THE NAVIGATOR

IN THIS ISSUE

Arriving at a Settlement Agreement: Be Intentional as with any Other Contract

A settlement agreement is a contract. As with any commercial agreement, a party to a settlement agreement must be deliberate in the articulation and documentation of its terms. A party who leaves a term "silent," or assumes that a court might naturally imply a term not spelled out does so at its peril.

The recent Ontario Superior Court decision in *Automodular Corporation v. General Motors of Canada* (*1) is an object lesson in how the courts approach a situation where a settlement agreement has not spelled out a certain term.

Is HST Included or Not?

It is a basic notion – at least, with the benefit of hindsight. After extended complex litigation concerning a supply agreement of automobile parts and services on the eve of trial the defendant General Motors of Canada ("General Motors") agreed to pay Automodular Corporation ("Automodular") a settlement of $7 million "inclusive of interest and costs, including disbursements". The terms of settlement made no express mention of the payment of the Harmonized Sales Tax ("HST").

Following plaintiff's counsel's advise to the court office that the matter had settled, the defendant's counsel sent draft minutes of settlement to the plaintiff that tracked the language of the emails by which the parties had achieved settlement – which had made no mention of HST. Automodular responded that it was happy to document the settlement by way of minutes of settlement but added that "*it's tax advisors have advised that the $7 million payment from GM is subject to HST and we have therefore amended your proposed Minutes of Settlement to reflect that*". This was the first time that the issue of HST was raised by other party.

As noted by the judge who would come to consider the issue, "things (then) fell apart".

The Motion Before the Superior Court of Justice

FIRM AND INDUSTRY NEWS

- **Louis Amato-Gauci** will be representing the Firm at the Can/AM Border Trade Alliance meeting**:** *"*A Unified Focus: Trade, Transportation and Border Management*"* being held at the Hyatt Regency Hotel Washington, D.C., September 30 to October 2, 2018.

- **Marine & Insurance Claims Association** Annual Dinner, October 5th, 2018, New York.

- **Rui Fernandes** will be speaking on a panel on Blockchain Technology at the Canadian International Freight Forwarders Association 70th Anniversary Conference on October 16th, 2018, Toronto.

- **McGill University / PEOPIL** International Aviation Law: Liability, Insurance & Finance Conference, October 19-20, 2018, Ireland.

- **Fernandes Hearn LLP** has been recognized as a "ranked firm" in the *Chambers Guide 2019* of leading law firms. **Rui Fernandes**, **Gordon Hearn**, **Kim Stoll** and **Louis Amato-Gauci** are listed as leading lawyers in the area of Road & Rail Law. **Rui Fernandes** and **Gordon Hearn** are also listed as leading Shipping Law lawyers.

- **Louis Amato-Gauci**, **Alan Cofman** and **Carole McAfee Wallace** will be representing the Firm at the Canadian Transport Lawyers Association Annual Meeting being held in Montreal, Quebec October 25-27, 2018.

- **Kim Stoll and Alan Cofman** will be speaking at the Women's Trucking Federation of Canada conference "Bridging Barriers", on October 27, 2018, in Mississauga, Ontario.

- **Gordon Hearn** and **Louis Amato-Gauci** will be representing the Firm at the Transportation Law Institute being held in Louisville, Kentucky on November 9, 2018.

The issue was referred to a judge for resolution. Neither party took the position that there was "no meeting of the minds", such that there was no settlement. Rather, both contended that there was a valid and binding settlement and that they wished to see it completed as soon as possible. Was HST included in the settlement amount, or was General Motors to pay HST in addition – amounting to a further payment of $910,000?

Was the HST Payable in Addition to the Settlement Figure in this Case?

No. The Court held that, to the extent that any or all of the settlement amount attracted HST, this was *included* in the lump sum settlement amount.

The Court's analysis provides "words for the wise". Its analysis admonishes all parties to a contract (settlement agreement or otherwise) to be careful and deliberate in their dealings.

Was there an Implied Term that HST was to be Paid by General Motors on Top of the Settlement Amount?

Automodular asserted that the Court should imply an HST payment term. The Court considered whether the parties intended the settlement amount to be a settlement of *all* claims (as the agreement explicitly purported to be) or whether the parties were to have been taken to have *intended* the settlement amount to be subject to the requirement to pay an additional amount as tax. The Court considered the case of *Neinstein v. Marrero* (*2)

> Settlement agreements are contracts. A court must interpret settlement agreements in a manner to ascertain the reasonable expectations of the parties, as expressed by the language that they have chosen and as understood with reference to the surrounding circumstances, or factual matrix, in which the agreement was concluded... As Professor Waddams noted at page 100 of his text, *The Law of Contracts*, 3d ed. (Toronto: Canada Law Book, 1993): "A reasonable expectation need not mean that all the implications must be spelled out in the mind of the promisee. All promises, even those we call express promises, contain elements of implication." In addition, a settlement agreement must be read as a whole in order to give effect to the reasonable expectations of the parties.

The Court also considered the Ontario Court of Appeal decision in *Adamson v. Steed* (*3) on the issue of implied terms:

> … The standard for implying a term into a contract is very high. Courts will not rewrite contracts to reflect changed circumstances or more equitable results. The court will imply a term where it is necessary to give the agreement efficacy by avoiding the undermining of the very rationale for entering into the agreement…

The Court framed the issue as having to determine the objective, reasonable expectations of the parties arising from the language they used to express their agreement as viewed in the proper context in which they reached it.

The Court found that the settlement was not intended to represent any particular formula based on stated or objective criteria, from which the intention of the parties in relation to HST might be inferred. There was no provision of the agreement which operation assumed a certain state of affairs in relation to HST that would be frustrated in ruling in favour of General Motors.

The Court noted the following factors, supporting the notion that it ought not to imply a term regarding the payment of HST so as to upset the clear wording of the lump sum payment:

i) the parties were sophisticated.

ii) the language used to express the settlement was clear and unambiguous.

iii) the agreed upon $7 million figure was simply a lump sum. No attempt had been made to allocate it to particular heads of damages. In this regard, the Court noted that certain claims in the lawsuit were for damages that, if awarded, were not-taxable.

iv) there was no commercial custom or usage in settlement agreements generally, or in the settlement of supply arrangements in particular, that assisted the plaintiff's argument that "naturally HST was to be paid in addition".

v) the circumstances did not call for General Motors to have "gone behind" the plaintiff's offer to ask what matters the plaintiff had considered in making it, or to whom the plaintiff would allocate it. General Motors was not taking advantage of an obvious error in not raising the HST issue with Automodular.

vi) it could not be said here that the agreement lacked commercial efficacy without an implied term for the payment of HST. It could not be said the duty to pay HST was so obvious so as to "go without saying" in the eyes of an objective person.

The Court also a cited a general policy basis for enforcing the settlement according to its stated terms. The settlement amount was simply a blended, unallocated lump sum amount. Such settlements are common, everyday occurrences. They offer a useful way for the parties to put aside disagreements about the value of particular issues in order to achieve a global settlement that each is able to find acceptable for their own different reasons. The plaintiff's motion would place the Court on a very slippery slope if successful. Finality and certainty of settlements requires parties to consider all of the ramifications of an agreement *before* committing to it.

The Court ruled that terms are not implied into contracts to achieve one party's view of a more equitable or suitable outcome than the one actually agreed to. Contractual terms are implied where they are demonstrably necessary to give commercial efficacy to the agreement reached, reflect a mutual understanding so evident as to have been left unexpressed. In all cases, the court's object is to reflect the agreement of the parties and not to re-write an agreement with the benefit of hindsight.

The language used to reflect this settlement agreement was not ambiguous and closely tracked language used in thousands of settlements reached in our courts every year. The settlement as expressed lacked neither clarity nor commercial efficacy without the suggested implied term. In these circumstances, it would be inappropriate to imply a term into the settlement agreement because doing so would impose a bargain other than the one the parties reached.

Gordon Hearn

Endnotes
(*1) 2018 ONSC 1640 (CanLII)
(*2) 2007 CanLII 13939 (ON SC)
(*3) 2008 ONCA 375 (CanLII)

2. Recreational Cannabis – October 17th Legalization – The Rules

Generally

Recreational cannabis will be legalized in Canada on October 17, 2018. Each Canadian province and territory will be responsible for establishing the rules for the sale, distribution and consumption of cannabis. Ontario, Canada's most populous province, has enacted draft legislation to deal with the introduction of recreational cannabis.

Ontario has passed new laws about how, where and who can buy, possess and consume cannabis in the province. These rules are similar to those in place for alcohol and tobacco, with some differences.

Medical cannabis will continue to be subject to different rules than recreational cannabis. Medical cannabis is governed by federal legislation.

An individual will need to be 19 and older to buy, use, possess and grow recreational cannabis. This is the same as the minimum age for the sale of tobacco and alcohol in Ontario.

An individual will only be able to use recreational cannabis in:

a) a private residence, including the outdoor space of a home (for example, a porch or back yard)

b) their unit or balcony, if they live in a multi-unit building like an apartment or condo, but that depends on building's rules or lease agreement

c) outdoors, in locations where cigarette smoking is permitted

An individual will not be allowed to use recreational cannabis in:

a) any public place, other than above

b) workplaces

c) motorized vehicles

These rules are designed to protect people from second-hand cannabis smoke, and to reduce youth and young adult exposure to cannabis.

Using cannabis in public can result in a fine of up to:

a) $1,000 for a first offence

b) $5,000 for subsequent offences

Zero tolerance for young, novice and commercial drivers

An individual will not be allowed to have any cannabis in their system (as detected by a federally approved oral fluid screening device) if the individual is driving a motor vehicle and:

a) is 21 years of age or under

b) has a G1, G2, M1 or M2 licence

c) the vehicle the individual is driving requires an A-F driver's licence or Commercial Vehicle Operator's Registration (CVOR)

d) is driving a road-building machine

Where to buy recreational cannabis

When it's legal, people 19 years of age and over will be able to purchase cannabis online through the Ontario Cannabis Store. Online orders will be delivered safely and securely. Consumers will be required to verify their age to accept delivery and no packages will be left unattended at the door.

An individual will be able to purchase up to 30 grams (about one ounce) of dried recreational cannabis at one time for personal use.

As of October 17, 2018, the Ontario Cannabis Store website will be the only legal option for purchasing recreational cannabis. It will follow strict rules set by the federal government.

The government will also introduce legislation that, if passed, would open up a tightly regulated private retail model for cannabis that would launch by April 1, 2019. Private stores would be regulated.

An individual will be able to grow up to four plants per residence (not per person). Starting October 17, 2018, a person will be able to

purchase legal seeds from the Ontario Cannabis Store online.

Medical cannabis

Medical cannabis is subject to different rules than recreational cannabis. The production and sale of medical cannabis is regulated exclusively by the federal government.

If a health care professional has already authorized the use cannabis for medical reasons, such access will not change when recreational cannabis is legal.

The only way to purchase medical cannabis is from:

a) a federally licensed producer online

b) by written order

c) over the phone and delivered by secure mail

Cannabis Rules – Consuming and Transporting

Ontario introduced its legislation with the *Cannabis, Smoke-Free Ontario and Road Safety Statute Law Amendment Act*, 2017, S.O. 2017, c. 26. This amendment enacts the *Cannabis Act, 2017*, the *Ontario Cannabis Retail Corporation Act, 2017* and the *Smoke-Free Ontario Act, 2017.* All are scheduled to come into force on or before October 17, 2018.

The *Cannabis Act, 2017* has three regulations (as at September 25th, 2018), Ontario Regulation 30/18 (General), Ontario Regulation 327/18 (Non-Application of Act to certain cannabis and cannabis products) and Ontario Regulation 325/18 (Places of Consumption).

Section 11 of the *Cannabis Act, 2017* is the governing section regarding the consumption of cannabis in Ontario. It states:

11 (1) No person shall consume cannabis in,

(a) a public place;

(b) a workplace within the meaning of the *Occupational Health and Safety Act*;

(c) a vehicle or boat; or

(d) any prescribed place.

A "Prescribed place" is:

1. A school within the meaning of the *Education Act*.

2. A building or the grounds surrounding the building of a private school within the meaning of the *Education Act*, where the private school is the only occupant of the premises, or the grounds annexed to a private school, where the private school is not the only occupant of the premises.

3. Any indoor common area in a condominium, apartment building or university or college residence, including elevators, hallways, parking garages, party or entertainment rooms, laundry facilities, lobbies and exercise areas, in the case of the consumption of cannabis by smoking or through the use of an electronic cigarette.

4. A child care centre within the meaning of the *Child Care and Early Years Act, 2014*.

5. A place where home child care is provided within the meaning of the *Child Care and Early Years Act, 2014*,

i. whether or not children are present, in the case of the consumption of cannabis by smoking or through the use of an electronic cigarette, or

ii. only when children are present, in the case of the consumption of cannabis in any other manner.

6. A place where an early years program or service is provided within the meaning of the *Child Care and Early Years Act, 2014*.

Section 12 of the *Cannabis Act, 2017* sets out the rule as to when an individual can transport cannabis on a vehicle or boat. Section 13 allows a police officer to search a vehicle or boat. The sections state:

12 (1) No person shall drive or have the care or control of a vehicle or boat, whether or not it is in motion, while any cannabis is contained in the vehicle or boat.

Exception

(2) Subsection (1) does not apply with respect to cannabis,

(a) that is packed in baggage that is fastened closed or is not otherwise readily available to any person in the vehicle or boat; and

(b) that meets any prescribed requirements.

Search of vehicle or boat

(3) A police officer who has reasonable grounds to believe that cannabis is being contained in a vehicle or boat in contravention of subsection (1) may at any time, without a warrant, enter and search the vehicle or boat and search any person found in it.

If an individual owns a vessel equipped with sleeping accommodation, a permanent cooking facility, and a sanitary facility, the individual may be able to consume cannabis on the vessel. Regulation 325/18 provides an exemption to section 11. The dock near the boat may also be exempt at times the dock is private.

Exemptions, vehicles and boats that are residences

8. (1) Subsection 11 (1) of the Act and section 7 of this Regulation do not apply with respect to the following:

1. A motor vehicle as defined in the *Highway Traffic Act* that is equipped with permanent sleeping accommodations and permanent cooking facilities, while it is parked in a place that is not a highway or a King's Highway within the meaning of that Act and is being used as a residence.

2. A boat with permanent sleeping accommodations and permanent cooking and sanitary facilities, other than a boat used to carry passengers for hire, while the boat is at anchor or is secured to a dock or land and is being used as a residence.

(2) If a boat referred to in paragraph 2 of subsection (1) is secured to a dock or land to which the public is not ordinarily invited or permitted access, the exemption in that subsection is extended to the portion of the dock or land that is immediately adjacent to the boat, except at any time when the public is invited or permitted access to that portion of dock or land.

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

3. Doing Business in Canada – Part 12 (*1) – Privacy

General

There are several laws in Canada that relate to privacy rights (*2). Enforcement of these laws is handled by various government organizations and agencies.

A number of factors determine which laws apply and who oversees them. Among them:

1. The nature of the organization handling the personal information

a) Is it a federal government institution?
b) Is it a provincial or territorial government institution?
c) Is it private sector?
d) Is it engaged in commercial activities?
e) Is it a federally regulated business?

2. Where is the organization based?

3. What type of information is involved?

4. Does the information cross provincial or national borders?

Personal Information

Personal information is data about an "identifiable individual". It is information that on its own or combined with other pieces of data, can identify the person as an individual.

The definition of personal information differs somewhat under different pieces of legislation but, generally, it can mean information about:

a) race, national or ethnic origin,
b) religion,
c) age, marital status,
d) medical, education or employment history,
e) financial information,
f) DNA,
g) identifying numbers such as social insurance number, or driver's licence,
h) views or opinions about the person as an employee.

What is generally not considered personal information can include:

a) Information that is not about an individual, because the connection with a person is too weak or far-removed (for example, a postal code on its own which covers a wide area with many homes)
b) Information about an organization such as a business.
c) Information that has been rendered anonymous, as long as it is not possible to link that data back to an identifiable person
d) Certain information about public servants such as their name, position and title
e) A person's business contact information that an organization collects, uses or discloses for the sole purpose of communicating with that person in relation to their employment, business or profession.
f) Government information.

Federal Laws

The Office of the Privacy Commissioner of Canada enforces two federal privacy laws, the *Privacy Act* and the *Personal Information Protection and Electronic Documents Act* (PIPEDA).

The *Privacy Act* relates to a person's right to access and correct personal information that the Government of Canada holds about them. The Act also applies to the Government's collection, use and disclosure of personal information in the course of providing services such as:

a) old age security pensions

b) employment insurance

c) border security

d) federal policing and public safety

e) tax collection and refunds.

The *Privacy Act* only applies to federal government institutions listed in the *Privacy Act* Schedule of Institutions. It applies to all of the

personal information that the federal government collects, uses, and discloses. This includes personal information about federal employees.

PIPEDA sets the ground rules for how private-sector organizations collect, use, and disclose personal information in the course of for-profit, commercial activities across Canada. It also applies to the personal information of employees of federally-regulated businesses such as banks, airlines and telecommunication companies.

PIPEDA does not apply to organizations that do not engage in commercial, for-profit activities.

Unless they are engaging in commercial activities that are not central to their mandate and involve personal information, PIPEDA does not generally apply to not-for-profit and charity groups and to political parties and associations.

Municipalities, universities, schools, and hospitals are generally covered by provincial laws. PIPEDA may only apply in certain situations. For example, if the organization is engaged in a commercial activity which is outside of its core activity such as, a university selling an alumni list.

Unless the personal information crosses provincial or national borders, PIPEDA does not apply to organizations that operate entirely within Alberta, British Columbia and Quebec.

These three provinces have general private-sector laws that have been deemed substantially similar to PIPEDA.

All businesses that operate in Canada and handle personal information that crosses provincial or national borders are subject to PIPEDA regardless of which province or territory they are based in. With respect to transfers of personal information to service providers located outside Canada, the "openness" principle under PIPEDA has been held by federal privacy regulators to require that notice of such transfers should be provided to affected individuals.

Federally-regulated businesses operating in Canada are subject to PIPEDA.

Organizations in the Northwest Territories, Yukon and Nunavut are considered federally-regulated and therefore are covered by PIPEDA.

Provincial Privacy Laws

Every province and territory has its own laws that apply to provincial government agencies and their handling of personal information. Some provinces have private-sector privacy laws that have been deemed "substantially similar" to PIPEDA: Alberta, British Columbia and Quebec.

The following provinces have health-related privacy laws that have been declared substantially similar to PIPEDA with respect to health information, Ontario, New Brunswick, Newfoundland and Labrador and Nova Scotia.

Compliance

PIPEDA and its provincial counterparts generally require compliance with the following principles:

Accountability: An organization is responsible for personal information under its control. It must designate an individual who are accountable for its compliance with the law.

Identifying Purposes: The purposes for which personal information is collected must be identified by the organization at or before the time the information is collected.

Consent: The knowledge and consent of the person are required for the collection, use or disclosure of personal information, except where inappropriate.

Limiting Collection: The collection of personal information must be limited to what is necessary for the purposes identified by the organization.

Limiting Use and Disclosure: Personal information must not be used or disclosed for purposes other than those for which it was collected, except with the consent of the individual, or as required by law.

Retention: Personal information must be retained only as long as necessary for the fulfillment of those purposes.

Accuracy: Personal information must be as accurate, complete and up-to-date as is necessary for the purposes for which it is to be used.

Safeguards: Personal information must be protected by security safeguards appropriate to the sensitivity of the information.

Openness: An organization must make readily available to persons specific information about its policies and practices relating to the management of personal information.

Individual Access: On request, an individual must be informed of the existence, use, and disclosure of his or her personal information and must be given access to that information. An individual must be able to challenge the accuracy and completeness of the information and have it amended as appropriate.

Challenging Compliance: A person must be able to address a challenge regarding compliance to the individual designated by the organization.

Failure to comply with privacy laws can result in complaints to the relevant Privacy Commissioner, orders and fines. An organization with deficient privacy practices may risk adverse publicity for failure to comply with privacy laws.

Rui M. Fernandes
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Endnotes
(*1) This article is part 12 of 17 parts dedicated to a review of doing business in Canada. Subsequent articles will include Real Property, Environmental Laws, Taxation, Insolvency, Litigation and ADR.
(*2) This article is a reproduction of information found at https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/02_05_d_15/#heading-0-0-1

4. *Canadian National Railway Company v. Scott*: Federal Court of Appeal Confirms Lack of Jurisdiction to Deal with Judicial Review Applications of Canadian Transportation Agency Decisions

The Federal Court of Appeal has recently released its decision in *Canadian National Railway Company v. Scott*, 2018 FCA 148, in which it held that the Federal Court of Appeal does not have jurisdiction to entertain applications for judicial review arising from decisions made by the Canadian Transportation Agency (the "Agency"). Instead, litigants who wish to challenge Agency decisions must use one of two alternative mechanisms: first, a litigant may formally appeal the Agency's decision, on legal or jurisdictional grounds, in the Federal Court of Appeal; second, a litigant who wishes to allege that the Agency made errors of fact must bring a petition before the "Governor in Council" (i.e. the Minister). These mechanisms are spelled out in ss. 40 and 41(1) of the *Canada Transportation Act*, S.C. 1996, c. 10 (the "*CTA*").

As discussed below, the Court based its ruling on ss. 18.1 and 18.5 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, which provide that while the Federal Court of Appeal normally does have authority to hear judicial review proceedings with respect to a federal board's or tribunal's decision, such a tribunal's or board's decision cannot be subject to such judicial review if other legislation provides for alternative routes to appeal that decision. In this case, since ss. 40 and 41(1) of the *CTA* do provide such alternative appeal routes, the Federal Court of Appeal therefore cannot entertain applications for judicial review by claimants unhappy with an Agency decision.

This would seem to be a reasonable decision were it not for s. 28(1) of the *Federal Courts Act*, which (confusingly) provides that the Federal Court of Appeal *does* have jurisdiction to entertain applications for judicial review of decisions made by the Agency.

This leads to a strange state of affairs: s. 28(1) of the *Federal Courts Act* purports to give the Federal Court of Appeal jurisdiction to entertain judicial review applications from Agency decisions, but the combined operation of ss. 40 and 41(1) of the *CTA* and ss 18.1 and 18.5 of the *Federal Courts Act* purport to take it away.

Perhaps the simple answer to this dilemma is that the Federal Court of Appeal's jurisdiction to entertain judicial review applications from Agency decisions continues to exist, but only to the extent necessary. At the moment, given the current provisions of the *CTA*, there is no way (or need?) for the Court to actually exercise its theoretical jurisdiction. However, that might one day change. Until then, however, litigants unhappy with a decision by the Agency must take heed that despite the language of s. 28(1) of the *Federal Courts Act*, they must follow the provisions of the *Canada Transportation Act* if they wish to challenge that decision.

Litigants who find themselves in such a situation should contact an experienced transportation lawyer for advice.

The Facts

The facts of this case are easily stated. On November 29, 2016, Robert Scott and other residents of the Mission Gardens neighbourhood in Winnipeg, Manitoba, filed an application with the Canadian Transport Agency (the "Agency") in regard to noise and vibration resulting from CN's railway operations on the Redditt Subdivision, west of CN's Transcona Rail Yard. Mr. Scott's position was that the noise levels caused by CN were not reasonable, and that consequently CN was not meeting its obligations under section 95.1 of the *CTA*, which provides:

> When constructing or operating a railway, a railway company shall cause only such noise and vibration as is reasonable, taking into account
>
> (a) its obligations under sections 113 and 114, if applicable;

> (b) its operational requirements; and
>
> (c) the area where the construction or operation takes place.

The Agency heard the matter and determined that, in fact, CN had caused unreasonable noise and/or vibration.

CN's Judicial Review

CN then launched a judicial review of the Agency's decision in the Federal Court of Appeal, taking the position that the Agency's decision was unreasonable. Pursuant to section 28(1) of the *Federal Courts Act*, the Federal Court of Appeal is given jurisdiction over judicial review applications from the Agency:

> 28(1) The Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review made in respect of any of the following federal boards, commissions or other tribunals:
>
> …
>
> (k) the Canadian Transportation Agency established by the *Canada Transportation Act*.

The Agency's Position

The Agency then obtained leave of the Federal Court of Appeal to intervene in the matter and make submissions. The Agency's position was that the Federal Court of Appeal did not have jurisdiction to entertain CN's judicial review application by virtue of other sections of the *Federal Courts Act*: sections 18.1 and 18.5, which provide:

> 18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.
>
> 18.5 Despite sections 18 and 18.1, if an Act of Parliament expressly provides for an appeal to the Federal Court, the Federal Court of Appeal, the Supreme Court of Canada, the Court Martial Appeal Court, the Tax Court of Canada, the Governor in Council or the Treasury Board from a decision or an order of a federal board, commission or other tribunal made by or in the course of proceedings before that before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act.

In this case, the Agency's position was that the "Act of Parliament" referred to in section 18.5 was the *CTA*. The operative provisions of the *CTA*, for purposes of this case, were sections 40 and 41(1), which provide as follows:

> 40 The Governor in Council may, at any time, in the discretion of the Governor in Council, either on petition of a party or an interested person or of the Governor in Council's own motion, vary or rescind any decision, order, rule or regulation of the Agency, whether the decision or order is made *inter partes* or otherwise, and whether the rule or regulation is general or limited in its scope and application, and any order that the Governor in Council may make to do so is binding on the Agency and on all parties.

> 41(1) An appeal lies from the Agency to the Federal Court of Appeal on a question of law or a question of jurisdiction on leave to appeal being obtained from that Court on application made within one month after the date of the decision, order, rule or regulation being appealed from, or within any further time that a judge of that Court under special circumstances allows, and on notice to the parties and the Agency, and on hearing those of them that appear and desire to be heard.

The Agency's main argument was simply that because ss. 40 and 41 of the *CTA* provided for other avenues of appeal in the case at bar (*i.e.* an appeal to the Federal Court of Appeal under s. 40 for issues of law or jurisdiction, or a petition under s. 41(1) to the Minister for issues of fact), section 18.5 of the *Federal Courts Act* therefore applied. Accordingly, the Agency's decision could not be entertained in the Federal Court of Appeal by way of judicial review.

The Decision

The Federal Court of Appeal agreed with the Agency and determined that it did not have jurisdiction to entertain CN's application for judicial review. Given that ss. 40 and 41(1) of the *CTA* provided for mechanisms by which CN could challenge issues of fact, law and jurisdiction (albeit through different channels), section 18.5 therefore operated to bar the Court from hearing judicial review applications directly. The Court observed that it would nonetheless be open to CN to bring a judicial review application in the Federal Court in the wake of a decision by the Governor in Council upon the bringing of a petition under s. 40, which could then be appealed to the Federal Court of Appeal. However, given the language of s. 18.5 of the *Federal Courts Act*, a direct judicial review was not permitted.

Accordingly, CN's application was dismissed. The Federal Court of Appeal did not entertain the merits of the application, and did not rule on the issue of whether CN had created unreasonable noise and/or vibrations in Winnipeg.

Was the Decision Correct?

On the one hand, it would appear that the Court's decision was correct. Section 18.5 of the *Federal Courts Act* clearly indicates that if another Act of Parliament provides for a route of appeal in respect of a decision of a federal board, commission or tribunal, then such decision is not subject to judicial review. In this case, given that ss. 40 and 41(1) do provide appeal routes, it would seem at first blush that Parliament did intend for s. 18.5 to bar judicial review applications in respect of Agency decisions.

Except for one thing.

The Court's decision does not appear to have expressly addressed section 28(1) of the *Federal Courts Act*, referred to above. That section is equally clear, and provides that "*the Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review made in respect of any of the following federal boards, commissions or other tribunals: […] (k) the Canadian Transportation Agency established by the Canada Transportation Act*; […]". [Emphasis added.]

The obvious issue is that the Court's decision in this case appears to render s. 28(1) meaningless. While s. 28(1) clearly gives the Federal Court of Appeal jurisdiction to entertain applications for judicial review, the import of this decision means that there are no issues that could ever be subject to judicial review. As the decision indicates, appeals involving errors of fact are to be appealed by way of petition to the Governor in Council under s. 40 of the *Canadian Transportation Act*, while appeals involving errors of law are to be brought under section 41(1) by way of a formal appeal in the Federal Court of Appeal.

So - what would be left for the Federal Court of Appeal to entertain by way of judicial review proceedings? The answer: almost certainly nothing…

It therefore appears that by virtue of the Court's decision in this case, the Federal Court of Appeal has theoretical jurisdiction to entertain judicial review proceedings in respect of the Agency's decisions, but, as long as sections 40 and 41(1) of the *CTA* "occupy the entire field" with respect to potential appeal routes that litigants may use to challenge the Agency's decision, the Court's theoretical jurisdiction will remain just that - theoretical. If and when those sections are repealed or amended, the Court's judicial review jurisdiction may come back into play.

Until then, it appears that the Federal Court of Appeal will not play a direct role in judicial review proceedings from Agency decisions for the foreseeable future, despite its formal capacity to do so.

James Manson

DISCLAIMER & TERMS

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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 the flying team depicted in photograph on page 10. Email your answer to info@fernandeshearn.com with a subject line "Newsletter contest". First response with the correct answer wins.