THE NAVIGATOR

IN THIS ISSUE

CANADIAN NAVIGABLE WATERS ACT DECISIONS

In 2019, the federal government enacted significant changes to legislation formerly referred to as the *Navigation Protection Act*, R.S.C. 1985, c. N-22 (the "NPA"), which was renamed the *Canadian Navigable Waters Act*, R.S.C. 1985, c. N-22 (the "CNWA"). The new Act provides, among other things, a new definition of "navigable water". That new definition of "navigable water" in s. 2 of the CNWA has been considered by only a few judicial decisions.

The prior definition was under the NPA and read as follows:

> navigable water includes a canal and any other body of water created or altered as a result of the construction of any work.

The new definition reads as follows:

> navigable water means a body of water, including a canal or any other body of water created or altered as a result of the construction of any work, that is used or where there is a reasonable likelihood that it will be used by vessels, in full or in part, for any part of the year as a means of transport or travel for commercial or recreational purposes, or as a means of transport or travel for Indigenous peoples of Canada exercising rights recognized and affirmed by section 35 of the Constitution Act, 1982, and
> (a) there is public access, by land or by water;
> (b) there is no such public access but there are two or more riparian owners; or
> (c) Her Majesty in right of Canada or a province is the only riparian owner.

In *Blackwell v. Grenier*, 2020 ONSC 1170, Justice Tremblay had to decide as a preliminary issue if the application before the court would be decided by the new definition of "navigable water" in the CNWA. The

FIRM AND INDUSTRY NEWS

- **Gordon Hearn** will be participating in a **Transportation & Logistics Council** webinar presentation on "Cross-Border Shipments - What You Need to Know" being held on August 3, 2022.

- **Grunt Club** Golf Tournament, August 8, 2022, Club de Golf Kanawaki, Kahnawake Quebec.

- **Gordon Hearn** will be participating in a **Canadian International Freight Forwarders Association** webinar presentation on "Freight Brokerage in Canada" being held on August 23, 2022.

- **CIFFA Central Gold Tournament**, September 15, 2022, Caledon Golf Club, Ontario.

- **Canadian Transport Lawyers Association** Annual Meeting & Seminar, October 13-15, Toronto. **Carole McAfee Wallace** will be running the conference as President. K**im Stoll**, **Rui Fernandes** and **Andrea Fernandes** will be speaking on the Maritime Law Update Panel. **Gordon Hearn** will be speaking on the Cross-Border Carrier Liability and Canadian Motor Carrier Compliance panels.

- **Fleet Safety Council Conference**, October 14th, 2022, Etobicoke Ontario. **Rui Fernandes** will be speaking on Structuring Corporate Policies and Procedures to Support Due Diligence Efforts. **Kim Stoll** will be speaking on Nuclear Verdicts.

- **Comite Maritime International Conference**, October 18-21, Antwerp. **Rui Fernandes** and A**ndrea Fernandes** will be attending.

- **CIArb 10th Annual Symposium** on International and Domestic Arbitration and Award Cocktail, October 19, 2022, Montreal.

applicants sought an injunction preventing the respondents from trespassing on a lake.

The applicants owned five parcels comprising much of the bed of a lake, as well as the adjacent shoreline and abutting lands. There was a long-standing verbal agreement between the various riparian owners allowing mutual access to the entirety of the lake but limiting the use of motorized watercraft. Four of the respondents purchased a property abutting the applicants' property and included a small sliver of the lake and its shoreline. When those respondents began using motorized watercraft (jet skis) on the lake, the applicants took the position that such activities interfered with their reasonable enjoyment of the property and were inconsistent with the verbal agreement. The applicants sought an injunction to prevent the respondents from trespassing on their portion of the lake by navigation or otherwise.

The respondents submitted that the definition of "navigable waters" in the CNWA was amended and expanded to change the common law definition. The legislator intended to protect the [page673] recreational use of all navigable waters in Canada and to prevent attempts, such as this application, to interfere with that right.

The Court reviewed the history of the legislation, the publications of the Government of Canada prior to and after the enactment of the CNWA. Justice Tremblay concluded:

> [27] Having read the CNWA, having compared it to the previous legislation (the NPA) and having considered the various documents published by the Government of Canada regarding the CNWA, I find that the intention of Parliament in enacting the CNWA is clear. Parliament intended to protect the navigation rights of Canadians on more bodies of water by adopting a new and more comprehensive definition of "navigable water".
>
> [28] Giving the CNWA such fair, large and liberal construction and interpretation as best ensures the attainment of its objects, the definition of "navigable water" it provides must, in my view, be used in any legal proceeding that may affect, restrict or interfere with the navigation rights of Canadians.

Justice Tremblay concluded that the definition of “navigable water” in s. 2 of the CNWA applied to the application. This was the determination on the preliminary application. What was left to determine was whether the lake in question was a “navigable water” and Justice Tremblay added:

> [if Silver Lake was a “navigable water”,] the Act would prohibit the applicants from physically obstructing or interfering with the navigation rights of the public, including the respondents on that lake. In the circumstances, it would be unjust and unreasonable that the applicants would, however, be able to prohibit navigation altogether on over 90 per cent of Silver Lake through a permanent injunction as a result of the court relying on a different definition of "navigable water" -- the common law navigability test -- in this proceeding.

The Grenier decision was appealed this year. The results of this appeal will be discussed below.

In 2021 the British Columbia Court of Appeal had occasion to consider s. 2 of the CNWA, in *Douglas Lake Cattle Company v. Nicola Valley Fish and Game Club*, 2021 BCCA 99. The trial judge gave the public access to two lakes on the appellant’s property. The two lakes were entirely surrounded by land owned by the appellant, the

Douglas Lake Cattle Company. The Court of Appeal held that the two lakes were not "navigable water" under the CNWA and therefore the appellant could prohibit trespass over its lands and water. The Court of Appeal held that:

> [117] …the evidence in this case does not support the conclusion that there is a reasonable likelihood that either Minnie Lake or Stoney Lake will be used as a means of transport or travel for commercial or recreational purposes, or as a means of transport or travel for Indigenous peoples. As we have seen, there is no public access, and there are not multiple riparian owners.
>
> [118] In addition, in my view, no operational conflict would arise if the Canadian Navigable Waters Act effectively regulated navigation on the lakes. Navigators would use the lakes pursuant to lawful authority, and such use would be exempted from the provisions of the Trespass Act by s. 3. On the other hand, while the Navigable Waters Act would preclude the creation of obstacles in the navigable waters, it would not preclude riparian owners from controlling access to water over their property.

The case of *Donnelly et al v. Guyconhud Inc. et al,* 2022 ONSC 1774 involved a dispute between two neighbours who owned adjacent properties near Port Burwell. The plaintiffs owned a large lot whose southerly boundary, when the lot was laid out in a reference plan, was close to, but still some small distance north of, the north shore of Lake Erie. The defendants Guy Hudson ("Hudson") and his wife Connie Hudson, through their corporation Guyconhud Inc., owned the lot immediately to the east of the plaintiffs' property. It was an odd-shaped lot, in that it included a long, narrow tongue of land that extended westerly a considerable distance, along the southerly boundary of the plaintiffs' land as well as along the southerly boundaries of several properties further to the west. This tongue of land served to separate the plaintiffs' land from Lake Erie.

The dispute was about access by the plaintiffs to Lake Erie for recreational purposes. The plaintiffs claimed entitlement to enter the lake from the southerly limit of their land. Hudson maintained that they cannot enter the lake without crossing their land and refused permission for them to do so. He erected a fence to prevent such access. The plaintiffs pleaded that the defendants were prohibited from obstructing the plaintiffs from accessing Lake Erie, based on the provisions of the CNWA as well as the common law. They pleaded that the defendants were infringing the plaintiffs' statutory and common law riparian rights.

The plaintiffs argued that the defendants constructed a "work", to wit a fence, that, at least in part, goes in, on, over, under, through or across Lake Erie, such that they were required to obtain approval from the Minister, which they had not done. They also argued that the fence constituted an "obstruction" as defined in s. 2 which, pursuant to s. 15(1) of the CNWA, must be removed, unless otherwise ordered by the Minister. On both grounds, the plaintiffs claimed that the fence had to be removed by the defendants, and that an injunction should issue to prevent them from constructing another one in the future.

The Court held that the plaintiffs did not have standing to advance the claims they made under the CNWA. The Court noted that s. 33 of the Act provides the "The Minister may designate

persons or classes of persons for the purposes of the administration and enforcement" of the Act. The Court held:

> [39] The plaintiffs here are attempting to enforce the provisions of the Act, by asking the court to make orders arising out of the defendants alleged failure to obtain approval of the Minister for the construction of the fence, and for failing to remove an obstruction to navigation. There is no evidence that the plaintiffs have been designated by the Minister as persons who are authorized to enforce the Act.
>
> [41] In my view, in asking for an order that the fence be removed, the plaintiffs are attempting, through this proceeding, to take action that only the Minister, or his or her designates, is authorized to take.

The Court agreed with the plaintiffs that the definition of "navigable water" in the CNWA is applicable to a common law claim to a right of access to navigable water, as held in *Blackwell v. Genier,* 2020 ONSC 1170. The Court found, however, that does not mean, that the CNWA gave the plaintiffs have a private right of action to take enforcement proceedings, such as seeking injunctive relief or ordering the removal of a work, that only the Minister, or his or her designates, are empowered to take.

This brings us back to the *Blackwell v. Genier* decision. On July 20, 2022 the Court of Appeal decision was released. The Court of Appeal held that the trial judge erred in applying the definition of "navigable water" in s. 2 of the CNWA. The trial judge erred in failing to consider the "context" in which the works are found. The definition is found in the statute. The application judge erred by using a definition provision adopted within the CNWA to resolve a dispute that was not governed by any of the provisions of that statute.

The Court of Appeal also found addition errors by the application judge stating:

> Second, I am persuaded that the application judge mischaracterized the purpose of the CNWA by concluding that "Parliament intended to protect the navigation rights of Canadians on more bodies of water by adopting a new and more comprehensive definition of 'navigable water'". In my view, this characterization is far too general. The CNWA has a dedicated and narrower purpose. In Friends of the Oldman River Society v. Canada (Ministry of Transport), [1992] 1 S.C.R. 3, at pp. 56-59, La Forest J. recognized for the majority of the court that the predecessor legislation to the CNWA, the Navigable Waters Protection Act, was enacted to address the public nuisance that occurs where "structures" impede the right of navigation. Like its predecessor statute, the CNWA contains provisions that regulate and restrict physical impediments that are liable to interfere with navigation, including "works" (such as structures or devices or the dumping of fill), "obstructions", "deposits" and acts of "dewatering". It contains no provisions that purport to address navigation rights generally. Although initially the application judge correctly noted that the "object" of the CNWA is "to prevent interference with navigation on any navigable water in Canada as a result of works or obstructions" (emphasis added), he lost sight of this. Instead, he mistakenly treated Parliament's intention to expand the definition of navigable waters for the purpose of the CNWA as

> though it was a general Parliamentary intention to expand the definition of navigable waters for all navigation disputes. In my view, there is no basis for interpreting Parliament's intention this broadly.

Lastly the Court of Appeal found that the application judge erred in concluding that a fair, large and liberal interpretation requires the CNWA's definition of navigable water to "be used in any legal proceeding that may affect, restrict or interfere with the navigation rights of Canadians". The Court found that "a fair, large and liberal interpretation of legislation was meant to give effect to legislated rights, not to create unlegislated outcomes that may happen to advance a purpose that the subject legislation reflects."

The appellants also asked the Court of Appeal to declare that Silver Lake is non-navigable within the meaning of the Beds of Navigable Waters Act (Ontario). The Court declined to grant the declaration sought by the appellants. The majority stated:

> [8] … First, there are likely hundreds, if not thousands, of lakes in Ontario similar to Silver Lake, with riparian landowners and owners of lakebeds, many engaging the interests of the Crown. Arcane and ancient common law intersects with federal and provincial legislation. A final decision in this case would have far-reaching implications. This is a case in which judicial minimalism is warranted. This court does not have before it representatives of the affected interests, nor is the Government of Ontario present.
>
> [9] Second, the application judge did not address the issue of Silver Lake's navigability within the meaning of the BNWA, and how it might be related to the appellants' property interests. He noted, at para. 42: "It is not necessary to decide whether the applicants are the owners and occupiers of their respective portions of the bed of Silver Lake for the purpose of this application". Because the application judge did not resolve the factual issues required to make the legal determinations flowing from an interpretation of the BNWA, there is no basis on which this court could do so. The interpretation of the BNWA by this court should await a case in which there is a decision on the merits below.
>
> [10] Third, s. 1 of the BNWA, on which the appellants rely, appears to be a provision for interpreting Crown grants and, perforce, title that flows from Crown grants. As was the case with the federal CNWA, the appellants seek to enlist the legislation to serve a purpose for which it was not intended. Given the scope of the issues, this court would benefit from the intervention of the Crown on the proper interpretation and application of the statute.
>
> [11] Fourth, I agree with my colleague that the exclusive control over the waters of Silver Lake that the appellants seek would not likely flow from s. 1 of the BNWA but from the common law, if at all. I agree with him that the declaration sought by the appellants would serve no purpose and would not resolve the live issue, which he identifies as "whether the appellants can prevent the respondents from navigating on water that sits above the lakebed property that they own".

[12] I would add that any determination of right must also account for the rights of riparian owners, whose rights of access to the water of Silver Lake were not fully litigated. The application of the common law was not fully argued on either the property rights of the owners of lake bottoms or the rights of riparian owners. The cases on which my colleague relies, Attorney-General of Canada v. Higbie, [1945] S.C.R. 385, at pp. 417-418, and Erik v. McDonald, 2019 ABCA 217, 4 R.P.R. (6th) 8, were both closely argued, as befits the common law. The parties did not refer to these authorities, nor did they offer arguments of similar cogency.

[13] Finally, this court heard no argument on the proper interpretation and application of s. 37.4 of the Public Lands Act, R.S.O. 1990, c. P.43, which appears to be relevant. It provides:

> 37.4 (1) A Crown transfer is subject to the reservations and conditions set out in this section.
> […]
> (4) The free use, passage and enjoyment of, in, over and upon all navigable waters found on or under, or flowing through or upon, any part of the lands that are the subject of a Crown transfer is reserved to the Crown.
>
> The court would benefit from the intervention of the Crown on the proper interpretation and application of this provision and of the impact of the common law on all the issues.

This latest decision of the Court of Appeal illustrates that disputes involving navigable waterways are complex and involve the intersection of common law, statutory provisions and an intersection of federal and provincial issues.

Rui M. Fernandes

2. A Canoe Is Now A Vessel Under The *Criminal Code* Per *R. v. Sillars*, 2022 ONCA 510 (CanLII),

In this Court of Appeal decision heard May 30th, 2022 and published July 5, the appellant Sillar, who had a blood alcohol content of 128 mg in 100 mg of blood and had smoked a marijuana cigarette at the time of the offence (*1), had taken his girlfriend's eight-year-old son canoeing and was paddling towards a waterfall when the canoe capsized, ultimately leading to the death of the child (*2). Sillars' appeal of his conviction for criminal negligence causing death and impaired operation of a vessel causing death (*3) was dismissed as he was unsuccessful in arguing that, amongst other things, a canoe is not a vessel under portions of the *Criminal Code* (*4).

What makes this appeal important is that the Court of Appeal reaffirmed the trial judge's decision that a canoe is in fact a vessel under the at issue sections of the *Criminal Code* (*5), and by inference, by doing so seems to have indirectly included muscle power crafts into the definition of conveyances in the rest of the Code and under section 320.11 (*6). This means that, by example, section 320.14(1) of the Criminal Code reproduced below would now apply to any muscle powered craft, regardless of the presence of a motor.

> "320.11 The following definitions apply in this Part.
>
> […]
>
> conveyance means a motor vehicle, a vessel, an aircraft or railway equipment. (moyen de transport)
>
> […]
>
> operate means
>
> (b) in respect of a vessel or aircraft, to navigate it, to assist in its navigation or to have care or control of it; and
>
> […]
>
> vessel includes a hovercraft. (bateau)
>
> […]
>
> 320.14 (1) Everyone commits an offence who
>
> (a) operates a conveyance while the person's ability to operate it is impaired to any degree by alcohol or a drug or by a combination of alcohol and a drug;
>
> (b) subject to subsection (5), has, within two hours after ceasing to operate a conveyance, a blood alcohol concentration that is equal to or exceeds 80 mg of alcohol in 100 mL of blood;
>
> (c) subject to subsection (6), has, within two hours after ceasing to operate a conveyance, a blood drug concentration that is equal to or exceeds the blood drug concentration for the drug that is prescribed by regulation; or
>
> (d) subject to subsection (7), has, within two hours after ceasing to operate a conveyance, a blood alcohol concentration and a blood drug concentration that is equal to or exceeds the blood alcohol concentration and the blood drug concentration for the drug that are prescribed by regulation for instances where alcohol and that drug are combined.
>
> […]
>
> 320.19 (1) Every person who commits an offence under subsection 320.14(1) or 320.15(1) is guilty of
>
> (a) an indictable offence and liable to imprisonment for a term of not more than 10 years and to a minimum punishment of,
>
> (i) for a first offence, a fine of $1,000,

(ii) for a second offence, imprisonment for a term of 30 days, and

(iii) for each subsequent offence, imprisonment for a term of 120 days; or

(b) an offence punishable on summary conviction and liable to a fine of not more than $5,000 or to imprisonment for a term of not more than two years less a day, or to both, and to a minimum punishment of,

(i) for a first offence, a fine of $1,000,

(ii) for a second offence, imprisonment for a term of 30 days, and

(iii) for each subsequent offence, imprisonment for a term of 120 days. ” (*7)

Although the Court of Appeal was describing the now repealed sections 253(1), 249(1) and 254(2) of the Code when it ruled that whether a watercraft is a vessel is not to be determined by the presence of a motor, the loose language present throughout the decision appears to mean that the word “vessel” in general throughout the Criminal Code, absent specific intent, is now meant to include any muscle powered watercraft (*8). This decision would suggest that from now on, those about to enjoy any water time in a human powered craft will have to seriously consider whether they are in a fit state to paddle, lest they face a similar charge to what they would receive for driving their car while over the blood alcohol content limit. For insurance purposes, parties should also remember that most contracts have exclusions for illegal conduct, meaning that any losses caused while paddling under the influence could be excluded from coverage.

Noah Bonis Charancle
Summer Student

Endnotes
(*1) R. v. Sillars, 2022 ONCA 510 (CanLII), <https://canlii.ca/t/jq32g> at paras 1 and 9
(*2) Ibid at paras 10-13
(*3) R. v. Sillars, 2019 ONCJ 710 (CanLII), <https://canlii.ca/t/j2t09> at para 71
(*4) Supra 1 at paras 51 and 83
(*5) Ibid at paras 29, and 47;49
(*6) Ibid at para 49
(*7) Criminal Code R.S.C., 1985, c. C-46
(*8) Supra 1 at para 49

3. Update on Applications to Strike Jury Notices

The appointment of a civil jury to a legal action as trier of fact is tool in the arsenal of counsel. In Canada, juries are perceived as more of a defence tool and the continued existence of the civil jury system remains at risk. The recent attacks on jury notices have been attempts by plaintiff's counsel in personal injury actions to strike existing jury notices in Simplified Rules matters where the actions were commenced prior to January 1 2020, when the rules changed regarding Simplified Rules matters, as described below.

In October 2020 edition of The Navigator and deep in the time of the Covid 19 pandemic, we celebrated and lamented the changes brought about to the Canadian judicial system including the unexpected but very welcomed embrace of 21st Century technology. Within just a few months and without the (dubious) benefit of lengthy pilot projects, parties were and continue to be able to file many more documents online and a variety of court proceedings were being conducted successfully using Zoom or similar technology. Mediations and discoveries continue to be regularly conducted virtually though there has been a migration back to live attendance in court for more significant matters, such as appeals and trials. Virtual attendance for many proceedings though continues to be more cost and time efficient resulting in greater access to justice. In effect, we have a hybrid system. (*1)

During the pandemic the courts struggled with the effective use of juries including challenges of safe jury selection and location for the trials given significant health restrictions. Some provinces like British Columbia took exceptional measures in response to the pandemic and in furtherance of access to justice – all civil jury trials were conducted by judge alone, regardless of the parties' choice in the matter. Similar measures were taken in Alberta and Saskatchewan.

In Ontario, Ontario's Attorney General, the Honourable Doug Downey had advised the legal profession that Ontario was considering elimination of juries in most civil matters. This did not come to pass, though a significant amendment was made to adjudication of civil claims under the Simplified Rules. The change took place, with certain specific exclusions, as of January 1, 2020 increasing the monetary jurisdiction to cover claims from $35,001.00 to $200,000.

The Courts of Justice Act was also amended to exclude jury trials from all Simplified Procedure matters unless they were commenced before 2020. (*2)

The Choice of a Civil Jury Trial

While the choice of a trial by jury is a right in some criminal matters, there is no constitutional right to a jury for civil matters. In fact, a number of jurisdictions do not have a jury option for civil matters. Civil juries, some argue, do not decide the guilt of an accused, which decision may affect that person's very liberty, but rather civil juries are dealing with monetary disputes, which a judge can handle. However, those monetary disputes can be quite significant, and juries are trusted to ferret out the truth and are often avoided for that very reason.

The appointment of a civil jury to a legal action as trier of fact can be considered a tool in the arsenal of counsel. Both plaintiffs and defendants serve a Jury Notice when they estimate that a jury will be the best trier of fact for their case. This is a deliberate strategy and, in Ontario, is used frequently in personal injury matters, especially by the defence. Canadian civil juries are perceived to be more conservative and less generous with awards, unlike their US counterparts. (*3)

Applications or motion to court to "strike" a jury notice have always been available but are not

easily attainable. The complaints usually relate to whether a jury will understand a complicated matter. During the pandemic, such motions centred on COVID 19 delays. (*4)

Applications to Strike: Simplified Rules and the Exclusion of Jury Trials

For matters with a monetary claim of more than $200,000, Section 108(3) of the Courts of Justice Act permits a court on motion to order that issues of fact be tried or damages assessed, or both. without a jury. Rule 47.02 (2) of the Rules of Civil Procedure provides that a motion to strike out a jury notice may be made on the ground at the action ought to be tried without a jury. The test to strike the jury was related in *Rolley v MacDonell* 2018 ONSC 508 at paragraph 15, stating:

> a) The factors to be considered include the legal and/or factual issues to be resolved, the evidence at trial, and the conduct of the trial; and
>
> b) The overriding test is whether the moving party has shown that justice to the parties will be better served by the discharge of the jury.

A trial judge is to exercise their considerable discretion on a motion to strike the jury notice; that is, (i) the discretion must not be exercised arbitrarily or on the basis of improper principles; and (ii) the right to a jury trial is not to be taken away lightly.

It is with this background that attempts are being made currently to attempt to strike jury notices on a more procedural basis. Recall above, it was noted that juries were eliminated for the most part in Simplified Rules matters as of January 1 2020. Those cases issued prior to that date were not subjected to the exclusion of juries and continued in the jury stream. Parties in cases commenced in the regular stream because the claims were outside of the original monetary limit of $100,000 may make applications to the court to move the action into Simplified Rules procedure, which has benefits of capped costs at $50,000 and length of trial at 5 days.

A new trend has parties taking the opportunity to bring applications to strike jury notices at the same time as changing to the Simplified Rules procedure, to attempt to avoid what would otherwise have been a jury trial.

Recent Motions to Strike Jury Notices

The main ground in support of a motion to strike a jury notice in this context is the concept of proportionality; that is, that trial by jury would be more cost effective. The trial by jury not being absolute, striking the jury notice would not be prejudicial to the party filing the notice. The onus is on the party bringing the motion to satisfy the motion judge pointing at legal or factual issues or the conduct of the trial which would merit the discharge of the jury.

In *Louis v. Poitras* 2021 ONCA 49, the Court of Appeal confirmed, “While a court should not interfere with the right to a jury trial in a civil case without just cause or compelling reasons, a judge considering a motion to strike a jury notice has broad discretion to determine the mode of trial.” Some cases have found that actions continued under Simplified Procedure had a natural consequence that the jury notice in the case must be struck finding no prejudice to the party that had filed the jury notice.

In *Lightfoot v Hodgins* 2021 ONSC 1950, the court found it would be contrary to the interests of justice of and the principles of proportionality to require a 3-week trial in the ordinary procedure rather than a proceed with a 5-day non-jury summary trial. This decision also considered pandemic delays.

Most recently, Justice Darla Wilson in *Andres v Rasheid* , 2022 ONSC 3317, did not strike the jury

notice or move the matter to the Simplified Rules procedure, citing that the parties had had significant time to make a motion to strike the jury notice and move the action to Simplified Rules procedure. The matter was already fixed for pretrial and trial dates. If moved to Simplified Procedure, the action would not have a trial date before the one already set. The motion was seen by the court to be a tactical manoeuvre by the plaintiff to gain more time to serve experts' reports rather than one based on proportionality.

At paragraph 19, Justice Wilson also reminded parties of the need to adhere to timetable orders.

> It is unclear to me why the Plaintiffs have breached the timetable order I made requiring their expert reports to be served by March 1, 2022. The submission that the Plaintiffs are ready for trial and wish an expeditious, efficient, cost-effective trial is difficult to accept given the failure of the Plaintiffs to serve expert reports in compliance with the timetable counsel agreed to. Further, the broad-brush assertion that jury trials take longer than non-jury trials and are more expensive to the parties is simply not the case. What increases costs of trials is the failure of counsel to agree on matters that ought to be agreed upon and the failure to work collaboratively to ensure the evidence is put before the Court in an efficient, fair fashion.

Finally

Jury trials are alive and well in Ontario though the jury notices are always under attack. Jury notices continue to be a valuable tool for defence counsel in Ontario personal injury actions.

Kim E. Stoll

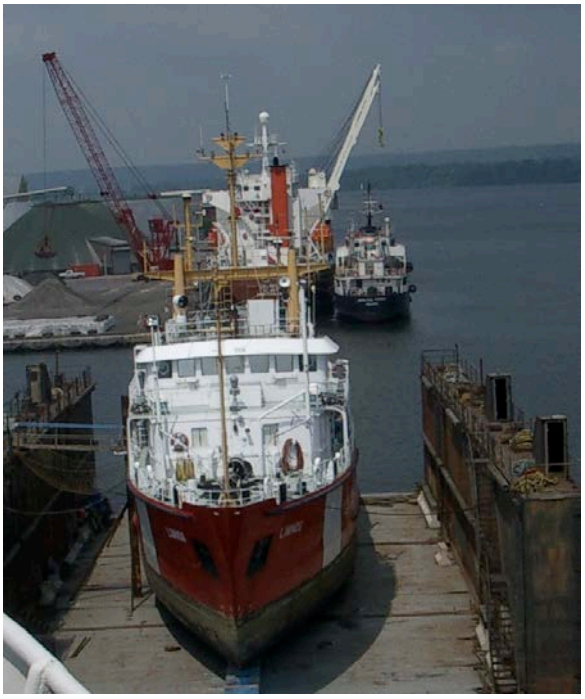
Endnotes

(*1) The Ontario Small Claims Court appears to be heading in the direction of full online hearings and procedures. Examination of this aspect is beyond the scope of this article, but this would be welcomed from the defence perspective given the high cost of defending small claims matters generally given the maximum monetary limit of $35,000 and the cost of personal attendance for settlement conference and trial. Zoom or the equivalent is now a familiar part of today's society. It is of note though that not every jurisdiction has embraced the new normal. New Brunswick still does not permit online filing of pleadings, for example.

(*2) Litigants are still permitted to request a jury for matters involving slander or libel, malicious arrest, malicious prosecution, or false imprisonment; but once a jury notice is delivered, the claim is subject to the same rules as for claims in excess of $200,000.

(*3) Damages for pain and suffering are limited by a cap on damages arising from a trilogy of cases. The absolute maximum fluctuates but is approximately $320,000 CAD. This avoids nuclear jury verdicts in Canada where the bulk of the award is for future losses regarding income and care.

(*4) Please review the October 2020 edition of *The Navigator* for a review of the caselaw relating to striking jury notices regarding Covid 19 delays.



4. The "Freedom Convoy" is Taken to Court

The recently published decision of the Ontario Superior Court in Li v. Barber (*1) arises in the context of civil litigation arising from the recent "Freedom Convoy" that gripped downtown Ottawa.

The "occupation" of downtown Ottawa by the self-declared "Freedom Convoy" attracted worldwide attention. The participants in the protest were well organized and well-funded. Apart from their declared opposition to COVID restrictions imposed by all levels of government, the participants presented challenges to law enforcement with a significant negative impact on residents and businesses in the downtown Ottawa core. Residents complained of having to endure days of impassible streets, constant noise, idling truck engines and obscenities, with allegations of racism, white supremacy, desecration of monuments, implied threats of violence and harassment of those who wore masks or who were otherwise attempting to comply with the then in effect COVID restrictions.

Enough was enough. A proposed class action proceeding was brought by certain citizens of Ottawa against the organizers, supporters and participants in the "Freedom Convoy". The plaintiffs sued for an injunction as well as for compensation for damages inflicted upon those who live, carry on business or work in the downtown core. The action for civil monetary damages claim was based on the torts of "private" and "public nuisance". That is, the plaintiffs complained that their rights and liberties were materially affected without any legal justification.

As the proposed class action was being filed in the courts the plaintiffs became concerned that the defendants were taking steps to move or dissipate assets, with a view to frustrating attempts by the plaintiffs to recover damages in the event that they succeeded with their claims. Accordingly, on February 17, 2022 the plaintiffs brought a court application for what is known as a "Mareva Injunction". A Mareva Injunction involves a request for extraordinary relief, whereupon a Court will rule that the target recipient(s) of the order be restrained from liquidating assets or moving any monies or assets from the jurisdiction of the Court. This motion was brought without notice: only the plaintiffs, through their legal counsel, would attend at court for the hearing. The plaintiffs brought their application without notice to the defendants as they were concerned about giving them advance warning of their application to protect the assets and monies from removal or dissipation.

The notion of appearing before a Court without the opportunity for the opposing interest to be heard is, naturally, both counter-intuitive and an approach reserved only for special situations. Where a Court is prepared to issue an order on the basis of having heard from just one party to a dispute it will be made only on a temporary basis, pending a hearing of all sides of the issue. Under the applicable Ontario Rules of Court, an injunction granted without notice will only be for a maximum of ten days. When the motion "returns" at the close of that initial period of time, the opposing parties must have been put on notice and be given opportunity to oppose the order if the plaintiff seeks a continuation of the injunction.

There are stringent tests for injunctions, particularly where first temporarily sought "without notice".

At the conclusion of the initial "without notice" hearing on February 17, the Ontario judge hearing the matter was persuaded by the evidence and by the submissions of counsel that this was case justified the issuance of a temporary Mareva Injunction. The initial injunction order was thus set expire on February 28, pending renewal.

This decision provides an illustration of the principles at play in a Court's consideration on whether to award injunctive relief:

1. Such an order may be made "where it appears to a judge to be just or convenient to do so". The usual basis for such an order is to prevent a party from continuing to inflict damage on the other or to preserve the rights of the parties in the pending litigation.

2. An interlocutory injunction is an equitable remedy that is ordinarily appropriate if i) there is a "genuine issue" to be tried, ii) the requesting party will suffer "irreparable harm" if the order is not granted and iii) the balance of convenience favours the granting of the order. By "irreparable harm" it must be generally established that the plaintiff's injury (or further injury) to be prevented or limited as the case may be involves a claim for more than just monetary damages.

3. Mareva injunctions involve even a higher test. The plaintiff must show he or she has an apparently strong case against the defendant, that the defendant has assets in the jurisdiction and there is a serious risk the defendant will dissipate those assets or remove them from the jurisdiction if the injunction is not granted.

The Court noted that the issues did not require a reconciliation of the competing interests of the right to freedom of speech and expression on one hand and the rights of other citizens on the other. It was not the Court's function to draw a line between the interests or to determine the point at which a lawful assembly becomes unlawful. The Court did recognize that "lawful acts do not provide cover to break other laws with impunity" and "an otherwise lawful act becomes unlawful and criminal if it is carried on in defiance of a lawful order prohibiting it". This said, the only question before the Court was whether the injunction should be granted within the context of the plaintiffs' claims.

Analysis

As mentioned, this matter concerned a civil action for damages based upon the torts of private and public nuisance. The law of tort permits a private right of action whenever an individual suffers damage due to activities of another individual which are actionable. Under the law of nuisance, the common law imposes liability against a tortfeasor (defendant) when the activities of a defendant unreasonably and substantially interfere with the plaintiff's occupation or enjoyment of land. In tort law, it is the impact on the plaintiff and not the intent of the defendant which makes it actionable.

The legal question in a nuisance action is whether the interference is substantial and unreasonable. The Court noted that it is important to understand that although the question of whether the defendant's activity is lawful or illegal factors into the question of whether the interference is reasonable, it is not determinative. Even lawful activity may be "tortious" measured against this standard. The Court noted that even if the defendants are ultimately found to be lawfully exercising constitutional rights of protest and dissent, it does not follow that in the exercise of those rights they do not have responsibilities to their fellow citizens. Under our system of law, citizens have legal rights, but they also have legal responsibilities. Perfectly lawful acts which cannot result in fines or imprisonment, may nevertheless result in liability to those who are intentionally or inadvertently injured as a result. Civil liability is not the same thing as "guilt" under criminal or regulatory law.

The tort of public nuisance is somewhat similar to private nuisance, but it is not concerned with occupation or enjoyment of property. It is public nuisance to unlawfully interfere with the right of the public to use and enjoy public areas such as streets and sidewalks. It may be public nuisance to interfere with the rights of the public at large without legal authorization. Public nuisance is a

tort that focuses on damages sustained by members of the public when they are denied their right to enjoyment of the common spaces and public thoroughfares. What makes it actionable is not the intent of the defendant, but the impact on the plaintiffs and the significance of the interference with the plaintiff's own rights.

The Court noted that based on the statement of claim, the plaintiffs had endured substantial interference with their rights. The disruption to the activities of daily living for the residential plaintiffs had as of the date of the hearing continued for more than three weeks. The business class claimants had endured interference with their ability to carry on business such that they had to close or limit the business and suffered a loss of revenue. The employee plaintiffs claim to have suffered loss or reduction of employment and loss of income. On the facts disclosed in the affidavits filed by the plaintiffs in support of the injunction order, there was an apparently strong case – or a "serious issue" - for establishing tort liability.

The more difficult question was whether the plaintiffs had a claim against the funds they were attempting to freeze. Just because a fund had been created to support the protest did not necessarily mean that a judgment against an individual defendant would attach to that fund. The judge noted that legal principles concerning fundraising is complex. People who start a fundraiser may have a duty to the donors. Funds raised from the public may be impressed with a "trust" character for the benefit of others, or in some cases may fall under the jurisdiction of the Public Guardian and Trustee. As such, a "crowdsourcing fund" held by a fundraising platform is probably not the property of the intended beneficiaries until the funds are released. The Court noted in this context that it would be difficult for the plaintiffs to argue that such a fund would fall within the ambit of a Mareva injunction.

The pertinent question for the hearing concerned whether specific funds the plaintiffs sought to preserve were owned or controlled by the defendants being the target of the injunction. The Court noted that it is fundamental to the granting of a Mareva Injunction that the defendants be seen to be attempting to dissipate funds to which a judgment might attach – that is, that the matter actually concerns property of the defendants.

The judge found on the evidence that the funds in question, whether they are in the form of currency or cryptocurrency, were in fact legally in the possession, power and control of the defendants being the target of the motion.

The judge was also satisfied on the evidence that the organizers of the protest and the defendants had purposely arranged the control of the funds in such a manner to try to shield them from litigation.

As far as the world of cryptocurrency is concerned, the Court noted that "digital" funds are not immune from execution and seizure to satisfy a debt any more than a bank account, provided the individual or institution which can access the funds are within the reach of a court order.

The Court noted that the defendants were subject to the jurisdiction of the Ontario court because they were present in Ontario and that accordingly they may be enjoined from cashing or transferring assets including cryptocurrency. The key point for the plaintiff's application was that certain of the defendants had ownership and control of the cryptocurrency "digital wallets" and that they were poised to distribute or dissipate those funds.

The Court was also satisfied on the evidence that the distribution of funds was imminent or underway for the very purpose of dissipating the fund so that it cannot be frozen or seized. Accordingly, the Court was persuaded that the

test for the injunction has been met. The Court took into consideration whether the issuance of a Mareva Injunction was necessary in light of other court actions and pending governing issued "Freedom Convoy" restraint initiatives. In this regard it was found that the interests for which the plaintiffs sought protection in the instant proceeding were not addressed or duplicated in any of the other pending legal proceeding or government prohibitory initiative.

The Result

Given the evidence of active steps to dissipate the funds, the Court concluded that a Mareva Injunction should be granted without any warning to the defendants. As mentioned above, this relief was only temporary in nature and was to be granted until the defendants were put on notice and had an opportunity to be heard on a subsequent hearing as to whether the injunction should continue.

Going Forward

The plaintiffs timely filed a motion to extend the Mareva Injunction, preventing the dissipation of assets. In response, various persons who attended and/or supported the Freedom Convoy events filed affidavit evidence in reply. The affidavits addressed proposals for the placement of funds into an escrow account pending the outcome of the litigation. In the result, certain extensions to the injunction have recently been issued, albeit on slightly modified terms, to accommodate the defendant's proposals as to how financial security might be preserved in an escrow fund for the purposes of the lawsuit. The litigation continues.

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DISCLAIMER & TERMS

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