JUNE 2013

Newsletter

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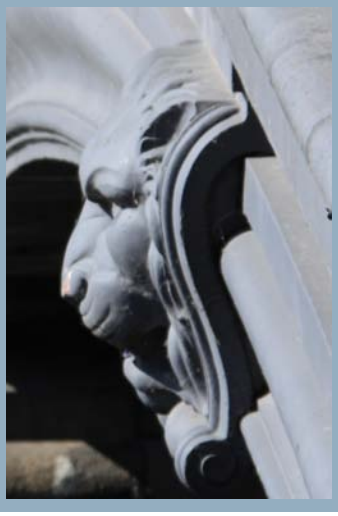

Dispute Resolution for Air Travelers - CTA

The Canadian Transportation Agency is an independent administrative tribunal of the Government of Canada. It is responsible for:

1. dispute resolution - to resolve complaints about transportation services, fares, rates, and charges;
2. accessibility - to ensure that the national transportation system is accessible, particularly to persons with disabilities; and
3. economic regulation - to provide approvals, licences and to make decisions on matters involving federally-regulated air, rail and marine transportation.

Every year, the Canadian Transportation Agency deals with hundreds of individuals in their disputes with rail, marine and air transportation service providers. The vast majority of complaints received involve air carriers (both Canadian and international). In 2011-12, the Agency processed some 685 air travel complaints on issues ranging from lost baggage to flight disruptions and delays. The majority of the Agency's work is driven by complaints from travellers and occasionally other interested parties. Each case is decided on its own merit and the resulting decisions are only applicable to the carrier or carriers named in the complaint. In all cases, the Agency assesses the complainant's case against the carrier's tariff – the contract between the passenger and the air carrier that includes the terms and conditions of carriage.

FIRM AND INDUSTRY NEWS

• **Fernandes Hearn LLP** is pleased to announce that the Firm has been listed for inclusion in Chambers and Partners Global 2013 as one of the best "Shipping" Law Firms in Canada.

• **Gordon Hearn** will be representing the Firm at the Conference of Freight Counsel meetings to be held in Washington, D.C. on June 16 and 17.

• **Rui Fernandes** will be presenting a paper on "Constitutional Jurisprudence in Transportation Law – Perspectives on Canadian Federalism and the Division of Powers" at the **Commons Institute's** *Seminar on Supreme Court and Constitutional Litigation* in Toronto on June 27th, 2013.

• **Gordon Hearn** will be speaking at the 2013 T2 meeting of the Transported Asset Protection Association (Americas) at Redmond, WA on July 11th on "Managing Risks in Intermodal Contracts of Carriage".

• **CBMU Golf Day** – August 28th – Richmond Hill Ontario Canada.

• **International Union of Marine Insurers (IUMI)** annual meeting – London England – 15th to 18th of September. **Rui Fernandes** will be representing the firm at the meeting.

• **Kim Stoll will** be speaking at the 2013 **Canadian Transport Lawyers Association** Annual Conference – Quebec City, Canada- 19th to 21st of September, 2013 on "Trucking Modal Update 2013". Gordon Hearn will also be in attendance representing the firm.

• **International Marine Claims Conference** – Dublin Ireland – 25 to 27 September. **Gordon Hearn** will be representing the firm at the conference.

• **CMI Symposium** - Dublin Ireland – 27 September to 4 October.

• **Women's International Shipping and Trading Association (Wista)** 1 to 4 October – Montreal, Quebec, Canada. **Kim Stoll** will be representing the firm at the conference.

• **Rui Fernandes** will be presenting a paper on general average in Montreal at the meeting of **The Association Mondiale de Dispacheurs / International Association of Average Adjusters** on October 8th.

• **2013 Surface Transportation Summit** 16 October Mississauga, Ontario Canada. **Kim Stoll** and **Martin Abadi** will be representing the firm at the summit.

Tariffs are required to be:

1. clear;
2. just, reasonable, not unduly discriminatory;
3. applied by the carrier; and
4. consistent with international agreements or conventions to which Canada is a signatory.

Two examples of such complaints and consequent decisions of the CTA are:

a) In decision number 227-C-A-2013 released June 12, 2013, "the Canadian Transportation Agency ruled on the reasonableness and clarity of WestJet's international tariff provisions related to its denied boarding compensation.

In response to a complaint alleging that WestJet's international tariff contained several unreasonable and conflicting provisions respecting denied boarding, WestJet now must provide compensation to passengers when affected by denied boarding on flights to and from Canada. The Agency has ordered WestJet to revise its existing rules for travel to and from Canada.

In addition, the Agency has disallowed tariff provisions that exempt WestJet from liability for overbooking a flight. This is irrespective of whether that overbooking occurred for reasons outside of the carrier's control or if WestJet gives the passenger a travel credit or a full refund.

The Agency "is of the view that passengers should be able to fully understand their rights and the remedies available to them simply by reading the tariff, which is the contract between the carrier and the passenger.

A carrier meets its tariff obligation of clarity when, in the opinion of a reasonable person, the rights and obligations of both the carrier and passengers are stated in such a way as to exclude any reasonable doubt, ambiguity or uncertain meaning.

When considering the reasonableness of a carrier's tariff, the Agency strikes a balance between the rights of passengers to be subject to reasonable terms and conditions of carriage and the carrier's statutory, commercial and operational obligations.

The Agency has the authority to address the terms and conditions of carriage for domestic traffic on complaint and for international traffic on complaint and its own motion. In these contexts, the Agency has the power to suspend, disallow or substitute the terms and conditions of carriage."

b) In a decision number Decision No. 239-C-A-2013 released June 18th, 2013, the Canadian Transportation Agency ruled on the reasonableness and clarity of the international tariff applied by Swiss International Air Lines (Swiss), and if it was properly applied.

"Today's decision is in response to seven complaints alleging that Swiss improperly cancelled on-line purchased tickets.

Although the passengers were refunded for the tickets, the Agency has ordered the carrier to:

- compensate one complainant for all expenses incurred as a result of the cancellation, by July 18, 2013.
- allow all other complainants to be transported on the same conditions, at the same price as the ticket originally booked by them, by June 18, 2014.

The Agency is of the view that passengers should be able to fully understand their rights and the remedies available to them simply by reading the tariff, which is the contract between the carrier and the passenger.

The applicable tariff states that Swiss reserves the right to cancel reservations and/or tickets with an erroneously quoted fare by reason of a technical failure prior to it being detected and corrected, and to void the purchased ticket and refund the amount paid by the customer and/or offer the customer the ticket at a published fare that should have been available at the time of booking.

In this case, the Agency concluded that the tariff rule did not clearly set out Swiss's policy with respect to the cancellation of tickets with erroneously quoted fares. Furthermore, Swiss did not properly apply its terms and conditions of carriage governing the cancellation of tickets as set out in its tariff.

On a preliminary basis, the Agency also found the tariff rule to be unjust and unreasonable as it was disadvantageous to consumers. The Agency is providing Swiss with the opportunity to demonstrate, by July 9, 2013, why the tariff rule in question should not be disallowed by the Agency."

Rui M. Fernandes

2. Duty of Insurance Brokers

The Court of Appeal for Ontario had occasion recently to revisit the duty of an insurance broker to a client when the broker failed to offer an insurance benefit to the client. The Court confirmed that even where a broker is negligent, there must be a causal connection of the negligence to the loss.

The client sued the insurance broker in negligence, alleging that it failed to offer optional income replacement benefits and that he suffered a loss as a result. The trial judge dismissed the action. His Honour accepted that the broker owed the client a duty of care and breached the applicable standard of care by failing to properly offer optional income replacement benefits. However, he found that the client failed to show on a balance of probabilities the necessary causal connection between the breach and his loss. The client appealed, arguing that on a claim arising out of insurance broker negligence, the claimant need not prove that the acts or omissions of the insurer caused the loss.

The Court of Appeal agreed with the trial judge and disagreed with the client.

The insurance broker context of the claim did not relieve the client of the requirement to prove that the broker's breach caused his loss. The trial judge did not err in finding that the client would not have purchased additional insurance had it been offered.

Counsel for the client argued that an insured need only show that the broker had a duty to inform the insured, that it breached its duty of care and that there was a gap in coverage. The claimant submitted that this exception from the normal rule that a claimant must prove causation can be justified by the fact that insurance contracts are different from normal contracts and that, to do otherwise, would place an impossible burden on the insured.

The Court of Appeal could not agree with this submission.

The Court summarized the test for determining when it is appropriate for an appellate court to depart from a trial judge's findings of fact: appellate courts should only interfere where the trial judge has made a "palpable and overriding error which affected his assessment of the facts."

> The very structure of our judicial system requires this deference to the trier of fact. Substantial resources are allocated to the process of adducing evidence at first instance and we entrust the crucial task of sorting through and weighing that evidence to the person best placed to accomplish it. As this Court and the House of Lords have repeatedly emphasized, it is the trial judge who is in the best position to assess the credibility of testimony. An appellate court should not depart from the trial judge's conclusions concerning the evidence "merely on the result of their own comparisons and criticisms of the witnesses": see Lord Sumner in The *S.S. Hontestroom, supra,* at p. 47.

In this case, the trial judge found as a fact, after assessing the evidence that the

client would not have purchased the additional insurance. The Court of Appeal was persuaded that the trial judge made any palpable and overriding error in making this finding of fact.

> In our view, the trial judge carefully reviewed the relevant facts and reached a conclusion that was open to him. He noted that the appellant had never before purchased anything other than basic automobile insurance coverage and that according to the insurer's records, the appellant's wife indicated that optional coverage was declined because there was no need. He also drew, permissibly in our view, an adverse inference against the appellant because his wife, who dealt with the respondent's representatives, provided no evidence about her dealings with those respondents.

The Court also stated that it did not agree that requiring proof of the elements of the tort would put an impossible burden on the insured. The Court noted that the difficulty in this case was that there was nothing but the bald and self-serving assertion in the client's affidavit that he would have purchased the additional insurance. There was nothing in the record to explain why the client would have taken the additional insurance. Against the bald assertion was the client's history of never taking the additional coverage although he and his wife had dealt with at least five different insurance companies over the years. There was the significant gap in the client's case because of his failure to call his wife as a witness, as it was she who had dealt with the broker on all but one occasion.

The appeal was dismissed.

Rui M. Fernandes

3. Canada's Anti-Spam Legislation

Canada's new anti-spam law has been passed, but is not yet in force. A specific date for coming into force of the law will be set in the coming months. Once in force, it will allow for investigations of alleged violations of the law.

The full name of the legislation is **An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act (S.C. 2010, c. 23).**

For the purposes of this article the legislation will simply be referred to by its common name "CASL"

The new law will affect any individual, business and organization that:

1. Makes use of commercial electronic messages
2. Is involved with the alteration of transmission data
3. Produces or installs computer programs

The fundamental principle is that you can only carry on these activities if you have the recipient's consent.

The anti-spam portion of CASL prohibits a sender from transmitting a commercial electronic message ("CEM") to an electronic address unless the intended receiver consents to its receipt and the message includes certain prescribed information. CEM's include messages sent by any electronic means. It includes email, text, instant messenger or any other similar means of telecommunication. The word "commercial" refers to anything that "encourages participation in commercial activity," including and offer to purchase, sell or lease goods or services; an offer to provide a business, sell or lease investment or gaming opportunity; or advertising or promotion of these activities or of a person carrying out or intending to carry out these activities.

CEMs may only be sent with the recipient's express or implied consent. The onus of proving consent rests with the sender.

CEMs must include identifying information for the sender or person on whose behalf the message is sent (as prescribed by regulation)

CEMs must set out a means by which to contact the sender (to be effective for at least sixty days)

CEMs must give the recipient a method to "opt out", or to "unsubscribe", from receiving messages.

Exemptions

The following CEMs are exempt from the legislation:

1. CEMs between individuals who have a "personal" or "family" relationship (defined in draft Industry Canada regulations)

2. An inquiry or application sent to a business, where the message relates to the activities of the business.

3. Other types of CEMs to be prescribed by regulations

Some examples of messages that are exempt from needing consent are:

1. A quote or estimate provided in response to a request by the recipient

2. Provision of warranty information to a recipient who has purchased goods or services

3. Provision of factual information about a product or service offered under a subscription or similar basis

4. Provision of information about employment

5. Delivery of product or update pursuant to contract terms

However there must still be an "unsubscribe" mechanism in these CEMs.

Industry Canada has also provided draft regulations with additional exemptions:

1. Messages sent within a business by its own employees

2. CEMs sent between businesses that are sent by an employee, representative, contractor or franchisee and are relevant to the duties, business and role of the recipients

3. Product recalls, warranty messages, safety messages, and sending software upgrades where this is part of the original contract

4. Providing a quote or estimate in response to a request for the quote or estimate or responding to complaints and other requests

5. The first CEM sent to a person based on a referral from a third party, after which consent will be needed for added CEMs

6. CEMs sent as part of a legal obligation [eg. product safety notice] or court order or to enforce a legal right [e.g. cease and desist letter]

7. CEMs received by someone while visiting Canada, when the sender was outside Canada and unaware of their location

8. Two way voice communications between individuals

Penalties

The following penalties are prescribed by the legislation:

1. Individuals – fines up to $1 million/ violation

2. Corporations – fines up to $10

million/violation

3. The CASL also allows for a private right of action by recipients of CEM sent in violation of Act, including right to statutory damages to a maximum of $100,000,000, or $200 for each electronic message sent per day.

Organizations will need to improve and update their IT procedures. You will need to know how many and what kind of CEMs you send out. Your customer lists will have to have a field to record that the consent was obtained, when and how. Your system will need to respond within 10 days to unsubscribe requests.

A prime example is our current newsletter. In the next few months in order to receive our newsletter we will be requesting your consent. This consent will be valid for two years. Our firm already has a procedure in place for individuals to unsubscribe to the newsletter.

All businesses will be grasping with the wide implications of the legislation. Will you need the consent of an existing customer or client before sending any email? Likely.

Remember, now is the time to prepare to obtain consents electronically. Once CASL is proclaimed into force it will be an offence to send an email to get consent! You will have to do so by snail mail.

Stay tuned.

Rui M. Fernandes

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To Unsubscribe email us at: info@fernandeshearn.com

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CONTEST

This month we are giving away a prize (A ticket to our annual Fernandes Hearn LLP Annual Seminar to be held January 16, 2014) for the first individual to email us the location of the photo at page 10. Email your answer to info@fernandeshearn.com with a subject line "Newsletter contest". First response with the correct answer wins.