while the government cancelled all further consideration of the Plaintiff's proposal as part of the overall cancellation of all offshore applications, *it went out of its way to do so before the Plaintiff's financing was formally in place.*

The day before Trillium's financing deal was too close in connection with the Project the Ontario government announced the termination of the Program. As a result, the financing deal did not close and Trillium was, in effect, deprived of resources that it expected to have at its disposal. As noted by the Court, had the announcement been made a day later, the financing presumably would have already gone through and Trillium would have had a larger war chest with which to do battle with the government's newly announced policy. Hence, the one claim left remaining for Trillium to pursue was based on the timing of that decision's announcement, that it was specifically geared toward the Plaintiff's closing and that the termination accomplished

the government's purpose in undermining the Plaintiff's financing arrangements.

The Trillium Claim Proceeds and the Search for Government E-mails

As the lawsuit proceeded the Ontario government was unable to locate and produce any emails from the email servers of any former Premier's Office personnel. This lack of documentation was significant as such personnel were centrally involved in decisions concerning the termination of the Program.

Certain government individuals provided affidavits and were cross-examined, all deposing that they followed the then in effect protocols for email accounts and hand-held devices. It was a matter of public record that during the McGuinty period the practice within the Premier's Office was for the email accounts of departed personnel to be "decommissioned" — that is, deleted in their entirety. Furthermore, there was evidence that the handheld devices used by the certain such personnel at the time were, after their departures, either reset or physically destroyed.

Interesting, the Court noted that evidence of this practice had been canvassed before the Legislative Committee investigating the deletion of documents in the context of the McGuinty government's termination of certain gas plant programs (*8) and was likewise the subject of an investigative report by the Information and Privacy Commission of Ontario, which concluded that the email destruction practice was a violation of the *Archives and Recordkeeping Act* and raised serious issues of political accountability (*9).

The device destruction and email deletion policy were also thoroughly canvassed during the course of a criminal trial of a chief of staff in the Premier's Office, which was described by that Court in rather scathing terms as a:

> …plan to eliminate sensitive and confidential work-related data . . . [which] amounted to a 'scorched earth' strategy, where information that could be potentially useful to adversaries, both within and outside of the Liberal Party, would be destroyed. (*10)

In light of the above, Trillium amended its lawsuit to add the tort of spoliation. It was the Trillium's position that but for the destruction, or spoliation, of relevant documentation, it would have been in a position to succeed in its remaining claim against the Province. Trillium brought its motion for summary judgment for a ruling before trial on this claim.

The Court considered how stand-alone legal claims for spoliation of evidence had been dealt with in other cases. Noting the concept to be controversial, the Court noted that an independently actionable tort of spoliation of evidence has been recognized in a handful of states in the United States. (*11). The Court noted while no such independently actionable tort has ever been recognized in Ontario that in the Ontario case of *Spasic Estate v. Imperial Tobacco Ltd. (2000) ("Spasic Estate")* (*12) the Court of Appeal indicated that spoliation as a cause of action remained a possibility for future consideration.

The Province asserted that Trillium had no basis to assert a stand-alone claim based on the spoliation of evidence but rather that the issue should only be dealt with as a possible rule of evidence for trial. In view of the *Spasic Estate* ruling, the Court refused to dismiss the Plaintiff's claim prior to trial notwithstanding that the claim was "somewhat novel".

The Trillium judge took the opportunity to note the following:

> … while spoliation as a self-standing cause of action is still open to question, Ontario courts have recognized spoliation as an evidentiary rule where there has been destruction of evidence by a party who reasonably anticipated litigation in which that evidence would play a part: *Ziai v.*

> *Koninklijke Luchtvaart Maatshappij NV* (*13). In fact, this rule of evidence giving rise to a rebuttable presumption has long been acknowledged. The Supreme Court of Canada stated as far back as (the 1896) case of *St. Louis v. The Queen* that, "the destruction of evidence carries a presumption that the evidence destroyed would have been unfavourable to the party who destroyed it, but that presumption may be rebutted" (*14).

Since there was no dispute that email accounts of relevant actors were destroyed by the Province, the question for the spoliation analysis was whether the presumption of adverse impact on it could be rebutted. Citing recent case law in Ontario (*15) which had adopted the above noted considerations from the *McDougall v. Black & Decker Canada Inc.* decision, noted above, the Court reiterated the key elements of spoliation:

(1) the missing evidence must be relevant;

(2) the missing evidence must have been destroyed intentionally;

(3) litigation must have been ongoing or contemplated at the time the evidence was destroyed; and

(4) it must be reasonable to infer that the evidence was destroyed in order to affect the outcome of the litigation.

Was there a Spoliation of Evidence by the Province?

The Court noted that the record showed that the evidence that Trillium contended *was* spoliated (i.e. email accounts from which potentially relevant emails were purged) having been destroyed or deleted as part of what was then an improper, but common practice of Premier McGuinty's office when senior employees left government.

The Court however went on to note that:

> The practice was anti-democratic and has been widely criticized as one of the most unfortunate legacies of that political era. However, there is no evidence before me that any records were deleted in an attempt to influence this particular legal action or that any document destruction was aimed at fending off the Plaintiff's claim. In my view, no reasonable inference can be drawn that any documents were deleted or destroyed in an attempt to affect this litigation.
>
> Another way of looking at the issue is that any presumption against the Defendant due to its intentional destruction of records is rebutted by the evidence that demonstrates that the normal PO recordkeeping practice at the relevant time was to purge email accounts for departing employees and to destroy mobile devices belonging to very senior PO employees … One cannot condone the now defunct policy of email deletion, but one equally cannot relate it to the present litigation with the Plaintiff.
>
> …
>
> What is missing is material that otherwise might have been evidence, but that that was destroyed in the unfortunate, but ordinary course of business as it was conducted by the Premier's Office at the time. The evidence before me … is that the destruction was done as a matter of routine by employees in the PO office. That is, it was done without the involvement of counsel, by persons with no particular knowledge of the Plaintiff's claim, and with no view to influencing the case's outcome.
>
> The evidence of intention that would be needed to support any spoliation claim is not present. Indeed, there is ample evidence that if relevant evidence was destroyed by the government, that

> destruction was distinctly *not* done with an eye on this case and therefore not with the requisite intent for a spoliation claim.
>
> The Plaintiff is in many respects a victim of governmental policy; but much as one might sympathize, it is not a victim of actionable wrongs.

Accordingly, while e-mails were destroyed, that practice did not draw any sanction against the Province as the same did not amount to legal spoliation. The Province accordingly prevailed in its argument and Trillium's application for judgment on its claim for spoliation of evidence was dismissed.

Conclusion and "Take Aways"

Any person or company who contemplates litigation, or is in the course of litigation, must be very careful and deliberate in the management and retention of documents and, for that matter, relevant pieces of evidence. "Documents" of course can refer to emails, photographs or any other chronicle or manifestation of an event. In the context of a product liability claim – just to name one scenario – relevant articles must not only be preserved but left unspoiled from what an adversary might complain to be improper spoliation from testing or interference. Each case will involve a unique strategy and management protocol, which may well call for legal advice along the way when there is any doubt. The following key principles can be gleaned from the foregoing (*this list being no means exhaustive or intended to be legal advice*):

1. Timely notice of claims: if you have a claim against a third party, they should be timely notified of same with a view to protection of legal rights and evidence. This might involve a request for the preservation of relevant documents and/or articles known to have existed or which might be expected to have existed in the normal course of events.

2. Litigation hold requests: when in receipt of a claim or request along the lines of the foregoing, give the same serious consideration and, where considered appropriate, implementation.

3. Establishing document management protocols and ensuring compliance and consistent implementation of same.

4. Individuals and businesses must comply with applicable regulations in terms of the retention of documents and records.

5. Naturally, where there is a preservation order and/or a destructive testing protocol, whether issued by a Court or agreed upon by the parties to a lawsuit, the same must be strictly complied with.

Gordon Hearn

Endnotes

(*1) 2021 ONSC 6731

(*2) *McDougall v. Black & Decker Inc.,* 2008 ABCA 353 at paragraphs 18 - 29.

(*3) The suggestion being that at a point in the future the spoliation of documents by one party might give the innocent "complaining" party the right to sue for damages on the basis of a legal action based on negligence principles.

(*4) 2014 ONSC 2763 at paragraph 296.

(*5) The "balance of probabilities" standard of proof means simply that the fact asserted "more likely than not" happened.

(*6) At paragraph 314.

(*7) *Trillium v. Ontario* 2013 ONCA 683

(*8) Standing Committee on Justice Policy, Legislative Assembly of Ontario, 2nd Sess., 40thParl., June 18, 2013.

(*9) IPC, *Deleting Accountability: Records Management Practices of Political Staff*, June 5, 2013, at 32

(*10) *R. v. Livingston*, 2018 ONCJ 25 at paragraph 176.

(*11) See *Coleman v. Eddy Potash, Inc.* 905 P.2d 185, (N.M. 1995); *Smith v. Howard Johnson Co.,* Inc., 615 N.E.2nd 1037 (Ohio 1993); *St. Mary's Hospital, Inc. v. Brinson*, 685 So. 2d 33,35 (Fla. App. 1996); *Smith v. Superior Court*, 198 Cal. Rptr. 829, 835 (Cal. App. 1984) but see *Cedars–Sinai Medical Center v. Superior Court of Los Angeles*, 1998 Cal. LEXIS 2624.(Cal. S.C.).

(*12) 49 OR (3d) 699 at paragraph 24.

(*13) 2007 CarswellOnt 6431 at paragraph 51 (SCJ).

(*14) 25 SCR 649, at 652–53

(*15) See: Yang v. Co-operators General Insurance Company, 2021 ONSC 1540 at paragraph 102.

2. Joint Notice on Collaboration between the Competition Bureau and Health Products and Food Branch of Health Canada

On January 10, 2022, the Competition Bureau ("the Bureau") and Health Canada's Health Products and Food Branch ("HPFB") issued a joint notice in which they committed to further collaborate to support Canadians' access to safe and effective pharmaceuticals and biologics.

The Bureau, as an independent law enforcement agency, ensures that Canadian businesses and consumers prosper in a competitive and innovative marketplace. The Bureau administers and enforces the *Competition Act*, which includes oversight of competition issues within the pharmaceutical sector.

Health Canada is part of the Government of Canada's Health Portfolio and is responsible for helping Canadians maintain and improve their health, while respecting individual choices and circumstances. Health Canada's HPFB is the national authority that regulates, evaluates and monitors the safety, efficacy, and quality of therapeutic and diagnostic products available to Canadians under the *Food and Drugs Act* ("FDA") and its associated regulations.

In 2019, drugs made up 15.3% of total health care spending in Canada. On average, annual drug spending was approximately $1,078 per person.

The pharmaceutical industry is split into two sectors, the branded pharmaceuticals ("Branded") and generic pharmaceuticals "Generics".

Brands incur significant costs in researching and bringing to market branded drugs, including costs to comply with regulatory requirements. Among other things, seeking authorization of a new drug under the FDA and its associated regulations requires extensive clinical trials to prove that the new drug is safe and effective.

In return for the associated up-front costs, Brands typically receive a period of time-limited market exclusivity – a period where they can introduce a branded drug and be insulated from competition.

Following the end of such exclusivity, generic small-molecule drugs and biosimilars can emerge. Generic drugs and biosimilars are typically less expensive than the original branded drugs to which they are compared because they partially rely on clinical testing previously conducted by the manufacturer of the branded drug (referred to as the reference product) to prove that the drug is safe and effective (among other reasons). This results in significant cost savings to the generic drug or biosimilar manufacturer. In order to rely on this clinical data, the manufacturer must demonstrate the equivalence of a generic drug, or a high degree of similarity in the case of a biosimilar, to the reference product by using comparative studies. Generics and may provide additional treatment options and help prevent drug shortages. Their use also has the potential to result in significant savings to the health care system and patients.

In the joint statement the Bureau and HPFB have indicated their commitment to collaborating in the following areas:

1. General information sharing
a) Exchanging information on the mandate, role, and framework of each organization to identify areas of mutual benefit.
b) Sharing information on developments in these areas and on topics of mutual interest.

2. Cooperation on Bureau enforcement actions
a) Upon request, HPFB provides information to the Bureau in the context of specific investigations.
b) HPFB refers issues to the Bureau where the *Competition Act* may apply.

3. The Bureau shares findings related to the impact of regulatory frameworks on competition in the context of access to medicines
a) The Bureau identifies issues where aspects of the regulatory framework for pharmaceuticals may be impacting elements of competition, including innovation and choice, and collaborates

on identifying potential changes to address these issues.

b) More generally, the Bureau provides any support or advice on designing laws, regulations, and policies in a way that balances policy objectives, including access to safe and effective therapies, with competition considerations (for example, advocating for greater competition based on the principles in the Competition Bureau's competition assessment toolkit).

4. HPFB provides relevant feedback to the Bureau on competition-related issues that impact access to medicines for Canadians.

The joint communication also makes it clear that Brands must provide Generics with access to samples of referenced products. Reference products are used by generic drug manufacturers for the purpose of conducting comparative testing. The communication notes that the Bureau has issued statements regarding its investigations into the alleged practices of Brands restricting access to samples of reference products and has a high degree of concern about recurrence of this type of conduct. Even if samples are eventually supplied, the Bureau will take the necessary steps to investigate and address conduct as appropriate, including seeking administrative monetary penalties, where the evidence establishes that the *Competition Act* is engaged. The communication noted that branded drug manufacturers should anticipate that the Bureau will treat any explanation for a failure to supply generic or biosimilar manufacturers in a timely manner with an extremely high degree of skepticism.

Rui Fernandes

3. Dishonesty During Covid Screening – Termination for Cause

In *Johnson Controls Canada LP and Teamsters Local Union 419,* 2022 CanLII 40 (ON LA) the employee was terminated for cause on the basis that they had committed serious violations of the hospital's COVID policies and in doing so had placed co-workers, hospital staff, patients and the public at serious risk. The employee was a technician who was performing maintenance work throughout a hospital. At the start of each shift, employees were required to attest that they were not experiencing any COVID symptoms using the hospital's standard form. The dismissed employee had several COVID symptoms, which he did not report. His explanation for not reporting them was that he felt they were attributable to allergies. The employee attended four separate shifts where he was displaying COVID symptoms and in which he completed a false attestation. His colleagues told him to report his symptoms as required by hospital policy. Ultimately, the employee tested positive for COVID.

Following termination, the union grieved. The matter was referred to arbitration under s. 50 of the *Labour Relations Act, 1995.* The union grieved that the employee was discharged without just cause, maintained that he reasonably believed that his symptoms were related to his allergies, and that when he realized he might be sick with something else he immediately called in sick, reported his symptoms and underwent testing.

The arbitrator found against the employee, and dismissed the grievance, noting:

> I have carefully considered all the materials before me and have carefully weighed the grievor's explanation in the context of this record. On balance, I have concluded that in failing to report his symptoms and specifically and falsely attesting on multiple occasions that he was not experiencing such symptoms, the grievor committed multiple and very serious breaches of an essential workplace policy intended to protect the health and safety of workers, patients, and the public, in a hospital environment where the importance of such protections is paramount. There can be no doubt that the grievor's conduct formed just cause for discipline. Further, considering the seriousness of this misconduct, combined with the grievor's past record of related discipline, and notwithstanding the grievor's long tenure, I find that the penalty of discharge was appropriate.

Rui Fernandes

4. Insurance and indemnity: When being a "named insured" may not be enough

A very recent decision of the Court of Appeal for Ontario has highlighted the importance of looking beyond whether you have adequate insurance for a particular peril and paying attention to whether additional contract language may affect how multiple insurance contracts operate when covering the same loss. In *Capital Sewer Servicing Inc. v. Crosslinx Transit Solutions Constructors* (*1) we see just such a problem, which found the parties arguing over this issue up through the Court of Appeal, at no small cost. The decision should foster a greater appreciation of the interplay between insurance coverage and other contract provisions, hopefully making people more aware that confirming that you have insurance with sufficient limits doesn't tell the whole story of how that coverage will work in the case of an accident.

The facts

The facts in *Crosslinx* are quite straightforward. Crosslinx was retained by its parent company, which itself had contracted with Metrolinx and others, to do work connected with the Eglinton Crosstown Light Rail Transit Project. As part of this work, Crosslinx contracted with Capital Sewer Servicing Inc. as its subcontractor to complete certain sewer work near the Avenue Road Station. In 2018, a sewer back up near the Avenue Road Station damaged three nearby properties. Two of the owners of the damaged property sued both Crosslinx and Capital Sewer for the damage caused, making specific allegations of negligence against Capital Sewer.

Upon being sued, Crosslinx brought an application that Capital Sewer was required to indemnify it against all damages resulting from its work pursuant to specific terms in the subcontract between these parties. That application for indemnity included, significantly, a request for an order that Capital Sewer compensate Crosslinx for the costs including its own insurance deductible. Capital Sewer, for its part, brought a cross-application against Crosslinx seeking a declaration that it did not have to indemnify Crosslinx because the main contract for the Project required that Crosslinx's parent obtain Primary Wrap-Up Insurance that would make every contractor and subcontractor a named insured under that policy, making each such named insured "primary without any right of contribution of any other insurance carried by any Named Insured" (*2). The subcontract between Crosslinx and Capital Sewer had specifically incorporated the terms of the main construction contract between Crosslinx's parent and Metrolinx by reference to it in the Subcontract.

Capital Sewer sought to rely on a general principle of insurance law that a covenant to insure against a peril constitutes the assumption of risk associated with that peril. The application judge, however, found that he could both accept this as a general principle and also find that the specific terms of the contract between Crosslinx and Capital Sewer might still require, as they appeared to in this case, that Capital Sewer indemnify Crosslinx for any harm arising from its own work. Crosslinx prevailed on the application and Capital Sewer appealed. The Court of Appeal sided with Crosslinx.

Insurance v. Indemnity

The main issue for the court to consider, as it was for the judge hearing the initial application, was that there appeared to be a conflict between the insurance provision in the main contract, which was made a term of the subcontract by reference, and the indemnity provisions of the subcontract. As the Court of Appeal put it, "the insurance covenants incorporated into the Subcontract favoured Capital's interpretation of the Subcontract, while the indemnity provisions in the Subcontract favoured the interpretation of Crosslinx" (*3).

In the end, the Court of Appeal affirmed the approach of the application judge that all the contract provisions had to be read in relation to one another, and a court interpreting them must

attempt to give meaning to all of them to the extent it could in the context of the entire agreement, pointedly referring to this approach as "well established, black letter law" (*4).Tipping the balance in favour of Crosslinx's interpretation was the fact that, in addition to the specific provision that Capital Sewer indemnify and hold Crosslinx harmless from any claims related to its work, except for any damage caused by Crosslinx's own negligence, the Subcontract also specifically imposed an obligation on Capital Sewer to obtain separate insurance coverage protecting Crosslinx from damage arising from Capital Sewer's work (*5).

Conclusion

In dismissing the appeal, the Court of Appeal noted in passing the remark of Crosslinx's counsel that the contest between it and Capital Sewer was, for practical purposes, about who should bear the cost of matters not covered by insurance, like the deductibles. One imagines these were not insignificant given that this contest went to the Court of Appeal. In the end, disputing the matter proved particularly costly for Capital Sewer, since as a result of the Subcontract indemnity provision being upheld it was liable to Crosslinx for 100% of its legal expenses of the application and appeal. The broad lesson in all of this is that one should never interpret insurance clauses in isolation. The indemnity provisions of any contract, as evidenced here, are at least as important, and should always be considered in attempting to understand how insurance will operate in the event of a loss.

Oleg M. Roslak

Endnotes

(*1) *Capital Sewer Servicing Inc. v. Crosslinx Transit Solutions Constructors*, 2022 ONCA 12 [*Crosslinx*].
(*2) *Crosslinx* at para. 9.
(*3) *Crosslinx* at para. 21.
(*4) *Crosslinx* at para. 22.
(*5) *Crosslinx* at para. 32.

5. Paid Sick Days – An Update

There is no question that COVID-19 has had a significant impact on every business. One of the issues that the pandemic has brought to light is the fact that many employees are not entitled to paid sick days. When faced with losing pay if they stay home while unwell, or when a family member is unwell, some employees will report to work, putting others at risk of getting sick. This has led to changes to employment standards legislation.

In the spring of 2021, the Ontario *Employment Standards Act, 2000* ("ESA") was amended to provide for a paid "infectious disease emergency leave" ("IDEL"). An employee whose employment is governed by the ESA qualifies for up to 3 days of paid leave if their absence is due to one of the following reasons: i) the employee is under medical investigation, supervision or treatment relating to COVID ("treatment" includes vaccination and recovering from any side effects); ii) the employee is under a public health order, for example a workplace shutdown due to an outbreak; iii) the employee is in quarantine or isolation; iv) the employee is following the employer's direction to not attend work to avoid spreading COVID; and iv) the employee is providing care or support to certain designated family members who are being investigated, supervised or treated for COVID or who are in quarantine or isolation.

If the employer already has a paid sick day program in place which covers the types of absences described above and provides for at least the same number of days, the employer's program applies instead of IDEL. An employee entitled to IDEL is to be paid their regular wages up to $200 per day. Currently, the paid IDEL is in place until July 31, 2022, at which time it is set to expire. Since it has been extended before, most recently due to Omicron, it is possible that there could be a further extension.

Effective January 1, 2022, British Columbia's *Employment Standards Act* was amended to provide for 5 paid sick days for employees who have completed 90 days of employment. This leave is available for the employee's absence due to personal illness or injury and the employer can ask the employee to provide reasonably sufficient proof that they are entitled to this leave.

An employer whose workplace is governed by the *Canada Labour Code* ("CLC"), such as a cross-border or inter-provincial trucking company, will soon be required to provide their employees with up to 10 days of paid medical leave in each calendar year. Bill C-3, *An Act to amend the Criminal Code and the Canada Labour Code* ("Bill C-3"), received Royal Assent on December 17, 2021. The amendments to the CLC will come into force on a day to be fixed by order of the Governor in Council.

Bill C-3 amends the medical leave section in Division XIII of Part III of the CLC. Thirty days after the amendments come into force, employees will earn their first 3 days of paid medical leave, which can be used for the employee's personal illness, injury, or organ or tissue donation. Employees who start work on a day after the day on which these amendments come into force, will have to complete 30 days of continuous employment before earning their first 3 days of paid medical leave. After 60 days of continuous employment the employee will continue to earn one day of paid medical leave at the start of each month, up to a maximum of 10 days. In each subsequent calendar year, after completing one month of continuous employment, the employee earns one day of paid medical leave at the beginning of each month, up to a maximum of 10 days.

An employee on this paid medical leave is to be paid their regular rate of wages for their normal hours of work. Each day of paid medical leave that the employee does not take in a calendar year is carried over to January 1 of the following calendar year and counts towards the 10 days that can be earned in that new year. An employer can require the employee to provide a certificate from a health care practitioner for any paid medical leave of at least 5 consecutive days, so long as the request is in writing and made no

later than 15 days after the employee returns to work.

This paid medical leave applies only to an absence due to the employee's own illness or injury. Under the CLC an employee may also be eligible for up to 5 days of personal leave in each calendar year to carry out responsibilities related to the health or care of their family members or relating to the education of any family member under age 18, or to deal with any urgent matter concerning themselves or their family members. After an employee has completed 3 consecutive months of continuous employment, the first 3 days of the personal leave are paid.

The CLC paid leave entitlements are broader than IDEL under the ESA, which is strictly COVID related, and is only temporary. However, the message to employers is clear – access to paid sick leave is an important part of ensuring a safe work environment for all.

Carole McAfee Wallace

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