Newsletter

IN THIS ISSUE

Criminal Interest Rate Overturned

Platypus Marine, Inc. v The Owners and All Others Interested in the Ship "Tatu" and the Ship "Tatu", 2016 FC 501

The plaintiff, Platypus Marine Inc. a Washington State Corporation, sued both *in personam* and *in rem* the Ship Tatu and its owners for $385,508.92 USD (*1) plus interest at Admiralty rates or pursuant to the British Columbia or Canadian *Interest Act* along with costs, condemnation of the vessel, if required, and other relief.

The plaintiff brought a motion for payment of the claimed monies in respect of certain invoices for maintenance and repair to the ship Tatu that had been rendered to the defendants and for other procedural remedies. The motions judge found that the defendants owed the said amount exclusive of interest. The defendant's motion regarding the dismissal of the interest claim was heard separately. The motions judge considered whether the plaintiff was entitled to interest claimed in the amount of $100,000 USD.

Facts

The plaintiff provided repairs, maintenance and refurbishment to the ship Tatu, at the plaintiff's facilities in Port Angeles, Washington. The plaintiff provided an estimate outlining the contemplated work, which estimate was accepted and signed on behalf of the Owner of the Tatu. There was no reference to interest.

Throughout the period of repair, the plaintiff rendered ten invoices to the defendants in respect of the ongoing work done on the Tatu. Each invoice stated "INVOICE DUE UPON RECEIPT", with no reference to interest. The Court noted that the plaintiff had not included interest in its "Statement" detailing amounts owed.

FIRM AND INDUSTRY NEWS

- **Rui Fernandes** will be speaking on "Limitation of Liability of Shipowners" at the *Canadian Transport Lawyers Association* annual conference being held in Toronto September 22-25, 2016. **Kim Stoll** is the program chair. **Louis Amato-Gauci** will also be attending.

- **International Marine Claims Conference 2016**, Malahide Dublin, 27 to 30 September 2016

- **Gordon Hearn** will be speaking on "Freight Broker Regulation and Liability Exposure" in a *Canadian International Freight Forwarders Association* (CIFFA) "M2M" Webinar presentation on October 5, 2016.

- **Martin Abadi** will be a guest speaker at the 2016 *Surface Transportation Summit*, to take place on October 13 in Mississauga, on the convergence of regulation and technology in transportation, specifically on the application of the Uber model to trucking and freight brokerage resources.

- **Fernandes Hearn LLP** has been named a "Top Listed" Firm in the areas of Maritime Law and Transportation Law in the 2017 Edition (11th Edition) of the *Best Lawyers in Canada*. In this edition, as selected by their peers, **Rui Fernandes**, **Gordon Hearn** and **Kim Stoll** are individually recognized in the area of Maritime Law. **Rui Fernandes**, **Gordon Hearn** and **Louis Amato-Gauci** are also individually recognized in the area of Transportation Law and **Louis-Amato-Gauci** is recognized in Aviation Law – Finance.

The Court found that there was little evidence to support a claim for interest other than an alleged oral agreement between the President of the plaintiff and the owner of the Tatu. The affidavit evidence of the President indicated that the owner of the Tatu had promised to pay an additional US $100,000.00 as interest for work provided and secured by the Tatu in exchange for the plaintiff agreeing to defer payment until January 2015, since the owner of the Tatu was short on funds.

The Judgment

The defendants argued that the agreement to pay interest in the amount of US $100,000.00, was in breach Canadian Criminal Code, RSC 1985, c. C-46, section 347, which states:

> 347 (1) Despite any other Act of Parliament, every one who enters into an agreement or arrangement to receive interest at a criminal rate, or receives a payment or partial payment of interest at a criminal rate, is
>
> (a) guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or
> (b) guilty of an offence punishable on summary conviction and liable to a fine not exceeding $25,000 or to imprisonment for a term not exceeding six months or to both.

"Criminal rate" is defined under subsection (2) as an "effective annual rate of interest calculated in accordance with generally accepted actuarial practices and principles that exceeds sixty per cent on the credit advanced under an agreement or arrangement;"

The Court noted that the leading authority is the decision of the Supreme Court of Canada in *Transport North American Express Inc. v. New Solutions Financial Corp.*, 2004 SCC 7 (CanLII) ("*Transport North American*"). Essentially, where a court finds that an agreement has violated s. 347 of the *Canadian Criminal Code* RSC 1985, c. C-46*,* the court must consider what remedy is appropriate "on a spectrum from striking down the entire contract at one extreme to reducing interest payable to the maximum of 60% at the other."(*2) A four factor test was enumerated:

> (i) whether the purpose or the policy of s. 347 would be subverted by severance;
> (ii) whether the parties entered into the agreement for an illegal purpose or with an evil intention;
> (iii) the relative bargaining positions of at the parties and their conduct in reaching the agreement; and
> (iv) whether debtor would be given an unjustified windfall.

Further, the Supreme Court of Canada went on to quote Blair J.A. in *William E. Thomson Associates Inc. v Carpenter* (1989)(*3) ("*Thomson")* at para. 24 of *Transport North American*, "(that whether) a contract tainted by illegality is completely unenforceable depends upon whether upon all of the circumstances surrounding the contract and the balancing considerations discussed above and, in appropriate cases, other considerations."

As to whether the sum of $100,000.00 is an interest rate that exceeded 60%, the Court found $100,000.00 USD represented an interest rate in excess of 60% per annum. No demand for interest was made in the plaintiff's Statement dated of August 27, 2014 and no interest appeared to be discussed until on or after the date of the last invoice, September 19, 2014. Beginning on whichever of those dates, the Court noted that the interest rate represented by $100,000 USD was well in excess of 60% per annum.

The Court then applied the four factors outlined in *Thomson*, which are directed to whether the contract as a whole can be declared void or whether there can be a severance of the interest portion from the rest. The Court found that, in fact, a severance had already been effected by the previous motions judge, the payment of the principal debt had been ordered and paid and

that the only question remaining was whether the $100,000.00 USD would be allowed as interest or some other amount, or none.

The parties, however, agreed that, if the provision respecting the US $100.000.00 was set aside, then a rate of 5% per annum as provided by the Interest Act, RSC 1985 c. I-15 section 4, should be ordered as the most appropriate rate.

The court held that, based on these circumstances, the agreement to pay interest at the sum of US $100,000 should be set aside, that 5% interest per annum was more appropriate and then awarded $35,000 CAD for interest. The Court awarded no costs to either side.

Kim E. Stoll

Endnotes

(*1) Any associated order would be rendered in Canadian Dollar equivalent.

(*2)*Transport North American Express Inc. v. New Solutions Financial Corp.*, 2004 SCC 7 (CanLII)

(*3) 1989 CanLII 185 (ONCA)

2. U.S. Regulations on UAVs

The Federal Aviation Authority has implemented new regulations for Unmanned aerial vehicles (UAVs), commonly known as "drones". The new regulations (the Small Unmanned Aircraft Rule (Part 107)) came into effect on August 29th, 2016. The regulations apply to UAVs weighing less than 25 kilograms (55 lbs). The regulations require operators to hold a remote pilot airman certificate. In Canada, new regulations are expected from Transport Canada in the first half of 2017. The current regulatory framework will continue to apply. See the Fernandes Hearn LLP newsletter article for April 2015.

The following is a Summary of the Small Unmanned Aircraft Rule (Part 107) published by the FAA:

Operational Limitations

* Unmanned aircraft must weigh less than 55 lbs. (25 kg).
* Visual line-of-sight (VLOS) only; the unmanned aircraft must remain within VLOS of the remote pilot in command and the person manipulating the flight controls of the small UAS. Alternatively, the unmanned aircraft must remain within VLOS of the visual observer.
* At all times the small unmanned aircraft must remain close enough to the remote pilot in command and the person manipulating the flight controls of the small UAS for those people to be capable of seeing the aircraft with vision unaided by any device other than corrective lenses.
* Small unmanned aircraft may not operate over any persons not directly participating in the operation, not under a covered structure, and not inside a covered stationary vehicle.
* Daylight-only operations, or civil twilight (30 minutes before official sunrise to 30 minutes after official sunset, local time) with appropriate anti-collision lighting.
* Must yield right of way to other aircraft.
* May use visual observer (VO) but not required.
* First-person view camera cannot satisfy "see-and-avoid" requirement but can be used as long as requirement is satisfied in other ways.
* Maximum groundspeed of 100 mph (87 knots).
* Maximum altitude of 400 feet above ground level (AGL) or, if higher than 400 feet AGL, remain within 400 feet of a structure.
* Minimum weather visibility of 3 miles from control station.
* Operations in Class B, C, D and E airspace are allowed with the required ATC permission.
* Operations in Class G airspace are allowed without ATC permission.
* No person may act as a remote pilot in command or VO for more than one unmanned aircraft operation at one time.
* No operations from a moving aircraft.
* No operations from a moving vehicle unless the operation is over a sparsely populated area.
* No careless or reckless operations.
* No carriage of hazardous materials.
* Requires preflight inspection by the remote pilot in command.
* A person may not operate a small unmanned aircraft if he or she knows or has reason to know of any physical or mental condition that would interfere with the safe operation of a small UAS.
* Foreign-registered small unmanned aircraft are allowed to operate under part 107 if they satisfy the requirements of part 375.
* External load operations are allowed if the object being carried by the unmanned aircraft is securely attached and does not adversely affect the flight characteristics or controllability of the aircraft.
* Transportation of property for compensation or hire allowed provided that- o The aircraft, including its attached systems, payload and cargo weigh less than 55 pounds total;
    - The flight is conducted within visual line of sight and not from a moving vehicle or aircraft; and
    - The flight occurs wholly within the bounds of a State and does not involve transport between (1) Hawaii and another place in Hawaii through airspace outside Hawaii; (2) the District of Columbia and another place in the

District of Columbia; or (3) a territory or possession of the United States and another place in the same territory or possession.

* Most of the restrictions discussed above are waivable if the applicant demonstrates that his or her operation can safely be conducted under the terms of a certificate of waiver.

Remote Pilot in Command Certification and Responsibilities

* Establishes a remote pilot in command position.
* A person operating a small UAS must either hold a remote pilot airman certificate with a small UAS rating or be under the direct supervision of a person who does hold a remote pilot certificate (remote pilot in command).
* To qualify for a remote pilot certificate, a person must:

- Demonstrate aeronautical knowledge by either:
  - -Passing an initial aeronautical knowledge test at an FAA-approved knowledge testing center; or
  - - Hold a part 61 pilot certificate other than student pilot, complete a flight review within the previous 24 months, and complete a small UAS online training course provided by the FAA.
- Be vetted by the Transportation Security Administration.
- Be at least 16 years old.

* Part 61 pilot certificate holders may obtain a temporary remote pilot certificate immediately upon submission of their application for a permanent certificate. Other applicants will obtain a temporary remote pilot certificate upon successful completion of TSA security vetting. The FAA anticipates that it will be able to issue a temporary remote pilot certificate within 10 business days after receiving a completed remote pilot certificate application.
* Until international standards are developed, foreign certificated UAS pilots will be required to obtain an FAA-issued remote pilot certificate with a small UAS rating.

A remote pilot in command must:

* Make available to the FAA, upon request, the small UAS for inspection or testing, and any associated documents/records required to be kept under the rule.
* Report to the FAA within 10 days of any operation that results in at least serious injury, loss of consciousness, or property damage of at least $500.
* Conduct a preflight inspection, to include specific aircraft and control station systems checks, to ensure the small UAS is in a condition for safe operation.
* Ensure that the small unmanned aircraft complies with the existing registration requirements specified in § 91.203(a)(2).

A remote pilot in command may deviate from the requirements of this rule in response to an in-flight emergency.

Aircraft Requirements

FAA airworthiness certification is not required. However, the remote pilot in command must conduct a preflight check of the small UAS to ensure that it is in a condition for safe operation.

Model Aircraft

* Part 107 does not apply to model aircraft that satisfy all of the criteria specified in section 336 of Public Law 112-95.
* The rule codifies the FAA's enforcement authority in part 101 by prohibiting model aircraft operators from endangering the safety of the NAS.

Rui M. Fernandes

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

3. Passenger's Claim Against Airline Grounded – Ontario Court Enforces Limitation Article under the Montreal Convention

The Ontario Superior Court of Justice has released a decision that enforces the applicability of the limitation provision found under Article 35 of the *Montreal Convention* (*1).

The Facts

The Plaintiff Abdourahame Diallo booked a return airfare flight with Royale Air Maroc ("Royale") from Montreal, Quebec to the Republic of Guinea on August 7, 2011 with a return flight on November 5, 2011. Mr. Diallo's return flight was cancelled by Royale due to technical issues but all passengers were placed on a replacement flight the same day.

Mr. Diallo did not return to Montreal on November 5, 2011, but instead purchased a return ticket over 15 months later on February 22, 2013.

Mr. Diallo brought an application to the Canadian Transportation Agency ("CTA"), which adjudicated his complaint through a specialized, quasi-judicial process and dismissed it in a decision dated June 29, 2015. The CTA found as fact that Mr. Diallo's return flights had not been cancelled, but that they were replaced for technical reasons, that the plaintiff had been informed that he had confirmed reservations on the November 5, 2011 replacement return flight from Conakry to Montreal, chose not to present himself for the flight and, instead, sought to extend the return ticket to Canada to a later date.

Mr. Diallo did not appeal the CTA's decision, but rather commenced an action in the Superior Court of Justice against Royale on June 16, 2015, alleging the cost of the return flight and damages for economic loss, loss of enjoyment and humiliation in the amount of $100,000.

Royale brought a motion to have Mr. Diallo's case thrown out for the following reasons (*2):

1. Mr. Diallo's claim was barred as it was not brought within the requisite time required under Article 35 of the *Montreal Convention*;

2. Mr. Diallo's claim was barred as it was not brought within the requisite time required under the *Limitations Act,* R.S.O. 2002; and

3. Mr. Diallo's claim was barred as it had already been litigated before the CTA.

The Montreal Convention

The right of a party to claim damages for personal injuries, loss or damage to luggage, and/or loss or damages to cargo against an international air carrier in relation to a contract for international carriage by air is subject to the conditions and limitations of the *Montreal Convention*.

The *Montreal Convention* applies to international air carriage where the place of departure and destination are within the countries that are parties to the *Montreal Convention.* This includes international air carriage where the place of departure and place of destination is in the same country if that country is a party to the *Montreal Convention* and there is an agreed upon stopping place within the territory of another country that is not a party to the *Montreal Convention.*

Pursuant to the *Montreal Convention*, Article 35:

> The right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.

The Court's Decision on the Limitation Period

With respect to Royale's submission that Mr. Diallo's claim was statute barred pursuant to the application of Article 35 of the *Montreal*

Convention, the Court had to first determine whether the *Montreal Convention* applied to this international air carriage. As Mr. Diallo's place of departure and place of destination were both in Canada, a contracting party, and there was an agreed upon stopping place within the territory of another country that is not a party to the *Montreal Convention,* in this case the Republic of Guinea, the Court found that the *Montreal Convention* applied.

Pursuant to Article 35, Mr. Diallo had until November 6, 2013 to commence an action against Royale for damages under the *Montreal Convention*. As the action was not commenced until June 16, 2015, the Court found that Mr. Diallo was time-barred from commencing his action against Royale.

In making the ruling, the Court offered some insight into how to treat Article 35 where it conflicts with limitation periods found in provincial or federal law*,* which will often be the case. For example, under the *Limitations Act*, R.S.O. 2002, a claimant must commence an action 2 years from the date which the claim is discoverable. This incorporates the concept of "discoverability", and can allow a claimant to bring an action beyond two years from the date of the act or omission that gives rise to the lawsuit. Conversely, Article 35 does not incorporate the concept of discoverability, and strictly bars claims two years after the date of arrival or expected date of arrival. Provincial limitation statutes from across Canada will conflict with Article 35.

In commenting on the conflict of law issue between Article 35 and the *Limitations Act,* R.S.O. 2002, the Court stated the following at paragraph 12 of the decision:

> As noted by Perell J in *Titulescu v. United Airlines Inc.*, *supra*, at paragraph 18, Article 35 of the *Montreal Convention* "is not an ordinary limitation provision. It contains a time bar of a special kind — one which extinguishes the claim and not just the remedy." Thus, the two-year limitation period for filing a lawsuit is a condition precedent to that lawsuit, that cannot be modified or tolled by any domestic law.

The above reasoning of the Court follows existing jurisprudence in Canada as well as internationally. Courts have consistently upheld the terms of the *Montreal Convention* where they conflict with domestic legislation. As stated by the House of Lords (the "Supreme Court" of England), the reason for that pattern is international consistency and stability in the air transportation sector:

> To permit exceptions, whereby a passenger could sue outwith the Convention for losses sustained in the course of international carriage by air, would distort the whole system, even in cases for which the Convention did not create any liability on the part of the carrier. Thus the purpose is to ensure that, in all questions relating to the carrier's liability, it is the provisions of the Convention which apply and that the passenger does not have access to any other remedies, whether under the common law or otherwise, which may be available within the particular country where he chooses to raise his action. (*3)

The Court's Decision on the Prior CTA Finding

As mentioned above, Mr. Diallo brought an application to CTA which dismissed it in a decision dated June 29, 2015. Dr. Diallo did not appeal that decision, but instead brought a fresh claim in the Ontario Superior Court of Justice.

Royale took the position that this was an abuse of process and that the action should be dismissed as it was *res judicata,* meaning that it had already been adjudicated upon by a competent court and thus could not be pursued further by the same parties.

Royale's argument was accepted by the Court. The Court found that the same issues had been before the CTA by the same parties, and as such,

Mr. Diallo was precluded from bringing this action in the Ontario Superior Court of Justice.

The Court's ruling is a reminder of the CTA's specialized, quasi-judicial function as an administrative body with the legislated authority to adjudicate such matters. It also serves to re-enforce the finality of CTA decisions. The Court commented that to allow Mr. Diallo's action would be a collateral attack on the CTA and would undermine the finality of an administrative decision.

Charles Hammond

Endnotes

(*1) The full title of the Montreal Convention is the "Convention for the Unification of Certain Rules for International Carriage by Air, and is incorporated into Canadian law by the Carriage by Air Act" R.S.C., 1985, c. C-26.

(*2) *Diallo v. Cie Nationale Royale Air Maroc*, 2016 ONSC 3247

(*3) *Sidhu and others v. British Airways*, 1997 AC 430

4. Password Protection When Crossing the Border

Can a Canadian Border Service Agency ("CBSA") officer demand that you provide the passwords to your smartphone, laptop or other electronic devices when you are crossing the border into Canada? Unfortunately, the answer is not entirely clear. Providing passwords to electronic devices to CBSA officers could be problematic for those storing confidential or sensitive information on those devices.

On March 2, 2015, Alain Phillippon from Quebec was crossing through Customs at the Halifax Stanfield Airport upon his return from his travels, when he was asked by a CBSA officer for the password to his Blackberry. Mr. Phillipon refused and was charged under section 153.1 of the *Customs Act* (*1) with hindering a CBSA officer from performing his job duties. A conviction can result in a fine up to $25,000 and/or imprisonment for up to one year.

This matter was set to go to trial in August 2016 and would have been a landmark decision on a "grey area" customs topic. Instead, Mr. Phillipon pleaded guilty and was ordered to pay a fine of $500.

Powers of the CBSA under the Customs Act

Section 99 of the *Customs Act* (the "Act") allows CBSA officers to examine goods that are in a traveller's possession. The Act defines "goods" as including "conveyances, animals and any document in any form." Cell phones, computers and electronic documents would fall under the definition and a CBSA officer could examine these items if he or she so chooses pursuant to section 99.

The power of the CBSA to conduct warrantless searches has been confirmed in *R v Buss* ("*Buss*"). (*2) The case also recognizes a computer or a cell phone as a "good" under the Act and cites the broad definition of a "good" as well as cases decided in other provinces as the reasoning for this conclusion, including the Ontario case of *R v Moroz*, 2012 ONSC 5642.

Furthermore, in the case of *R v Whittaker* (*3), the court stated that a computer file (such as the digital storage of photographic images) is a document and "falls squarely within the definition of 'goods'."The court makes the analogy that, had the images been printed and stored in an album or book, it could not be seriously argued that it was not a "good" which was liable to be searched.

Protecting these "goods" by using a password may not be enough to safeguard them. Under section 153.1 of the Act, an individual may be required to provide that password, if requested, because if they refuse, they could be charged and arrested, as was the case with Mr. Phillippon. Section 153.1 reads as follows:

> No person shall, physically or otherwise, do or attempt to do any of the following:
> (a) interfere with or molest an officer doing anything that the officer is authorized to do under this Act; or
> (b) hinder or prevent an officer from doing anything that the officer is authorized to do under this Act.

What this means in practicality is that if you are a foreign national, you have no automatic right of entry into the country to begin with; so if you refuse to provide your password, the CBSA does not have to let you into Canada and/or could charge you. If you are a Canadian or permanent resident and you refuse, this could result in a charge of preventing a CBSA officer from doing their job.

In *Whittaker*, the accused refused to provide his passwords until the CBSA officer informed him of the consequences of hindering the officer in the execution of his duties. The court did not comment on whether the charge of hindering would have been valid under the circumstances, but did note that it has been established in case law that "while border crossings are not "Charter free zones" the degree of personal privacy

expected there is lower than in most other situations". (*4)

The Office of the Privacy Commissioner of Canada has recognized the decisions of Canadian courts that people should have a reduced expectation of privacy at border points. "In this special context, privacy and other Charter rights are limited by state imperatives of national sovereignty, immigration control, taxation and security." (*5)

The issue of whether police can search an individual's cell phone during an arrest was decided in 2014 by the Supreme Court of Canada in *R v Fearon* (*6), where the court decided that such a search was allowed as part of a search incidental to an arrest. However, the court set out specific rules that must be met in that context to ensure that an individual's charter rights are not violated.

A spokeswoman for CBSA provided further information by indicating that "the principal difference between borders…and our day-to-day interactions with police is the voluntary engagement with the border because we have at some level chosen to attempt to cross a border, it's in a sense, us who has engaged our liberties, not the police having inserted themselves into our lives." (*7)

This view has also been confirmed by the court in *Buss* where it was noted that people choose to seek entry into Canada and through its border service officers, Canada is entitled to screen who it allows into the country on the basis of goods they are seeking to bring with them, among other requirements. (*8)

Unfortunately, the issue of what level of privacy protection is associated with electronic devices and their passwords in the context of a border crossing has not yet been considered in any high level Canadian courts. Therefore, the question of whether a charge under 153.1 is appropriate in these circumstances is left open.

It is worth noting that the court in *Buss* looked at whether the requirement to provide a password offends the right to be free from self-incrimination. The court held that the right was not offended since there is no enhanced right against self-incrimination at the border. The court went on to reiterate that the border is not a Charter-free zone but there is no detention in a constitutional sense until a specific criminal jeopardy arises, and, at that point, the right not to self-incriminate would take effect. (*9) However, *Buss*, a BC provincial court level decision has not been considered by any other courts so the legality of demanding a password to electronic devices is still in question.

What can you do when crossing the border to protect confidential information?

Individuals crossing the border are left with a dilemma regarding the delivery up of the passwords of their electronic devices, considering the current state of the law on this issue. If they say yes, there is the risk that confidential information may potentially be disclosed to a government governmental authority. If they refuse, they run the risk of being charged and arrested for hindering a CBSA officer's authority. This is particularly problematic if truck drivers are randomly targeted for secondary inspections and have confidential information on their phones or laptops regarding the company's customers, their price lists, and so on.

The Canadian Bar Association ("CBA") has published a helpful guide on how to secure your electronic devices, which can be accessed here: <http://www.cba.org/Publications-Resources/CBA-Practice-Link/Young-Lawyers/2008/How-to-secure-your-laptop-before-crossing-the-bord>

Some of CBA's tips are outlined below:

1. Travel with a "bare" computer or device. Where individuals might have particularly sensitive information on their devices, the CBA recommends travelling with a "forensically clean" device. In essence, it would contain only the operating system, required applications and little or no data. Once at their destination, these individuals work with data stored on other

servers (e.g. their employer's company server) through a virtual private network (VPN) with a secure connection. They can then download files to their device and upload their work to the company server and "forensically clean" their device before travelling again.

2. Use Software with SAAS. This is software that is based in and accessed through the Internet rather than on your hard drive. Any data is stored on the same server as the SAAS. Individuals who use this option are reminded to delete traces of their internet activity (i.e. cookies, history and other data) before their travels. One thing the CBA notes is that if the US government wanted your data, it could access it if it is stored on servers located in the United States pursuant to US law, the *PATRIOT Act*.

3. Delete sensitive files and store them elsewhere. A search can be done on common file name extensions to locate items.

4. Review e-mail, texts, and personal information managers (calendars, task lists, notes) for items that can be deleted and/or stored elsewhere.

5. Keep in mind that many programs will save copies of documents in temporary folders. These can be found by doing a global search on the word "temp".

6. Back up your data. In case your electronic device is confiscated by CBSA, have the data backed up elsewhere so that you can easily access it from another device, if needed.

7. Turn off your computer early. At least five minutes prior to reaching customs. If you leave your computer on "sleep mode", the RAM will store unencrypted information and can show what you were working on. RAM will void itself of information about 5 minutes after a computer has been turned off.

8. Use a different user account to hold sensitive information to which you do not know the password. Have someone else set up the account and when you arrive at your destination, have him or her email you with the logon password.

9. Choose complicated passwords. In cases where the CBSA confiscates your device without asking for a password, ensure that your device and confidential information are protected by passwords that are long, incorporate both letters and numbers, upper case and lower case or even special characters. Also avoid using passwords that contain birthdays *etc.* that are easy to guess. The CBA encourages making up words or combinations of letters to avoid the passwords being cracked by technology that performs a "dictionary attack". (*10)

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Endnotes
(*1) R.S.C., 1985, c. 1 (2nd Supp.).
(*2) *R v Buss*, 2014 BCPC 16 at 25.
(*3) *R v Whittaker*, 2010 NBPC 32 at 8.
(*4) Ibid., at 4 & 9.
(*5) "Your Privacy at airports and borders" Office of the Privacy Commissioner of Canada, online: https://www.priv.gc.ca/en/privacy-topics/public-safety-and-law-enforcement/your-privacy-at-airports-and-borders/
(*6) 2014 SCC 77
(*7) as quoted in "Alain Phillippon phone password case: Powers of border agents and police differ" Mark Gollom, CBC news, online: http://www.cbc.ca/news/alain-philippon-phone-password-case-powers-of-border-agents-and-police-differ-1.2983841
(*8) *Buss* at 24.
(*9) *Ibid*., at 33-35.
(*10) *i.e.* it throws as many words in the English language against your password until it finds the correct one. Please see <http://www.cba.org/Publications-Resources/CBA-Practice-Link/Young-Lawyers/2008/How-to-secure-your-laptop-before-crossing-the-bord>

5. CFIA and the Transportation of Animals

Recently there have been a number of decisions involving prosecutions by the Canadian Food Inspection Agency dealing with the transportation of animals and the application of the *Health of Animals Regulations.*

A. Serbo Transport inc. and F. Ménard inc. v. *Canada* (CFIA), 2016 CART 19

On July 23, 2013, employees of the applicant trucking company, Serbo Transport inc. ("Serbo") loaded and transported a load of 193 hogs owned by the applicant pork producer F. Ménard inc. ("Ménard") from a Quebec farm to the Agromex slaughter house ("Agromex"). After the pigs were unloaded, one pig in particular was observed to have a serious limp and, upon further examination, a Canadian Food Inspection Agency (Agency) veterinarian, Dr. Marius Liviu Dumitru ("Dr. Dumitru"), ordered the pig euthanized by a slaughter house employee. Dr. Dumitru then carried out a *post mortem* of the pig.

Given Dr. Dumitru's observations, which formed part of the Agency's investigation of the event, the Agency issued a Notice of Violation with Penalty on September 11, 2014, to each of Serbo and Ménard in the amount of $6,600 for loading, having loaded, transporting or having transported an animal which could not be loaded or transported without causing undue suffering contrary to paragraph 138(2)(*a*) of the *Health of Animals Regulations* (HA Regulations).

Serbo and Ménard then separately requested that the Canada Agricultural Review Tribunal ("Tribunal") review the facts surrounding the issuance of their respective Notices of Violation.

The crux of the violation was whether Pig #19 was non-ambulatory and unfit for transport prior to the time it was found in the holding pen at Agromex.

For a conviction, the Agency must establish each of the seven elements of the offence:

1. that the animal in question was loaded (or was caused to be loaded) or transported (or caused to be transported);

2. that the animal in question was loaded onto or transported on a railway car, motor vehicle, aircraft or vessel;

3. that the cargo loaded or transported was an animal;

4. that the animal could not be transported without undue suffering;

5. that the animal suffered unduly during the expected journey ("voyage prévu" in French);

6. that the animal could not be transported without undue suffering by reason of infirmity, illness, injury, fatigue or any other cause; and

7. that there was a causal link between the transportation, the undue suffering and the animal's infirmity, illness, injury or fatigue, or any other cause.

The regime established by the *Agriculture and Agri-Food Administrative Monetary Penalties Act* ["AMP Act"] and Regulations is harsh. It grants to the Agency the ability to prove the violation using a burden of proof, on a "balance of probabilities", rather than the heavier burden of "beyond a reasonable doubt". The AMP Act creates an absolute liability regime whereby it specifically disallows any defence of due diligence and mistake of fact.

The Chairperson of the Canada Agricultural Review Tribunal [CART] had to deal with an event which took place three years prior to the hearing. The Tribunal Chairperson stated:

> When faced with a request to review of the facts of this case, I take notice of the practical difficulties the alleged violator faces in producing an evidentiary record to counterbalance that offered by the Agency. In this case, Serbo was able to

> have the driver of the load, containing the pig in question, testify, but he had no recollection of the pig. This is understandable given that he testified that he hauls thousands of pigs per year and the hearing of this matter occurred nearly three years after the event.

One key element of the offence that the Tribunal Chairperson took into account was the establishment of "undue suffering".

The Tribunal Chairman referred to the decision of *Attorney General of Canada v. Porcherie des Cèdres Inc.,* 2005 FCA 59 (CanLII), where the issue was to determine the meaning of the expression "undue suffering" found in paragraph 138(2)(a). The Court in that case was of the opinion that the Tribunal had interpreted "undue" too restrictively by giving it the meaning of "excessive". The Court gave it the more usual, all-encompassing meaning of "unjustifiable", "unreasonable" and "inappropriate". The Court stated at paragraphs 31 to 36:

> [31] The case at bar does not dispute this interpretation. However, it does challenge the very parameters of the violation, that is, its essential elements and their scope. At issue are also the sufficiency and the probative value of the evidence of undue suffering, the causal link and the Tribunal's interpretation and application of that evidence.
>
> [33] Contrary to what the applicant suggests, it is not necessary for an animal to be suffering at the time and place of its being loaded for transportation for a violation of paragraph 138(2)(a) of the Regulations to be committed. Although this Court's decision in Samson v. Canada (Canadian Food Inspection Agency), 2005 FCA 235 (CanLII), at paragraphs 11 and 12, may be somewhat ambiguous in that respect, it is clear to me, first, that the provision is not limited to cases in which an animal's condition worsens as a result of its being transported. It prohibits transportation in conditions that cause undue suffering to an animal thus transported.
>
> [34] Beyond the reasons of an animal's infirmity, illness, injury or fatigue, the provision also proscribes the imposition of undue suffering for "any other cause" on an animal, which may otherwise be healthy. Undue suffering can result from suffocating, unsuitable, gruelling and intolerable transport conditions caused by, for example, cramped space, overcrowding, temperature, the length of the journey or a combination of such factors.
>
> [35] Of course, proof of undue suffering can, with respect to the owner of the animal, be made more easily if, during loading, the animal was visibly ill and suffering before the decision to include it in the load was made.
>
> [36] But it is also clear to me, second, that the fact that an animal is compromised and suffering does not necessarily mean that it cannot be transported, especially if it remains ambulatory. The literature to help producers and transporters comply with the regulations identifies the class of "lameness". It indicates that hogs that fall into classes 1 to 3 may be transported to the slaughterhouse as long as the following measures are taken: isolating them from healthy hogs, transporting them to the slaughterhouse as quickly as possible, loading them last in the rear compartment of the trailer and unloading them first upon arrival at the slaughterhouse...

The Tribunal Chairman in this decision added:

> While Parliament has enacted a specific provision to protect animal health for animals during transport from undue suffering, the provision must be interpreted so as to maintain a balance between the regular commercial activities of actors in agricultural and agri-food production systems and the protection of

> the animals in those systems. The deliberate intention of Parliament to use the phrase "undue suffering" must therefore be read in the context of this balancing in mind, given the scheme and object of the HA Act and HA Regulations.
>
> "Undue" under this legislative scheme means "undeserved", "unwarranted", "unjustified", or "unmerited" (*Porcherie des Cèdre*s, at paragraph 26) and "unjustified", "unmerited" or "unwarranted" (*Doyon*, at paragraph 30). As such, liability will generally attach to an actor in the Canadian agri-food system where animals in the care and control of that actor are exposed to "undeserved", "unwarranted", "unjustified" or "unmerited" suffering.

The Chairman dealt with the evidence and noted:

Beyond his own *ante mortem* and *post mortem* examinations, Dr. Dumitru did not order any further tests, such as a histography, to determine the exact pathology of the tissue and bone in the pig's injured hip area.

The Tribunal Chairman also noted that the interpretation of the results of Dr. Dumitru's *post mortem* examination was disputed by the experts.

The Chairman stated:

> Undue suffering can result from suffocating, unsuitable, gruelling and intolerable transport conditions caused by, for example, cramped space, overcrowding, temperature, the length of the journey or a combination of such factors … There is no evidence of such factors in this case.
>
> There is no evidence which showed that the loading, transit or unloading of the pigs was in any way unusual or compromised.

The Chairman found that on a balance of probabilities the Agency had failed to prove the seven elements of the offence.

B. 1301479 Ontario Inc. (dba Utica Livestock Carriers) v. Canada (Canadian Food Inspection Agency), 2016 CART 22

American horses are shipped to Canada for slaughter and processed here into consumable meat products. Mr. Fred Bauer ("Mr. Bauer") of La Rue, Ohio, is one such shipper who regularly retained the services of 1301479 Ontario Inc., doing business as Utica Livestock Carriers ("Utica"), to transport his American slaughter horses to Canada. On November 1, 2012, Ms. Gina Arsenault ("Ms. Arsenault"), an employee of Utica and driver of one of Utica's horse transport trailers, received onto her trailer 29 horses from Mr. Bauer's farm in Ohio.

At the Canadian border, Ms. Arsenault's load was inspected and certified, and, when all was found to be in order, the Canadian Food Inspection Agency ("Agency") officials sealed the trailer and Ms. Arsenault resumed her journey across Ontario and into Quebec.

The next day, Ms. Arsenault arrived with her load at the Viande Richelieu Meats inc. ("Richelieu Meats") slaughterhouse in Massueville, Quebec. An Agency veterinarian, Dr. Véronique Martel ("Dr. Martel") observed all the horses coming off Ms. Arsenault's trailer and then inspected Ms. Arsenault's empty trailer, which was found to be in good order. Later that morning, Dr. Martel inspected the holding pens of Richelieu Meats containing the horses that came off Ms. Arsenault's trailer and found one horse ("Horse 9584") to be in poor condition.

Twenty months later, on July 14, 2014, the Agency issued to Utica a Notice of Violation with a penalty in the amount of $6,600 for loading, having caused to be loaded, transporting or having caused to be transported an animal which could not be loaded or transported without causing undue suffering during the expected

journey contrary to paragraph 138(2)(*a*) of the *Health of Animals Regulations* (HA Regulations).

Interestingly, the Chairman of the Tribunal referred to the difficulties of the respondent in gathering evidence a number of months after the violation, stating:

> Required to recall or reconstruct events that occurred three years prior, Utica is faced with a significant documentary and testimonial challenge. I take notice of the practical difficulties Utica faces in producing an evidentiary record to counterbalance that offered by the Agency. In this case, Utica was able to have the driver of the load Ms. Arsenault, testify, but she had no recollection of Horse 9584. This is understandable given that she testified that she hauls thousands of horses per year and the hearing of this matter commenced three years after the event.

The Chairman reviewed the evidence that was available and concluded:

> There is no direct evidence in the record or from the hearing that Horse 9584 was suffering any physical ailment *prior to* Dr. Martel's discovery of it in the holding pens of Richelieu Meats the morning of November 2, 2012. In fact, all of the direct evidence points to Horse 9584 being an unremarkable, fit-for-transport animal.

The Chairman found that Utica had not committed the violation.

C. Christensen v. Canada (Canadian Food Inspection Agency), 2016 CART 23

This case concerns the state of a trailer used for animal transport, where the same facts resulted in the issuance of two Notices of Violation. The Canada Agricultural Review Tribunal ("Tribunal") determined that it would first address the alleged violation with respect to whether "insecure fittings, the presence of bolt-heads, angles or other projections" in relation to the trailer amounted to a circumstance where injury or undue suffering to the animals transported was likely. Depending on the result of such evaluation, the Tribunal was then to determine whether it was necessary to address the second Notice of Violation, addressing whether the state of repair of such trailer amounted to inadequate construction that made injury or undue suffering to the transported animals likely.

The Tribunal used the same analysis of the elements of the offence and reviewed the available evidence. It concluded that the Agency established, on the balance of probabilities, that Carsten Christensen committed the first violation as alleged. In particular, he transported an animal in a container where injury or undue suffering is likely, by reason of insecure fittings.

A review of the case law indicates an increase in the number of violations being pursued by the CFIA and also being subjected to review.

Rui M. Fernandes

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CONTEST

This month we are giving away a complimentary ticket for attendance at our annual seminar day - January 19th 2017 in Toronto - for the first individual to email us the name of the aerial acrobatic team at photograph on page 2. Email your answer to info@fernandeshearn.com with a subject line "Newsletter contest". First response with the correct answer wins.