# THE NAVIGATOR


## IN THIS ISSUE



## QUEBEC BILL 96

Quebec parliament has on May 24th passed Bill 96, "An Act respecting French, the official and common language of Quebec." The legislation has received criticism from many corners.

Interestingly, even commentators outside of Canada have gotten into discussion. The Washington Post on May 26, 2022, published an article on the legislation. The introduction to the piece is interesting:

> I often hear elite-level American intellectual types — pundits and academics and futurists and so on — express great optimism about Canada's potential. The country is framed as a glimmer of hope in a bleak world, a dynamic, modern, urbane, democratic, multicultural, open-minded success story, free of the toxic nationalism and populist authoritarianism steering the rest of the planet into a ditch.
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> The great blind spot of such optimistic analysis has always been Quebec — a province housing 8.7 million of Canada's 38.7 million citizens, and a place preoccupied with pursuing policies at odds with every flattering Canadian stereotype. On virtually any metric one might correlate with a promising, modern society — a hospitable business climate, an up-to-date education system, open and inviting communities, robust protection of individual liberties, a moderate and rational political class — Canada's second-largest province marches unapologetically in the opposite direction.

The legislation has been criticized as over-reaching, unreasonable and unnecessary. The following is a short summary of the key pieces.

1. Use of French in Private Businesses

Presently a business in Quebec with more than 50 employees are obligated to use French as their primary language of internal communication. Bill 96 sets that number at 25.

## FIRM AND INDUSTRY NEWS

- **Rui Fernandes** will be speaking at the *Best Practices Council* on June 1st, 2022, on "How Carriers Can Best Protect Themselves with ESDC's Current Stance on Owner Operators."

- **Gordon Hearn** will be participating as a panelist on the Canadian Maritime Law Association Seminar on June 17th, 2022, speaking on "Issues Arising from Supply Chain Disruptions." **Rui Fernandes** is organizing the seminar for the CMLA. He is the current National Vice President.

- **Fernandes Hearn LLP** is a proud member of *Globalaw*™, a global network of more than 100 independent law firms with over 4500 lawyers in 165 cities.

2. New Language Policing Powers

Bill 96 grants the language policy new powers to raid businesses without a warrant to ensure compliance. They are entitled to search through documents, computers and even telephones. A breach can result in the loss of a business license. The Charter of Rights (which would product a citizen from unreasonable warrants) has no effect. The Province of Quebec has used its constitutional notwithstanding clause to protect the entire Bill 96, not just selected parts.

3. Immigrant Rights

After six months immigrants' ability to communicate in the province in English will be cut off. So will access to English schools.

4. Anglophone loss of rights

English speaking Quebecers (estimated at half million) could lose access to services due to bureaucratic redefinition of their community.

5. Contracts of Adhesion

Bill 96 requires as a condition of validity that all adhesion contracts (contracts that are non-negotiable) and consumer contracts be systematically provided in French to counterparties in Québec.

6. Signage

Bill 96 requires that the French text that accompanies a trademark containing text in a language that is not in French be "markedly predominant" in relation to the non-French text. This essentially requires the size of the French signage that must already accompany any non-French trademark on premises to be increased to twice the size of the non-French trademark.

7. Private Right for Quebec Residents

The legislation institutes a new private right of action for all Québec residents to seek injunctive relief, damages and punitive damages for violations of the provisions of the legislation.

8. Trademarks

Bill 96 limits the use of trademarks that contain text in a language other than French in commercial advertising by requiring that such trademarks be registered under the *Trademarks Act* in order to be used in Québec. This effectively puts an end to the ability of businesses to use common law (i.e., unregistered) trademarks containing text in a language other than French in their commercial advertising in Québec.

9. Products and Services

Bill 96 specifies that Information displayed on a product, on its container or wrapping, or on a document supplied with it in a language other than French cannot be available "on more favourable terms" than the information displayed in French. Catalogues, brochures, order forms and other documents of the same nature that are available to the public, regardless of the medium used, as well as invoices, receipts and acquittances, must be drawn up in French. They cannot be made available in another language if the French version is not available on "terms that are at least as favourable".

A business that offers goods or services to the public must inform and serve in French.

10. Judicial Documents

After 3 months of assent, any pleading drawn up in English that emanates from a legal person must be translated to French by a certified translator. Does this mean that a pleading issued by an Ontario in Federal Court and served on a business in Quebec must have attached to it a French translation? The legislation has been criticized as adding costs and delay. It could get in the way of filing of time sensitive injunctions or child protection orders.

The list goes on. Doctors will have to speak to patients in French. The appointments of bilingual judges will be discouraged! It caps the number of students that can enter English language colleges.

The Washington Post article concluded with the following comments:

> The dream embodied by Bill 96 — alongside other nationalistic initiatives of Quebec Premier François Legault, including cuts to immigration and a ban on public servants wearing religious clothing — is one of a “pure” Quebec, splendidly unspoiled by other cultures. It brings to mind the "sakoku” years of Japan, in which a sheltered political elite convinced of the inherent inferiority of the outside world isolated itself for two centuries, tightly restricting even *learning* about foreign things.
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> …
>
> Canada may still be a country worth betting on, but in a post-Bill 96 world, it’s clear any compliments of Canadian progressiveness must be accompanied by a large, Quebec-shaped asterisk.

It is anticipated that there will be court challenges to the legislation.

*Rui Fernandes*

**2. Read Now or Cry Later: Reliance on Waiver Proves Useful**

*Overview*

A recent summary judgement decision at the Superior Court of Justice of Ontario further explores the consequences of signing a waiver without first reading it.

In *French v. Augusta Motorsports Park (2021 ONSC 8385),* the lead Plaintiff [Randall] was operating a four-wheel all-terrain vehicle ("ATV") up a sand pit at Augusta Motorsports Park in Brockville, Ontario ("Park"), when the vehicle tipped backwards and landed on him, rendering him seriously injured.

Consequently, the lead Plaintiff commenced an action against the Park seeking damages for the injuries he had sustained, based in part on the Park's alleged failure to maintain the sand pit. Other Plaintiffs advanced claims pursuant to the *Family Law Act*.

The Defendants (Augusta Motorsports Park, as well as others named in the action) brought a motion for summary judgement to dismiss the Plaintiffs' claims, relying on the terms of a release of liability and waiver of claims form ("Waiver") that had been signed by the lead Plaintiff prior to operating the ATV.

At the motion, the Plaintiffs argued that the motion did not constitute an appropriate case for summary judgement since there were, in their opinion, genuine issues requiring a trial concerning the interpretation and applicability of the Waiver.

For the reasons set out below, Justice Bell concluded that the case ought to be resolved summarily as the Plaintiffs' claim could not succeed in the face of the Waiver signed by the lead Plaintiff. According to Justice Bell, "the Waiver brought home to a reasonable reader that liabilities of the nature claimed by [Randall] were waived any were not actionable".

*The Facts*

On July 25, 2015, the lead Plaintiff attended the "Wheels-A-Churnin" motorsports event at Augusta Motorsports Park involving, among other activities, races involving all-terrain vehicles ("ATV").

When the lead Plaintiff arrived at the Park, he was presented with and signed a one-page Waiver. Evidence was tendered to the Court persuasive of the fact the lead Plaintiff was told that what he was signing was in fact a Waiver, that he was instructed to read the Waiver, that he was given adequate time to read the Waiver, and that the Park made volunteers available to answer any questions that the lead Plaintiff or any of his accompanying patrons would have had regarding the Waiver.

In his Affidavit, the lead Plaintiff stated that he understood that he was signing a Registration Form, not a Waiver.

On cross-examination, the lead Plaintiff conceded that he was not rushed through the signing process and that he was given ample opportunity to both read the Waiver and ask any questions that he would have had regarding the same.

Justice Bell further acknowledged and credited the Park for having several warning signs on its premises to advise all patrons of the event and its rules, that advised participants that they would be signing a release and waiver. The sign stated the following, in part:

*"Warning: You are signing a Release. Know what it says…copies available. The holder of this pit pass acknowledges signing the release and waiver, in exchange for admittance to the restricted area. By signing, holder has waived certain legal rights, and acknowledges the potentially dangerous nature of activities in and adjacent to restricted areas".*

*Law on Waivers*

Justice Bell referred to the law on waivers as recently laid out by Justice Myers in *Arskey v. Sky Zone Toronto* (2021 ONSC 4564), wherein Justice Myers held that a person who actually signs a waiver will be presumed to have intended to be bound by it.

He further held that, generally, there is no obligation on the part of the Defendant to ensure that the Plaintiff has read the agreement they voluntarily signed. If a Plaintiff is provided with an opportunity to read and review the agreement, then it is up to him to choose whether to in fact read it or not.

The Waiver employed by the Park constituted a one-page agreement, the title of which is set out below, in bolded, capital letters:

*RELEASE OF LIABILITY, WAIVER OF CLAIMS, ASSUMPTION OF RISKS AND INDEMNITY AGREEMENT*

*BY SIGNING THIS DOCUMENT YOU WILL WAIVE CERTAIN LEGAL RIGHTS, INCLUDING THE RIGHT TO SUE*

*PLEASE READ CAREFULLY*

Justice Bell found that a reasonable person could not have missed or otherwise misinterpreted the title. He further drew attention to the following two paragraphs of the Waiver:

*"I am familiar with and accept there is real risk of serious injury and death in participation, whether as a competitor, student, official or worker, in all forms of motor sport and in particular in being allowed to enter, for any reason, any restricted area.."*

*"I understand that all applicable rules for participation must be followed, regardless of my role, and that at all times during the EVENT the sole responsibility for my personal safety remains with me…"*

The lead Plaintiff printed his name, signed, and dated the Waiver in the spaces provided at the bottom of the Waiver.

*Interpretation and Application of the Waiver*

The Park's position was that the Waiver constituted a complete and absolute defence to the Plaintiffs' Claim.

In response, the Plaintiffs raised the following issues that they maintained required a trial:

1. Whether [Randall] knew at the time that what he was signing was a waiver;
2. Whether the location of the accident was covered by the Waiver;
3. Whether the Waiver applied to event participants and not event spectators; and
4. Whether [Randall] understood the potential implications of the Waiver.

Justice Bell swiftly dealt with each of the Plaintiffs' arguments as follows:

1. A reasonable person could not have missed the title of the Waiver, which expressly stated it was a release of liability and a waiver of claims.
2. There was no dispute that the sand pit was located inside the Park, and there was no debate that the lead Plaintiff was required to sign the Waiver in order to gain admission to the Park.
3. The Waiver applied to any injury that the lead Plaintiff may sustain as a result of his "participation in any part of, or his presence in any capacity". As the lead Plaintiff was indeed present

"in any capacity", the Waiver was found to Apply.

4. Justice Bell repeated his previous sentiment with respect to the Plaintiffs' fourth argument. There is no general requirement that a party tendering a document for signature take steps to apprise the party signing of the onerous terms or to ensure the party signing reads and understands the terms. Only where the circumstances are such that a reasonable person should have known that the party signing was not consenting to the terms does such an obligation arise. No such obligation arose in the matter at hand. Nothing in the present circumstance would suggest to a reasonable person that the lead Plaintiff was not consenting to the terms of the waiver.

*Conclusion & Take-Aways*

Justice Bell found that there were no genuine issues requiring a trial with respect to any of the claims in the action. Summary judgement was granted to the Park and the action was dismissed with costs.

What can we learn from this case? Most notably, the signee of a waiver is presumed to have intended to be bound by the agreement and to have knowledge of its contents, irrespective of whether the agreement was actually read. This places an onus on a Plaintiff who has signed such a waiver to rebut the presumption of knowledge of and intention to be bound by the agreement.

Those signing a waiver would be wise to take a pause and make the requisite efforts to understand what it is that they are signing, as this can, as it did in this case, to have fairly significant consequences in the event that an accident was to occur.

As we saw here, an unambiguous and clearly defined waiver, provided in tandem with an environment that encourages its careful review and execution with aids available to respond to any questions arising therefrom, can serve as a fulsome shield to claims where there may otherwise be exposure.

*Jamal Rehman*

**3. Casually Incorporated Contract Terms: Do They Apply?**

The recently published decision of *Kozlik's Mustard v. Acasi Machinery Inc.* (*1) provides a helpful review on the principles that will be considered by a court where a party to a contract wants to enforce a term incidentally incorporated into a quotation form provided to the other.

Kozlik's Mustard ("Kozlik") is a family-owned company based in Ontario. It is in the condiment processing and supply business. It purchased an industrial condiment bottler for its mustard products from Acasi Machinery Inc. ("Acasi"). Acasi is based in Florida. Acasi conducts business by way of quotes and invoices that purport to set out the terms of the contracts it makes with its customers. One such clause selected Florida as the forum for any dispute resolution relating to a purchase contract. The clause provided as follows:

> *All matters arising out of or relating to this agreement shall be governed by the laws of the State of Florida (exclusive of conflict of laws principles) and shall be deemed to have been executed in Miami, Florida. Any legal action of proceeding relating to this agreement shall be instituted solely in a state or federal court in Miami-Dade County, Florida. ACASI Machinery and Buyer agree to submit to the jurisdiction of, and agree that venue shall only be proper in, these courts in any such legal action or proceeding.*

Kozlik was unhappy with the bottler. Apparently, it did not "cut the mustard" (*2). Kozlik commenced a lawsuit in the Ontario Superior Court action in Ontario, suing Acasi for breach of contract and other claims for monetary damages, claiming that the bottler was defective. Acasi brought a court application to "stay" the action on account of the contract forum selection clause calling for disputes to be referred to the courts of Florida.

The judge hearing the stay application addressed whether the above forum selection clause - found at the bottom of a price quotation - was binding on Kozlik. Of interest is the fact that the judge took into consideration the impact of the availability of Zoom on the factors that determine the convenient forum for an action.

The judge dismissed Acasi's application for a "stay" of the action, finding that there was a strong reason to avoid the Florida selection clause as it had neither been negotiated or pointed out to Kozlik during the formation of the contract. The judge reasoned that manufacturers should expect to defend claims in the location of the users of the equipment unless they negotiate a forum selection clause or bring such a clause to the customer's attention prior to finalizing the sales contract. Further, the judge noted that the harm caused by the alleged defect occurred in Ontario. Also central to the judge's analysis was the fact that Ontario had a "real and substantial connection" to the dispute and was the most "convenient forum". In this regard the judge noted the ability of parties and witnesses to participate in a trial in Ontario via Zoom.

*The Judge's Analysis*

The sale process started by Acasi providing Kozlik with a quote for the bottler. The evidence presented indicated that it was Acasi's practice to set out the terms and conditions of its sales contract within the quote, on the assumption that the contract would be created when a purchaser makes a down payment. As mentioned, one such term indicated that any disputes were to be resolved in Florida.

Affidavit evidence on the motion from Kozlik attested that throughout the contract negotiation process no one from Acasi pointed out the forum selection clause.

The judge noted in his analysis the general power of the Court to "… stay any proceeding in the court on such terms as are considered just." (*3) The judge reviewed the history of the judicial treatment of forum selection clauses and the

leading Canadian case law on the criteria to be considered on a stay application:

> Forum selection clauses were first recognized in England, largely in the context of bill of lading commercial disputes. In such cases, in the absence of "strong cause", a clear forum selection clause negotiated between sophisticated commercial parties was upheld on the premise that contracting parties should be held to their bargain as to where and under what law a dispute should be resolved.
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> The importance of forum selection clauses and the strong cause test has since been accepted in Canada in Z.I. Pompey Industrie v. ECU-Line N.V. (*4) (a bill of lading case) and by other appellate Courts including the Ontario Court of Appeal in 2249650 Ontario Ltd. v. Sparkasse Siegen (*5) who stated: "Forum selection clauses in an agreement between parties, particularly sophisticated commercial parties, will normally be enforced in Ontario".
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> Most recently, the Supreme Court of Canada has elaborated on the test to be met by parties seeking to enforce a forum selection clause in Douez v. Facebook (*6) in cases that involve consumers. In that case, the plaintiff sued Facebook for using her name and profile picture to advertise companies to other members on the site. Facebook brought a preliminary motion to stay her action on the basis that any claim is to be disputed in California. Ms. Douez purportedly agreed to the clause by clicking "accept" in the mandatory registration process.

The judge noted that in the *Douez* case that the Supreme Court of Canada examined whether the test it had established in 2003 *Pompey* case applied to *consumer contracts*. The Supreme Court concluded that it did, but added some additional considerations to recognize the inequality of bargaining power that exists when consumers contract with companies like Facebook.

The judge reiterated the test on stay applications as established in the *Pompey* case:

> At the first step, the party seeking a stay based on the forum selection clause must establish that the clause is "valid, clear, and enforceable and that it applies to the cause of action before the court." At this step of the analysis, the court applies the principles of contract law to determine the validity of the forum selection clause.
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> Once the party seeking the stay establishes the validity of the forum selection clause, the onus shifts to the plaintiff. At this second step of the test, the plaintiff must show strong reasons why the court should not enforce the forum selection clause and stay the action.

The judge noted the following principles in applying this two-part test:

> 1. A court must consider all the circumstances of the case including the convenience of the parties, fairness between the parties and the interests of justice.
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> 2. Other factors to consider are: a) In what country the evidence on the issues of fact is situated or more readily available; b) whether the law of the foreign court applies and whether it differs from the domestic laws; c) what country are the parties connected to; d) whether the defendant is seeking a procedural advantage; e) whether the plaintiffs would be prejudiced by having to sue in a foreign court because they would be deprived of security for the claim, unable to enforce a judgment, be time-barred in the foreign jurisdiction or

for political, racial or other reasons would be unlikely to get a fair trial.

3. The “strong cause” factors were meant to provide some flexibility.

4. The test applies differently in different contractual contexts.

5. Not all forum selection clauses are created equally depending on factors such as the relative bargaining power of the parties.

6. The strong cause test must ensure that the court's plenary (that is, general or assumed) jurisdiction only yields to privately negotiated contracts where appropriate, and

7. The “strong cause” factors ought to be different in a consumer context. In such cases, the court should also take into consideration public policy considerations relating to the gross inequality of bargaining power between the parties and the nature of the rights at stake.

Taking into consideration the above factors, the judge found the Florida forum selection clause to be “valid, clear and enforceable”. The judge however noted that the more controversial issue was whether Kozlik could show “strong cause” why it should not be enforced. The judge ruled that Kozlik in fact did meet this test to resist the “stay”. Highlights of the key findings in this regard are as follows:

1. The *Pompey* decision is a reminder that equal parties who have negotiated a contract which includes a forum selection clause should be held to their bargain.

2. The *Douez* case however illustrates that this principle has elasticity when the circumstances of the negotiations change — for example if, like in that case there was no opportunity to bargain, and the consumer was in a 'take or leave it' situation.

3. The onus was on Kozlik to persuade the Court that the otherwise valid forum selection clause should not be enforced in this case.

4. The forum selection clause was not "negotiated". Rather, the agreement between Acasi and Kozlik fell closer to a “contract of adhesion” than to a fully negotiated contract between sophisticated commercial parties. While the judge agreed that both Acasi and Kozlik were seasoned businesses, they had in fact only negotiated price and machine specifications. The terms and conditions which contained the forum selection clause were not negotiated.

5. While the courts have traditionally enforced bill of lading forum selection clauses – typically being pro forma “sign here” documents – on the basis that they are entered into between sophisticated parties experienced in shipping, this case involved different considerations. Unlike the typical bill of lading case, in this case there was no evidence of industry practice in the purchase machines like the bottler, let alone any suggestion of extensive experience of the part of Kozlik in purchasing machinery.

6. Accordingly, in this case Koslik and Acasi were not of equal bargaining power. Acasi had drafted the terms and simply attached multiple pages of terms to the quote. There was no opportunity for Kozlik to have negotiated the forum selection term.

7. While the inability to negotiate weighs heavily against enforcing the clause, the Supreme Court of Canada noted in the *Pompey* case that a court is to look at "all of the circumstances" including the "convenience of the parties, fairness

between the parties and the interests of justice."

8. Another factor was the consideration of the location of the evidence and the effect of that on the relative convenience and expense of trial as between the courts of Florida and Ontario. In this regard the judge noted that the significance of this factor was greatly reduced with the introduction of zoom trials as a result of the Covid-19 pandemic. The need for witnesses to travel between or within countries is eliminated by the availability of Zoom testimony in Ontario proceedings.

9. It is a long-established principle that a manufacturer selling outside of its jurisdiction should expect to defend negligent manufacture claims in the place where the allegedly defective product was used (the so-called *Moran* principle) (*7)

Having found that Kozlik had established a strong cause to avoid Acasi's forum selection clause, the judge noted that the action could only proceed in Ontario if it has a "real and substantial connection" to Ontario. In the case of *Van Breda v. Village Resorts Ltd*. (*8) the Supreme Court of Canada established presumptive factors that establish a province's jurisdiction over an action.

In this case based on the application of the *Moran* principles the alleged negligent manufacture and misrepresentation were deemed to have been committed in Ontario. Accordingly, there was a sufficient connection with the province of Ontario for the action to proceed in Ontario. Based on the sum total of the evidence before the Court the judge was able to determine that Ontario was a convenient jurisdiction for the adjudication of the claim.

Accordingly, the judge dismissed Acasi's application for a stay of the action.

*Conclusion*

Ideally, parties to contracts will formally execute a written document containing terms and conditions. Owing to commercial practice or practical considerations, this may however not be possible. A party wishing to impose a forum for the resolution of disputes – and for that matter, any *other* term or condition considered material – should take steps to make sure that the same be prominently and timely brought to the attention of the contracting partner. This may especially be the case where the contract term has not been negotiated in a consumer context or other case not falling within a well-established commercial framework such as the issuance of a bill of lading, where parties will be assumed to be sophisticated with knowledge concerning typical terms and conditions.

*Gordon Hearn*

*Endnotes*

(*1) 2022 ONSC 2356
(*2) Sorry. With apologies. The author relishes play on words.
(*3) *Courts of Justice Act,* s. 106
(*4) 2003 SCC 27
(*5) 2013 ONCA 354 at para. 39
(*6) 2017 SCC 33
(*7) *Moran v. Pyle National (Canada) Ltd*. 1973 CanLII 192 (SCC)
(*8) 2012 SCC 17 at para. 90

**4. Secret Recordings in the Workplace**

As an employment lawyer, one of the questions I am often asked is whether an employee can legally record a workplace conversation without the knowledge or consent of the employer. This question usually arises in circumstances where an employee believes that they are being mistreated in the workplace, sometimes by way of harassment or discrimination, and they want to record the conversation as evidence of their mistreatment.

In Canada, it is not a violation of the *Criminal Code* to record a conversation if you have the consent of one of the parties. As a result, if an employee is a party to a conversation in the workplace, the employee can "consent" to its recording, and does not need the consent of the others.

The recent British Columbia case of *Shalagin v. Mercer Celgar Limited Partnership* (*1) is a good example of when such secret recordings may cross the line and support an employer's right to terminate the employee for cause.

The plaintiff, Roman Shalagin, began employment with Mercer Celgar Limited Partnership ("Celgar"), a pulp mill operator, as a financial advisor on January 6, 2010. There was no written employment contract. There were workplace policies that applied to Mr. Shalagin's employment. First, a Code of Business Conduct and Ethics, which required him to conduct himself with honesty and integrity and to adhere to the highest ethical standards in carrying out his duties and in his dealings with other employees, customers and other third parties. Second, there was a confidentiality policy that required Mr. Shalagin to keep all confidential information strictly confidential, to not use it for any purpose other than for Mercer, and to not remove it from Mercer's premises. He was to either return or destroy any confidential information in his possession at the end of his employment.

As a Certified Professional Accountant ("CPA"), Mr. Shalagin was also bound by the CPA Code of Conduct which included the requirement that Mr. Shalagin act ethically and with integrity and to not disclose confidential information concerning any employer.

At Mercer Mr. Shalagin initially reported to Ryan Marshall but he felt that Mr. Marshall discriminated against him based on his country of origin, Russia. Mr. Shalagin was promoted to Senior Financial Analyst in May 2016 and in May 2019 he became eligible for the Manager's Incentive Bonus (also referred to as "bonus"). This was a discretionary bonus based on personal performance and the company's performance. Mr. Shalagin's first bonus would be determined in the spring of 2020.

In 2019 Mr. Marshall was terminated and Mr. Shalagin took over some of his responsibilities, on an interim basis. He was asked to review Mr. Marshall's documents and records and determine what could be shredded. During this review Mr. Shalagin came across documents that showed that Mr. Marshall had lied to him about certain things, including his chances for a promotion. There was also information about the bonuses paid out in previous years, including a document entitled "Sr. & Mid-Management Performance Bonus 2017". Mr. Shalagin made notes of what he reviewed in these documents.

Eventually, Mr. Shalagin reported to Lori Ketchuk. By 2020 Mr. Shalagin had two employees reporting to him, and was paid a base salary of $123,000 annually, was eligible for the Manager's Incentive Bonus, and received a pension contribution of up to 7% of his salary along with other benefits.

In March of 2020, before the 2019 bonuses were announced, Mr. Shalagin met with human resources to talk about his bonus and appeared to be upset about the pending bonus and how it would be calculated and disagreed that it should be based in part on his personal performance. He then met with Ms. Ketchuk to discuss these concerns about his bonus. Ms. Ketchuk described Mr. Shalagin as upset in the meeting and she sensed that he may have known about the

amount of the bonus he was going to receive, even though this was not public knowledge.

Following these meetings Mr. Shalagin wrote to both HR and Ms. Ketchuk and once again challenged the bonus determination formula and stated that he was open to resolving this issue without litigation. Mercer was troubled by this threat of litigation and decided to terminate Mr. Shalagin's employment without cause. The termination was carried out on March 25, 2020. He was paid all amounts that were due to him under BC's *Employment Standards Act* ("ESA"). He had received his 2019 bonus on March 23, 2020 in the amount of $6,925.

After being terminated, Mr. Shalagin filed an ESA complaint, a human rights complaint, and a wrongful dismissal action. In his action he claimed that his supervisor was dishonest about the bonus payment, was rude, abrupt, and dismissive with him, and that he was terminated as a reprisal for raising his bonus payment with his supervisor and HR – he sought common law wrongful dismissal damages. In the human rights proceeding he produced information about surreptitious recordings he had taken while employed. Through the discovery process he revealed that he made recordings of several one-on-one training sessions that took place between 2010 to 2014, of over 100 Toolbox Talk and safety meetings, and at least 30 one-on-one meetings with supervisors and HR personnel about compensation and recruitment.

Mr. Shalagin said that he recorded the training and Toolbox meetings to help him with his English, and that he did not seek permission from the others in those meetings as he thought they would feel uncomfortable if they knew they were being recorded. With respect to the meetings with HR and his supervisors, he recorded them to create a record of conversations about his right to a bonus as well as his concerns about discriminatory or bullying treatment by colleagues. In these meetings, information about other employees was disclosed and in one case, Ms. Ketchuk revealed personal family information, all of which was captured in the recordings.

During the discovery process, Mr. Shalagin asked Mercer to produce a "Sr. & Mid-Management Performance Bonus 2020" document. Mercer became suspicious as to how Mr. Shalagin knew the name of the document with such accuracy, and whether he had reviewed this document which he was not authorized to see. Mercer also learned that Mr. Shalagin had prepared a programming script through which he extracted the name, subject, and date of his work emails in a spreadsheet that he maintained on his home computer (the "Database") and which he failed to return or destroy post termination.

Based on the evidence obtained after Mr. Shalagin was terminated, Mercer took the position that it had cause for the termination (and therefore no common law notice was owing), based on three grounds: the secret recordings of co-workers, the creation of the Database and failing to return it, and the unauthorized review of confidential bonus information.

The Court summarized the principles applicable to establishing "just cause". It described just cause as behaviour that is "seriously incompatible with the employee's duties. It is conduct which goes to the root of the contract, and fundamentally strikes at the heart of the employment relationship." The context in which the misconduct occurred must also be considered, along with the proportionality between the severity of the alleged misconduct and the sanction imposed.

In determining whether there was just cause, the Court's focus was on the surreptitious recordings and whether they go to the root of Mr. Shalagin's contract with Mercer, and fundamentally struck at the employment relationship. While it is legal to record a conversation, so long as one party to the conversation consents, this was not the sole consideration. The issue is whether Mr. Shalagin's actions fundamentally ruptured the relationship

such that the mutual trust between the parties was broken.

The Court found that Mercer had established just cause for Mr. Shalagin's termination, based on the surreptitious recordings. The Court found that Mr. Shalagin knew that his fellow employees would be uncomfortable with the recordings, even the earlier ones, yet he continued to make them. With respect to Mr. Shalagin's suggestion that some conversations were recorded because he was concerned about discriminatory treatment, he did not put forward any evidence to support this. The Court observed that Mr. Shalagin received several promotions while at Mercer. The Court concluded that based on the evidence, there was no legitimate basis for Mr. Shalagin to make recordings based on a fear of discrimination.

Mr. Shalagin also argued that he needed to make the recordings to ensure his compensation was properly calculated. The evidence shows that the fear of under-compensation was based on Mr. Shalagin's own misapprehension about how the bonus was calculated, when it was clear that it was discretionary. The Court said that Mr. Shalagin could not invoke an irrational concern to support the reasonableness of the secret recordings that would otherwise be considered as destroying the trust between him, his colleagues, and his employer.

The Court commented on the fact that Mr. Shalagin did not act with malice in making the recordings. He also did not publish the recordings and did not seek to make use of them for his own benefit, outside of the legal proceedings. However, the Court found that the sheer volume of recordings and the length of time over which they were made offset those factors. Just cause was made out on this ground alone.

With respect to the other grounds for cause asserted by Mercer, the Court found that the creation of the Database was not a breach of Mr. Shalagin's duties to Mercer as he worked from home and his reason for creating this document, for easier access to emails, was reasonable. The fault was with his failing to return it after he was terminated. The Court found that Mr. Shalagin's retainer of the Database was innocent, and that he did not seek any financial gain as a result of its retention. Proportionality would not support termination for cause on this ground.

With respect to the unauthorized review of 2020 bonus information the Court found that Mercer did not prove that Mr. Shalagin improperly accessed it, and so this could not support just cause.

With today's technology, recording conversations has never been easier. An employee who records a workplace conversation they have with a colleague or supervisor may not be breaking the law, but they may very well be breaching the trust that is fundamental to the employment relationship, putting their future at great risk. Employees must proceed with extreme caution.

*Carole McAfee Wallace*

*Endnotes*
(*1) 2022 BCSC 112 (CanLII)

**5. Court of Appeal for Ontario Declines to Expand the Analysis for the Duty to Defend**

In May, the Court of Appeal for Ontario decided a grouped appeal from several companies involving the wrap-up liability insurance policy for a condominium construction project in the city of Toronto. In *GLF Infrastructure Group Inc. v. Temple Insurance Company* (*1) ("*GLF Infrastructure*"), the Court declined to narrow aspects of the determination of a duty to defend in Ontario. Despite a voluminous record before the application judge, the Court upheld the application judge's decision to decline to undertake an in-depth analysis of the factual matrix giving rise to potential liability. In addition, the Court ultimately declined to decide the general principle of whether the possibility of a claim being within the deductible operated to negate the duty to defend.

*Facts*

*GFL Infrastructure* dealt with a group of applications from four companies involved in the construction of the Clear Spirit Condominium Project. The parties applied to the Superior Court for declarations that Temple Insurance and Aviva Insurance, the providers of the project's wrap-up liability policy, had a duty to defend the applicants against claims brought by TSCC 2299, the condominium corporation that purchased the building upon completion.

The developer group of corporations was sued by TSCC 2299 for deficiencies in the building they allege became apparent following construction, which they claim amounted to approximately $10,000,000. As might be expected, the developer group brought actions seeking contribution and indemnity from thirty-eight contractors involved in the project, including the three contractor corporations who were parties to this appeal. In turn, those contractor corporations sought coverage from the insurers pursuant to the wrap-up policy. The insurers denied coverage and the contractor corporations brought applications for a declaration that the insurers had a duty to defend.

The additional insured listed on the policy included "[a]ll contractors, subcontractors, engineering and architectural consultants." (*2) An interesting aspect of this case was that expert reports were incorporated into the insurers' pleadings by reference and were available on the applications as part of a nearly 1,000 page responding record. The insurers argued, supported by their expert reports, that the claims against the contractor corporations were not property damage as defined by the policy or, alternatively, if they were property damage such damage was subject to one or more of the exclusions contained in the policy. The application judge determined that the insurers did have a duty to defend and that the parties' "forensic analysis" of the expert reports was not properly the province of applications of this kind.

*Wrap-Up Liability Insurance*

In construction projects, a wrap-up liability policy exists to provide insurance encompassing all manner of contractors and subcontractors which are routinely found working on large, high-cost projects. The purpose of these general liability policies is to avoid the need for individual contractors and subcontractors to obtain policies covering all potential aspects of their involvement. By insuring all the risk associated with the different levels of contractors and sub-contractors, costs can be shared by the scores of players involved in an undertaking on this scale and no party need be concerned about gaps in the coverage of individual contractors, sub-contractors or consultants.

*The Court of Appeal*

As noted above, the insurers' pleadings included by reference expert reports running into the hundreds of pages. The reports were included to give substance to their argument that the allegations against the contractor corporations were either not property damage per se or were subject to policy exclusions. The Court disagreed with the insurers' position that in duty to defend applications "the allegations must be taken as pleaded, irrespective of their length and level of detail" and that the judge "was bound to review the allegations in these actions in light of the

documents explicitly referred to therein" which the judge had refused to do "on the basis that through a 'fluke of pleading', he had been asked to conduct a forensic analysis best left for trial". (*3)

The Court confirmed that in duty to defend cases, the test remains the one articulated by the Supreme Court in *Monenco* that "[t]he mere possibility that a claim falling within a policy may succeed will suffice". (*4) The insurers argued that the "mere possibility" does not operate to excuse a judge from analyzing possible exclusions in the policy. The Court declined to accept the insurers' proposition that the "mere possibility" test must be abandoned when the relevant issue is an exclusion clause, (*5) and emphasized that the Supreme Court concluded the test for an exclusion is that it must "clearly and unambiguously" exclude coverage to negate the duty. (*6)

An interesting question raised by the insurers that was not analyzed in detail was whether a potential claim being within the deductible would operate to neutralize the duty to defend. On the applications, the parties agreed that no Canadian case law directly addressed that question. (*7) Justice MacPherson agreed with the application judge that given the size of the claim, the peculiarity of the record before him and the insurers' admissions that claims against two of the parties came within a mere $1,500 of the deductible, the Court need not consider the question of whether the deductible impacts the duty to defend as a general principle. (*8)

*Conclusion*

The Court of Appeal has declined to inject involved factual inquiries as to liability into the determination of a duty to defend. Depending on their appetite for risk, *GFL Infrastructure* may discourage parties from going to the hilt on applications of this kind, particularly those involving wrap-up policies with potentially large numbers of applicants and by extension counsel. The Court declined to interfere with the application judge's decision to order the insurers to pay the contractor corporations some $325,000 in legal fees, in that respect this case may prove a cautionary example for insurance companies looking to construe their obligations narrowly. (*9)

*Conal Calvert*

*Endnotes*

(*1) *GLF Infrastructure Group Inc. v. Temple Insurance Company*, 2022 ONCA 390.
(*2) *GLF Infrastructure Group Inc. v Temple Insurance Company*, 2021 ONSC 1909, para 21.
(*3) *GLF Infrastructure*, para 20.
(*4) *Monenco Ltd. v Commonwealth Insurance Co*., 2001 SCC 49 at para 29.
(*5) *GLF Infrastructure*, para 25.
(*6) *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, para 51.
(*7) *GLF Infrastructure*, para 16.
(*8) *Ibid*, paras 31-32.
(*9) *Ibid*, paras 36-38.

## DISCLAIMER & TERMS



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