THE NAVIGATOR

IN THIS ISSUE

Notices to Shipping and Mariners

In *Canada v. Adventurer Owner Ltd.*, 2017 FC 105, Justice Sean Harrington of the Federal Court of Canada paid homage to the U.K.'s Lord Denning, Master of the Rolls (*1), with the following opening to his judgment and reasons:

> It was a beautiful summer's eve in the Canadian Arctic. The sun was up and the seas in Coronation Gulf were calm. It was August 27, 2010, the day the *Clipper Adventurer* steamed full speed ahead onto an uncharted, submerged shoal. Thus a fourteen-day expedition cruise in the waters of Greenland and Canada ended on day 13 at 18:32 hrs local time at 67° 58.26N, 112° 40.3W. The *Clipper Adventurer* was in Nunavut *en route* from Port Epworth to Kugluktuk. Fortunately, not one of her 128 passengers and crew of 69 was injured. Over the next few days, the passengers and crew members not necessary for navigation were rescued by the Canadian Ice Breaker *Amundsen*, and brought to Kugluktuk.

The owners of the *Clipper Adventurer* sued the Canadian Government in the amount of U.S. $13,498,431.19 for the cost of temporary and permanent repairs, payment to the salvors, business interruption, and related matters. The basis of the claim was that Her Majesty, more particularly the Canadian Coast Guard and the Canadian Hydrographic Service, knew of the presence of the shoal, had a duty to warn, and failed to do so. Had a proper warning been issued, this casualty would not have occurred.

Her Majesty filed her own action against the ship and her owners in the amount of CDN $468,801.72 for costs and expenses incurred in respect of measures taken to prevent, repair, remedy or minimize pollution damage, the whole pursuant to various provisions of the *Marine Liability Act* and the *International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001*, appended thereto.

Her Majesty admitted that both the Canadian Coast Guard and the Canadian Hydrographic Service had known of the presence of the shoal some three years before the grounding. She denied that any duty was owed to the *Clipper Adventurer* to give warning. Nevertheless, warning

FIRM AND INDUSTRY NEWS

- **Rui Fernandes'** article *"S.C.C.: Federally Regulated Employees – Termination for Just Cause Only"* appears in February's edition of **The Transportation Lawyer**.

- **Rui Fernandes** and **Kim Stoll** have been listed as leaders in the field of Shipping Law in **Who's Who Legal: Transport 2017.** The publication lists 1323 lawyers in 69 countries.

- **ABA Transportation Megaconference**, March 8-10, 2017, New Orleans.

- **Gordon Hearn** will be speaking at the **Transportation Intermediaries Association** Annual Conference meeting on April 6, 2017 in Las Vegas, Nevada. Gordon will be providing the Canadian perspective on a cross-border panel addressing legal liability and regulatory considerations in the surface carriage of goods between Canada, the United States and Mexico

- **Canadian Maritime Law Association** Seminar, April 7th, 2017, Ottawa.

- **Mari-Tech 2017** Conference, April 20-21 2017, Montreal.

- **Transportation Lawyers** Annual Conference & **Canadian Transport Lawyers Association** Semi Annual Meeting, April 26-29 2017, Santa Fe, New Mexico. **Rui Fernandes, Gordon Hearn, Kim Stoll** and **Louis Amato-Gauci** will be attending. **Kim Stoll** will be moderating a panel on "New Solutions for Old Obstacles: Cross-Border Motor Carrier Operations in North America. **Louis Amato-Gauci** will be a speaker on this panel. **Kim Stoll** will also be moderating a panel on "Through the Spyglass: The Future of Act of God Defence in Intermodal Transport."

- **Ontario Trucking Association** Annual Spring Golf Classic, May 16th 2017, Milton Ontario.

- **North American Rail Shippers Association** Annual Conference, May 23-25 2017, San Francisco.

- **Canadian Board of Marine Underwriters** 100th Anniversary Conference, May 24-25 2017, Montreal.

- **Canadian Inland Ports** Conference, May 24-25 2017, Calgary.

was given both by means of a Notice to Shipping and by a Navigational Area Warning. The casualty was caused by the *Clipper Adventurer*'s failure to update Canadian Hydrographic Chart 7777.

Justice Harrington found that the sole cause of the casualty was the failure on the part of those interested in the *Clipper Adventurer* to maintain Canadian Hydrographic Chart 7777 up-to-date.

The evidence at trial established that the shoal was discovered September 13, 2007, by Captain Mark Taylor, Master of the Canadian icebreaker the *Sir Wilfrid Laurier*. Notices to Shipping are defined in the *Collision Regulations* as "an urgent release by the Department of Fisheries and Oceans to provide marine information". Both the Canadian Coast Guard and the Canadian Hydrographic Service fall within the jurisdiction of "Fisheries and Oceans". Both may issue Notices to Shipping, commonly referred to as NOTSHIPs. Captain Taylor reported the presence of the shoal to the Hydrographic Service and also personally caused Notice to Shipping A101/07 to be issued.

Justice Harrington reviewed many aspects of the way waters are charted in Canada. The case provides an excellent summary of this work in Canada. Justice Harrington noted (*2):

> Most of the surveying done in the Arctic is opportunistic by nature. The Canadian Hydrographic Service does not have its own ice breaking capacity and so relies upon the Canadian Coast Guard. Less than ten percent of the vast Arctic waters have been surveyed to modern standards. The prime role of Canadian icebreakers during the short summer navigation season is, as the name implies, to act as icebreakers and to carry out search and rescue missions. Hydrographers are welcome aboard, but their surveys are not of the highest priority. For example, in 2008, a hydrographic team was on an icebreaker in Coronation Gulf. However, the icebreaker was called to other duties and so no exact survey of the shoal was carried out.

Justice Harrington noted the importance of Notices to Mariners(*3):

> Notices to Mariners are well-known in Canada and internationally. They serve as a permanent update to a paper hydrographic chart. The Canadian Hydrographic Service maintains approximately 1,000 charts, and issues about 50 new charts yearly. It would be impracticable to issue a new chart every time an existing chart had to be updated, for instance to show the installation of a new light or, indeed, a recently discovered shoal. Chart 7777 was a high priority chart, meaning that every five years the Hydrographic Service would consider whether a new chart should be issued. The chart used by the *Clipper Adventurer* had been purchased by its agent, Marine Press of Canada. As printed by the Canadian Hydrographic Service, this was a new edition issued on May 30, 1997, and corrected by Notices to Mariners up to June 4, 2004. Marine Press itself corrected the chart through the last Notice to Mariners which was issued in 2008.

In Canada, all ships must have on board all Canadian charts and publications required by the *Charts and Nautical Publications Regulations, 1995.*

The case against Her Majesty was in negligence. The *Crown Liability Act*, SC 1952-53, c 30 imposes vicarious liability in respect of a tort committed by a Crown servant and in respect of a breach of duty pertaining to "the ownership, possession or control of property". The Act was later amended and renamed the *Crown Liability and Proceedings Act.* The two principles enunciated above remain the same in the latter legislation.

Justice Harrington noted that the shoal was in no way owned or controlled by the Crown, and therefore liability must be founded upon s 3(b)(i) and s 10 of the Act which provides for Crown liability in respect of a tort committed by a servant of the Crown as long as the act or omission of that servant would have given rise to a cause of action against that servant.

The claimant submitted that that, having learned of the presence of the shoal, any number of Crown servants in the employ of the Canadian Hydrographic Service or the Canadian Coast Guard owed a duty to give warning to the *Clipper Adventurer*. The issuance of NOTSHIP A102/07 almost three years before the grounding, when it was admitted the *Clipper Adventurer* was not within radio range, was akin to no notice at all. To find NOTSHIP A102/07 was to search for a needle in a haystack.

The claimant further submitted that even allowing for the fact that the report of the shoal was not based on professional hydrographic standards, a Temporary and Preliminary Notices to Mariners ("NOTMAR") should have been issued. The *Clipper Adventurer* would have been on the lookout.

Canada's failure to issue a NOTMAR was claimed to constitute a violation of international law. Canada has signed on to the *International Convention for the Safety of Life at Sea, 1974* (SOLAS) and is a member of both the International Maritime Organization and the International Hydrographic Organization. SOLAS recognizes NOTMARs but not NOTSHIPs.

Justice Harrington concluded that while there was no duty on the part of any Crown servant to seek out and discover uncharted shoals, once the shoal has been discovered, the Crown servants were under a duty to warn mariners of the presence of a shoal, and that there are no policy considerations to negate that duty.

Section 7 of the *Charts and Nautical Publications Regulations, 1995* provides:

> The master of a ship shall ensure that the charts, documents and publications required by these Regulations are, before being used for navigation, correct and up-to-date, based on information that is contained in the *Notices to Mariners, Notices to Shipping* or radio navigational warnings.

Justice Harrington was of the view that if a master must navigate based on information contained in Notices to Shipping, it follows that the issuance of a Notice to Shipping discharges the Crown's duty to warn. He repeated his conclusion that the casualty was caused by the negligence on the part of the *Clipper Adventurer* noting:

> The plaintiff emphasizes that radio communication in the Arctic may be difficult, and that the *Clipper Adventurer* was not required to be fitted with the Internet. It beggars belief, however, that all Coast Guard systems would have been down for an extended period of time. Even if they were, which I do not for a moment accept, as Captain Grankvist stated that Internet reception was excellent in Greenland, and the ship had no difficulty in making her daily positioning reports to MCTS, had Officer Mora, under the supervision of Captain Grankvist, taken serious note of the publications with which he was required to be familiar, he would have known perfectly well that there were written NOTSHIPs, and that if he could not get them by visiting the Canadian Coast Guard website, all he had to do was call MCTS Iqaluit. Indeed, he could have called the ship managers in Miami. As it was, this nonchalant attitude put the lives of close to 200 souls at risk.
>
> The owners' managers, International Shipping Partners Inc., of Miami, are not blameless either. Vice-President, Nick Inglis, was perfectly aware that Canada issued NOTSHIPs and that copies thereof were not provided to the fleet by Marine Press of Canada. Yet, Captain Grankvist

> and Mr. Mora were left to their own devices. The printed Passage Plan Appraisal sheets that the managers furnished referred to NAVAREA warnings, but not to NOTSHIPs. Furthermore, had there been any difficulty on the part of the *Clipper Adventurer* in communicating with MCTS Iqaluit, and no such evidence has been led, the *Clipper Adventurer* was also fitted with what is called Iridium, which is not part of the international safety system. Had the ship been having difficulty in obtaining NOTSHIPs, she could have sent the managers a message over Iridium. However, as Mr. Inglis stated, "but if they didn't know there was a problem, they wouldn't be able to call me and say 'we have a problem'."

Justice Harrington also dealt with Crown's claim for damages for the costs and expenses incurred by the Minister of Fisheries and Oceans in respect of measures taken to prevent, repair, remedy or minimize oil pollution damage. Justice Harrington noted that section 77(3) of the *Marine Liability Act* provides that liability does not depend on proof of negligence. To escape liability, the shipowner must establish that the occurrence resulted from an act of war, hostilities, insurrection, act of God, deliberate act or omission by a third party with intent to cause damage, or wholly caused by the negligence or other wrongful act of a government authority. "Thus, if there were divided responsibility, and I think this is an either/or situation, the shipowner would still be liable in full notwithstanding any contributory negligence on the part of the Crown." (*4)

The *Clipper* was found liable to the Crown for the $445,361.64 plus interest plus costs.

Rui M. Fernandes

Follow *Rui M. Fernandes on Twitter @RuiMFernandes* and on Linkedin. See also his blog at http://transportlaw.blogspot.ca

Endnotes

(*1) Lord Denning was an English judge who served on the Court of Appeal in England as Master of the Rolls for twenty years. He was noted for his bold judgments running counter to the law at the time. In 1947, he decided *Central London Property Trust Ltd* v *High Trees House Ltd* [1947] KB 130 (known as the 'High Trees' case), which was a milestone in English contract law. It resurrected the principle of promissory estoppel. In his cases he referred to the parties by name in his judgments rather than as "plaintiff" and "defendant" and used short sentences and a "storytelling" style of speech. In *Beswick v. Beswick* [1968] AC 58 his judgment started: "Old Peter Beswick was a coal merchant in Eccles, Lancashire. He had no business premises. All he had was a lorry, scales, and weights. He used to take the lorry to the yard of the National Coal Board, where he bagged coal and took it round to his customers in the neighbourhood. His nephew, John Joseph Beswick, helped him in his business. In March 1962, old Peter Beswick and his wife were both over 70. He had had his leg amputated and was not in good health. The nephew was anxious to get hold of the business before the old man died. So they went to a solicitor, Mr. Ashcroft, who drew up an agreement for them."

(*2) Paragraph 30

(*3) Paragraph 33

(*4) Paragraph 105

2. Release from Liability Clauses and Consumer Agreements: Beware the Minefield!

You may provide services or supplies to consumers. For that matter perhaps you insure the liabilities of such providers. The recently published decision in the case of *Woodhouse v Snow Valley* (*1) provides a stark illustration of how certain terms of consumer agreements are regulated. A contract term might be elegantly worded, and timely brought to the attention of a consumer; however, it may not ultimately be enforceable if it offends certain provisions of the Ontario *Consumer Protection Act, 2002* (the "*CPA*") (*2), the significant regulation of certain terms of consumer agreement. Suppliers and their insurers need to take heed of this reality in their risk allocation and management.

Background Facts

The Defendant ("Snow Valley") operated a ski facility in the Township of Springwater in the County of Simcoe. On December 23, 2008, the Plaintiff attended at Snow Valley to go skiing. She purchased a beginner ski package, which included a lift ticket ("the lift ticket"), equipment rental and a lesson. The lift ticket issued to her contained an exclusion or release of liability. As well, the Plaintiff executed a "Rental Agreement & Release of Liability", (the "rental agreement"), which contained a section entitled "Waiver of Claims". After taking the ski lesson, the Plaintiff and her family made use of the ski facilities, including the tow rope. While using the tow rope, the Plaintiff claimed to have sustained personal injuries.

The plaintiff commenced a lawsuit in the Ontario Superior Court of Justice. The parties sought to dispose of matters by posing five questions for the opinion of the court by way of a 'Stated Case'. (A Stated Case involves the parties asking a court to adjudicate on a matter based on agreed facts stipulated in writing for the court):

1. Does the *CPA* apply to the lift ticket and the executed rental agreement?

2. If the answer to Question 1 is yes, is the release of liability on the lift ticket and in the executed rental agreement rendered void in law and unenforceable by ss. 9(1) and (3) of the *CPA*?

3. If the answer to Question 2 is yes, is the release of liability on the lift ticket and in the executed rental agreement rendered void in law as a whole or are the offending terms or acknowledgments contained therein severable pursuant to s. 9(4) of the *CPA*?

4. Can the Plaintiff nevertheless be bound by the terms of the release of liability on the lift ticket and in the executed rental agreement by exercise of the court's discretion under s. 93(2) of the *CPA*?

5. If the provisions of the *CPA* negate the application of the waivers, do the provisions of the Ontario *Occupiers Liability Act* ("*OLA*") (*3) supersede those of the *CPA* to allow Snow Valley to rely on the waivers?

The Lift Ticket Wording

The wording in the release of liability on the lift ticket was as follows:

> NOTICE TO ALL USERS OF THESE FACILITIES
>
> EXCLUSION OF LIABILITY-ASSUMPTION OF RISK- JURISDICTION
>
> THESE CONDITIONS WILL AFFECT YOUR LEGAL RIGHTS INCLUDING THE RIGHT TO SUE OR CLAIM COMPENSATION FOLLOWING AN ACCIDENT
>
> PLEASE READ CAREFULLY
>
> As a condition of the use of the ski area and other facilities the Ticket Holder

assumes all risk of personal injury, death or property loss resulting from any cause whatsoever including but not limited to the risks, dangers and hazards of skiing, snowboarding, cycling, tubing, hiking and all other recreational activities; to use the ski lifts, collision with natural or manmade object or with skiers, snowboarders, cyclists, hikers, tubes or other persons; travel within or beyond the ski area boundaries; or negligence, breach of contract or breach of statutory duty of care on the part of Snow Valley Resorts (1987) Ltd and its directors, officers, employees, instructors, volunteers, agents, independent contractors, subcontractors, representatives, sponsors, successors and assigns (hereinafter collectively referred to as the "Ski Area Operator"). The Ticket Holder agrees that the Ski Area Operator shall not be liable for any such personal injury, death or property loss and releases the Ski Area Operator and waives all claims with respect thereto. The Ticket Holder agrees that any litigation involving the Ski Area Operator shall be brought solely within the Province of Ontario and shall be within the exclusive jurisdiction of the Courts of the Province of Ontario. The Ticket Holder further agrees that these conditions and any rights, duties and obligations as between the Ski Area Operator and the Ticket Holder shall be governed by and interpreted solely in accordance with the laws of the Province of Ontario and in no other jurisdiction.

THE SKI AREA OPERATOR'S LIABILITY IS EXCLUDED BY THESE CONDITIONS

PLEASE ADHERE TO THE ALPINE RESPONSIBILITY CODE AND BE RESPONSIBLE FOR YOUR OWN SAFETY IN ALL ACTIVITIES.

The Rental Agreement Wording

In turn the wording in the waiver of claims section of the rental agreement was as follows:

WAIVER OF CLAIMS

I HEREBY AGREE; 1. TO WAIVE ANY AND ALL CLAIMS that I have or may have in the future against Snow Valley Resorts (1987) Ltd. and the manufacturer and distributor of the Equipment and their directors, officers, employees, agents and representatives (all of whom are hereinafter collectively referred to as "the Releasees") and 2. TO RELEASE THE RELEASEES from any and all liability for any loss, damage, injury or expense that it may suffer, or that my next of kin may suffer as a result of or arising out of any aspect of my use of the Equipment.

DUE TO ANY CAUSE WHATSOEVER, INCLUDING NEGLIGENCE, BREACH OF CONTRACT OR BREACH OF WARRANTY ON THE PART OF THE RELEASEES in respect of the design, manufacture, selection, installation, maintenance, or adjustment of the equipment, or in respect of the provision of or the failure to provide any warnings, directions, instructions or guidance as to the use of the Equipment. 3. That Snow Valley Resorts (1987) Ltd. is [*its*] employees and agents, shall not be liable for any such personal injury, death or property loss and releases Snow Valley Resorts (1987) Ltd., its employees or agents and waives all claims with respect thereto.

Relevant Statutory Conditions: the CPA and the OLA

The relevant statutory provisions for consideration in this case are set out below:

CPA

Interpretation

1. In this Act,

"consumer" means an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes;

"consumer agreement" means an agreement between a supplier and a consumer in which the supplier agrees to supply goods or services for payment;

"consumer transaction" means any act or instance of conducting business or other dealings with a consumer, including a consumer agreement;
…

"goods" means any type of property;
…

"payment" means consideration of any kind, including an initiation fee;
…

"regulations" means regulations made under this Act;
…

"services" means anything other than goods, including any service, right, entitlement or benefit;

"supplier" means a person who is in the business of selling, leasing or trading in goods or services or is otherwise in the business of supplying goods or services, and includes an agent of the supplier and a person who holds himself out to be a supplier or an agent of the supplier;
…

Application

2. (1) Subject to this section, this Act applies in respect of all consumer transactions if the consumer or the person engaging in the transaction with the consumer is located in Ontario when the transaction takes place.

Exceptions

2) This Act does not apply in respect of,
(a) consumer transactions regulated under the *Securities Act*;
(b) financial services related to investment products or income securities;
(c) financial products or services regulated under the *Insurance Act*, the *Credit Unions and Caisses Populaires Act, 1994*, the *Loan and Trust Corporations Act* or the *Mortgage Brokerages, Lenders and Administrators Act, 2006*;
(d) consumer transactions regulated under the *Commodity Futures Act*;
(e) prescribed professional services that are regulated under a statute of Ontario;
(f) consumer transactions for the purchase, sale or lease of real property, except transactions with respect to time share agreements as defined in section 20; and
(g) consumer transactions regulated under the *Residential Tenancies Act, 2006*.

Rights reserved

6. Nothing in this Act shall be interpreted to limit any right or remedy that a consumer may have in law.

No waiver of substantive and procedural rights

7. (1) The substantive and procedural rights given under this Act apply despite any agreement or waiver to the contrary.

Quality of services

9. (1) The supplier is deemed to warrant that the services supplied under a consumer agreement are of a reasonably acceptable quality.

Quality of goods

(2) The implied conditions and warranties applying to the sale of goods by virtue of the *Sale of Goods Act* are deemed to apply with necessary modifications to goods that are leased or traded or otherwise supplied under a consumer agreement.

(3) Any term or acknowledgement, whether part of the consumer agreement or not, that purports to negate or vary any implied condition or warranty under the *Sale of Goods Act* or any deemed condition or warranty under this Act is void.

(4) If a term or acknowledgement referenced in subsection (3) is a term of the agreement, it is severable from the agreement and shall not be evidence of circumstances showing an intent that the deemed or implied warranty or condition does not apply.

…

93(2)
… a court may order that a consumer is bound by all or a portion or portions of a consumer agreement, even if the agreement has not been made in accordance with this Act or the regulations, if the court determines that it would be inequitable in the circumstances for the consumer not to be bound.

OLA

Occupier's duty

3. (1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.

…

(3) The duty of care provided for in subsection (1) applies except in so far as the occupier of premises is free to and does restrict, modify or exclude the occupier's duty.

Reasonable steps to inform

5. (3) Where an occupier is free to restrict, modify or exclude the occupier's duty of care or the occupier's liability for breach thereof, the occupier shall take reasonable steps to bring such restriction, modification or exclusion to the attention of the person to whom the duty is owed.

The Plaintiff's Arguments on the Stated Case

The Plaintiff argued that s. 9(3) of *CPA* operated to defeat any effort by Snow Valley to disclaim or waive its own negligence or that of its employees or agents in the consumer agreement in question. It argued that in this case the waivers and limitations on liability for the goods and services supplied in the ski package constituted terms and acknowledgments that purported to negate or vary the supplier's deemed warranty under s. 9(1) to supply services of a reasonably acceptable quality and that those terms and acknowledgments contravened the express prohibition in s. 9(3).

Counsel for the plaintiff argued that the *CPA* was designed to protect an identified class of individuals – consumers – by providing a defined set of rights which should not be subject to bargain or compromise and that pursuant to section 7(1) the parties to a consumer agreement cannot contract out of the *CPA*.

Counsel for the plaintiff argued that s. 93(2) was entirely irrelevant as it only applied to *procedures* for consumer remedies, designed for example to prevent a consumer from escaping payment for a service that has been delivered and consumed under a consumer agreement not made in accordance with the *CPA*. The s. 93(2) "saving" provision could not be used to "reinvigorate" a

contract term that has already been rendered void by s. 9(3).

With respect to the *OLA*, the Plaintiff submitted that the provisions of the *CPA* had the effect of articulating the duties of an occupier of land when it is also a *provider of services*. Accordingly, where the activities of an occupier comes within the application of the *CPA*, any attempt to limit its liability under s. 3(3) of the *OLA* is barred by the *CPA,* which strictly forbids the limitation of liability for the quality of services provided.

The Defendant's Argument on the Stated Case

The Defendant in turn asserted that the *CPA* was not designed or intended to apply to recreational or sporting activities. It argued that the purpose of the *CPA* was not simply to protect consumers, but to also create a predictable and stable environment for businesses. Drawing on excerpts from Ontario's Official Report of Debates (Hansard) and in particular the readings of the proposed *CPA* in the Legislative Assembly of Ontario, the Defendant asserted that the *CPA* was enacted in order to protect consumers from fraudsters and unscrupulous operators and that ski resort operators do not fit into this category.

The Defendant referred the Court to case law relating to the enforceability of waivers/releases in the context of recreational sports and skiing: *"The court should be slow to interfere with the contractual arrangements entered into between knowledgeable adults acting under no compulsion and with an apparent understanding of the risks involved*" (See: *Lafontaine (Guardian ad litem of) v. Prince George Auto Racing Assn.* (*4))

In further argument, the Defendant asserted that, in any event, the waiver language did not violate the *CPA*, there being no term, condition or provision in the waiver relating the *quality* of the services provided. Rather, the waiver only operated as a potential defence to claims brought in the courts, where it would be naturally then be subject to the usual scrutiny by the court before it could serve as a bar to the Plaintiff's claim.

The Defendant also argued that s. 93(2) of the *CPA* could in fact be applied by the Court. This section allows a court to order that "a consumer is bound by all or a portion or portions of a consumer agreement even if the agreement has not been made in accordance with the Act or regulations if the court determines that it would be inequitable in the circumstanced for the consumer not to be bound." In this regard the Defendant noted that the Part of the *CPA* containing this section does not even address the question of consumer remedies.

Finally, the Defendant argued that it should be able to benefit from the freedom of contract rights expressly accorded to it as an occupier under s. 5(3) of the *OLA* to restrict, modify, or exclude its duty of care or liability for breach thereof.

The Court's Analysis and Holding

The Court noted that consumer protection legislation is all about consumer protection. As such, the *CPA*'s terms should be interpreted generously in favour of consumers (*5). The Court also noted that consumer protection legislation is inherently consumer focused as its main objectives are:

(i) protecting consumers,

(ii) restoring balance in the contractual relationship between suppliers and consumers, and

(iii) eliminating unfair and misleading practices (*6).

Question 1 - Does the CPA apply to the "Release of Liability" executed by the Plaintiff?

The Court disagreed with the Defendant that the *CPA* was not designed to apply to the circumstances in question. Section 2 of the *CPA* makes it clear that the Act applies to "*all consumer transactions*" subject only to that section. Second, "consumer agreement" is broadly defined to capture "an agreement

between a supplier and a consumer in which the supplier agrees to supply goods or services for payment". "Consumer transaction" is said to mean "any act or instance of conducting business or other dealings with a consumer, including a consumer agreement." Clearly, the Defendant in this case was a supplier of services (the use of a ski facility, ski equipment and a tow rope operated by the Defendant) for payment. As well, the rental agreement and the lift ticket were inescapably consumer agreements because they were the basis upon which the payment was made, entry onto the premises allowed and the services provided. Third, s. 2(2) sets out a limited number and type of transaction to which the *CPA* is not applicable. None of the exceptions even remotely resembles the type of services provided under the consumer agreement in this case.

In the Court's view, "it would offend not just any notion of common sense but also the wide import of the CPA to hold that in the present case: (i) the Plaintiff was anything but a consumer, (ii) the purchase of the ski package was anything but a consumer transaction, and (iii) the Rental Agreement and lift ticket were anything but consumer agreements. Had the legislature sought to exclude waivers of the variety found here from the clutches of s. 9, it could have and would have done so explicitly in the very section where the deemed warranty is imposed. Instead, the CPA contains very plainly and powerfully worded language in s. 7(1): The substantive and procedural rights under this Act apply despite any agreement or waiver to the contrary."

The Court was not persuaded that there was a public policy reason why the *CPA* should not apply to the services provided by ski resorts, noting that it would seem contrary to the idea of consumer protection to afford ski resort operators or extreme sports activity hosts a leg up on say, auto repair shops or service stations, simply because the nature of the activities that are engaged in at ski resorts are inherently more dangerous for consumers than those that would typically accompany an oil change or a car wash.

Accordingly, the Court's answer to Question 1 was therefore "yes", that the *CPA* did apply.

Question 2 - If the answer to Question 1 is yes, was the release of liability on the lift ticket and the executed rental agreement rendered void in law and unenforceable by ss. 9(1) and (3) of the CPA?

The Court answered this question in the affirmative. The terms "negligence, breach of contract or breach of warranty on the part of the releasees" in the rental agreement and "negligence, breach of contract or breach of statutory duty of care on the part of Snow Valley" in the lift ticket were found to be presumptively void, pending the analysis that followed as to whether such otherwise void contract terms were capable of being saved under s. 93(2) of the *CPA*.

In answering this question in the affirmative the Court noted that a term in a consumer agreement is void under the *CPA* not because a transaction has resulted in a demonstrable wrong against a consumer but because the very intention or purpose of the term or acknowledgment was clearly to nullify, negate, vary, or make ineffective an inviolable right contained in the *CPA*. The Court found that the consumer agreement did contain terms and acknowledgments that purported to do this.

Accordingly the Court found that that the above terms and acknowledgments offended both ss. 9(1) and (3) of the *CPA*. By virtue of s. 9(3), those terms were void.

Question 3 - If the answer to Question 2 is yes, is the Release of Liability on the lift ticket and in the executed Rental Agreement rendered void in law as a whole or are the terms or acknowledgments in the Rental Agreement that violate s. 9(3) severable pursuant to s. 9(4) of the CPA?

The Court noted that there is no doubt that s. 9(4) allowed for offending terms and acknowledgements in a consumer agreement to be severed and this was clear from the wording of the subsection. However, this raised the

following questions: who is authorized to sever the offending terms and acknowledgements? When and how can the offending terms and acknowledgements be severed? And, what is the effect of severance on the conveniently termed "remnant consumer agreement"?

In this regard the Court noted the fundamental difference between the respective uses of "void" in s. 9(3) and "severable" in s. 9(4). "Void" carries with it a *fait accompli*: the fact has been done or decided by operation of s. 9(3). Subject to any saving or remedial provision, the offending terms and acknowledgments are inoperable. "Severable" as employed in s. 9(4), however, is not a *fait accompli*: nothing has been decided. The language of the latter subsection is not mandatory. This is a distinction with a difference because the parties, by agreement in the form of words or actions, may opt to carry the consumer agreement to its conclusion. Severance is therefore either actual or constructive. Though the offending terms and acknowledgments are void, the remnant consumer agreement can still be viable and capable of execution by both sides. In this case, there was clearly no agreement to sever the offending terms; indeed the Defendant set up the waivers of liability as a complete defence to the action brought by the Plaintiff to recover her damages. One is thus left with a consumer agreement containing presumptively void terms and acknowledgments because they purport to limit the liability of the supplier for, among other things, breaches of warranty and breaches of statutory duties of care.

Accordingly, the partial answer to Question 3 was therefore "yes". The parties to a consumer agreement, whether by actual or constructive agreement, may simply sever the offending terms and acknowledgments from the consumer agreement, leaving them to carry on with the rights and obligations contained within the remnant consumer agreement. For the complete answer to this question, however, the Court proceeded to address Question 4 below.

Question 4 – Can the Plaintiff nevertheless be bound by the terms of the release of liability on the lift ticket and executed rental agreement by exercise of the court's discretion under s. 93(2) of the CPA?

Having considered the respective arguments of the parties together with the provisions, scheme and overall purpose of the CPA, the Court arrived at the conclusion that the answer to Question 4 must be "yes," noting that it is tempting to conclude that it is not possible for the Plaintiff to be bound by the waivers because those portions of the consumer agreement were void by operation of s. 9(3). Something that is void is a nullity; it is not salvageable. Indeed, the word "void" has a ringing finality to it. Moreover, s. 9(3) was not made subject to any other section in the Act. Although s. 9(4) would seem to allow for the offending term or acknowledgment to be severed from the agreement, that severing can save only the remnant consumer agreement, not its "offending limb".

Nevertheless, the Court did find that s. 93(2) does serve as an overall saving provision for a consumer agreement infected by terms and acknowledgments that offend ss. 9(1) and (3) for a variety of reasons, including:

i) on a technical construction of the CPA, the Court found that s. 93(2) is not limited in application to any isolated portion of that statute, but rather applied to the whole.

ii) Section 93(2) contemplates binding the consumer to "all or a portion or portions of a consumer agreement". The Court interpreted this to mean that s. 93(2) allows for a consideration of the original consumer agreement with all of its terms and acknowledgments. The subsection does not limit the court's scrutiny to only the remnant or non-voided portions of consumer agreements.

iii) The doctrine of severance enables a court to excise an offending provision from an agreement and permit each party to enforce the remainder of its terms that are untouched by the illegality.

iv) Section 93(2) invites the court to explore the inequities involved in allowing the consumer not to be bound by the consumer agreement. This invocation of the court's equitable jurisdiction is not inconsistent with the overall intent of the *CPA* which is to ensure both transparency and integrity of consumer agreements and transactions, and

v) Liability waivers have long been a feature of both tort and contract law. They have been the subject matter of intense judicial scrutiny such that an entire body of case law has built up around them, replete with considerations which extend well beyond the four corners of waivers. Courts have historically imposed a strict test which a defendant/operator must meet before the court will enforce a waiver. In the Court's view, had the legislature intended through the introduction of the *CPA*, and in particular s. 9(3), to render void all waivers for the provision of quality services found in consumer agreements without allowing for recourse to the equitable jurisdiction of the courts, it would have done so in clear, emphatic, and certain language. Instead, it left the door open to considerations of equity in s. 93(2).

The Court accordingly concluded that in situations where a consumer agreement contains terms or acknowledgments rendered presumptively void by the operation of s. 9(3) and where the parties cannot agree to sever those offending terms from the consumer agreement under s. 9(4), that it may exercise its jurisdiction to sever the offending terms of the consumer agreement. It may do so as part of its s. 93(2) inquiry into whether it would be inequitable in the circumstances for the consumer not to be bound by the original agreement, including those terms and acknowledgments that would be void but for the equitable jurisdiction of the court. The onus rests upon the service supplier to satisfy the court that the presumptively void terms should remain in the consumer agreement and bind the Plaintiff. In the case at bar, that onus would fall upon the Defendant/operator – Snow Valley.

Although the Court thus retained jurisdiction to sever the offending terms and acknowledgments, in this case it was not been asked to do so. Question 3 was limited to whether any offending terms and acknowledgments were capable of severance. Moreover, the parties did not ask the Court to embark on any determination of the equities in this case. There was an insufficient evidentiary basis before the Court for it to do so. Each case turns upon its own facts. Some considerations which a court might look to would include: the nature of the service supplied, the sophistication of the parties involved, whether the contract was bargained at arm's length, the degree of completion of the contract, the benefit derived by the consumer, and whether it would be against public policy to enforce the contract. (*7)

The answer to Question 4, which is also a partial answer to Question 3, was therefore "yes". The terms and acknowledgments in question are severable under s. 9(4) by either the parties themselves or as part of the exercise of the court's equitable jurisdiction under s. 93(2). Accordingly, it remains within that equitable jurisdiction whether to sever the offending terms, or, if not, to then bind the Plaintiff to those that violate ss. 9(1) and (3).

Question 5 – If the provisions of the CPA negate the application of the waivers, do the provisions of the OLA supersede those of the CPA to allow Snow Valley to rely on the waivers?

The Court noted that Sections 3(3) and 5(3) of the *OLA* permit occupiers to restrict, modify or exclude the duty of care imposed on them to take reasonable steps to ensure that persons entering onto their property are reasonably safe. However, that allowance is subject to the occupier being "free" to do so. The language in the *OLA* is not entirely permissive: it does not say that the occupier "is free" to restrict that duty; nor does it suggest that the occupier "may" or "is entitled to" restrict that duty. Instead, we see the

wording "in so far as the occupier of premises is free" in s. 3(3) and "where an occupier is free" in s. 5(3). The Court interpreted this to mean that the ability to restrict a duty or any liability was not self-evident but instead must derive from a context where the occupier is not restricted from doing so. In a consumer transaction agreement, the occupier is not free to restrict its liability for the provision of services of an unreasonable quality because of the operation of ss. 9(1) and (3) of the *CPA*.

The *OLA* is certainly not assigned any paramount status over consumer protection legislation. The Court accordingly concluded that where, as here, an occupier has made its premises subject to a consumer agreement for the supply of services, the *CPA* serves to impede the freedom of that occupier to restrict, modify or exclude its duty to provide services of a reasonable quality in a consumer transaction. The answer to Question 5 was accordingly "no"; that the provisions of the *OLA* do not supersede those of the *CPA* so as to allow Snow Valley to rely on the offending terms of the waivers.

The Disposition: The "Go Forward" Onus Was Now on the Supplier

Unfortunately for the parties, at this point the case effectively hit at least a temporary "dead end". The Court noted that there was nothing in the *CPA* which directed *how* the parties should go about seeking the equitable determination of the Court under s. 93(2) in circumstances where an impugned waiver is set up as a defence to an action for damages. The Court noted that the "Stated Case" approach may not be appropriate given that a consideration of the equities and what is "fair" almost always requires an evidentiary record whereas the Stated Case involves stipulated facts presented to the court and there is no evidence from witnesses. Hence, in this case, the "dead end". While noting that a motions judge would have the discretion under s. 93(2) to still impose the "offending terms", the reality is that it is hard to adjudicate on the point without a formal trial.

Nevertheless, the Court made it abundantly clear that the onus in this case now rested with the Defendant to persuade the Court that it would be inequitable not to bind the Plaintiff to all or some portions of the consumer agreement, including the presumptively void terms and acknowledgements found in the release of liability and the rental agreement. A ruling as to whether the particular waivers at issue would survive a review under s. 93(2) would have to wait until a formal trial.

The "Take Away"

As mentioned at the outset, this case serves as a reminder that the notion of "freedom of contract" has its limitations. Even clearly drafted language, properly incorporated into a contract may not be enforceable if the subject matter is regulated by statute. On a more technical level, this case also serves as a reminder that, while there is economy in seeking an interim adjudication in the course of a lawsuit, there frequently remains the need for a formal trial.

Gordon Hearn

Endnotes

(*1) 2017 ONSC 222 (CanLII)
(*2) S.O. 2002 c. 30 Sched. A
(*3) R.S.O. 1990, c. O.2
(*4) 1994 CanLII 1532 (BC SC), at pp. 20-21.
(*5) *Seidel v. TELUS Communications Inc.*, 2011 SCC 15 (CanLII), [2011] 1 S.C.R. 531, at para. 37.
(*6) See: *Ramdath v. George Brown College of Applied Arts and Technology,* 2012 ONSC 6173 (CanLII), 113 O.R. (3d) 1531, at para. 36; affirmed in *Ramdath v. George Brown College of Applied Arts and Technology,* 2013 ONCA 468 (CanLII), 307 O.A.C. 196; referring to *Richard v. Time Inc.*, 2012 SCC 8 (CanLII), [2012] 1 S.C.R. 265, at para 50.
(*7) See: *Grainger v. Flaska*, 2013 ONSC 4863 (CanLII), 31 C.L.R. (4th) 23, at paras. 77-79 and *Connect Electric Inc. v. Pullen*, 2013 ONSC 1837 (CanLII), at para. 57.

3. EU-Canada Trade Agreement: An Overview

On February 15, 2017, the European Parliament in Strasbourg approved the *Comprehensive Economic and Trade Agreement* ("CETA") between Canada and the European Union ("EU"). CETA was signed by Canada and the EU in October 2016. The EU national parliaments must now approve CETA before it can take full effect; however, it is expected that the phase-in of the vast majority of its benefits will begin within weeks. (*1) Canada's Senate must still ratify CETA (through Bill C-30). The provinces must then bring some of their laws into compliance, as necessary.

The Canadian government is promoting CETA as a deal that will provide a "competitive advantage for all Canadians" by boosting trade, creating jobs and allowing growth for small to medium sized Canadian companies by reducing barriers to trade. (*2) However, the deal has been met by strong opposition in both Canada and EU member states.

Once in force, CETA will reduce or eliminate 98% of tariffs on products imported to Canada from the EU and vice-versa, with the remaining 2% to be eliminated over 3-7 years. (*3) CETA also contains provisions governing other trade issues such as the ability of EU companies to bid on Canadian government procurement contracts and vice-versa, intellectual property rights, dispute resolution, maritime transportation and labour mobility. Here are some highlights of the deal:

Market Access for Goods
This section includes a commitment by Canada and the EU to lower or eliminate tariffs and to not apply restrictions or prohibitions (for example, regulatory or technical restraints) on the import or export of goods, and to treat imported products no less favourably than similar goods produced domestically. This applies to all sectors of the economy. As stated above, the day that CETA comes into force, 98% of Canada and the EU's tariff lines will be duty free for originating goods traded between the two parties with the remainder being phased out over time. For example, duties on motor vehicle parts will be eliminated immediately, while those for trucks will be eliminated over 3 years. (*4)

There are also tariff rate quotas (TRQs) applied in certain cases. For example, frozen cod fillets are not one of the products where tariffs will be immediately eliminated; however a TRQ applies to 1000 tonnes of cod annually which can be imported duty free and any amounts in excess of the TRQ will be subject to the existing tariff until it is phased out over 7 years.(*5)

Of note, goods of a party that are sent to the other party for repair or alteration can re-enter on a duty-free basis after the repair is completed. However, for ships, boats and floating structures that re-enter Canada, the value of the repair or alteration to these goods is subject to customs duties as per Canada's tariff schedule. (*6)

Rules of Origin
As stated above, the elimination of duties only applies to goods originating in Canada or the EU. Accordingly, CETA establishes procedures for determining whether a product satisfies this requirement by having undergone sufficient production in either Canada or the EU to be deemed originating. CETA requires that only the value of specific, key non-originating components be considered thereby minimizing the number of materials that must be tracked for origin purposes. (*7)

For example, for automobiles, CETA requires that they have 50% originating content in order to qualify for preferential treatment. This percentage will be raised to 55% after 7 years. CETA also has a TRQ in place allowing for up to 100 000 autos per year containing up to 70% of their value to be of non-Canadian components to be exported on a preferential EU tariff. (*8)

A certification of origin (origin declaration) must be completed by the exporter to enable the importer to claim preferential tariff treatment under CETA. This can take the form of a simple statement on an invoice indicating that the goods

meet the rule of origin. The exporter, or importer, as applicable, upon request, must provide the declaration to either party's customs officials. Importers, exporters and producers must maintain records that support the origin status of the product. (*9)

Sanitary Measures

CETA allows each party to maintain their right to take measures necessary to protect against risks to food safety, animal or plant life or health. However, it requires these measures to be science-based, transparent, and applied only to the extent necessary for protection, so as not to create an unjustifiable trade restriction. (*10)

CETA also recognizes distinct regional conditions in cases of pest or disease outbreak in Canada and the EU. Accordingly, import restrictions can be limited to the region affected rather than the entire territory of the exporting party. (*11)

Customs

Effective and efficient border measures expediting the movement of foods wile maintaining national safety and security are goals of CETA with respect to customs. Parties will be required to electronically publish all regulations, policies and requirements with respect to imports, exports and customs to allow easy access and transparency. CETA also allows goods to be released at the first point of arrival and importers may remove goods from the control of customs before the payment of duties and taxes. However, customs will retain the right to demand that the importer provide a guarantee of final payment either through a deposit or a surety. CETA includes a commitment by the parties to coordinate their different agencies to concentrate all import and export data and document requirements in a single location. (*12)

Investments

CETA prohibits the parties from imposing quantitative measures that may inhibit the ability of an investor to establish an investment. It specifically focuses on the number of enterprises to carry out an economic activity, the total value of the transactions or assets, the number of operations or the number of individuals employed. (*13)

The deal also requires the parties to provide each other's investors with treatment that is no less favourable than that granted to their domestic counterparts or third country investors in like situations. Governments cannot unfairly discriminate against foreign investors in the application of their laws. (*14)

There are two Annexes to the deal that contain exclusions to the investment rules. For example, Canada has excluded areas such as social services, cultural industries, rights of socially disadvantaged peoples, aboriginal rights, fishing-related activities, and public utilities. Canada also maintains the ability to review major acquisitions from investors; the threshold is $1.5 billion. (*15)

A dispute resolution mechanism is also created. Parties are encouraged to use their domestic court system first and have up to 10 years to exhaust such remedies before a claim under CETA is barred. Additionally, mediation is encouraged as the time-bar clock is suspended while mediation is ongoing. Before resorting to arbitration under CETA, parties must request a consultation. Finally, Canada and the EU will appoint 15 members to a permanent Tribunal where cases can be heard before a division of the Tribunal, which is made up of a random selection of members. (*16)

Temporary Entry of Natural Persons for Business Purposes

CETA addresses administrative requirements including labour market tests or economic needs tests that impose time delays on business entrants. The requirements differ based on the purpose of entry (e.g. intra-corporate transfer, investor visit, contract service suppliers, independent professionals. CETA also includes the mutual recognition of certain professional qualifications by allows similar professional organizations to enter into mutual recognition agreements to facilitate the entry of professionals, irrespective of their training, citizenship or where they were educated. (*17)

Financial Services

In keeping with the general theme of CETA, the deal requires the parties to treat each other's financial institutions no less favourably than they treat their own institutions or those of a third country. Exceptions to this are set out in Annex III. There is also a carve out to allow parties to take restrictive measures where reasonably necessary to protect their investors, policy holders and the integrity/stability of the financial system. (*18)

International Maritime Transport Services

CETA establishes that government measures affecting this sector (passenger and cargo and including the direct contracting of suppliers of other transport services) are subject to the investment provisions of the deal and includes an obligation not to maintain discriminatory measures in terms of accessing/using ports as well as their infrastructure. Some highlights of this section include obligations to allow maritime service providers to provide the repositioning of owned or leased empty containers on a non-revenue basis as well as feeder services for international cargo between ports in each other's territory, a prohibition on cargo-sharing agreements with third countries and an obligation to provide these suppliers with the ability to contract directly with road and rail carriers for door-to-door multimodal transport operations. (*19)

Government Procurements

Finally, CETA allows companies from the other party to bid on government procurement contracts above a certain monetary value. This applies to contracts of a wide range of entities (*e.g.* central governments, sub-central, municipal, government enterprises, crown corporations). These entities are set out in Annexes to the deal along with the relevant monetary threshold. This allows Canadian suppliers "for the first time, guaranteed and secure access to opportunities to supply their goods and services to EU regional and local governments" and vice versa. Canada has also agreed to supply a single electronic point of access for procurement tenders. (*20)

Jaclyne Reive

Twitter: @jaclyne_reive
Blog: https://jaclynereive.wordpress.com

Endnotes

(*1) "Against all odds, CETA, Canada's trade deal with Europe moves forward. Now what?" The Globe and Mail, online: < http://www.theglobeandmail.com/report-on-business/economy/against-all-odds-ceta-moves-forward-now-what/article34031523/>
(*2) "Agreement Overview" Government of Canada, online: <http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/overview-apercu.aspx?lang=eng>
(*3) Ibid.
(*4) "CETA: Chapter Summaries" Government of Canada, online: < http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/chapter_summary-resume_chapitre.aspx?lang=eng>
(*5) Ibid.
(*6) Ibid.
(*7) Ibid.
(*8) Ibid.
(*9) Ibid.
(*10) Ibid.
(*11) Ibid.
(*12) Ibid.
(*13) Ibid.
(*14) Ibid.
(*15) Ibid.
(*16) Ibid.
(*17) Ibid.
(*18) Ibid.
(*19) Ibid.
(*20) Ibid.

4. STANDING BEFORE THE CANADIAN TRANSPORTATION AGENCY

Serial aviation litigant, Dr. Gabor Lukács (Dr. Lukács) has at least 13 appearances before the Federal Court of Appeal ("FCA") in challenging decisions of the Canadian Transportation Agency ("CTA"). Dr. Lukács' latest quest to protect not only his personal, but also the broader Canadian consumer interests in the air transport field, will reach a full hearing before the Supreme Court following the recent decision of the highest Court to grant a leave application brought by Delta Airlines (*1).

The matter before the Supreme Court concerns Dr. Lukács's standing to bring a complaint before the CTA. In 2014, the CTA dismissed a complaint brought by Dr. Lukács concerning the practices of Delta Airlines *vis à vis* "large passengers" (*2). This stemmed from an e-mail sent from Delta Airlines to a passenger who complained that his comfort was affected by a "large" passenger. Via e-mail, Delta advised that "We recommend that large passengers purchase additional seats".

Dr. Lukács brought his complaint pursuant to s. S. 67.2 (1) of the Canada Transportation Act (the "Act") (*3), alleging that Delta's stated practice was (1) discriminatory, (2) in breach of s. 111(2) of the *Air Transportation Regulations* which exclude an airline from terms and conditions of air carriage that give any undue or unreasonable preference or advantage to or in favour of any person (*4), and (3) contrary to previous cases decided by the CTA concerning the accommodation of disabled persons.

The CTA was not persuaded that Dr. Lukács had standing to bring the complaint and afforded him an opportunity to make submissions as to his standing. Following such submissions, the CTA decided against Dr. Lukács.

In its decision denying standing to Dr. Lukács, the CTA refuted that Dr. Lukács had either a private or public interest standing to bring his complaint. A private interest corresponds to a direct personal interest in the issue to be decided. As per the Supreme Court of Canada, a private interest has to be read in a manner that excludes the "mere busybody litigant" (*5). The CTA, before whom Dr. Lukács regularly appears, clearly had concerns about limiting the floodgates to consumer advocates petitioning the Agency.

The CTA denied that Dr. Lukács was "aggrieved or affected" by the policy of Delta Airlines. Although no specifics were submitted as to the application of Delta Airlines's policy, the CTA expressed that there was nothing to indicate that Dr. Lukács at six feet tall and 175 pounds would be captured by the policy. Citing the British Columbia Supreme Court, the CTA held that private interest standing test could not be satisfied by a mere hypothetical (*6).

As concerned Dr. Lukács's public interest standing arguments, the CTA looked to the Supreme Court case law on standing before the courts of common law. The CTA repeated the conclusion of the Supreme Court that public standing to litigate before the courts should be limited to instances where the constitutionality of legislation or of administrative actions are at issue (*7). As Dr. Lukács's complaint to the CTA raised neither of these threshold issues, public interest standing was denied.

Dr. Lukács brought a statutory appeal of the CTA decision before the FCA (*8). Dr. Lukács conceded his arguments as concerned private interest standing, therefore the appeal proceeded with respect only to the denial of public interest standing for Dr. Lukács to bring the complaint.

The Court first addressed the standard of review applicable to the decision of the CTA. The FCA limited its scope for intervention by finding that the standard of review of the decision of the CTA was one of reasonableness given that the issue before the Court fell squarely within the expertise of the Agency.

This notwithstanding, the FCA allowed the appeal. The Court held that the limitations on standing imposed in the civil litigation arena,

underpinned by concerns as to the allocation of judicial resources, should not have been superimposed by the CTA on the regulatory framework established by Parliament through the *Act*. The FCA relied on Supreme Court case law indicating that the question of standing before a tribunal must be resolved in accordance with the enabling statute (*9).

S. 67.2 (1) of the Act confers on the CTA jurisdiction to rule on an allegation of discriminatory terms or conditions upon a complaint brought by "any person". Accordingly, per de Montigny J.A. for a unanimous bench of the FCA, it is not requisite under the Act that the complainant be directly affected by the impugned terms or conditions.

For these reasons, the appealed decision of the CTA depriving Dr. Lukacs of standing on his complaint was erroneous at law and unreasonable, warranting the FCA to intervene pursuant to its review mandate.

On February 23, 2017, nine judges of the Supreme Court granted Delta Airlines's application for leave to appeal to the highest court. The outcome could either fuel or hinder Dr. Lukács' unwaning appetite to litigate perceived unfair and anti-consumer injustices of airline practices before the CTA.

Mark Glynn

Endnotes

(*1) *Delta Air Lines Inc. v. Gábor Lukács*, 2017 CanLII 8567

(*2) Decision No. 425-C-A-2014 (November 25, 2015) *Complaint by Gábor Lukács against Delta Air Lines, Inc. carrying on business as Delta Air Lines, Delta and Delta Shuttle*

(*3) *Canada Transportation Act*, SC 1996, c 10

(*4) *Air Transportation Regulations* (SOR/88-58)

(*5) *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45

(*6) *Downtown Eastside Sex Workers United Against Violence Society v. Attorney General (Canada)*, 2008 BCSC 1726

(*7) *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)* [1992] 1 S.C.R. 236

(*8) *Lukács v. Canada (Transportation Agency*), 2016 FCA 220

(*9) *Innisfil Township v. Vespra Township*, [1981] 2 S.C.R. 145

5. Corporate Defendants Successfully Having Charges Stayed Under New "Speedy Trial" Requirements.

Overview

Last July, in its decision in *R. v. Jordan* (*1), the Supreme Court of Canada ruled that delays in criminal and pseudo-criminal proceedings were taking too long, in violation of section 11 of the *Canadian Charter of Rights and Freedoms* (*2). Henceforth, new default rules would apply, whereby pure criminal matters in a superior court would have to be brought to trial within 30 months; and matters in the provincial courts would have to be done within 18 months (*3).

The 18-month timeline affects many regulatory matters, ranging from occupational health and safety matters to highway traffic offences and the transportation of dangerous goods. Thus, it is relevant to any transportation-focussed business.

In short, the law now requires the court to: (i) calculate the total length of time for the matter to get to trial, (ii) deduct any delays attributable to the defence, and (iii) compare the net delay to the above-noted presumptive ceiling (usually 18 months for an alleged violation of a regulatory offence, such as a charge under the Ontario *Highway Traffic Act*). If the delay is beyond the presumptive time limit, the presumed prejudice can be rebutted, but generally only if there were unusual, discrete events, or if the case is particularly complex. The new framework also includes some provision for "transitional" cases, where the underlying events occurred prior to the release of *R. v. Jordan*. A full discussion of the new rules can be found in our July 2016 Newsletter.

In the six months following the release of the *R. v. Jordan* decision, provincial courts have begun to address several points arising from the Supreme Court of Canada's directive. For example, in some relatively high profile matters, such as *R. v. Stanley* (*4) and *R. v.* McCready (*5), the Ontario Court of Justice has thrown out serious drug charges on account of the Crown's lackadaisical attitude towards evidentiary disclosure. Of more particular note to businesses, it has now become clear that the court will apply the *R. v. Jordan* considerations to protect corporations (and not just individuals) from inefficient prosecutions.

Thus, a well-thought-out corporate strategy for tackling regulatory charges can mean the difference between having a charge stayed and facing a likely fine.

R. v. Live Nation

In *R. v. Live Nation* (*6), the accused (both corporate and individual) were charged with several violations under Ontario's *Occupational Health and Safety Act* relating to the collapse of a concert stage at Downsview Park in Toronto, Ontario on June 16, 2012. The charges were not laid for almost a full year, until June 6, 2013. At the time of the hearing in December 2016, a final trial of the matter on its merits was not anticipated until January 27, 2017.

The Crown argued that the new *R. v. Jordan* analysis did not apply to corporations, relying on an old 1992 case, called *R. v. CIP Inc.* (*7), which also arose pursuant to the *Occupational Health and Safety Act*. *R. v. CIP* was decided pursuant to the prevailing regime that was overturned by *R. v. Jordan*. At the time, the Supreme Court of Canada had held that there was no presumption of prejudice to a corporation on account of a 19-month delay. It held that such an inference of prejudice must be linked to the liberty and security interests of an accused, rather than the fair trial interest; and since a corporation does not have a liberty or security interest, it would have to lead actual evidence of an irremediable prejudice resulting from the delay. In other words, a corporation could not rely on an inference. Of course, the presumptive periods supplied by the *R. v. Jordan* framework are codified inferences. Thus, there is a disconnect.

In *R. v. Live Nation,* the Honourable Justice Nakatsuru recognized that corporate and individual accuseds were treated differently

under the old, pre-*Jordan* law. However, the Court cited other case law for the proposition that a corporate accused could be denied the right to make a full-answer-and-defence by reason of a delay in the prosecution. For example, a corporation could be prejudiced because witnesses' memories would fade over time. Moreover, there was a basis in the case law to show that there was a societal interest in an efficient judicial system, even if specific prejudice to a corporate accused could not be presumed.

Beyond the foregoing, the Court also rejected the Crown's argument because, in *R. v. Jordan*, the Supreme Court of Canada explicitly overruled its older decisions, which had provided the basis for the old system, including its well-known decisions in *R. v. Morin* (*8) and *R. v. Askov* (*9). In other words, we are now in a *Brave New World*, without any holdovers from the old law (except for the transitional provisions).

The Court therefore went on to consider the reasons for the delay in the circumstances, including discrete events and the complexity of the case, as well as the transitional rules. In the end, it ruled in favour of the Crown and permitted the prosecution to continue.

Despite the fact that the accused lost their application on the facts, the principle that *R. v. Jordan* serves to protect corporations was endorsed in the strongest possible terms.

Mississauga v. Uber

Similar arguments were advanced in *Mississauga (City) v. Uber Canada Inc.* (*10), but with a different final outcome. Both Uber and an individual applicant were successful in having their charges stayed.

In the *Uber* matter, several municipal bylaw charges were laid under the City's "Public Vehicle Licensing Bylaw". Two charges were laid against Uber and 28 were laid against its drivers. The parties agree to begin with this matter as a test case, proceeding only against Uber and one of the drivers. The other drivers would be bound by the results.

On the facts, Uber was alleged to have been acting as a broker without a licence, contrary to a municipal bylaw. The charge against it was slightly more than 24 months old. Both the driver and the company argued that the delay was all attributable to the Crown and not to them.

Justice of the Peace Quon relied on the *CIP* decision at issue in the *Live Nation* litigation (noted above) for the proposition that the *R. v. Jordan* framework applied in the circumstances. That case had suggested that all regulatory or public welfare statutes should be treated, in principle, the same as criminal matters with respect to the *Charter* right to a speed trial.

As in *R. v. Live Nation*, the accused advanced an argument that *R. v. Jordan* had obviated the necessity to conduct a "prejudice" review. The Court agreed.

This time, in *Mississauga v. Uber*, the Court focussed on the Supreme Court's call for a culture shift in the *R. v. Jordan* decision itself. The Court highlighted language to the effect that the ability to provide speedy trials is "an indicator of the health and proper functioning of the system itself"; that it is "an essential part of our criminal justice system's commitment to treating presumptively innocent accused persons in a manner that protects their interest in … a fair trial"; and that "the longer a trial is delayed, the more likely it is that some accused will be prejudiced…"(*11). In short, the Court again gave strident comments that corporations were, indeed, entitled to the protection of the new regime.

Again, the Court engaged in a lengthy review of the history and circumstances of the case, this time including a determination as to whether any waiver of delay was made, the legitimacy of the purposes for which certain procedural motions were made, the existence of "discrete events", the complexity of the case, and transitional considerations.

In the result, the charges were stayed.

Conclusion

The conclusion is a positive one for corporations facing regulatory and pseudo-criminal charges. These cases suggest that they will be entitled to the full benefit of the new *R. v. Jordan* regime. It follows, then, that planning and strategy at the outset of a corporation's defence will take on an increased significance.

Alan S. Cofman

Endnotes
(*1) 2016 SCC 27.
(*2) Part I of *The Constitution Act, 1982*, being *Schedule B* to the *Canada Act* (U.K.), 1982, c. 11, Part I, s. 11(b).
(*3) Deductions are made for any delay that is attributable to the accused or for matters where the accused waived its rights (*e.g.*by consenting to an adjournment for a more convenient trial date)
(*4) 2016 ONCJ 730.
(*5) 2017 ONCJ 15.
(*6) 2016 ONCJ 735.
(*7) [1992] 1 S.C.R. 771.
(*8) [1992] 1 S.C.R. 771.
(*9) [1990] 2 S.C.R. 1199.
(*10) 2016 ONCJ 746.
(*11) *Ibid*. See especially paragraph 88.

DISCLAIMER & TERMS

FERNANDES HEARN LLP

155 University Ave. Suite 700

Toronto ON M5H 3B7

416.203.9500 (Tel.) 416.203.9444 (Fax)

CONTEST

This month we are giving away a complimentary ticket for attendance at our annual seminar day - Wed. January 17th 2018 in Toronto - for the first individual to email us the name of city depicted in photograph on page 22. Email your answer to info@fernandeshearn.com with a subject line "Newsletter contest". First response with the correct answer wins.