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Force Majeure:

It's Frustrating...

2020 CMLA Annual Seminar

Toronto, ON June 12, 2020

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Today's Topics

1. **Force majeure provisions in Canada**
2. **The doctrine of frustration**

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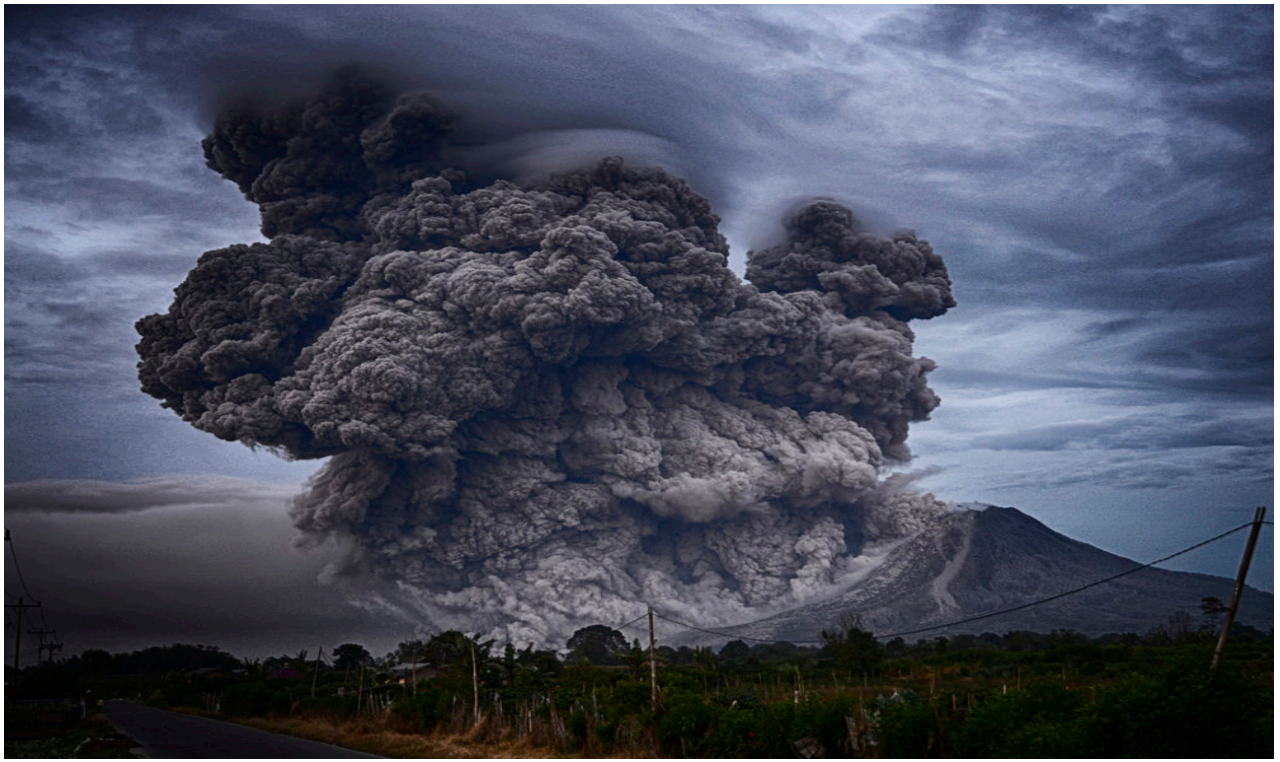

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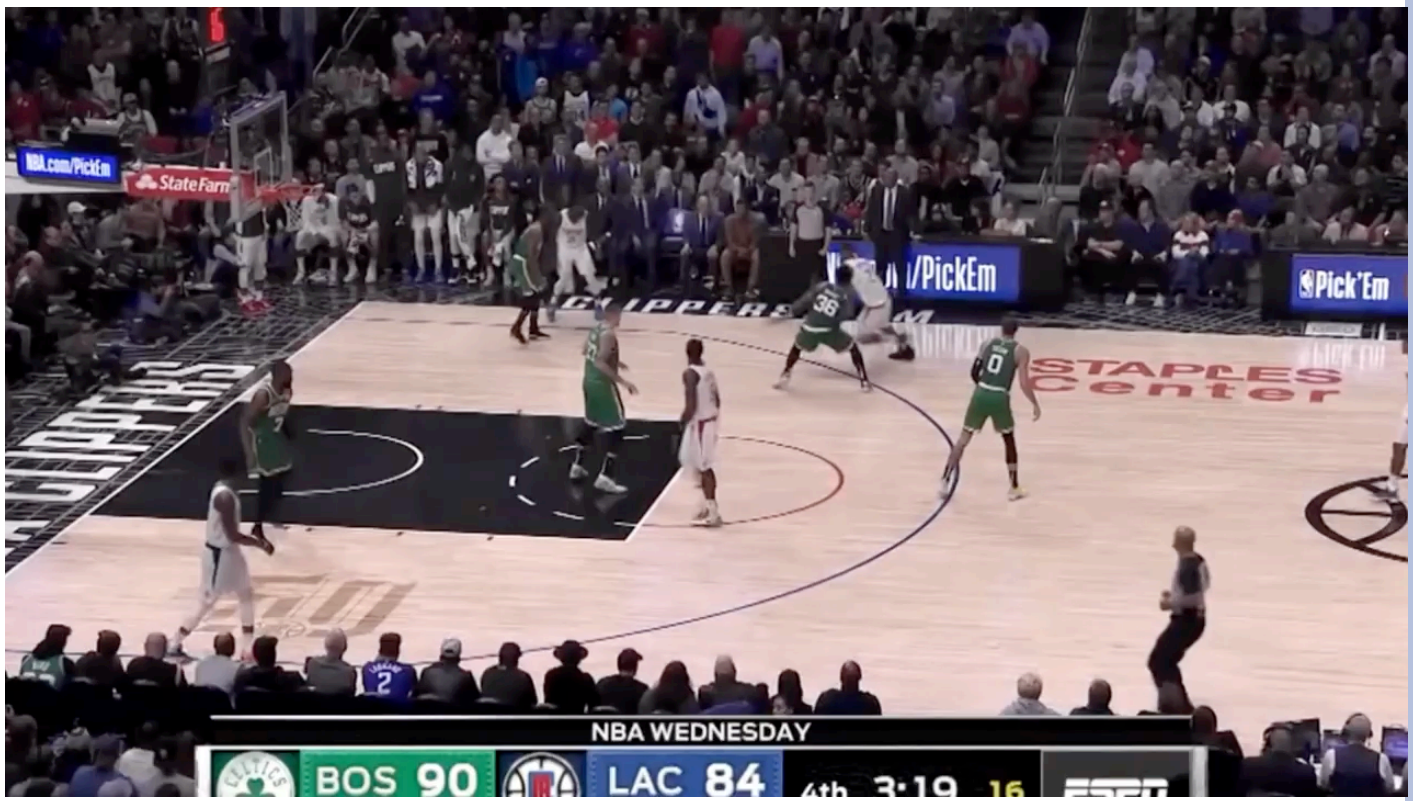

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Atlantic Paper Stock Ltd. v. St. Anne-Nackawic Pulp & Paper Co.

[1976] 1 S.C.R. 580 (SCC)

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- **contract between two paper companies**
- **10,000 tons of waste paper per year**
- **to be used as secondary fibre for making corrugating material**

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- **after 14 months, St. Anne advised it would not accept any more secondary fibre**

- **Atlantic sued for damages**

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- **St. Anne relies on its force majeure clause**

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- **The clause…**
- **"St. Anne warrants and represents that its requirements under this contract shall be approximately 15,000 tons a year, and further warrants that in any one year its requirements for Secondary Fibre shall not be less than 10,000 tons,**

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- **unless as a result of an act of God, the Queen's or public enemies, war, the authority of the law, labour unrest or strikes, the destruction of or damage to production facilities, or the nonavailability of markets for pulp or corrugating medium"**

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- **trial judge allowed the action, assessed damages at about 100K**

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- **NBCA reverses lower court decision**

- **key issue: meaning of term "nonavailability of markets"**

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- **<u>Plaintiff:</u> "a market which St. Anne can supply legally without regard to price or loss"**

- **<u>Defendant:</u> "a profitable or economic market"**

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- **<u>Court:</u> Black's Law Dictionary**

- **"available market" – one capable of being used, advantageous**

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- **<u>Court:</u> Greater Oxford Dictionary**

- **"available" – of advantage, serviceable, beneficial, profitable**

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- **Court:** ***Devitt v. Mutual Life Ins. Co. of Canada (1915), 33 OLR 473 (CA)***

- **Riddell J.: "'Available' does not mean 'existing'. It means 'in such a condition as that it can be taken advantage of"**

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- **<u>Court:</u> Available means more than existing. An available market means one which is reasonable accessible.**

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- **<u>Court:</u> discusses St. Anne's difficulties post-start-up**
- **freight rate increase to US**
- **preferential tariff rates to US were declared not applicable**
- **West Germany – developed a new process**
- **Scandinavia – had birch wood (the best material)**

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- **<u>Court:</u> discusses St. Anne's difficulties post-start-up**
- **tries to find markets in Iran, West Indies, Italy – no success**
- **ultimately, St. Anne concludes there were no real markets for it**

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- **<u>Court:</u> non-availability of markets must relate to markets not available to *St. Anne***
- **use of the phrase "*non-availability of markets*" is different than "*if there is no market for corrugating medium*"**

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- **<u>Court:</u> concludes that St. Anne was justified in refusing further supplies**

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- **Supreme Court of Canada**
- **Dickson J.**
- **Totally different view of the case**

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- **"An act of God clause or force majeure clause, and it is within such a clause that the words "non-availability of markets" are found, generally operates to discharge a contracting party when a supervening, sometimes supernatural, event, beyond control of either party, makes performance impossible."**

(paragraph 4)

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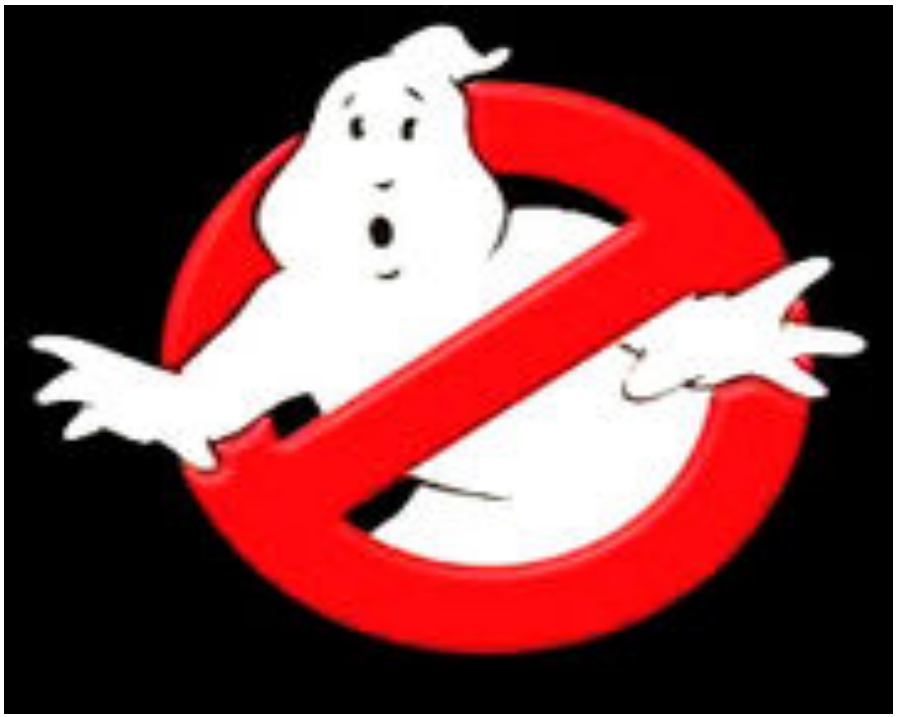

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- **"The common thread is that of the unexpected, something beyond reasonable human foresight and skill."**

(paragraph 4)

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- **"If markets were unavailable to St. Anne, did they become so because of something unexpected happening? Was the change so radical as to strike at the root of the contract? Could the company, through the exercise of reasonable skill, have found markets in which to trade?"**

(paragraph 4)

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- **"Clause 2(a) contemplates the following frustrating events: an act of God, the Queen's or public enemies, war, the authority of the law, labour unrest or strikes, the destruction or damage to production facilities."**

(paragraph 4)

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- **"Reading the clause *ejusdem generis*, it seems to me that "non-availability of markets" as a discharging condition must be limited to an event over which the respondent exercises no control."**

(paragraph 4)

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- **"The primary cause of failure of the facility was lack of an effective marketing plan."**
- **Dickson J. proceeds to trash St. Anne's business plans**

(paragraph 5)

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- **"The different between the trial judge and the Appeal Division turned essentially on whether "non-availability of markets" meant non-availability of economic markets for St. Anne"**
- **trial judge – objective test**
- **Appeal Court – subjective test**

(paragraph 6)

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- **"The effect of the Appeal Division opinion would be to relieve St. Anne of contractual obligation if St. Anne could not operate at a profit. I doubt that reasonable [people] would have made such a bargain."**

(paragraph 6)

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- **"It would in my opinion be doing violence to the plain words "non-availability of markets for pulp or corrugating medium" in the context of the entire clause within which the words were found, to permit St. Anne to rely upon its soaring production costs to absolve it of contractual liability."**

(paragraph 6)

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- **"I do not think St. Anne can rely on a condition which it brought upon itself. A fair reading of the evidence leads one to conclude the whole St. Anne project was misconceived."**

(paragraph 9)

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- **"The project, conceived in ephemeral hopes and not the harsh realities of the marketplace, resulted in a failure for which St. Anne… must be held accountable."**

(paragraph 9)

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- **Thoughts?**
- **unless as a result of an act of God, the Queen's or public enemies, war, the authority of the law, labour unrest or strikes, the destruction of or damage to production facilities, or the nonavailability of markets for pulp or corrugating medium**

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- **did Dickson J. base his decision on how good a company St. Anne was?**
- **what if St. Anne had a brilliant marketing plan but the markets were still just as difficult?**
- **what would St. Anne need to have done to benefit from the clause?**

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- **didn't the parties agree to the clause?**
- **was it reasonable to make it so onerous on St. Anne to avail itself of the clause (which both parties agreed to)?**
- **did St. Anne really have control over the markets?**

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- **drafting…**
- **force majeure clauses are infinitely varied – their interpretation will always boil down to the precise language used**

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- ***M.A. Hanna Co. v. Sydney Steel Corp.* (1995), 136 N.S.R. (2d) 241 (NSSC)**

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- **similar situation to *St. Anne* case**
- **plaintiff claimed the buyer had wrongfully refused to purchase iron ore pellets under a long-term contract**

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- **defendant relied on force majeure clause**

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- **If, by reason of any impediment of whatsoever nature, including but not by way of limitation, action of military, naval or civil authorities, war, revolution, political disturbances, riots, strikes, lockouts, accidents, fires, explosions, acts of God and all other causes beyond the control of buyer or seller…, buyer cannot take delivery either in whole or in part, both parties will be relieved from their obligation for duration and in proportion to the extent of the impediment."**

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- **Court: "Here, the state of the market and conduct of the plaintiff put the defendant in an economically critical condition. This is not sufficient, however, to bring the doctrine of frustration into play. Even if Sysko were broke and simply unable to pay Hanna for pellets, this would not provide an excuse for non-performance."**

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- **But… the defendant argued that the crash of the steel market and subsequent events were beyond its control.**
- **Court: here, the plaintiff has employed some broad phraseology… the broad wording of the clause creates an ambiguity which should, in this case be interpreted against the drafter.**

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- **the lesson? Put a general basket clause into the FM clause!**

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- **can you imply a force majeure clause into a contract?**
- **we don't know (but probably not): *Royal Bank v. Netupsky* (1988), 76 A.C.W.S. (3d) 985 (BCSC)**

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- **does performance have to be impossible?**
- **it would help**
- ***St. Anne* – not impossible**

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- **does performance have to be impossible?**
- ***BC v. Cressey* (1992, BCSC) – zoning issue – not impossible**
- ***"at the heart of Dickson J's decision in Atlantic Paper is that the supervening event must make performance impossible"***

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- **does performance have to be impossible?**

- ***Tom Jones & Sons Ltd. v. R.*** **(1981, OHC) – financing issue - not impossible**

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- **does performance have to be impossible?**
- **on the other hand…**
- ***M. A. Hanna* – not impossible either but the Court ruled in favour of the defendant**

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- **does performance have to be impossible?**
- ***Atcor v. Continental Energy Marketing Ltd.* (1996, ABCA)**
- **ABCA allows appeal and orders a new trial**
- **lower court had found that FM applied**
- **CA held that the defendant needed to show not just that the FM event took place but also that the event made it "commercially impracticable or unreasonable" to perform**

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- **does performance have to be impossible?**
- ***Atcor v. Continental Energy Marketing Ltd.* (1996, ABCA)**
- **"a supplier need not show that the event made it impossible to carry out the contract, but it must show that the event created, in commercial terms, a real and substantial problem"**

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- **so be precise!**
- **add a generic basket clause (e.g. "other events beyond the reasonable control of a party")**
- **talk to the client about what types of things that could go wrong – anything out of the ordinary?**

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- **consider what your client wants to happen in the event of a force majeure?**
- **does performance have to be impossible or simply commercially impracticable?**
- **what will the other side accept?**

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- **Hapag Lloyd – General Terms and Conditions**

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- **17. Liability and limitation**
- **(A) HLAG shall be relieved of liability for any loss or damage if and to the extent**

  that such loss or damage is caused by:

  i. Strike lockout, stoppage or restraint of labour, storm, earthquake, natural disaster, acts of God, blockade, ice, civil commotion, restraints, or any other cause the consequences of which HLAG is unable to avoid by the exercise of reasonable diligence

  ii. Any cause or event which HLAG is unable to avoid and the consequences whereof HLAG is unable to prevent by the exercise of reasonable diligence

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- **what about COVID-19?**
- **“pandemic”?**
- **“public health emergency”?**

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- HAGUE VISBY RULES – ARTICLE 4 SECTION 2
- 2 Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from
  - (a) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship;
  - (b) fire, unless caused by the actual fault or privity of the carrier;
  - (c) perils, dangers and accidents of the sea or other navigable waters;
  - (d) act of God;
  - (e) act of war;
  - (f) act of public enemies;
  - (g) arrest or restraint of princes, rulers or people, or seizure under legal process;
  - (h) quarantine restrictions;
  - (i) act or omission of the shipper or owner of the goods, his agent or representative;
  - (j) strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general;
  - (k) riots and civil commotions;
  - (l) saving or attempting to save life or property at sea;
  - (m) wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods;
  - (n) insufficiency of packing;
  - (o) insufficiency or inadequacy of marks;
  - (p) latent defects not discoverable by due diligence;
  - (q) any other cause arising without the actual fault and privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

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- **possible advice to clients before invoking force majeure:**
- **1) consider commercial and reputational matters – does the client want the "optic" of being unable to perform a contract?**
- **2) consult insurance policies and whether they might impact ability to declare force majeure**

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- **possible advice to clients:**
- **3) is the client performing the same obligation for another contracting party?**
- **4) consider a negotiation with the other party**
- **5) consider any notice provisions in the force majeure and abide by them**

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- **possible advice to clients:**
- **6) make records of everything (to prove what you are doing and to justify the declaration of FM)**

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- **remember the duty to mitigate**
- **not just against the effect of the force majeure itself**
- **but also the effect of the force majeure on the counterparty**

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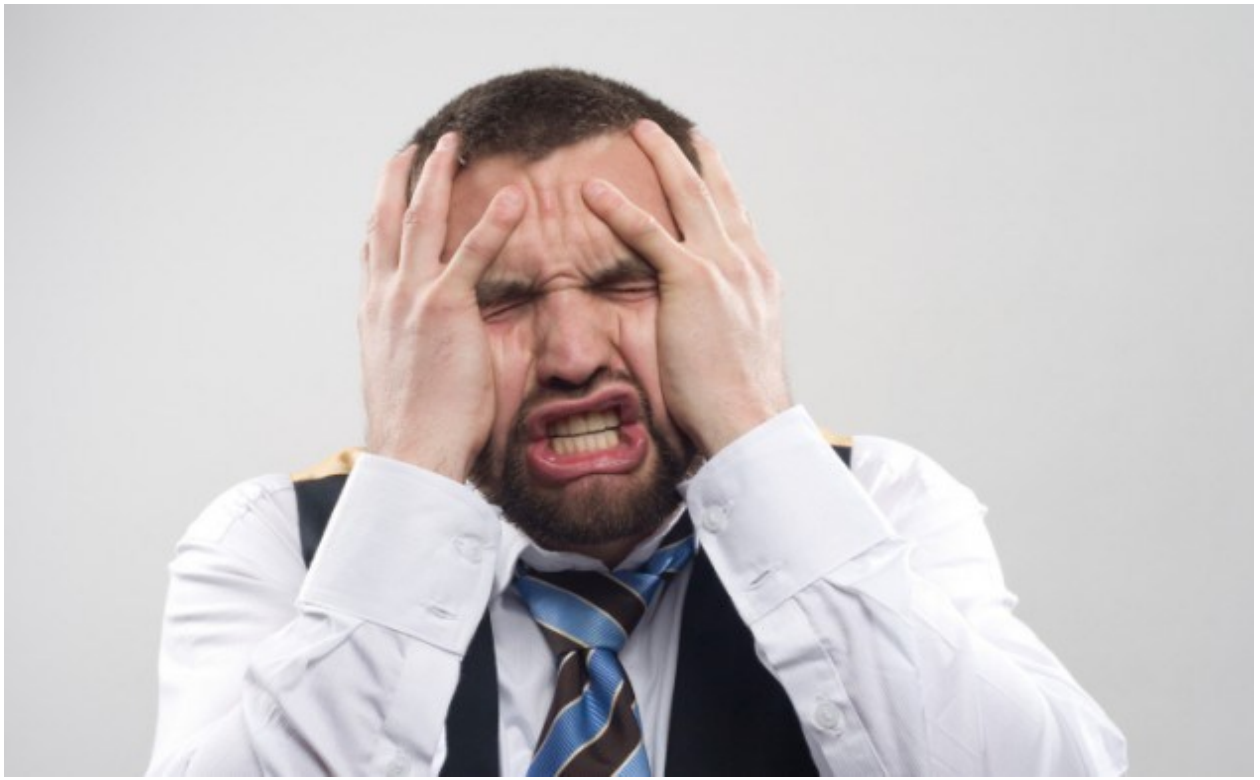
PART II –

The Doctrine of Frustration in Canada



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- **traditionally, at common law, contracts were absolute**
- **parties were bound to their positions even if performance became impossible**

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- **Courts held that a party could have provided for a contingency if the contract became impossible, and if it did not, then too bad**

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- ***Paradine v. Jane*** **[1647] 4 (KB)**
- **tenant evicted by an enemy force, given no compensation**
- **landlord sued tenant for arrears**
- **court found for landlord, as there was no exemption in the contract**

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- ***Taylor v. Caldwell*** **(1863), 122 ER 309**
- **defendants agreed to rent out a music hall to plaintiffs**
- **fire burned down the hall**
- **Court excused both parties from performance**

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- ***Krell v. Henry,* [1903] 2 KB 740**
- **defendant rented two rooms in plaintiff's house to watch coronation procession of Edward VII**
- **coronation postponed, defendant refused to take the rooms and pay**

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- ***Krell v. Henry,* [1903] 2 KB 740**
- **while performance was not physically impossible, a "*state of things, going to the root of the contract, and essential to its performance*" had ceased to exist**

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The Doctrine of Frustration in Canada

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- ***Nowadays…***
- **frustration occurs when a situation has arisen for which the parties made no provision in the contract and performance of the contract becomes "a thing radically different from that which was undertaken by the contract"**
- ***Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58**

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- ***Nowadays…***
- **you need:**
- **(1) a supervening event occurring through no fault of either party**
- **(2) absence of a contractual provision**
- **(3) performance becomes "radically different"**

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- ***In other words…***
- **(1) where the frustrating event has rendered performance impossible**
- **(2) where performance remains possible but the purpose for which one or both parties entered the agreement has been undermined**
- **(3) where temporary impossibility has grounded discharge for frustration**

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PART II –

The Doctrine of Frustration in Canada

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- **Don't forget…**
- ***Frustrated Contracts Act*!**
- **all provinces and territories have similar legislation – EXCEPT NOVA SCOTIA**
- **does not apply to contracts for carriage of goods by sea (except a time or demise charterparty)**
- **provides what happens to amounts paid by the buyer once a contract has been frustrated**

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Questions?

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Thank you!

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