THE NAVIGATOR

IN THIS ISSUE

PAGE 1
BC COURT OF APPEAL ALLOWS ANTI-ARBITRATION INJUNCTION

PAGE 2
FIRM AND INDUSTRY NEWS

PAGE 3
ANNUAL CONFERENCE

PAGE 4
THE FUTURE IS HERE CONFERENCE

PAGE 8
LOAD BROKERS' TRUST OBLIGATIONS PART 2

PAGE 14
SECURITIES LAWS UPDATE

PAGE 15
UPDATE ON CONFIDENTIAL RAIL CONTRACTS

PAGE 17
BC & ONT COURTS: COST PENALTIES TO INSURERS

PAGE 19
"PREMATURE COMMERCIALIZATION"

PAGE 21
AIR PASSENGER PROTECTION REGULATIONS PRIMER

PAGE 24
WHO'S HAULING YOUR CARGO?

PAGE 28
CONTEST

BC COURT OF APPEAL ALLOWS ANTI-ARBITRATION INJUNCTION

The decision of the British Columbia Court of Appeal, *Li v Rao*, 2019 BCCA 264 will be of interest to parties engaged in foreign arbitral proceedings. The Court ruled as to the validity of an injunction as a matter of contract law. The Court noted that the contractual basis for such an injunction is novel in Canadian law, but well established in English law, and found that there was no reason not to apply the English common law principles in Canada. In Canada, as in England, anti-arbitration injunctions awarded on the basis of a private contract will not be granted lightly, but only in exceptional circumstances.

Ms. Li, a resident of British Columbia, and Mr. Rao, a resident of China, met in August 2015 when Mr. Rao was on a trip to Vancouver. They commenced a romantic relationship. In September 2015, the parties discussed starting a real estate business together. Ms. Li incorporated a company for that purpose, which later came to be called LPP Properties Inc. ("LPP").

In October 2015, the parties executed an agreement, entitled the "Capital Increase and Share Expansion Agreement", whereby Mr. Rao agreed to invest $20 million in LPP in return for becoming a 50% shareholder in the company (the "LPP Agreement"). Ms. Li had invested $1,000 in LPP and was the other 50% shareholder.

The LPP Agreement contained a dispute resolution clause which provided that disputes under the LPP Agreement were to be submitted to the Shenzhen branch of the Chinese International Economic and Trade Arbitration Commission ("CIETAC") for final and binding arbitration and that Canadian law would be applied to disputes. Mr. Rao transferred a total of $17.65 million to LPP between January and May 2016.

On April 10, 2016, the parties underwent a marriage ceremony in Las Vegas, Nevada. Mr. Rao was already married at that time and he continued to be married to his first wife throughout. Ms. Li asserted that she was unaware that Mr. Rao was already married. (continued page 5)

FIRM AND INDUSTRY NEWS

- **WISTA International Conference**, October 29 to November 1, Cayman Islands.
- **Fort Lauderdale Mariner's Club Seminar** October 28-29, Fort Lauderdale, Florida
- **United States Maritime Law Association Fall Meeting,** October 29 to November 2, Scottsdale Arizona. **Rui Fernandes** and **James Manson** will be attending representing the firm.
- **CILTNA Fall Outlook Conference,** November 4, Ottawa.
- **HWY H20 Conference,** November 12-14, Toronto.
- **ISB Global Services Biz and Breakfast Seminar**, November 13, Mississauga, **Kim Stoll** is a speaker on the Legal Update Panel.
- **Passenger & Commercial Vessel Association Annual Conference**, November 26-28, Ottawa. **Rui Fernandes** will be attending and participating on a panel on insurance.
- **28th Latin American Congress of Ports**, November 19-21, Miami Florida.
- **Boating Ontario Conference** November 25-27, Niagara Falls. **Rui Fernandes** and **Kim Stoll** are speakers on the Legal Update Panel
- **World Rail Festival,** December 3-5, Amsterdam.
- **Canadian Board of Marine Underwriters Annual Conference & Dinner,** December 3, Toronto.
- **Toronto Transportation Club Annual Dinner,** December 5th, Toronto.
- **Grunt Club Annual Dinner,** December 6th, Montreal.
- **Port Performance North America,** December 10-11, Newark, New Jersey.

FERNANDES HEARN ANNUAL CONFERENCE FEBRUARY 10, 2020

Location: The Advocates' Society Education Centre
250 Yonge Street, Suite 2700 Toronto
Cost: $70.00 - Includes light lunch and materials (by download)
Registration: Marianne Sheldrake, Fernandes Hearn LLP 416-203-9620 and email to: info@fernandeshearn.com
Send cheques to: Fernandes Hearn LLP,
155 University Ave. Suite 700, ON M5H 3B7
Limited to 120 attendees RIBO Accreditation (applied for): 6.5 Technical hours
By Invitation only.

Program:

8:30am – 8:45am	Registration and Coffee
8:45am – 9: 00am	Welcome Remarks *Rui Fernandes*
9:00am -10:00am	Freight Forwarders and Load Brokers: Risks and Opportunities Demurrage, Limitation of Liability *Gordon Hearn*
10:00am – 10:45am	Cross Border Law Suits – Minimizing Opportunists Jurisdiction Clauses, Arbitration Clauses, Law Clauses, Extreme Contracts *Rui Fernandes*
10:45am – 11:00 am	*Coffee*
11:00am – 11:30am	Independent Contractors/Employees/Dependent Contractors/Driver Inc. *Carole McAfee Wallace*
11:30am – 12:00pm	Cannabis Opportunities and Risks *Kim Stoll*
12:00pm - 1pm	Lunch
1:00pm – 1:45 pm	Customs and New CBSA Rules *Mark Glynn* *Tracy McLean*
1:45pm – 2:15pm	Transport Canada Initiatives *Alan Cofman*
2:15pm – 2:30pm	*Coffee*
2:30pm – 3:15pm	St. Lawrence Seaway /Polar Transit Risks *James Manson*
3:15pm – 4:00pm	Energy Projects – Obstacles and Risks *Robert Carillo*

THE FUTURE IS HERE CONFERENCE - FEBRUARY 11, 2021

For Registration:
Contact Marianne Sheldrake
Telephone: 416-203-9500 Ext. 248
Email: marianne@fernandeshearn.com
Cost: $125.00 includes lunch and cocktail party
Location: Ontario Bar Association
200-20 Toronto Street, Toronto Ontario

8:30 am	**Registration and Coffee**
8:40 am	**Welcome**
8:45 am	**Opening Remarks**
9:00 am	**Future of Litigation and Dispute Resolution** Access to Justice, Our Current Court System, Arbitration, A.I. and the Law
9:45 am	**A.I., Autonomous Vehicles Vessels and Drones –** Autonomous Vehicles/Vessels/Aircraft/Drones
10:45 am	**Coffee**
11:00 am	**Blockchain Unchained**
11:30 am	**Cyber Risks, Cyber Attacks and Insurance**
12:00 am	**Protecting Intellectual Property in a New World**
12:30 pm	**Lunch** **Luncheon Speaker**
1:30 pm	**International Trade Issues – The Future is Canada's** CETA, NAFTA, CITT, Customs Issues
2:30 pm	**Coffee**
2:45 pm	**Food, Water and Air Safety**
3:30 pm	**Conscious Capitalism, Ethics and Diversity**
4:30 pm	**Cocktail Party**

In September and October 2016, Mr. Rao borrowed $16 million from LPP and executed two promissory notes in favour of LPP. The promissory notes directed that $10 million was to be paid to the parties' joint account and $6 million into Ms. Li's personal account.

The parties' romantic relationship ended in the fall of 2016 when Ms. Li asserted she first learned that Mr. Rao was still married to his first wife. After the romantic relationship ended, a series of proceedings were commenced in British Columbia and China.

On December 5, 2016, Mr. Rao commenced a civil action against LPP and Ms. Li in British Columbia, seeking return of the $17.65 million he transferred to LPP, or alternatively, a declaration that Ms. Li held the funds in trust for him (the "Civil Action"). His notice of civil claim did not disclose his status as a shareholder of LPP or his past romantic relationship with Ms. Li.

On January 24, 2017, Ms. Li filed a notice of family claim seeking, among other things, spousal support, 100% reapportionment in her favour of all property in British Columbia and an order that the $17.65 million transferred to LPP was not subject to exclusion (the "Family Proceeding"). Mr. Rao filed a counterclaim, alleging that Ms. Li held various assets in trust for him.

In the Civil Action, Ms. Li filed an application for summary judgment returnable April 12, 2017. Mr. Rao obtained an adjournment of this application.

In June 2017, Mr. Rao commenced arbitration with CIETAC in June 2017 (the "CIETAC Arbitration"). As with the Civil Action, when Mr. Rao commenced the CIETAC Arbitration, he did not mention the parties' relationship history or the promissory notes executed in favour of LPP. On July 24, 2017, counsel for Mr. Rao wrote to counsel for Ms. Li, advising that the CIETAC Arbitration had been commenced, enclosing a copy of the filed petition for arbitration and inquiring whether they would accept service for Ms. Li.

Ms. Li's lawyers accepted service on her behalf on two conditions: First, Mr. Rao was not to take any further steps in the CIETAC proceeding (or require Ms. Li to) until the Court had ruled on Ms. Li's summary judgment application. Second, Ms. Li's acceptance would not prejudice any rights she may have had to argue against the jurisdiction of the CIETAC or the validity of the CIETAC proceeding itself. Mr. Rao agreed to these conditions (the "Standstill Agreement").

On the surface, this case appears to pit the jurisdiction of a foreign arbitration panel against that of a domestic court. Mr. Rao argued that, on the well-accepted doctrine of "competence-competence", the arbitral panel could rule on its own jurisdiction in the first instance. The Court of Appeal did not view the issue that way, however. The Court held that the ruling of the Chambers Judge concerned the actions of the litigants between themselves, which was validly within the Court's jurisdiction. The Court noted:

> I accept that courts should exercise caution before granting any injunction affecting the conduct of foreign proceedings whether those be judicial or arbitral in nature. Courts should pay due regard to the objectives of arbitration before granting an anti-arbitration injunction, just as they must pay due regard to comity before granting an anti-suit injunction. On the other hand, neither comity nor the objectives of arbitration justify exceptional diffidence where the injunction is based on a breach of contract, i.e., on a party's own conduct.[paragraph 73]
>
> As I have said, an injunction of the sort granted by the chambers judge, based on a breach of contract, operates personally against a litigant over which the British Columbia court has *in personam* jurisdiction. It does not engage the jurisdiction of the foreign court or tribunal. The contract based injunction does not involve a decision upon the jurisdiction of the foreign arbiter, but an

> assessment of the conduct of the relevant party in invoking that jurisdiction, that is, whether to enforce a promise freely made. [paragraph 74]

Mr. Rao argued that an anti-suit injunction is an extraordinary remedy and there was no case law supporting the granting of an anti-suit injunction to enforce a contract. Ms. Li pleaded that while no Canadian court has considered whether a litigant can be enjoined from proceeding in a foreign jurisdiction in breach of a forum selection agreement in favour of a Canadian court, it is well-established in English law that an anti-suit injunction is available to enforce a forum selection agreement. She argued that this law should be adopted in Canada and that an anti-suit injunction to enforce the Standstill Agreement could be granted on this basis.

The Court noted that the leading Canadian case on anti-suit injunctions, is *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, 1993 CanLII 124 (SCC), [1993] 1 S.C.R. 897 ("*Amchem*"). The case concerned an anti-suit injunction issued in British Columbia that prevented the appellants from pursuing an action against the respondents in Texas for damages from injuries caused by exposure to asbestos.

In *Amchem*, the Supreme Court of Canada discussed two remedies that control a party's choice of forum: a stay of proceedings and an anti-suit injunction. A stay of proceedings enables the forum chosen by the plaintiff (i.e., the domestic forum) to stay the domestic action at the request of the defendant if it is satisfied that the case should be tried elsewhere. An anti-suit injunction may be granted by the domestic forum at the request of a party in a foreign suit. Such an injunction is typically applied for by the plaintiff in a domestic action to restrain the domestic defendant from commencing or continuing a proceeding in a foreign court.

While a stay of proceedings and an anti-suit injunction both concern selection of the appropriate forum for resolving a dispute, they have a crucial difference. With a stay of proceedings, the domestic court determines for itself whether it should take jurisdiction. With an anti-suit injunction, the domestic court can be said to "in effect" determine jurisdiction for the foreign court. While an anti-suit injunction operates personally on the plaintiff in the foreign suit, rather than on the foreign court itself, it has the effect of restraining continuation of a proceeding in the foreign court. Given the effect on a foreign court, anti-suit injunctions raise issues of comity. In light of the comity concerns, the Supreme Court held that a court should only entertain an application for an anti-suit injunction if a serious injustice will occur because of a failure of a foreign court to decline jurisdiction. In order to determine whether failing to decline jurisdiction results in a serious injustice, it is necessary to consider whether the foreign court departed from the Canadian test for *forum non conveniens* to a sufficient extent.

The B.C. Court of Appeal, however, noted that no Canadian court appears to have yet considered whether to grant an anti-suit injunction to enforce a forum selection agreement made in favour of a domestic court. Canadian courts have only granted anti-suit injunctions on the "interests of justice" basis developed in *Amchem*, applying the principles of *forum non conveniens.* The Court noted that in England, however, courts routinely grant both stays of domestic proceedings and anti-suit injunctions to enforce forum selection agreements. Thus, there are two grounds on which an anti-suit injunction may be granted in England: a non-contractual ground that is analogous to *Amchem* and a contractual ground, holding:

> …there is no reason for this Court not to adopt the English approach and grant anti-suit injunctions on a contractual basis in appropriate circumstances. I see no principled reason why an anti-suit injunction should not be granted to hold parties to their agreements concerning forum selection in the absence of strong reasons to the contrary. Although issues

> of comity arise with any anti-suit injunction given the effect of an anti-suit injunction on a foreign court, in my view, comity concerns are less significant where the ground for imposing the injunction is contractual. Under the contractual ground for an anti-suit injunction, a court is not deciding that the domestic forum is the more appropriate forum; it is enforcing the parties' contractual agreement to proceed in the domestic forum, in the absence of strong reasons not to. In this respect, it is the parties' agreement, rather than a discretionary decision of the domestic court, or a commentary on the appropriateness of proceeding in a foreign court, which is the foundation of the remedy. [paragraphs 56, 57].

The B.C. Court of Appeal held that no strong cause existed to support the conclusion that it would be unreasonable or unjust to require Mr. Rao to adhere to the terms of the Standstill Agreement and not proceed with the CIETAC Arbitration until the B.C. Supreme Court ruled on the extant applications. The Court found there were good reasons to enforce the Standstill Agreement.

The Court of Appeal dismissed the appeal and upheld the Chambers Judge's ruling. The case should not be seen as undermining foreign arbitrations. The Court was fully alive to the principle of primacy of arbitration, noting at page 73 that "Courts should pay due regard to the objectives of arbitration before granting an anti-arbitration injunction, just as they must pay due regard to comity before granting an anti-suit injunction. On the other hand, neither comity nor the objectives of arbitration justify exceptional diffidence where the injunction is based on a breach of contract, i.e., on a party's own conduct."

Rui Fernandes

2. Load Brokers' Trust Obligation under the Ontario *Highway Traffic Act* - PART 2

Last month in *The Navigator*, Part 1 in this two-part series examined the trust obligation in the context of priority disputes.

Review of the Trust Obligation

By way of review, as mentioned in Part 1, Ontario continues to be the only province in Canada requiring that persons who arrange for carriage, typically load brokers or "load arrangers", must hold "in trust" any freight charges earmarked for the associated carriers.

Prior to the enactment of the current *Highway Traffic Act* ("HTA") (*1) provisions, carriers were frequently at the mercy of unscrupulous or eventually insolvent load brokers that had already received freight payment from the shipper, but had failed to pay the carrier.

To combat this problem, the *Load Brokers Regulation* (Ontario Regulation 556/92) under the former Ontario *Truck Transportation Act* (*2) was enacted to regulate the activities of load brokers. Regulation 556-92 required load brokers to register with the Ministry of Transportation, to obtain and maintain a surety bond and to hold "in trust" those funds that a load broker owed to carriers for freight charges. To most carriers, this regulation was ineffective, especially given the lack of enforcement by the Ministry of Transportation.

Deregulation efforts saw the repeal of the Ontario *Truck Transportation Act* and Regulation 556/92 as of January 1, 2006. One provision of the *Load Brokers Regulation* was reborn as part of the *Highway Traffic Act,* specifically, Section 191.0.1(3) for the trust fund requirement, applying to all "persons" (which arguably may include any carrier who sub-brokers a load). This section continues to be important as a tool for carriers to collect freight charges (particularly in bankruptcy and insolvency situations) though there continues to be no regulatory "teeth" to enforce such trust provisions in the normal every day course of business. The trust protection afforded to carriers regarding freight owed by Ontario-based load brokers is based on an honour system.

The Legislation – The Statutory Trust

> Contracts of carriage
>
> **191.0.1** (1) Every contract of carriage for a person to carry the goods of another person by commercial motor vehicle for compensation shall contain the information required by the regulations and shall be deemed to include the terms and conditions set out in the regulations. 2002, c. 18, Sched. P, s. 34.
>
> **. . .**
>
> Money for contract of carriage held in trust
>
> (3) A *person who arranges with an operator to carry the goods of another person, for compensation and by commercial motor vehicle, shall hold any money received from the consignor or consignee of the goods in respect of the compensation owed to the operator in a trust account in trust for the operator until the money is paid to the operator.* 2002, c. 18, Sched. P, s. 34.
>
> Other rights unaffected
>
> (4) *Nothing in subsection (3) derogates from the contractual or other legal rights of the consignor, the consignee, the operator or the person who arranged for the carriage of the goods with respect to the money that is held in trust under that subsection.* 2002, c. 18, Sched. P, s. 34.
>
> (emphasis added)

Can the Parties Contract out of the HTA Trust Obligation?

There is a paucity of case law whether parties can agree not to be bound by the HTA trust obligation and, in fact, there is very little treatment on interpreting contracts of carriage in Ontario on the whole. The Court in the next case noted that this issue had not been judicially considered and, other than this case, has not since been judicially considered to the writer's knowledge.

In *E-Conomy Finance Group Ltd. v FLS Transportation Services Inc. 2016 CanLII 30099* (Ont Sm Cl Crt), the Court reviewed regulation 643/05 under the HTA. Section 4(2) of that regulation provides that certain uniform conditions of carriage are "deemed" to be terms and conditions of every contract to which that section applies. Uniform condition 5 provides, in part, that a carrier shall not be liable for damage to goods caused by an act or default of the consignor, owner or consignee.

The Court held that the "deeming" provisions in this section were not conclusive but presumptive only, which presumption can be displaced if some other state of affairs is proven to be the case, including by contracts entered into by the parties.

> Regarding the wording of subsection 191.0.1(4) of the HTA, the Court held that the wording was clear on its face that nothing in the trust requirement in subsection (3) derogated from the rights of the parties under contracts entered into by those parties. The Court declined to exercise the defendant's contractual set-off right under their carrier agreement because of findings of fact made on liability in the case.
>
> Whether or not parties can contract out of these statutory provisions in Ontario seems to be just a little less muddy at this point, though it would appear that such contracting out should be possible given the wording of 191.0.1(4) supported by the fact that Ontario has freedom of contract.

Personal Liability of Directors and Officers for Freight Charges

As it happens, there is one more avenue that might be helpful in situations where the carrier is left unpaid by the insolvent or unscrupulous load broker or load arranger. This avenue involves consideration of the trust and the exposure of the individual to liability. Success will depend very much on the facts.

Personal liability of directors of closely held corporations for breach of trust by the corporation was considered by the Supreme Court of Canada in *Air Canada v. M&L Travel Ltd.,* [1993] 3 SCR 787 ("*Air Canada*").

Iacobucci J. for the Court held, at page 26,

> "..whether personal liability is imposed on a stranger to a trust depends on the basic question of whether the stranger's conscience is sufficiently affected to justify the imposition of personal liability"

There are two bases on which personal liability can attach:

> (1) As trustees *de son tort,* where such persons, "although not appointed trustees, 'take on themselves to act as such and to possess and administer trust property" Trustees *de son tort* are personally liable only if he or she "commits a breach of trust while acting as trustee".
>
> (2) Strangers to the trust knowingly participate in a breach of trust. This basis of liability is established where a person is either "in receipt and chargeable with trust property" in his or her personal capacity (referred to as "knowing receipt") or is "knowingly assist[ing] in a dishonest and fraudulent design" (referred to as "knowing assistance") (at p. 28).

> Knowing assistance may be proved by actual knowledge, recklessness, or willful blindness (at p. 29). If a trust is created by statute, the trustee "will be deemed to have known of it" (at p. 30).
>
> Receipt of a benefit as a result of the breach of trust "may ground an inference that the stranger knew of the breach", but this is neither a sufficient nor a necessary ground (at p. 30).

There were two lines of cases with respect to the "knowing assistance" branch: one requiring fraudulent and dishonest conduct, and the other requiring only innocent or negligent breach of trust if the person knowingly assisted in that breach of trust. Iacobucci J. held, at p. 42, that "a stranger will be liable if he or she knowingly assisted the trustee in a fraudulent and dishonest breach of trust", so, therefore, "it is the corporation's actions which must be examined."

Iacobucci J. referred to *Scott v. Riehl* (1958), 15 DLR (2d) 67 (BCSC) where the directors of the defendant corporation failed to comply with the statutory trust in the *Mechanics' Lien Act, 1956,* SBC 1956, c. 27. Funds payable to the corporation were deposited into one bank account that was always overdrawn. The director and president of the corporation knew that monies deposited should not be used for the general purposes of the company in abuse of the trust. The Court found that the corporation was the instrument of its operation, but the defendant was the director and the acts of the corporation, while not physically his, were entirely directed by him. The director received a benefit from this breach of trust of payment of his salary out of the account into which these trust funds were paid. In such circumstances, not only the principal, but also the agent was liable.

Iacobucci J. also referred to *Wawanesa Mutual Insurance Co. v. J.A. (Fred) Chalmers & Co.* (1969), 7 DLR (3d) 283 (Sask. QB) where the defendant corporation was under a statutory obligation to hold premiums in trust for the insurer. The defendant corporation collected insurance premiums and deposited them into its general account from which office expenses and salaries had been paid. The personal defendant also transferred funds between two of his businesses. The judge held that the conversion of the trust funds to other purposes was a wrongful or illegal act or series of acts and that the breach was inspired and directed by the personal defendant who made all the corporate decisions. The personal defendant was found liable for the plaintiff's loss.

The proper description of fraudulent and dishonest conduct is, therefore, the taking of a risk to the prejudice of another's rights, which risk is known to be one, which there is no right to take. Iacobucci J. held, at page 43, that the taking of a knowingly wrongful risk resulting in prejudice to the beneficiary is sufficient to ground personal liability.

With respect to the knowledge requirement, Iacobucci J. held, at page 44, that such requirement would not generally be a difficult hurdle to overcome in cases involving directors of closely held corporations because they, if active, usually have knowledge of all of the actions of the corporate trustee. Where the personal defendant knew that the trust funds were being deposited in the general bank account, this constituted actual knowledge of the breach of trust.

Personal Liability of Directors and Officers For Freight Charges

(a) *Sager Transport Ltd. v. Varga Trucking Ltd.,* [2004] OJ No 4923 ("*Sager*")

Sager considered the issue of whether the HTA trust obligation can be imposed personally on directors and officers of a load broker. The defendant, Varga Trucking (operated by its principals Dennes and Candace Varga), occasionally operated as a load broker by "double-brokering" loads to other carriers. The Court held that monies paid to Varga by various shippers did not go to pay the plaintiff carrier

Sager's invoices, but rather went to the "ultimate benefit" of the personal defendants.

Justice Harris referred to *Commercial Union Life Assurance Company of Canada v. John Ingle Insurance Group Inc. et al.* (2002), 61 OR (3d) 296 (CA) where Weiler J.A. held that the personal defendant not only had knowledge of the breach of trust (as majority shareholder of the corporation, as the person who directed that the premiums be withheld, and who "benefitted significantly" from the withholdings by developing the business) but "as the directing mind… participated or assisted in the breach of trust" (at para. 72). Weiler J.A. also held that if a statutory trust exists, the corporation is deemed to have knowledge that the monies are to be held in trust because it is deemed to have knowledge of the law.

Weiler J.A also referred to *Wawanesa,* noted above, that was referred to by the Supreme Court in *Air Canada* for the proposition that "liability for breach of trust is not confined to express trustees, but extends to all who are actually privy to the breach", where the breach of trust was "inspired and directed by [the personal defendant] who made all the corporate decisions" (at para. 74).

Justice Harris, (at para. 12), referred to *Air Canada* for the proposition that:

> "Irrespective of good faith or intent, in an instance where a corporation had a duty to pay out funds from the designated proceeds but such proceeds were used for other purposes, the directors were held personally liable because they had a duty to see that the funds were used for the agreed upon purpose and they could not excuse themselves on the grounds that they did not dissipate or misappropriate the funds nor were they, in other respects, derelict in their duties."

The judgment was given against the corporate and personal defendants for breach of the statutory trust.

(b) *Sunbelt Transport Inc. v. Bonair Logistics Inc.* (2006), 2006 CanLII 5460 (ON SC), 17 B.L.R. (4th) 131 (Ont. S.C.J.)

In this case the plaintiff moved unsuccessfully for summary judgment against the sole director and officer of the load broker.

Applying *Air Canada v. M & L Travel Ltd.*, noted above, the Court observed that the director's evidence of his non-involvement in the routine business of the corporation had not been contradicted and that the plaintiff's position amounted, in essence, to holding the director personally liable simply because he was the sole director and president.

The Court considered *Sager*, noted above, as proof of the proposition that the directors of the load broker could be held personally liable on the basis that they had a duty to ensure that the funds were used for their proper purpose. However, as the trust funds in *Sunbelt* were distributed to entitled carriers other than the plaintiff, and because the defendant director of the load broker was not personally involved in the business of the defendant, Sager was distinguished on the basis that the two directors in that case had been found to have substantial involvement in the corporation's affairs.

(c) *4 Star Courier & Logistics Inc. v Domino's Pizza Canadian Distribution ULC,* (2012), 6 BLR (5th) 132, 219 ACWS (3d) 839 (Ont Sm Cl)

In this Ontario Small Claims Court case, Deputy Judge Winny also held that the statutory trust obligation imposed on load brokers could be extended to directors of the corporation if the requirements in *Air Canada*, noted above, could be made out. The Court confirmed that *Air Canada* applied to deemed statutory trusts such as with s. 191.0.1(3).

The Court stated that the HTA trust obligation is not one imposed on the directors personally. The Court also vigorously critiqued *Sager*, noted above, and held, that while directors could be personally liable for the breach of a load broker's

statutory trust if certain factors exist, the suggested presumptive liability or reverse onus regarding the director's personal liability, as found in Sager, was contrary to the appellate jurisprudence.

The Court ultimately dismissed the case on the basis that there was no evidence that 4 Star's director knowingly assisted in the breach of the trust obligation.

Despite dismissing the action for evidentiary reasons, an identical conclusion about the state of the law as concerns load brokers was also made *in Travelers Transportation Services Inc. v 14155557 Ontario Inc.* 2011 ONSC 44, 197 ACWS (3d) 276.

(d) *Tripar Transportation LP v. U.S. Consolidators Inc., Linda Earle-Barron and Jonathan Turner,* heard August 2012 Court file SC-1100001987-0000 (Brampton) (unreported)

In this Ontario Small Claims Court case, a carrier sued a load broker along with its three officers and directors for a number of unpaid invoices.

The broker had not held any freight charges due to the carrier segregated and "in trust" as is required pursuant to the HTA trust obligation. The broker was insolvent and was no longer operating. The personal defendants defended on the basis that they were not liable for the obligations of the load broker as it was an incorporated company.

The trial judge held that the load broker had committed a breach of the HTA trust obligation. The load broker, via the evidence of the personal defendants at trial, admitted that the work was performed and invoiced by the carrier, monies were received from the various shippers and deposited into a general account and not a separate trust account. From that account, other creditors of the load broker (including rent and payroll) were paid before the carrier's obligations. The Court found that because the funds were deposited into a general account and not segregated into a specifically designated trust account was, in itself, an act of a breach of trust, as was remittance of those trust funds to entities other than the carrier beneficiary. The broker had subsequently become insolvent and had no assets with which to satisfy any creditor or any judgment for the unpaid invoices.

Per *Air Canada,* the Court further held that two of the three corporate directors and officers "knowingly assisted" the corporation in its breach of trust. To prove "knowing assistance", the directors and officers were required to have actual knowledge (or be reckless or willfully blind) of the corporation's breach of trust and that the disbursal of trust funds was in breach of trust.

The Judge imposed personal liability upon two of the corporation's three directors and officers for the corporation's breach of trust as each was personally aware of the corporation's breach of the statutory trust given their intimate knowledge of the day to day running of the corporation and were aware of the details of the broker corporation's accounts.

One director had received trust funds directly from the subject general account pursuant to a contractual agreement and the other director had authorized payment of the trust funds to other creditors despite the requirement that they were to be held in trust. This latter director received a salary and certain benefits paid from the general account and admitted that he and the other director knew that the funds received by the shippers as payment for freight were to be paid to Tripar, but that Tripar remained unpaid. The directors, therefore, not only were deemed to be aware of the trust obligation imposed by the HTA and that such disbursal of funds was in breach of the statutory trust, but they were also were found to be fully aware of the broker corporation's breach of trust.

Does the Debt Arising from Breach of Trust Survive Personal Bankruptcy?

While the focus here is not on this issue nor are the comments meant to be exhaustive or to delve into a discussion of constructive trust, it bears

considering that Section 178(1)(d) of the *Bankruptcy and Insolvency Act* ("BIA") could, depending upon how the trust funds were managed, operate to block the discharge of such a debt arising out of a fiduciary capacity.

Section 178(2) of the BIA establishes that an order of discharge releases a bankrupt from all claims provable in bankruptcy subject to subsection (1).

Section 178(1) of the BIA provides several exceptions to the rule, at Section 178(2), that a discharge releases the bankrupt from all claims provable in bankruptcy. The only potentially applicable exception is at Section 178(1)(d), which provides that "[A]n order of discharge will not release a bankrupt from any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity…"

While fraud and embezzlement may be more obvious on the evidence, the issue may often become whether the co-mingling and misuse of the trust funds were a "misappropriation or defalcation" of the funds subject to the trust.

The British Columbia Court of Appeal, in *Valastiak v Valastiak*, 2010 BCCA 71, 3 BCLR (5th) 1, considered the meaning of "misappropriation" as used under the BIA. Reviewing the jurisprudence in British Columbia, the Court, at paragraph 31, held that "misappropriation", as opposed to being mere mismanagement, is characterized by "some element of wrongdoing, improper conduct or improper accounting." Accordingly, the Court went on to find that the bankrupt's use, "as a personal piggy bank", of property held in trust by his closely-held corporation amounted to a wrongful use of trust property that triggered Section 178(1)(d) of the BIA.

This interpretation has been positively received in Ontario, including by the Court of Appeal for Ontario in *Korea Data Systems (USA) Inc. v Aamazing Technologies Inc.* 2015 ONCA 465, 126 OR (3d) 81, where the Court held that Section 178(d) must be construed narrowly and that its focus is on debts incurred by the bankrupt breaching a fiduciary obligation to the creditor.

Finally

It is clear from all of the above that, in any event, the HTA trust obligation should likely be directly addressed in the drafting of the terms of any transportation agreement.

Kim E. Stoll
Follow Kim on LinkedIn and at url: linkedin.com/in/kim-stoll-transportationlaw

Endnotes
*(*1) R.S.0 1990 c. H8, as amended*
*(*2) R.S.0 1990 c. T. 22, repealed January 1 2006*

3. Securities Laws Updates

The Canadian Securities Administrators ("**CSA**") recently published for comments proposed amendments to National Instrument 51-102 Continuous Disclosure ("**NI 51-102**") and its companion policies related to the business acquisition report requirements for reporting issuers that are not venture issuers. These proposed amendments are part of the CSA's efforts to reduce the regulatory burden on non-venture reporting issuers by limiting the requirements for filing a business acquisition report. Business acquisition reports provide investors with relatively timely access to historical and often *pro-forma* financial information on a significant acquisition (*1).

It appeared however in response to CSA Consultation Paper 51-404 (*2) that the business acquisition report was of limited value to investors and CSA thus concluded that such burden on non-venture reporting issuers may not be generating relevant information to investors' decision-making process. Currently, an acquisition of a business, or related businesses, is a significant acquisition that requires the filing of a business acquisition report if it triggers any one of the three significance tests we already mentioned: the asset test, the investment test and the profit or loss test. The proposed amendments will modify the rules from an any-one-of-three test to at least two of the tests to be met in order for an acquisition of a business, or related businesses, to be considered significant.

Under the proposed amendments, the 20% significance threshold for non-venture reporting issuers shall be increased to 30%. CSA's objective is to reduce the regulatory burden for non-venture reporting issuers without compromising investor protection.

CSA is expecting additional comments regarding above by December 4th, 2019.

Robert Carillo

Endnotes

(*1) A reporting issuer that is not an investment fund must file a business acquisition report after completing a significant acquisition. For a non-venture reporting issuer, if the results of any one of the three significance tests (the asset test, the investment test and the profit or loss test) set out in NI 51-102 exceeds 20 per cent, the acquisition is considered significant.

(*2) https://www.osc.gov.on.ca/en/SecuritiesLaw_csa_20170405_51-404_considerati

4. La Cour d'Appel du Québec Confirme Que Les Transporteurs ferroviaires ne Peuvent Exclure Toute Responsabilité par Contrat Confidentiel

*The Quebec Court of Appeal upheld a trial level decision finding that a clause in a confidential agreement between a rail company and a shipper was void for wholly excluding liability of the rail company for damages contrary to the Canada Transportation Act (*1), albeit with nuanced reasons.*

La partie demanderesse, assureur de Bombardier, a déclenché cette action subrogatoire contre la compagnie de chemin de fer Canadian National Railway (« CNR »), afin de se faire indemniser pour les pertes résultant des dommages subis par des wagons de métro, au cours d'un déraillement survenu lors d'un transport ferroviaire.

CNR et Bombardier avaient conclu un contrat confidentiel, signé par Bombardier, qui excluait toute responsabilité de CNR qui aurait pu résulter du transport des wagons de métro. Le contrat avait été signé en juillet 2009, donc postérieurement à ladite perte, qui avait eu lieu en avril 2009. Devant la cour, CNR avait nié toute responsabilité, en invoquant la clause d'exonération de responsabilité.

Lors du procès, en 2017, la Cour Supérieure du Québec a accueilli la demande de l'assureur (*2). Courchesne J.C.S. a rejeté les prétentions de CNR. La juge a décidé que le contrat confidentiel gouvernait les relations entre les parties. Nonobstant le fait que le contrat avait été signé après la perte, le contrat précisait expressément qu'il s'appliquait à tout transport de wagons en 2009. Par ailleurs, le contrat était substantiellement conforme aux contrats conclus par les parties en 2007 et 2008.

Cependant, la juge a ensuite décidé que les dispositions de l'accord concernant l'exonération de responsabilité violaient la *Loi sur les transport au Canada* (*3), et plus particulièrement l'article 137(1) de cette Loi. A l'époque de l'incident, cet article disposait que :

> « La compagnie de chemin de fer ne peut limiter sa responsabilité envers un expéditeur pour le transport des marchandises de celui-ci, sauf par accord écrit signé soit par l'expéditeur, soit par une association ou un groupe représentant les expéditeurs ».

Selon la Cour Supérieure, cet article ne permet aux transporteurs ferroviaires que de limiter leur responsabilité, et non pas de l'exonérer complètement.

CNR s'est pourvue contre ce jugement de première instance, qui l'avait condamnée à payer plus de 600.000$ en dommages-intérêts à l'assureur de Bombardier.

La Cour d'Appel du Québec a rejeté l'appel et a confirmé le jugement de première instance (*4). Toutefois, le raisonnement de la Cour d'Appel était légèrement différent de celui de la juge Courchesne.

La juge d'appel, Hogue J.C.A., s'est exprimée pour un banc unanime. Elle a expliqué que contrairement au raisonnement du juge d'instance, la source du droit des transporteurs ferroviaires leur permettant de limiter leur responsabilité, n'est pas l'article 137(1) de la Loi, mais plutôt son article 126(1)(e) qui dispose que :

> « Les compagnies de chemin de fer peuvent conclure avec les expéditeurs un contrat, que les parties conviennent de garder confidentiel, en ce qui concerne
> […] (e) les conditions relatives au transport à effectuer par la compagnie, notamment les sommes à payer par la compagnie ou l'expéditeur en cas de non-respect de toute condition liée aux obligations visées à l'alinéa d) ».

Selon la juge., l'article 137(1) ne fait que préciser une condition de forme, à savoir que l'accord limitant la responsabilité du transporteur doit être écrit et signé par l'expéditeur.

Nonobstant ce point de distinction, la Cour d'Appel a conclu que, vu sous les auspices de l'article 126(1)(e), l'effet et le résultat sont toujours les mêmes, et donc que l'article 126(1)(e) de la Loi ne permet pas une exonération totale de responsabilité par le transporteur.

La cour a aussi traité d'un argument que l'effet de cette distinction est arbitraire dans la mesure ou une compagnie ferroviaire ne peut jamais exclure sa responsabilité, mais pourrait la limiter à un dollar. Hogue J.C.A. a employé une logique pragmatique, en déclarant que la clause de limitation de responsabilité à 1$ serait traitée en justice comme une clause d'exonération de responsabilité et que la cour ne serait pas bernée par une telle rédaction spécieuse.

Malgré la différence de réflexion théorique entre les juges des deux instances, le point essentiel à retenir de la décision d'appel est toujours le même : un transporteur ferroviaire n'a pas le droit d'exclure sa responsabilité entièrement (ni de la limiter à une somme nominale) pour le transport de fret.

Mark Glynn

(*1) *Canada Transportation Act* (S.C. 1996, c. 10)
(*2) *Ace European Group Ltd. c. Canadian National Railway Company*, 2017 QCCS 2531
(*3) *Loi sur les transports au Canada* (L.C. 1996, ch. 10)
(*4) *Canadian National Railway Company c. Ace European Group Ltd.,* 2019 QCCA 1374

5. BC and Ontario Courts Disagree on Costs Penalties to Insurers for Improperly Denying Coverage

It is longstanding law in Ontario, for almost 20 years, that an insurer found to have wrongly denied coverage must pay elevated costs to its innocent insured. In 2000 and 2003, in its decision in *Godonoaga (Litigation Guardian) v. Khatambakhsh* (*1) and *E.M. v. Reed* (*2), respectively, the Ontario Court of Appeal held that an insurance contract was a unique type of contract, entitling the insured to expect to be "held harmless" (*i.e.* to full indemnification).

In 2006, *Reed* was followed by the Newfoundland and Labrador Court of Appeal in *Lombard General Insurance Co. of Canada v. Crosbie Industrial Services Ltd*.(*3) However, two recent decisions of the BC Court of Appeal have recently, explicitly, refused to follow the Ontario case law.

In *West Van Holdings Ltd. v. Economical*, West Van Lions Gate Cleaners – a dry cleaner in operation since 1976 – and West Van Holdings Ltd. – a related company, which owned the land did battle against their insurers, Intact and Economical.(*3) The West Van companies had been sued by an adjacent landowner for property damage arising because of underground contaminants. Both Intact and Economical denied that they had a duty to defend the underlying action because their policies had included limitations on damage arising because of "pollutants".

At a summary trial in *West Van*, the Honourable Madam Justice DeWitt-Van Oosten found in chambers that both exclusionary provisions were ambiguous. Thus, she found in favour of the West Van companies. On the question of costs, Her Ladyship found that the Plaintiffs were entitled to solicitor-client (*i.e.* elevated) costs (now called "special costs" in BC), following the logic of the Honourable Mr. Justice Fitzpatrick in *The Co-Operators General Insurance Company v. Kane*: "Simply put, where the [insurance] policy intended full indemnity in relation to defence costs, it follows that any expenditure by the insured in enforcing that objective would, if successful, be followed by a costs award that similarly achieved that objective…"(*4)

The Honourable Mr. Justice Goepel, on behalf of a panel of three appeals justices, found that the claims against the West Van companies were clearly not covered. He found that they were either beyond the scope of the initial grants of coverage or they were addressed by the exclusionary language. Thus, it was not strictly necessary for him to address the costs issue. He did anyway, at length.

His Lordship found that costs should be consistent and predictable across the gamut of cases before the court. Given that party-and-party (partial indemnity) costs were the default option under the *Supreme Court Civil Rules*, and, given the need for parties to be able to forecast costs with some degree of predictability, he disagreed with the Honourable chambers judges. Elevated "special" costs ought only to be awarded in cases of reprehensible conduct worthy of sanction or where there is a justifiable reason for it, such as a contractual agreement.

Goepel J.A. noted that most of the case law submitted by the West Van companies were from Ontario, including *Godonoaga* and *Reed* (*5) and he distinguished them. In the end, his Lordship found that "costs are not a remedy for breach of contract" and that the special nature of insurance contracts does not justify the creation of a different costs regime. He went so far as to find that other British Columbia jurisprudence following the Ontario line of cases were "wrongly decided".

More recently, in *Blue Mountain Log Sales v. Lloyd's Underwriters*, Madam Justice Dickson wrote on behalf of another unanimous panel of three appeals justices.(*7) In that case, the insured Plaintiff, Blue Mountain Log Sales, had been sued in Washington State for allegedly having misappropriated and marketing a formula for the treatment of wood products. Her Ladyship upheld a decision that the insurer had a duty to defend in the circumstances of its policy.

As the Petitioner was successful in the *Blue Mountain* case, the costs issue was live. Her Ladyship followed the Court's decision in *West Van* and substituted an order for ordinary costs with an order for special (substantial indemnity) costs.(*8)

Thus, two influential courts of appeal are at odds. Be on the lookout for the Supreme Court of Canada to address the issue when the opportunity next arises!

Alan S. Cofman

Endnotes
(*1) (2000), 50 O.R. (3d) 417 (C.A.).
(*2) (2003), 49 C.C.L.I. (3d) 57 (Ont. C.A.), ref'd leave to appeal, [2003] S.C.C.A. No. 334,
(*3) 2006 NLSCA 55.
(*4) 2019 BCCA 110.
(*5) 2017 BCSC 1720.
(*6) His Lordship also referred to *Markham General insurance Co. (Liquidator) v. Bennett*, 23 C.B.R. (5th) 203 (Ont. S.C.J.) and *Hoang v. The Personal Insurance Co*., 2017 ONSC 4193.
(*7) 2019 BCCA 240.
(*8) *NB*: the underlying Petition in *Blue Mountain* was decided prior to the reason released in *West Van*. In fact, the underlying decision in *Blue Mountain* was criticized in *West Van* as having been wrongly decided.

6. Is "Premature Commercialization" a Thing?

"Maybe" is the answer recently delivered by the Court of Appeal for Ontario. In its just released decision in *Darmar Farms Inc. v Syngenta Canada Inc. ("Darmar Farms")* (*1), the Ontario Court of Appeal allowed the appeal of Darmar Farms Inc. ("Darmar") in a novel class action case brought against Syngenta Canada Inc., a seller of a genetically modified form of corn seed known as Agrisure. Darmar had claimed it was damaged by the marketing of Agrisure in Canada because failure to obtain regulatory approval in China before 2014 resulted in a ban on the import of Canadian corn into the Chinese market until that time. The successful appeal meant that Darmar's interesting claim for damages could go forward, as the appeal overturned the motion judge's decision that Darmar had failed "to disclose a reasonable cause of action" (*2)

"Premature Commercialization"

In its action against Syngenta, Darmar had alleged it was damaged by Syngenta's misrepresentations and its "premature commercialization" of a genetically modified seed. In short, Darmar argued that Syngenta knew or ought to have known that introducing this form of seed into the Canadian market before it obtained approval for sale in major export markets would result in import bans in those markets. As one of those markets was China, the predictable import ban had the effect of significantly reducing demand for Canadian corn, causing economic losses to Darmar and other members of the proposed class who could not sell their corn there.

What makes the claim brought by Darmar an intriguing one was that it had at no time been a customer of Syngenta, nor did it ever use the genetically modified seed, Agrisure. In its claim Darmar alleged, for one, that Syngenta had made negligent misrepresentations to customers in its advertising; specifically, that it exaggerated how quickly the process for Chinese regulatory approval would proceed. Darmar claimed that it relied on these representations in buying non-genetically modified corn, and that it would have planted other crops had the statements about the timing of Chinese regulatory approval been accurate. Although Darmar did not buy the modified seeds, it argued that the corn industry was so "interconnected and interdependent" (*3) that the seed would inevitably be intermingled with other corn products, leading to a blanket ban on imports into the Chinese market, impacting non-genetically modified corn as well.

The Court of Appeal ultimately agreed with the motions judge regarding the misrepresentation claim as having no chance of success, however. It noted that Darmar first needed to establish that it fell within the scope of proximity in which the statements of Syngenta were made. To answer this question, the purpose of Syngenta's representations was critical. Darmar alleged that the purpose of the representations made by Syngenta was to "encourage further sales" of Syngenta's product. Darmar had alleged that it relied on these representations, not to buy the product, but in planting ordinary corn. While Darmar may well have purchased ordinary corn for planting in reliance on these representations, that Darmar might do so was not "reasonably foreseeable" by Syngenta, and therefore the court rejected this as a viable cause of action. It concluded that "in an interconnected and interdependent market, a representor's duty does not extend to reliance on its representations by a market member for purposes other than those for which the representations were made" (*3).

The Court took a different view of Darmar's "premature commercialization" claim. Darmar had also argued that, because of the interconnectedness and interdependence of the industry, it was foreseeable to Syngenta that its actions in bringing Agrisure to market early would cause damage to growers like Darmar, even if no misrepresentations had been made. In looking more favourably on this cause of action, the Court of Appeal was admittedly influenced in no small measure by the fact that a parallel and broadly similar action had recently been permitted to proceed in the United States (*4).

Just as influential, however, was that fact that the court had recognized such a duty of care in somewhat similar circumstances in its decision in *Sauer v. Canada (Attorney General)* (*5).

The *Sauer* case involved the sale of cattle feed from Alberta contaminated with mad cow disease into the Ontario market. Just like in *Darmar Farms*, *Sauer* involved a plaintiff that had not purchased the tainted feed but was clearly affected by it when the introduction of the feed in Ontario resulted in global import bans. In *Sauer*, similarly, the Court found it was not "plain and obvious" that there was insufficient proximity between the non-customer cattle farmer and the sale of the contaminated feed. In that case, also, the Court stressed the "integrated" nature of the industry as creating a relationship of sufficient proximity so as to find a duty of care (*6).

Conclusion

What will ultimately result from the *Darmar Farms* case is far from certain. At this stage, all that the Court found was that, as pleaded, it was not certain to fail. Syngenta still will advance a defence that the claim threatens to create indeterminate liability, and it may finally prevail on this point. *Darmar Farms* highlights a trend, however, in that the courts are more open to entertain claims of damage from plaintiffs that had no direct relationship with a seller because of the "interconnectedness" of various industries and global markets. As the world becomes ever smaller, industries would be wise to look more broadly at how their actions might negatively impact seemingly remotely connected actors.

Oleg M. Roslak

Endnotes
(*1) 2019 ONCA 789 [*Darmar Farms*].
(*2) *Darmar Farms* at para. 5.
(*3) *Darmar Farms* at para. 70.
(*4) *In re Syngenta AG MIR 162 Corn Litigation* (2015), 131 F. Supp. 3d 1177 (D. Kan).
(*5) 2007 ONCA 454 [*Sauer*].
(*6) *Darmar Farms* at para. 78.

7. Canada's New *Air Passenger Protection Regulations* – A Primer (Part I)

Earlier this year, the federal government enacted the *Air Passenger Protection Regulations*, SOR/ 2019-150 (the "*APP Regs*"), pursuant to the *Canada Transportation Act*, S.C. 1996, c. 10 (the "CTA"). This is the first in a series of articles intended to outline these new regulations and what they mean for air passengers in Canada.

The *APP Regs* impose certain minimum requirements on airlines, including standards of treatment and, in some situations, compensation for passengers. The *APP Regs* deal with the following matters:

- Communication
- Delayed or cancelled flights
- Denied boarding
- Tarmac delays
- The seating of children under 14
- Lost or damaged baggage
- Transportation of musical instruments

On July 15, 2019, the *APP Regs* dealing with communication, denied boarding, tarmac delay baggage and transportation of musical instruments came into force. The remaining *APP Regs* will only come into force on December 15, 2019. (*1)

Application of the APP Regs

The *APP Regs* are intended to apply to all flights to, from and within Canada, "including connecting flights". (*2) This means that the *APP Regs* will apply to a flight between two points outside of Canada as well, as long as (1) it connects with a flight to or from Canada, and (2) the flight in question is part of a single through fare. By way of example, if a passenger pays two separate fares for two separate flights (even if they are grouped together and sold by a travel agency), then the *App Regs* would not apply to the separate flight that operates outside of Canada.

The *APP Regs* apply to all airlines, "large" and "small". However, different requirements for compensation and rebooking apply to "small airlines". The regulations define "large airline" as an airline that has transported at least two million passengers in each of the two preceding years. All other airlines are considered "small airlines".

Clear Communication

The *APP Regs* require that passengers be informed of their rights in a timely, clear and accessible way. Airlines now have to provide passengers with information in simple, clear and concise language regarding their terms and conditions of carriage for:

- Flight delays and cancellations
- Denial of boarding situations
- Lost or damaged baggage
- The seating of children under 14 years old (*3)

Airlines must also provide information on the treatment of passengers and minimum compensation owed by the airline (and the recourse against the airline available to passengers, including recourse to the Canadian Transportation Agency) in simple, clear and concise language. (*4)

The *APP Regs* also require the following notice to be made available on all digital platforms that an airline uses to sell tickets and on all documents on which the passenger's itinerary appears:

> "If you are denied boarding or your baggage is lost or damaged, you may be entitled to certain standards of treatment and compensation under the *Air Passenger Protection Regulations*. For more information about your passenger rights please contact your air carrier or visit the Canadian Transportation Agency's website."(*5)

All airlines operating a flight to or from an airport in Canada must display the above notice at the check-in desk, self-service machines and boarding gate. (*6)

All of the above information must now be provided electronically (i.e. on the airline's website), and also on all travel documents that the airline provides to passengers. This could be done via a "hyperlink" mechanism taking the passenger to the airline's website. Airlines must also make reasonable efforts to ensure that official ticket resellers provide this information to passengers. (*7)

The above information must also be accessible to persons with disabilities. Where information is provided digitally, the format will have to be compatible with adaptive technologies used by persons with disabilities. If the information is provided in paper format, the airline will have to be able to provide it in large print, Braille or a digital format, upon request. (*8)

Assignment of Seats to Children Under 14

The *APP Regs* also require airlines to make efforts to assign seats to children under 14 in close proximity to their parent, guardian or tutor. Where an airline assigns seats before check-in, it must assign a seat before check-in to a child that is in close proximity to their parent, guardian or tutor. Where an airline does not assign seats before check-in, the airline must assign the seat at the time of check-in. If this is not possible, then the airline must ask for volunteers to change seats at the time of boarding and again before take-off, if necessary. (*9)

In the case of a child who is 4 years old or younger, the seat assignment must be adjacent to the seat of the parent, guardian or tutor. In the case of a child who is 5 to 11 years old, the seat assignment must be in the same row as the parent, guardian or tutor and separated by not more than one seat. In the case of a child who is 12 or 13 years old, the seat assignment must be in a row that is separated by not more than one row from the seat of the parent, guardian or tutor. (*10)

If the seat assignment is in a lower class of service than what a passenger's ticket provides, the airline must reimburse the difference in cost between the classes of service. (*11)

Lost or Damaged Baggage

Under international treaties to which Canada is a party, airlines can be held liable for baggage that is damaged, delayed or lost during *international* travel, up to approximately CAD$2,100. The *APP Regs* extend this liability up to the same amount for baggage that is lost, delayed or damaged during *domestic* flights too. (*12)

If a passenger's baggage is valued at more than the above monetary limit, the passenger may, prior to boarding, ask the airline for a special declaration of interest. If the airline agrees, it will then be liable for the agreed-upon amount. The airline, however, may charge a supplementary fee. (*13)

A passenger must file a claim for expenses with the airline in order to receive compensation. For damaged baggage, the claim must be submitted within 7 days after the passenger receives the damaged baggage. For potentially lost baggage, the claim must be submitted within 21 days after the day it was supposed to arrive. (*14)

Airlines are also obligated to reimburse passengers any baggage fees charged to the passenger if their baggage is damaged or lost. (*15)

Transporting Musical Instruments

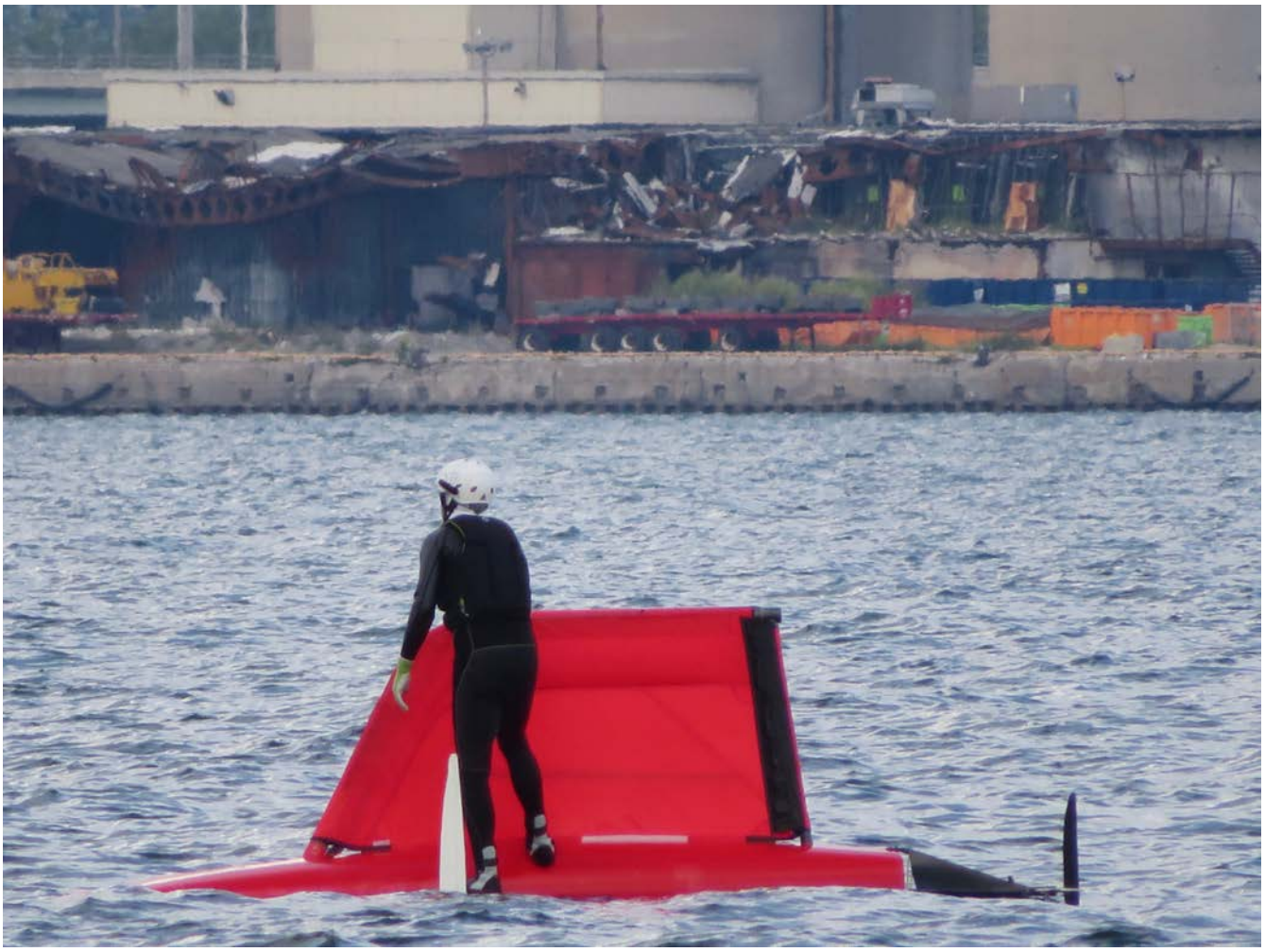
The *APP Regs* require airlines to accept musical instruments as checked or carry-on baggage, unless accepting an instrument would be contrary to the airline's general terms and conditions in its tariff with respect to the weight or dimension of baggage, or safety. (*16)

Airlines must also establish terms and conditions with respect to musical instruments that may be carried in the cabin, or that must be checked. These terms and conditions include restrictions on size and weight, quantity, use of stowage space in the cabin, fees for transporting instruments, and passenger options if, because a flight will occur on a different aircraft than expected, there is insufficient stowage space in the cabin. (*17)

The next installment in this series will focus on the *APP Regs*' provisions concerning denial of boarding, tarmac delays and other flight disruptions.

James Manson

Endnotes
(*1) See the *APP Regs*, section 46.
(*2) CTA, section 86.11(1).
(*3) *APP Regs*, section 5.
(*4) *APP Regs*, section 5(3).
(*5) *APP Regs*, section 5(5).
(*6) *APP Regs*, section 7(1).
(*7) *APP Regs*, sections 5(2) and 5(4).
(*8) *APP Regs*, section 5(6).
(*9) *APP Regs*, section 22.
(*10) *APP Regs*, section 22(2).
(*11) *APP Regs*, section 22(3).
(*12) *APP Regs*, section 23.
(*13) Article 22, section 2 of the *Convention for the Unification of Certain Rules for International Carriage by Air* (the "*Montreal Convention 1999*"), set out at Schedule VI of the *Carriage by Air Act*, R.S.C., 1985, c. C-26.
(*14) Article 31, section 2 of the *Montreal Convention 1999*.
(*15) *APP Regs*, sections 23(1)(a) and 23(2)(a).
(*16) *APP Regs*, section 24(2).
(*17) *APP Regs*, section 24(1).



8. Who's Hauling Your Cargo? - Managing Risk and Unintended Consequences

Transparency and control are important in managing the carriage of goods from origin to destination. In recent years we've seen an increase in the so-called "double brokering" of goods, whereby a carrier delegates or assigns the carriage of goods that it undertook to carry to another carrier. The shipper or broker who assigned the load to the first carrier may not have intended this to be the case. As explored below this practice may lead to negative unintended consequences for parties in the supply chain. The practice of "double brokering" is now so prevalent that it is now arguably incumbent on a shipper or a broker assigning a load to a carrier to expressly prohibit that practice from taking place should it be the intention that only the assigned carrier should perform the move.

A court may in any event protect the shipper's interest of having a right of claim for cargo loss or damage with the party that it has a direct contract with. The terms of the shipper's engagement of a carrier (or for that matter, of a broker who assumes carrier liability for the safe delivery of cargo) will invariably provide that that first "downstream" service provider will be liable to the shipper for cargo loss and damage claims. This notwithstanding, when a load is "double brokered" or "brokered out" by the entity who was expected to perform the haulage the resulting lack of transparency and control over who is actually hauling the freight may cause negative unintended consequences:

1. While the shipper or broker may initially engage a reputable carrier known to them to haul freight, should the latter in turn "broker out" or sub-contract a load to a third party carrier (who may for that matter pass the load onto yet another carrier…) in the event of a road casualty causing injury or loss of life to third parties or their property they, their estates or their insurers as the case may be might seek to "go up the supply chain" for recovery of damages. The performing carrier – who may not be known to the shipper or broker – may be inadequately or not insured. Questions may be raised concerning who selected the carrier who is alleged to have caused the accident in question. Were they properly "vetted"? Who allowed them to handle the cargo? Was there negligence involved in the selection process (or the lack thereof)? The shipper or broker might find themselves embroiled in litigation that would not have happened had the "intended" carrier been hauling the cargo. (*1)

2. Shippers are, of course, supposed to pay freight charges to brokers, or to their carrier as the case may be. It is self-evident that, as layers of players and intermediaries are introduced, the chances of a failure in payment by someone in the chain of intended invoicing and payment may take place. Shipper "A" is expected to pay a freight invoice to Broker "B", or perhaps to Carrier "B" where a load broker is not involved. Broker "B" will, acting as such, have engaged Carrier "C" and be expected to pay that carrier's invoice.
Suppose Carrier "C" has engaged performing Carrier "D" to haul the cargo. After the goods are delivered, "D" invariably invoices "C", who invoices "B", who in turn invoices "A". What happens if "A" and "B" comply in paying the respective invoices submitted to them, but "C" fails and does not pay "D"? Where is "D" to go for payment? "D" may file claims against the shipper at origin, or a buyer at destination. Whether "D" has a right to claim or not there may be a negative commercial effect from the standpoint of the "upstream" originating shipper or broker. The shipper may be a seller of goods. The consignee may be its buyer. Under the relevant terms of sale, the shipper may have had a delivery obligation of getting the goods to the buyer's "door". That buyer may be upset with the shipper should the buyer be the recipient of an

unpaid freight claim from a carrier – especially if the purchase price to be paid by the buyer contains a freight cost component. If a broker was involved, the shipper may be upset with the broker for not having controlled the equation: *why did you allow "C" to allow "D" to carry the freight?* (*2)

3. The element of control over who handles cargo and the related need for transparency in the supply chain is also important to reduce the incidence of "identity theft". Various fraud schemes exist whereby a "pretend" carrier assumes the identity of a legitimate carrier, attending at a point of origin with its own equipment to receive the cargo. The cargo is never heard of again. While there are various methods adopted by the fraudsters, the common denominator is that they somehow come into possession of shipment details and information while keeping the legitimate carrier out of the equation. While shippers and brokers must be diligent in confirming the identity of their immediate "downstream" contracting partners the potential for fraud will naturally increase with the addition of further intermediaries and "downstream players" in the equation.

An effective "control" mechanism is to introduce a written contract clause limiting if, or when, a downstream transportation intermediary or service provider can delegate out work. A carrier might agree that it, and only it, will perform a move. Shipper-broker agreements may also contain a requirement that the broker contract its carrier on terms that only that carrier will carry the cargo.

One example of such a clause in the broker-carrier context is in the following language produced by the *National Transportation Broker Association*:

> Carrier…will not re-broker, assign or interline the shipments hereunder, without prior written consent of BROKER. If CARRIER breaches this provision, BROKER shall have the right of paying the monies it owes CARRIER directly to the delivering carrier, in lieu of payment to CARRIER. Upon BROKER's payment to delivering carrier, CARRIER shall not be released from any liability to BROKER under this Agreement. In addition to the indemnity obligation in Par 1.H, CARRIER will be liable for consequential damages for violation of this Paragraph.

This language can of course be easily adapted into a Shipper-Broker or a Shipper-Carrier Agreement.

The recent case of *Seenergy Foods Ltd. v. Ready Go Transport Inc*. (*3) in the Ontario Superior Court of Justice illustrates how there might be further unintended mischief that may come with the lack of transparency of who is involved in the carriage of goods.

In Case There is a Cargo Claim, You Will Want to Know all the Players

Seenergy Foods Ltd. ("Seenergy") hired Ready Go Transport Inc. ("Ready Go") to carry a shipment of industrial kettles. Two of the kettles were damaged during unloading at destination on November 27. 2014. Seenergy commenced a lawsuit, naming the shipper who created the relevant bill of lading form, a freight broker and Ready Go as the carrier who was expected to deliver the cargo. At the time of the commencement of the action, Seenergy understood that the truck driver, one Sukhpreet Singh Panjeta ("Panjeta"), who operated the delivery truck and unloaded the kettles, was an employee of Ready Go.

Ready Go was examined for discovery on January 26, 2018. During that examination it was suggested that Panjeta was not an employee of Ready Go, but was in fact working for a third party carrier by the name of SH Pan Transport Inc. ("SH Pan"). That the shipment had in fact been brokered out by Ready Go to SH Pan was later confirmed following the discovery.

Seenergy brought a court application to amend its statement of claim to add SH Pan as a defendant. SH Pan protested, asserting that the applicable limitation period of 2 years had expired for any claim to be brought against it.

The Time Bar Issue: Could the Plaintiff Still Add SH Pan as a defendant?

The court considered the applicable law in Ontario on contractual time bar claims, and the possible qualifier to the standard 2 year provision being the "discoverability" principle. The relevant provision from the *Limitations Act, 2002* (*4) provides as follows:

> 4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary on the day on which the claim was discovered.
>
> 5. (1) A claim is discovered on the earlier of
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

SH Pan argued that the plaintiff knew about its involvement by at least January 19, 2017, being the date that Ready Go delivered its statement of defence in the action which implicated SH Pan as being the carrier responsible for the cargo damage. As the plaintiff's application to add SH Pan as a defendant was being heard more than 2 years later, SH Pan argued that the plaintiff was "out of time", even on the basis of a "discoverability" softening of the general rule that contract claims must be brought within 2 years from the date of breach.

The court however found that the statement of defence delivered by Ready Go was "exceedingly unclear" on point. In effect, the plaintiff was not "fixed" with knowledge upon with it could sue SH Pan in January of 2017. Ready Go had pleaded in its defence that it was responsible for the transportation of the load, and that it delivered the shipment to the plaintiff and that that completed the shipment. It denied being responsible for the offloading of the shipment. It also pleaded that SH Pan was the operator of the truck. In effect, the defence filed was not clear on how or why SH Pan might be implicated. The court accordingly found that the plaintiff did not know from the defence filed that SH Pan caused or contributed to the damages alleged. Accordingly, it was reasonable for the plaintiff to choose to wait until examinations for discovery to reconcile who exactly had done what in connection with the shipment. Accordingly, the plaintiff's application to add SH Pan as a defendant was "in time".

The court fortified its views above, that the plaintiff had not failed in any due diligence in its initial composition of the law suit, in noting that the Ready Go had initially following the cargo claim indicated to the plaintiff that Panjeta was its driver and that it would cover the cost of repairs to the damaged cargo. The court noted that had Ready Go taken the initial position that it was not liable for the damages because another party had transported and/or delivered the goods, then the plaintiff would have then had a duty of inquiry to investigate was involved.(*5)

The court found that the plaintiff had in fact been duly diligent by a) obtaining a witness statement from Panjeta at the outset, where he identified his company as Ready Go; b) being advised by Panjeta that his insurer was the insurer of Ready

Go; c) receiving correspondence from Ready Go which identified Panjeta as its driver: and d) receiving information from Ready Go that it would pay the repair costs of the freight. In the court's view, the plaintiff was diligent in waiting until 2018 to add SH Pan as a defendant, being when Ready Go first took the position that Panjeta was not its employee and it was not responsible for the plaintiff's loss.

SH Pan also asserted that the plaintiff's claim against it was barred by the *Carriage of Goods* regulation 643/05 enacted under the *Highway Traffic Act*, which requires that a carrier be put on notice of a claim within a fixed period of time. In this regard the court noted that the purpose of this provision was that the responsible carrier be timely advised of a cargo incident such that it could investigate matters. As Panjeta was aware of the cargo claim from the outset, it followed that his company, SH Pan, was thus effectively "on notice" of same.

On the facts the case the court accordingly found that the plaintiff timely brought its application to add SH Pan as a defendant within the discoverability time frame contemplated by the above statute and that the claim could proceed as against it in addition to the other named defendants.

Conclusion

The court decision is still underway. Determinations of liability have not yet been made. It seems that the opportunity for justice has been preserved in the addition of SH Pan being allowed to the action. The shipper should not be allowed to be taken by surprise. Still one can conceive that if the facts might have been different that a shipper plaintiff might be frustrated from recovering from a responsible carrier even if its involvement was not initially contemplated. Bearing in mind the risk factors identified above, and the admonition from this case that, with the greater number of players involved, "someone might be left out" of an action, shippers and brokers are reminded of the need for transparency and deliberate risk management regarding "who will be hauling the cargo".

Gordon Hearn

Endnotes

(*1) A discussion on the possible defences to such a claim, and repercussions concerning the possible existence of contractual indemnity clauses between the parties and the benefit of insurance coverage as may arise with such a claim scenario is beyond the scope of this article.

(*2) Likewise, a discussion on the rights of claim of the unpaid carrier and corresponding payment obligations of others in the supply chain is beyond the scope of this article.

(*3) 2019 ONSC 4562

(*4) S.O. 2002, c. 24, Sched. B.

(*5) The published court decision does not disclose why Ready Go had at one point admitted that it would repair the damaged goods but then resiled from that position, or, for that matter, why the case is not simply being pursued against Ready Go as the "contracting carrier" who in turn may have its own claim for contribution and indemnity from SH Pan. This may be because Ready Go came to fashion a defence that the unloading function at destination was not part of its carriage undertaking, or for some other reason. We don't know.

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 Feb. 10 2020 - for the first individual to email us the location (street corner) depicted in photograph on page 31. Email your answer to info@fernandeshearn.com with a subject line "Newsletter contest". First response with the correct answer wins.