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Precision in Drafting Employment Agreements – an Expensive Lesson

An employer can rely on a termination provision in an employment agreement to limit its obligations to an employee whose employment is terminated without cause (*1). An employer who fails to ensure that these termination provisions are clearly drafted will face costly consequences, which is the lesson learned by the employer in the recent Ontario Court of Appeal decision of *Wood v. Fred Deeley Imports Ltd.* (*2).

In April 2007, Julia Wood was hired by Fred Deeley Imports Ltd. ("Deeley"), a Harley-Davidson supplier, as a Sales and Event Planner. On May 1, 2015, Deeley advised Ms. Wood that her employment would terminate on August 4, 2015. At the time of termination, Ms. Wood had been employed by Deeley for 8 years and 4 months, was 47 years old and was earning an annual compensation package, including benefits, worth $100,000.

Ms. Wood had signed an employment agreement on the day after she started working for Deeley, which contained the following termination clause:

> [The Company] is entitled to terminate your employment at any time without cause by providing you with 2 weeks' notice of termination or pay in lieu thereof for each completed or partial year of employment with the Company. If the Company terminates your employment without cause, <u>the Company shall not be obliged to make any payments to you other than those provided for in this paragraph</u>, except for any amounts which may be due and remaining unpaid at the time of termination of your employment. <u>The payments and notice provided for in this paragraph are inclusive of your entitlements to notice, pay in lieu of notice and severance pay pursuant to the *Employment Standards Act, 2000*</u>. [Emphasis added]

At the date of termination of her employment, in addition to the 13 weeks of working notice already provided (from May 1 to August 4, 2015), Ms. Wood received a lump sum payment equal to 8 weeks'

FIRM AND INDUSTRY NEWS

- **Kim Stoll** will be representing the firm at the Commercial Litigation Women's Breakfast held by the Commercial Litigation Practice Group of The Advocates' Society on April 4, 2017 in Toronto.

- **Gordon Hearn** will be speaking at the **Transportation Intermediaries Association** Annual Conference meeting on April 6, 2017 in Las Vegas, Nevada. Gordon will be providing the Canadian perspective on a cross-border panel addressing legal liability and regulatory considerations in the surface carriage of goods between Canada, the United States and Mexico

- **Canadian Maritime Law Association** Seminar, April 7th, 2017, Ottawa. **Rui Fernandes, Kim Stoll, Alan Cofman** and **James Manson** will be attending.

- **Mari-Tech 2017** Conference, April 20-21, 2017, Montreal.

- **Transportation Lawyers** Annual Conference & **Canadian Transport Lawyers Association** Semi Annual Meeting, April 26-29, 2017, Santa Fe, New Mexico. **Rui Fernandes, Gordon Hearn, Kim Stoll** and **Louis Amato-Gauci** will be attending. **Kim Stoll** will be moderating a panel on "New Solutions for Old Obstacles: Cross-Border Motor Carrier Operations in North America. **Louis Amato-Gauci** will be a speaker on this panel. **Kim Stoll** will also be moderating a panel on "Through the Spyglass: The Future of Act of God Defence in Intermodal Transport."

- **Ontario Trucking Association** Annual Spring Golf Classic, May 16th, 2017, Milton Ontario.

- **North American Rail Shippers Association** Annual Conference, May 23-25 2017, San Francisco.

- **Canadian Board of Marine Underwriters** 100th Anniversary Conference, May 24-25 2017, Montreal.

- **Canadian Inland Ports** Conference, May 24-25 2017, Calgary.

- **Rui Fernandes** will be speaking at **The Chartered Institute of Logistics and Transport (North America)** Transport Outlook Conference in Mississauga on June 6th and 7th, 2017. He will be speaking on a panel on "Five Hot Topics in Transportation Law, Risk Management and Insurance" and on a panel on "Governance".

- **Gordon Hearn** will be speaking at the **Eye For Transport: 3PL & Supply Chain Summit** in Chicago, Illinois on June 15. He will be speaking on a panel addressing legal trends in the 3PL and supply chain marketplace.

salary. Notwithstanding that Ms. Wood received a total of 21 weeks' notice, and her employment agreement provided for only 18 weeks, she sued Deeley for wrongful dismissal, arguing that the employment agreement was not enforceable as it was signed after employment began and, alternatively if it was enforceable, the termination provision was unenforceable as it did not meet the minimum requirements of the *Employment Standards Act, 2000* ("ESA").

Enforceability of a Contract signed after employment begins

Ms. Wood was offered the job by telephone on April 17, 2007 and she accepted over the phone. An email followed that outlined the terms of employment discussed, although neither party was able to produce this email. Ms. Wood started work on April 23, 2007 and on April 24, 2007 she signed a number of documents including the employment agreement that was dated April 17, 2017. Ms. Wood argued that there was no fresh consideration provided at the time she signed the employment agreement as she had already started work and therefore the agreement was unenforceable. The court stated that a written employment agreement is not unenforceable merely because the employee signs it after work commences, but it could be unenforceable if the employer includes in it a material term that was not part of the original employment relationship. Based on the facts of this case, the court found that the email received before Ms. Wood started work contained the terms of employment, and because there was no evidence that Ms. Wood only saw the agreement for the first time after starting work, or that the employment agreement contained additional material terms, fresh consideration was not required and the employment agreement was enforceable.

Enforceability of Termination Provision

An employee who is terminated without cause is entitled to reasonable notice at common law, which is determined by considering the employee's age, position held, and length of service. Common law notice is always greater than the minimum termination requirements under the ESA. The parties can contract out of the common law notice and agree to another notice period, so long as their agreement does not provide for something less than the minimum requirements under the ESA. Ms. Wood argued that the termination provision in this employment agreement did not comply with the ESA.

Under the ESA, Ms. Wood was entitled to 8 weeks notice plus 8.3 weeks severance (because the employer's payroll exceeded $2.5 million and she had at least 5 years of service), for a total of 16.3 weeks, and all benefits were to continue for the duration of the 8 weeks notice period. This was less than the 18 weeks provided for in the employment agreement, and the 21 weeks that Deeley actually provided to Ms. Wood.

Deeley also paid Ms. Wood the sum of $7,131 representing a pro rated bonus, and outplacement services. Deeley offered a further lump sum payment of $12,470 in exchange for a release, which Ms. Wood refused to sign; instead she sued for wrongful dismissal, claiming that she was entitled to common law notice.

Ms. Wood argued that the termination provision in the employment agreement was unenforceable because it did not include a reference to Deeley's statutory obligation to continue her benefits, and it expressly excluded any payments other than those set out in the provision. The court held that the fact that Deeley voluntarily continued all benefits had no bearing on whether the termination clause itself was enforceable.

The court also looked at the severance pay issue. Under the ESA, Ms. Wood was entitled to 8.3 weeks severance pay. Deeley characterized the 8 weeks lump sum payment to Ms. Wood at the end of the working notice period as severance pay. Severance, unlike notice, must be paid to the employee and cannot be satisfied by way of an extended working notice period. However,

the wording of the termination provision in the employment agreement allowed Deeley to provide notice and severance by way of a working period only, or by way of payment only, or by combination thereof; because it did not clearly provide for severance to be paid it contravened the ESA.

The court held that the termination provision was unenforceable and that Ms. Wood was entitled to notice at common law equal to 9 months salary, which was more than double the amount provided for in the employment agreement.

Lessons learned

- It remains best practice to have new employees sign and return the employment agreement before their first day of work. The finding in this case is specific to its facts. The risk of an employee challenging the agreement's enforceability in order to seek greater rights is too significant, especially when the risk can be eliminated by finalizing the agreement in advance.

- Do not rely on precedent employment agreements without having them reviewed by a lawyer; the law is always changing; what might have been upheld in the past may no longer be enforceable.

- Review and update all existing employment agreements to ensure that the termination provisions are enforceable; however, you will not be able to impose a new employment agreement on an existing employee unless you provide fresh consideration, such as a promotion or pay increase or something else of value.

It is not only the omission of words that can be costly…a tale about a comma

In Maine, the absence of a comma helped a group of dairy drivers win a claim for overtime pay (*3). The Oxford comma, also known as a serial comma, is used before the words "and" or "or" in a list of three or more things.

Under the state's law, the following activities did not qualify for overtime:

> The canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment or distribution of:
>
> 1. Agricultural produce;
> 2. Meat and fish products; and
> 3. Perishable foods.

The drivers distributed the goods, but they did not pack them. The drivers argued that, because there was no comma between "packing for shipment" and "or distribution of", the legislation excludes from overtime only one activity, that of packing, and not two separate actions. The court held that the exemption to overtime pay was not clear and that an ambiguity in labour laws must be construed liberally, and adopted the drivers' interpretation. The drivers won by a comma.

Carole McAfee Wallace

Endnotes

(*1) Reminder that federally regulated employers are limited as to when they can terminate non-managerial employees without cause

(*2) *Wood v. Fred Deeley Imports Ltd.,* 2017 ONCA 158

(*3) *O'Connor v. Oakhurst Dairy,* No. 16-1901 (1st Cir. 2017)

2. Courier Limits Liability to $1

In the recent decision of *Distribution de produits Vican Canada inc. c. Federal Express Canada* ***Ltd.,*** 2017 QCCS 717, a courier was sued for $443,456.00 for handing over an envelope containing negotiable bills of lading to a fraudster.

The claimant was a shipper of seven containers of recycled metal from Canada to China. The claimant entered into contracts of carriage with a number of ocean carriers, receiving original bills of lading that were required to be handed over to the carriers in China for receipt of the cargo.

The claimant contracted with Federal Express Canada Ltd. ("Fedex") for it to deliver an envelope containing the seven original bills of lading to The Industrial Bank in Taizhou China. The shipment was "door to door." Unfortunately, for the claimant, a fraudster named Madam Wu attended at the Fedex sorting facility in Taizhou claiming to be a representative of the bank and picked up the package. The fraudster gave the Fedex employee the tracking number and the employee verified the identity of the recipient by taking a photograph of Madam Wu. The package was then handed over to Madam Wu. Fedex advised the claimant of the delivery.

Realizing there was a problem, the claimant then advised the ocean carriers of the fraudulent obtaining of the bills of lading and then requested them not to deliver the goods. It was informed by the ocean carriers that an injunction was required to do this. The Federal Court of Canada issued an interim injunction ordering the ocean carriers not to deliver the cargo. The claimant, however, also applied to the Chinese court for a similar interim injunction. The application was rejected, and the claimant seller lost control of the goods. The claimant alleged that the Chinese government and the buyer were corrupt. The buyer thus obtained the cargo, having the original bills of lading, without paying for the goods. The bills of lading had not been processed through the bank system for collections.

The claimant brought the claim in the Quebec Superior Court against Fedex alleging that the delivery of the parcel to a person other than the designated recipient to the contract of carriage constituted a serious misconduct for which Fedex should be held responsible under the provisions of the Civil Code in respect of transportation. Fedex pleaded that it had fulfilled its obligations under the contract of carriage, pleaded that it committed no fault, and that that, in any event, its liability was limited to the value of $1, being the declaration on the courier waybill for the package.

Certain Articles of the Civil Code of Quebec were reviewed. These Articles provide:

> **1474.** A person may not exclude or limit his liability for material injury caused to another through an intentional or gross fault; a gross fault is a fault which shows gross recklessness, gross carelessness or gross negligence.
>
> **2033.** A carrier who provides services to the general public shall carry any person requesting it and any property he is requested to carry, unless he has serious cause for refusal; the passenger, shipper or receiver is bound to follow the instructions given by the carrier, in accordance with the law.
>
> **2049.** The carrier is bound to carry the property to its destination. He is bound to make reparation for injury resulting from the carriage, unless he proves that the loss was caused by superior force, an inherent defect in the property or natural shrinkage.
>
> **2052.** The liability of the carrier, in the case of loss, may not exceed the value of the property declared by the shipper. If no value has been declared, it is determined on the basis of the value of the property at the place and time of shipment.
>
> **2053.** No carrier is bound to carry documents, money or property of great value. If a carrier agrees to carry that type of property, he is not liable for loss unless its

> nature or value has been declared to him; any deceitful declaration which misleads as to the nature of the property or inflates its value exempts the carrier from all liability.

The court noted that the claimant chose the cheapest Fedex service ($53) being a type "door to door" service to carry parcels containing "Export papers" (as described on the waybill filled out by the claimant) and with a declared value of $1. The court noted that the claimant had the opportunity to choose another service offered by the defendant at a higher cost.

The court also noted that, in selecting the service, the claimant failed to declare to Fedex the true nature and the true value of the delivered documents while knowing that the sending of the parcel contained significant risks.

The court also noted that the claimant's employee had given the tracking number to the buyer's representative and not just to the bank.

In setting out the law, the court commented that the very high burden of proof of the gross negligence of a carrier belongs to the shipper. The judge noted that courts have upheld the existence of a serious misconduct in the presence of a proof establishing an extreme recklessness, gross negligence and a total lack of consideration for the interests of others.

The judge reviewed prior decisions establishing that the loss of goods constitutes negligence but not gross negligence; that the late delivery of an envelope containing a certified cheque in the amount constitutes negligence, but not gross negligence or misconduct.

Fedex was negligent in failing to properly deliver the parcel. However, it was not grossly negligent nor did it display misconduct. The court noted that after the loss Fedex's behavior was difficult to reconcile with the commission of a serious misconduct because it worked with the claimant during several weeks including:

- In tracing the packages and the person who had committed fraud;
- By providing all the information that it had;
- In attempting several times to obtain a police report in China;
- Communicating with the claimant on an almost daily basis during the month of August; and
- Assisting the claimant in China in their representations to the police and the courts.

The court noted that the claimant had received the Fedex service guide prior to shipment. It noted that the guide specifies the terms and conditions of the contract, and the types of service available. The claimant could not ignore the fact that the transport of a regular package with a value of $1 allowed Fedex to take arrangements for different delivery to meet the needs of the recipient wishing a faster delivery or to retrieve the package at the counter. The claimant had not acted with due diligence because it had not notified Fedex of the nature and the actual value of the bills of lading, nor the risk associated with transportation of the package.

The judge bolstered her decision by finding that the claimant was negligent in entrusting the tracking number of the parcel to the buyer in Taizhou. The court noted that even before the Fedex shipment, the buyer, according to the testimony of the President of the claimant, had tried to avoid paying the cargo by invoking all kinds of excuses. The evidence also established that the claimant had not made any diligent "audits" in respect of the buyer before concluding a contract with it.

The court concluded that Fedex was liable but could limit its liability to the declared value of $1. It had not committed an intentional or gross fault.

Rui M. Fernandes

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

3. Autonomous Vehicles Update

Generally, an autonomous vehicle is capable of sensing its environment and navigating without human input. Classifications have been developed by governments and professional associations to describe the levels of automation.

A classification system based on six different levels (ranging from none to fully automated systems) was published in 2014 as "J3016 (Taxonomy and Definitions for Terms Related to On-Road Motor Vehicle Automated Driving Systems)", by SAE International, an automotive standardization body. SAE International, initially established as the Society of Automotive Engineers, is a U.S.-based, globally active professional association and standards developing organization for engineering professionals in various industries. Principal emphasis is placed on transport industries such as automotive, aerospace, and commercial vehicles.

The SAE automated vehicle classifications are:

- Level 0: Automated system has no vehicle control, but may issue warnings.
- Level 1: Driver must be ready to take control at any time. Automated system may include features such as Adaptive Cruise Control (ACC), Parking Assistance with automated steering, and Lane Keeping Assistance (LKA) Type II in any combination.
- Level 2: The driver is obliged to detect objects and events and respond if the automated system fails to respond properly. The automated system executes accelerating, braking, and steering. The automated system can deactivate immediately upon takeover by the driver.
- Level 3: Within known, limited environments (such as freeways), the driver can safely turn their attention away from driving tasks, but must still be prepared to take control when needed.
- Level 4: The automated system can control the vehicle in all but a few environments such as severe weather. The driver must enable the automated system only when it is safe to do so. When enabled, driver attention is not required.
- Level 5: Other than setting the destination and starting the system, no human intervention is required. The automatic system can drive to any location where it is legal to drive and make its own decisions.

In Ontario Canada, Ontario Regulation 306/15, which came into force on January 1, 2016, uses SAE Standard J3016.

Many autonomous vehicles are being developed, but as of March 2017 automated cars permitted on public roads are not yet fully autonomous. They all require a human driver at the wheel who is ready at a moment's notice to take control of the vehicle. There is a lot of testing going on. The bulk of the testing is in California.

As of mid-March, the number of total number of companies in California now licensed to test drive autonomous vehicles on California roads totals twenty-seven. This is double the number of companies licensed a year ago and up from just seven in early 2015. According to the Department of Transportation in California the number of self-driving test vehicles on their roads is now one hundred and eighty.

The players in Silicon Valley now are:
Volkswagen Group of America
Mercedes Benz
Google
Delphi Automotive
Tesla Motors
Bosch
Nissan
GM Cruise LLC
BMW
Honda
Ford
Zoox, Inc.
Drive.ai, Inc.

Faraday & Future Inc.
Baidu USA LLC
Wheego Electric Cars Inc.
Valeo North America, Inc.
NextEV USA, Inc.
Telenav, Inc.
NVIDIA Corporation
AutoX Technologies Inc.
Subaru
Udacity, Inc
Navya Inc.
Renovo Motors Inc.
UATC LLC (Uber)
PlusAi Inc.

Under the testing regulations, manufacturers are required to provide the DMV with a Report of Traffic Accident Involving an Autonomous Vehicle within 10 business days of an incident. The California Autonomous Vehicle Testing Regulations require every manufacturer authorized to test autonomous vehicles on public roads to submit an annual report summarizing the disengagements of the technology during testing. "Disengagement" means a deactivation of the autonomous mode when a failure of the autonomous technology is detected or when the safe operation of the vehicle requires that the autonomous vehicle test driver disengage the autonomous mode and take immediate manual control of the vehicle.

There is active debate as to when we will see the arrival of fully autonomous cars in operation on our roads. Elon Musk, CEO of Tesla has made a prediction that it will be in 2020. The head of Nissan has made a similar prediction. Uber foresees having an entirely driverless fleet by 2030 (a mere 13 years away!).

Governments, insurers, judges and lawyers will have to grapple with the issues raised by the introduction of autonomous vehicles.

In February 2017, the United Kingdom introduced *The Vehicle Technology and Aviation Bill.* It sets out how the liability for accidents involving automated vehicles should be apportioned. It also sets out whether the owners of those vehicles are insureds, the liability of insurers, the ability to recover amounts paid from manufacturers, and other providers of systems.

The introduction of autonomous vehicles will have profound effects on government and many industries.

Legislators will need to consider the following issues:

- Liability between owners, manufacturers, third party providers, insurers
- Safety standards
- Infrastructure – road building, communications, traffic management, licensing
- Cybersecurity and privacy

Many industries will be affected:

- Technology companies
- Insurance
- Commercial transport and logistics, workforce
- Travel industry – airlines, taxis, hotels, rental cars
- Healthcare
- Criminal liabilities
- Legal – patents, product liability, contracts

In the following months, we will be exploring the different aspects of law with the introduction of autonomous vehicles, vessels, aircraft and rail carriers.

Rui M. Fernandes

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

4. Federal Government Introduces Interim Order on Use of Recreational Drones

The following is a release from Transport Canada summarizing *Interim Order Respecting the Use of Model Aircraft.*

Rules for recreational drones

If you fly your drone for fun and it **weighs more than 250 g and up to 35 kg**, you do not need special permission from Transport Canada to fly. Follow the basic safety rules below. Not doing so may put lives, aircraft and property at risk. If you fly where you are not allowed or choose not to follow any of the rules below, you could face fines of up to $3,000.

Do not fly your drone:

- higher than 90 m above the ground
- closer than 75 m from buildings, vehicles, vessels, animals, people/crowds, etc.
- closer than nine km from the centre of an aerodrome (any airport, heliport, seaplane base or anywhere that aircraft take-off and land)
- within controlled or restricted airspace
- within nine km of a forest fire
- where it could interfere with police or first responders
- at night or in clouds
- if you can't keep it in sight at all times
- if you are not within 500 m of your drone
- if your name, address, and telephone number are not clearly marked on your drone.

Rui M. Fernandes

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

5. Applicable Law in Aviation Tort

Thorne v. Hudson Estate, 2017 ONCA 208 (March 10, 2017)

In *Thorne v. Hudson Estate*, the Ontario Court of Appeal found no palpable and overriding error in the motion judge's conclusion that the U.S. legislation, the *General Aviation Revitalization Act of 1994* ("GARA") had no application in this action. U.S. law was not applicable. The law to be applied in torts is the law of the place where the activity occurred. The activity in question was negligent misrepresentations regarding engine repair bulletins and manuals, not negligence in the production of the engine itself. The activity took place in Ontario.

Facts
During a flight from Oshawa Ontario to Wilmington, Delaware, a twin-engine Beech aircraft lost power in its left engine. Shortly after aborting an attempted emergency landing at an airfield in New York State, the plane crashed killing the two pilots and the one passenger on board.

The defendants include the companies that inspected and maintained the engine, 1205055 Ontario Limited c.o.b. Aviation Technical Consultants ("ATC") and Corporate Aircraft Restorations Inc., together with its employee, Maurice Nesbitt (collectively "CAR"), along with the manufacturer of the engine, Continental Motors, Inc. ("CMI") of the United States.

CMI brought an application to the court for summary judgment on the basis that the claims asserted against it were barred by GARA. GARA is a United States federal statute that imposes an 18-year final limitation period on civil actions against aviation manufacturers for damages for deaths arising out of an accident involving an aircraft. It was argued that since the aircraft crashed in New York, GARA applied and barred the claims against CMI. The judge dismissed CMI's summary judgment application and declared that Ontario law applied to the proceedings.

Issues
What law applied and did the motion judge err by dismissing the motion for summary judgment?

Analysis
The Ontario Court of Appeal concluded that there was no palpable and overriding error in the motion judge's characterization of the "crux" of the claims against CMI. The judge had concluded that the "crux" of the claims was negligent misrepresentations contained in the repair manuals and bulletins that CMI published, and not negligence in the production of the engine itself. The judge had correctly applied the principles set out in *Tolofson v Jensen* – that "the law to be applied in torts is the law of the place where the activity occurred*, i.e.* the *lex loci delicti*."(*1) Therefore, there was no error in the judge's conclusion that Ontario law applied to the negligent misrepresentation claims.

The Court further found that the Application materials did not support CMI's argument that GARA would bar the claims against it in the event that New York law applied. In his reasons, the judge considered two expert opinions on the scope of GARA both of which cited the decision of the United States Court of Appeals, Ninth Circuit, in *Blazevska v. Raytheon Aircraft Co*. In that decision the Court found that GARA's application was limited to U.S. federal and state courts, and that "It would be up to any foreign court to determine whether it wanted to apply GARA to litigation occurring within its borders…" Therefore, there was no palpable and overriding error in the judge's conclusion that "…this is not a case where CMI deserves judgment based on an application of GARA."(*3)

Andrea Fernandes

Endnotes
(*1) *Tolofson v Jensen*, 1994 3 SCR 1022.
(*2) *Blazevska v. Raytheon Aircraft Co.*, 522 F.3d 948 (2008), at para. 8.
(*3) *Thorne v Hudson*, 2016 ONSC 5507, at para. 36.

6. *ING Bank v. Canpotex Shipping*: The Parol Evidence Rule is Alive and Well in Canada

The Federal Court of Appeal recently released its decision in *ING Bank N.V. v. Canpotex Shipping Services Limited*, 2017 FCA 47. The case is about a marine fuel bunker delivery; essentially, two competing parties (one, a middleman; the other, the actual fuel supplier) each claimed they were entitled to be paid by the customer for the same delivery.(*1)

The lower court made its determination and ultimately ordered the customer to pay the fuel supplier most of the money in dispute (but ruled that the middleman could keep the mark-up it had charged the customer).

However, on appeal, Justice Nadon found that the lower court judge should never have accepted certain key oral evidence from one of the witnesses, because it violated what is known as the "parol evidence" rule. Accordingly, the Court allowed the appeal and referred the matter back to the lower court judge for reconsideration.

The parol evidence rule is an old, well-known and widely-accepted general principle of contractual interpretation. It precludes the admission of evidence, outside the words of a written contract, that contradicts or seeks to vary the terms of that written contract. In 2014, in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, the Supreme Court of Canada described the rationale for the rule as follows:

> The purpose of the parol evidence rule is primarily to achieve finality and certainty in contractual obligations, and secondarily to hamper a party's ability to use fabricated or unreliable evidence to attack a written contract.

Following *Sattva*, Justice Nadon held that the lower court judge in this case had improperly accepted parol evidence, and thus wrongly concluded that certain contractual terms applied to the transaction in dispute even though a plain reading of the relevant contractual documents showed that the disputed terms did not apply. This made the lower court judge's ultimate decision potentially suspect, and so the matter was sent back for reconsideration.

This case is a cautionary tale, for a couple of reasons. First, it serves as another reminder of how important written contracts are, and how important it is to properly "paper" a transaction at the outset of a contractual relationship. Absent very special circumstances, courts will simply not accept parol evidence from a party (about what they believe the terms of a contract are or should be) in the face of a contradictory written agreement. (*2) Thus, if you're not happy with the terms of your written contract, do not simply assume that you'll be able to "explain it away" later – because you likely won't be able to. The better way is to spend the time, energy (and yes, money) to properly negotiate what you want in the contract before a dispute arises.

Secondly, and on a more practical level, this decision is a prime example of the wasted costs and time that gets spent when parties do not take the above advice to heart. In this case, many thousands of dollars, over several years, have now been paid to lawyers to litigate what should have been a straightforward issue. Because of one party's attempt to introduce parol evidence, thereby introducing uncertainty and confusion into the contractual equation, the result is that an enormous amount of time, energy and money has been spent by all parties. And, in light of the Court's decision, over two years later, still no one has been paid!

The Facts

The facts of the case, stripped to their essentials, are fairly simple. In February 2014, two parties, Canpotex Shipping Services Limited ("Canpotex") and O.W. Supply and Trading A/S ("OW S&T"), entered into a fixed price trading agreement (the "Fixed Price Agreement") governing Canpotex's purchase of marine fuel bunkers in respect of vessels chartered by Canpotex. The purpose of

the agreement was so that Canpotex would have the option of purchasing bunkers at a set price over a set period when market rates were favourable. However, because Canpotex never viewed the market conditions as favourable during the relevant period, it never "locked in" the price of bunkers; thus, no purchases were ever made pursuant to the terms of the Fixed Price Agreement.

Importantly, the Fixed Price Agreement contained a number of Schedules. One of them, Schedule 3, was entitled "Terms and Conditions of sale for Marine Bunkers".

In October 2014, however, Canpotex did place an order for marine fuel bunkers to be delivered to two of its chartered vessels: the M.V. Star Jing and the M.V. Ken Star. There was no dispute that these purchases were not made under the terms of the Fixed Price Agreement, but were rather "spot purchases".

Canpotex ordered the bunkers from an entity known as O.W. Bunkers (UK) Limited ("OW UK"), one of OW S&T's subsidiaries. In turn, OW UK sent Canpotex two sales order confirmations, which provided that the purchases were subject to OW S&T's General Terms and Conditions. These terms and conditions differed from the language of Schedule 3 as found in the Fixed Price Agreement – thereby setting the stage for the eventual legal showdown that would ensue.

In any event, the OW UK order confirmations also indicated that OW UK had arranged for a fuel supplier in British Columbia, Marine Petrobulk Ltd. ("Petrobulk") to physically deliver the bunkers in Vancouver.

Petrobulk then confirmed with OW UK that it was prepared to deliver the bunkers. Petrobulk indicated that, as between Petrobulk and OW UK, Petrobulk's own Standard Terms and Conditions would apply.

On October 27, 2014, Petrobulk delivered the fuel bunkers to the two vessels at the Port of Vancouver. Petrobulk then invoiced OW UK in the amount of USD$648,917.40, and OW UK (after its mark-up) in turn invoiced Canpotex in the amount of USD$654,493.15.

All in all, this was a fairly straightforward transaction, featuring a buyer, a seller, and a middleman who connected the dots and charged a few thousand dollars for doing so.

Unfortunately, this is where things turned sour. OW UK went bankrupt and ultimately failed to pay Petrobulk, who then turned directly to Canpotex for payment. In addition, Petrobulk asserted a contractual lien and a statutory maritime lien against the two ships, which would allow Petrobulk to arrest the vessels.

In addition, all of OW UK's receivables in respect of fuel bunker sales were assigned to receivers in the UK. The receivers also turned to Canpotex for payment.

In short, Canpotex was asked to foot the bill twice; once to the bankrupt middleman's receivers, and once to the unpaid fuel supplier. Obviously, it would not be fair for Canpotex to pay twice; the question was, who should be paid what?

The Action

Fortunately, like other jurisdictions, Canadian law provides for what is known as an "interpleader" proceeding. Essentially, this is a legal proceeding available to a person or entity who is in possession of property in which it claims no interest, or accepts that it owes money, but does not know who to pay or give the property to. The person or entity can post the money or property in court, and then let others fight over who should be allowed to claim it.

In this case, Canpotex wanted to pay the right entity (Petrobulk or OW UK's receivers), but was concerned that if it paid the "wrong" entity, then it might be liable to pay again at the end of a lawsuit that would surely be commenced by the unpaid party. So, Canpotex commenced an interpleader proceeding and obtained leave to

deposit the disputed funds into its lawyers' trust account. Canpotex then filed a summary judgment motion, seeking judgment from the Court as to which entity was entitled to be paid the disputed funds: Petrobulk or the OW UK receivers. These parties filed similar summary judgments, seeking judgment in respect of their respective unpaid invoices.

Justice Russell of the Federal Court heard the motions. In the course of his decision, His Honour considered whether the terms of Schedule 3 of the Fixed Price Agreement between Canpotex and OW UK governed in the circumstances, or whether OW UK's standard terms, as relayed to Canpotex in the order confirmations, governed instead.

Russell J. ultimately determined that Schedule 3 governed the parties' contractual relationship in this case. As a result, His Honour concluded that Petrobulk was entitled to be paid USD $648,917.40 for the fuel delivery. The OW UK receivers, meanwhile, were entitled to be paid the value of their mark-up (USD$5,575.75) for the service OW UK provided to Canpotex.

Most people would think that Russell J.'s decision was correct. After all, the supplier was paid for the fuel, and the middleman was paid for its involvement in arranging for the supplier. Sounds fair, right?

Well… maybe.

The Appeal

Ultimately, the OW UK receivers appealed. The Federal Court of Appeal allowed the appeal and returned the matter to Justice Russell for reconsideration, not necessarily because he made a wrong decision, but rather because of the way he reached it.

The main issue on appeal (*3) was whether Justice Russell ought to have accepted certain evidence tendered by Mr. Keith Ball. Mr. Ball's evidence featured prominently in the lower court decision. It centred around whether Schedule 3 of the Fixed Price Agreement applied to the disputed transaction.

Mr. Ball's evidence (which Russell J. accepted) was that Schedule 3 did apply to the transaction. His Honour observed that Mr. Ball, on cross-examination, stated that he and OW UK's representative had in fact agreed during negotiations that spot purchases from Petrobulk would be subject to Schedule 3 of the Fixed Price Agreement, even if the purchases themselves were not made under the Fixed Price Agreement. In other words, Mr. Ball's evidence was simply that it was agreed by all sides that Schedule 3 would apply, no matter what.

Justice Russell noted also that the opposite parties had not called anyone from OW UK who had been involved in the contractual negotiations, who could refute Mr. Ball's evidence. Russell J. went on to draw a negative inference from their failure to do so.

On appeal, Justice Nadon observed that were it not for Mr. Ball's evidence, Justice Russell would necessarily have concluded that Schedule 3 of the Fixed Price Agreement did not apply to the subject transaction. The Court held that the contractual documents terms (leaving aside Mr. Ball's evidence) were clear and unambiguous, providing that bunker purchases were subject to OW UK's Terms and Conditions, and *not* Schedule 3 of the Fixed Price Agreement.

This led to the *Sattva* case and the parol evidence rule. The Court found that its conclusion (that the contract did not include the terms of Schedule 3) was totally in accordance with the principles of contractual interpretation set out in *Sattva*. As Justice Rothstein commented in *Sattva*, the purpose of contractual interpretation was to determine "the intent of the parties and the scope of their understanding". Rothstein J. held that in order to accomplish this task, judges must read the contract as a whole, "giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract".

Rothstein J. in *Sattva* went on to say that although "surrounding circumstances" were to be considered in interpreting a contract, these circumstances must "never be allowed to overwhelm the words of the agreement", adding that contractual interpretation was to "be grounded in the text and read in light of the entire contract." Rothstein J. also said that courts are not to use surrounding circumstances "to deviate from the text such that the court effectively creates a new agreement." Surrounding circumstances should only consist of objective evidence pertaining to background facts existing at the time of the institution of the contract, i.e. "knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting".

Rothstein J. made the further point that the examination of surrounding circumstances is subject to what is known as the "parol evidence" rule. Rothstein J. wrote:

> The parol evidence rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing. To this end, the rule precludes, among other things, evidence of the subjective intentions of the parties. The purpose of the parol evidence rule is primarily to achieve finality and certainty in contractual obligations, and secondarily to hamper a party's ability to use fabricated or unreliable evidence to attack a written contract.

With these principles in mind, the Court re-examined Mr. Ball's evidence and found it wanting. Basically, the Court concluded that Mr. Ball's evidence violated the parol evidence rule. His evidence included for example, the following statements:

- that Schedule 3 of the Fixed Price Agreement was meant to apply to spot purchases of bunkers
- that "it was Canpotex's understanding" that Schedule 3 "would cover all bunker purchases by Canpotex with the OW Group, including both fixed price transactions and spot purchases"
- that "Canpotex would not have entered into the Contract if the Terms noted therein did not apply to spot purchases"

The Court found these statements to be problematic, as they were simply attempts by Mr. Ball to introduce Canpotex's subjective intentions and views about the contract, in the face of the written contractual documents themselves.

The Court also noted that on cross-examination, Mr. Ball testified that after several rounds of negotiation, during which Canpotex attempted unsuccessfully to have the OW Group to agree to its proposal to subject spot purchases to Schedule 3, finally the OW Group did agree to do so. However, critically, the Court pointed out that Mr. Ball was unable to point to any documents to support this contention. Moreover, and importantly, the Fixed Price Agreement did not contain any language that would support his contention either.

The bottom line is that for the Court, Mr. Ball's testimony contradicted the written contractual documents. There was no documentary support at all for Mr. Ball's contentions that somehow Schedule 3 applied to the subject transaction.

The Court therefore concluded that Justice Russell should never have accepted Mr. Ball's evidence. More particularly, his evidence should not have been used to, in effect, replace the words of the contract used by the parties. This was, in the Court's view, a direct violation of the principles set out in *Sattva*.

The Court held that Schedule 3 of the Fixed Price Agreement, in fact, did not apply to the subject transaction. Consequently, the applicable terms were those found in OW UK's Terms and Conditions.

The Court stopped short of interpreting OW UK's Terms and Conditions, however, and instead sent

the matter back to Justice Russell for reconsideration.

And so, the saga continues for the parties. Again, this case illustrates the importance of properly papering a transaction at the outset. For example, a simple clause inserted into the Fixed Price Agreement providing that "the terms of this Schedule 3 do not apply to spot purchases of fuel bunkers made outside of this Fixed Price Agreement" would almost certainly have precluded Mr. Ball from attempting to use parol evidence to explain what terms applied to spot purchases. Justice Russell would then almost certainly not have ruled as he had. In the result, thousands of dollars and over two years spent on litigation would have been avoided.

As they say, hindsight is 20/20.

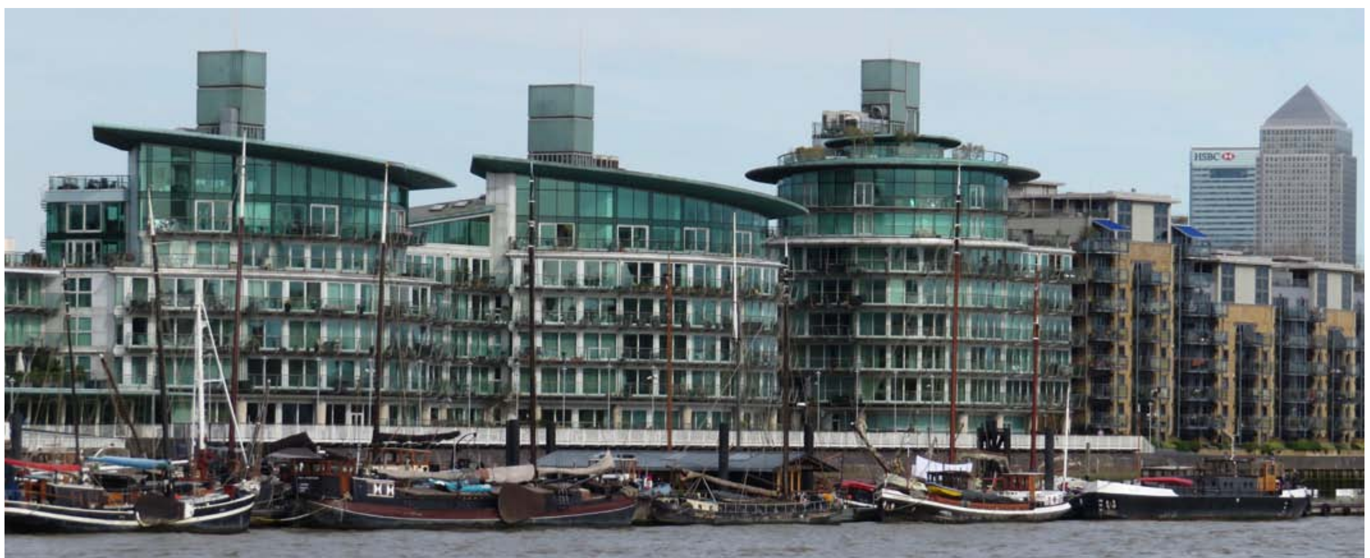
James Manson

Endnotes

(*1) A case comment l on the lower court's decision can be found in the Fernandes Hearn LLP July 2016 Newsletter

(*2) The Court also considered other issues on appeal, of a more technical nature. One such issue raised was whether this particular case was suitable for the interpleader mechanism in the first place. Essentially, Justice Russell held that it was. On appeal, the Court agreed, up to a point. It held that the contractual issue of who, as between Petrobulk and OW UK, was entitled to be paid for the fuel delivery, was a proper matter to be settled by the interpleader proceeding. However, the Court held that Petrobulk's statutory maritime lien claim (which, it argued, it had against Canpotex by virtue of it being a supplier of goods to the foreign vessels) fell outside the contractual dispute. Thus, in the event that Petrobulk ultimately lost the interpleader action, it could still advance its lien claim. Thus, the Court held that Petrobulk's maritime lien should not have been extinguished along with the contractual claims in the interpleader action. Rather, it remained a "live" issue, to be litigated if necessary at a later date.

(*3) There are exceptions to the parol evidence rule. Importantly, parol evidence is admissible in the case of an oral contract (obviously, if there is no written document, the parties will have to testify as to what the terms of the contract were). As well, a party would be entitled to resort to parol evidence to demonstrate that the parties entered into a collateral agreement that does not contradict the main written agreement. A party would also be entitled to give evidence to support a claim that a contract is invalid for lack of consideration, etc.



7. Private Right of Action for Anti-Spam Law to Come into Effect July 1, 2017

Canada's Anti-Spam Law (*1), colloquially known as "CASL", came into effect on July 1, 2014 to regulate and discourage unsolicited "commercial electronic messages" ("CEMs"), such as e-mails, text messages, and voice messages.

The main concern for most businesses is compliance with the obligation to obtain and record consent. Basic requirements to obtain express consent in compliance with CASL include providing recipients with (i) the name of the person seeking consent and the organization's name for whom the consent is being sought, (ii) the purpose of the consent, (iii) an address where recipients can get more information, and (iv) a free mechanism to withdraw their consent.

Consent can be implied for existing business or non-business relationships, or if recipients conspicuously publish their contact information, but we generally recommend against reliance on implied consent.

Until now, CASL has only be enforced by the Canadian Radio-television and Telecommunications Commission (the "CRTC"), the Competition Bureau, and the Office of the Privacy Commissioner of Canada. That will change on CASL's third birthday, July 1, 2017, when a new private right of action will come into effect, with potentially large impacts.

Under the new private right of action, individuals and corporations will be able to seek redress for violations of the Act that have impacted them with respect to the sending or re-routing of CEMs, the installation of computer programs, or participation in or promotion of a prohibited activity; if they have been the target of false or misleading messages contrary to the *Competition Act*; if their e-mail address has been obtained through unauthorized data mining; or if their personal information has been obtained in violation of the *Personal Information Protection and Electronic Documents Act* (better known by its acronym, "PIPEDA").

Penalties can theoretically be imposed up to $1,000,000 for every day on which a contravention occurred, plus compensatory damages for any actual damages suffered by the applicant. The penalty in excess of actual damages is supposed to be imposed with a view to ensuring compliance with the Act and not to punish. However, the determination of the proper penalty will be entirely in the discretion of the court.

In effect, class actions or large multi-party actions will be possible if mass messaging is done in breach of the CASL requirements. These can be significant, even if the distribution lists were relatively small and the fine-per-recipient is relatively small. For example, if a message is sent to 100 recipients, and a $100 penalty is imposed per recipient, the fine could be $10,000, even if none of the recipients suffered any actual damages.

In setting a penalty, the court is directed to specifically consider seven factors, in addition to the Act's regulations and anything else that the court finds relevant. These seven explicit factors include: (i) the purpose of the order, (ii) the nature and scope of the contravention, (iii) the person's history of compliance, (iv) any regulatory undertakings or agreements made with the CRTC or the Competition Bureau, (v) the financial benefit gained by the violation, (vi) the person's ability to pay, and (vii) whether the applicant has already received any compensation.

Corporations may be found vicariously liable for their employees' and agents' breaches of the legislation, subject to a "due diligence" defence that they took reasonable measures to protect against the breach in the circumstances.

Officers, directors and agents of a corporation may also be held vicariously liable if they "directed, authorized, assented to, acquiesced in or participate in the commission of that contravention, or engaged in that conduct whether or not the corporation is proceeded against". Thus, individuals may face personal

liability even after a corporate bankruptcy. However, they will also be protected by the entitlement to a “due diligence” defence.

Private claims will be barred if there has already been an enforcement action taken against the violation, or after the passage of a three-year limitation period. Thus, on July 1 of this year, parties might face private prosecutions for violations dating back as far as July 1, 2014.

Conclusions

Now is an excellent time for businesses to assess their risk, including to identify the channels through which they send CEMs and whether they have obtained consent. In some cases, communications and advertising policies may need to be urgently revised.

Now is also an excellent time to have your colleagues and clients consent to their receipt of *The Navigator*! They may do so by contacting info@fernandeshearn.com.

Alan S. Cofman

Endnotes

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

8. Garage Owes Duty of Care to Minor Who Stole Vehicle from Premises

J.J. et al v. C.C., James Chadwick Rankin, carrying on business as Rankin's Garage & Sales et al 2016 ONCA 718 (Leave to Appeal to the Supreme Court of Canada granted March 9, 2017)

A duty of care is required to be established before a court can consider whether there is liability on a defendant and if damages accrue. There must be a duty or obligation upon one person to another that is then breached causing damages to flow.

In this case, while coming to the same result as the trial judge and jury, the Court of Appeal had different reasons for the conclusion that Rankin's Garage owed a duty of care to the plaintiff.

Rankin's Garage however was not satisfied and made application for leave to appeal to the Supreme Court of Canada, which was granted this month on March 9, 2017. Apparently, Canada's highest court also wants to weigh in on the issues.

Facts

Two 16-year-old friends were drinking at one their homes. A 15 year old friend, J.J., was with them, but did not drink. They all shared a marijuana cigarette. The adult female, D.C., who had been in attendance, went to bed leaving the boys unsupervised. One of the 16-year-old boys went home, but the other two boys left the house and were in a car accident that night. Only the 16 year old, C.C., was able to give evidence as J.J. was catastrophically injured.

C.C. testified at trial that he and J.J. attempted to break into parked cars and also found some that were unlocked. They made their way to the defendant, Rankin's Garage, which was a business that sold and serviced cars and trucks. Rankin's Garage's property was not secured in any way. The two boys entered onto the property and located an unlocked vehicle with the keys in the ashtray. Neither boy had a driver's licence. C.C. stole the vehicle even though he had never driven a car before and J.J. was his passenger. On the way to pick up a friend, C.C. crashed the vehicle. He was charged and pleaded guilty to dangerous operation of a motor vehicle causing bodily harm, possession of stolen property obtained by theft and theft of property over $5,000.

The Trial Decision

J.J. sued C.C., Rankin's Garage, and D.C. for negligence and admitted that he was partially responsible for his own injuries.

The trial judge instructed the jury that Rankin's Garage owed J.J. a duty of care, "because people who [are] entrusted with the possession of motor vehicles must assure themselves that the youth in their community are not able to take possession of such dangerous objects."

The jury found C.C., D.C., and Rankin's Garage negligent and J.J. was found to be contributorily negligent.

Rankin's Garage was found by the jury to be 37% negligent because the car in its possession was left unlocked with the key inside the car when it knew or ought to have known of the potential risk of theft, given the poor security on the premises.

D.C. was 30% negligent because she provided alcohol to minors and failed to supervise them. C.C. was 23% negligent because he drank underage, stole a vehicle and drove while unlicensed and impaired. J.J. was 10% contributorily negligent because he willingly got into a stolen car when he knew that C.C. was unlicensed and impaired.

Amongst other grounds, Rankin's Garage appealed indicating that the trial judge had erred by concluding that it had a duty of care to J.J., who had helped to steal the vehicle.

The Court of Appeal

The main issue on appeal was whether Rankin's Garage owed a duty of care to J.J. who had helped to steal the subject vehicle from its premises.

The Court of Appeal reviewed the law regarding whether a duty of care arises to third parties upon the theft of a vehicle. The Court of Appeal disagreed with the trial judge that the case law supported a conclusion that a duty of care had previously been found in this regard. In fact, the Court of Appeal found that none of the cases cited at the trial level were analogous to the case under consideration.

The Court of Appeal then went on to consider whether a duty of care did indeed exist in the circumstances.

The Court noted, "The finding that a duty of care is owed to a third party is relatively rare in cases arising out of the theft of a vehicle." (*1) In most cases, a duty of care to a third party had not been found because injury to the third party was not a reasonably foreseeable consequence of the theft and the Court stated that, "It might be thought that the argument against liability in negligence is at least as strong, if not stronger, when injuries are incurred by someone involved in stealing the vehicle, as opposed to a third party injured by the vehicle."

The Court of Appeal found the facts here to be "a novel case" requiring a full review and examination of whether a duty of care existed. The Court applied the reasoning in the English House of Lords decision in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), as modified by the Supreme Court of Canada in *Cooper v. Hobart*, 2001 SCC 79 (CanLII), [2001] 3 S.C.R. 537 (together, *"Anns-Cooper*").

Essentially, the *Anns-Cooper* test involves the questions: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act and considering the relationship or proximity between the parties; and (2) notwithstanding an affirmative answer to (1), are there any policy reasons that tort liability should not be recognized? Where this test is used, the plaintiff has to establish the duty of care in (1) leaving the defendant to establish the requirement in (2) to negative that duty.

The Court of Appeal ultimately found that these requirements of foreseeability and proximity were established on the facts in this case and that the duty of care then arising was not negated by any policy concerns.

The Court held that there was ample evidence to support the conclusion of foreseeability given the practices at Rankin's Garage as well as the history of theft in the area. Witnesses had testified that Rankin's Garage had poor security practices and they routinely left cars unlocked with keys in them, whereas other garages provided drop boxes or locked boxes for their customers' keys. Rankin Garage's principal, Chad Rankin, had testified that there were proper measures such as keeping the keys in a safe and had specifically recalled checking the subject vehicle to ensure that it was locked shortly before it was stolen. The Court found his evidence inconsistent with the evidence of all of the other witnesses and noted that the jury found that Rankin had left the car unlocked, left the key in the car, and that Rankin had very little security despite the history of theft in the area, including directly from Rankin's Garage's premises. The jury found that Chad Rankin knew, or ought to have known, of the potential risk of theft.

The Court found that Rankin's Garage was easily accessible by anyone and there was no evidence of any security measures designed to keep people off the property when the business was closed. There was a clear risk of theft because cars were left unlocked with the keys in them.

At paragraph 53, the Court concluded regarding step 1 in the *Anns-Cooper* test, "it was foreseeable that minors might take a car from Rankin's Garage that was made easily available to them. …It is a matter of common sense that minors might harm themselves in joyriding,

especially if they are impaired by alcohol or drugs."

The Court went on to consider whether it was fair and just to impose a duty of care in the circumstances considering "expectations, representations, reliance, and the property or other interests involved." (*2) The Court considered the proximity between the alleged wrongdoer (Rankin) and the victim (J.J.) and "whether the *actions* of the alleged wrongdoer have a close or direct effect on the victim, such that the wrongdoer ought to have had the victim in mind as a person potentially harmed." (*3)

Finding proximity, according to the Court, did not depend on whether Rankin knew J.J, but on whether Rankin should have had minors like J.J. in mind when he considered security measures at Rankin's Garage.

At paragraph 57, the Court stated:

> In my view he should have. The appellant had care and control of many vehicles for commercial purposes, and with that comes the responsibility of securing them against minors, in whose hands they are potentially dangerous. He should have adverted to the risk that minors would be tempted to take a vehicle if it were made easily available to them.

The securing of the vehicles was not an onerous obligation and involved only locking the vehicles and storing the keys. Rankin's Garage even had its own interest in taking such steps as bailee of the property. The Court found it fair and just to impose a duty of care in these circumstances. Rankin's Garage could easily have met the standard of care simply by ensuring that all of its vehicles were locked and that their keys were protected -– precautions Chad Rankin testified that he was willing to take and claimed to have taken.

Having found a duty of care given foreseeability and proximity, the Court went on to consider whether any residual policy considerations would stop its imposition. The Court in this step appeared to intend to limit the application of the duty of care in such circumstances to the facts of the case.

The Court stated when considering any broad policy concerns, at paragraph 68-69,

> It is important to emphasize the particular factors that make it appropriate to recognize a duty of care in this case, while limiting its application. The appellant operated a commercial garage and had care and control of many vehicles on its premises on an ongoing basis. ….His business was an inviting target for theft and joyriding, especially by minors. The risk was real and knowable, yet there was virtually no security in place at Rankin's Garage. On the contrary, theft of the car was facilitated by the appellant's decision to leave it unlocked with the keys in it. The existence of a duty of care in these circumstances stems from the appellant's responsibility to have the protection of minors in mind when he made decisions about security at his business.
>
> It is also important to emphasize that recognition of a duty in the circumstances of this case results in no hardship to the appellant. Indeed, the duty can be complied with simply by locking the vehicles and securing the keys. Not only was there evidence that this was standard practice in the industry, there was also evidence that it was a practice the appellant was willing to follow – and claimed to have followed in this case.

The Court also addressed the objection that establishing liability for the injuries of someone who participates in a theft is "offensive to society's standards", describing the sentiment as having intuitive appeal because wrongdoers should be responsible for the damage they may cause to themselves by their wrongdoing.

The Court found that it is well established that the duty of care arises independently of the illegal or immoral conduct of the injured party. Such conduct of a plaintiff, the Court noted, operates as a defence to an action in tort only when the integrity of the legal system is at stake; that is, where a damage award in a civil suit would allow a person to profit from illegal or wrongful conduct or would permit evasion or rebate of a penalty prescribed by the criminal law. Wrongdoers may seek compensation for damages from a defendant's negligence but not their own and this is taken into account by assessing contributory negligence.

The Court could find no policy reasons to negative the establishment of a duty of care in this case.

The Court would also not interfere with the apportionment of liability imposed by the jury stating that it could not be said that the jury's finding was "so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it".

Finally

As noted above, the Supreme Court of Canada will hear Rankin Garage's appeal from the decision of the Court of Appeal. This is significant, as the Supreme Court of Canada does not typically weigh in on just any case. This case, however, dealt with the existence of a new duty of care where there appears to have been little close or direct relationship or proximity between the parties. The fact that the plaintiff was a minor may also have influenced the Court. With the Supreme Court of Canada's review, the law on the establishment of a duty of care will be further strengthened and we will be sure to further report.

Kim E. Stoll

Endnotes

(*1) at para 28

(*2) *Cooper v. Hobart*, 2001 SCC 79 (CanLII), [2001] 3 S.C.R. 537 at para. 34.

(*3) *Ibid*

9. Fuel Surcharge Class Action Certified in Quebec Against Air Canada

Fuel surcharges on airline tickets were introduced in an era when carriers were greatly restricted in their ability to revise fares by reason of regulatory constraints. Fuel surcharge afforded airlines the ability to align fares with their most variable of their critical cost bases, kerosene. The fuel surcharge is traditionally identified by the YQ abbreviation in a fare breakdown.

Although airlines are now largely free to change their pricing in most markets, fuel surcharges have persisted. Some jurisdictions such as Brazil have outlawed fuel surcharges altogether on tickets originating from their territory, while other jurisdictions, such as South Korea, tightly control fuel surcharges which are indexed against actual fuel prices. Many countries, however, including Canada, leave surcharges wholly at the discretion of the operating carriers.

The YQ charge in the Canadian framework, like airfares generally, are adapted to specific markets. They are neither linear nor commensurate to oil prices or distance flown. Accordingly, on direct flights on the same carrier from Toronto, the fuel surcharge is greater to Frankfurt than to Beijing despite the latter being more than 50% further in distance. The competitive landscape underpins these otherwise apparent irrationalities.

Whereas oil prices have fallen sharply since their peak in 2008, unregulated fuel surcharges have been much slower to contract. Consumer irritation has generally been abated in Canada since the introduction of mandatory all-inclusive advertising of airfares (*1), prohibiting headline fares subject to surcharges many times greater than the net fare advertised. Passengers now have to dig deep into the fare basis of their ticket to even find out how the final price was derived.

This notwithstanding, Mr. Robert Choquette was incensed after learning that the fuel surcharge applied to his roundtrip fare to Paris in September 2014 was more than the base air fare and all other taxes combined. Despite expressing his global satisfaction with the total airfare and despite the break down of the total airfare having been available to him when he booked his ticket with Air Canada, Mr. Choquette elected after his trip to commence a class action for damages on behalf of all passengers having purchased an international ticket through Air Canada's website in respect of which a fuel surcharge was levied.

On January 30, 2017, the Quebec Superior Court released its reasons on the certification hearing as well as on the preliminary motion of Air Canada to dismiss the suit on the basis of the absence of jurisdiction of the courts of common law (*2). Air Canada alleged that the plaintiff's complaints, framed under the Quebec Consumer Protection Act (*3) should properly be brought before the Canadian Transportation Agency, given the Agency's jurisdiction over airline tariffs and consumer complaints.

The Quebec Superior Court disagreed with Air Canada's position. In accordance with precedent from the Quebec Court of Appeal (*4), Duprat J. acknowledged that the court could not regulate the air carrier's tariff. However, insofar as the claims of Mr. Choquette were in fact claiming damages from the defendant airline, absent any express provision granting exclusive jurisdiction to the Agency, the action fell within the inherent jurisdiction of the Superior Court.

As concerned the certification application, the Superior Court analyzed the admissibility of the proposed action pursuant to the conditions laid out at art. 575 of the new Quebec Code of Civil Procedure (*5). The plaintiff proposed a common question of law as to the application of the Consumer Protection Act to the application of a fuel surcharge by Air Canada on international air fares. Duprat J. denied Air Canada's argument that each of hundreds of thousands of claims would have to be analyzed individually by way of mini-trials, the court applied appeal level case law that a single common question of law suffices to meet the conditions set out at art. 575 1 (*6).

As concerns the condition laid out at art. 575 2 that the facts alleged must appear to justify the conclusions claimed, the court upheld the position of Mr. Choquette. Mr. Choquette alleged with supporting evidence (the quality of which was questioned by Air Canada) that the fuel charges exceeded the total cost of fuel used on his flight, that the charges were not proportionate to the cost of fuel nor to the length of flight stages, that Air Canada misled him and that this constituted a breach of the Consumer Protection Act, which creates a presumption of prejudice for the consumer.

The court is bound to assume the facts as alleged in the claim at the stage of authorization, and accordingly, the facts sustained an arguable cause of action against Air Canada. The resistance raised by the airline pertaining to the quality and deficiencies of the supporting evidence of the plaintiff were more properly for the consideration of the court at the trial of the action, not on an application for certification where the threshold for admissibility is not overly burdensome.

As concerns the third criterion of art. 575.3, that there be no more suitable form of joining the claims, Air Canada argued that the class action was not the appropriate procedural vehicle given that the size of the class was not determined. As there were no other reasonable means for Mr. Choquette to proceed on a joint basis with other affected persons, the court applied the principle enunciated by the Court of Appeal that the strict determination of the scope of the class is of lesser importance in cases where it is apparent that the class comprises a vast number of persons (*7), as was patently the case in this action.

Finally, Air Canada opposed certification on the fourth requirement at art. 575.4 as concerned the suitability of Mr. Choquette to serve as a representative of the class. The court again dismissed the airline's argument. The court noted the liberal position taken by the Court of Appeal as concerned the adequacy of a representative (*6). The court is not to be concerned that the lawyers lead the charge as concerns the prosecution of the claim, and the plaintiff need not understand all of the underlying mechanisms to satisfy the requirements of art. 575.4.

Duprat J. upheld the plaintiff's position that it was impossible for Mr. Choquette to have identified the class members in advance of the certification hearing. Mr. Choquette understood that his claim was premised on his allegation that he had been charged a disproportionate and arbitrary amount as fuel surcharge, which sufficed to qualify him as a suitable representative.

The class action will therefore proceed and Air Canada was ordered to pay the costs of advertisements informing consumers as to the proceedings.

Mark Glynn

Endnotes

(*1) *Air Transportation Regulations* (SOR/88-58) Part V.1
(*2) *Consumer Protection Act* RLRQ c P-40.1
(*4) *WestJet v. Chabot* 2016 QCCA 584
(*5) *Code of Civil Procedure*, CQLR c C-25.01
(*6) *Sibiga c. Fido Solutions Inc*. 2016 QCCA 1299
(*7) *Martel c. Kia Canada Inc. 2015 QCCA 1033*
(*8) See *supra,* note (*6)

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CONTEST

This month we are giving away a complimentary ticket for attendance at our annual seminar day - Wed. January 17th 2018 in Toronto - for the first individual to email us the name of building and city depicted in photograph on page 21. Email your answer to info@fernandeshearn.com with a subject line "Newsletter contest". First response with the correct answer wins.