THE NAVIGATOR

IN THIS ISSUE

RIBO Complaints & Discipline Process Now Open to the Public

The Registered Insurance Brokers of Ontario ("RIBO") is the self-regulatory body for insurance brokers in Ontario. It regulates the licensing, ethical conduct, and insurance related financial obligations of all independent general insurance brokers in the province. The complaints and discipline process can be a minefield for the broker being investigated. In the fall of 2017 the Government of Ontario released it 2017 Fall Economic Statement and Bill 177. Bill 177 received Royal Assent on December 14, 2017, and amended the *Registered Insurance Brokers Act* (the "*Act*") so that a broker's disciplinary hearing is open to the public. It is important for brokers to understand their duties and obligations under the *Act* and their rights when facing a complaint or disciplinary hearing.

RIBO is a corporation that is managed and administered by a "Council". The Council is the governing body and the board of the directors of the corporation. It consists of eight persons who are individual members of the Corporation. Every person who is a registered broker is a member of the Corporation. In addition to the eight members who are registered brokers, the Council is composed of three members of the public appointed by the Government of Ontario.

The *Act* prohibits anyone from acting as an insurance broker unless the person is a registered broker under the *Act.* There are exceptions. Lawyers and accountants acting in their professional capacity (for example, providing risk management or claims assistance) are exempt. So are insurance agents licensed under the *Insurance Act* while acting within the authority of their license.

Brokers have duties under the regulations to the *Act*, to clients, members of the public, fellow members and insurers. Regulation 991 sets out the code of conduct:

> 14. All members shall act as insurance brokers in accordance with the following code of conduct:

FIRM AND INDUSTRY NEWS

- The **Fernandes Hearn LLP Annual Conference** took place on January 17th at the Advocates' Society Education Centre. The sold out seminar featured panels on NAFTA, Autonomous Vehicles, Blockchain, Social Media, Cannabis, Online Insurance and Climate Change. The conference was covered by John G. Smith, editor of **Today's Trucking.** [See Page 3]

- On January 26th, 2018 **Rui Fernandes** presented on a panel on "Cargo Insurance" to the **Bankers Association for Finance and Trade** Canada Trade Finance Workshop in Toronto.

- **ABA Midyear and TIPS Admiralty Law Committee Meeting**, January 31 to February 6, 2018, Vancouver.

- **Cargo Logistics Expo**, February 6 – 8, 2018, Vancouver.

- **BB&T Capital Markets Logistics and Transportation Conference**, February 13-14, 2018, Coral Gables Florida.

- **Meet the Buyers Forum Marine Trade**, February 28 to March 3, 2018, Virginia.

TODAY'S TRUCKING [AUTHORIZED REPRODUCTION]

NAFTA deal still in question - NAFTA Panel - Fernandes Hearn LLP Seminar

Shoan, Snowden, and Ujczo discuss the future of NAFTA.

January 17, 2018 by **John G. Smith**

TORONTO, ON – The future of NAFTA remains uncertain as negotiators prepare for their latest round of meetings, this time in Montreal. Months into discussions, nobody even knows if U.S. President Donald Trump will decide to outright scrap the deal that governs every load of cross-border freight.

With about 10 million trucks crossing between Canada and the U.S. each year, there is plenty of business at stake. A recent survey by Export Development Canada even found that 26% of exporters would shift their business to the U.S. if the agreement was revoked.

Trade between the U.S. and Canada tripled between 1986 and 2017, Canadian International Freight Forwarders Association executive director Ruth Snowden observed, during a January 17 seminar hosted by the Fernandes Hearn law firm in Toronto. "If [NAFTA] goes, it could be very significant."

The Canadian Trucking Alliance was among groups discussing NAFTA with Transport Minister Marc Garneau at the same time the seminar was held, and the alliance has openly lobbied for changes to help address barriers like restrictions on repositioning foreign trailers, in addition to calling for further investments in regional border staff and systems alike. "Border fees is another big one," added Lak Shoan, the Ontario Trucking

Association's director – policy and industry awareness, while sharing the stage with Snowden. Administrative Monetary Penalty System (AMPS) costs linked to problems with Advance Commercial Information (ACI) data are an example of those barriers to trade.
But that wish list is part of a best-case scenario. If NAFTA was actually scrapped, the costs of cross-border trucking could actually become "too prohibitive" to be viable, he said.

The talks

Dan Ujczo, an international trade and customs lawyer with Dickinson Wright, expects the Montreal round of talks to focus on sticking points around rules of origin, as the U.S. looks to require a larger share of domestic vehicle content.
Vehicles that are made with at least 62.5% of North American content can move duty-free between Canada, the U.S., and Mexico. But the U.S. Congressional Research Service has determined that the real share is closer to 45%, he said during the panel presentation. Raw material from China is being transformed into vehicle parts in Mexico, for example. His guess is that negotiators will settle on a target closer to 70% North American content.
Ujczo believes bigger threats to a deal have more to do with challenges around seasonal produce from Mexico. Then there's the need for Trump to secure a political win to appease anti-NAFTA supporters who helped to propel him into office.
"The politics of trade, the politics of NAFTA, are terrible in the U.S.," Ujczo said. "There aren't enough votes in Congress for a new NAFTA right now."
"The one consistency that's been very quiet right now is the anti-NAFTA constituency," he added. What would the voters of Michigan and Ohio say if Trump decides to extend the NAFTA discussions? They might decide to vote for Democrats who have anti-trade positions of their own.
Provisions that require consultations with members of the U.S. Congress could further drag down the already-troubled discussions, especially as the politicians move closer to midterm elections. "Keep an eye on members of Congress saying, 'We haven't been consulted with,'" he said, suggesting that the end of March is a key deadline for the negotiations.
Ujczo said it's also time for Canadian politicians to pull back on their visits to state leaders in their bid to secure more support. "It helped facilitate and got attention on the issue," he stressed. "You couldn't go to an airport in the U.S. without bumping into a Canadian minister somewhere." But now he believes the extra face time could simply feed more discussions about longstanding trade disputes.
In the meantime, there are even questions about what a withdrawal from NAFTA would look like. "Is it Congress or the president that has the authority to withdraw?" he asked. And there are questions about whether the pre-existing Canada-U.S. Free Trade Agreement would snap back into place if the North American deal was scrapped.
No matter what is decided, though, one thing is certain. The discussions promise to reshape north-south freight.

INVITATION TO MESA 2018 CONFERENCE

Fernandes Hearn LLP is one of the sponsors for the **Marine & Energy Symposium of the Americas 2018 ("MESA 2018")** conference in Toronto April 18-20, 2018 in Toronto. The following is the program for the conference.

Where? Omni King Edward Hotel, Toronto Canada
When? 18-20 April 2018

Registration: http://www.mesa2018.com

Wednesday, April 18, 2018

6:00 - 8:00 pm Registration - Mezzanine, Omni King Edward Hotel
6:30 - 8:00 pm Opening Reception - Palm Court, Omni King Edward Hotel
8:00 pm Dinner on your own - or join us at a pre-arranged restaurant

Thursday, April 19, 2018

8:00 am to noon Registration - Mezzanine, Omni King Edward Hotel

Time	Joint Session - Vanity Fair Ballroom
9:00 to 10:00 am	**Arctic Exploration and Shipping / The Polar Code** Moderator: **Rui Fernandes**, Partner Fernandes Hearn LLP **Peter Pamel** – Partner Borden Ladner Gervais, **Aldo Chircop** – Professor of Law; Canada Research Chair (Tier 1) in Maritime Law and Policy Dalhousie University
10:00 to 11:00 am	**NAFTA Modernization and Impact on Energy and Trade** **Dan Ujczo** – Dickenson Wright (USA)
11:00 to 11:15	Coffee Break
11:15 am to 12:15 pm	**Catastrophes and Crisis Management** Moderator: **Kim Stoll** – Partner, Fernandes Hearn LLP **Mark Newcomb** – Counsel and VP Claims & Insurance, Zim Integrated Shipping Services Ltd. **Bruce Hennes**, Managing Partner, Hennes Communications (USA)

12:15 pm to 1:15 pm Lunch - Keynote Address - TBA

Concurrent Session Time	Session A - Vanity Fair	Session B – Kensington
1:15 to 2:15 pm	**Application of Jurisdiction Clauses in Different Countries** **Shelley Chapelski** – Partner Norton Rose Fulbright **Robert Reeb** – Shareholder Marwedel, Minichello & Reeb **Fabiana Simões Martins** – Siano & Martins	**LNG Contracts and Transportation** **Jason Hicks** – Bernard LLP

MESA 2018 CONFERENCE

2:20 to 3:20 pm	**Arrest of Vessels in Various Jurisdictions** **Susan Dorgan** – AIG (USA) **Jorge Luis Cordoba** – Cordoba & Associates (Colombia)	**Seabed Mining** Moderator: **James Manson** – Associate, Fernandes Hearn LLP **Wylie Spicer** – Counsel – McInnes Cooper
3:25 to 4:25 pm	**Issues Arising from Project Cargo** **John Evans** – Berkshire Hathaway	**Blockchain & Smart Contracts** **Craig Fuller** – Transrisk

6:00 PM MESA 2018 Cocktail Reception and Dinner – Hotel

Friday, April 20, 2018

Concurrent Session	Session A - Vanity Fair	Session B - Kensington
9:00 to 9:55 am	**Limitation of Liability by Statute – Conventions and in Contracts** **George Arghyrakis** – E.G. Arghyrakis & Co. (UK) **Heneghan, Elizabeth** – Federal Court of Canada **Steven W. Block** – Foster Pepper LLC (USA)	**Impact of Climate Change on Shipping and Energy Projects** **Dr. Panyaotis Tsantrizos** – Terragon Environmental Technologies Inc. (Can)

Friday, April 20, 2018

10:00 to 10:45 am	**Autonomous Ships and Equipment** **Laura Hill** – Perkins Coie LLP (U.S.) **Roger Adamson** – Futurenautics (U.K.)	**Cyberterrorism in Transportation and Energy Projects** **Caroline Leprince** – Canadian Cyber Incident Response Centre – Public Safety Canada
10:45 to 11:00 am	Coffee	Coffee
11:00 to 11:45 am	**Offshore Exploration and Exploitation: Liability and Compensation Issues** **Lawrence Malizzi** – Senior Manager – O'Brien & Gere **Lucas Leite Marques** – Partner, Kincaid Mendes Vianna Advogados (Brazil)	**Pipeline Technologies, Development Issues and Litigation** **Joshua Jantzi**, Partner, Dentons Canada LLP **Kori Patrick**, Technical Manager, Research & Development, Enbridge, Edmonton Alberta
11:55 am to 12:45 pm	**Emerging Issues in Insurance in Marine and Energy** **Simon Swallow** – Chief Executive Shipowner's Club **Brian Murphy** – Vice President, Berkley Offshore	**Wind Turbine Litigation** **Sarah Powell** – Partner – Davies Ward Phillips & Vineberg LLP

12:45 pm to 2:00 pm Lunch – Ethics Presentation

MESA 2018

1. A member shall discharge the member's duties to clients, members of the public, fellow members and insurers with integrity.

2. A member owes a duty to the member's client to be competent to perform the services which the member undertakes on the client's behalf.

3. A member shall serve the member's client in a conscientious, diligent and efficient manner and shall provide a quality of service at least equal to that which members would generally expect of a member in a like situation.

4. A member shall be both candid and honest when advising the member's client.

5. A member shall hold in strict confidence all information acquired in the course of the professional relationship concerning the business and affairs of the member's client, and the member shall not divulge any such information unless authorized by the client to do so, required by law to do so or required to do so in conducting negotiations with underwriters or insurers on behalf of the client.

6. A member shall observe all relevant rules and laws regarding the preservation and safekeeping of property of the client entrusted to the member and, when there are no such rules or laws or the member is in doubt, the member must take the same care of such property as a careful and prudent person would take of the person's own property of like description.

7. A member who engages in another business or occupation concurrently with the practice of the member's vocation shall not allow such outside interest to jeopardize the member's integrity, independence or competence.

7.1 A member shall disclose in writing to a client or prospective client any conflict of interest or potential conflict of interest of the member that is associated with a transaction or recommendation.

8. A member shall not stipulate, charge or accept any fee that is not fully disclosed, or the basis for which is not fully disclosed prior to the service being rendered, or which is so disproportionate to the service provided as to be unconscionable.

9. A member shall encourage public respect for and try to improve the practice of the member's vocation.

10. A member shall make the member's services available to the public in an efficient and convenient manner which will command respect and confidence and which is compatible with the integrity, independence and effectiveness of the member's vocation.

11. A member shall assist in maintaining the integrity of the member's vocation and should participate in its activities.

12. A member shall assist in preventing the unauthorized practice of the member's vocation.

13. A member's conduct towards other members, members of the public, insurers and the Corporation shall be characterized by courtesy and good faith.

Under the *Act*, a failure to carry on business in a manner consistent with the code of conduct is "misconduct" under section 15 of Regulation 991. Misconduct can result in a complaint and disciplinary hearing with resulting penalties including the loss of a broker's certificate to carry on business.

The complaints and discipline process is described by RIBO as follows (mirroring the *Act*) (*1)

> There are two Committees involved in the complaints process, the Complaints Committee and the Discipline Committee. The committees are composed of brokers and public members, appointed by the government

to protect the public interest. All of the latter proceedings take place at the RIBO office, however RIBO staff are not involved in the decision making process.

The Complaints Committee consists of two Brokers and a Public Member. They evaluate the evidence and merit of a complaint. If it is determined that there is sufficient evidence to indicate a possible misconduct, the matter is referred to the Discipline Committee.

The Discipline Committee consists of four Brokers and a Public Member and conducts hearings very similar to that of a court of law. Evidence is introduced during the hearing and testimony is given under oath in the presence of a court reporter. The Committee determines the facts and makes findings of innocence or guilt based on the evidence presented. In the event a broker is found guilty of misconduct, this Committee has the authority to reprimand, impose additional educational or financial reporting requirements, restrict, suspend, fine or revoke a registration.

There are two types of complaints addressed by RIBO: consumer and financial. Consumer inquiries may originate from various sources including brokers, consumers, lawyers and law enforcement. Of these complaints, 95% may be resolved informally by mediating the issues while the remaining 5% require the formal complaint process. Financial complaints are usually generated by RIBO and result from financial reports submitted by the brokerage or from a random spot-check performed by a RIBO financial investigator.

Every written complaint that alleges wrong-doing on the part of a broker is carefully investigated. When a formal inquiry into a complaint is necessary, the process is as follows:

- A copy of the written letter of complaint or a summary of the complaint is sent to the broker with the request

that the broker provide a written response to the allegation. The broker is also advised of who the assigned investigator will be.

- During the investigation, if matters can be clarified by correspondence and phone calls, a completed investigation report is submitted to the Manager of Complaints & Investigation for direction and authorization to close the complaint investigation file and to notify the complainants of the result.

- If matters cannot be satisfactorily concluded, the complaint and investigation file may then be filed with the Manager for consideration by a Complaints Committee.

- A Notice of Complaint is then sent to the broker involved outlining the allegations, the section of the RIB Act that may have been violated, the date of the hearing and opportunity for the broker to submit further written explanation/information.

- At the Complaints Hearing, evidence from all parties is presented to the panel by RIBO staff and any of the parties who are present to speak to their claims. A copy of all documentation provided by the parties is distributed to the panel members for their review and deliberation.

- Following deliberation by the panel members, the matter may be dismissed, resolved on a Consent basis or referred to a Discipline Committee.

During a Complaints Hearing, a broker has an opportunity to acknowledge guilt or "Consent" to a guilty finding and agree to a penalty. Before a Consent can become official, the Discipline Committee must first agree to the Consent and penalty. Once a Consent is approved, the Consent becomes an Order of the Discipline Committee. Should the Committee not agree to the Consent, the matter is scheduled for hearing at a later date before a different panel of the Discipline Committee. This Consent procedure saves both time and the expense of a Discipline Hearing at a later date.

When a matter is referred to the Discipline Committee, a Notice of Hearing is sent to the broker 30 days in advance of the hearing date to allow the broker sufficient time to prepare. It includes an explanation of the powers of the Committee and a Direction from the Complaints Committee outlining the charges and particulars of the allegations. The broker is usually in attendance at the Discipline Hearing, however, the proceedings may take place even in the broker's absence if there is no response to the Notice of Hearing.

It is important to realize that in all complaint cases there is a presumption of innocence and RIBO is required to prove the alleged misconduct.

A broker is entitled to have a lawyer represent them at complaints or disciplinary hearings. Having a lawyer will ensure that the provisions of the *Act* are properly applied, that the rules and procedures for the hearing as set out in the RIBO by-law are followed, and that natural justice is paramount. It starts with a broker receiving a copy of the written letter of complaint or a summary of the complaint with the request that the broker provide a written response to the allegation. The broker is also advised of the identity of the assigned investigator. It is recommended that a lawyer be involved from the start. The written response is very important, but, if not vetted by a lawyer, it may make matters worse. Self-incrimination is a risk. The response can be used as evidence in a complaints or disciplinary hearing. The discipline committee has the power to impose penalties, including the loss of the certificate to carry on business as a registered broker. Compliance with the penalty imposed by the Discipline

Committee can be enforced by an order of a judge of the Superior Court of Justice of Ontario.

A broker is entitled to full disclosure before hearings. Section 19 of the *Act* provides that the broker shall be entitled to examine any written or documentary evidence that will be produced or any report, the contents of which will be given in evidence at the hearing.

A final decision of the Discipline Committee may be appealed to the Divisional Court in Ontario. The appeal may be made on questions of law or fact or both.

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Endnotes
(*1) http://www.ribo.com/index.php?option=com_content&view=article&id=521&Itemid=377
(*2) Natural justice refers to the rule against bias (actual bias, imputed or apparent bias) and to the right to a fair hearing. The right to a fair hearing requires that individuals should not be penalized by decisions affecting their rights or legitimate expectations unless they have been given prior notice of the case, a fair opportunity to answer it, and the opportunity to present their own case. The mere fact that a decision affects rights or interests is sufficient to subject the decision to the procedures required by natural justice.

2. Doing Business in Canada – Part 4 (*1) – Securities Regulation

Canada's debt capital market is active, with both investment grade and sub-investment grade corporate issuers, as well as government issuers, engaging in a wide range of offerings of convertible and non-convertible debt securities. In 2016, it was estimated that Canadian debt issuance activity generated an aggregate of Can $163.6 billion. (*2)

In Canada, securities law is currently regulated under provincial jurisdiction. Each province and territory has enacted its own securities legislation and has established a regulatory authority to administer it. National securities transactions require compliance with several regulatory regimes administered by different authorities.

Nonetheless, securities legislation in Canada is largely harmonized through the use of national and multilateral instruments adopted by the Canadian Securities Administrators (CSA), an umbrella organization comprising all of the ten provincial and territories securities regulators, and implemented as law by the provinces. The CSA has developed the "passport system" through which a market participant has access to markets in all passport jurisdictions by dealing only with its principal regulator and complying with one set of harmonized laws. It is a major step forward in improving Canada's securities regulatory system by providing market participants with streamlined access to Canada's capital markets. Ontario, Canada's largest capital market, does not participate in the passport regime. Ontario is recognized by the other jurisdictions as a principal jurisdiction for passport decisions but the Ontario Securities Commission has not adopted the passport rule itself. As a result, Ontario market participants have access to other jurisdictions through the passport system but participants from other jurisdictions do not have access to Ontario. Instead, the Ontario Securities Commission follows a "mutual reliance" policy in which it decides in each case whether to accept the decision of the principal regulator. Ontario supports the harmonization and improved coordination of securities regulation in Canada; however, it does not participate in the passport system because of the preference for the creation of a national securities regulator.

Provincial securities laws are generally very similar (and, in many cases, uniform) and the regulatory authorities have implemented procedures to reduce the difficulties of dealing with multiple regulators. The federal government, five provinces and one territory are pushing ahead with the establishment of a single securities regulation system, the Cooperative Capital Markets Regulatory System (CCMR). The CCMR has released and received comments on consultation drafts of the uniform provincial capital markets legislation and complementary federal legislation proposed for enactment. The participating jurisdictions have targeted 2018 as the new implementation date for the CCMR.

Most regulators' mandates include the review and receipt of prospectuses, compliance with continuous disclosure obligations and obtaining exemptions from various provisions of securities law. The securities regulator relies on the work of two national self-regulatory organizations, the Investment Industry Regulatory Organization of Canada ("IIROC") and the Mutual Fund Dealers Association ("MFDA") for most aspects of regulation of the organizations' member firms and their employees. Accountability for securities regulation extends from the securities regulator to the Minister responsible for securities regulation and, ultimately, the legislature, in each province. The largest of the provincial regulators is the Ontario Securities Commission.

Generally, persons or companies that engage in the business of trading in securities are required to be registered as dealers in the provinces or territories in which the dealers carry on business. Persons or companies that engage in the business of providing investment advice (including providing portfolio management services) are required to be registered as advisers in the provinces or territories in which

the advisers do business. Persons or companies that act as investment fund managers are required to register as such in the provinces or territories in which the investment fund managers do business.

When debt or equity securities are offered to the public in Canada, whether as part of an initial public offering ("IPO") or not, a prospectus must be filed with the securities regulatory authorities in those provinces and territories where the securities are being offered. The prospectus is reviewed by the principal regulator. In connection with any public offering of debt securities, an issuer must file and disseminate to potential investors both a preliminary and final prospectus and obtain receipts for those prospectuses from the applicable Canadian Securities Administrator. Debt securities are most commonly offered by private placement (with an offering memorandum or term sheet). If using the public market, they are most commonly offered via a base shelf prospectus or a short form prospectus. The prospectus must contain full, true and plain disclosure of the nature of the securities being offered and the business of the issuer. Canadian securities laws permit certain limited marketing-related activities to occur between the issuance of a receipt for a preliminary prospectus and the issuance of a receipt for a final prospectus (waiting period). The only written information that issuers and investment dealers can disseminate to potential investors during the waiting period is:

- The preliminary prospectus.
- A skeletal prospectus notice (identifying the securities, their price and a contact from whom they will be available for purchase).
- Standard term sheets.
- Marketing materials.

Each of these items must also include certain prescribed disclosures. For example, marketing materials must contain information disclosed in, or derived from, the preliminary prospectus. Issuers and dealers are also permitted to put on presentations to potential purchasers of the issuer's securities, also known as "road shows".

Issuers can offer or issue their securities in a manner that is exempt from the prospectus requirements. For example, an exemption would be available for sales to those defined as "accredited investors" or those who spend at least C$150,000 to purchase the securities. In these cases, there are filing requirements and there may also be specific disclosure obligations. Exemptions are also available for certain sales to family and friends, sales to employees, and sales made under a prescribed form of offering memorandum. Securities sold on an exempt basis may be subject to resale restrictions.

Issuers who wish to list their securities on stock exchanges, such as the Toronto Stock Exchange or the TSX Venture Exchange, must satisfy minimum listing requirements relating to their management, issued capital, distribution of securities and financial resources. They must also sign a listing agreement with the stock exchange and agree to comply with its rules. Listed issuers must make regular filings with the exchanges, pay annual fees and satisfy timely disclosure requirements.

Issuers with equity securities listed on certain Canadian exchanges can take advantage of Canada's short-form prospectus distribution system, which enables capital to be raised in the public markets quickly by preparing and filing a shorter prospectus that incorporates by reference the issuer's most recent financial statements and other continuous disclosure documents.

An issuer filing a prospectus, listing its securities on a Canadian stock exchange or acquiring a Canadian reporting issuer through a share exchange transaction, will become a "reporting issuer," and thereby become subject to various continuous and timely disclosure obligations. These include the requirement to prepare and file quarterly and annual financial statements and the related management's discussion and analysis, as well as an annual information form

and reports with respect to material changes in the affairs of the issuer. Directors, officers and other "insiders" of the issuer will be required to file reports with respect to any trading they conduct in securities of the issuer and will be precluded from trading in the issuer's securities if they possess any material non-public information about the issuer.

A person that offers to acquire voting or equity securities which, if acquired, would cause the offeror's holdings of the securities to exceed 20 per cent of the outstanding securities of that class is considered to be making a "take-over bid". Unless it can avail itself of one of the exemptions, a take-over bidder must comply with certain rules, including that it send a take-over bid circular with specified disclosure to all holders in Canada of securities of the class concerned, offering to buy their securities.

An issuer that offers to acquire its own securities (other than non-convertible debt securities) from holders in Canada is considered to be making an "issuer bid" in Canada. Unless an exemption from those requirements is available, an issuer bidder must comply with certain rules, including the requirement to send an issuer bid circular with specified disclosure to all holders of securities of the class concerned, in Canada, offering to buy their securities.

Foreign issuers that meet certain conditions and have become reporting issuers in Canada, whether by listing on a Canadian exchange or by acquiring a Canadian reporting issuer through a share exchange transaction, may generally satisfy their ongoing continuous disclosure obligations in Canada by filing their home jurisdiction documents.

Private placements provide a relatively simple and cost-effective means by which foreign issuers can access the Canadian capital market. Private placements are made in reliance upon exemptions from the requirement to deliver a prospectus to prospective Canadian purchasers and provide dealers and issuers with benefits including, offering documents are not subject to review by provincial securities commissions, financial statements do not have to conform to International Financial Reporting Standards ("IFRS"), issuers do not become subject to Canadian continuous disclosure obligations, costs are low due to a simple offering process, and information relating to the offering is not generally disclosed to the public. The two private placement exemptions most commonly relied upon by foreign issuers are the accredited investor exemption (the "Accredited Investor Exemption") and the minimum amount investment exemption (the "Minimum Investment Exemption"). Accredited investors are purchasers who are presumed to be sophisticated due to certain characteristics they possess that minimize the need for the additional information contained in a prospectus. Accredited investors include institutional investors, portfolio managers and advisers, investment funds and persons or companies that meet income or asset test. Under the Minimum Investment Exemption securities can be offered without a prospectus to any purchaser who purchases, as principal, securities of a single issuer, having an aggregate acquisition cost of not less than Canadian $150,000, paid in cash at the time of the trade, provided that the purchaser was not created or used solely to purchase or hold securities on that basis.

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 4 of 17 parts dedicated to a review of doing business in Canada. Subsequent articles will include Canadian Immigration, Employment Laws, Directors and Officers, International Trade, Competition, Sale of Goods, Intellectual Property, Privacy, Real Property, Environmental Laws, Taxation, Insolvency, Litigation and ADR.

Endnotes
(*2) *Debt capital markets in Canada: regulatory overview*, Thomson Reuters Practical Law, May 2017.

3. Cockpit Voice Recorder Proposed Regulation

Not all aircraft operating in Canada currently have a cockpit voice recorder ("CVR") on board that meet certain high-end uniform standards, i.e. being able to retain 2 hours of recorded information and that have a recorder independent power supply ("RIPS"), (i.e. a 10-minute backup power supply). The Transportation Safety Board of Canada ("TSB") stated in 2013 that a lack of recorded voice and other aural information can hinder aircraft safety investigations and delay or prevent the identification of aircraft or operational safety deficiencies.

Certain proposed amendments (*1) would require a CVR and RIPS for an expanded number of aircraft except, for example, turbine-powered aeroplanes with a maximum certificated take-off weight less than 27,000 kg that were manufactured before January 1, 1987, and non-transport helicopters.

Rui M. Fernandes

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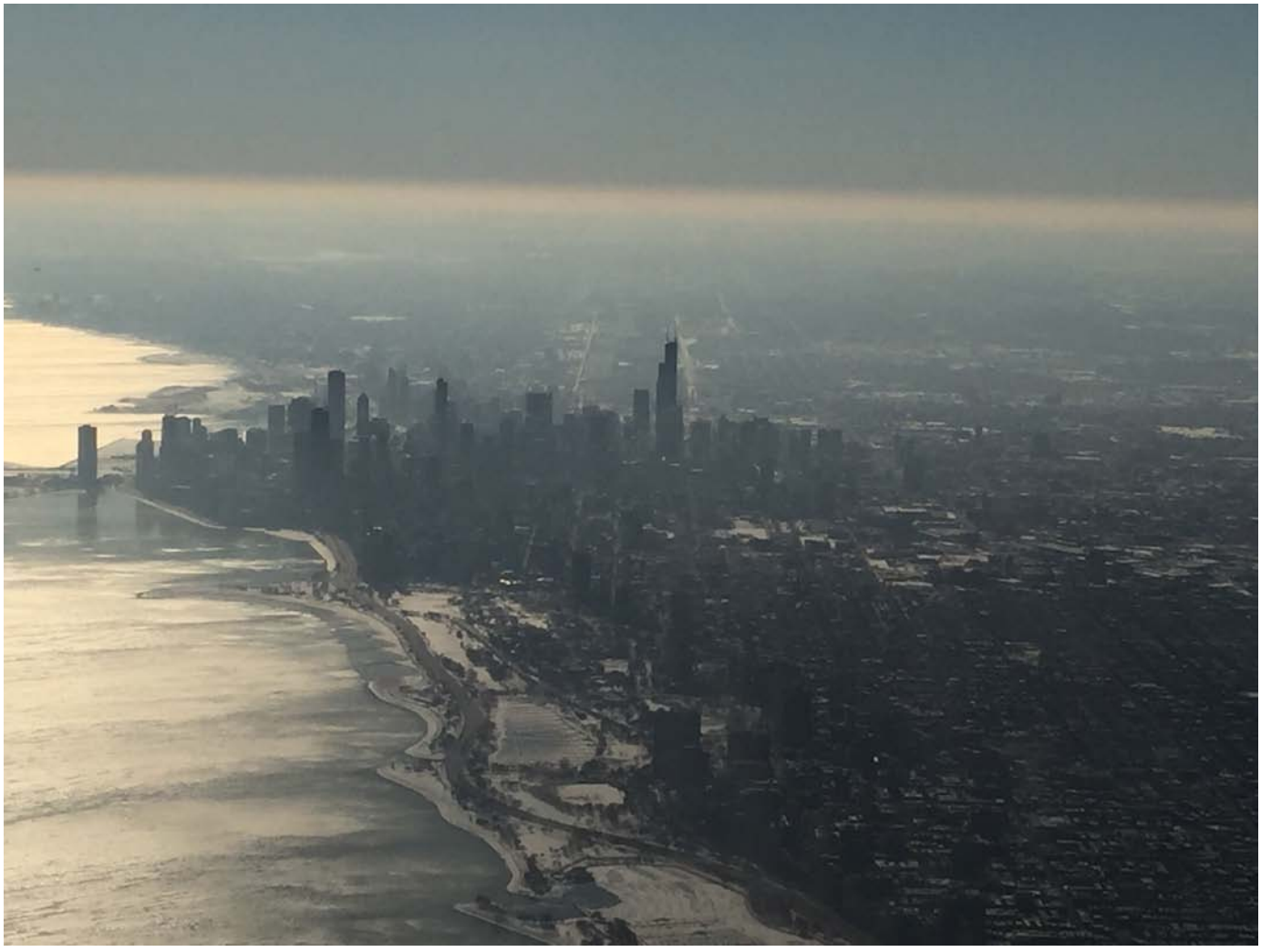
Endnotes
(*1) *Canada Gazette Part I, Vol. 151, No. 51*



4. Freight Brokerage Employment Contracts and Non-Solicitation Clauses: A Case Study

The recently published decision in *Titanium Logistics Inc. v. B.S.D. Linehaul Inc.,* (*1) illustrates certain key principles applied by the courts in the enforcement of non-solicitation clauses in employment contracts. This decision arises in the load brokerage context.

Titanium Logistics Inc. ("Titanium") and B.S.D Linehaul Logistics Inc. ("B.S.D.") compete in the load brokerage industry. Titanium brought a clam against B.S.D. and two of its former employees, Andrew Shim ("Shim") and David Dal Bello ("Dal Bello") to enforce certain confidentiality and non-solicitation terms in contracts they had signed with Titanium in connection their prior employment with that company. Titanium also asserted that Shim and Dal Bello were key employees who had breached fiduciary duties owed to Titanium when they left Titanium to work for B.S.D.

Titanium had carried on business as a load broker for its customers since 2002. Shim started working as an account executive for Titanium in July 2013. Dal Bello was hired by Titanium as an account executive in June 2015.

As account executives at Titanium, Shim and Dal Bello were responsible for developing and maintaining customer accounts. This included providing quotes for shipping services to customers and prospective customers, sourcing performing carriers and coordinating freight carriage logistics. Titanium asserted that in the course of these activities that Shim and Dal Bello were privy to sensitive and proprietary customer list and pricing information.

Shim and Dal Bello had signed an employment agreement with Titanium that contained a confidentiality and non-solicitation clause providing that they would:

> … well and faithfully service [Titanium] and use his … best efforts to promote the interest thereof, and **shall not**, **during his … employment and for a period of 12 months following termination of his** … employment for any reason … **disclose** the private affairs of [Titanium], or any trade secret, **confidential or proprietary information** of [Titanium] to any person other than the President, and **shall not solicit any of the customers of the company**, whether former or current at the time of termination or in the previous two years, or otherwise directly or indirectly attempt in any way to obtain from those customers or former customers business to the detriment of [Titanium] **for any competitive endeavour**, whether [Shim] participates is [sic] such endeavors as an employee a partner, a shareholder, an agent, a consultant or otherwise. [emphasis added]

In its court action, Titanium complained that after they resigned from it to work for B.S.D. that Shim and Dal Bello then improperly used confidential Titanium information for B.S.D. to compete against it.

Titanium applied to the Ontario Superior Court for an injunction restraining B.S.D., Shim and Dal Bello from soliciting new business with 93 companies that Titanium asserted to be established customers. On September 14, 2017 the Ontario Superior Court of Justice granted a temporary injunction "protecting" Titanium in respect of these customers. Titanium sought an extension of this injunctive relief, also seeking an order that the defendants not be allowed to deal with yet a further Titanium customer, namely KP Building Products Inc. ("KP"). Titanium had provided brokering services for KP since March of 2015. In 2016, Titanium billed KP just over $1 million and was on track to bill a similar amount in 2017. Shim had been the account executive for KP while he was at Titanium. After Shim resigned from Titanium, KP informed Titanium that it would no longer be using Titanium for freight-forwarding services.

Dal Bello did not object to this application. B.S.D. and Shim did, however, "push back", opposing

this "injunction extension" application. They wanted to service the 93 companies in question as well as KP.

Titanium filed evidence that while at Titanium, Shim was responsible for 43 customer accounts and had coordinated the logistics for approximately 1207 loads through over 800 lanes. Shim did not deny these facts. The evidence also indicated that Dal Bello was responsible for 45 customer accounts, coordinating approximately 425 loads through 350 freight lanes. Titanium asserted that that as account executives, they gained access to confidential information critical to its market competitiveness.

Titanium filed in evidence a "Rate and Load Confirmation" form issued by B.S.D. for a KP shipment, which Titanium had received by accident on August 4, 2017. This was dated after Shim and Dal Bello had left Titanium to work for B.S.D. confirmed that B.S.D. was using the same freight lanes that Titanium had been previously servicing for KP and that B.S.D. had exactly matched Titanium's pricing. Titanium also produced Shim's email dated August 1, 2017 - the day after Shim resigned – sent to another Titanium customer stating:

> *… If you have any shipments this week please do not hesitate to reach out to me or our team and we can provide rates and availability."*

Shim countered that he had obtained a publicly available contact list of approximately 2000 companies in Ontario that used freight-forwarding services and that he had sent out the above "email blast" to those companies. He did not dispute that some of Titanium's customers may have been recipients, but stated that he was not aware of the identity of all of Titanium's current or former customers. He denied that the above email was an attempt to solicit Titanium's customers.

As far as KP was concerned, Shim did not dispute that B.S.D. was providing freight-forwarding services for it, but he submitted that Titanium had lost KP's business as it did not have the correct type of truck to move KP's product and KP had become "very displeased" with Titanium. The Court however found there to be insufficient evidence to support Shim's assertions that KP no longer used Titanium owing to service issues.

Titanium also alleged that one of its employees, Brian Rupnarain, was approached by Shim in January 2017 to "start up our own trucking brokerage and for all of us to leave Titanium". Shim denied doing this. Shim also denied that he had any confidential information of Titanium and denied taking any customer lists, documents or other information from Titanium. His evidence was that the rates and prices used by Titanium were not trade secrets and were well known in the industry.

Shim raised various defences to Titanium's complaints that he used its confidential information to improperly solicit customers:

> i) The language in the above non-solicitation agreement was not enforceable as it was too broad and ambiguous;
>
> ii) Shim was not a key employee and did not owe a fiduciary duty to Titanium;
>
> iii) B.S.D. was not in competition with Titanium; and
>
> iv) Shim had no recollection of ever seeing the subject employment agreement, let alone ever signing it, although he conceded "certain initials on the agreement looked similar to his signature".

Titanium's request to Extend the Injunction

Having review the facts of the case the Court addressed the following:

1. What is the applicable test to obtain an injunction?

2. Did Titanium Meet this Test on the Facts of this Case?

1. What is the Test to Obtain an Injunction?

In *RJR-MacDonald Inc. v. Canada (Attorney General)* (*2), the Court established a three part test for a court to grant an interlocutory judgment:

> i) The party requesting the injunction must show that there is a serious issue to be tried, and that it has an apparently strong case;
> ii) Irreparable harm would be suffered by the applicant if the injunction is not granted; and
> iii) Taking into consideration the interest of the parties and the facts of the case, the balance of convenience must favour granting the injunction.

As further articulated in the case of *Altus Group Limited. v. Yeoman* ("*Altus*")(*3) on an application for an injunction, the court must undertake a preliminary analysis to assess the strength of the plaintiff's case and of the defences which are offered in order to determine if an injunction should be granted. The test is whether there is a presumptively strong case – in legal terms, a "*prima facie* case". The Court took this into consideration, bearing in mind that Titanium was seeking to enforce the non-solicitation agreement which might have the effect of restricting B.S.D.'s operations and Shim's ability to earn a livelihood. The second and third parts of the test, being that of "irreparable harm" and "balance of convenience", would then be considered in the event that this first test was satisfied.

2. Should Titanium Obtain an Injunction on the Facts of this Case?

i) Was There a "Serious Issue" to be Tried and did Titanium have an apparent strong case?

In its analysis, the Court first took into consideration Shim's assertion that the non-solicitation clause was not enforceable as it was too broadly worded. The Court noted the decision in *Mason v. Chem-Trend Limited Partnership* ("*Mason*") (*4) which reviewed the governing principles when considering whether a restrictive covenant in an employment contract is overly broad (or unreasonable) so as to therefore be unenforceable:

> - To be enforceable, the covenant must be "reasonable between the parties and with reference to the public interest";
>
> - The balance is between the public interest in maintaining open competition and discouraging restraint on trade on the one hand, and on the other hand, the right of an employer to the protection of its trade secrets, confidential information and trade connections;
>
> - The validity, or otherwise, of a restrictive covenant can be determined only upon an overall assessment of the clause, the agreement within which it is found and all of the surrounding circumstances;
>
> - In that context, the three factors to be considered are (1) did the employer have a proprietary interest entitled to protection; (2) are the temporal or spatial limits too broad; and (3) is the covenant overly broad in the activity it proscribes because it prohibits competition generally and not just solicitation of the employer's customers?

The Court then considered the case of *Benson Kearley & Associates Insurance Brokers Ltd. v. Jeffrey Valerio*, ("*Benson*") (*5) which considered certain general principles applicable to restrictive covenants:

> … non-solicitation clauses, suitably restrained in temporal and spatial terms (are) more likely to represent a reasonable balance of the competing interests than is a non-competition clause. An appropriately limited non-solicitation clause offers protection for an employer without unduly compromising a person's ability to work in his or her chosen field. A non-competition

> clause, on the other hand, is enforceable only in exceptional circumstances….

In *Benson*, the Court found that a non-solicitation clause was unreasonable as it was of unlimited duration. On that basis, it found the plaintiff had not met the strong "*prima facie* test". In the present case, the Court noted that the non-solicitation clause had only a 12 month duration during which time Shim could not solicit Titanium's customers. On that basis, the Titanium contract term was not considered to be unreasonable.

The Court also noted that, in the *Benson* case, the trial judge was also concerned as the non-solicitation clause dealt with *all* of the plaintiff's clients and not just those whom the defendant *knew or those to whom it had access*. The concern was that the defendant would therefore have no way of knowing whether any particular potential client was a current client of the plaintiff.

The same issue was raised in the *Mason* case, cited above, where the non-solicitation clause stated that the former employee could not deal with *any* customer of the company during the period in which he was an employee. In the *Mason* case, the former employee had worked for the employer for 17 years and the company had worldwide operations. The restriction was not limited just to the customers that the former employee had dealt with, but *all* customers. The Court of Appeal in *Mason* found that the former employee did not know and would not have access to a list of all of the company's customers and that the restriction was overly broad and unworkable and, therefore, unreasonable and unenforceable.

The non-solicitation clause in the Titanium agreement included a provision that Shim could not solicit *any* of Titanium's current customers or those that existed in the prior two years. Titanium however sought to restrict access to the 93 customers (and KP), being a finite listing of companies. Accordingly Titanium asserted that the restriction was not overly broad and was, therefore, enforceable.

In the circumstances, the Court was satisfied that Titanium had established a "serious issue to be tried" and a strong presumption that there had been a breach of the non-solicitation agreement. Accordingly Titanium established the first criteria of obtaining the extension to the injunction.

Was Shim A "Key Employee"?

In the course of its analysis on the test for an injunction, the Court also considered Titanium's concerns that Shim owed it fiduciary duties. Citing the *Benson* case, the Court noted all employees have certain basic duties to their employer. In that case the judge had ruled as follows:

> All employees have certain basic duties to their employers of loyalty and confidence during the course of their employment. In the absence of a valid restrictive covenant, however, ordinary or "mere" employees are free to compete with their former employers once their employment is terminated subject to the caveat that he or she may not make use of the employer's confidential information, such as customer lists or trade secrets. A higher duty applies to a former employee who may be characterized as "top management", "senior management" or a "key employee" on the basis of the functions and duties performed. Such a "key employee" may have a post-employment fiduciary duty that precludes him or her from soliciting a former employer's clients or customers.

A determination of whether or not Shim was a key employee was not to be based on his job title. An important factor would be whether the beneficiary, Titanium, was "unusually vulnerable" to the fiduciary.

Taking the above and all of the circumstances into account, the Court was not satisfied that Shim was a key employee at Titanium. He was not

a manager or a director of Titanium. He was a commissioned salesperson who had worked for Titanium for four years. He was not a long-term employee. There was no evidence filed as to how many other commissioned sales employees were employed by Titanium, or what revenue was generated by Shim for Titanium. Accordingly the Court lacked any context to gauge Shim's relative importance in terms of function to the Titanium operation as a whole. Accordingly Titanium did not prevail under this assertion; however, as noted above, it met the initial test for an injunction by virtue of the non-solicitation clause wording in the employment contract.

ii) Would Titanium suffer irreparable harm if the injunction were not granted?

Titanium presented evidence that it lost the KP business following Shim's resignation and the creation of B.S.D. Titanium pointed to the fact that KP had generated over $1 million in revenue for Titanium in 2016. Titanium also complained of the risk of its losing market share, as well as a loss to its reputation as a result of allegation that KP had left on account of service issues.

In the *RJR-Macdonald Inc. v. Canada (Attorney General)* case cited above, the Court gave some definition to what may qualify as "irreparable harm":

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision, where one party will suffer permanent market loss or irrevocable damage to its business reputation or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined. The fact that one party may be impecunious (i.e. unable to pay a judgment to pay monetary damages) does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration. (*6)

The *Altus* decision cited above also considered the issue of irreparable harm, with the judge in that case noting as follows:

> Evidence of irreparable harm must be clear and not speculative. [The plaintiff] has provided no real evidence other than its bald statement that it will either lose market share, or be put out of business. Lost sales and market share can be compensated in damages, and can generally be calculated on the basis of sales histories, and sales projections. Although perhaps difficult, [those] damages can be calculated. If the nature of the damage can be calculated in money, then no matter how hard it may be to the quantify damages, the court should decline to grant an injunction.

Taking the foregoing into consideration the Court found that Titanium had not produced sufficient evidence that it would suffer irreparable harm if the injunction extension that it sought was not granted. Titanium was in fact able to quantify the loss associated with KP. Presumably, if other customers were also lost, the issue of damages could be quantified as Titanium would have information regarding any lost revenue, as it did with KP. Accordingly, Titanium would be able continue with its claim that the defendants should pay monetary damages for their conduct. Further Titanium's claim for loss of market share and damage to its reputation was found to be too speculative. In simple terms, the Court found that the evidence before it only tended to support a claim for monetary damages.

Accordingly, on the basis of this second injunctive relief test, Titanium failed to secure the injunction it was looking for.

iii) Did the "Balance of Convenience" favour Titanium in obtaining an injunction?

Given the Court's determination that a case of irreparable harm had not been established, it was not obliged to consider the balance of convenience test; however, in the interest of being thorough, the Court did address the issue, finding that the "balance of convenience" did favour Titanium. While Shim had filed evidence that an injunction would prevent B.S.D. from operating, depriving him of the opportunity to make a living, the Court recalled Shim's evidence that he had obtained the "publicly available contact list of 2000 companies" in Ontario which used freight-forwarding services. Finding that there would then be 1,907 potential other customers for B.S.D. to solicit, the Court determined that, were it to enforce the non-solicitation agreement, it would not prevent B.S.D. from operation or Shim from working in his field.

Conclusion

Given the finding regarding a lack of evidence of irreparable harm, Titanium had not met all of the requirements required to obtain the injunction extension and accordingly its request was denied.

Gordon Hearn

Endnotes

(*1) 2017 ONSC 7526 (CanLII)
(*2) [1994] 1 SCR 311
(*3) 2012 ONSC 4406 (CanLII)
(*4) 2011 ONCA 344 (CanLII) at para. 16
(*5) 2016 ONSC 4290 (CanLII) at para. 39
(*6) at para. 64.

5. Lukács Advocating for Obese Passengers – Supreme Court Divided on Standing Before the CTA

In February 2017, we reported on the then pending litigation to be heard by the Supreme Court of Canada (*1) with respect to a Federal Court of Appeal decision, which overturned a decision of the Canadian Transportation Agency ("CTA") (*2) dismissing a complaint brought by serial aviation litigant, Dr. Gabor Lukács ("Lukács") (*3).

Lukács had brought a complaint before the CTA in which he disputed the practices of Delta Air Lines ("Delta") in handling obese passengers. Delta had written to an affected passenger and explained that it recommended that obese passengers purchase two seats and otherwise their practice was to move the passenger to alternative seats where there was no neighbouring passenger or to move the passenger to a later flight if the flight was overbooked.

Lukács brought his complaint about the practice pursuant to s. S. 67.2 (1) of the Canada Transportation Act (the "*Act*") (*4). Lukács alleged that Delta's stated practice was (i) discriminatory, (ii) in breach of s. 111(2) of the *Air Transportation Regulations* which exclude an airline from applying terms and conditions of air carriage that give any undue or unreasonable preference or advantage to or in favour of any person (*5), and (iii) contrary to previous cases decided by the CTA concerning the accommodation of disabled persons.

The complaint was dismissed on a preliminary basis raised by the CTA of its initiative concerning whether Lukács had the requisite standing to prosecute the complaint. The CTA decision held that Lukács did not have private interest standing since he was personally unaffected by the policy as he stood at six feet tall and weighed 175 pounds.

The CTA further held that Lukács did not have public interest standing to bring the complaint. The CTA denied that public interest standing could be established absent a challenge to the constitutionality of legislation or of administrative actions.

Lukács successfully appealed to the Federal Court of Appeal which found that the decision of the Agency was unreasonable. Per de Montigny J.A., the standing test applied by the CTA was unreasonable given that S. 67.2 (1) of the *Act* confers upon the CTA the jurisdiction to rule on an allegation of discriminatory terms or conditions whenever a complaint is brought by "any person".

The Federal Court of Appeal directed that the matter be returned to the CTA for consideration of whether to inquire into and hear the complaint otherwise than on the basis of standing.

Delta successfully obtained leave from the Supreme Court of Canada to bring an appeal, which was heard on October 4, 2017, with a decision released on January 19, 2018 (*6). The Court was split on a 6-3 basis. The majority of the court, led by the outgoing Chief Justice McLachlan allowed the appeal in part only on the issue of whether the Federal Court of Appeal erred in denying the CTA the opportunity to reconsider the issue of standing in light of the Court's comments. The dissenting judges, whose reasons were expressed by Abella J., would have allowed the appeal in whole and reinstated the decision of the CTA that Lukács failed to establish his standing as an expression of the discretion afforded to the CTA to control its processes by the *Act* by enforcing "gatekeeping and screening mechanisms" to obviate an "*ad hoc* approach" to standing.

Never at issue was the standard of review, which was agreed by the parties to be reasonableness in accordance with the case law applicable when an administrative body interprets its enabling legislation and is called upon to exercise discretion thereunder (*7).

The majority found that the CTA decision fell short of being reasonable on two grounds. The first reason for this was that the CTA recognized

that there was a possibility to bring a complaint before the CTA pursuant to public interest standing, but then proceeded to set out a test for such standing which could never be met, thereby fettering the discretion afforded to the CTA by the Act.

The CTA indicated that to establish public interest standing before it on a complaint, either legislation or administrative action would have to be impugned on constitutional grounds. Given that the complaint mechanism of s. 67.2 of the *Act* relates solely to complaints about the terms, conditions and practices of air carriers, a complaint brought would never be challenging legislation or administrative action. Per the Chief Justice, "The imposition of a test that can never be met could not be what Parliament intended when it conferred a broad discretion on this administrative body to decide whether to hear complaints".

Furthermore, the majority expressed concern that the standing test applied by the CTA would exclude public interest groups from ever prosecuting a complaint, which would thus have to be brought by a directly affected passenger. The Chief Justice highlighted that successful and important advocacy groups, such as the Council of Canadians with Disabilities, would never have standing to bring a complaint pursuant to the test set out by the CTA. (*8) The CTA's test, the Court found, was inconsistent with and unreasonable in light of the broad remedial powers conferred on the CTA by the *Act* to intervene upon a complaint by any person concerning discriminatory terms and conditions.

The CTA decision could not be remedied by the court by way of supplementary reasons given that, pursuant to the decision of the Supreme Court, the reasons consisted of the articulation of a test for standing which could not be reconciled with the statutory scheme. The courts cannot provide their own reasons as an alternative way to support outcomes reached by the CTA. Deference is to be owed to the CTA and, therefore, its role of determining when to hear a complaint could not be usurped by the Supreme Court on the basis that it, the CTA, had applied an unreasonable test in this case.

The Chief Justice and the majority did however agree with the dissenting cohort that the Federal Court of Appeal went too far in directing that the matter should be reconsidered by the CTA without reference to the issue of standing. There was no basis to deny the CTA the opportunity to reconsider the standing issue given the legislature's intent that deference be afforded to the CTA's determination of its own complaints process.

Mark Glynn

Endnotes

(*1) *Delta Air Lines Inc. v. Gábor Lukács*, 2017 CanLII 8567

(*2) *Lukács v. Canada (Transportation Agency*), 2016 FCA 220

(*3) Decision No. 425-C-A-2014 (November 25, 2015) *Complaint by Gábor Lukács against Delta Air Lines, Inc. carrying on business as Delta Air Lines, Delta and Delta Shuttle*

(*4) *Canada Transportation Act*, SC 1996, c 10

(*5) *Air Transportation Regulations* (SOR/88-58)

(*6) *Delta Air Lines Inc. v. Lukács* 2018 SCC 2

(*7) *Dunsmuir v. New Brunswick* 2008 SCC 9

(*8) This would have been particularly problematic given the success of the Council in bringing complaints under other provisions of the *Act* such as one against VIA Rail where a favourable decision of the CTA was reinstated by the Supreme Court in 2007, *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650

6. The Importance of Having a Well-Drafted Shareholder Agreement

Are you one of two or more shareholders of a business? Have you thought about what your rights are if:

(i) you decide that you want to sell your shares but cannot find a buyer;
(ii) the other shareholder decides to sell their shares to someone you do not particularly want to do business with;
(iii) another shareholder becomes ill and is unable to participate in the business;
(iv) you want your shares to be treated a certain way upon your death;
(v) you've loaned a large amount of money to the corporation to get it started and now the other shareholders wish to issue dividends to themselves before your loan is paid;
(vi) the other shareholders receive a great offer for their shares from a potential buyer and you would like to participate;
(vii) there are an even number shareholders and you cannot agree on a key issue; or
(viii) you are a minority shareholder and the other shareholders want to make a crucial business decision that you do not agree with?

A shareholder agreement can provide the answer to each of these questions. It sets out each shareholder's rights, privileges and obligations in connection with the business and is a cost-effective way of providing a roadmap of how certain issues will be dealt with, should they arise. By forcing shareholders to think ahead about the issues that may affect them in the future, a shareholder agreement provides clarity, certainty and flexibility, and is able to assist shareholders to avoid costly litigation in the future.

We strongly recommend that private corporations with two or more shareholders have a shareholder agreement in place. Here are some of the main ways a shareholder agreement can help:

Decision Making

Generally, business decisions that require shareholder consent can be made with the approval of the majority of shareholders. In certain limited cases, a "special majority" (2/3 of votes) is needed to make fundamental decisions. In cases where one or more shareholders hold the majority of voting rights, the minority shareholders can be left with little to no decision-making power.

A shareholder agreement can avoid this situation and provide some equalization among the shareholders by setting out certain key business decisions that will require unanimous shareholder approval before taking effect. What decisions will be considered "key" will depend on the business in question but could include anything from selling all or substantially all of the corporation's assets, to taking out a bank loan, dissolving the corporation, paying dividends, changing executive employees' salaries, purchasing assets over and above a certain monetary threshold and even more decisions.

Funding the Business

A shareholder agreement can set out how the corporation may access funds. In particular, it can establish when the shareholders should provide additional capital, whether the provision of funds will be mandatory, the requisite amount that each shareholder must contribute, penalties for failing to do so, and repayment methods if the funds will be advanced as shareholder loans. For example, a shareholder agreement could state that no dividends should be declared or paid until certain shareholder loans have been repaid in full.

Where a corporation decides to borrow funds from a bank or other third party, the shareholder agreement can set out whether personal guarantees must be provided and how liability will be shared among the shareholders.

Anti-Dilution

A shareholder agreement can also address situations where the corporation intends to issue additional shares in the capital of the corporation. A "pre-emptive right" clause would allow the existing shareholders to first subscribe for additional shares based on their pro-rata ownership levels, thereby allowing them to protect their ownership percentage on future share issuances.

Exit Strategies / Restrictions on Share Transfers

Various circumstances might arise where a shareholder no longer wishes to be part of the business. A shareholder agreement can set out the circumstances under which a departing shareholder may transfer their shares. Most shareholder agreements will prohibit a transfer of shares that are not in accordance with the terms set out in the agreement unless all shareholders approve. Typical provisions include a variation of the following:

(i) *right of first refusal:* a selling shareholder must first offer their shares for sale to the other shareholders. If the other shareholders do not wish to purchase the shares, then the selling shareholder may offer them for sale to a third party. Similarly, if a selling shareholder received an offer from a third party, the other shareholders must first have the option to purchase those shares at the same price;

(ii) *drag along right:* if a majority shareholder wishes to sell all of their shares to a third party, this clause forces the minority shareholder to sell all of their shares as well;

(iii) *tag along or piggy back right*: where a majority shareholder has received an offer to sell their shares, a minority shareholder has the option to also sell their shares to the same purchaser; and

(iv) *shot-gun clause:* a shareholder makes an offer to the remaining shareholders to buy their shares at a certain price; those remaining shareholders must either accept the offer or buy the shareholder's shares at the specified price. The alternative to this scenario could also apply – where the triggering shareholder offers to sell their shares and the others must accept or sell their own.

The shareholders may also want certain transfers to be allowed under the agreement, for example: to a trust or holding corporation controlled by the shareholder.

Insolvency, Illness, Death or Incapacitation

If a shareholder dies, becomes severely ill, disabled, insolvent or unable/unwilling to contribute to the business due to some other cause, this can leave a lot of uncertainty as to the future of the business and what will happen to that shareholder's shares. A well-drafted shareholder agreement can set out whether the shares are to be bought by the corporation or the remaining shareholders, or transferred to another beneficiary (perhaps named in the shareholder's will). The agreement can also set out the method for determining the value of those shares and exactly when such disposal measures are to take effect.

For example, an agreement might provide that if a shareholder is unable to participate in the management of business for 45 days or more, then this triggers a requirement for the remaining shareholders to purchase his/her shares at a predetermined price. The agreement can also require the shareholders to have key man insurance in place on the life of the shareholders to provide capital to the corporation or remaining shareholders should a triggering event occur.

From an estate planning perspective, it is important that the provisions of the shareholder agreement and the shareholder's will are aligned to avoid any uncertainty that might arise if they were to contradict each other. Additionally, there may be tax consequences associated with each method of disposal which should be considered by the shareholder.

Dispute Resolution and Other Clauses

If shareholders prefer to avoid litigating a matter in a courtroom, they can ensure that the shareholder agreement provides for alternative methods of dispute resolution, such as mediation or arbitration. This can be particularly useful where there are an even number of shareholders and a tie-breaker vote may be needed on particular issues.

An agreement can also include non-competition clauses that would apply when a shareholder no longer holds shares in the Corporation. An additional clause could include the method to calculate the current value of the business.

Why You Should Act Now

The sooner that shareholders think about these issues and put an agreement in place, the less headache, cost, and possibility of litigation that they will face in the future. A shareholder agreement provides clarity and certainty to the relationship between business owners. With a shareholder agreement set up, the business is able to run more smoothly because its owners know that they have a proper contingency plan that deals with their key concerns.

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CONTEST

This month we are giving away a complimentary ticket for attendance at our annual seminar day - Wed. January 16th 2019 in Toronto - for the first individual to email us the name of exact location depicted in photograph on page 15. Email your answer to info@fernandeshearn.com with a subject line "Newsletter contest". First response with the correct answer wins.