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Newsletter

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La Loi Sur Les Connaissements, Une Portée Extraterritoriale?

In a recent decision, the Court of Quebec had the opportunity to review the possible extraterritorial effect of the Bills of Lading Act. The Court concluded that in the event of a carriage of goods where the point of origin is in the USA and the point of destination is also in the USA, the Bills of Lading Act will not apply notwithstanding that the carrier is a Canadian company.

Dans une récente décision, *Entreprise Steve de Montbrun Inc. c. CVS Caremark Corporation* (*1), la Cour du Québec a eu l'opportunité d'étudier la portée extraterritoriale de la *Loi sur les connaissements*. Après analyse, la Cour conclut, que *Loi sur les connaissements* de n'applique pas aux transport de marchandises lorsque le point d'origine et de destination sont tous les deux aux Etats-Unis et ce même si le transporteur est canadien.

1. Les faits

Dans cette affaire, la demanderesse, une compagnie de transport ayant domicile au Québec, alléguait que ses services avaient été retenus par un tiers, Encore Food Gourmet Corporation, pour effectuer le transport de marchandise à partir de l'entrepôt de Encore Food Gourmet Corporation vers différents entrepôts de la défenderesse situés aux quatre coins des Etats-Unis. La demanderesse alléguait que sa cliente, Encore Food Gourmet Corporation était en défaut de paiement pour les frais de transport et qu'en vertu d'une loi canadienne, la *Loi sur les connaissement*, la défenderesse devenait instantanément responsable pour les frais de transport impayé par l'expéditrice, Encore Food Gourmet Corporation, à titre de consignataire en

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 profiled as President of the Transportation Lawyers Association in the April edition of Lawyer Monthly magazine. The interview will focus on the Association and developments in the area of Transportation Law.

- **Rui Fernandes** will be presenting a paper on *"New Developments in Canadian Subrogation Law*" at the Recovery Forum in New York on April 11th, 2013.

- **Rui Fernandes** will be presenting a webinar for the Ontario Trucking Association on the *Kruger* decision and implications for the trucking industry on April 25th, 2013.

- **Rui Fernandes, Gordon Hearn** and **Kim Stoll** will be representing the firm at the Transportation Lawyers Association Annual Conference and the Canadian Transport Lawyers' Association Mid-Year Meeting in Napa California on April 30th to May 4th, 2013.

- **Chris Afonso** will be presenting a paper on "Third Party Logistics Contracts: Avoiding Common Pitfalls" at the 46th Annual Conference for Supply Chain Canada in Mississauga on May 14th, 2013.

- **Rui Fernandes** and **Kim Stoll** will be representing the firm at the Semi-Annual Meeting of the Canadian Board of Marine Underwriters on May 22 and 23rd, 2013 at Manoir Saint-Sauveur Quebec.

- **Rui Fernandes** will be presenting on a panel on "Law & Order: Police and Criminal Investigation in the Boating and Small Vessel Sector" at the annual seminar of the Canadian Maritime Law Association on June 7th, 2013 in Toronto.

- **LexisNexis Canada** has released its **Halsbury's Laws of Canada – Maritime Law** title. **Rui Fernandes** is the author of this new work. This completes Rui's trilogy of works for LexisNexis' Halsbury's Laws of Canada. Last December his Transportation – Carriage of Goods and Transportation – Railway Law was published. The current work is described by LexisNexis with the following introduction:

"The globalization of the economy has ballooned the international shipping community in size, making the sea an integral means of modern trade. This title is a complete source of admiralty law across Canada. Covering both the general issues of maritime law, such as its legislative and constitutional framework, and the more specific issues, such as regulatory and safety requirements and the operation of ships, this title is essential for practitioners working in fields of trade, administrative and international law."

vertu des connaissements émis par Encore Food Gourmet Corporation.

La demanderesse fondait sa prétention en se fondant sur l'article 2 de la *Loi sur les connaissements* :

> « Tout consignataire de marchandises, nommé dans un connaissement, et tout endossataire d'un connaissement qui devient propriétaire de la marchandise y mentionnée par suite ou en vertu de la consignation ou de l'endossement, entrent en possession et sont saisis des mêmes droits d'action et assujettis aux mêmes obligations à l'égard de cette marchandise que si les conventions contenues dans les connaissement avaient été arrêtées avec ce consignataire ou cet endossataire. »

En réponse à cette action, la défenderesse déposa une requête en exception déclinatoire et en irrecevabilité, évoquant, entre autre, que les tribunaux québécois n'avaient pas juridiction pour entendre et disposer du litige qui opposait la demanderesse et la défenderesses.

2. <u>La question en litige</u>

L'une des questions sur lesquelles la Cour devait se pencher était la suivante:

> Est-ce que la *Loi sur les connaissements* peut s'appliquer au transport de marchandises n'ayant uniquement transité qu'aux États-Unis?

3. <u>La décision</u>

La réponse de l'Honorable juge Armando Aznar à la question susmentionnée fut négative. Dans les circonstances en l'espèce, il fut décidé que la *Loi sur les connaissements* ne s'appliquait pas :

> « Or, en l'espèce, selon les fait allégués à la requête introductive d'instance amendée de la demanderesse, il appert que le transport de marchandise a eu lieu exclusivement au État-Unis.
>
> À la lecture de la requête introductive d'instance amendée de la demanderesse, l'on constate que son recours se fonde sur l'application de la Loi sur les connaissements aux faits en litige.
>
> À cet égard, au paragraphe 7 de la requête introductive d'instance amendée, la demanderesse allègue ce qui suit :
>
> > « In accepting the freight, the défendant has become, as consignée, liable for the payment of all freight charges under Section 2 of the Bill of lading act. » »

La Cour rappela par la suite les enseignements de P.A . Côté concernant la portée extraterritoriale d'une loi :

> « 770. En l'absence de disposition contraire, expresse ou implicite, on présumera que l'auteur d'un texte législatif entend qu'il s'applique aux personnes, aux biens, aux actes ou aux faits qui se situent à l'intérieur des

> limites du territoire soumis à sa compétence.
>
> Cela signifie d'abor qu'il faut présument que le législateur ne veut pas donner à ses lois une portée extraterritoriale : tout texte législatif doit, si c'est possible, être interprété et appliqué de manière à respecter cette intention présumée du législateur. Ce principe général a été souvent affirmé en droit canadien. […]

La Cour conclut donc ainsi sur la question de la portée extraterritoriale de la *Loi sur les connaissements* :

> « En l'espèce, à la lecture de la Loi sur les connaissements, l'on constate que le législateur ne lui a pas conféré de portée extraterritoriale.
>
> En conséquence, le Tribunal conclut que ladite loi ne s'applique qu'au transport de marchandise au Canada. Cette loi ne lie pas la défenderesse qui n'est pas partie au contrat intervenu entre la demanderesse et Encore Gourmet Food Corporation, d'autant plus que la marchandise n'a transité que par les Etats-Unis et n'a été livrée qu'aux Etats-Unis.

David Huard

Endnotes :

(1) *Entreprises Steve de Montbrun c. CVS Caremark Corporation*, 2013 QCCQ 1437(CanLII).

2. An Ontario Case Law Update on Insurance Broker Liability

Introduction

In a recent decision, the Ontario Court of Appeal has weighed in decisively on the necessary elements of a successful claim by an "uninsured" or an "underinsured" client against an insurance broker.

The case of *Zefferino v. Meloche Monnex Insurance* (*1) involved a claim brought by a client against his insurance broker. The client asserted that the broker had failed to offer him optional income replacement benefits. The client did not purchase this product, and later alleged losses on the basis that this coverage was not there "when he needed it".

The broker defended the action. The client and the broker agreed to refer the dispute to a court by way of a 'summary judgment' application for adjudication. The court dismissed the client's action.

The trial judge found that the broker did owe the client a 'duty of care'. There is a clear recognition that a duty of care can be owed by insurance agents who are in the business of providing insurance information and advice to customers. (*2) The Supreme Court of Canada has determined that the sale of automobile insurance (and, for that matter, the sale of any line of insurance) is a business in the course of which information is routinely provided to prospective customers with the expectation that they will rely on it and they do in fact reasonably rely on it.

The trial judge also found that the broker had further breached this duty of care by not offering optional income replacement benefits.

The trial judge, however, dismissed the client's claim, finding that the client had failed on the essential element of showing that the broker's 'failure' actually *caused* the loss in question.

On Appeal to the Court of Appeal: A Claim that an Insurance Broker was Negligent is a Tort Just Like any Tort

The client appealed the lower court's finding – asserting that, as a matter of governing case law, it need not have to prove that the acts or the omissions of the broker actually *caused* the loss. Rather, the affected insured need only show that the broker advisor had a duty to inform the insured, that it breached its duty of care and that there was a gap in coverage. The client cited the special nature of insurance contracts and asserted that to place a 'burden of proof' on an insured to prove that the broker's failures actually caused the loss in question would place too much of a burden on the client. In short, as went the argument, "*I relied on my broker, and we had a special relationship. He owed me a level service that he did not provide, and now I am stuck without the insurance that I needed. I should not have to prove anything beyond this for me to win my case.*"

The Court of Appeal disagreed. It is still essential that a disgruntled client prove in court each of the essential elements of the tort of "negligence", involving proof of the following:

1) the defendant owed the plaintiff a duty of care;

2) the defendant breached the duty of care owed to the plaintiff, and
3) the defendant's breach had a causal connection to the losses complained of by the plaintiff.

Don't Forget the Element of "Causation"

The Court of Appeal provides a reminder in this case that the issue of whether the negligence in question actually caused a loss is a *question of fact*. The case law has not carved out any exception concerning the insurance broker context - the plaintiff still has this 'causation' burden of proof. This, however, should not be seen to work an unfair 'hardship'. As the issue will involve questions of fact, there remains in the plaintiff's 'arsenal' the potential of showing 'causation' through a possible wide array of factual elements or different "pieces of the puzzle". As we lawyers put it, one has to 'build the wall' of proof on the legal proposition that must be satisfied, but there may be different "bricks" or a number of "bricks" in each case in building the requisite wall of proof.

Dealing with the case of a gap in coverage, one such manner of proof of causation in a case against the broker may concern the client giving evidence that, had he been advised of the existence of or the need for a particular insurance product, he would then have purchased it. This might then lead to a debate on the credibility of the evidence – the broker might assert one way or another that the insured would *not* have exercised the election. Perhaps the client had been offered the same or similar coverage on past occasions, the same being rejected by the client. Perhaps the client had given past instruction that the premium or the cost of insurance in no circumstance should exceed that which would have been required to cover the 'gap' for the case in question.

In turn, the client might show that he *would* in fact have purchased the coverage had it been offered to him. He might point to a pattern of product purchases in the past from the broker or other brokers. He might point to the general scope of or nature of discussions with the broker. Perhaps the 'record' shows a particular risk aversion on point on the part of the client. It all goes to how the judge or jury at the end of the day assesses the evidence: on the requisite "more likely than not" standard of proof, was the client, in fact, led to his detriment by the conduct complained of? Or is the analysis merely an academic one?

The particular analysis in this case at the Court of Appeal simply concerned whether the plaintiff client has to prove "causation": yes, it must. One should bear in mind that there may be instances where a broker can be held liable even where, in fact, the coverage 'gap' in question could not have been filled or prevented by the purchase of a policy, or an endorsement, or some extension.... It may be that there was simply no coverage available. One should not lose sight of the fact that the leading cases on insurance broker liability (*4) suggest that the broker has a duty of care to its customer to identify reasonably foreseeable risks in the customer's enterprise and that the duty of care does not end simply because a risk might not be insurable. Maybe the customer simply will not qualify for the insurance. Maybe the premium will be overtly prohibitive. Or possibly there is simply no such insurance product that exists – or maybe a standard exclusion will clearly govern making the

purchase of a product illusory. The point here is that the broker must advise the client on the available options and, where insurance protection is not available, to advise the client such that the client has the opportunity to govern its affairs accordingly. The client might alter the nature or course of its business accordingly, so as to avoid or minimize the risk, or the client might decide to "self insure".

Thus, the potential factual "mix" on a "causation" debate at a trial may also encompass not only the question of whether existing products would have been purchased, but also whether, in the absence of available coverage, the broker caused the loss by failing to alert the insured to the situation. If the insured would credibly have taken steps to avoid the risk, this may suggest "causation". If, however, the insured more likely than not would have forged ahead with the enterprise in question, still bearing the risk and in the knowledge that it was in effect "self-insuring", then the broker would likely be vindicated.

An Oft-Employed Tool of the Trier of Fact: Drawing an "Adverse Inference"

Clients and counsel alike are alerted to a standard 'Evidence textbook' warning with this case: another part of the mix might concern whether the court can draw an 'adverse inference' from the evidence. Just as a judge or jury may properly infer facts that logically follow from facts proven in evidence, they can come to question why certain evidence was "left out". In this case, the Court of Appeal ratified the trial judge's drawing of an adverse inference against the client because his wife, who had dealt with the defendant's representatives, did not provide any evidence about her dealings with those respondents. An adverse inference was drawn that the wife's evidence would not support the client's case, for her not being called as a witness: the reasonable assumption being that, if her evidence would have helped the client's case, she would have been called as a witness. Accordingly, the trial judge had some difficulty, on this consideration alone, in finding that, even given the chance, the client would have purchased the income replacement benefits product.

Ultimately, the appeal was dismissed on the basis that there was nothing credible on the record to show that the client would have taken the additional insurance, given the chance. Against the bald assertion that he "would have" purchased the insurance, with nothing more, and on account of his failure to call his wife as a witness on the point, the Court of Appeal agreed that that the trial judge was reasonable in his finding that the requisite element of 'causation' had not been proven. In the result, the plaintiff client was unable to recover against the defendant insurance broker.

Gordon Hearn

Endnotes

*1 2013 ONCA 127 (CanLII)
*2 See for example the recent decision of *Godina v. Tripemco Burlington Insurance Group Limited* 2013 ONSC 979
*3 *Fletcher v. Manitoba Public Insurance Company* 1990 CanLII 59 (SCC)
*4 *Fletcher*, *supra*

3. "Just Plants" – Insurance Coverage Regarding the Theft of Medicinal Marijuana Plants

Stewart v. TD General Insurance Company 2013 ONSC 1412

Insurance policies are drafted with a view to accommodating our ever-changing world. Medicinal marijuana is an expensive and legal commodity involving particular risks, but, as this case shows, if such plants are growing outside, they will be treated as just a "plant in the yard".

The plaintiff, Darren Stewart, had the appropriate licences to possess and cultivate medicinal marijuana pursuant to the *Marihuana Medical Access Regulations*. (*1) Mr. Stewart and his wife were insured under an insurance policy (the "policy") as issued by the defendant, TD General Insurance Company ("TD Insurance"). The plaintiffs brought a motion for the determination of a question of law before a trial on liability and agreed that Ramsay J., the motions judge, could interpret the associated written insurance policy.

Facts

On September 22, 2009, Mr. Stewart's six marijuana plants growing in his backyard were stolen by persons unknown. He then made a claim under the policy. TD Insurance, on November 14, 2009, paid Mr. Stewart the sum of $6,000.00 or a total of $1,000 per "plant". A similar theft occurred yet again on September 29, 2011, Mr. Stewart made a claim and TD Insurance once again paid $1,000 per "plant". The plaintiffs brought two actions claiming a further $26,000 for the value of the original six marijuana plants and a further $19,000 for the further 5 marijuana plants plus another $180,000 in damages regarding each insurance claim citing breach of contract and fiduciary duty, mental stress and physical pain and for infliction of mental and physical suffering.

The TD Insurance policy stated as follows:

> Coverage
>
> Coverage B – Personal Property (contents)
>
> 1. **We** insure the contents of **your dwelling** and other personal property you own, wear or use while on **your premises** which is usual to the ownership or maintenance of a **dwelling**.
>
> …
>
> EXTENSIONS OF COVERAGE
>
> 15. Trees, shrubs and plants
>
> Trees shrubs and plants being part of **your** landscaping on **your premises**. **We** will pay up to 5% of the limit of insurance applicable to **your dwelling**, subject to a maximum of $1,000 for any one tree, shrub or plant including debris removal. You are insured against loss cause (sic) by fire, lightning, explosion, impact by aircraft or land vehicle, riot, vandalism or malicious acts, theft or attempted theft.
>
> PERILS EXCLUDED
>
> We do not insure loss or damage:

> …
>
> 8. Grow-op
>
> arising directly or indirectly from the growing, manufacturing processing or storing by anyone of any drug, narcotic or illegal substances or items of any kind the possession of which constitutes a criminal offence. This includes any alteration of the **premises** to facilitate such activity whether you have any knowledge of such activity.
>
> (bold print is in the policy)

The policy defined "dwelling" as the insured building, while "premises" meant the land upon which the building sat. The policy also provided for coverage of the contents of certain types of outbuildings.

TD Insurance took the position that only paragraph 15 applied, as above, and the maximum coverage was $1,000 per "plant", which it paid. The plaintiffs argued that the plants were personal property owned or used while on the premises and were usual to the ownership and maintenance of a dwelling and were not covered by the "plants" identified in paragraph 15 as they were not part of "landscaping" and were not aesthetic in their purpose.

The Decision

The Court applied the essential principles for policy interpretation as found in *Consolidated Bathurst v. Mutual Boiler and Machinery Insurance Co.*, 1979 CanLII 10 (SCC), [1980] 1 SCR 888 and in *Solway v. Lloyds Underwriters* 2006 CanLII 17254 (ON CA), (2006), 80 OR (3d) 401 (CA).

In *Solway*, above, Moldaver J.A. said at

paragraph 43:

> I begin my analysis with the observation that an insurance contract, like any other contract, should be construed in a manner that attempts to harmonize and make sense out of the various provisions contained in it, and does not strain them. Ambiguities are to be resolved in favour of the insured. But ambiguity does not exist whenever the policy contains wording that could be open to two or more reasonable interpretations. Before resorting to the contra proferentem principle, an effort should be made to interpret the policy in a commercially reasonable fashion and in a way that gives effect to the reasonable expectations of the parties.

First and foremost, Ramsay J. was not convinced that the marijuana plants whether medicinal or not, would be covered as personal property as they were not located in the plaintiffs' "dwelling". His Honour stated at paragraph 9 of the judgment, 'it strikes me as a stretch to say that this provision, which falls under the heading "Contents," and which by its terms seems to be principally concerned with contents, by itself covers items that are not contained in the dwelling.'

His Honour went on to review the policy as a whole. He noted that personal property in general was covered under a one heading and then, under "Extensions of Coverage", the policy provided specifically for items not contained in that general provision. The "Extensions of Coverage" section included provision for items such as a reward for information leading to the conviction of a person for arson, compensation for fraud and forgery, mortgage rate protection, moving expenses, and trees, shrubs and plants. This section (which included relating to trees, shrubs and plants) specifically included coverage for those items that were not contents of the "dwelling". "Plants" not in the dwelling were simply not covered regardless of their nature or purpose (i.e. whether they were owned or used while on the insured's premises usual to the ownership and maintenance of a dwelling) whereas paragraph 15 spoke directly to coverage for their loss and specifically covered "plants". The Court would not ignore a provision dealing directly with the very items at the heart of the loss in favour of following a general provision of "doubtful application" which "would strain the meaning of the policy". (*2)

The plaintiffs argued that their "plants" were not, in fact, covered by paragraph 15 as such plants were not part of the premises' "landscaping" as identified therein; however, Ramsay J. did not accept the plaintiff's restrictive definition of "landscaping." He applied a dictionary definition of "landscaping" (*3) stating that such definition did not necessarily exclude plants that were laid out for non-aesthetic reasons. His Honour went on to say that it was not reasonable to infer that the parties' intentions regarding the purpose of any planting would have to be considered every time a claim was made in that regard. The intention was clearly that coverage was extended to the noted maximum provided that the claim related to a tree, shrub or plant in the yard, even though it was not in a dwelling.

The Court went on to conclude that such

plants would not be covered anywhere else in the policy, if not under the extended cover of paragraph 15.

On the other side of the equation, TD Insurance had argued that paragraph 8 "Grow Op" of "Excluded perils" limited recovery as the policy did not cover "loss or damage… arising directly or indirectly from the growing, manufacturing, processing or storing by anyone of any drug…" The Court dismissed this argument stating that paragraph 8 dealt with damage caused by the growing or production of drugs, and not with the loss of the drugs themselves.

The Court held that the maximum recovery under the policy was $1,000 per plant pursuant to the extension of coverage provided by paragraph 15. TD Insurance had paid that amount and any additional claims automatically failed given that there was no requirement under the policy to pay more than was already paid. The motion by TD Insurance to dismiss the action was granted and the actions were dismissed.

Finally

Given the number of persons with licences to grow medicinal marijuana, no doubt coverage will be sought by endorsement to cover same if not stored inside the dwelling. There may be a need for some minimum security provisions. On the other hand, insurers may want to specifically include the actual drugs themselves (whether legal or illegal) in the associated exclusion, if there is no intent to cover such items.

Kim E. Stoll

Endnotes

(*1) SOR 2001-227

(*2) at paragraph 11

(*3) The court's reasons do not provide which definition of "landscaping" was actually used. A quick look at the Oxford Paperback Dictionary 1983 does not exclude non-aesthetic plants but indicates: "1. *n*. the scenery of a land area, 2.*v*. to lay out an area attractively, with natural features". Plants without an aesthetic purpose would not appear to fit the definition. With a different definition, as the plants were not in the dwelling, the plaintiffs might have been shut out completely though they had already been paid by the insurer.

4. Ontario Court Clarifies the Extent of its Power to Decide Cases Involving Foreign Defendants With No Connection to Ontario

We live in an increasingly interconnected world. When it becomes necessary to commence a lawsuit, the party that starts it must pick a particular place or court system to hear it. This can be straightforward when all parties involved are within a single province; however, once multiple provinces or even multiple countries are involved, the question becomes murkier.

This is a key issue for transportation companies, companies within the supply chain and their insurers as their operations can expose them to claims across provincial and national borders or can require them to start proceedings in courts far from their home base.

The Supreme Court of Canada recently clarified the rules in a case called *Van Breda* (*1). The Court determined the general principle that Canadian courts will not allow a suit to be heard in a location that is unfair to the defendants. The lawsuit can only be heard in a particular province if that province satisfies at least one of the following four criteria:

> (a) The defendant is domiciled or resident in the province;
> (b) The defendant carries on business in the province;
> (c) The tort was committed in the province; or
> (d) A contract connected with the dispute was made in the province.

The question for an Ontario judge in a recent case, *Cesario v. Gondek* (*2), was what happens in a case with two defendants where one satisfies the test and one does not? Is the court required to split the lawsuit and force the parties to fight a "multi-front" battle?

In this case, the foreign defendant - who had a basis to dispute the Ontario forum - argued that the Ontario court should have strictly applied the Supreme Court's test, which would have released it from the Ontario action. The plaintiffs would have been forced to start a foreign lawsuit while continuing a lawsuit against the other domestic defendant locally.

The plaintiffs argued that if the Supreme Court's test was about fairness, then the test was not meant to be applied in a way that would lead to this kind of unfairness.

The facts of this case were important to the plaintiffs' argument. The plaintiffs were a married couple who were first injured in a car accident on the US side of Niagara Falls. A few weeks later, they were involved in a second accident in Canada. They started an Ontario action against the Canadian driver who hit them in Canada, the American driver who hit them in the US and their own insurance company.

The plaintiffs argued that splitting their case would lead to an impossible process because any trial would require a judge to determine which of the two accidents caused their injuries. If both accidents caused some injuries, then a court would have to determine which accident caused which injuries.

Splitting the actions would, they argued, not only lead to increased costs, but would lead to a process that might result in different judges in different courts providing different answers to the same legal questions.

The Court sided with the plaintiffs and pointed out that the Supreme Court never intended for its rules to be applied without considering this kind of unfairness:

> [S]tability and predictability in this branch of law of conflicts should turn primarily on the identification of objective factors that might link a legal situation or the subject matter of litigation to the court that is seized of it. At the same time, the need for fairness and justice to all parties engaged in litigation must be borne in mind in selecting these presumptive connecting factors.

The Court reasoned that the foreign defendants' position was opportunistic – if the suit was started in New York, the other plaintiff could have brought the same motion asking for the opposite relief. The fact is that there is no perfect jurisdiction for this set of parties, so the Court needed to make the most of an imperfect situation:

> During the course of argument, I posed to counsel a hypothetical situation which highlights the potential absurdity of who the moving party might be seeking to fall within the language of a connecting factor being "the defendant". If the facts before this court had involved a motor vehicle accident occurring in the State of New York involving a plaintiff resident in Ontario, a defendant resident in Ontario and a defendant resident in New York State, and if the moving party was the New York resident defendant, then that party could argue that he or she not being domiciled or resident in the province clearly was not a connecting factor and Ontario should not assume jurisdiction. If on the other hand the moving party was the Ontario defendant, then that defendant could argue that he or she was domiciled or resident in the province and there would be a connecting factor to Ontario.
>
> In the situation where the moving party was the New York defendant, there would be no presumptive connecting factor established and this would result in the inevitable splitting of the case, which is precisely what the Supreme Court of Canada intended to avoid with a multiplicity of proceedings.

In fact, the Court pointed out that the Supreme Court in *Van Breda* did not intend lawsuits to be split up into unmanageable segments fought in different places:

> Supreme Court of Canada determined that splitting the case into parts would breach the principles of fairness and efficiency upon which the assumption of jurisdiction is based.

The Court in this case set out the rule that, as long as one defendant is "properly caught in the plaintiff's choice of the jurisdiction in accordance with the *Van Breda* test, then the other defendants cannot argue that the court is incapable of hearing their segment of the same lawsuit:

> The principle of fairness and justice

referenced by LeBel J. in Van Breda causes this court to conclude that where there are multiple defendants, at least one of whom is resident in the Province of Ontario, or domiciled in the Province of Ontario (as is the case on the facts before this court, i.e., the defendant Domenic Cesario, the defendant Elizabeth Ruth Stoutz and the defendant Security National Insurance Company), then there is a sufficient real and substantial connection existing such that the court should assume jurisdiction over all aspects of the case, including that aspect of the case involving the New York defendants. [29] The New York defendants did not address the doctrine of forum non-conveniens and the exercise of the court's jurisdiction.

The lesson for the transportation industry, insurers and anyone contemplating a lawsuit, is that the Ontario courts may be prepared to extend their reach even farther than may be apparent on a simple reading of the *Van Breda* decision.

Potentially, this lesson can be turned to the advantage of Ontario litigants, particularly if lawsuits against foreign parties are necessary. In some cases, it will be possible to include locally based defendants to ground the lawsuit in a preferred location.

Chris Afonso

(1) *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17
(2) *Cesario v. Gondek*, 2012 ONSC 4563

5. Aviation Surprise: Will *Durunna v. Air Canada* Stand Up on Appeal?

In the very recent decision of *Durunna v. Air Canada* 2013 ABPC (Alberta Provincial Court) the Court ruled that a carrier under the *Montreal Convention* may not be able to limit liability if airline staff fail to bring the rules of the *Convention* to the attention of non-commercial shippers.

The decision involved a plaintiff claimant who shipped ten laptops worth $4600 to Nigeria. He had visited Air Canada's freight offices and an air waybill was issued but it made no reference to the value of the goods. It also contained a square box with a warning in capital letters stating that the shipper's attention was being drawn to the notice concerning the carrier's limitation of liability under the *Montreal Convention*. The plaintiff paid the shipping fee and was given a copy of the waybill, which he had neither signed nor read. The plaintiff was never offered additional insurance in excess of the standard *Montreal Convention* coverage. The goods disappeared en route to Nigeria. Air Canada sought to rely on the *Montreal Convention* to limit the compensation payable to the plaintiff.

In the opinion of the Court, a simple verbal declaration of a shipment value that exceeds the *Montreal Convention* coverage may now be enough to circumvent previously unbreakable limits. The Court ruled that the *Convention* does not dispense with the notice requirements applicable in common law. Judge Skitsko rejected the airline's argument that the *Montreal Convention* intended to dispense with any requirement on carriers to provide notice of the limitations of liability. The Court concluded that enforcing the Montreal Convention liability limits would be unconscionable in the circumstances. As a result, it awarded damages of US$4,000, equal to the value of the lost goods as verbally declared by the plaintiff.

It is expected that this decision will be appealed. The case flies in the face of numerous decisions worldwide that hold the *Montreal Convention* limits to cargo as unbreakable and not subject to common law.

Rui Fernandes

6. Federal Court of Appeal Confirms Restrictive Test For Advance Costs in No-fly Litigation

Canada (Procureur général) v. Al Telbani
2012 FCA 188

On June 4, 2008, Hani Al Telbani became the first person to be refused embarkation on a commercial flight out of or into Canada by virtue of being on the country's "no fly list". Mr. Al Telbani, a Canadian permanent resident of Palestinian origins, was the subject of an Emergency Direction of the Minister of Transport, Infrastructure and Communities ("Minister") which prescribed that he posed an immediate threat to aviation security, and, as such, was prevented from traveling to Saudi Arabia via an Air Canada flight from Montreal to London Heathrow. The Minister later refused Mr. Al Telbani's request to be removed from the list.

Mr. Al Telbani has since proceeded with litigation seeking judicial review of the decision to issue the Emergency Direction preventing his travel as well as the refusal upon his request to remove his name from the list. Proceedings, however, continue to be delayed at preliminary stages. The application on its merits currently remains suspended pursuant to a Federal Court decision of Frenette D.J. on November 27, 2008. This decision denied Mr. Al Telbani's motion for full disclosure by the Minister of his files pertaining to his case, the Minister resisting provision of such documentation by invoking s. 38.01(1) of the *Canada Evidence Act*. This dismissal was on procedural rather than substantive grounds, since there is a discrete procedure for disputes arising over disclosure of information under the *Evidence Act,* s. 38.04(1). The judicial review application was frozen pending the hearing and determination of the application regarding disclosure.

Mr. Al Telbani brought an interlocutory motion seeking advance costs within this discrete proceeding brought by the Attorney General to resist disclosure. On July 27, 2011, De Montigny J. denied the application for an advance costs order, which would require that the Attorney General to cover Mr. Al Telbani's legal costs in all proceedings before Federal Court. De Montigny J. quickly reduced the scope of the application to the hearing on disclosure, noting that the Attorney General was not even party to the suspended judicial review applications, which are directed against the Minister.

In dismissing the application, De Montigny J. stated that advance costs represented an exception from the ordinary process which would see costs allocated only after a decision is rendered on the merits of a case. De Montigny J. acknowledged the social justice vocation of accelerated costs orders that promote access to the legal system.

The tripartite test for an advance costs order as established by the Supreme Court of Canada in *British Columbia (Minister of Forests) v. Okanagan Indian Band* ("*Okanagan*") was then laid out in the judgment, with the specificity being underlined that meeting the elements of this test gives rise only to the discretion of the judge to issue an order, and does not *ipso facto* entitle the applicant to relief by way of advance costs. The conditions for the possibility of an order are, per LeBel J. of the Supreme Court in *Okanagan*:

1. Genuine financial need with no realistic alternative financing option;
2. The claim must be *prima facie* meritorious;
3. The legal issues must transcend the interests of the particular case of the applicant.

The Supreme Court has further underlined in *Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue Agency),* that even overcoming this initial obstacle to reach the stage of judicial discretion to make an award is to be interpreted particularly restrictively and applied in "rare and exceptional" circumstances. The Supreme Court guards against the judiciary developing "their own … alternative and extensive legal aid system".

De Monitgny J. found that the application fell down at the first hurdle, given that Mr. Al Telbani failed to prove his impecuniosity. Given that Mr. Al Telbani had personal gross income of $56,004 and declared $900 of living costs declared beyond his rent, student loan reimbursement, transportation and utilities expenses, his situation did not correspond with the rare and exceptional cases in which the Supreme Court had envisaged allocating advance costs. However, De Montigny went further by stating that Mr. Al Telbani had failed to petition local community groups for financial assistance with his proceedings and to explain why his parents, who had supported his studies, were not in a position to assist him in his legal proceedings.

Although this failure to meet the first part of a conjunctive test was sufficient cause to dismiss the application, De Montigny J. further noted that the case did not meet the latter two cumulative requirements established by the Supreme Court. With respect to the merits of Mr. Al Telbani's legal position, the judge highlighted that the application was formally brought by the Attorney General seeking to restrict access to information. Mr. Al Telbani was not even formally a respondent to this proceeding, and the judge may elect to rule on the basis of the submissions of the Attorney General with no obligation to consult Mr. Al Telbani. Moreover, the Federal Court had already appointed two senior counsel as *amici curiae* in the *Evidence Act* application at the expense of the Attorney General, thus Mr. Al Telbani's interest would be represented in the process.

Finally, the Court concluded that the interests of the case were restricted to Mr. Al Telbani's own circumstances. In balancing the interests of Mr. Al Telbani in disclosure against the public interest there against, the outcome would per De Montigny J. affect only the applicant. Although constitutional questions over the validity of *ex parte* hearings under s. 38 of the *Canada Evidence Act* were raised by the applicant, these same arguments had already been debated and decided previously by courts thus there was no pressing public interest in hearing Mr. Al Telbani's submissions for these issues to be ruled upon.

Resiliently, Mr. Al Telbani proceeded to contest the first instance ruling before the Federal Court of Appeal. The basis of the appeal was that De Montigny J. had erred in basing his decision solely upon the context of the application under s. 38.04(1) application of the Attorney General, dissociated from the context of the judicial review application. Mr. Al Telbani appealed not the substance of the law but the application of it to his case.

Trudel J.A. for the court reaffirmed the denial of an order, approving the analysis of De Montigny J. The court reiterated the conjunctive nature of the three part test set out in *British Columbia (Minister of Forests) v. Okanagan Indian Band* and approved De Montigny J.'s reasoning that the first part of the test to reach discretion, being impecuniosity, was not met. Trudel J.A. noted that the determination that Mr. Al Telbani was not impecunious was, "at best a finding of mixed fact and law" thus restricting the scope of intervention by the appeal court to instances of patent error. In finding no so such plain error in the reasoning of the judge of first instance, the Federal Court of Appeal was bound to dismiss the appeal. Trudel J.A., however, proceeded to note that she, on behalf of the bench, agreed with *obiter* reasoning with respect to the latter two requirements under the *Okanagan* test, being the lacking merits of Mr. Al Telbani's case in the Attorney General's application as well as the absence of general interest in the resolution of the point of law at issue which would warrant the exceptional assistance of an advance costs order.

It is to be hoped that the Attorney General's application will be resolved promptly such that Mr. Al Telbani's application for judicial review may proceed on its merits. The case will ultimately establish a precedent with respect to the standard of review and the application of that standard to cases of persons placed on the no fly list. However before reaching that stage, Mr. Al Telbani's case has allowed the Federal Court to clarify the nature of the process to be followed in case of a dispute over refusal to disclose by the Attorney General under the *Canada Evidence Act*; and the Federal Court and the Federal Court of Appeal have reaffirmed the extremely strict test established by the Supreme Court of Canada in *Okanagan* for advance costs orders. The decision on the merits of the Attorney General's application will be equally instructive on the balancing of the interest of a litigant in full disclosure and that of the public interest in national security.

Mark Andrew Glynn

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CONTEST

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