Newsletter

IN THIS ISSUE

LAWSUIT IMMUNITY FOR FOOD INSPECTION AGENCIES AND INSPECTORS

Government agencies are typically afforded a degree of protection from lawsuits brought by private citizens. The policy underpinning is that such agencies or public authorities are expected to fulfill their duties without the fear of virtually unlimited exposure to private claims, which might unnecessarily "tax" public resources and "chill" statutory mandated government intervention. (*1)

Background

This policy driven protection was confirmed in favour of the Canadian Food Inspection Agency ("CFIA") in the important 2013 decision of the British Columbia Court of Appeal in *Los Angeles Salad Company Inc. v. Canadian Food Inspection Agency* (*2). In this case the Court addressed the question as to whether federal government food inspectors owed a private law "duty of care" to the sellers of food products, a breach of which would provide an action for damages in tort. The "duty of care" analysis is a critical component of any tort case: a plaintiff claiming for damages on the basis of the negligent conduct of another must show: a) that there existed a duty of care owed to the plaintiff, b) that the standard of care associated with the duty was, in fact, 'breached' i.e. that the conduct was negligent; and c) that the negligent conduct caused or contributed to the damages complained of. In this case, a supplier of foodstuffs shipped to Canada had taken issue with the CFIA as to its findings that certain shipments were contaminated. The supplier alleged that these findings were incorrect and that the inspections and related procedures had been negligently performed. The supplier claimed that this prevented the product from making its way to the intended marketplace and that its reputation was sullied and that it also suffered economic losses as a result of the CFIA's negligent inspection. The supplier brought a lawsuit against the CFIA for damages.

The issue in the *Los Angeles Salad Company Inc.* case was whether the CFIA might owe a "private duty of care" to a stakeholder such as a seller

FIRM AND INDUSTRY NEWS

- **Gordon Hearn** will be representing the firm at the Conference of Freight Counsel meeting being held in Captiva, Florida on January 10 and 11, 2015

- The **Fernandes Hearn LLP Annual Seminar** will be held in Toronto on January 15th 2015.

- **Gordon Hearn** will be representing the firm at the Chicago Regional Seminar meeting of the Transportation Lawyers Association being held on January 16, 2015

- The **Marine Club Annual Dinner** will be held in Toronto on January 16th, 2015 at the Royal York Hotel.

- **Rui Fernandes** will be speaking at the **Cargo Logistics Canada Conference** taking place January 28 & 29, 2015 in Vancouver BC. He will be speaking on "Risk & Liability in Global Shipping".

- **Kim Stoll** will be representing the firm at the **Trucking Industry Defense Association** Advanced Seminar January 28 & 29, 2015 in Tampa, Florida

FIRM AND INDUSTRY NEWS

Fernandes Hearn LLP 15th Annual Maritime and Transportation Conference

Date: **Thursday January 15th, 2015**
Location: The Advocates' Society Education Centre
250 Yonge Street, Suite 2700 Toronto
Cost: $65.00 - Includes light lunch and materials on USB Drive
Registration: Sharifa Green, Fernandes Hearn LLP 416-203-9500
Send cheques to: Fernandes Hearn LLP,
155 University Ave. Suite 700, ON M5H 3B7
Limited to 120 attendees 5.5 RIBO Credits (Technical Category)

Topics and Speakers:

8:00-8:30	**Registration & Coffee**	
8:30-8:45	Welcome	Rui Fernandes
8:45-9:15	Arising Issues in Cross Border Trucking	Gordon Hearn
9:15-9:45	Arising Insurance Coverage Issues: Drones, Cyber Attacks, Insurance Requirements in Contracts	Rui Fernandes
9:45 – 10:15	Casualty Investigations in Transportation	Kim Stoll
10:15 – 10:30	**Coffee Break**	Sponsored by **AON**
10:30-11:15	Mapping Emotional Claims in the Brain	Dr. D. Kumbhare, University Health Network
11:15-11:45	Quantification of Transportation / Cargo Claims	Matson Driscoll & Damico Ltd.
11:45-12:30	Personal Injury Claims in Transportation: Air & Marine	Kimberly Newton
12:30-1:15	**Lunch**	Conference Centre
1:15-2:00	Panel: Accident Claim Panel	James Manson, David Huard
2:00 – 3:45	Mini Trial and Argument: Trucking Accident involving personal injuries, loss of perishable cargo, and load brokers. [Casualty Investigation, Sleep Apnea, Personal Injury, Loss Transfer, Cargo Loss Perishable Goods]	Firm Members: Rui Fernandes, Kim Stoll, James Manson, Tara Cassidy, Martin Abadi, Kimberly Newton

in the food transportation chain. The analytical framework concerning actions taken against public authorities generally had earlier been established in the Supreme Court of Canada decision of *Cooper v. Hobart* (*3) which laid out the following approach in determining whether the agency "owed" the duty alleged to have been breached.

First, the plaintiff must establish that the existence of the duty of care alleged to have been owed (and, in turn, breached) has been recognized in past cases by the courts. If this is the case, the plaintiff will be seen to have then established on a *prima facie* (that is, at first blush) basis that a duty of care existed. If this is established, there is still more to the analysis, canvassed below.

The second part of the framework concerns the case where there is no prior case on point being a precedent for the existence of the duty of case alleged to have been owed to the plaintiff. Where this is the case, the analysis proceeds to a consideration as to whether there is in the relationship between the parties a reasonable foreseeability of harm to the plaintiff from the defendant's carelessness and a sufficient proximity between the parties to make it just and fair to impose such a duty of care. If these elements do not exist, then the plaintiff's case will fail. If these elements do exist, there is still more to the analysis, canvassed immediately below.

Finally, if a *prima facie* duty of care is seen to exist under either the First or Second approach listed above, the Court is then to analyze whether there are residual policy considerations outside of, or independent of the relationship between the parties that ought to negate or limit there being a duty of care. In other words – even if there be a historically recognized "duty" said to have been breached, or if the relationship between the parties would itself suggest that such a "duty" ought to exist, the Court will still consider whether there is a societal interest in preventing a "floodgate" of claims as might be brought against the agency in question.

Adopting the above analytical framework, the Court in *The Los Angeles Salad Company Inc.* case ruled that the circumstances of the case did not fall within a category of cases in which a duty of care had been recognized, and that while the CFIA owed a duty of care to the public at large it did not owe a duty of care to commercial food suppliers on the basis that there was insufficient proximity between them. The Court commented that the existence of any such a duty of care should alternatively or in any event be negated by the overarching policy concern of "indeterminate liability". Accordingly, a food seller that suffers losses (or allegedly suffers losses) as a result of the negligence (or alleged negligence) of government authorities will as a general rule have no basis to sue for resulting damages.

Fast Forward to the Present: Toronto Sun Wah Trading Inc. v. Canadian Food Inspection Agency and others

The above principle, and the interest in not allowing lawsuits to work at cross purposes with the broader benefit that comes with a public agency mandate was the subject of a recent decision of the Ontario Court of Appeal in *Toronto Sun Wah Trading Inc. v. CFIA and others*. This case proceeded on an analogous footing, but came to be determined on the basis of specific legislation designed to protect certain *provincial* public authorities from lawsuits. Jerry Zalewski was named as a defendant in this case. Mr. Zalewski was a public health inspector who, in 2005, was directed by his superiors to investigate a salmonella outbreak in the Kingston, Ontario area. This investigation identified Toronto Sun Wah Trading Inc. as a supplier of bean sprouts linked to the salmonella outbreak after which it recalled its sprouts and disposed of over 3700 pounds of them. This company then brought a claim for damages against Mr. Zalewski and the other named defendants. As against Mr. Zalewski, it was asserted that he had been negligent in the way

in which he carried out his role as a public health inspector in the investigation and that he had defamed the plaintiff by making false and misleading statements to the public regarding the source of the salmonella outbreak.

Mr. Zalewski brought a motion for summary judgment seeking the dismissal of the claim against him, claiming that as a public health inspector he was statutorily immune from liability. While Mr. Zalewski might have availed himself of the "lack of a duty of care" defence being the subject of the above discussion, his basis for seeking to have the claim dismissed was based on Section 95 of the Ontario *Health Protection and Promotion Act* (*4) which provides as follows:

> *No action or other proceeding for damages or otherwise shall be instituted against* the Chief Medical Officer of Health or an Associate Chief Medical Officer of Health a member of the board of health, a medical officer of health, an associate medical officer of a board of health or *a public health inspector* or an employee of the board of health or of a municipality who was working under the direction of a medical officer of health *for any act done in good faith* in the execution or the intended execution or any duty or power under this Act *or for any alleged neglect or the fault in the execution of good faith of any such duty or power*.
>
> (emphasis added)

This provincial statute thus provides the benefit of statutory immunity to the civil servant or government agent in question for as long as they were acting in "good faith". (*5)

On the hearing of the motion for summary judgment to dismiss the claim, the plaintiff supplier asserted that the "good faith" defence should not apply in this case on the basis that "bad faith" does not always require intentional harm but that serious carelessness or recklessness could constitute a lack of good faith. The motion judge disagreed, finding that negligent conduct (even if this were the case on the facts) was not the same thing as a failure to exercise good faith. The motion judge noted that there was no evidence produced by the plaintiff of bad faith nor for that matter was there any evidence indicating recklessness or negligence on the part of Mr. Zalewski to the point of amounting to an abuse of power or a breakdown of the use of authority such that it might be said that there was conduct amounting to bad faith. The claim was accordingly dismissed as against Mr. Zalewski.

The plaintiff then appealed the matter to the Ontario Court of Appeal on the issue as to whether the motion judge erred in finding that there was no "genuine issue requiring a trial" on the question as to whether the respondent had acted in bad faith. The Court of Appeal dismissed the appeal, agreeing with the motion judge's analysis that the plaintiff had failed to produce any evidence of bad faith such that Mr. Zalewski would be deprived of the protection conferred by section 95(1) of the statute. Accordingly the plaintiff's claim failed.

Gordon Hearn

Endnotes

(*1) See: *Alberta v. Elder Advocates of Alberta Society* 2011 SCC 24 (CanLII)
(*2) 2013 BCCA (CanLII)
(*3) 2001 SCC 79 (CanLII)
(*4) R.S.O. 1990 c. H.7
(*5) Being provincial legislation, this statute would presumably not apply or work in favour of a federal agency such as the CFIA.

2. Canadian International Aviation Litigation Updates

Although the Supreme Court of Canada's recent final disposition of the Thibodeau litigation (*1) will serve as the focal point of developments in 2014 of Canadian private international air law, the lower courts across Canada have considered a number of other interesting claims and the resulting decisions add to the growing domestic jurisprudence in respect of the Montreal Convention of 1999, the successor instrument to the Warsaw Convention of 1929.

Titulescu v. United Airlines Inc. (*2)

This case involved a suit commenced by a passenger who contracted with United Airlines for carriage from Canada to Sweden, using the United hub at Newark, NJ as a transit point. The epileptic plaintiff suffered a *grand mal* seizure while at Stockholm airport, and brought this action for damages premised on the failure of the airline to assist him and to allow him to return later to Toronto.

The plaintiff had originally commenced an action before the Ontario Small Claims Court, which was dismissed as abandoned by Order of the Small Claims Court. Prior to that Order, however, the plaintiff commenced the present action before the Superior Court of Justice. The Statement of Claim for this action was issued on June 26, 2014 whereas Mr. Titulescu's scheduled return flight had been May 27, 2012.

United Airlines brought a motion for summary judgment premised *inter alia* on the claim being prescribed by virtue of being issued more than two years after the cause of action arose, contrary to Article 35 of the Convention for the Unification of Certain Rules for International Carriage (Montreal Convention 1999) (*3), which prescribes the extinguishment of a right of action where an action is not commenced within two years.

The issue before the court was whether by virtue of the commencement of the Small Claims Court action, the tolling period had been suspended. The court refuted the argument and rather adopted a strict reading of Article 35, which denied that in any circumstance the *lex fori* could be used to permit an action to proceed where the claim was issued more than 2 years post loss. The court relied on a Warsaw Convention precedent decision of the same court, holding that given the alignment of Article 35 of the Montreal Convention with Article 29 of the Warsaw Convention, Warsaw Convention jurisprudence was authoritative. This approach was confirmed by the Supreme Court in Thibodeau only three weeks after this decision was rendered.

Mourad v. Deutsche Lufthansa Aktiengesellschaft (*4)

"Not all business class cabins are equal" was the *ratio decidendi* (or governing "take away" principle) of the Alberta Provincial Court in dismissing this litigation commenced by a plaintiff who was disappointed by the provided by Lufthansa on one stage of his three leg journey between San Diego, California and Cairo, Eygpt.

Comfort clearly took precedence over time economy for the student plaintiff as he elected a circuitous routing from origin to destination that comprised connections in Houston and Frankfurt.

Comfort is far from guaranteed even in the premium cabin of regional flights aboard European airlines. The standard configuration of business class for regional aircraft in Europe is a common seat and seat pitch with the economy class cabin; however on the omnipresent single aisle Boeing 737 and Airbus 319-20-21 aircraft series, which have a 3x3 seating layouts, the accepted norm is to block the middle "B" and "E" seats in the premium cabin. Although this is a clearly inferior product to the North American standard of 2x2 seating with increased seat pitch on the same aircraft types, the European configuration allows operators the operational advantage of readily adapting the size of a

business class cabin according to demand on a particular route, time or day by simply moving the divisive curtain backwards and forwards. This standard also reflects the typically short flight stages for intra-European flights where most of the key routes involve less than 90 minutes of flying time.

The soft product for European regional flights is on a par with North American standards with meals, alcohol, extra luggage, lounge access and priority ground services ubiquitously offered. The same aircraft and cabin layouts are also employed by European airlines on routes to a select number of proximate points in North Africa and the Middle East, which for reasons of distance, pricing and/or demand are most economically served by intra-Europe aircraft. Lufthansa adopts this strategy on its Frankfurt-Cairo route, which is served once daily by an A321 aircraft. (*5)

Mr. Mourad alleged that he expected intercontinental service standards on the portion of his itinerary between Lufthansa's global hub at Frankfurt and Cairo, and deemed Lufthansa to be in breach of its contractual obligations since it effectively downgraded him to an economy class product. Lufthansa brought this motion for summary judgment in respect of the claim.

The provincial judge disagreed with the plaintiff's characterization of breach of contract by the airline and stated that the plaintiff knew or ought to have known at the time of booking that all business class cabins are not equal and are rather adapted to flight duration and the aircraft type employed. Lufthansa delivered to the plaintiff what it had contracted to provide and the plaintiff's claim had no chance of succeeding.

A secondary claim made by the plaintiff in his pleading was for damages resulting from delay in delivery of his checked baggage, which resulted from an error in tagging his luggage on his outbound fight. The court noted a term of the applicable Lufthansa tariff, which excludes any liability for baggage delay in excess of proven damages. The plaintiff failed to substantiate the alleged loss of $250 per day in any manner and as such this second portion of his claim was similarly summarily dismissed on the grounds that the plaintiff had no chance of prevailing in his claim.

Ejidike v. Ethiopian Airlines (*6)

Ethiopian Airlines, which entered the Canadian market in 2012 and now serves Toronto three times weekly with direct flights to Addis Ababa, escaped a liability bullet in this litigation which it failed to defend and which allowed the plaintiff to bring this motion for default judgment. Fortunately for the airline, which provides the only direct scheduled air service between Toronto and Africa, the plaintiff was sufficiently unbelievable that the court at its own initiative maneuvered the Montreal Convention in order to limit the plaintiff's claims.

Ms. Ejidike, an Ontario admitted lawyer who represented herself in these proceedings, was ticketed to fly Toronto to Lomé, Togo with a layover at the Ethiopian Airlines hub in Addis Ababa. Ms. Ejidike's checked luggage did not make its way to Lomé on the same flight as the plaintiff, and thus she was allegedly provided $30 by the airline for accommodation to wait overnight for the arrival of her baggage. The plaintiff testified that the defendant airline indicated that her luggage was in Lagos, Nigeria thus she chartered a driver to take her to Lagos instead of her intended destination in Ghana. The plaintiff went on to recount that her bag took a further five days to be delivered in Lagos and as a resulting of her prescribed medication being in her checked bag, she fell ill and was hospitalized in Lagos. Ms. Ejidike produced a hospital invoice, which was marred by arithmetic errors and absence of proof of payment.

The plaintiff then had to pay to change her return ticket and alleged that further money was extorted from her by check in staff in Lomé. Although the airline acknowledged receipt of the plaintiff's consumer relations complaint, no

further compensation was paid and thus suit was brought claiming $50,000 in general damages and $300,000 in special and punitive damages.

The judge raised in argument with Ms. Ejidike the Montreal Convention and leading Canadian authorities in respect of the limitations on liability of airlines under the Convention which establishes a ceiling on damages for lost baggage of 1,000 SDRs which equates to $1,514 CAD and which exclude claims for pain, suffering and mental distress which represented the lion's den of the plaintiff's claim. (*7)

Given that there was no rebuttal evidence from the airline *in abstentia,* the court accepted that the plaintiff's baggage had been lost and that this caused damages of at least 1,000 SDRs. The court also accepted the plaintiff's testimony that $365 in local currency had been paid to the airline as an upgrade fee to business class but that the upgrade was not delivered.

The court awarded damages of 1,000 SDRs less $70USD (*8), which sum the judge found had been paid by the airline upon non-delivery of the checked baggage. The court further ordered payment of $365USD on account of the upgrade fee. The outcome of the case could have been much worse for the airline but for the judge taking notice of the Montreal Convention and precedent decisions curtailing the plaintiff's claims for damages. To this end, the high profile nature of the recent Thibodeau litigation which reached the Supreme Court is likely playing a role in raising the awareness of the judiciary of the lower courts as to the content of the discrete legal regime for claims arising out of international carriage by air.

Mark Glynn

(*1) 2014 SCC 67 discussed in the October edition of Fernandes Hearn LLP newsletter
(*2) 2014 ONSC 5683
(*3) Enacted into Canadian Federal law by the Carriage by Air Act R.S.C. 1985 c. C-26.
(*4) 2011 ABPC 107
(*5) Flight LH580 from Frankfurt to Cairo at 2,920 km is in the upper distance band of flights which would typically be served by this layout of aircraft.
(*6) 2014 ONSC 1187
(*7) The cited authorities were *Holden v. Ace Aviation Holdings Inc*. [2008] O.J. No. 3134; *Gontcharov v. Canjet 2012 ONSC 2279; and O'Mara v. Air Canada* 2013 ONSC 2931.
(*8) The court found that the sum paid in local currency upon arrival in Lomé equated to $70USD not the $30USD alleged by the plaintiff.

3. Definition of "Accident" Revisited: *Van Berlo v Aim Underwriting Limited et al* 2014 ONSC 4648, 122 O.R. (3d) 315

Van Berlo v Aim Underwriting Limited et al (*"Van Berlo")* proceeded to trial, was appealed and then was sent back to be reheard anew when the Ontario Court of Appeal decided that the trial judge had used an incorrect standard when coming to her decision.

This case involved a pilot's take-off attempt with a compromised engine that resulted in a crash and the issue was whether such incident was an "accident". Also at issue was whether the plaintiff was in breach of a condition of the subject policy that obligated him to minimize the loss, once the risk materialized and whether his failure to do so, disentitled him to coverage.

This case provides a helpful review of the Supreme Court of Canada decisions regarding the definition of "accident" and confirms that, even if conduct is foolish, simply bad judgment or can be characterized as "gross negligence", the circumstances can still amount to an "accident" and corresponding coverage.

Facts

The 54 year old plaintiff, who was an experienced pilot, owned a single-engine Piper "Cherokee Six" (the "Aztec"). He had logged close to 1,000 hours with this aircraft using it to travel between various states in the United States and Canada. On the morning of August 24, 2009, the plaintiff, in his Aztec, took off from a private airstrip in Delhi, Ontario heading to a town in North Carolina and he had clients with him as passengers. The trip to North Carolina was uneventful, as was the plaintiff's solo return trip of 2 hours and 20 minutes to the airport at Brantford, Ontario. The plaintiff landed at the Brantford airport at about 4:00 p.m. The plaintiff was registered in the "Canpass" programme and accordingly he had confirmed earlier that he would be at the Brantford airport at 4:15 p.m. for the purpose of clearing customs. This protocol required the plaintiff to be present at 4:15 p.m. for the purpose of meeting with a customs official. On a random basis, however, such customs official may or may not attend. If that customs official does not attend, then the person is free to go. On August 24, 2009, no customs official attended at the appointed time and so the plaintiff left and proceeded to the Aztec to fly home, which was a short six-minute flight.

Upon starting the engines of the Aztec, the plaintiff's right engine would not start, but, after his inspection, the plaintiff determined that the starter motor on the right engine would not engage properly or "turn over". The plaintiff's assessment was that the right engine itself was capable of functioning properly although it could not be started via the starter motor. The plaintiff chose not to use the repair facility at the airport because he did not have confidence in it typically using, instead, his own local mechanic to carry out any necessary repairs.

The plaintiff, fatefully, decided he would fly home utilizing a single engine take-off. The right engine had trouble and not the critical left engine that powered the hydraulics. The left engine also had the thrust closest to the fuselage. The Aztec was "light" having no passengers or cargo and only an hour and a half of fuel. Further, the wind was light and blowing in the intended direction of his flight giving him increased lift at take-off. The plaintiff also knew that, while operating on a single engine, the Aztec would tend to "yaw" and, given the direction, he would be heading away from people towards an open field area where he felt that he would not endanger others.

The plaintiff also had multi-engine training with, according to the plaintiff's evidence, over 50% of that training involving single-engine operation of the Aztec. The plaintiff explained in his evidence that the Aztec's ability to fly on one engine was "flawless", although the speed was slower. During cross-examination the plaintiff agreed that he had never attempted a one engine take-

off. The plaintiff testified that he considered that the runway had a length of five thousand feet and that, with two engines, if you held the brakes and powered up, the Aztec could be airborne within five hundred feet. With a single-engine take-off, the plaintiff testified that he had to power gradually to the left engine, and "roll into it" being careful not to apply too much throttle or the aircraft would spin. As speed was gained, the plaintiff would have to apply "left rudder" and "more right aileron" to steer the plane down the runway and to counteract the tendency of the plane to veer or "yaw" to the right. The plaintiff expected (or rather he was "hopeful") that he would achieve a speed of 102 miles per hour, whereas, in normal circumstances, a speed of ninety to ninety-five miles per hour would result in liftoff.

The plaintiff's state of mind as to the ability of the Aztec to take-off on one engine was also important. The plaintiff was confident that the Aztec could take off on one engine. He bet his life on it.

The actual one-engine take-off on August 24, 2009 involved the plane being positioned at the beginning of the runway after which he kept "inching the power up" and the speed increased. Thee Aztec became airborne after it was approximately two-thirds down the runway after which it yawed to the right. The plaintiff applied the necessary controls to counteract the yaw. However, he did not "think" that the plane touched the ground again and he thought he managed to keep the aircraft flying over a cornfield, which was to the right of the runway, and which was actually on the airport property according to the plaintiff.

Once airborne, the plaintiff testified he only had one option and that was to keep flying. If he had tried to put the aircraft back down, the plaintiff testified that he would have ended up in the cornfield at a high rate of speed with potentially "deadly" consequences. The Aztec cleared the cornfield and the estimated speed was 100 miles per hour. The aircraft was climbing but the plaintiff could not recall at what rate. The plaintiff ~~he~~ could not quite clear the tree line at the eastern end of the airport and he "nicked" a tree with the Aztec's right wing, which was then damaged. As a result, the plaintiff testified that the Aztec was not capable of flying and so he rolled it to the left with the intention of the Aztec to impact the ground on its left wing to absorb the shock and then perform a cartwheel to avoid a nosedive into the ground. The plaintiff did this but ended up in a different cornfield west of the tree line and not on airport property.

The Court accepted that, on the day in question the Aztec, as it was proceeding down the runway, veered to the right on a grassy infield somewhere close to taxiway Echo, proceeded across taxiway Echo after coming into contact with and breaking one of the taxiway markers, and then continued across another grassy infield until it was airborne. The Court was satisfied on a balance of probabilities that, even though this type of aircraft was not uncommon at the airport, the taxiway tire marks depicted in the photographs filed belonged to the plaintiff's Aztec aircraft and that this aircraft caused the damage to the taxiway marker. The Court also found that, after crossing the taxiway, the Aztec travelled a very brief period of time prior to being airborne, given the plaintiff's evidence as to the speed of the aircraft.

Transport Canada via a Notice of Assessment of Monetary Penalty pursuant to s. 7.7 of the *Aeronautics Act* assessed a penalty of $1,000 in relation to the plaintiff's conduct in attempting a single-engine take-off in a twin-engine aircraft. The notice also informed the plaintiff of a right of a review by the Transportation Appeal Tribunal of Canada. The notice alleged a contravention of section 602.01 of the *Canadian Aviation Regulations.* The plaintiff paid the fine and testified that it was simpler to pay the fine because it would have cost more to defend it than to pay the penalty. He did not admit culpability.

The Insurance Policy

The relevant portions of the subject insurance policy ("the Policy") were:

> Insuring Agreements
>
> In return for payment of the premium, we will provide the insurance described in this Policy and attached Endorsements, for the Coverages applicable according to the Declaration Page, and subject to the **Conditions, Definitions, Limitations and Exclusions** contained herein and in the Policy Declaration Page or attached Endorsements.
>
> [Emphasis added]
>
> Law and Jurisdiction
>
> This Policy shall be Governed by the laws of Canada whose courts shall have jurisdiction in any and all disputes whatsoever.
>
> When and Where Coverage Applies
>
> The Insurance applies to claims arising from **occurrences** which take place during the Policy period shown on the Declaration Page while your aircraft is within or is en route between these places; Canada, the French Islands of St. Pierre and Miquelon, the Republic of Mexico, the Bahamas, the Islands of the Caribbean or the Continental United States of America including Alaska.
>
> [Emphasis added]
>
> Occurrence
>
> This means an **accident**, or a continuous or repeated exposure to conditions, which results in injury during the term of the Policy, provided the injury is accidentally caused; all damage arising out of such exposure to substantially the same general conditions shall be deemed to arise out of the same occurrence.
>
> [Emphasis added]

Coverage under the Policy is triggered by an "occurrence" which means an "accident". The term "accident" was not defined in the Policy.

Another relevant condition in the policy dealt with the insured's obligation to protect the aircraft, noted below.

Was the Plaintiff's attempt at a one-engine take-off and resulting damage, an "accident" within the meaning of the policy?

(a) The Meaning of "Accident"

The Court looked to the case law to determine the meaning of "accident". In *Canadian Indemnity Company v. Walkem Machinery & Equipment Ltd.,* (*1) ("*Walkem*"), the Supreme Court of Canada stated at paragraph 10:

> [10] Therefore, the only ground remaining to be considered is whether the collapse of the crane was an "accident" within the meaning of the policy. Counsel for the appellant relied heavily on the judgment of the Court of Appeal for Manitoba in *Marshall Wells of Can. Ltd. v. Winnipeg Supply & Fuel Co.* (1964), 49 W.W.R. 664. In my view, Macfarlane J. was quite correct in preferring to the views of the majority those expressed by Freedman J.A. dissenting, in these words (at p. 665):
>
> > With respect, I am of the view that what occurred here was an accident. One must avoid the danger of construing that term as if it were equivalent to "inevitable accident." That a mishap might have been avoided by the exercise of greater care and diligence does not automatically take it out of the range of accident. Expressed another way, "negligence" and "accident" as here used are not mutually exclusive

terms. They may co-exist.

The Supreme Court of Canada in *Walkem* then quoted from and disagreed with the majority judgment of Manitoba Court of Appeal in *Marshall Wells*, noted above, stating at para. 11 of the *Walkem* judgment:

> [11] Guy J.[A.], for the majority, had said (at p. 669):
>
> > Halsbury, (vol. 22, 3rd ed.), uses these expressions at p. 294:
> >
> > > The idea of something haphazard is not, however, necessarily inherent in the word; it covers any unlooked for mishap or an untoward event which is not expected or designed, or any unexpected personal injury resulting from any unlooked for mishap or occurrence. *The test of what is unexpected is whether the ordinary reasonable man would not have expected the occurrence*, it being irrelevant that a person with expert knowledge, for example of medicine, would have regarded it as inevitable.
> >
> > In the light of the foregoing, I must agree with the learned trial judge that this was not an unanticipated mishap. Indeed, it is difficult to see how Litz, the insured, can argue that it was an accident and not a calculated risk, in view of his continued insistence that in his conversation with Mr. Coad, superintendent of Winnipeg Supply & Fuel Company, he had pointed out vigorously how dangerous it was to leave the tank in the unsupported condition it was.
> >
> > A great deal of argument was devoted to the finding of the learned trial judge that he believed Coad, as opposed to Litz, in so far as the alleged critical conversation is concerned. But surely whichever one he believed, both of them agreed that leaving this unsupported hot-water tank was dangerous.

Walkem specifically rejected the analysis of Guy J.A. in *Marshall Wells* as to the meaning of "accident" preferring a definition of accident as being "any unlooked for mishap or occurrence". The Supreme Court of Canada then stated at para. 12, regarding the analysis of Guy J.A.:

> [12] With respect, this is a wholly erroneous view of the meaning of the word "accident" in a comprehensive business liability insurance policy. On that basis, the insured would be denied recovery if the occurrence is the result of a calculated risk or of a dangerous operation. Such a construction of the word "accident" is contrary to the very principle of insurance which is to protect against mishaps, risks and dangers. While it is true that the word "accident" is sometimes used to describe unanticipated or unavoidable occurrences, no dictionary need be cited to show that in every day use, the word is applied as Halsbury says in the passage above quoted, to any unlooked for mishap or occurrence. That this is the proper test rather

> than the words italicized by Guy J. is apparent from a reading of the two cases on which that passage is based.

The Court in *Van Berlo* went on to review a further Supreme Court of Canada case, *Stats v. Mutual of Omaha Co.*, (*2) ("*Stats"*) where the issue had centred on the interpretation of a travel accident insurance policy that included coverage in the amount of $25,000 upon death occurring as a result of an automobile accident. The injuries insured against were defined to mean "accidental bodily injuries". The driver of the insured motor vehicle and her passenger were killed when the motor vehicle mounted a sidewalk and hit a brick building. The Supreme Court of Canada agreed that the driver was "grossly impaired" and that the deceased driver's blood alcohol concentration as revealed during the autopsy was 190 milligrams of alcohol in 100 millilitres of blood. The insurer refused to pay the claim. The trial judge dismissed the action of the beneficiary under the insurance policy, finding that the driver was impaired to such an extent as to be incapable of driving a motor vehicle and finding that the collision was the result of the driver's grossly impaired condition. The decision was appealed and eventually, the Supreme Court of Canada in dismissing the appeal from the Court of Appeal for Ontario, stated as follows:

> [20] Therefore, I am in agreement with Blair J.A. when, in giving reasons, he said that there was every justification for the learned trial judge's description of the deceased woman's conduct as dangerous and grossly negligent but that that was far different from finding that the insured actually and voluntarily "looked for" or "courted" the risk of the collision that killed her.
>
> [25] … Pigeon J., in *Canadian Indemnity Company v. Walkem Machinery & Equipment, supra* , adopted Halsbury's words, "any unlooked for mishap or occurrence", and in *Fenton v. Thorley & Co. Limited* , Lord Macnaghten said at p. 448:
>
> ... the expression "accident" is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed.
>
> [26] These two definitions would bring within the term "accident" those which result from the negligence of the actor whose acts are being considered even if that negligence were gross. With this view, I agree for the reason that to exclude from the word "accident" any act which involved negligence would be to exclude the very largest proportions of the risks insured against. …

The *Stats* case (*3) also considered the relevance of a person's state of mind in deciding whether an occurrence was an accident. In the Court of Appeal, Blair J.A, at para. 13, stated,

> [13] Rarely is an accident purely fortuitous. In most cases, some human act, usually of the insured, initiates the chain of circumstances from which the mishap results. *The test of whether that mishap is an accident is the actual mental state of the actor at the time the act leading to it is performed*. [Emphasis in text]

In *Stats*, the Supreme Court of Canada considered that where a person has been found to be negligent, or even grossly negligent that the person at the time the acts were performed may not have thought the acts to be negligent; however, where a person realizes the danger of his actions and deliberately assumes the risks, then the actions are not an accident. At para. 28 (referring to the decision of Grant J. being the case of *Candler v. London & Lancashire Guarantee & Accident Co.*,(*4):

> [28] Negligence is a finding made whereby the conduct of a person is judged by the concept of a reasonable man under certain circumstances. *A person may be found to*

> *have been negligent or even grossly negligent but at the time that that person performed the acts in question he might never have thought himself to be negligent*. If, on the other hand, the person realized the danger of his actions and deliberately assumed the risk of it then in Grant J.'s view his actions could not be characterized as accidental. I agree with the Court of Appeal that such analysis does not apply to the circumstances in this case and I agree, therefore, with the view of the Court of Appeal that this occurrence was an "accident" within the words of this policy. [Emphasis in text]

The Court in *Van Berlo* then cited the Supreme Court of Canada's decision in *Cooperative Fire & Casualty Co. v. Saindon*, 1975 CanLII 180 (SCC), ("*Saindon"*), which involved a comprehensive liability policy. In that case, the plaintiff and defendant, who were neighbours, were involved in an incident where the plaintiff's was injured after the defendant raised his lawnmower above his own head as a threat but then connected with the plaintiff's hand severing his fingers and hurting his right wrist. The defendant testified that he only intended to scare, not injure, the plaintiff. The defendant sought indemnity under his liability policy. The trial judge's dismissal of the claim against the insurer was restored upon appeal to the Supreme Court of Canada.

The Supreme Court of Canada in *Saindon* stated that at p. 748:

> No doubt the word "accident" involves something fortuitous or unexpected, but the mere fact that a wilful and culpable act – which is both reckless and unlawful – has a result which the actor did not intend surely does not, if that result was one which he ought to reasonably have anticipated, entitle him to say that it was an accident.

The Court then noted *Cooperators Life Insurance Co. v Gibbens*, (*6) ("*Gibbens"*) where the insured had unprotected sex and acquired genital herpes which led to a rare complication resulting in total paralysis from the mid-abdomen down. The insured claimed compensation under his group insurance policy, which stated that coverage was only provided for "bodily injury occasioned solely through external violent and accidental means".

In *Gibbens,* the Supreme Court of Canada, cited the definitions in *Walkem* and *Stats* and other cases, stating at para. 22:

> [22] What then is the "ordinary meaning" of "accident"? In *Canadian Indemnity Co. v. Walkem Machinery & Equipment Ltd.*, 1975 CanLII 141 (SCC), [1976] 1 S.C.R. 309, at pp. 315-16, Pigeon J. suggested that an accident is "any unlooked for mishap or occurrence" (p. 316). This definition was endorsed in *Martin* [*Martin v. American International Assurance Life Co.*, 2003 S.C.C. 16], at para. 20. *Martin* also quoted *Stats* which similarly held that "'accident' … denot[es] an unlooked-for mishap or an untoward event which is not expected or designed". …

The Court in *Van Berlo*, also noted that recently, in *Progressive Homes Ltd. v. Lombard General Insurance Company of Canada* (*7), the Supreme Court of Canada approved the definitions of "accident" as discussed in the cases cited above being *Walkem*, *Gibbens*, and *Martin*.

At paragraph 72, the Court held that the definition of "accident" as discussed in the various cases should be applicable to the policy in *Van Berlo* and, quoting from *Stats* (*8), above, stated that "accident" must be, apart from specific definitions in specific policies, similarly interpreted in both accident and indemnity policies.

The Decision: Was the Attempted Take-Off an "Occurrence" amounting to an "Accident" under the Policy?

The Court stated that the scope of the decision to be made by it was not whether a failed one-

engine take-off in a twin-engine aircraft constitutes an "accident" but, rather, was the decision by the plaintiff to take-off in his Aztec knowing that one of the two engines was not functioning, and then crashing, an "occurrence" that amounts to an "accident" within the meaning of the Policy?

The Court accepted the plaintiff's evidence that the plaintiff believed a one-engine take-off could be safely accomplished and accepted the plaintiff's evidence regarding his experience, during training, as to the strong performance of the Aztec while flying on one engine even though the plaintiff had not done a one-engine take-off in the Aztec. Further there were other factors enumerated above regarding the plaintiff's belief as to why such a take-off would be successful.

The plaintiff, the Court noted, knew that the Aztec could fly on one engine and it was only a six-minute flight home. From his perspective, all he had to do was to get the aircraft off the ground and he believed he could do it for all of the described reasons.

The Court accepted limited hearsay evidence as to what other pilots told him about the Aztec's ability to take-off on one engine and such evidence was admissible only on the issue of the plaintiff's state of mind as to the Aztec's ability, and not for the truth of those statements. The plaintiff, based on his own experience, the weather and other conditions, and his discussion with others, believed "one hundred percent" that the aircraft was capable of a single-engine take-off.

Further, the flight manual did not specifically state that a single-engine take-off should not be attempted and there was no placard warning against a one-engine take-off in the Aztec though there was no real suggestion that such one engine take-off was in any way condoned by the manufacturer.

The plaintiff's state of mind was also influenced by the contents of the flight manual, the proper pre-flight check procedure (that requires two operating engines), and the plaintiff's knowledge that a dead engine was regarded by the manufacturer as an emergency condition.

The Court concluded that the plaintiff's decision to attempt a single-engine take-off was bad judgment amounting to negligence but that the incident was still an "accident" – or an "unlooked for mishap or occurrence" per *Walkem* and *Stats* above. An accident can occur where the conduct of the insured constitutes negligence and even gross negligence, where it still would amount to an accident on the facts of the *Van Berlo* case.

The Decision: Was the Plaintiff So Reckless to Bring Conduct Outside of Coverage?

The Court did not agree with the insurer defendant's submission that the plaintiff was so reckless that his conduct was outside the scope of coverage under the Policy and that the plaintiff realized the dangers of his actions and deliberately assumed the risk. Further, the Court did not agree that the plaintiff "courted" the risk and that he ought to have reasonably anticipated the result. The Court did not agree that a single-engine take-off so increased the risk that the incident could not be characterized as an "accident" even though there were monetary penalties for breach of the *Canadian Aviation Regulations*. Nor did the Court agree that the plaintiff's conduct amounted to an occurrence that was outside the risks that were intended to be insured under the Policy in this heavily regulated area.

The Court at para. 92 stated, "It cannot be said, on the facts, that the plaintiff realized the danger of his actions and deliberately assumed the risk; nor can it be said that the plaintiff's conduct rose to a level of recklessness or culpability such that the occurrence was no longer an accident."

The Court disagreed with the defendant insurer's submission that the path of the aircraft supported its position. The Court found that the damage to the marker was a minor incident and the time

spent by the aircraft on the grassy infield areas was not significant given its speed as it was approaching the point of being airborne. The Court accepted that it might not be normal to veer off a runway during take-off but found that the path taken by the Aztec was a product of the plaintiff's negligence in his attempt to make a one-engine take-off, but that did not render the occurrence one which fell outside the scope of an accident.

The Decision: Was the Plaintiff in Breach of the Aircraft Protection Condition in the Policy?

As an alternative argument, the insurer defendant argued that the plaintiff violated the aircraft protection condition and was thereby disentitled to coverage. The Policy stated:

> Physical Damage to Your Aircraft
>
> *Protection of your Aircraft.* You must protect your aircraft from any further loss or physical damage. Any loss or physical damage due directly or indirectly to your failure to protect your aircraft shall not be recoverable under this Policy. We will pay all reasonable expenses that you incur to protect your aircraft from further loss.

The argument was that this section of the Policy obligated the plaintiff to minimize the loss once the risk had materialized or when the aircraft first left the runway and contacted the grassy infield area and then hit the taxiway marker. The plaintiff could have, it was argued, and should have, stopped the aircraft; but instead continued his reckless attempt to take-off.

The Court disagreed stating that the plaintiff was well aware of and was prepared for the aircraft to "yaw" to the right. The aircraft travelled only a short distance while in the grassy areas, and given its speed, was soon airborne and the plaintiff's evidence was accepted that he would have had to land in the cornfield on the airport property with potentially deadly consequences.

The Court found that the plaintiff was not in a position to bring the aircraft safely to a stop, and that the reasonable course of action as taken by the plaintiff was to continue the liftoff attempt. Further, there was insufficient evidence to conclude that the aircraft's movement to the right along the ground, shortly before take-off, was a serious enough situation to consider aborting the take-off.

The Court found that the plaintiff was not in breach of the aircraft protection condition and pronounced judgment in favour of the plaintiff for $140,000 and left the issues of costs from the first trial and prejudgment interest to written submissions.

Finally

This matter went through two trials and an appeal. The cost of pursuing and defending such a matter would have seemed prohibitive given that the damages sought were only $140,000 plus costs and interest. However, the issues of whether the incident was an "accident" and whether there was a breach of a condition in the subject policy, were crucial and Underwriters may be expected to employ due diligence in analyzing and testing the merits of any insurance claim.

Kim E. Stoll

Endnotes

(*1) 1975 CanLII 141 (SCC), [1976] 1 S.C.R. 309
(*2) 1978 CanLII 38 (SCC), [1978] 2 S.C.R. 1153 (S.C.C.)
(*3) 1976 Carswell Ont 534 (C.A.)
(*4) 1963 CanLII 155 (ON SC), [1963] 2 O.R. 547 (Ont. H.C.)
(*5) [1976] 1 S.C.R. 735
(*6) 2009 SCC 59 (CanLII) at para 47
(*7) 2010 SCC 33 (CanLII),
(*8) at para 24

4. Maritime Lien Granted For Bunkers

A maritime lien for bunkers supplied to a ship does not exist under Canadian maritime law. However, courts may in certain circumstances grant a maritime lien for bunkers. The Federal Court of Canada did just that in the recent decision of *Norwegian Bunkers AS v. The Ship "Samatan"* 2014 FC 1200 released on December 11th 2014.

Norwegian Bunkers AS ("Norwegian"), a Norwegian company, and Atlas Bunkering Services B.V.B.A. ("Atlas"), a Belgian company, brought a summary judgment application against the vessel owners and an *in rem* action against the Maltese flag ship M/V Samatan for payment of the bunker fuel ordered by the ship's agent in Norway. The fuel was delivered to the ship in Brazil.

The vessel was arrested in Vancouver to cover unpaid bunkers of U.S. $666,915.19. The Federal Court confirmed that Canadian maritime law does not generally create a maritime lien in favour of a supplier of necessaries. The Court, however, has jurisdiction to enforce valid foreign maritime liens.

The parties submitted a Statement of Agreed Facts and a Book of Agreed Documents, which enabled the Court to deal with the matter in a summary manner. The Court was required to determine whether Canadian law or the law of a foreign jurisdiction applied, being the jurisdiction where the bunkers were supplied and which law does provide for a maritime lien.

The basic facts were as follows:
1. The ship's agent in Norway placed a telephone order with Norwegian for fuel oil for the vessel, to be delivered in Brazil.
2. Norwegian sent a bunker confirmation form to the agent.
3. There were charter agreements with a "no-lien" clause in existence. These were not public documents. The clause effectively stated no lien was created when suppliers provided goods or services to the vessel. Norwegian was not notified of the no lien clause.
4. There was no contract between the owner of the vessel and Norwegian.

The Court affirmed that in the absence of a contract with a jurisdiction clause, the proper law "is determined … by an attempt to determine, on the basis of the facts and events of the case, which jurisdiction has the closest and most substantial connection to the transaction". Absent a contract between the parties to the litigation, the term "transaction" is to be understood as the factual context of the supplying of necessaries.

The Court referred to seven factors (set out in the *Imperial Oil Ltd. v. Petromar Inc.* 2001 FCA 391) that the Court must weigh to the jurisdiction to which the transactions had the closest and most substantial connection. The Court noted that this list must be adapted to the circumstances of the case and that not all factors may be applicable. These were set out as:

(1) the place of the wrongful act;
(2) the law of the flag;
(3) the allegiance or domicile of the injured seaman;
(4) the allegiance of the defendant shipowners;
(5) the place where the employment contract was made;
(6) inaccessibility of a foreign forum;
(7) the law of the forum.

The Court noted that six jurisdictions were implicated in the action. However, only Brazil had the closest and most substantial connection to the supply of bunkers. It noted as well that the bunker confirmation referred to Petrobras' general terms and conditions (the actual supplier of the bunkers in Brazil), the latter of which made Brazilian law applicable.

Once the Court determined that Brazilian law applied, it then considered an expert affidavit from a licensed lawyer in Brazil, a former law professor in Brazilian maritime law, wherein the expert asserted that Brazilian law grants a

maritime lien for the provision of bunkers.

The Court reaffirmed the principle that a maritime lien survives the sale of the ship. The claimants need not show that the vessel owners are liable *in personam.*

Summary judgment was granted against the vessel.

Rui Fernandes

5. Good faith and fair dealing in tendering process reaffirmed: *Topsail Shipping Co. Ltd. v. Marine Atlantic Inc.*

The Newfoundland and Labrador Court of Appeal has recently reminded us that in a contract tendering process, bidders are to be treated fairly, equitably and in good faith. This is in accordance with the well-rehearsed principles set out years ago by the Supreme Court of Canada in such cases as *The Queen (Ontario) v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111 ("*Ron Engineering*") and *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. ("*MJB*").

In *Topsail Shipping Co. Ltd. v. Maine Atlantic Inc.*, 2014 NLCA 41, the evidence clearly demonstrated that the defendant, Marine Atlantic Inc. ("MAI") had favoured one bidder over another in the course of a contract tendering process concerning the award of a one-year charter party in connection with the defendant's cargo and passenger transportation service between Newfoundland and the Labrador coast. MAI had also secretly negotiated a reduction in price with that same bidder.

Both the lower court and the Court of Appeal easily found that MAI's conduct violated its duty in a tendering process to treat all bidders fairly and in good faith. Any party about to commence a tendering process of its own would do well to keep this decision in mind.

The Facts

MAI and its predecessors had contracted for freight and passenger services between Newfoundland and the Labrador coast (the "Labrador Service") since 1949. Before 1997, MAI's charter parties, usually awarded for a five-year term, were awarded by way of a public call for tenders.

MAI had had previous charter parties with the plaintiff, Topsail Shipping Co. Ltd. ("Topsail"), including one for its vessel, the *M.V. Duke of Norfolk*. One of these charter parties had been

extended in 1991 and was due to expire on December 31, 1996.

Meanwhile, a larger vessel, the *M.V. Astron*, owned by Canship Limited ("Canship"), was also on charter to MAI for the Labrador Service, and its charter party was also due to expire on December 31, 1996.

A third charter party with Puddister Shipping Limited ("Puddister") for the *M.V. Northern Cruiser* had expired in 1993 and had not been extended or renewed.

In the fall of 1996, the federal and provincial governments were debating which level of government would assume future responsibility for the Labrador Service. Consequently, MAI was unable to enter into any new five-year charter parties when the two existing charter parties with Topsail and Canship expired.

As an alternative, MAI requested proposals for two one-year charter parties, with a possible one-year extension. This request was made to Topsail, Canship and Puddister. All three parties were aware that MAI intended to renew the charter party for Cansail's larger vessel, the *M.V. Astron*, and that the two smaller vessels owned by Topsail and Puddister would be competing for the second charter party.

When MAI contacted Topsail to make a proposal, its president informed MAI that Topsail had listed its vessel for sale, but that if Topsail's charter party was extended the vessel would be withdrawn from the market. MAI advised that a decision would be made within two weeks.

Written proposals were thus received by MAI from Topsail and Puddister. Ultimately, an internal MAI document revealed that Topsail was the low bidder. Both companies were informed that a decision would be reached by December 2, 1996. However, MAI's decision was delayed, due to ongoing discussions between the governments.

During this time, however, it was found that MAI had allowed Puddister to amend its bid by including overtime and certain other costs in the bid price as opposing to charging extra for these services – essentially, reducing its overall pricing proposal. It was also found that MAI entered into a direct comparison of the two bidders' vessels, when the bidders themselves had not contemplated such a comparison and they had not been given an opportunity to address it themselves.

Finally, on February 10, 1997, MAI advised that the second charter party had been awarded to *Puddister*, not Topsail. In the meantime, Topsail had turned down an offer by a third party to purchase its vessel for $900,000.

In May 1997, Topsail sold its vessel for $822,000, resulting in a loss of opportunity given the previous offer that it had rejected.

In the Lower Court

Topsail commenced a proceeding against MAI, seeking loss of profits respecting the charter party and loss of opportunity regarding the sale of its vessel. The lower court judge allowed Topsail's action for loss of profits, but did not allow its action for loss of opportunity regarding the sale of the vessel.

The trial judge had no difficulty in finding that MAI had set up a tender call, that MAI intended to award contracts as a result of this process, and that the basic contractual form of the previous charter parties was to constitute the general terms of the new contracts, tailored only with respect to prices tendered.

Thus, a valid "contract "A"/contract "B"" scenario was created, engaging the well-known principles regarding tender calls set out by the Supreme Court of Canada in *Ron Engineering* and *M.J.B.*

The trial judge found that MAI, in allowing Puddister to change its pricing structure and also by comparing the two vessels without giving the

parties a chance to address the issue, swung the process in the favour of Puddister over Topsail, and were improper in the process which was established. The Court concluded that the principles set out by the Supreme Court of Canada in *Ron Engineering* and *M.J.B. Enterprises* had been violated.

On Appeal

MAI appealed to the Newfoundland and Labrador Supreme Court – Court of Appeal, arguing that the lower court judge had made several errors, including: (1) characterizing its procurement process as a "call for tenders" rather than simply a "request for proposals"; (2) finding that MAI had engaged in "bid shopping" or "bid manipulation" with respect to Puddister's quoted rates; and (3) finding that MAI had breached a duty of good faith to Topsail in its "contract "A"/contract "B"" course of dealings with Topsail and Puddister, which required MAI to award the contract to the lowest bidder.

The Decision

After a discussion of the well-known principles applicable in a tendering process, the Court of Appeal affirmed the lower court judge's decision in its entirety. Ultimately, on the facts of the case, Justice Harrington found that a valid call for tenders had been established by MAI, and that both Topsail and Puddister were pre-qualified to submit their rates and other surcharges for MAI's consideration, which would be binding if and when MAI awarded the charter party to whichever bidder.

Thus, in the circumstances, Harrington J.A. held that MAI was prohibited from negotiating the price with Puddister. Nonetheless, the evidence demonstrated MAI's clear preference for Puddister's vessel, and also that MAI had engaged in a process of negotiation with Puddister, seeking to reduce its quoted rates, without Topsail's knowledge. This negotiation with Puddister amounted to a breach of its obligation to treat all bidders fairly in the context of a contract tendering process.

In the result, the Court concluded that Topsail should have been awarded the charter party. Topsail was accordingly awarded damages for its lost profits (to be assessed). The Court also agreed with the lower court judge that Topsail should not be awarded anything for the loss of opportunity in the context of selling its vessel at a lower price, as this would obviously constitute double recovery.

James Manson

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CONTEST

This month we are giving away a prize - a ticket to attend the Fernandes Hearn LLP Annual Seminar being held January 15th 2015 - for the first individual to email us the name of the city in the photograph on page 8. Email your answer to info@fernandeshearn.com with a subject line "Newsletter contest". First response with the correct answer wins.