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TRANSPORTATION NOTES

Legal Decisions and Developments Affecting the Transportation Industry in Canada

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Stringent Anti–Spam Legislation and Regulations on the Horizon

The business of marketing air carriers has changed markedly in the last decade. Gone are the days of glossy posters crowding the walls of travel agencies depicting aspirational photos of exotic, far-flung places. The new advertising battleground has moved on-line and into our electronic inboxes, vanquishing the now yellowing BOAC posters promising adventures in "the orient" to live out the remainder of their lives on eBay. But, in Canada, with progress so comes regulation.

And the consequences of running afoul of these particular regulations is very serious indeed.

If an aviation marketing professional were to go to the Canadian Radio-television and Telecommunications Commission (CRTC) webpage on the topic of Canada's anti-spam legislation (*CASL*) s/he would learn that "there are three simple rules to follow" when sending commercial electronic messages, or CEMs. These are described as:

- Consent: You must have express or implied consent to send a message.
- Identification: You must clearly and simply identify yourselves and anyone else on whose behalf the message is sent.
- Unsubscribe Mechanism: You must clearly and simply identify yourselves and anyone else on whose behalf the message is sent.

Based on the many concerns raised by stakeholders both before and after the *CASL* was passed by Parliament, it would appear that many lawyers, business leaders and owners, and marketing experts would not agree that complying with the *CASL* —widely viewed as one of the most stringent and onerous anti-spam regimes in the world—will be "simple". The regime, which takes an "opt-in" approach, does not only apply to what most of us think of as "spam"—bulk, unsolicited email messages that (hopefully) end up in your junk folder—but also covers almost all electronic messages sent for a commercial purpose.

In December 2013, the Minister of Industry announced that most of *CASL*, including the rules governing unsolicited CEMs, will come into force on July 1, 2014. The legislation was passed by Parliament and received royal assent in December 2010, more than five years after a government-appointed national task force issued a report recommending the adoption of anti-spam legislation. It took three years after the bill became law for the government to finalize the regulations. The CRTC and Industry Canada have each developed and issued Electronic Commerce Protection Regulations.

The federal government has set up a website—fightspam.gc.ca—dedicated to providing information about the *CASL* regime. This is separate from the CRTC's webpage on the legislation. Both pages include FAQ pages to help businesses and individuals understand the law and its regulations. In addition, Industry Canada has published a Regulatory Impact Analysis Statement and the CRTC has published two information bulletins providing guidance on interpretation and compliance.

The CRTC will take the lead in enforcing the *CASL*'s prohibition on sending CEMs without consent, as well as the provisions governing the alteration of transmission data and installing a computer program on a person's computer without consent. Administrative penalties of up to $1 million for individuals and up to $10 million for corporations can be assessed against offenders. In July 2017, the provisions governing private rights of action will come into force—meaning that any person will then be able to pursue businesses or individuals they allege to have infringed the *CASL*.

In addition, the Competition Bureau and the Office of the Privacy Commissioner will also have roles to play in the enforcement of *CASL*.

Some describe the *CASL*'s definition of CEM as "broad" or "vague" or both. Under the Act, a CEM is an electronic message (e.g. email, IM message, text message) that "it would be reasonable to conclude has as... one of its purposes to encourage participation in a commercial activity." If a message offers to purchase, sell, barter or lease a good, service, or interest in land, or offers to provide a business or investment opportunity—or if it advertises or promotes these activities or a person who does or intends to engage in these activities—it qualifies as a CEM.

Further, the Act explicitly states that any electronic message that "contains a request for consent to send" a CEM, as described above, is also a CEM itself. So how is consent acquired?

Implied consent will exist where there is an "existing business relationship", which is defined in the Act. The purchase of any good or service from, or the entering into a contract with a business establishes a business relationship. But, for the purpose of the *CASL*'s implied consent provision, that relationship ends two years after the date of purchase

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Terminated Employee Reinstated: Hearsay Evidence Not Enough

Roger Pouget, an employee with VIA Rail Canada ("VIA") brought a grievance against the company disputing his discharge. VIA had terminated Pouget's employment based on two alleged incidents of sexual misconduct on a VIA train.

Ultimately, the arbitrator reinstated the grievor's employment as the company was unable to prove on a balance of probabilities that Pouget had committed the acts alleged.

Before dealing with the substantive issues of the case, the company attempted to have the grievance dismissed on the basis that it was made after the 21 day deadline following notification of discipline, as set out in the collective agreement. Apparently, the grievance was placed on the desk of a management representative within the appropriate time period by the local chairperson. Following delivery, there was a transition between local chairpersons of the union. Several months later, it came to the attention of the new chairperson that the company had not received the grievance. It was resubmitted the day following this realization. The company took the position that the grievance had been dropped.

The arbitrator, Christine Schmidt, ruled that the delay in the delivery of the grievance was an innocent error. Termination of employment is a very serious matter. The company argued that it would suffer prejudice, in that the grievance process would be undermined, if the arbitrator extended the deadline. The arbitrator gave little weight to this argument. The company could not show that it was disadvantaged by the delay with respect to its ability to actually defend the grievance. As such, the arbitrator exercised her discretion pursuant to section 60 of the *Canada Labour Code* to relieve against the time limit, thereby permitting the grievance to be adjudicated on its merits.

In April 2013, the grievor, Pouget, was on vacation and travelling by train in a sleeper car. At the time of the alleged incidents, Pouget was seated with another passenger in the coach car. The complainant, TL, alleged that Pouget approached him and tried to reach for his groin. He also alleged that Pouget, who was sitting three rows away from him, had been engaged in a sexual act with another passenger.

TL, who was 15 years old at the time, was seated in a different area of the train than his parents, who were in the sleeper car. His brother was beside him, but asleep.

Apparently, as Pouget approached TL, TL cursed at him and told him to leave.

TL located the Service Manager on the train and reported the incidents. TL and his brother stayed with the Service Manager for two hours following his interaction with Pouget. Thereafter, the Service Manager found Mr. Pouget, informed him of the complaint by TL and requested that he return to his sleeper cabin. At the time, the Service Manager discussed the allegations with his supervisor. He was advised to tell Pouget to stay away from TL and his family. It does not appear that Pouget received this direction.

Upon the train's arrival in Winnipeg, Pouget approached TL and his family to apologize for the "misunderstanding". Pouget stated that TL's father had been looking at him with disgust. After the apology, TL's father cursed at Pouget and told him to leave.

The family was informed by VIA Rail staff that they could make a complaint to the police with respect to the allegations. No criminal complaint was ever made.

The Service Manager made a vague incident report at the end of his shift on the day of the alleged events. He characterized the incident as one of "sexual advancement". He reported the incidents in more detail in an investigation statement 10 days thereafter. The Service Manager himself was investigated with respect to the allegation that he had not properly handled the matter and was derelict in his duties.

Pouget vehemently denied attempting to touch TL. According to Pouget's version of events, when he walked past TL, TL stated "don't even try it". Pouget states that he did not stop while passing TL. Pouget also denied engaging in sexual acts while on the train. He explained that he had been sitting across the aisle from a male passenger with whom he had been in a friendly conversation for approximately 30 minutes. The two men then moved to sit side by side. Pouget admitted that he had touched the passenger's knee and vice versa. Pouget noted that TL and his brother had been observing their conversation by looking at them from above the seat, down the aisle and in between the seats.

Pouget provided a statement to the company over the course of the investigation into the incidents. He also spoke to another employee about the events who recorded their conversation in her notes. Her notes set out that Pouget relayed to her that the passenger, TL, had been repeatedly glancing at him, and he believed that TL might be interested in him or curious. He further relayed that the passenger told him, "don't even ... go there" when he approached TL. Pouget disputed the completeness of the employee's notes. Pouget remembered discussing with her that TL's father might be homophobic and that differing levels of acceptance of same-sex relationships exist across the country. These comments were not contained in the employee's record of the discussion.

Arbitrator Schmidt commented that if she had found that Pouget had attempted to touch a minor in a sexual way, dismissal from employment would be appropriate. She also stated that some discipline would have been appropriate if the employee had been found to have been engaged in a sexual act in the presence of other passengers.

The company had the burden of showing on a balance of probabilities that the acts occurred. The arbitrator elaborated that due to the seriousness of the allegations, clear and cogent evidence in support of the allegations was required.

The arbitrator reviewed the evidence with respect to the allegation of public sexual activity. Pouget denied that any sexual act occurred. TL's evidence, from his statement, was that it appeared that sexual activity was taking place. The Service Manager's report, which was created 10 days after the fact, stated that TL had informed him that "it could have been" an inappropriate act. The arbitrator found the observations speculative, tentative and less than definitive.

Thereafter, the arbitrator considered the allegation of an attempt to inappropriately touch TL. She examined the evidence from Pouget, the Service Manger's report, TL's statement and TL's father's statement with respect to the subsequent apology. She noted difficulty in reconciling the different versions of events. The arbitrator noted specifically that at the time that the Service Manager informed Pouget to return to the sleeper cabin, he was unaware of the allegations against him. She suspected that "something happened that led TL to react in the manner he did towards the grievor. However, I am unable to ascertain with any degree of confidence what that might have been on the evidence before me."

Pouget had a prior disciplinary record but no history of similar allegations.

The arbitrator commented that almost all of the evidence advanced by the company was hearsay. While there were discrepancies in the individuals' accounts of the incidents, some of these were consistent with Pouget's version of events. On the totality of the evidence, the arbitrator found that the company had not met its onus to show that Pouget had committed the two incidents of sexual misconduct. She ordered that he be reinstated without loss of seniority and with compensation for all wages and benefits.

VIA Rail Canada Inc. v. UNIFOR, CROA&DR 4274, 2014 CanLII 5319 (CA LA)

Anti– Spam Legislation and Regulations *(cont'd)*

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or contract. Messages sent after the expiry of those two years are prohibited.

A business relationship is also established if the person to whom a CEM is sent has made an inquiry about the purchase of a good or service. In that case, a CEM sent to the inquirer more than six months after the inquiry was made would fall afoul of the Act. If a business is relying on implied consent, it must carefully monitor the currency of its relationships with its customers.

Where express consent to receive CEMs is given, only express withdrawal of that consent terminates it. Express consent requires "a positive or explicit indication of consent" meaning that "opt-out" methods of obtaining consent, such as the widely used pre-checked consent box on a web page, will not conform with the *CASL*. The consumer must take some sort of active step to indicate that consent is being given. In addition, consent to receive CEMs must be set apart from any other agreement or consent – express consent under the *CASL* cannot be bundled in with acceptance of general terms and conditions.

A request for express consent must clearly and simply identify the purpose for which consent is being sought, identify and provide contact information for the person or business seeking consent, and state that the person to whom the request is sent can withdraw their consent.

Note again, however, that unlike the federal CAN-SPAM regime in the United States, the *CASL* explicitly states that an electronic message sent to request consent to send CEMs is itself a CEM. Many businesses are therefore sending requests for express consent prior to July 1, after which such messages will not be allowed.

Once consent is acquired, CEMs must meet certain form and content requirements:

- the sender of the message must be clearly identified – if the message is being sent on behalf of another person, both the sender of the message and the person on whose behalf the message is being sent must be identified;
- the message must contain the mailing address and one of (1) a telephone number providing access to an agent or a voice message system, (2) an email address, or (3) a web address of the sender or the person on whose behalf the message was sent; and
- the message must include an unsubscribe mechanism, which must remain valid for at least 60 days after the message is sent – a request to unsubscribe must be complied with without delay and in no circumstance must it take more than 10 business days to unsubscribe someone who has requested it.

These are the basic rules, but there are several exemptions under the Act and its regulations. For example, CEMs sent by registered charities or political parties are exempt from the *CASL* under the Industry Canada regulations. The same is true of CEMs sent to satisfy a legal obligation or those sent by an employee of an organization to an employee of another organization, so long as the two organizations have a relationship and the message is in regard to the recipient organization's activities.

In addition, certain kinds of messages need not meet the consent requirement, but must still fulfill those regarding form and content. Probably of most interest to airlines and others in the transportation sector, included in this category of exemptions are CEMs that are sent solely to facilitate, complete or confirm a commercial transaction between the parties where the recipient agreed to enter into the transaction – this would appear to include flight reminder and check-in messages.

However, a number of other situations do require some attention, as they may render the exemption inapplicable or otherwise invalid. For example,

- promotional emails where the passenger has not purchased the air carrier's services for more than two years;
- e-mailed material emanating under frequent flyer programs, where those programs are operated by companies other than the associated airlines;
- satisfaction surveys undertaken by third parties in association with airlines;
- promotional communications by airlines to former passengers who have always booked their itineraries through tour operators or travel agents.

The *CASL* has been hotly-debated in the ten years leading up to its coming into force. No doubt that discussion will continue as its provisions are interpreted and enforced after July 1, 2014.

Bill C-28. Third Session, Fortieth Parliament, 59 Elizabeth II, 2010 (assented to December 15, 2010)

End of the Line *(cont'd)*

(Continued from page 4)

favour of state immunity. The Court noted that Bombardier's evidence "does little more than show that the Republic responded to requests that it guarantee loans to [Estonian Air], something it consistently refused to do, and may have urged [Estonian Air] to carry out a comparative analysis of competing bids from aircraft suppliers." This was found to fall short of "commercial activity."

Twice in its short endorsement the Court alluded to one piece of evidence that apparently did tend to show some level of interference in the business activities of Estonian Air by the Republic. This evidence was described as "insignificant" at one point in the decision and as "a second-hand report contained in a tabloid" later. In dismissing this evidence, the Court of Appeal apparently deemed it so insignificant as to not warrant further description.

Justice Morgan was more expansive on the content of this piece of evidence, which consisted of an article published in *Eesti Päevaleht (Estonian Daily)*, the second highest selling newspaper in Estonia. Bombardier had translated the entire article and included the translation in the motion record considered by Justice Morgan. The article addressed one account of the negotiations that eventually led Estonian Air to cancel its contract with Bombardier and instead to instead buy aircraft from the Brazilian aerospace conglomerate Embraer. In dismissing the article's relative evidentiary value, Justice Morgan stated:

> To say that the reportage, for want of a better word, is colourful is to understate the matter. The article describes Bombardier as a "vampire lover". The vampire lover, according to the writer, demanded "new winter boots after receiving flowers, an opera and dinner." The article goes on to say that Estonian Air preferred Embraer, which it describes as a "Brazilian beauty", and that this beauty prompted the airline to "get rid of the Canadian lady."

Neither the Court of Appeal nor the court below was convinced that *Eesti Päevaleht*'s story of intrigue, betrayal and "imaginative creatures" constituted evidence sufficient or reliable enough to refute the countervailing evidence that the Republic's activities "were sovereign in both purpose and nature and did not cross the line into the management sphere."

Bombardier Inc v AS Estonian Air
2014 ONCA 41

End of the Line *(Sovereign Immunity)*

In the May 2013 issue, we reported on a decision of Justice Morgan of the Ontario Superior Court of Justice in a dispute between Bombardier Inc. and Estonian Air. At the time, in mid-2011, 97% of the shares of Estonian Air were owned by the Republic of Estonia (the "Republic"). Bombardier sued Estonian Air claiming that the cancellation of a contract for the purchase of five new CRJ900 aircraft was the result of the Republic's tortious interference. Before Justice Morgan, the Republic succeeded in having the action permanently stayed on the basis that it is immune from the jurisdiction of any court in Canada. Bombardier appealed that decision to the Ontario Court of Appeal, which rendered its decision on January 17, 2014, dismissing Bombardier's appeal.

As a brief reminder of some of the most pertinent facts, while the vast majority of Estonian Air's shares were owned by the Republic, the remaining shares were owned by SAS Group AB. The five-member management board of Estonian Air did not include any representatives of the government, while three of the six members of the Supervisory Council, which oversaw the management board, were government representatives. One of these three was a member of the Estonian parliament.

The shareholders' agreement between Estonian Air, SAS and the Republic included a statement that the agreement "constitutes a private act, subjecting the [Republic] to private civil law in Estonia as well as abroad," and that the Republic "expressly acknowledges that…it waives all defences based on sovereign immunity or other form of immunity."

On the motion before Justice Morgan, it was held that Bombardier could not rely on the shareholders' agreement because it was not a party to it.

On appeal, the focus was on another element of Bombardier's argument: whether or not the Republic was engaged in "commercial activity". Under Canada's *State Immunity Act*, RSC 1985, c. S-18, section 3(1) creates a presumption that a foreign state is immune from the jurisdiction of Canadian courts. As noted by the Court of Appeal in its endorsement, whether or not the immunity is raised by the state in a proceeding, a court is obliged to give effect to it.

Section 5 of the Act provides for the so-called "commercial activity" exception:

> A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state.

"Commercial activity" is defined in the Act as "any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character."

The Supreme Court of Canada has held that to succeed in bringing a foreign state before a Canadian court under the commercial activity exception, a party must provide evidence allowing the court to conduct a contextual analysis. It is not enough to plead facts sufficient to constitute a cause of action and plead that those facts include the conduct of commercial activity by the state. The court must be able to conduct a merits-based analysis of the evidence supporting or refuting the assertion that the state has engaged in commercial activity and that the proceedings relate to that activity. See *Schreiber v Canada (Attorney General)*, 2002 SCC 62 and *Kuwait Airways Corp v Iraq*, 2010 SCC 40.

Bombardier argued before the Court of Appeal that Justice Morgan had erred in refusing to defer the Republic's motion until a later stage of the proceedings, "so the issue could be determined on a 'full record.'" The Court rejected this argument swiftly, stating that "the action cannot proceed until the issue of sovereign immunity has been decided."

Further, the Court of Appeal held that Justice Morgan's findings on the Republic's involvement in the affairs of Estonian Air were "squarely based on the evidence", noting that he had considered affidavits from the Chief Financial Officer of Estonian Air and a senior officer of the Ministry of Economic Affairs and Communications. Specifically, Justice Morgan found that:

- the Republic's activities were restricted to oversight as shareholder and to the furtherance of governmental objectives;
- with one "insignificant" exception, the evidence demonstrated that "there was no involvement by the government and no political interference with [Estonian Air's] management in reaching its decision" to cancel the Bombardier contract and to buy aircraft from a competitor.

The Court of Appeal was not persuaded that the evidence brought forward by Bombardier was sufficient to discharge its burden of proof in setting aside the presumption in

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Our transportation law group represents the interests of carriers in litigation of personal injury, property loss and commercial disputes. We also advise on insurance and regulatory issues and represent clients before the courts, agencies, tribunals and authorities with important jurisdiction over transportation undertakings.

We welcome your comments and suggestions.