THE NAVIGATOR

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Compulsory Insurance for Passenger Vessels

The 2001 *Marine Liability Act* (the Act) introduced a liability regime for all commercial and public purpose ships engaged in the carriage of passengers. However, carriers are not currently required to maintain insurance towards their liability to passengers and, as a result, passengers may not be able to receive compensation in the event of a marine accident.

The Regulations Respecting Compulsory Insurance for Ships Carrying Passengers (the Regulations) comes into force on January 11th, 2019 (*1). The Regulations require that commercial and public purpose ships engaged in the domestic carriage of passengers maintain liability insurance in a minimum amount of $250,000 multiplied by the passenger capacity of the ship. The Regulations also require that a certificate of insurance or certificate of entry be kept on board the vessel where feasible or be produced within 24 hours after a designated officer boards the ship.

The Regulations do not apply to:
(i) the master of a ship, a member of a ship's crew or any other person employed or engaged in any capacity on board a ship on the business of the ship,
(ii) a person carried on board a ship other than a ship operated for a commercial or public purpose,
(iii) a person carried on board a ship in pursuance of the obligation on the master to carry shipwrecked, distressed or other persons or by reason of any circumstances that neither the master nor the owner could have prevented, and
(iv) a stowaway, a trespasser or any other person who boards a ship without the consent or knowledge of the master or the owner.

The Regulations also do not apply to:
(a) an adventure tourism activity that meets the conditions set out in subsection 37.1(1) of the *Marine Liability Act*;
(b) the carriage of a sail trainee or a person who is a member of a class of persons prescribed under paragraph 39(d) of the *Marine Liability Act*;

FIRM AND INDUSTRY NEWS

- The **Fernandes Hearn LLP Annual Seminar** will take place in Toronto at the Advocates' Society Education Centre on January, 16th, 2019.

- The **Second Annual Women in Logistics Event 2019** will be held in Toronto on Thursday, January 17th, 2019. Fernandes Hearn LLP is a sponsor and **Kim Stoll** will be in attendance representing the firm.

- The **Marine Club Annual Dinner** will be held in Toronto at the Royal York Hotel on Friday January 18th, 2019.

- **Rui Fernandes** will be speaking on "Maritime and Energy Arbitration in Canada" at the **7th Annual Arbitration & Investment Summit**, Nassau, Bahamas, January 25th, 2019.

- The **Transportation Lawyers Association** Chicago Regional Seminar and Bootcamp will take place on January 25-26, 2019 at the Fairmont Chicago – Millennium Plaza, Chicago**. Gordon Hearn**, K**im Stoll**, and **Carole M. Wallace** will be representing the Firm. **Kim Stoll** will be speaking on the Ethics panel "Lost at Sea: How Defeat was Snagged from the Jaws of Victory."

FERNANDES HEARN LLP 19TH ANNUAL SEMINAR

Date: **Wednesday January 16th, 2019**
Location: The Advocates' Society Education Centre
250 Yonge Street, Suite 2700 Toronto
Cost: $65.00 - Includes light lunch and materials (by download)
Registration: Shellie Coghlan, Fernandes Hearn LLP 416-203-9620 and email to: info@fernandeshearn.com
Send cheques to: Fernandes Hearn LLP,
155 University Ave. Suite 700, ON M5H 3B7
Limited to 130 attendees RIBO Accreditation (applied for): 6 hours

Topics and Speakers:

8:00-8:25	**Registration & Coffee**	**Sponsor: RIO Insurance Brokers**
8:25-8:30	**Welcome**	Rui Fernandes
8:30-9:15	Cross Border Carriage Contract Pitfalls	Gordon Hearn
9:15-10:00	Dealing with Emergency Situations and Post Accident Aftermath	Rui Fernandes
10:00-10:30	Multi-Modal Cargo Claims	Alan Cofman
10:30-10:45	**Coffee**	**Sponsor: AON**
10:45-11:45	Food Safety / Customs Issues	Mark Glynn
11:45-12:45	Insolvency Basics	Oleg Roslak
12:45-1:30	**Lunch**	**Sponsor: Fernandes Hearn LLP**
1:30-2:15	Mediation / Arbitration	Kim Stoll -FHLLP/Bluestone ADR Joel Richler – Bay Street Chambers
2:15-3:00	Cannabis Update	Jeremy Thiel – DriverCheck Inc.
3:00-4:00	Mock Trial – Human Rights Hearing	Carole M. Wallace Alan Cofman Andrea Fernandes Janice Pereira

(c) search and rescue operations that are carried out by the Canadian Coast Guard Auxiliary;
(d) a carriage performed by the Government of Canada or the government of a province, or by an entity that is entitled to indemnification by that government for liability under Part 4 of the *Marine Liability Act*; or
(e) a carriage by a pleasure craft as defined in section 2 of the *Canada Shipping Act, 2001*.

Operators who do not currently have a liability insurance policy will need to comply within 60 days after the regulations come into force.

If a vessel operator already holds a liability insurance policy that covers death or personal injury to passengers when the Regulations come into force, they will need to comply with the new rules when the current policy expires or is cancelled or modified.

If the liability insurance policy covers a fleet of ships, such as for fishing expeditions or outfitters, the owner must carry:

- the certificate of insurance on board one ship, and
- a copy of it on board every other ship in the fleet

The certificate of insurance must state:

- the amount of insurance for each ship in the fleet, or
- the amount that applies to the ship with the highest passenger capacity, and the number of ships for which that amounts applies, and
- the policy provides the same coverage as a separate policy for each ship would

If a ship is exempt from registration requirements (per regulations made under the *Canada Shipping Act, 2001*), the certificate of insurance does not need to include its name and official number. If there is not enough room to list all ships in the fleet on the front of the insurance certificate, they must be listed on the back.

The Regulations have been contemplated since the early 2000s. On June 16, 2000, the tour boat *True North II* sank in 15 m of water in Georgian Bay resulting in the drowning of 2 children. The inquest found that the owner-operator was not insured and recommended compulsory insurance for commercial ships carrying passengers. Following this incident, the Minister of Transport committed in 2001 to enact regulations requiring compulsory insurance for ships carrying passengers. The Minister publicly announced the Government's plans to proceed with these Regulations in 2003.

It has taken over 15 years, but the compulsory insurance is finally here. Is the next step compulsory insurance for pleasure craft vessels?

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

Endnotes
(*1) SOR/2018-245

2. Doing Business in Canada – Part 15 (*1) – Taxation

Income Tax - Generally

Income taxes are imposed at the federal level, as well as by the various provinces and territories. Federal income tax is levied on the worldwide income of every Canadian resident and, subject to the provisions of any applicable income tax convention, levied on the Canadian source income of every non-resident who is employed in Canada, who carries on business in Canada or who realizes a gain on the disposition of certain types of Canadian property.

Generally, a province or territory will also impose an income tax on persons resident, or carrying on business, in the provincial or territorial jurisdiction. Certain provinces also tax non-residents on gains realized on the disposition of certain types of Canadian property situated in the province.

The federal government levies income tax under the Income Tax Act (“ITA”]
It covers federal income tax for individuals and other taxpayers, including corporations and trusts, whether resident in Canada or non-resident. A partnership is generally a flow-through entity for Canadian tax purposes and not itself a taxable entity (unless deemed to be a specified investment flow-through (“SIFT”) partnership). The ITA is administered by Canada Revenue Agency (“CRA”).

Where personal income is earned in the form of a capital gain, only half of the gain is included in income for tax purposes; the other half is not taxed.

Settlements and legal damages are generally not taxable, even in circumstances where damages (other than unpaid wages) arise as a result of breach of contract in an employment relationship.

Companies and corporations pay tax on profit income and on in some provinces on capital. Tax is paid on corporate income at the corporate level before it is distributed to individual shareholders as dividends. A tax credit is provided to individuals who receive dividends to reflect the tax paid at the corporate level.

Corporations may deduct the cost of capital following Capital Cost Allowance Regulations. The Supreme Court of Canada has interpreted the Capital Cost Allowance in a fairly broad manner, allowing deductions on property which was owned for a very brief period of time, and property which is leased back to the vendor from which it originated. (*2)

Residency

An individual’s residency for Canadian income tax purposes generally involves a determination as to whether the individual was “ordinarily resident” in Canada or has otherwise established significant residential ties to Canada. The ITA also deems certain persons to be resident in Canada. An individual who is physically present in Canada for a total of 183 days or more in any year is deemed to be a resident of Canada for the entire year.

A corporation is deemed to be a resident of Canada for tax purposes if it was incorporated in Canada at any time after April 26, 1965. In addition, a corporation incorporated in a foreign jurisdiction will be resident in Canada if the directors meet in Canada or if control over the corporation is exercised in Canada. If the foreign jurisdiction is a country with which Canada maintains a tax treaty, further tie-breaker rules may apply if an individual or corporation is found to be resident in more than one country.

Non Residents

Non-residents of Canada are subject to taxation on Canadian source income, subject to relief by way of rate reduction or, to a limited extent, elimination of Canadian tax, under a tax treaty. Canada has an extensive network of treaties, with more than 90 treaties currently in force.

The principal sources of income of non-residents that are subject to tax in Canada are:

• income from a business carried on in Canada;
• income from an office or employment performed in Canada;
• gains realized on the disposition of "taxable Canadian property"; and
• certain types of passive income such as dividends paid by a Canadian corporation or rent from Canadian real estate.

Taxable Canadian property is generally limited to:

• real property situated in Canada;
• assets used in a business carried on in Canada;
• a share of a private corporation, an interest in a trust or an interest in a partnership more than 50% of the value of which was derived from any combination of real or immovable property situated in Canada, Canadian resource property, timber resource property, or interests, options or rights in such property at any time in the 60-month period prior to the disposition of such shares or other interests; and
• units of a mutual fund trust and listed shares of a corporation, where at any time during the 60-month period preceding the disposition, a 25% ownership threshold is exceeded and at that time more than 50% of the value of the units or shares was derived from any combination of real or immovable property situated in Canada, Canadian resource property, timber resource property, or interests, options or rights in such property.

Value-Added Taxes

Canada imposes a multi-staged goods and services tax ("GST") under the *Excise Tax Act* on the consumption of goods and services in Canada. Some of Canada's provinces have chosen to harmonize their retail sales taxes with the federal GST. While GST is collected by all registered businesses at each stage in the production or marketing of goods and services, the burden of the tax is borne by the ultimate consumer. Under this system, businesses collect tax on their sales and claim a credit, referred to as an input tax credit, for any tax paid on their purchases. While most sales of goods and services are subject to GST, some goods and services are exempt or zero-rated (taxable but at a rate of zero per cent). GST is currently payable at a rate of 5 per cent.

Certain provinces have harmonized their provincial retail sales taxes with the federal GST, which has the effect of raising the rate of the overall tax rate in those provinces. Currently the rates are as set out in the table /next page.

Canada's Province	Rate type (HST, GST, PST)	Provincial rate	Canada rate	Total
Alberta	GST	0%	5%	5%
British Columbia (BC)	GST+PST	7%	5%	12%
Manitoba	GST+PST	8%	5%	13%
New-Brunswick	HST	10%	5%	15%
Newfoundland and Labrador	HST	10%	5%	15%
Northwest Territories	GST	0%	5%	5%
Nova Scotia	HST	10%	5%	15%
Nunavut	GST	0%	5%	5%
Ontario	HST	8%	5%	13%
Prince Edward Island (PEI)	HST	10%	5%	15%
Québec	GST + QST	9.975%	5%	14.975%
Saskatchewan	GST + PST	6%	5%	11%
Yukon	GST	0%	5%	5%

Administration

Federal taxes are collected by the Canada Revenue Agency (CRA). Under tax collection agreements, the CRA collects and remits to the provinces:

• provincial personal income taxes on behalf of all provinces except Quebec, through a system of unified tax returns.

• corporate taxes on behalf of all provinces except Quebec and Alberta.

• that portion of the Harmonized Sales Tax that is in excess of the federal Goods and Services Tax (GST) rate, with respect to the provinces that have implemented it.

The Agence du Revenu du Québec collects the GST in Quebec on behalf of the federal government, and remits it to Ottawa.

Payroll Taxes

Employers are required to remit various types of payroll taxes to the different jurisdictions they operate in:

Jurisdiction	Type
Federal	Canada Pension Plan Employment Insurance
Ontario	Employer Health Tax
Quebec	Quebec Pension Plan Health Services Fund Quebec Parental Insurance Plan Commission des normes du travail Workforce Skills Development and Recognition Fund Compensation Tax
All provinces	Workers' compensation premiums

Property Taxes

The municipal level of government is funded largely by property taxes on residential, industrial and commercial properties. These account for about ten percent of total taxation in Canada. There are two types. The first is an annual tax levied on the value of the property (land plus buildings). The second is a land transfer tax levied on the sale price of properties everywhere except Alberta, Saskatchewan and rural Nova Scotia.

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

Endnotes
(*1) This article is part 15 of 17 parts dedicated to a review of doing business in Canada. Subsequent articles will include Insolvency, Litigation and ADR.
(*2) *Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336.

3. Air Canada Language Rights Before Federal Court Again

More than four years following the Supreme Court's seminal pronouncement on the exclusivity of the Montreal Convention remedies for incidents aboard aircraft in the context of a claim advanced by serial complainant Michel *Thibodeau* (*1), the Federal Court again confronted language rights issues in a claim against the flag bearing airline i*n Leduc v. Air Cana*da (*2) in October 2018, with judgment rendered in November 2018. (*3)

On November 11, 2009, the plaintiff was forced to disembark his Air Canada flight from Fort Lauderdale to Montreal prior to take off from the Fort Lauderdale airport. Mr. Leduc alleged that he was removed for insisting that he be spoken to in French. Air Canada claimed that Mr. Leduc was improperly occupying a seat in the business class section of the aircraft whereas he was ticketed in the economy cabin.

Mr. Leduc was subsequently issued a travel ban by Air Canada in December 2009. In Air Canada's covering correspondence to Mr. Leduc, the airline enclosed its tariff for his reference, which was in its English language version only. The Office of the Commissioner of Official Languages ("OCOL") received a complaint with respect to the correspondence from the airline to Mr. Leduc in English only. OCOL accepted that this had been an oversight and closed its file as resolved.

Mr. Leduc subsequently booked a flight in February 2012 with the same airline and was refused boarding by reason of his travel ban. Mr. Leduc contested the travel ban before the Canadian Transportation Agency, which dismissed his complaint.

Mr. Leduc then began to re-litigate the 2009 incident before the OCOL, which upheld his complaint that his language rights were violated by the airline upon his disembarkation from the aircraft, but not during the on-board sequence of events leading to his forced disembarkation. The OCOL also confirmed that Mr. Leduc's language rights had been violated when the Tariff was sent in its English language version only, albeit the Office upheld that this was an administrative oversight.

Mr. Leduc brought civil claims concerning Air Canada's refusal to allow him to fly both in November 2009 and in February 2012. The claims were dismissed by the Quebec Court in their entirety. (*4)

Concomitantly, Mr. Leduc commenced proceedings in Federal Court claiming a declaration of violation of his language rights by Air Canada as well as monetary relief, an apology, costs and the overturning of the ban preventing him from traveling with the airline.

The Federal Court process was delayed extensively, initially pending the outcome of the Supreme Co*urt decis*ion in *Thibodeau*, and subsequently by reason of delay in prosecution of the matter by the plaintiff.

Based on the evidence before the court, Mr. Justice Harrington ruled that Air Canada had breached the plaintiff's language rights upon his disembarkation. The court found that the evidence of on-board events was consistent with the airline's version of events and the finding of the OCOL was that Mr. Leduc addressed the airline's staff in English, thus he could not raise objection to being responded to in English. This was corroborated by a fellow passenger, whose testimony was not subject to cross examination by the plaintiff.

The court did however find that the evidence supported a failure by Air Canada to provide a French language interlocutor to explain the situation to the plaintiff on the jetty bridge and around the gate following his removal from the flight. Furthermore, there was a breach of the plaintiff's language rights when Air Canada wrote to the plaintiff with an English copy only of its tariff.

The court made a declaration, as claimed, that Mr. Leduc's language rights were breached in these two instances by the airline. However, this was the only relief offered by the Federal Court. Harrington J. was bound by and duly applied the governing principle in *Thibodeau*, that the Montreal Convention 1999 pre-empts any claim for monetary damages for incidents on board the aircraft, except where such monetary relief is provided for by the Convention. As such, damages are unavailable in connection in with a breach of language rights by the airline both onboard the aircraft. Given the case law on the temporal application of the Montreal Convention extending to the embarkation and disembarkation of passengers, damages were also pre-empted with respect to events in the jetty bridge and departure gate areas following the offloading of Mr. Leduc. (*5)

The Federal Court was clearly underwhelmed by Mr. Leduc's case, comprised of minor and aged transgressions by the airline, particularly in light of the OCOL's investigation and confirmation of improved compliance by Air Canada. As such, the court saw no useful purpose being served by a requirement that the airline issue an apology to the plaintiff. The court further confirmed that it had no jurisdiction to overturn the travel ban against Mr. Leduc as a remedy had been properly sought and refused by the competent body in the CTA, in respect of which the Federal Court had already refused an application for review.

Finally, notwithstanding that the plaintiff prevailed on part of his claim, costs were ordered to be assumed by *the respective parties*.

Mark Glynn

Endnotes

(*1) *Thibodeau v. Air Canada 2014* SCC 67
(*2) *Leduc v. Air Canada*, 2018 FC 1117
(*3) Air Canada has a statutory duty to provide service in English and French on routes on which there is significant demand for the respective language. This duty dates to Air Canada's former status as a Crown corporation at the time of the enactment of the *Official Languages Act* in 1969. *The Air Canada Public Participation Act* of 1988 further clarifies *at* s. 10(1) that the *Official Languages Act* continues to apply to Air Canada after its privatization.
(*4) *Leduc c. Air Canada, 2013 QCC*Q 12682
(*5) *O'Mara v. Air Canada*, 2013 ONSC 2931

4. Is International Law Messing with Your Sale of Goods Contract? – The "CISG"

You enter into a sale transaction with another party who is in another country. You (should) have a written contract setting out term and conditions. You may even have progressed to the point where respective delivery and receiving obligations have been spelled out – perhaps by means of an Incoterm (*1) such as "FOB" or "CIF". You may however at your peril wrongly assume that other terms will apply as set by prescribed by local *Sales of Goods* legislation or common law will govern – without realizing that your deal may be subject to the provisions of the *United Nations Convention on Contracts for the International Sale of Goods* (the "CISG"). The CISG is an international set of rules designed to provide clarity to most international sales transactions for the sale of goods. The CISG was adopted by Canada in 1992. Most western countries, including the United States, are signatories to it. The CISG is deemed to apply to most contracts for the sale of goods when the seller and buyer are both in signatory countries. As a result, most international sale of goods contracts with parties in western countries will be subject to the CISG unless specifically excluded in accordance with its "opt-out" provisions. While the CISG is silent on many issues that may arise in the sale of goods context, it does codify various rights and obligations that may lay a trap for the unwary.

An interesting example of the CISG "spin" affecting parties' rights comes with the recent Ontario Superior Court decision in *Solea International BVBA v. Bassett & Walker International Inc*. (*2)

The Dispute

This case involves a dispute regarding Bassett & Walker International Inc.'s ("BWI") purchase of frozen shrimp from Solea International BVBA ("Solea"). Solea, a trader of seafood products, purchased the shrimp from an Ecuadorian supplier for shipment to BWI, a Toronto-based company, via an Ecuadorian shipping line for delivery to a port in Mexico where the goods were to clear Mexican customs. Some of the documents pertaining to the sale stipulate that Belgian law applies to disputes arising out of the contract". Others contained no governing law provisions.

The shipment was not "cleared" through the Mexican customs authority into Mexico. BWI asserted that this was on account of deficient health certification paperwork. Solea asserted that this was neither a problem or a reason for the goods to not be "cleared" and that in any event this was not its risk or responsibility, asserting that even though the shipment was returned to origin that BWI still had to pay for the shipment. Solea brought a lawsuit against BWI for payment. Solea then brought a motion for summary judgment in the action for a ruling that that amount was payable.

BWI disputed owing the money. It asserted that it was not liable for payment because the shrimp could not clear Mexican customs. It argued that Solea did not give Mexican authorities the proper import documents by way of a valid health certificate as it was contractually bound to do. Solea, however, countered that there is no evidence that BWI tried to import the container into Mexico or that it was a deficiency in the health certificate which prohibited importation. Rather, Solea submitted that the evidence was that the reason the container could not be imported was because of BWI's own actions.

Solea pointed to the CIF term of sale in the agreement of the parties which provided that it was responsible for the container of shrimp until it cleared "the rail at the port of destination" on June 13, 2014, from which point BWI would then be responsible for payment of the shipment and assume the risk of loss.

The Ontario Superior Court judge agreed with the submissions of Solea that there was no evidence that there was a deficiency in the health certificate provided by the Ecuadorean government and consequently, that Solea had not failed to provide a timely or effective health certificate.

The evidence supported the submission of Solea that the "CIF" term meant that the risk belonged to BWI and that the responsibility for including the proper import documents was on BWI. As well, the email evidence of BWI showed that the reason for refusal to accept the shrimp was that BWI could not pay the fees at the port to release the containers. These fees were not paid by BWI. Accordingly, it was held that BWI was liable to pay the purchase price to Solea. Interestingly, the CISG was not raised at the hearing, notwithstanding that all concerned countries (Ecuador, Mexico, Canada and Belgium) are signatories. The CISG was still "lurking" around the next corner and would only reveal itself in the next step of the proceedings.

BWI appealed to the Ontario Court of Appeal.

On Appeal

The Ontario Court of Appeal noted that the parties simply assumed that the contract was governed by domestic Ontario law, no issue as to the law governing the contract having been raised before the motion judge who to determined BWI's liability as if the contract was governed by the common law of Ontario.

Enter then the CISG. The Court of Appeal noted that it was unclear how the issue of the appellant's liability for the outstanding purchase price for the shrimp could have been determined without the "proper law" of the contract first being determined. This would require an inquiry into whether the CISG applied in the circumstances and, if so, to what effect.

The Court of Appeal set aside the summary judgment, referring the matter back to the original motion judge to determine the question of BWI's liability in the context of the CISG.

Back Before the Original Motion Judge

The motion judge considered the evidence and addressed certain relevant provisions in the CISG. The judge noted that the CISG provided that if BWI failed to perform its obligation in paying the purchase that Solea may

> (a) require payment of the purchase price, and
> (b) claim damages for same pursuant to the terms of the CISG.

BWI asserted that Solea had a duty to mitigate its damages by accepting the return of the shipment in exchange for releasing BWI from the obligation to pay the purchase price. The judge however noted that while the CISG codifies certain requirements for a claimant to mitigate losses that those provisions apply only to claims for damages (i.e. compensation for the infliction of harm or injury, being distinct from a contractual obligation to pay money) but not to a demand for payment of a purchase price.

Solea also submitted that, even if the specific form of a Health Certificate was a fundamental term of the contract, BWI was not entitled to resile from its obligation to pay for the goods for the following reasons:

> (a) Solea's breach was not the reason BWI was deprived of the benefit of the contract;
> (b) There was no fundamental breach because Solea did not violate a duty which deprived BWI of justified contract expectations in the circumstances;
> (c) BWI did not make a "declaration of avoidance", in accordance with the requirements of the CISG; or alternatively, BWI did not make the declaration of avoidance within a reasonable time after knowing or when it ought to have known of the alleged breach; and
> (d) such avoidance was in any event not justified.

Item (c) above is of interest. It reflects a novel term incorporated by default through the CISG. It may well have caught BWI by surprise. In this regard Solea relied on Article 49 of the CISG which provides in part that:

> (1) The buyer may declare the contract avoided:
>
> > (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or
> >
> > (b) in respect of any breach other than late delivery, within a reasonable time:
> >
> > > (i) after he knew or ought to have known of the breach
>
> (2) However, in cases where the seller has delivered the goods, *the buyer loses the right to declare the contract avoided unless he does so.*

There was no evidence that BWI declared the contract avoided as required by the CSIG. Therefore, the judge found that BWI did not declare the contract avoided as would have been required even had Solea breached a term in respect of the Health Certificate.

On the basis of the lack of evidence that Solea breached a contract term or that it did not fail in respect of any duty to mitigate it claims, the Court ruled in its favour and held that BWI had to pay the purchase price. It is interesting to note that even had there been a breach of the contract by Solea that BWI might then have inadvertently waived its rights by not timely declaring the contract "avoided".

The "Take-aways"

1. Parties to any contract must be deliberate and intentional, and, of course, do their homework in terms of risk identification and assumption.
2. The parties need to be aware of what laws apply, whether as a function of express inclusion in a contract, or as may apply by default.
3. As a general rule, a buyer who wrongly rejects goods cannot avoid paying the purchase price by asserting that the seller has a duty to mitigate or make up the same by accepting the goods back to resell to another market: mitigation and the performance of contractual obligations "do not mix".
4. Know your contractual rights and obligations!

Gordon Hearn

Endnotes

(*1) The "Incoterms" are a set of rules which define the responsibilities of sellers and buyers for the delivery of goods under sales contracts. They are published by the International Chamber of Commerce and are widely used in commercial transactions.

(*2) 2017 CarswellOnt 18046, 2017 ONCA 886, 285 A.C.W.S. (3d) 750

6. Supreme Court Strikes Down Mandatory Victim Surcharges on Criminal Offences: Potential Impact on Provincial Offences Under the *Highway Traffic Act*?

In its December 14, 2018 decision in *R. v. Boudreault* (*1), the Supreme Court of Canada (the "SCC") quashed the mandatory victim surcharge laid upon convicted individuals under the *Criminal Code* of Canada (the "*Code*"). In a 7-2 ruling, the Honorable Madam Justice Martin writing for the majority said that the mandatory fine ignores the fundamental principal of proportionality, does not allow sentencing judges to consider mitigating factors, ignores the objective of rehabilitation, and undermines Parliament's intention to improve the problem of Indigenous overrepresentation in prison (*2).

> "…the impact and effects of the surcharge, taken together, create circumstances that are grossly disproportionate, outrage the standards of decency, and are both abhorrent and intolerable. Put differently, they are cruel and unusual, and therefore, violate s.12 [*of the Charter of Rights and Freedoms*]." (*3)

Section 737 of the *Code* provides that a convicted offender pay a victim surcharge that is 30 percent of any fine ordered by the court. If no fine is imposed, the surcharge is $100 for an offence punishable by summary conviction, and $200 for an offence punishable by indictment. (*4)

The majority ruling struck down section 737 of the *Code*, declaring it to be immediately of no force and effect. (*5)

So what does this mean for victim fine surcharges imposed on provincial offences such as offences under the *Highway Traffic Act* (the "*HTA*")?

Under section 60.1 of the Ontario *Provincial Offences Act* (*6), a victim fine surcharge is applied to all provincial offences (except for Part II offences - parking infractions), when a fine is imposed in respect of the offence. The following table under Ontario Regulation 161/00 sets out the surcharge that is applied (*7):

Fine Range	Surcharge
$0 - $50.00	$10.00
$51.00 - $75.00	$15.00
$76.00 - $100.00	$20.00
$101.00 - $150.00	$25.00
$151.00 - $200.00	$35.00
$201.00 - $250.00	$50.00
$251.00 - $300.00	$60.00
$301.00 - $350.00	$75.00
$351.00 - $400.00	$85.00
$401.00 - $450.00	$95.00
$451.00 - $500.00	$110.00
$501.00 - $1,000.00	$125.00
Over $1,000.00	25% of actual fine

The victim fine surcharge can amount to serious money for both individuals and corporations. For example, if convicted of "causes a wheel to become detached from vehicle" under section 84.1 of the *HTA*, a fine of up to $50,000 can be imposed. If this fine is imposed, the victim fine surcharge would be an additional $12,500. (*8) Likewise, if convicted of "careless driving causing bodily harm or death" under s. 130(3) of the *HTA*, a fine of up to $50,000 can be imposed leading to a victim surcharge of up to $12,500. (*9)

Similar to the *Code*'s surcharge provision, the *Provincial Offences Act* does not give justices of the peace discretion regarding the imposition of the victim fine surcharge. However, like the

individuals in *R. v. Boudreault*, individuals convicted of a provincial offence may face similar financial hardships, mental illness, and disability which could pose as significant barriers to payment.

Whether the ruling of the SCC could apply to individuals convicted under provincial offences is unclear at this point, as the SCC's decision could be read narrowly to only apply to certain individuals convicted under offences in the *Code*. What is almost certain is that future challenges to the *Provincial Offences Act*'s victim fine surcharge will be forthcoming.

Andrea Fernandes

Endnotes

(*1) *R. v. Boudreault*, 2018 SCC 58 [*Boudreault*].
(*2) *Ibid* at paras. 81-83.
(*3) *Ibid* at para. 94.
(*4) *Criminal Code*, RSC 1985, c C-46, s. 737.
(*5) *Boudreault* at para 98.
(*6) *Provincial Offences Act*, RSO 1990, c. P.33, s. 60.1.
(*7) *Victim Fine Surcharges*, O Reg. 161/00, s. 1 .
(*8) *Highway Traffic Act*, RSO 1990, c. H.8, s. 84.1.
(*9) *Ibid*, s. 130(3) and 130(4).

6. The ESA Rollercoaster: More Changes to the *Employment Standards Act, 2000*

In our June 2017 newsletter we provided an overview of Bill 148: *Fair Workplaces, Better Jobs Act*, which came into force on November 27, 2017 and which significantly changed the *Employment Standards Act, 2000* ("ESA"). Many of the changes took effect in November 2017 and January 2018; additional changes were scheduled to take effect on January 1, 2019. This time last year, provincially regulated employers were required to review and update their employment contracts and workplace policies and procedures in order to ensure that they were in compliance with these amendments.

Not quite one year later, on November 21, 2018, Bill 47: *Making Ontario Open for Business Act*, received Royal Assent and repealed some of the Bill 148 amendments and implemented further amendments to the ESA, which will take effect on January 1, 2019. The changes include the following:

- Minimum Wage: it was increased to $14/hour on January 1, 2018 and was to increase to $15/hour on January 1, 2019; it is now frozen until 2020 and future increases will be tied to the rate of inflation.
- Misclassifying employees as independent contractors: while an employer has always been prohibited from treating an employee as an independent contractor, on November 27, 2017, the ESA was amended to include a statutory prohibition against doing so, and it put the onus on the employer to prove that the worker was an independent contractor and not an employee, which onus was difficult to meet given that the employer would not have access to the worker's books, records and financial information. Effective January 1, 2019 the reverse onus obligation on the employer has been repealed.
- Personal Emergency Leave: effective January 1, 2018 all employees were entitled to 10 days off per calendar year, 2 of which were paid, and the employer was not permitted to ask the employee for a medical note to support the leave. Effective January 1, 2019, Personal Emergency Leave has been repealed, and in its place an employee, with at least 2 consecutive weeks of service, is entitled to the following:
  - 3 days of unpaid sick leave per calendar year for personal illness, injury or medical emergency, and the employer is no longer prohibited from asking for a medical note to support the leave
  - 3 days of unpaid family responsibility leave per calendar year, to care for the illness, injury or medical emergency of prescribed family members; the employer can request reasonable evidence to support the leave
  - 2 days of unpaid bereavement leave per calendar year for the death of prescribed family members, and the employer can request reasonable evidence to support the leave
- Scheduling: Bill 148 had provided that as of January 1, 2019, an employee could request changes to their schedule or location of work, or refuse such a change; this has been repealed

On-call and cancellation pay: Bill 148 had provided that as of January 1, 2019, if an on-call employee was not called into work or was called in but worked less than three hours, they were to be paid for three hours, and if a scheduled shift or scheduled on-call assignment was cancelled within 48 hours of its start, the employee was to be paid for three hours – this has been repealed.

- Three Hour Rule: effective January 1, 2019, where an employee regularly works more than three hours a day and attends at work, and the employer sends the employee home before three hours for reasons beyond the employer's control, the employee is entitled to be paid for three hours
- Equal pay for equal work: Bill 148 had provided that effective January 1, 2019, employees were entitled to equal pay for equal work based on "employment status" which meant that those performing substantially the same job for the same employer at the same establishment were to

be paid the same, with no differentiation due to full time, part time, casual, temporary or seasonal, and an employee was entitled to request a written review of his or her pay. This has been repealed. The right to equal pay for equal work based on gender remains in place, while the right to request a written review of one's pay has been repealed.

- Vacation: the increase to 3 weeks of vacation after 5 years of service remains in place
- Public Holiday Pay: pre-Bill 148 formula has been reinstated, and public holiday pay is based on all regular wages earned and vacation pay paid in the 4 work weeks before the week in which the holiday occurs, divided by 20.
- New/Enhanced Leaves of Absence: these leaves, introduced under Bill 148, have been preserved and include the extension of pregnancy/parental leave to 18 months, family medical leave increased from 8 weeks to 28 weeks, new critical illness leave of 37 weeks for a child and 17 weeks for an adult, domestic and sexual violence leave, up to 10 individual days and up to 15 weeks and 5 of the days are paid, and the new child death/ crime-related disappearance leave of up to 104 weeks.

On December 6, 2018 Bill 66: *Restoring Ontario's Competitiveness Act, 2018*, received first reading. If passed it will further amend the ESA and other statutes. The proposed changes to the ESA include:

- ESA Poster: currently the Minister of Labour is responsible for preparing and publishing a poster that sets out the rights and obligations under the ESA, and an employer is required to post the ESA Poster in a conspicuous place and provide a copy to all employees. Under the proposed amendment, the ESA Poster will be prepared by the Director of Employment Standards ("Director") and an employer will no longer be required to post the ESA Poster but will still have to provide all employees with a copy.
- Excessive Hours of Work: currently an employer requires the approval of the Director to allow employees to work in excess of 48 hours in a week. Under the proposed amendment an employee can agree in writing to work more than 48 hours in a week so long as the employee does not exceed the number of hours agreed to and Director approval is no longer required.
- Averaging Agreements: currently an employer requires Director approval for a written averaging agreement for determining an employee's entitlement to overtime. The proposed amendment dispenses with Director approval where an employee and employer enter into a written averaging agreement and the averaging period does not exceed 4 weeks.

The amendments to the ESA which will come into force on January 1, 2019, are welcomed by many provincially regulated employers; however, employers are, once again, required to undertake a review of their employment contracts and workplace policies and procedures to ensure that they start 2019 in compliance.

Carole McAfee Wallace

8. Newsflash: Increased Penalties for Distracted Driving Come into Effect on January 1, 2019

If you have not already learned that texting while driving, talking on your cell phone without blue tooth while driving, or even holding your cell phone while driving, is against the law, the Ministry of Transportation is hoping that the increased penalties for a distracted driving conviction, effective January 1, 2019, will serve as an effective deterrence.

Currently the consequences for a conviction of the Ontario *Highway Traffic Act* offence of driving a motor vehicle while holding or using a hand-held wireless communication device (aka distracted driving) is 3 demerit points and a fine of between $3,000 and $1,000, with the set fine at $400. Starting on January 1, 2019 the fines will increase to a minimum of $500 and up to $1,000 for a first offence, up to $2,000 for a second offence, and up to $3,000 for a third or subsequent offence. In addition, for a first conviction there will be a 3 day licence suspension, a 7 day licence suspension for a second conviction and a 30 day licence suspension for a third or subsequent conviction. Where more than 5 years has passed between convictions, they will not be considered subsequent.

In our experience, prosecutors are not prepared to plea bargain with a driver charged with distracted driving so any expectation that you can negotiate yourself out of a conviction of this offence is unrealistic. The better strategy is to comply with the law.

Carole McAfee Wallace

8. Canoes are "Vessels" for the Purpose of Some Sections of the Criminal Code

In *R. v. Sillars* (*1), the defendant David Sillars was charged with impaired operation of a vessel causing death, operating a vessel with more than 80 mg of alcohol per 100 ml of blood, and dangerous operation of a vessel. He was also charged with criminal negligence causing death. Counsel sought a preliminary determination whether his vessel – a canoe – was a "vessel" for purposes of the first three charges. Effectively, they sought a determination whether drunk canoeing was akin to drunk boating on a motorized vessel.

Of interest, the drunk operation of a human-power land-based vehicle, like a bicycle, is NOT caught by the *Criminal Code*. However, the Honourable Mr. Justice West of the Ontario Court of Justice distinguished human-powered land vehicles from human-powered water-based vehicles. In doing so, he found that drunk canoeing was indeed regulated by the *Criminal Code*.

The definition of a "vessel" had recently been amended in 2017 to read "includes hovercraft". However, a prior draft of the amendment had read, "includes hovercraft but does not include a vessel that is powered exclusively by means of muscular power". His Honour reasoned that the removal of any reference to "muscular power" was purposive. In other words, the legislature had intended to include human-operated vehicles, like canoes.

His Honour also took comfort in the history of the legislation. The sections at issue had originally mimicked the former *Canada Shipping Act*'s *Small Vessel Regulations* (*2), which covered non-propelled "vessels".

Finally, the Court also appears to have accepted that dictionary definitions and the "ordinary meaning" of a canoe fits within the concept of a "vessel". It was not concerned, for example, that two people might operate a canoe at the same time. It was sufficient that an investigating officer could form an opinion whether one or both of them was intoxicated.

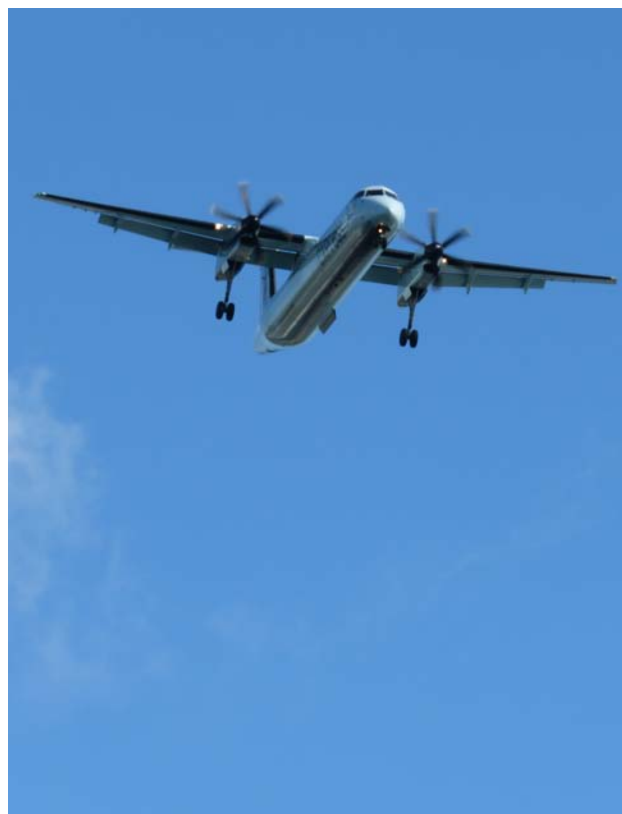
One commentary on the *Sillars* case questions its conclusions based on the French text of the *Criminal Code*, which refers to "driving" a vehicle, rather than "operating a vehicle" (*3). It questions whether a canoe can really be "driven". However, that was not apparently raised by the parties.

This case is a good illustration that courts are willing to characterize activities on the water in ways that are far different from parallel activities on land. Nothing should be taken for granted.

Alan S. Cofman

Endnotes

(*1) 2018 ONCJ 816
(*2) SOR/2010-91
(*3) Leo Fugazza, "Impaired canoeing and bilingualism in statutory interpretation: going beyond *R. v. Sillars*, 2018 ONCJ 816", <http://canliiconnects.org/en/commentaries/64916>.



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