THE NAVIGATOR

IN THIS ISSUE

BILL C-86, *BUDGET IMPLEMENTATION ACT, 2018, NO. 2*

Bill C-86, *Budget Implementation Act, 2018, No. 2* (Bill C-86) recently introduced by the Canadian Federal Government received Royal Assent on December 13th, 2018. The Bill most importantly includes significant proposed changes to the *Canada Business Corporations Act* ("CBCA") to require private corporations (*1) to track and record individuals with "*significant control*" over such corporations. These changes are expected to come into force in the summer of 2019.

Who is an individual with "*significant control*"? This would include both registered holders and beneficial owners of:

1. shares representing 25% or more of a corporation's voting rights attached to all of the corporation's outstanding voting shares;

2. any number of shares that is equal to 25% or more of all of the corporation's outstanding shares measured by fair market value;

3. in addition, an individual with *"significant control"* includes any individual who has *"direct or indirect control or direction"* over such shares, that if exercised would result in control in fact of the corporation. This could take a variety of forms and would include:

> (a) each individual who, jointly with one or more other individuals, holds shares meeting the *"significant number of shares"* threshold;
> (b) each individual who, by an agreement to act together with one or more other individuals, jointly meets the *"significant number of shares"* threshold; and
> (c) individuals with the right to nominate or remove a majority of the board of directors (whether shareholders or not).

The register must also contain the name, date of birth, address, residence for tax purposes, and other prescribed information for each relevant individual. The register is required to be updated annually and corporations must also update the register within fifteen days of becoming aware of any information that is required to be recorded in the register.

FIRM AND INDUSTRY NEWS

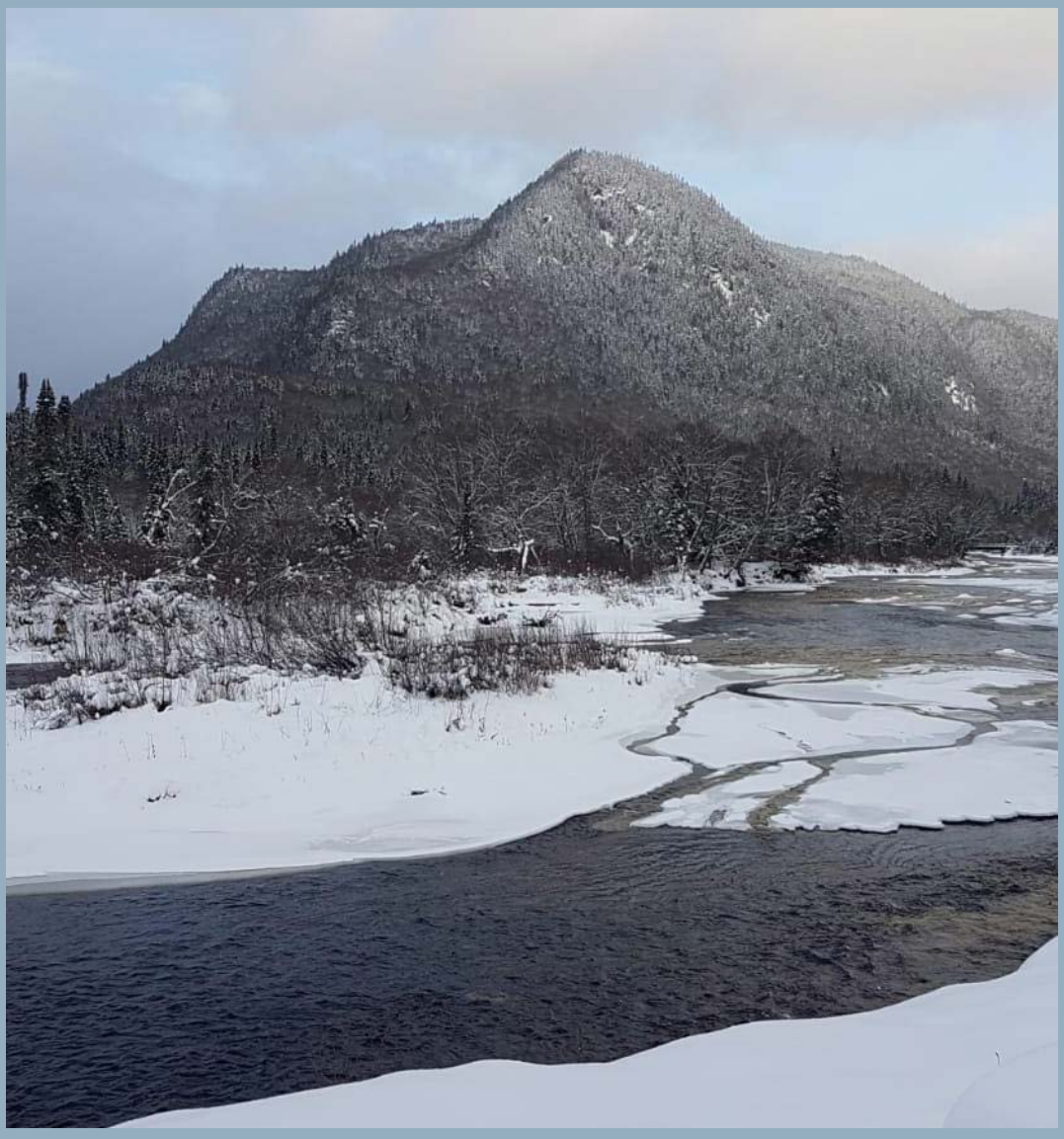
- The firm is pleased to announce that **Alan Cofman** and **Carole M. Wallace** have been become partners in the firm. We are also pleased to announce that **Robert Carillo** has joined the firm as a senior associate in business law.

- **Arctic Shipping Summit,** 13-14 March, 2019, Montreal, Canada.

- **Supply Chain Conference,** 19-21 March 2019, Atlanta U.S.A.

- **Gordon Hearn** will be presenting a paper on "International Trade: Trends and Developments from A Canadian Perspective" at the **Transportation & Logistics Council Annual Conference** being held on March 25, 2019 in Memphis, Tennessee.

- **Gordon Hearn** will be participating in a panel presentation entitled "Defending the Claim for Catastrophic Injury: Is There a Way Out Through Mediation?" **at the Transportation Intermediaries Association 2019 Capital Ideas and Exposition** on April 13, 2019 in Orlando, Florida.



The register will not be available to the general public; however, corporations will be required to disclose the register to the Director under the CBCA upon request. Shareholders and creditors of the corporation may also request access to the register. It is uncertain though to what extent an auditor can access the register while conducting its review of the financial statements of the corporation pursuant to section 170 of the CBCA.

A pro-active approach to these new changes is also required as they come with punitive penalties. Any director or officer of a corporation who knowingly authorizes, permits or acquiesces in recording of false or misleading information in the register can be subject to fines of up to $200,000 or imprisonment for a term of up to six months (or both). Similarly, a shareholder who knowingly contravenes its obligation to reply accurately and completely to a request for information from the corporation also commits an offense and can also be subject to fines of up to $200,000, up to six months of jail time (or both).

Bill C-86 is probably the first step until the various provincial and territorial corporate statutes are amended to reflect similar requirements.

Robert Carillo

Endnotes

(*1) Reporting issuers, corporations listed on a designated stock exchange and corporations of a “prescribed class” are not required to comply.

Introduction

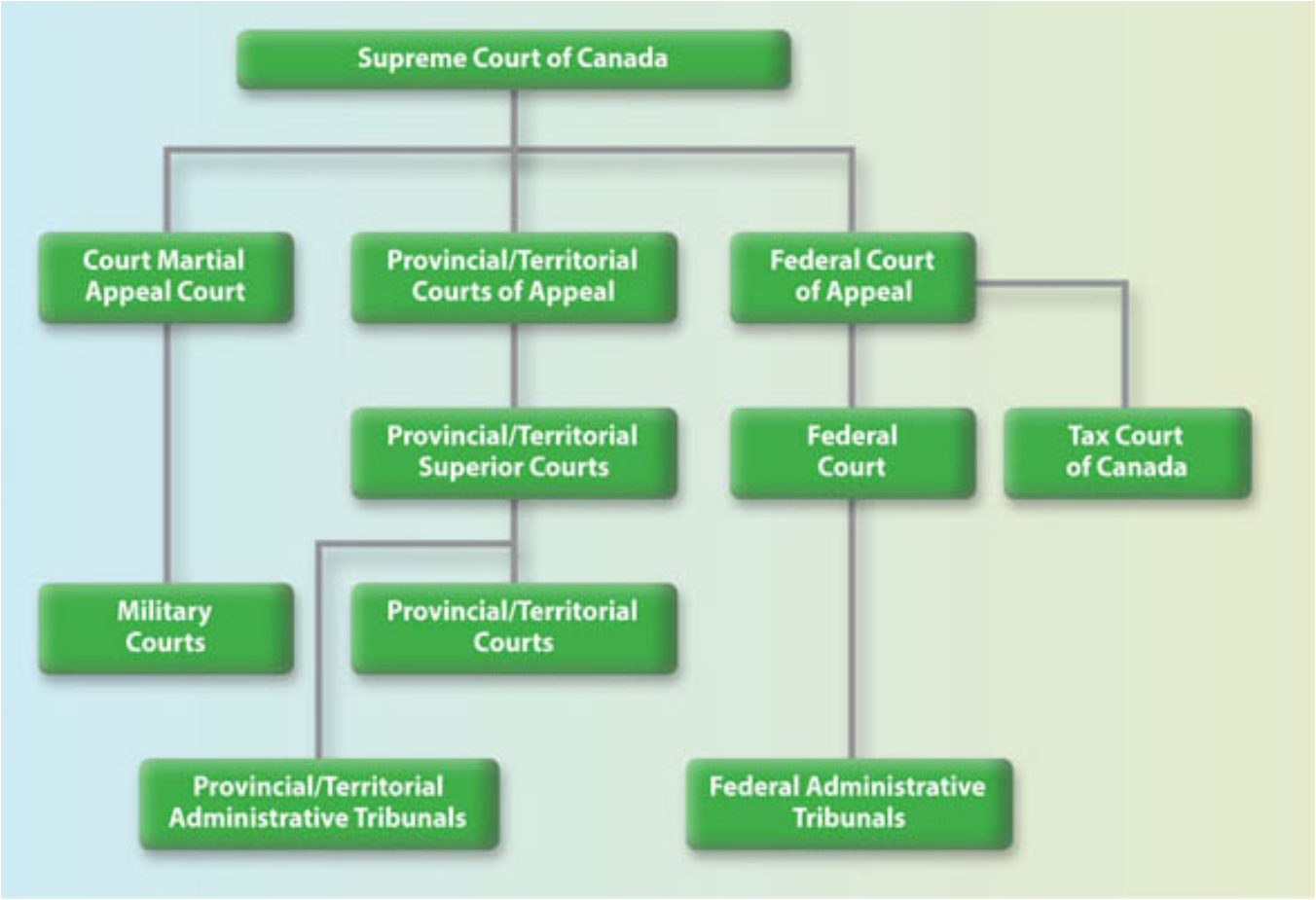
2. Doing Business in Canada – Part 17 – Litigation and ADR

Introduction

Under the *Constitution Act, 1867*, the Canadian judiciary is separate from and independent of the executive and legislative branches of government. This judicial independence is a cornerstone of the Canadian judicial system. Judges make decisions free of influence and based solely on fact and law. Judges are appointed for life. Canada has provincial trial courts, provincial superior courts, provincial appellate courts, federal courts and a Supreme Court. Judges are appointed by the federal or provincial and territorial governments, depending on the level of the court. Canada also has a robust alternative dispute resolution industry for the resolution of disputes outside the courtroom. Mediation is common in many parts of Canada and mandatory in some jurisdictions. Both institutional and ad hoc arbitrations are commonly employed in disputes.

Court Systems

The following is an outline of Canada's Court System.



The Supreme Court of Canada is Canada's final court of appeal with nine judges representing the four major regions of the country. Three must be from Quebec, to adequately represent the civil law system.

The federal government has established the Federal Court (which specializes in areas such as intellectual property, maritime and aviation law, federal-provincial disputes and civil cases related to terrorism), the Tax Court (which specializes in hearing appeals from tax assessments, and the Federal Court of Appeal which reviews the decisions of both these courts.

The court system is roughly the same across Canada. Except for Nunavut, each province has three levels: provincial and territorial, or lower, courts; superior courts; and appeal courts. The Nunavut Court of Justice has a single-level trial court.

Administrative boards and tribunals

There are disputes that are not dealt with in the courts in the primary instance. Different kinds of administrative tribunals and boards deal with disputes over the interpretation and application of laws and regulations, such as entitlement to employment insurance or disability benefits, refugee claims, and human rights.

Administrative tribunals are less formal than courts and are not part of the court system. However, they play an essential role in resolving disputes in Canadian society. Decisions of administrative tribunals may be reviewed in court to ensure that tribunals act fairly and according to the law.

Litigation Costs, Awards, Punitive Damages and Security for Costs

The general rule in Canada is that the successful party is entitled to be compensated for at least some of its legal costs (i.e. fees and disbursements) by the losing party. This rule applies to virtually all proceedings in Canadian Courts whether it be in respect of an interlocutory motion, a trial or an appeal. Depending upon the circumstances involved, the Court generally awards the successful party its legal costs on one of two scales: partial indemnity (i.e. approximately 35%-50% of actual legal costs), or substantial indemnity (i.e. approximately 60%-90% of actual legal costs). In making such orders for the payment of legal costs to the successful party, the Courts in Canada discourage frivolous proceedings and encourage litigants to make and to consider reasonable offers to settle.

Civil jury trials are rare in Canada as there is no such constitutional right. While a party may request a trial by jury, the Canadian courts have a broad discretion to refuse a party's request for trial by jury where it is felt that the issues are too complex or the other party might be prejudiced.

General damages for pain and suffering are capped. A party can reasonably expect to obtain on account of pain and suffering in a personal injury action to an amount less than CDN$350,000 (indexed to inflation).

Punitive damages are rare.

Foreign clients seeking to commence litigation in Canada should be aware of the fact that because successful litigants in Canada have a right to recover a portion of their legal costs if successful, a foreign litigant without assets in the Canadian jurisdiction in which the litigation has been commenced might be ordered by the Court to post security for the other party's costs of defending the proceeding. When ordered, the security is often posted by way of bond or payment (by lump sum or installments) into Court to be held by the accountant of the Court pending determination of the proceeding.

Civil Procedure

Civil procedure rules governing litigation in Canada allow for the exchange of pleadings, followed by an exchange of documents relevant to the dispute. Examinations for discovery (depositions) are permitted of single representatives of the parties only, except with leave of the court. Many cases in major urban

areas are case-managed by judges or court officials who attempt to ensure that cases move forward in an orderly fashion to trial.

Electronic Discovery

The discovery and production of electronically stored information, commonly called e-discovery, has become an increasingly significant issue in litigation across Canada. A national committee has produced the Sedona Canada Principles to establish national guidelines for electronic discovery. These guidelines are thought to be compatible with the rules of procedure in each of the Canadian territories and provinces.

Mediations

Mediation is negotiation between disputing parties, assisted by a neutral. While the mediator is not empowered to impose a settlement, the mediator's presence alters the dynamics of the negotiation and often helps shape the final settlement. The Canadian Bar Association defined mediation as "the intervention into a dispute or negotiation by an acceptable, impartial and neutral third party who has no decision making power, to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute" (in its Task Force Report on ADR in *Canada*, 1989).

Successful mediations result in a signed agreement or contract which prescribes the future behaviour of the parties; this is often called a memorandum of understanding. Such an agreement has the force of a contract and, when signed, becomes binding.

The characteristics of a mediation are: voluntary, non-coercive, assisted negotiation, informal confidential.

Arbitrations

Arbitration may be conducted under the administrative and supervisory powers of one of the recognized international arbitration institutes, such as the International Court of Arbitration of the International Chamber of Commerce in Paris, the London Court of International Arbitration, the American Arbitration Association or the ADR Institute of Canada. These bodies do not themselves render arbitration awards, but they do provide a measure of neutrality and an internationally recognized system of procedural rules.

Arbitrations have the advantage of being confidential and the procedure is selected by the parties. Generally, arbitrations are faster than the court system and there is generally no right of appeal from an arbitration award.

Each province has domestic arbitration statues in place as well as statutes for international arbitrations, with the exception of Quebec which does not have an international arbitration statute. Instead all arbitrations that take place in the province are subject to the provisions of the *Civil Code of Quebec*. Thus, for example, the province of Ontario has enacted the *Arbitration Act, 1991*, which governs domestic arbitration and the *International Commercial Arbitration Act, 2017* governing international commercial arbitrations. Virtually all of the provinces (except Quebec) have incorporated the UNCITRAL 1985 Model Law into their respective statutes. Ontario's incorporates the changes to the Model Law in 2006. The federal government legislation on international arbitrations governs arbitrations involving a department of the federal Crown, a Crown corporation or raising issues of maritime or admiralty law.

Class Actions

Class proceedings are procedural mechanisms designed to facilitate and regulate the assertion of group claims. Almost all Canadian provinces have class proceedings legislation. In provinces without such legislation, representative actions may be brought at common law.

Rui M. Fernandes

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

3. Accidents Involving Injuries or Fatalities: What to do?

Torontonians were saddened to learn that recently, a homeless woman sleeping in a downtown Toronto alleyway was struck and killed by a garbage truck as it made its morning rounds. This tragic news raises once again the issue of what transportation companies and drivers should do (and expect) when dealing with an incident involving a serious personal injury or fatality.

The first thing to bear in mind is that when serious injuries or fatalities are involved, the driver (and its employer) are at risk of being charged under various provisions of the Ontario *Highway Traffic Act* (or similar legislation in other provinces) and the *Criminal Code*. Obviously, charges under either statute can be very serious.

Under the Ontario *Highway Traffic Act*, a driver may be charged with "careless driving causing bodily harm or death", which carries a potential penalty of demerit points, a fine of between $2,000 and $50,000, or imprisonment of up to two years (or both), in addition to a potential five-year driver's license suspension. Under the *Criminal Code*, a driver may be charged with "dangerous operation of motor vehicles", which carries a harsher penalty: in the case of bodily injury, imprisonment of up to ten years; in the case of a fatality, imprisonment of up to fourteen years.

The (obvious) point is that when a serious accident involving bodily injury or death occurs, both drivers and employers need to take the matter *extremely seriously*.

The *Highway Traffic Act* requires drivers to report an accident that results in property damage or personal injuries to the nearest police officer. The police officer must then investigate the accident, and must obtain from the driver the particulars of the accident, the persons involved, the extent of the personal injuries and all other information that may be necessary to complete a written report.

Drivers who are in charge of a vehicle involved in an accident are also obligated to a) remain at or immediately return to the scene of the accident; b) render all possible assistance; and c) upon request, furnish their name, driver's licence number and jurisdiction, insurance policy details, and name and address of the owner of the vehicle.

However, drivers and employers should also be aware of the interplay between, on the one hand, the duty to report an accident and co-operate as described above by furnishing particulars, etc., and on the other hand, the rights of an accused person under the *Canadian Charter of Rights and Freedoms*. These include the right to remain silent, the right to counsel, and the right, upon being arrested, to be promptly informed of the reasons why.

Sometimes during an investigation, the police officer will form a belief that there is reason to believe that an offence has been committed by the driver under either the *Highway Traffic Act* or the *Criminal Code*. If that happens, the police officer must "caution" the driver (i.e. "read them their rights"). Generally speaking, this is the moment where the driver's *Charter* rights are engaged. From then on, the driver has the right to remain silent, and the right to speak with counsel, etc. If a caution is not properly given by the police, it might mean that any subsequent statement given by the driver is not admissible in evidence should the matter proceed to a criminal or quasi-criminal trial. However, if a caution is given, and the driver acknowledges understanding it but then proceeds to give damaging information (possibly out of fear or in an attempt to be helpful), then that evidence may well be used against the driver.

Thus, a very important event post-accident is the caution. Drivers should make every effort to write down ***where and when*** a caution was given to them, and ideally ***what exactly was said*** to the driver. If a caution is given, drivers should

bear in mind that anything they say from that point onwards could come back to haunt them later.

Ultimately, drivers are urged to do the following if they find themselves involved in an accident.

First, ***remain calm***. Try not to get upset or overly defensive. That won't help anything.

Second, ***report*** the accident immediately to your employer.

Third, ***report*** the accident to the nearest police officer and ***co-operate*** within reason with the investigation. This means answering the questions asked honestly and as simply as possible. Remember, there is no need to volunteer more information than is being asked.

Fourth, try to ***make notes or records*** of what happens during the investigation. Use your smartphone to take pictures, make recordings, write down notes, etc. If a police officer directs you not to do so, comply with such directions, but make note of who gave the directions, and when.

Fifth, be sure that you ***understand*** any questions being asked of you before answering. Do not say "I understand" if you do not understand what is going on!

Sixth, ***read everything carefully and make sure you understand everything before signing anything***! This is critical. Make a note of anything objectionable, and don't hesitate to ask for clarification - in writing, or on video, etc.

Finally, if the situation results in a police officer giving you a "caution", first, ***note down what was said, by whom, and when***. Next, ***do not say anything further or sign anything further***. Instead, ***call your employer immediately***. If your employer is not available, call a lawyer immediately. If you don't know a lawyer, ask to be given a lawyer's number immediately. If you are not sure whether you have been given a caution, do not hesitate to ***ask what your rights are and if you are being cautioned***.

Employers, meanwhile are urged to provide their drivers with means to contact employers for round-the-clock assistance and support. Should a driver report an accident involving serious injury or death, employers are urged to attend immediately at the scene of the accident in order to render such support and assistance to the driver as may be necessary.

James Manson

4. When Not to Enjoin: The Key to a Successful Injunction

When people believe they are being wronged by the conduct of others, one possible solution would be to turn to the law to get a court order restraining that conduct or forcing the wrongdoer to do something else. Such orders are called injunctions. A recent decision of the Federal Court helps to illustrate both how and why this remedy is infrequently given. Court orders to restrain wrongful conduct, while they can be both appropriate and necessary in the right circumstances, are for good reason difficult to obtain on an urgent basis. Looking at this recent case provides important lessons regarding when this remedy makes sense.

The facts and result in *Mercedes-Benz Financial Services Canada Corporation v. Maersk Line A/S* ("*Mercedes*") (*1) show us both when an injunction will, and when it won't, be granted. In *Mercedes*, six individuals separately bought Mercedes vehicles under conditional sales contracts, each of which contracts was assigned to the applicant, Mercedes Financial. Since money was still owing under the contracts, Mercedes Financial claimed that it had title to the cars. Further, the contracts didn't permit the transfer of interest in those cars to others, or their removal from Canada, without the consent of Mercedes Financial. Despite this, the cars were received by the respondent Maersk in Toronto and Montreal, loaded onto two of its vessels, and shipped to South Korea and China. The shipper was a numbered company that had allegedly purchased the vehicles. When Mercedes Financial discovered that the cars were apparently re-sold in breach of the sales contracts, it notified the police and Canadian Border Services Agency ("CBSA"), but by that point the cars were no longer in Canadian waters. By the time of the motion, they had been discharged in ports in Shanghai and Busan and remained in Maersk's custody.

Mercedes Financial was seeking the return of the vehicles to Canada by court order. It argued that, if they were not ordered to be returned, they might be permanently lost and needed to be returned so that the police could carry out necessary investigations of their alleged theft. There was indeed some evidence that the cars were stolen, and that the shipper company had misrepresented their ownership status to the CBSA. Mercedes Financial also argued that it had registered financing statements with respect to the cars, and that a simple search would have disclosed its ownership interest before they were shipped.

The Injunction

The order sought by Mercedes Financial was technically a "mandatory interlocutory injunction"; that is, as opposed to *restraining* someone from doing something (*i.e.*, ordering someone *not* to do something), they wanted Maersk to *do something*; that is, to deliver the cars back to Canada. In a prohibitory, or restraining, injunction, the three part test that the moving party must satisfy is: 1) to show that there is a "serious issue to be tried;" 2) show "irreparable harm" if the order isn't given; and 3) to show that, on a "balance of convenience," there will be more harm to the moving party if the order is not granted than to the responding party if it is. In this case, however, the motions judge noted that the Supreme Court of Canada had recently raised the bar for part 1) of the test where "mandatory" (*i.e.* "do something") orders were concerned. The moving party in such cases had to show, not just a serious issue, but that it had a "strong *prima facie* case" that it would succeed at trial (in other words, on the face of things the case appears strong and credible). (*2)

What not *to do*

There was nothing particularly special about the motion brought by Mercedes Financial. However, the poor grounds Mercedes Financial had for such a mandatory order is instructive about when one *shouldn't* seek an injunction.

Regarding the first part of the test – showing a "strong *prima facie* case" – Mercedes Financial erred in going after Maersk as a respondent. The Court noted that Maersk was merely a party of convenience, in that it had possession of the cars. It was thus in a position to deliver them back to Canada if the order was granted. That aside, Mercedes Financial faced a serious problem in that it had no real legal claim against Maersk. It raised only vague allegations that Maersk had not responded quickly enough to CBSA's request to return the vehicles. Maersk was not a party to any contract with Mercedes Financial, and there was no suggestion that it was involved in the alleged fraud regarding their sale. While injunctions can be made against third parties that in some way "facilitated" wrongful conduct, Mercedes Financial was not prepared to make this allegation against Maersk. Thus, there was anything but a "strong *prima facie* case" against Maersk.

Mercedes Financial had a similarly weak case on the second part of the test; "irreparable harm." The cars were hardly unique, and Mercedes Financial could, under its conditional sales contracts, seek compensation from the original purchasers of the cars, both because they were required to pay Mercedes Financial all amounts due if the cars were lost and stolen, and because they were required to insure the cars against the risk of theft. Mercedes Financial had a remedy against these parties whether the cars were stolen from their original purchasers or whether they were complicit in the alleged fraud. Whenever there is an obvious available route to compensation as an alternative to an injunction, "irreparable harm" is very hard to show.

Finally, Mercedes Financial did at least do something right with respect to the last branch of the test. Since it had offered to pay Maersk's costs of shipping the vehicles back to Canada, it relieved Maersk of any burden that might result from the granting of the requested order. The "balance of convenience," as was found by the Federal Court in this case, thus clearly favoured Mercedes Financial, as Maersk would not have been inconvenienced in any way. However, as the Court noted in dismissing the motion, the moving party must satisfy *all* branches of the test in order to succeed. Having fallen at the first two hurdles, Mercedes Financial necessarily failed.

Conclusion

Injunctions are attractive remedies. They can be obtained very quickly, and, in the right cases, they can stop a wrongdoer from continuing to cause harm, or sometimes force them to do something to fix a problem. As the *Mercedes* decision illustrates, however, they are not for all cases. Because they are typically sought early in a legal proceeding, before any of the merits are considered, courts apply a particularly strict test. Knowing when such an order will not be granted is important, and the *Mercedes* decision helps to explain this. It is a useful reminder of the basic principle that injunctions are, in a general sense, only appropriate for true emergencies.

Oleg M. Roslak

Endnotes
(*1) 2018 FC 1119
(*2) *Mercedes* at paras. 28 and 29.

5. Article 22(2) of Montreal Convention Interpreted by Divisional Court

The Divisional Court recently had the opportunity to interpret Article 22(2) of the Montreal Convention (*1) in the context of an appeal brought by Air Canada from a decision of the Small Claims Court (*2). Reported decisions on this provision are few and far between given that the majority of claims begin and end in the lowest level of court as damages are limited to 1,131 Special Drawing Rights ("SDRs"), which is approximately $2,160 CAD at the time of writing (*3).

In the facts of this action, the lead plaintiff, Mr. Naieni had travelled from Bogota, Columbia to Toronto with a connection in Miami. Mr. Naieni travelled with three family members. At the Bogota airport, Mr. Naieni checked eight pieces of luggage, with each being processed in his name.

Five out of the eights pieces of baggage were lost in transit. Four items were subsequently recovered and delivered to the Toronto airport; however, notwithstanding this, three of the four located pieces of luggage were never delivered to the plaintiff family.

The plaintiffs made a claim totaling $6,800 CAD, and the airline refused to honour the full claim of the basis of the limitation of liability at s. 22(2) of the Montreal Convention. The airline invoked the limitation of 1,131 SDRs on the basis that only Mr. Naieni had checked baggage and so he alone had standing to make claim, and his claim was so limited by the Montreal Convention.

At trial, the Deputy Judge of the Small Claims Court refuted the argument of the airline that the limitation at s.22(2) is determined by reference to the person(s) whose name(s) the baggage is checked under. The trial judge found in favour of the plaintiff and held that either (i) each of the plaintiffs had a claim for 1,131 SDRs/$2160 CAD, or (ii) Mr. Naieni had a claim for 4524 SDRs/ $8,460 CAD, of which three quarters was held in trust for the co-plaintiffs.

The airline appealed the court's judgment, and particularly (i) the award of quadruple the limitation amount; and (ii) the award of the default limitation of liability as liquidated damages. The appeal succeeded only on the second subsidiary ground.

Wilton-Siegel J. for the Divisional Court agreed with the Small Claims Court that the total limitation of liability for the plaintiffs' claim could not be restricted to the cap for one passenger. The judge reasoned that:

"Neither Art. 17(2) nor Art. 22(2) defines a passenger who has checked luggage for the purposes of these provisions. In particular, the Convention does not stipulate that a passenger must physically hand over his or her bag, being the bag in which his or her personal effects are packed, in order to assert a claim. Nor does the Convention provide that a passenger must obtain a luggage tag in the passenger's name in order to qualify as a passenger who checked baggage. In short, a passenger having a claim for lost baggage for the purposes of these sections is simply a passenger who can establish as a factual matter that he or she checked a bag containing his or her belongings which was lost while under the control of the carrier".

The Divisional Court found that there was no need to consider, as a matter of practicality, the arguments of the airline as to the alternative finding of liability of the carrier to Mr. Naieni only with a portion of the award to be held for his accompanying family members in trust.

The Divisional Court distinguished its decision from that of Divisional Court in *Holden v. ACE Aviation Holdings (*4)*, in which case there was a single piece of baggage checked between the two plaintiffs. The finding of the court in *Holden* that the claim was limited to a single passenger, and hence limitation quantum, was premised on the concept that two passengers cannot check the same bag.

The Divisional Court decision is the most practical and reasonable in the circumstances. When families travel together it is not necessarily within their control as to whose names the pieces of luggage are controlled, particularly at a foreign outstation, where there may be language barriers, it would not be unexpected to trust the airline attendant to allocate the bags to passengers on a single itinerary. In the alternative, the passengers may direct the check in of luggage to a certain traveler according to frequent flyer status or fare class; in this latter case, the equities are less apparent. The contents of family luggage may also very easily be comingled, which would present a further difficulty for the courts to unravel on a factual level for what are minor claims.

The Divisional Court did however agree with Air Canada that the trial judge erred in the quantum of damages. The plaintiffs had completed claim associated with their baggage and the total value of contents was $6,800. The judge therefore could not award a greater amount. The amount in SDRs stipulated at s.22(2) of the Convention is a limit and not a default quantum of damages in the event of lost luggage, the burden rests with the plaintiff to prove the actual value of contents.

Mark Glynn

Endnotes

(*1) *Convention for the Unification of Certain Rules for International Carriage by Air*, signed at Montreal on May 28, 1999, as implemented into Canadian law pursuant to the *Carriage by Air Act*, R.S.C. 1985, c. C-26

(*2) Decision of Ferranti DJ dated June 7, 2018 (unreported).

DISCLAIMER & TERMS

FERNANDES HEARN LLP

155 University Ave. Suite 700

Toronto ON M5H 3B7

416.203.9500 (Tel.) 416.203.9444 (Fax)

CONTEST

This month we are giving away a complimentary ticket for attendance at our annual seminar day - in 2020 in Toronto (date to be advised) - for the first individual to email us the name of the bird depicted in photograph on page 8. Email your answer to info@fernandeshearn.com with a subject line "Newsletter contest". First response with the correct answer wins.