Human sperm is “property”. So sayeth the British Columbia Court of Appeal. In this seminal decision, the Court had to decide whether human sperm was property and thus “goods” for the purposes of the Warehouse Receipt Act, R.S.B.C. 1996, c. 481 (the “WRA”).

Lam v. University of British Columbia, 2015 BCCA 2 involved a class action brought by men who had cancer and before undertaking radiation treatment had deposited their frozen sperm at the University of British Columbia’s Andrology Laboratory. In May 2002, it was discovered that the freezer had suffered a power interruption, which damaged or destroyed the stored sperm. The Court of Appeal acknowledged that it was a hard and emotional decision. The University charged little for its services and faced a significant exposure; the class members potentially lost the opportunity to procreate and were faced with a provision that denied them compensation. At paragraph 32 of the decision, the Court stated: “Although the result likely will be disquieting for one side or the other, the task of the courts is to determine the legal rights of the parties.”

At the time they deposited their sperm for storage, the men signed a Bank Facility Agreement (“Facility Agreement”). It required depositors to pay a deposit fee, an annual storage fee and a withdrawal fee, all of which were fairly modest. The agreement also stated:

4. WITHDRAWAL OF THE SPECIMEN
You may at any time upon:
(a) payment of the Withdrawal Fee;
(b) delivery by your physician to us of 45 days prior written notice of withdrawal; and
(c) delivery to us of such withdrawal forms or releases as we require; require us to deliver to your physician within the 45 day notice period any part or all of the Specimen....
FIRM AND INDUSTRY NEWS

- The following members of Fernandes Hearn LLP have been listed in the 10th Edition of *The Best Lawyers in Canada*: Rui Fernandes for Maritime Law and Transportation Law, Gordon Hearn for Maritime Law and Transportation Law, Kim Stoll for Maritime Law, Louis Amato-Gauci for Aviation Law and Transportation Law.

- The **International Marine Claims Conference** will take place in Malahide, Co. Dublin 23 to 25 September 2015. Kim Stoll will be attending representing the firm.

- The **2015 Canadian Transport Lawyers Association** Annual Conference will take place in Kelowna, British Columbia on 1-3 October 2015. Kim Stoll, Louis Amato-Gauci, David Huard, and Jaclyne Reive will be attending representing the firm. Kim Stoll is speaking on Trucking and Freight Forwarding on the Modal Update Panel. Louis Amato-Gauci is speaking on a panel on Transborder Transportation Contracts.

- Mark Glynn will be speaking on “Security, Safety, Liability & Insurance” at the **Trans-Pacific Aviation Law & Policy Conference** on October 8th 2015 in Vancouver, British Columbia.

- The **2015 Surface Transportation Summit** will take place on October 14, 2015 in Mississauga, Ontario.

- Gordon Hearn will be speaking on “The Enforceability of Form Contract Choice of Law and Jurisdiction Clauses in Cross-Border Transactions” as a participant on the International Law panel at the **American Bar Association** meeting on October 23, 2015 in Montreal, Quebec.

- The **Fort Lauderdale Mariners Club 26th Annual Marine Seminar** will be taking place November 3-4, 2015, in Fort Lauderdale Florida.
7. LIMITATION OF OUR LIABILITY
By signing this Agreement you agree that neither we nor our successors or assigns nor any of our governors, directors, officers, employees or agents will be liable to you or anyone else for any destruction of, damage or alteration to or misuse of your Specimen for any reason whatsoever, including:
(a) the improper testing of your Specimen;
(b) improper freezing of your Specimen;
(c) improper maintenance and/or storage of your Specimen in a frozen state; or
(d) improper withdrawal and/or delivery of your Specimen.
This exclusion of our liability extends to any damage, misuse or impropiety caused by or resulting from any malfunction of our freezing equipment (whether for causes within our control or not) or from any failure of utilities, strike, cessation of services or other labour disturbances or any failure or similar occurrence in our or any other laboratory or from any fire, earthquake or other acts of nature beyond our control, or caused by or resulting from any act, omission or negligent conduct on the part of us or our successors or assigns or any of our governors, directors, officers, employees or agents.

The University relied on the exclusion of liability in clause 7. The respondents raised s. 2(4) of the WRA which allows a warehouse to insert in a receipt any term or condition that is not contrary to the Act and does not impair the warehouser’s obligation to exercise the care and diligence in regard to the goods as a careful and vigilant owner of similar goods would exercise in the custody of them in similar circumstances. The University argued that the sperm deposits were not “goods” and thus this limiting section of the WRA was not applicable and the University could therefore exclude liability without breaching the WRA.

The trial judge held that the University was precluded from relying upon the exclusion clause in the Facility Agreement by virtue of the WRA.

The judge concluded that the parties did not contemplate the application of the WRA at the time the men signed the Facility Agreement because the issue was not raised until well into the litigation. He also observed that at the time the WRA was enacted it was not intended to apply to the storage of sperm because “technology for the storage of sperm was not in use and the common law did not recognize that sperm or body parts could be property”(*1).

The trial judge referred to several fairly recent cases that concluded sperm is property: Yearworth v. North Bristol NHS Trust, [2009] EWCA Civ 37; Kate Jane Bazley v. Wesley Monash IVF Pty Ltd, [2010] QSC 118 (T.D.); C.C. v. A.W., 2005 ABQB 290 (CanLII); J.C.M. v. A.N.A., 2012 BCSC 584 (CanLII), and concluded(*2):

[41] These cases did not consider whether the term “property”, as used in legislation, could include sperm. They were concerned with whether the common law now regards stored sperm or embryos as property. That distinction is of no consequence to the analysis I must make in this case. Courts in a variety of jurisdictions have come to the conclusion that stored sperm is property. I agree with the conclusion arrived at in these cases. The frozen sperm at issue in this case is the property of the class members. The sperm was ejaculated, frozen and stored for the purpose of using it for conception. Applying the current state of the law of property to the definition in the WRA leads to a conclusion that frozen sperm is “goods”.

The judge continued his analysis stating (*3):

[42] The next step in the analysis is to ask if the purpose of the provisions in the WRA justifies the application of those provisions to the new definition of property. One of the purposes of the WRA was to codify the common law of bailment. Under the common law, a bailee is required to exercise the same care and diligence with respect to the bailed goods as a careful and vigilant person would exercise over his own similar goods in like circumstances. Sections 2(4)
and 13 of the WRA effectively accomplish that. There is no reason why these provisions should not be applied to property that can be stored for reward which was not contemplated at the time the legislation was enacted. The purpose of requiring bailees to exercise adequate care and diligence applies equally to all kinds of property that can be stored for reward.

[43] The other step in the [Côté] analysis is to ask if the legislative provision in question is sufficiently general to permit its application to things unknown at the time of enactment. As I have already noted, the definition of goods is broad and inclusive. In other words, the provision is sufficiently general to apply to things unknown at the time of passage. There is no reason not to apply the provisions of the WRA to goods which fall within the current understanding of “all property other than things in action, money and land.”

The judge observed that the thrust of the University’s argument was that it is an offence under the Assisted Human Reproduction Act, S.C. 2004, c. 2, to sell human sperm. If a warehouser were to issue a negotiable receipt or a transferrable non-negotiable receipt for frozen human sperm, the sperm could be sold, creating a conflict between the WRA and the Assisted Human Reproduction Act. The judge rejected the University’s argument. The judge found that the fact that sperm cannot be purchased does not prevent it from falling within the definition of ‘goods’ in the WRA. It simply reflects the fact that sperm, like other classes of property, is subject to control or regulation by other statutory provisions. If sperm is property that can be stored and for which a receipt can be issued, then it falls within the definition of ‘goods’ in the WRA. (*4)

The judge dealt with how section 7 of the Facility Agreement breached the provisions of the WRA, stating at paragraph 90:

On a plain reading of clause 7, it is clear that it is directly contrary to s. 13 of the WRA. As previously noted, s. 13 imposes liability on a warehouser for the loss of or injury to goods caused by the warehouser’s failure to exercise the care and diligence that a careful and vigilant owner of similar goods would exercise in the custody of them in similar circumstances. Clause 7 attempts to shield the Andrology Lab from the same liability that s. 13 assigns to it as a warehouser. Clause 7 excludes the Andrology Lab from liability for any acts, omissions or negligent conduct, and covers a wide variety of circumstances including freezer malfunction, labour disturbances, or conduct of its employees. The clause is patently contrary to s. 13. It does not merely provide a limitation of damages in a manner similar to the warehouse receipt in Evans Products.

The judge recognized that while the WRA did not permit exclusion of liability, limiting liability is allowed. The University could simply have stated in its Facility Agreement that its liability was limited to $50 per deposit.

The Court of Appeal agreed with the findings of the trial judge and dismissed the appeal. It acknowledged at paragraph 95 of its decision that “Historically, there was no property interest in the human body, dead or alive. Save for the despicable period of history when slavery and ownership of humans was legally recognized, ownership of the human body has been eschewed.” The Court, however, agreed with the comments of Madame Justice Russell in the J.C.M. decision (*5) that “jurisdiction developments in medical science now require a re-analysis of the common law’s treatment of and approach to the issue of ownership of parts or products of a living human body, whether for present purposes (viz. an action in negligence) or otherwise.”

The Court of Appeal recognized that defining human sperm as “property” under the WRA in this case could widen the available remedies to Mr. Lam and the class members, stating at paragraph 94:

For example, Mr. Lam arranged to freeze his sperm as he was about to receive cancer treatment that could leave him infertile. He
froze his sperm as a contingency plan for having children of his genetic make-up should he no longer be able to produce viable sperm. If someone broke into the lab and stole the sperm, could he or she be charged with theft? Theft is a crime against property. Could Mr. Lam have donated his sperm to a sperm bank if he chose not to have his own children? What would happen if Mr. Lam had died? Would he be able to leave his sperm to his family or someone else in a will? Could he leave it to a sperm bank in his will? These are all questions that may arise if human sperm is generally classified as property.

The Court of Appeal cautioned against using this decision as a basis for determining the property interests that a person can have in human sperm, stating at paragraphs 113 and 114:

The nature and scope of property interests that a person can have in human sperm need not be decided on the facts of this case. This case, unlike for example, *J.C.M. v. A.N.A.*, 2012 BCSC 584 (CanLII), does not deal with competing property interests in human sperm. This case considers whether Mr. Lam, a cancer patient, has ownership of the sperm he produced, such that he can contract for its storage to enable his personal use of the sperm at a later date. If so, the sperm is property, as something must be property if it is capable of being owned. There may also exist things that are property that cannot be owned, but that is not something that needs to be decided in the context of this case...

Ownership of body parts must be contextual, and often limited by legislation because of public policy reasons. No one would argue that if a cancer patient cut her hair and stored it for the purpose of later making a wig after treatment that she did not “own” her hair in that context. On the other hand, legislation prevents the selling of sperm and organs such as kidneys, but does not prevent their donation. The prohibition on sale does not necessarily mean the legislation is inconsistent with ownership. It has provided limits to ownership in some contexts.

For warehousemen this decision is germane to the issue of exclusion and limitation of liability and how this is dealt with in contract in relation to legislation in place in each province. The decision is not anticipated to sow the seeds of discontent in the industry.

*Rui Fernandes*

Endnotes

(*1) Paragraph 21 *Lam v. University of British Columbia*, 2009 BCSC 196

(*2) Paragraph 41

(*3) Paragraphs 42 and 43

(*4) Paragraph 49

2. Is Your Business Complying with Canadian Privacy Laws? An Overview of PIPEDA and Recent Changes

Does your company collect, use or disclose personal information from its customers? If so, it is required to comply with certain privacy laws in Canada regarding the protection of that information.

The Personal Information Protection and Electronic Documents Act (“PIPEDA”) (*1) sets out the rules that govern the collection, use and disclosure of personal information of an individual by an organization.

“Personal information” is defined under PIPEDA to mean information about an identifiable individual. This includes age, name, ID numbers, income, ethnic origin, opinions, evaluations, comments, social status, disciplinary practices, employee files, credit records, loan records, medical records, etc... (*2)

On June 8, 2015, Bill S-4 (*3), also referred to as the Digital Privacy Act (“DPA”), became law in Canada and amends certain parts of PIPEDA. This article is meant to serve as an overview of PIPEDA and its recent amendments.

The rules created under PIPEDA aim to balance the rights of individuals to privacy with respect to their personal information while also recognizing the need of organizations to collect, use and disclose that information in certain circumstances. (*4)

*Does PIPEDA apply to your organization?*

PIPEDA applies to all private-sector organizations that collect, use or disclose personal information in the course of commercial activities, except those in Alberta, British Columbia and Quebec, which have privacy legislation deemed substantially similar to PIPEDA. It does not extend to employment practices (including personal information about an employee or applicant for employment) unless the organization is a federal work, undertaking or business. Interprovincial or international transportation companies would fall under the federal works category. (*5)

Since Ontario does not have substantially similar legislation, PIPEDA applies to companies operating in Ontario, except in relation to the collection of health information. (*6)

Organizations may only collect, use, or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances. (*7) For example, a reasonable person would not expect the personal information that they provide when purchasing sporting equipment from an online store to be disclosed to a telemarketing company for mobile phones.

*(1) Compliance*

Schedule 1 of PIPEDA sets out certain principles with which organizations must comply. First, an organization is responsible for any personal information that is under its control and must designate someone to be accountable for the company’s compliance with the PIPEDA principles. This individual (or team of individuals) can designate others to be responsible for the day-to-day collection and processing of personal information and to act on their behalf. However, the delegators are ultimately still accountable for the company’s compliance. (*8)

A company must implement policies and practices to give effect to the principles. It should ensure that it has procedures in place, which cover the protection of personal information, methods of receiving and responding to complaints and inquiries, and training of staff regarding the company’s policies. The company must also ensure that it develops some form of information that explains its policies and procedures. (*9)

Policies regarding the management of data must be made readily available to individuals. (*10) Similarly, an individual must be informed, upon request, as to the existence, use and disclosure
of his or her personal information and must be given access to it. (*11)

If information is transferred to a third party for processing, the company must either enter into a contract or use other means of ensuring that the personal information is properly protected while being processed. (*12)

The Privacy Commissioner may audit the personal information management practices of an organization, upon reasonable notice, if it has grounds to believe that the organization is breaching or has breached the provisions of PIPEDA. (*13)

(2) Purpose of Collection

When collecting personal information, a company must identify and document the purpose for which the information is being collected either before or during collection. The company must only collect the information that is necessary for the identified purpose. The purpose should be specified to the individual from whom the personal information is being collected either before or at the time of collection; this may be done orally or in writing. (*14)

When personal information is to be used for a purpose that was not previously identified, the company must obtain the consent of the individual before it can be used unless the new purpose is required by law. (*15)

(3) Valid Consent

Knowledge and consent of the individual is required for the collection, use or disclosure of personal information. (*16)

The organization must make a reasonable effort to ensure that the individual is advised of and understands the purpose for which the information will be used. (*17)

The newest version of PIPEDA, as amended pursuant to the DPA, establishes that the consent of an individual is only valid if it is reasonable to expect that an individual to whom the organization’s activities are directed would understand the nature, purpose and consequences of the collection, use or disclosure of that information. (*18)

Similarly, personal information should not be collected, used, or disclosed in a manner or for a purpose that the person would not reasonably have expected. For example, a person who provides their personal information to a health care provider would not expect that the information would be given to a company selling health care products without consent. (*19)

(4) Collection, Use or Disclosure Without Knowledge or Consent

In certain circumstances, an organization may collect the personal information of an individual without their knowledge or consent. For example, if the collection is clearly in the interests of the individual and consent cannot be obtained in a timely way or if it is reasonable to expect that the knowledge of the collection would compromise the availability or accuracy of the information, then consent is not necessary. In the latter case, the collection must be reasonable for the purposes of investigating a breach of an agreement or the laws of Canada or a province. (*20)

There are also instances where an organization may use the personal information of an individual without their knowledge or consent. For example, where the information is to be used for the purpose of acting in respect of an emergency that threatens the life, health or security of an individual or where an organization has reasonable grounds to believe that the information could be useful in an investigation of a contravention of the laws of Canada, a province or a foreign jurisdiction. (*21)

Pursuant to the DPA, these sections of PIPEDA have been amended to include collection, use and disclosure of personal information without
consent when it is contained in a witness statement and its collection or use is necessary to assess, process or settle an insurance claim. Additionally, where the information was produced by the individual in the course of their employment, and the collection or use is consistent with the purpose for which it was produced, then consent is not necessary. (*22)

In certain cases, an organization may also disclose personal information without the knowledge or consent of the individual if the disclosure is made to the organization’s lawyer, for the purpose of collecting a debt owed by that person to the organization, or if it is required to comply with a subpoena or warrant issued or an order made by a court. Similarly, consent is not required where the disclosure is made to a government institution with lawful authority to obtain the information for national security purposes or for the enforcement of a law. (*23) These are just some of the exceptions to consent listed under PIPEDA.

(a) Changes under the DPA – fraud or breach of agreement or law

Pursuant to the DPA, personal information may also be disclosed without knowledge of consent for the purposes of detecting or suppressing fraud or to investigate a breach of an agreement or contravention of the laws of Canada or a province. In both cases, disclosure can only be made without consent where it is reasonable to expect that disclosure with the knowledge or consent of the individual would compromise the investigation or the ability to prevent or suppress the fraud. (*24)

(b) Changes under the DPA – injury, illness, or death

The DPA has also implemented amendments to the consent requirements to allow for the disclosure of personal information to a government institution or next of kin without the consent of the individual where he or she is injured, ill, or deceased, where he or she may be the victim of financial abuse or where it is necessary to identify an individual who is injured, ill or deceased. If the individual is alive, the organization must notify them of the disclosure in writing without delay. (*25)

(c) Changes under the DPA – prospective business transactions

Companies that are parties to a prospective business transaction can use and disclose personal information without the knowledge and consent of the individual in some cases. Pursuant to the DPA, PIPEDA has been amended to include the following definition of “business transaction”:

“(a) the purchase, sale or other acquisition or disposition of an
organization or part of an organization, or any of its assets;
(b) the merger or amalgamation of two or more organizations;
(c) the making of a loan or provision of other financing to an organization or a part of an organization;
(d) the creating of a charge on, or the taking of a security interest in or a security on, any assets or securities of an organization;
(e) the lease or licensing of any organization’s assets; and
(f) any other prescribed arrangement between two or more organizations to conduct a business activity.”

Knowledge and consent is not required if the organizations have entered into an agreement that requires the receiving organization to (1) use and disclose it only for purposes related to the transaction, (2) to protect it by security safeguards, and (3) to return it to the organization that disclosed it (or destroy it) within a reasonable time if the transaction does not proceed. In addition, (4) the information must also be necessary to determine whether to proceed with and complete the transaction. (*26)

Once the transaction has actually been completed, the parties may continue to use and disclose personal information without knowledge and consent if (1) the agreement requires it and (2) it is used solely for the purposes for which it was collected, permitted to be used or disclosed before the transaction was completed. Further, (3) The information must be necessary for carrying on the business that was the object of the transaction. In addition, (4) the information must be protected by security safeguards. (*27)

Finally, (5) one of the parties must notify the individual within a reasonable time after the transaction is completed that their personal information has been disclosed. The parties must give effect to any withdrawal of the individual’s consent. (*28)

These rules do not apply to transactions where the primary purpose is the purchase, sale, acquisition, disposition, or lease of personal information. (*29)

(5) Safeguards

The organization must implement security safeguards that protect personal information against loss or theft, unauthorized access, disclosure, copying, use or modification. Sensitive information should be guarded by a higher level of protection. Employees must be made aware of the importance of maintaining the confidentiality of personal information. (*30)

(6) Requests for Access

An individual may request access to any records held by the company, may challenge the accuracy and completeness of the information, and may have it amended as appropriate. The company must inform the individual of the existence, use and disclosure of his or her personal information, upon requested. The company must respond to a request within thirty days of its receipt or must have sufficient grounds for an extension of time. (*31)

There are certain circumstances where an organization is not required to give access to personal information; for example, if it may include information about a third party, if it is protected by solicitor-client privilege, if it would reveal commercial information, and so on. Special rules apply in these cases. (*32)

(7) Business Contact Information

Under the new regime, PIPEDA no longer applies with respect to business contact information that an organization collects, discloses, or uses solely for the purpose of communicating or facilitating communication with someone in relation to their employment, business or profession. “Business contact information” means an individual’s name, position name or title, work address, work telephone and fax numbers, and work e-mail address.
(8) Breach Notification and Record Keeping

Pursuant to the DPA, PIPEDA will be amended to require an organization to report to the Privacy Commissioner regarding any breach of security safeguards involving personal information under its control. The breach notification provisions are not yet in effect and will be enacted at a later date.

If it is reasonable in the circumstances for the organization to believe that a breach will create a “real risk of significant harm to an individual” then it will be required to report that breach. (*33)

The DPA defines “significant harm” as including “bodily harm, humiliation, damage to reputation or relationships, loss of employment, business or professional opportunities, financial loss, identity theft, negative effects on the credit record and damage to or loss of property.” (*34) Factors that should be considered in determining whether the breach creates a real risk include the sensitivity of the information involved, the probability that it has been, is being, or will be misused and other factors to be outlined in regulations.

The breach must also be reported directly to the individual to whom the information belongs as soon as feasible after the breach. The notification must contain information that will allow the individual to understand the significance to them of the breach so that they may take steps to reduce or mitigate any harm. (*35)

The amendment calls for regulations to be made under PIPEDA that will address the content and form of the report to the Commissioner and the notification to the individual. The regulations will also address circumstances where the notification can be made indirectly.

A company must also notify any other government organization of the breach if it might be able to reduce the risk or mitigate the harm that could result from the breach. This notification can be made without the consent of the individual so long as the reduction or mitigation of harm is the sole purpose for the disclosure. (*36)

Pursuant to the DPA, PIPEDA will also require that an organization keep a record of every breach of security safeguards involving personal information under its control. (*37) Note that the wording of this section does not narrow the necessity of record keeping solely to breaches resulting in “significant harm”. Out of an abundance of caution, companies should ensure that records are kept for all breaches, no matter how minor or trivial.

(9) Compliance Agreements

Pursuant to the DPA, PIPEDA has been amended to allow the Privacy Commissioner to enter into compliance agreements with organizations where there are reasonable grounds to believe that there has been a commission or there is about to be a commission of an act or omission that would constitute a contravention of the provisions of PIPEDA outlined above. (*38)

The compliance agreement may contain any terms that the Commissioner considers necessary to ensure compliance with PIPEDA. Once an agreement is entered into, the Commissioner may not apply to the court for a hearing regarding the organization’s breach of PIPEDA and any pending applications must be suspended. However, the fact that a compliance agreement is in place does not provide immunity to an organization from an individual who starts an action for compensation or from the prosecution of an offence under PIPEDA. (*39)

If the organization is not complying with the agreement, the Commissioner may apply to the court to have a hearing reinstated or to request an order requiring the organization to comply with the terms of the agreement. Once the agreement has been complied with, the Commissioner must provide notice to that effect to the organization and withdraw any applications made to the Court. (*40)
(10) Fines for Knowingly Contravening the Act

An individual can file a written complaint with the Privacy Commissioner against an organization for breaching a provision of PIPEDA. The Commissioner is required to give notice of the complaint to the organization. (*41) The Commissioner must investigate the complaint except under certain circumstances. (*42) Within one year of the filing of the complaint, the Commissioner must prepare a report containing its findings and recommendations along with other information. (*43) The decision of the Commissioner may be appealed to the Court. (*44)

Every person who knowingly contravenes certain sections of PIPEDA or who obstructs the Commissioner’s investigation of a complaint or conduct of an audit may be subject to a fine of up to $10,000 for an offence punishable on summary conviction or $100,000 for an indictable offence. The sections in question include the future breach notifications and record keeping requirements, the dismissal of a “whistle blowing” employee and the requirement to retain information subject to an access request until the individual exhausts all avenues of appeal. (*45)

(11) Summary of Responsibilities of a Company

The basic PIPEDA principles with which a company must comply can be summarized as follows: (*46)

a) Appoint an individual or team responsible for the company’s compliance with PIPEDA;

b) Create and implement personal information protection policies and practices regarding information held by the company and disclosed to third parties for processing;

c) Ensure that these policies address the retention and destruction of personal information;

d) Ensure that these policies address complaint procedures – they should be simple and efficient;

e) Ensure that customers are aware that these policies exist;

f) Ensure that these policies are easily understood and available to customers;

g) Implement safeguards to protect the information from loss, theft, unauthorized access, disclosure, copying, use or modification;

h) Identify and document the reasons/purposes for the collection of personal information, including how it will be used and disclosed;

i) Ensure that the individual is informed as to why the company is collecting their personal information and how it will be used;

j) Obtain the individual’s consent before collecting, using or disclosing their personal information before or at the time of collection;

k) If a new use is identified, obtain further consent;

l) Collect only as much information as needed for the intended purpose;

m) Do not deceive or mislead individuals about the reasons for collection;

m) Use or disclose the information only for the purpose for which it was collected unless the individual consents or it is authorized under PIPEDA;

0) If the information is used to make a decision about an individual, keep it for a reasonable amount of time so that they can seek any redress;

p) Destroy, erase or render anonymous information that is no longer required;

q) Inform individuals that the company has information about them, if requested;

r) Provide access to the information or cite the reasons for denying access, if requested; and

s) Once the breach notification and record keeping sections are in effect:

(i) Notify the Privacy Commissioner of any breach of security safeguards involving personal information that may create a real risk of significant harm to the individual; and

(ii) Keep a record of all breaches of security safeguards.
End Notes

(*1) S.C. 2000, c. 5
(*2) Office of the Privacy Commissioner of Canada Fact Sheet, “Complying with PIPEDA”
(*3) An Act to amend the Personal Information Protection and Electronic Documents Act and to make a consequential amendment to another Act, S.C. 2015, c. 32
(*4) Supra note 1, s 3.
(*5) Supra note 1, s 4; supra note 2.
(*6) Supra note 2.
(*7) Supra note 1, s 5(3).
(*8) Supra note 1, Schedule 1 at 4.1.
(*9) Ibid.
(*10) Supra note 1, Schedule 1 at 4.8.
(*11) Supra note 1, Schedule 1 at 4.9.
(*12) Ibid.
(*13) Supra note 1, s 18.
(*14) Supra note 1, Schedule 1 at 4.2 & 4.4.
(*15) Ibid.
(*16) Supra note 1, Schedule 1 at 4.3.
(*17) Ibid.
(*18) Supra note 1, s 6.1.
(*19) Supra note 1, Schedule 1 at 4.3.
(*20) Supra note 1, s 7(1).
(*21) Supra note 1, s 7(2).
(*22) Supra note 1, ss 7(1)-(3).
(*23) Supra note 1, s 7(3).
(*24) Ibid.
(*25) Ibid.
(*26) Supra note 1, s 7.2.
(*27) Ibid.
(*28) Ibid.
(*29) Ibid., s 7.2(4).
(*30) Supra note 1, Schedule 1 at 4.7.
(*31) Supra note 1, s 8 and Schedule 1 at 4.9.
(*32) Supra note 1, ss 8 &9.
(*33) Supra note 3, s 10.
(*34) Ibid.
(*35) Ibid.
(*36) Ibid.
(*37) Ibid.
(*38) Supra note 1, s 17.1.
(*39) Ibid.
(*40) Supra note 1, s 17.2.
(*41) Supra note 1, s 11.
(*42) Supra note 1, s 12.
(*43) Supra note 1, s 13.
(*44) Supra note 1, ss 14 & 15.
(*45) Supra note 1, s 28.
(*46) Supra note 1, Schedule 1; Supra note 2.
3. Letters of Intent – The State of Law in Ontario Post-Wallace

Background

A letter of intent (“LOI”), also known as a memorandum of understanding, is a common commercial tool used by parties who are in the process of negotiating an agreement but that have not yet agreed on the specific terms of the deal. The purposes of an LOI is to set out the broad intention of the parties involved in negotiating a final contract. An LOI can be useful in a commercial context as it can allow parties to signify a commitment to a potential agreement and can also allow for stakeholders to shape the process by which a contract is negotiated. For example, an LOI can obligate parties to maintain confidentiality or exclusivity during the negotiation process. An LOI is commonly used in the context of the purchase and sale of businesses. That being said, they are also utilized in larger sale of goods agreements or long-term supply service agreements.

An LOI can be problematic, however, where it is not what the parties signing the LOI are agreeing to be legally bound to. A poorly drafted LOI can lead to disputes regarding whether the document was intended to be a legally binding contract or merely a statement of business intentions.

Seminal Case – Wallace v. Allen

In the widely reported decision of Wallace v. Allen, 2009 CarswellOnt 150 (ONCA), the Ontario Court of Appeal considered the ruling of the Superior Court of Justice that an LOI regarding the purchase and sale of a company did not signal that a final agreement had been made (*1). The Superior Court of Justice had reached this decision despite the fact that the LOI set out almost all of the essential terms of the purchase and sale agreement.

In overturning the Superior Court decision, the Court of Appeal ruled that the LOI clearly expressed an intention on the part of the parties to be bound by its terms, which were to be incorporated into the more formal purchase and sale document.

The Court of Appeal relied on the fact that the language in the LOI referenced “this agreement,” suggesting that the substance of the LOI was acceptable to the parties and that only the wording would be altered in the drafting of a binding agreement of purchase and sale. Interestingly, the Court of Appeal was also influenced by the conduct of the parties following the signing of the LOI. The Court found that the fact that the purchaser had begun to work in the business and had been introduced to the employees as the new owner was evidence that the parties intended to be bound by the terms of the LOI.

The Wallace decision was a clear indication from the Courts that where the wording of that an LOI is specific, clear, and contained the essential provisions that will be included in the final contract, as opposed to merely setting out a broad intention of the parties to agree to a contract at a later date leaves out the negotiation of additional critical terms, it may be that the court will find that the parties intended to be bound immediately upon signing the LOI. The Wallace decision also demonstrates that a court will consider the conduct of the parties subsequent to the signing of the LOI. Where the parties conduct post-signing signifies that a deal has been reached, the Court may find that the LOI is not merely a provisional document but is a binding contract.

Post-Wallace – Where are we Now?
The Wallace decision provided important lessons on the use of a LOI and was widely reported on in the legal community. The questions coming out of Wallace were whether this represented a shift in the state of the law or whether this was just an unusual application of the current law to a unique fact scenario. In other words, was the Court attempting to bend the law in order to find an equitable result in this factual matrix?

In the 6 years that have passed since the Ontario Court of Appeal released its decision in Wallace, the case has only been considered three times by the Ontario courts, all at the Superior Court of Justice level, with only two of those commenting on the effect of that an LOI.

In 1589380 Ontario Ltd. v. Heasty 2009 CarswellOnt 2878 (Ont. S.C.), the Court referred to the Wallace decision as standing for the proposition that that an LOI can be binding and enforceable based on the parties’ conduct after signing the document (*2). Likewise, in Wilson v. Bkk Enterprises Inc., 2015 CarswellOnt 11233 (Ont. S.C.), (while not dealing with that LOI but rather a series of e-mails between counsel for the parties) the Court followed the Court of Appeal’s reasoning in Wallace that the conduct of the parties can be considered in determining whether the parties considered themselves legally bound (*3).

There have been several cases since 2009 that focus on whether that an LOI constitutes a binding contract, which have not considered the Wallace decision. In Clark Machine Inc. v. R. Difruscia Holdings Ltd. 2010 ONSC 5449 (OSCI), the Court found that the parties conduct following the signing of that an LOI were not consistent with the parties being legally bound(*4). What is important here is that again the Court took into consideration the parties’ conduct. Likewise, in the recent case of Georgian Windpower Corp. v. Stelco Inc., ONSC 3759 2012 (Ont. S.C.), the parties entered into a preliminary agreement pertaining to a land lease agreement for a wind energy farm (*5). The Court held that the LOI (referred to as a “memorandum of understanding” in this instance) was generally unenforceable as it was merely an agreement to “confirm the general principles pertaining to the ongoing discussions between GWC and Stelco”. That being said, the Court also upheld specific provisions in the LOI, being the exclusivity and confidentiality terms.

Conclusion

The Wallace decision has received a surprisingly small amount of jurisprudential treatment and the law in Ontario with respect to letters of intent has remained relatively settled since 2009.

It continues to be the case that whether that an LOI will be found to form a binding contract will depend on the wording used in the LOI and the conduct of the parties. The courts will find that an LOI constitutes a binding contract where the LOI contains all the essential terms of the agreement and the language used in the LOI and the parties’ behaviour during the period leading up to the execution of some ultimate agreement reflects that the parties intended to be legally bound.

If one wishes to enter into that an LOI with a party to shape the negotiation process, but does not wish to be bound to the object of the final contract, one should carefully construct that an LOI so that the essential terms of the deal are not set out. Additionally, one may also wish to consider that an LOI which clearly and unequivocally sets out which terms are non-binding and
which terms are intended to be binding. This is known as a “hybrid contract”. The non-binding portion of the LOI should contain the principal business terms of the deal while the binding portion of the LOI should set out the rights of the parties and the process to be followed up to the signing of the definitive agreement (most commonly being the terms related to confidentiality and exclusivity). Moreover, one may also wish to include many conditions precedent, so that a Court analyzing the document would have a difficult time finding that the LOI showed the final intention of the parties to be legally bound to an agreement. Finally, language is also important, and words such as “may” or “consider”, rather than “will” and “shall”, are illustrative of a party’s intent not to be bound.

Charles Hammond

Endnotes

(*2) 1589380 Ontario Ltd. v. Heasty, 2009 CarswellOnt 2878, 177 A.C.W.S. (3d) 693, 61 B.L.R. (4th) 64
4. Owner Found Not Liable for Damages Caused by Unseaworthy Vessel: Operator Liable for Failure to Keep a Proper Lookout under Collision Regulations

Atkinson (Guardian ad litem of) v. Gypsea Rose (Ship) 2014 BCSC 1017

This 2014 case only recently came to our attention and involves consideration of maritime claims and associated legal principles. It covers issues of duties of owners including proper staffing of vessels and the duty to ensure seaworthiness. The duty of operators to keep a proper lookout is also examined. The impact of the issue of implied or express consent is key to this decision.

On June 30, 2008, two small pleasure boats collided on Lake Okanagan in British Columbia. Both vessels were operated by experienced drivers. The GYPSEA ROSE was a 26.5 ft. Campion vessel and was operated by Cory Skidmore and was owned by his mother, Maridee Skidmore. The GYPSEA ROSE hit the starboard side of a stationary 20 foot SeaRay vessel (the “SeaRay”), owned and operated by Norman Atkinson causing personal injuries and property damage. On the SeaRay were Mr. Atkinson’s wife, Kathe, and their three children as well a friend’s three children and their grandmother, June Boys.

Three actions were commenced arising out of this collision. Kathe Atkinson and one of her children sued Cory Skidmore and Maridee Skidmore as operator and owner, respectively, of the GYPSEA ROSE. June Boys and her three grandchildren sued Norman Atkinson as operator and owner of the SeaRay vessel as well as Cory and Maridee Skidmore. A third action was commenced by Norman Atkinson as against the Skidmores regarding his property loss.

Cory Skidmore, as operator of the GYPSEA ROSE, admitted negligence and liability and the trial before the Supreme Court of British Columbia was limited to the issue of liability. (*1)

Facts

The “GYPSEA ROSE” was purchased in January 2004 and had a maximum speed of 24 mph. It was admitted at trial that the GYPSEA ROSE would not plane at certain speeds, with the result that her bow would obstruct the operators view. This was apparently on account of a problem with the propeller. Further, the throttle would stick causing the vessel to maintain speeds causing a dangerous situation. These problems were not fixed by the time of the collision.

Cory Skidmore, 29 years old, admitted that he was impaired and was operating the vessel at 15 mph, even though he knew that the vessel could not plane at that speed. While he had not taken any training and had not heard of the Collision Regulations (*2), Cory had a lot practical knowledge and experience operating vessels. Maridee Skidmore did not operate the GYPSEA ROSE.

Mr. Atkinson was the operator of the SeaRay, which is a bow rider. Mr. Atkinson, 62 years old at the date of the accident, held a Canadian Power & Sail Squadron Certificate and a Pleasure Craft Operators Card. He had 15 years of experience operating a boat. He knew that he had to keep a proper lookout while operating the SeaRay but was not aware of the Collision Regulations. He was aware that he had to continuously monitor the situation on the water around him and to look out for and assess the risk of a potential collision. He knew that he should have a spotter if he was unable to keep a proper lookout, as the circumstances required per below.

On the date in question, there were nine people in the Atkinson vessel after the SeaRay was launched at the Peachland Marina at about 1:30 p.m. They spent some time water-tubing with the children and weather was not a factor. At about 3 p.m., they stopped in the middle of Lake Okanagan and turned off the engine and came to a rest in the lake. Thirty minutes later, they were preparing to get underway for more tubing. Mr.
Atkinson did not speak to June Boys or his wife about keeping a proper lookout.

At the time of the collision, all passengers were on board the SeaRay except for one who was approximately 30 ft. away, floating in a tube waiting to start tubing. The SeaRay was stationary and had been without power in the water for approximately 20-30 minutes prior to collision.

Just prior to the collision, Mr. Atkinson was at the stern of the SeaRay on the swim grid in the process of hooking up the tube. The tow rope was tangled in the leg of the propeller. His wife, Kathe, was sitting on the driver’s chair focused on the children. Mr. Atkinson testified that there was only one boat in the vicinity of the SeaRay (not the GYPSEA ROSE) before he moved to the swim grid. While fixing the tow rope, Mr. Atkinson had his head down and was preoccupied with untangling the tow line and could not see anything occurring around the SeaRay. Kathe Atkinson was not watching the water for boat traffic or keeping a lookout. When she looked up, she saw a large boat with a big burgundy hull straight up out of the water approaching off to the starboard side of the SeaRay. Kathe yelled to alert her husband and then jumped up on the seat screaming frantically and waving her arms to get the attention of the approaching vessel. She was aware that there was a horn on the dashboard, but she did not use it. The vessel did not have to be powered in order to operate the horn. She did not attempt to start the engine because her son was in the tube behind the SeaRay and could have been hit if they moved and, in any event, there also was not enough time to take this step.

Mr. Atkinson testified that he was on the swim grid for about a minute or ninety seconds prior to hearing his wife yell that there was a boat approaching. The GYPSEA ROSE was estimated to be about 300 ft. away at the time. Mr. Atkinson testified that it was about 10 seconds from the time that he first saw the GYPSEA ROSE to the time of the collision. He did not move from the swim grid to the helm but rather yelled at the passengers to get out of the bow area and he described a panic situation on board the SeaRay. No one on board made an attempt nor did Mr. Atkinson ask them to sound the SeaRay’s boat horn or sound the other separate signaling horn kept aboard the SeaRay.

Meanwhile Cory Skidmore could not see the SeaRay, because his vessel’s bow was straight up out of the water and his vision was obstructed. Cory heard the screams but it was too late to avert the collision or to cut engine power. The GYPSEA ROSE hit the bow of the SeaRay at a 90 degree angle on the starboard side, drove over the bow and windshield and stopped on the port or far side of the SeaRay. Needless to say, there was significant damage to the SeaRay and there were injuries sustained by Kathe Atkinson and one of her daughters as well as to June Boys and her three grandchildren.

The Law

This matter involved a collision between a stationary vessel and another vessel admitted by its driver and owner to be unseaworthy, as per below. The unseaworthy vessel was operated by a drunk driver at an excessive rate of speed and without a proper lookout. The operator of the stationary vessel was also alleged to have not kept a proper lookout.

The Court confirmed, at paragraph 84,

In Maritime Law, the manner in which a vessel is operated is governed by both the common law and statute law. Liability for damages caused by a vessel will depend on the failure of the owner or operator to meet the standards set by the common law, or upon the violation of statute law in regards to the equipping or operation of a vessel: *Halsbury’s Laws of Canada, 1st ed.*, Maritime; Municipal (Markham, ON: LexisNexis, 2012) at 302, HMT-97.”

And further at paragraph 86,

In *The “Dundee”* (1823), 166 E.R. 39 at 43,
Lord Stowell of the High Court of Admiralty set out the essential elements of actionable negligence:

...a want of that attention and vigilance which is due to the security of other vessels that are navigating on the same seas, and which, if so far neglected as to become, however unintentionally, the cause of damage of any extent to such other vessels, the maritime law considers as a dereliction of bounden duty, entitling the sufferer to reparation in damages.

The Court also confirmed that the test of negligence in maritime matters is determined by the actions of the ordinary seaman, rather than the ordinary man, quoting Boleslaw Chrobry (The), [1974] 2 Lloyd’s L.R. 308 at 316,

The standard of skill and care to be applied by the Court is that of the ordinary mariner and not the extraordinary one, and seamen under criticism should be judged by reference to the situation as it reasonably appeared to them at the time, and not by hindsight.

Further, liability for a marine collision is based on a finding of fault for an act that has caused or contributed to the damage.

The Judgment: Liability of the Parties

There were three parties who were potentially liable.

As indicated, Cory Skidmore’s negligence was admitted at trial. The Court found that he failed to keep a proper lookout while operating the GYPSEA ROSE and that his failure to do so was a cause of the collision. Cory Skidmore was one party who was liable for the damage to the plaintiffs.

Maridee Skidmore’s liability as owner of the GYPSEA ROSE was at issue as was Norman Atkinson’s negligence (as a defendant) or his contributory negligence (as a plaintiff suing for his own injuries). The evidence at trial had been inconsistent and contradictory from the various witnesses, particularly the Skidmores. Accordingly the credibility and reliability of the evidence was specifically reviewed by the Court and findings made in that regard.

Liability and Evidence of the Owner of the GYPSEA ROSE

Maridee Skidmore was the owner of the GYPSEA ROSE, either in her personal capacity or as executrix and trustee of the estate of her late husband, Lloyd Skidmore, also named as a defendant and who had purchased the boat in 2004. Mr. Skidmore had drowned in Lake Okanagan in 2007 and alcohol was a factor his death.

The Court heard testimony about how Ms. Skidmore was still mourning her husband’s death on the date of the collision and how, on that date, she spent much of the day in her bedroom as had become her custom. The Court appeared to have significant sympathy for Ms. Skidmore.

After her husband’s death, Ms., Skidmore’s two sons, Cory and Nathan, were the only operators of GYPSEA ROSE and were responsible for the maintenance and refueling of the vessel. She owned seven acres of waterfront property south of Peachland, British Columbia, and the GYPSEA ROSE was moored at a dock on her property.

Ms. Skidmore gave permission to her sons to use the vessel if they obeyed her three rules for operating it: (a) they had to ask her permission; (b) they had to be responsible and careful; and (c) no alcohol nor anyone who had drunk alcohol was permitted on the boat. The Court found that her “reason for the no-alcohol rule was compelling: her husband had drowned in a boating accident when he had been drinking. She did not want to lose her sons to the lake too”.

(*3)

On the date of the collision, Ms. Skidmore
Ms. Skidmore admitted at trial that the GYPSEA ROSE was not well maintained and was not in good operating condition. The Court found as a fact that the vessel was unsafe and seaworthy, specifically finding (1) there had been an improper replacement propeller installed which caused the vessel not to plane at higher speeds and causing its bow to go straight up in the water obstructing the operator’s view ahead; and (2) that the throttle could stick causing the speed of the vessel to be maintained and out of control. The Court found that both Ms. Skidmore and Cory Skidmore knew about these problems.

Ms. Skidmore testified that she had spoken to her sons about her rules and they were aware of them. The rules were in place because she knew Cory was alcoholic and could not be trusted to use good judgment on his own and also because of the vessel’s poor condition. Regarding speed, Ms. Skidmore had no specific rules or discussions with her sons because the vessel was slow as it was a fishing or cruising boat. However, as part of being responsible and careful, she testified that had she spoken to her sons about not going fast given the vessel’s problem propeller and its inability to plane at higher speeds.

The Court found that Cory knew his mother’s rules about the operation of the GYPSEA ROSE given his alcoholism and the poor condition of the vessel. The only evidence that Cory breached Ms. Skidmore’s rules prior to subject accident is that he was driving fast on the return leg of the first trip.

As indicated, regarding the first trip, Ms. Skidmore gave permission to Cory to take the vessel. The Court accepted the testimony of Ms. Skidmore that she observed Cory at the dock before he left on the first trip about 11:00 a.m. and that she confirmed with him that he was sober.

Upon his return from the first trip at about 12:30 p.m., Cory testified that he tied up the vessel, had a conversation with his mother and told her to take a nap. He then drank a quantity of alcohol and operated the vessel taking two others to Peachland Marina to refuel the boat. His goal, he testified, was to take the boat keys and “go party”. Where and how he obtained the keys was not clear and there appeared to be little evidence in this regard. It was during this journey to Peachland Marina (the “second trip”) that the subject collision occurred.

The Court noted that the evidence of Ms. Skidmore and Cory Skidmore was inconsistent regarding the events between the two trips and included several versions by Ms. Skidmore but the Court found the full context of the evidence must be examined as some of the inconsistency was the result “elongated cross-examination which clearly had the effect of confusing the witness.” (*4)

The Court ultimately found that Ms. Skidmore did not see Cory after he started drinking and before the second trip and that Cory did not want his mother to see him drinking or getting drunk. He drank five to six beers, vodka and smoked marijuana. Cory admitted that he was drunk before he went out on the the second trip and admitted that he was an idiot for driving the boat when he was drunk.

The Issue of Implied or Express Consent

The Court stressed that there must be consent by the owner to the use of the vessel by the operator before there can be any liability and stated that “in order for the owner to be at fault, there must be consent, express or implied, for the person in control of the vessel at the time of the accident to have that vessel. Without the requirement of consent, an owner with no intention of allowing an unfit ship to operate may have that ship stolen and be held liable for any
accidents that result.” (*5)

The Court found that there were two trips and not one continuous trip by Cory Skidmore. Ms. Skidmore had given her express consent for the first trip, but there was no evidence that Ms. Skidmore gave her express consent for the second trip.

Consent may be express or implied. Regarding implied consent, the Court noted that the test in this regard was both objective and subjective. The test was stated in Morrison (Committee of) v. Cormier Vegetation Control Ltd. [1996] B.C.J No. 612 at para. 62:

[62] While the implied consent test is sometimes described by the Courts as an objective test, it necessarily imports a subjective element into that determination. Put another way, would this particular owner, in all of the circumstances, have consented to the driver acquiring possession of the vehicle as a matter of course? If the answer to that question is "yes", then the driver has proven that he or she drove the vehicle with the owner's implied consent. (*6)

The Court found that Ms. Skidmore did not give Cory her implied consent to operate the vessel for the second trip even though he had previously had her consent to refuel the vessel. In fact, Cory testified that he knew she would say “no” (as she had twice before that month) when he had been drinking.

The Court found that Ms. Skidmore had a clear rule (and this was uncontroverted) that no one was to operate or even be on the boat if they had been drinking alcohol. Cory had been drinking and no permission would have been given (nor did he expect same) and therefore there was no implied consent.

The Court also found that Cory was intent on taking the boat on the second trip his mother’s knowledge and accepted that, if she had seen him, she would have known he had been drinking and refused permission.

Ultimately, the Court found that Cory did not have either the express or implied consent of Ms. Skidmore, to operate the vessel to the Peachland Marina to refuel on June 30, 2008.

The owner, then, in this case, to be found liable, must be at fault having contributed to the cause of the loss at issue.


1. The ship must be seaworthy in the sense of being fit for the intended voyage, in good repair and properly equipped, and safe for those on board.

2. The ship must be provided with proper navigational aids including current charts, rules and information.

3. The ship must be properly and competently staffed.

This list of categories was adopted by the British Columbia Court of Appeal in Vukorep v. Bartulin, at para. 19 and Rowles J.A. went on to state:

No. 1411 (B.C.C.A.) [cited to B.C.L.R.], Lowry J., as he then was, said that an owner:

...must discharge what is a heavy burden of proving that the person or persons who represented its managing or directing mind were not at fault in any way that was at all causative of the loss: there must have been no failure to do what ought to have been done. The standard of care is not one of perfection; it is rather one of what would be done by a reasonable owner (at para. 18).

[21] In summary, an owner will not be permitted to limit his liability under the Act if:
(a) the accident in question occurred with the owner’s actual fault or privity in that it occurred as a result of the owner’s failure to ensure that the ship was (i) seaworthy (ii) provided with proper navigational aids or (iii) properly and competently staffed; and

(b) the relevant fault caused or contributed to the accident. (*7)

(a) The Duty of the Owner to Properly and Competently Staff the Vessel

Regarding the owner’s responsibility to properly and competently staff the GYPSEA ROSE, the Court found that Ms. Skidmore must have been satisfied that Cory was competent to operate the boat at the time of the collision as she had permitted him to operate the vessel subject to her rules. (*8)

When considering the “proper and competently staffed” requirement above, the Court questioned whether Cory had Ms. Skidmore’s consent to take the boat on the second trip on June 30, 2008. If there were no express or implied consent, Ms. Skidmore would not be in breach of this obligation as owner to properly and competently staff the vessel.

(b) The Duty to ensure that the vessel was seaworthy

A seaworthy vessel must include being fit for the intended voyage, in good repair and properly equipped, and safe for those on board under the first category in Conrad, above.

As noted above, the Court found that the GYPSEA ROSE was unseaworthy as she was not in good repair and was unsafe.

Ms. Skidmore knew the propeller was defective and had not repaired or replaced it with a proper propeller. The Court found that she was in breach of her responsibility as an owner for failing to ensure that her vessel was seaworthy.

However, the Court stated,

[126] As with the owner’s responsibility to properly staff the ship, the owner cannot be liable for the unseaworthiness of the ship if they did not give consent for the ship to be operated in that condition. There was no “intended voyage” in the words of Conrad. Otherwise, a prudent owner, knowing their ship to be unfit for operation and taking steps to have it repaired at dock, would be liable if that ship was stolen and involved in an accident.

[127] As discussed above, in this case Ms. Skidmore did not give Cory her consent to use the boat on his second trip to the Peachland Marina. I therefore find that the breach of her duty to keep the ship seaworthy did not cause the collision, and she is therefore not liable.

Even though the Court acknowledged that Ms. Skidmore had previously consented to the use of the Gypsea Rose knowing it to be unseaworthy, such trips did not result in an accident.
On June 30, 2008, Ms. Skidmore did not give Cory her express or implied consent to use the boat on the second trip. The collision occurred at a time when Cory did not have consent of any kind and Ms. Skidmore did not voluntarily give control of the boat to Cory. She, as owner, the Court found, was not liable for the collision.

Therefore, her breach of duty as owner to keep the ship seaworthy did not cause the collision, and the actions against Ms. Skidmore were dismissed.

Liability or Contributory Negligence of the SeaRay’s Owner and Operator

Failure to Keep a Proper Lookout

In Canada, the Collision Avoidance Rules came into force in 1914 and were replaced by the Collision Regulations, which incorporate at Schedule 1 the International Regulations for Preventing Collisions at Sea, 1972, and were enacted pursuant to the Canada Shipping Act, 2001, S.C. 2001, c. 26 (the “Act”). These statutory rules have superseded the common law rules regarding collisions.

In that regard, Rule 5 of the Collision Regulations requires that all operators maintain a “proper lookout” and states:

Every vessel shall at all times maintain a proper look-out by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and of the risk of collision.

The evidence indicated that Mr. Atkinson was on the swim grid for a minute to 90 seconds with his attention focussed on the rope, not on the lake traffic. He had his head down and could not see the surrounding lake. He was kneeling until he heard his wife scream and that was when he saw the GYPSSEA ROSE heading for them.

A proper lookout, as noted above, includes an aural lookout. Mr. Atkinson testified that his head was down on the swim grid near the water and he did not hear the GYPSSEA ROSE as she approached. His wife testified that the GYPSSEA ROSE was “eerily quiet” as the engine noise was travelling out of her stern. Therefore, the visual lookout was even more important and also allowed the GYPSSEA ROSE to hear sounds from the SeaRay. The GYPSSEA ROSE was there to be including the size of the vessel, visibility, and the density of marine traffic. The designated lookout must be posted in a place on the vessel where there is an unobstructed view.

However the mere breach of a statute, standard or rule such as the Collision Regulations is not the equivalent to a finding of liability and the Court must look to standards and rules to determine the appropriate standard of care.

The Date of Loss

Norman Atkinson was, at all material times, in command and was the operator of the SeaRay.

On the day of the collision, as noted above, Mr. Atkinson had stopped on the lake for lunch and swimming and properly he kept watch on the lake. He had appropriately turned the engine off because there were swimmers around the SeaRay and a tuber attached to the boat by a rope. Mr. Atkinson knew that starting the engine safely was a time consuming process and immediately before the collision he was preparing to resume the days’ tubing activity. His attention was taken from watching out for other vessels by his task of untangling the rope. No one was keeping the required lookout nor was anyone instructed by Mr. Atkinson to do so.

The evidence indicated that Mr. Atkinson was on the swim grid for a minute to 90 seconds with his attention focussed on the rope, not on the lake traffic. He had his head down and could not see the surrounding lake. He was kneeling until he heard his wife scream and that was when he saw the GYPSSEA ROSE heading for them.

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There was expert testimony with regard to whether or not Mr. Atkinson was keeping a proper lookout prior to the collision of June 30, 2008 and delving into the standards of a prudent vessel operator.

After cross-examination, experts produced on behalf of the plaintiff and Mr. Atkinson agreed that Mr. Atkinson was not keeping a proper lookout pursuant to the requirements of Rule 5. They also agreed that (1) someone in the SeaRay should have been paying attention but neither the passengers or the person in charge (Mr. Atkinson) were doing so; (2) the collision was preventable; (3) the inability to start up the SeaRay because someone was in the nearby tube created a “dangerous situation”, given that the SeaRay was unable to manoeuvre; and (4) that it was implicit in Rule 5, above, that “keeping a proper lookout” meant the ability to see and take evasive action. There was an ability to take evasive action in this matter as part of “keeping a proper lookout” by sounding the vessel’s horn or other “signaling device”.

Kathe Atkinson screamed when she saw the Gypsea Rose approach and she stood on the driver’s seat and waved her arms in an attempt to make herself as big as possible so that the other boat would see them. Cory heard Kathe’s screams but this action was not enough but it was too late to change course and the collision occurred.

The Court noted that Rule 5, as above, requires consideration of the “prevailing circumstances and conditions”. The Court noted that, on a lake, the “risk of collision” is always present and the safety that Mr. Atkinson felt when he anchored in the middle of Lake Okanagan was an “illusion”.

Section 3 of the Collision Regulations Defence

Mr. Atkinson submitted a defence that the SeaRay met the Collision Regulations definition of a “vessel not under command” at the time of the collision. The Collision Regulations state:

3. For the purpose of the Rules, except where the context otherwise requires:
   ...
   (f) term “vessel not under command” means a vessel which through some exceptional circumstance is unable to manoeuvre as required by these Rules and is therefore unable to keep out of the way of another vessel.

Rule 18 of the Collision Regulations provides that a power-driven vessel shall keep out of the way of a vessel not under command and that the facts of the case constituted exceptional circumstances under Rule 3(f) because the vessel was turned off, there was a child floating in a tube attached to the vessel and the rope was entangled in the leg of the propeller. However, the expert produced by Mr. Atkinson had conceded and the Court agreed that a “proper lookout” must be maintained even for those vessels “not under command”.

Further, Rule 2(a) of Schedule 1 of the Collision Regulations states:

Nothing in these Rules shall exonerate any vessel, or the owner, master or crew thereof, from the consequences of any neglect to comply with these Rules or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case. (*9)

The defence based on Section 3 of the Collision Regulations failed.

Inevitable Accident Defence and Agony of the Moment Defences

The defences of inevitable accident and “agony of the moment” apply (where errors made in emergencies can be excused) if it can be shown that the proximate cause of the accident was an external event beyond the ship’s control that
could not be avoided by ordinary care, caution and maritime skill.

(a) Inevitable Accident defence

Mr. Atkinson submitted that the accident was “inevitable because there was not enough time to react to prevent the collision even if he had been keeping a proper lookout. The Court agreed that it would have taken too long to start the SeaRay and manoeuvre out of the way of the GYPSEA ROSE; however, there were other steps that could have been taken to avoid the collision. Therefore, the defence of “inevitable accident” failed.

Cory Skidmore testified that he heard Kathe Atkinson’s screams and he gave uncontroverted and logical evidence that he could hear a horn over the sound of his engine because “horns are made to be loud” and a horn means that “something is wrong”.

The Court accepted Cory’s evidence, even though Cory was intoxicated at the time, that he would have laid off the throttle all the way had he heard a horn because he heard Kathe Atkinson’s screams and also because he grew up on the lake and knew the sounds of distress. Further the SeaRay was required to be fitted with horns audible at a distance of .5 miles or 2640 feet (*10) and the Court found that the GYPSEA ROSE would have been seen sooner had a proper lookout been maintained given the estimate that they would have had 50 - 80 seconds more to react.

The Court stated,

[149] I am satisfied on the evidence, including the evidence of times and distances, that the collision could have been avoided if the SeaRay had seen the Gypsea Rose earlier. Although Cory Skidmore was impaired at the time, he was experienced in driving the Gypsea Rose on Lake Okanagan. I accept his evidence that if he had heard the horn one minute before the collision then he would not have hit the SeaRay. With 30 seconds warning he might have been able to take evasive measures. He did not hear a horn or any signalling device before the collision.

The immediate use of the horn would have, the Court found, given the approaching vessel sufficient time to take evasive action to avoid the collision.

The Court concluded that, if Mr. Atkinson had been keeping a proper lookout, there would have been time for him to assess the situation and instruct Kathe Atkinson, who was close to the horn, to signal or to sound the horn. Cory, the Court stated, would have heard earlier screams or the horns and the collision would have been averted. At para. 150, the Court stated, “…the failure to keep a lookout resulted in insufficient time to take those appropriate measures to warn the oncoming vessel and thereby to avoid the collision. The absence of proper lookout was a cause of the collision.”

(b) Agony of the Moment defence

Mr. Atkinson also asserted the “agony of the moment” defence arguing that he could not be faulted, in the short time he had, for the decision to stay where he was in the vessel and instruct the passengers in the bow to get on the floor rather than trying to start the boat. The Court dismissed this defence, stating that the reason that there was such a short time available to take any actions was the failure to keep a proper lookout. The defence of the “agony of the moment” failed.

The Court found that Mr. Atkinson failed to keep a proper lookout in breach of Rule 5 of the Collision Regulations, and that this breach was negligent and a cause of the collision.

Apportionment of Liability

Where more than one party is at fault, apportionment is based on the degree of fault and liability is joint and several, pursuant to s. 17 of the Marine Liability Act, S.C. 2001, c. 6, which
states:

Apportionment based on degree of fault

17. (1) Where loss is caused by the fault or neglect of two or more persons or ships, their liability is proportionate to the degree to which they are respectively at fault or negligent and, if it is not possible to determine different degrees of fault or neglect, their liability is equal

Joint and several liability

(2) Subject to subsection (3), the persons or ships that are at fault or negligent are jointly and severally liable to the persons or ships suffering the loss but, as between themselves, they are liable to make contribution to each other or to indemnify each other in the degree to which they are respectively at fault or negligent.

Exception — loss of ships and property

(3) Where, by the fault or neglect of two or more ships, loss is caused to one or more of those ships, their cargo or other property on board, or loss of earnings results to one or more of those ships, their liability to make good such loss is not joint and several.

Persons responsible

(4) In this section, a reference to liability of a ship that is at fault or negligent includes liability of any person responsible for the navigation and management of the ship or any other person responsible for the fault or neglect of the ship.

Cory Skidmore admitted liability and the Court found him more blameworthy and 80% liable. Mr. Atkinson for his failure to keep a proper lookout was found 20% liable (or contributorily negligent for his action as plaintiff). Ms. Skidmore was not found liable despite having an unseaworthy vessel operating freely on the lake. The Court could not find that Cory Skidmore had express or implied consent from the owner Maridee Skidmore to operate the vessel after he had imbibed alcohol thereby relieving her of her responsibility as an owner to ensure that her vessel was seaworthy and properly and competently staff the vessel.

Comment

This case is interesting because the finding that the owner was not liable for failing to keep her vessel seaworthy really had nothing to do with her consent. The owner here had no issue with consenting to the operation of the vessel that was in an unseaworthy condition (which is not the same as the Court’s example confirming that there should be no liability on an owner where there is a theft of an unseaworthy boat where the owner would not have allowed it to be operated in that condition). The poor condition of the vessel was due to her failure to ensure that the vessel was fit for the intended voyage, in good repair and properly equipped, and safe for those on board. This failure was, it is submitted, a cause of the collision.

On the issue of implied consent, the decision might also be questioned given that there was no consideration given to the fact that the vessel’s key(s) were readily available and that the owner had made no attempt to control their use. Unfortunately, there was apparently no evidence presented at trial regarding the operator’s previous breaches (if any) of the owner’s rules. The Court accepted the evidence of the seemingly sympathetic owner balancing her inconsistencies with all of the evidence presented.

Regarding the finding of fault of Mr. Atkinson at 20% for not keeping a proper lookout might also be questioned. The evidence indicated that the GYPSEA ROSE had been observed prior to the collision and also that efforts were taken to alert her operator. Unfortunately, those efforts were unsuccessful and, respectfully, were not truly a “cause” of the collision.

This case is also interesting because there are a lot of unanswered questions given that it dealt with only liability and the damages portion has
not yet been heard. The damages trial may still deal with the statutory limitation of liability restricting the quantum available to satisfy maritime claims (*11) and any attempt to break that limitation where the operator’s conduct bars access to that limitation (*12).

Conduct barring limitation
A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.

It is possible that Cory’s reckless disregard for the safety of others operating an unseaworthy vessel while intoxicated might fill the requirement noted in this section, though there have been no cases as yet in Canada that have successfully broken that limitation. Unfortunately for the injured plaintiffs, if their injuries are more than $1,000,000 collectively, there is likely no insurance to respond or assets over and above to satisfy the unlimited recovery.

However, it may be that the damages are not significant enough that the limitation would be engaged or that breaking limits where there is a defendant with no insurance or few assets will not ultimately matter. (*13)

It appears that Ms. Skidmore did not have any insurance on her vessel (which insurance is not required) given her unseaworthy condition or lack of funds (there being some evidence that repairs had not been effected on the vessel because of the expense of same). However, she did own some land in Peachland that could have been accessed to satisfy a judgment, had one been rendered against her.

With this decision it is likely that any damages portion of the action will be settled. Joint and several liability permits the recovery by a plaintiff from any defendant, even if that defendant is only 1% liable. This leaves that defendant to recover any amount that he overpaid pursuant to his percentage fault from any other liable co-defendant.

The Court’s assessment of 20% liability on Mr. Atkinson ensures that the plaintiffs who sued him will be able to recover from him or his insurer in full. In this case, 100% of damages may be recovered from Mr. Atkinson even though he was only found to be 20% liable.

The Judgment regarding liability in this matter was not appealed.

Kim E. Stoll

Endnotes

(*1) Provincial Courts have concurrent jurisdiction with the Federal Court in respect of maritime claims. This trial was bifurcated. The damages trial is to proceed separately and is still an ongoing action.

(*2) C.R.C., c.1416.

(*3) at para 121. Ms. Skidmore’s husband sadly died on the lake and alcohol was involved. The Court noted that she did not want to lose her sons to the lake like she had her husband. This reasoning for and application of her strict rules seems internally inconsistent, however, in that she seemed to have no problem risking her sons lives by allowing them to operate an unseaworthy dangerous vessel which had numerous problems. Her insistence on such rules, with respect, seems suspect.

(*4) at para. 118, With respect, sounds like effective cross-examination to this author.

(*5) at para. 98. This principle is stated by the Supreme Court of Canada in Goodwin Johnson Ltd. v. AT & B No. 28 (The), 1954 CanLII 59 (SCC), [1954] S.C.R. 513 at 533: “His absolute authority on board ship derives from that conception. So long as there is the voluntary entrustment of interests to the administrator or person in complete control of the vessel, what that vessel does through its fault to damage another is chargeable against those interests, and only when there is a breach in authority from the owner can they claim exemption.”

(*6) Morrison was reversed on appeal on the
basis of express not implied consent. The test for implied consent was affirmed by the Court of Appeal in Godsman v. Peck, [1997] B.C.J. No. 377 (C.A.).

(*7) Vukorep v. Bartulin, 2005 BCCA 142 (CanLII)

(*8) The question of whether the vessel could ever be properly staffed by an alcoholic son who was intent on taking the vessel that day resonates. However it does appear that no evidence was provided that he had breached his mother’s rules on previous occasions, except that he was speeding earlier in the day.

(*9) at para, 142, the Court references The Donald Helene (The) v. Gloucester No. 26 (The), [1965] 1 Ex. C.R. 586 (Exchequer Court of Canada – New Brunswick Admiralty District), the Donald Helene was drifting with its engine stopped when it was rammed by the Gloucester No. 26. The Court found that there was a lack of proper lookout on the part of both vessels and, despite the fact that the Donald Helene was not under power at the time of the collision, attributed fault at 50% for each vessel.

(*10) Collision Regulations Annex III, s. 1(c).

(*11) The limitation on damages is $1,000,000 CAD (per vessel) for maritime claims involving vessels under 300 tons contained in the Marine Liability Act, SC. 2001 S. 29


(*13) There is no evidence or information
5. CN v. Richardson Int’l Ltd.: FCA Upholds Another Inter-Switching Order

This month, the Federal Court of Appeal released its decision in Canadian National Railway Company v. Richardson International Limited, 2015 FCA 180. In the decision, the Court upheld an “interswitching order” granted by the Canadian Transportation Agency (the “Agency”) to Richardson International Limited (“RIL”) pursuant to the federal “interswitching regulations” enacted under the Canada Transportation Act, S.C. 1996, c. 10 (the “Act”). The order requires the Canadian National Railway (“CN”) to haul RIL’s rail traffic between a rail siding located at a grain elevator (the “Red River South elevator”) on CN’s line in Letellier, Manitoba (some 20 km from the Canada – United States border near Emerson), and a line owned by the American carrier BNSF Railway Company (“BNSF”) in the United States.

The facts in this case bear a striking resemblance to the facts in Canadian Pacific Railway Co. v. Canada (Canadian Transportation Agency), 2015 FCA 1 [Parrish & Heimbecker], recently decided by the Federal Court of Appeal. In that case, the Court similarly upheld the Agency’s interswitching order in circumstances where a grain elevator, owned by Parrish & Heimbecker Ltd., was located close to the Canada – United States Border, and where a Canadian carrier was requested to haul rail traffic from the elevator to the border, after which an American carrier would assume forward carriage into the United States.

As in the Parrish & Heimbecker case, the dispute in this case focused on whether CN’s railway line connected at the border with a railway line owned by BNSF in such a manner that would engage the interswitching regulations under the Act.

Ultimately, also as in the Parrish & Heimbecker case, the Court agreed with the Agency and found that BNSF had a sufficient property interest in CN’s track in Manitoba, which arose, among other things, pursuant to a historical agreement and course of dealings between CN and BNSF. This, plus the fact that the track between CN and BNSF was “connected” within the meaning of the Act, was sufficient to engage the interswitching regulations.

This decision is important in that it further underscores the Agency’s (and the Court’s) continued departure from an earlier requirement for a railway company to demonstrate a true “ownership” interest in a railway in order for the interswitching regime to apply. Although earlier Agency decisions had stood for such a proposition, that reasoning is no longer the case in light of the Court’s 2010 decision in Canadian National Railway Company v. Transportation Agency, 2010 FCA 166 [known as the Fort Rouge case].

In Fort Rouge, the Court considered an arrangement whereby BNSF and CN essentially shared CN’s rail yard in Winnipeg pursuant to a complex agreement that gave BNSF certain rights (among them, a track at the yard where it could place cars for delivery to CN, and another where it could pick up cars for delivery of CN traffic to BNSF) in exchange for sharing the costs of the arrangement. The Court upheld the Agency’s interswitching order in that case, holding that BNSF had a sufficient interest to be said to have a railway line for the purpose of the interswitching provisions of the Act.

Similarly, in this case (as in the Parrish & Heimbecker case), the Court found that that the arrangement between BNSF and CN gave BNSF the right to interchange traffic at Emerson. These rights allowed the Agency to conclude that BNSF had a sufficient interest in the CN line for it to be treated as part of BNSF’s railway.

Thus, it continues to appear from this case that as long as a railway can demonstrate a sufficient property interest in the railway in question, this will be sufficient to engage the regime. A true “ownership” interest is not required. This decision confirms that the Court has accepted the Agency’s refined view of when a railway company “has” a line of railway, moving away from a strict
ownership position to a more nuanced position based on functional integration. As Justice Pelletier in the Parrish & Heimbecker case observed:

This refinement is in keeping with Canada’s national transportation policy which favours competition and market forces, and discourages rates and conditions which are an undue obstacle to the movement of traffic. It is entirely within the Agency’s mandate to refine its approach to the issue of what constitutes an interchange.

The Facts

RIL is a subsidiary of James Richardson & Sons Limited, and is Canada’s largest privately owned agri-food business. It has been in business for over 150 years. RIL owns the Red River South elevator, which is located on CN’s track near Letellier, Manitoba, about 95 km south of Winnipeg, and 20 km north of the Canada – United States border. This track ultimately connects with BNSF’s track at the border.

The Red River South elevator is accordingly well positioned for shipping grain into the United States. In particular, the Red River South elevator handles a large amount of oats, as Manitoba produces about 20-25% of Canada’s oat crop. The Red River South elevator became even more valuable to RIL with its recent acquisition of an oats processing plant located in South Sioux City, Iowa.

On May 29, 2013, RIL advised CN that it intended to order a train of 100 empty railway cars from BNSF, presumably for a shipment of oats from the Red River South elevator to RIL’s processing plant in Iowa. RIL requested an interswitch delivery of the cars by CN from the Canada – United States Border to the Red River South elevator, for loading in June 2013.

CN refused to comply, asserting that the Red River South elevator was not open to interswitching with other rail carriers such as BNSF. CN claimed that the “official” interchange with BNSF was in the United States at Noyes, Minnesota, just across the border from Emerson. CN made this claim despite the undisputed fact that CN and BNSF have had a long-standing practice of interchanging cars at both Emerson and Noyes.

The matter thus proceeded to a hearing before the Agency. Under the Act, the Agency has the power to make regulations with respect to interswitching. Among other things, the regulations prescribe the amounts that one railway company can charge another for providing interswitching services from its line to a competitor’s line.

Section 127 of the Act also provides that the Agency can make an “interswitching order” in appropriate circumstances, thereby forcing a railway company to provide interswitching services to another railway company in accordance with the regulations. The circumstances are:

a) a railway line of one company must connect with a railway line of another company before a company or other party can apply for an interswitching order;

b) where an order is made, the Agency may order the railway companies to provide facilities for the interswitching to take place at an “interchange” between the two companies’ railway lines; and

c) if a point of origin or destination of the rail carriage is within 30 km of an interchange, then a railway may only transfer the rail traffic in accordance with the regulations (i.e. at certain prescribed rates).

An “interchange” is defined in the Act in section 111 as “a place where the line of one railway company and where loaded or empty cars may be
stored until delivered or received by the other railway company”.

Ultimately, the Agency considered the matter and granted the order, requiring CN to haul RIL’s traffic to the border as requested.

The Agency’s Decision

The Agency began by considering whether the first criterion had been met, and it found that it had. Essentially, the Agency concluded that both CN and BNSF were railway companies within the meaning of the Act. Furthermore, the Agency found, among other things, that pursuant to certain pre-existing contractual agreements between predecessors to CN and BNSF, including an agreement dating back to 1912, BNSF had acquired a sufficient interest in the CN track in Canada (with respect to operating traffic and performing interchange activities between the border and Emerson) for it to be considered to have a line of railway in Canada. This, plus the carriers’ pre-existing practice of interchanging cars in both Noyes and Emerson, as well as the physical reality of BNSF’s track extending, at least slightly, beyond the “thin membrane” of the Canada – United States border and onto Canadian soil, was more than sufficient for the Agency to hold that BNSF had a railway line in Canada along with CN.

Finally, the Agency also found that there was a connection between BNSF’s line and CN’s line. While CN attempted to argue that both lines ended at each country’s borders, the Agency found that a railway line could not be considered in the same manner as an international boundary. While it can be said that two countries’ territories touch or abut an international border without overlapping, the same cannot be said about connecting railway lines that are physically linked together. The connection of two railway lines necessarily happens over a physical distance that exceeds the width of the border. Thus, whether by this “physical reality” analysis, or by the above contractual analysis, the Agency found that BNSF’s line extended into Canada and connected with CN’s line.

Next, the Agency quickly disposed of the second and third criteria necessary for the granting of an interswitching order. The Agency found on the evidence before it that Emerson was properly construed as an “interchange” within the meaning of the Act, and also that the Red River South elevator was located within 30 km of the interchange at Emerson, and therefore qualified for an interswitching order.

CN then appealed the Agency’s decision to the Federal Court of Appeal.

On Appeal to the Federal Court of Appeal

On appeal, CN disputed only the Agency’s finding in respect of the first criterion, above (that is, whether BNSF “had” a line of railway in Canada that “connects” with CN’s line.

CN sought to advance several arguments before the Federal Court of Appeal, including that the Agency had unreasonably misinterpreted the parties’ contractual arrangement (in particular, by misinterpreting the 1912 agreement entered into by their predecessors), and that the Agency unreasonably found that there was a “connection” in Canada between CN’s line and BNSF’s line.

Ultimately, the Court rejected CN’s appeal. Justice Dawson, writing for the Court, observed that the Agency had specialized expertise in the railway industry, including specialized knowledge about railway practices and operations, railway engineering, the pricing of railway services, the economics of railway operations, the history of railway operations, and industry contracts and nomenclature. Its assessment of such matters is also informed by its understanding of transportation policy. (*2) This, among other things, required the Court to accord significant deference to the Agency’s findings.

Dawson J.A. concluded that the proper standard of review was reasonableness; that is, the Court should only interfere where the Agency made an unreasonable finding. If the Agency’s decision
falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and the law, the Court will not interfere. (*3)

Applying this standard of review, the Court was unable to conclude that the Agency’s decision was unreasonable in any respect. The Court agreed, amongst other things, that it was reasonable for the Agency to conclude that by virtue of the parties’ contractual relationship, BNSF had acquired the necessary rights to be said to have a sufficient interest in CN’s line so as to engage the interswitching regulations.

Likewise, the Court agreed that it was reasonable for the Agency to conclude that BNSF’s line connected with CN’s line, both because of the fact that BNSF’s line physically crossed into Canada, and also due to the parties’ contractual relationship.

Other arguments raised by CN similarly failed, as the Court found that the Agency’s decision was reasonable in its entirety.

Accordingly, the Court dismissed CN’s appeal.

*James Manson*

Endnotes

(*1) See “Right on Track”: Federal Court of Appeal Upholds CTA’s Inter-switching Order, Fernandes Hearn LLP Newsletter, January 2015, page 5.

(*2) Paragraph 28 of the Reasons for Judgment

(*3) Dunsmuir v. New Brunswick, 2008 SCC 9 at paragraph 47.
6. ICAO Immunity Confirmed: *Ferrada v. ICAO* (2015 QCCS 3121)

The International Civil Aviation Organization ("ICAO"), the United Nations specialized agency for civil aviation, has pride of place amongst the myriad international bodies headquartered in Montreal. ICAO is home to both high-income international civil servants and foreign diplomats, and it attracts scores of delegates to meetings, General Assemblies and Diplomatic Conferences hosted at the Montreal headquarters. Moreover, a number of other aviation-related agencies are based in Quebec’s financial capital and largest city as a direct result of ICAO’s location. These include the International Air Transport Association “IATA”, which is the global airline industry’s lobby group and Airport Council International “ACI”, which is the global airports lobby group.

Accordingly, and in light of the importance of ICAO to the Montreal and Quebec economies, a favourable *Headquarters Agreement between the Government of Canada and the International Civil Aviation Organization* (*1*) (the “Agreement”) governs the relations between Canada as host State, and the Organization. Critically, at Article 3 of the Agreement, it is provided that “The Organization, its property and its assets, wherever located and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign states.” This confers thus upon ICAO all of the benefits enjoyed by foreign States under the *State Immunity Act* (*2*).

The plaintiff to this action was the wife of a deceased member of the ICAO Secretariat (*3*). She commenced suit against ICAO amongst others before the Quebec Superior Court claiming her entitlement as beneficiary of life insurance benefits pursuant to the United Nations health and life insurance plan to which she alleged her husband subscribed.

The Attorney General of Canada ("AG") intervened in the Superior Court proceedings and moved for the summary dismissal of the claim against ICAO and the United Nations Health and Life Insurance Section. The Superior Court upheld the intervention of the AG in this case on the basis of Canada’s interest as host country of ICAO to see that the immunities conferred upon the organization under international and domestic laws be upheld by the court.

The AG relied on the immunity specifically conferred upon ICAO under domestic legislation and the Agreement. The plaintiff argued that s.5 of the *State Immunity Act* provides that “A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state”, and that, in its capacity as the former employer of her deceased husband, ICAO was engaged in a commercial activity and capacity.

Justice Déziel for the Superior Court dismissed the plaintiff’s argument. His Honour relied on precedent case law from the Supreme Court of Canada to the effect that the plaintiff had the burden of proving an exception to the prima facie and presumptive protection offered by the *State Immunity Act* (*3*). He also relied on authorities confirming that the employer-employee relationship between a foreign State or an international organization and its Secretariat did not amount to a commercial undertaking by the State/Organization, which would cause the commercial activity exception to immunity to apply (*4*).

The plaintiff failed in her fallback argument that, even if immunity were *prima facie* applicable, ICAO could not rely on this given its failure to enact a dispute resolution mechanism. The plaintiff did not meet her burden of proving the absence of any such mechanism, and in any event, the Supreme Court had held that the absence of a dispute resolution mechanism was not determinative of a State’s right to rely upon its immunity (*5*).

Given the above, Justice Deziel allowed the AG’s motion and dismissed the action as against ICAO and the UN Health and Life Insurance Section.
Mark Glynn

Endnotes

(*1) Headquarters Agreement Between the Government of Canada and the International Civil Aviation Organization E101905 - CTS 1992 No. 7
(*2) State Immunity Act, RSC 1985, c S-18
(*3) Kuwait Airways Corp. v. Iraq 2010 SCC 40

(*4) Maroc (Gouvernement du Royaume du) c. El Ansari, 2010 QCCA 225
and Trempe c. Canada (Procureure générale) 2005 QCCA 1031
