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TRANSPORTATION NOTES

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Bills of Lading Act Requires Consignee to Pay Twice

The Government of Canada ("GOC") contracted with Canada One Sourcing ("Canada One") to supply it with approximately nine million dollars worth of army socks. The terms of the contract with Canada One included the supply and shipping of the socks to Canadian Forces Bases in Montreal and Edmonton. The invoicing and payment requirements were also stipulated in the contract. The shipment of socks would be received by the military bases, opened and inspected. If all was in order, confirmation would be sent to the GOC procurement office and Canada One's invoice would then be paid.

The plaintiff, Cassidy's Transfer & Storage Ltd. ("Cassidy"), delivered the socks for Canada One. Cassidy invoiced Canada One for its shipping services and received payment for its initial invoices. However, Cassidy's April and July 2008 invoices, amounting to approximately $51,000, went unpaid. After unsuccessfully pressing Canada One for payment, Cassidy sued Canada One, as well as the GOC, for recovery of its freight charges, asserting that the GOC was liable for the freight fees as consignee of the goods.

The GOC refused to pay Cassidy and took the position that its contract was with Canada One, that the contract included the cost of shipping, that it had already paid Canada One for shipping, and that the GOC's contract with Canada One provides that subcontractors (such as Cassidy) are bound by the terms of the contract between the GOC and Canada One. As such, the GOC argued, it was not responsible for paying Cassidy.

Bills of lading were prepared by Cassidy in respect of the shipments. Six of the eight bills of lading in question stated, "Received, subject to the contract between the Shipper, Consignee or Third Party and the carrier in effect on the day of shipment…" and indicated the freight was "prepaid."

The GOC also argued that this term incorporated the contract between it and Canada One into the bill of lading.

The issue before the Court was whether Cassidy could rely on the federal *Bills of Lading Act* (the "*BLA*") or the provincial *Mercantile Law Amendment Act* to recover its freight from the GOC.

Paraphrasing, section 2 of the *BLA* provides the consignee named in a bill of lading and the endorsee, to whom property in the goods passes, is vested with all of the rights and liabilities in respect of those goods, as if the contract in the bill of lading had been signed by the consignee. The *Mercantile Law Amendment Act* was considered for its definition of "bill of lading," however the matter was decided under the provisions of the *BLA*.

The Court reviewed a number of cases and found the following principles apply to cases where s. 2 of the *BLA* is relied upon to recover freight from the consignee:

> 1. Section 2 of the *BLA* creates a presumption of privity of contract between the carrier and the consignee in order to allow the carrier to recover freight charges. The consignee need not know the terms of the transportation contract to be bound by it;
>
> 2. To avoid liability, the consignee must prove:
>
> (a) the existence of another arrangement wherein the shipper alone would be responsible for the freight charges; and
>
> (b) the carrier had not waived the protection afforded by the *BLA*;
>
> 3. The carrier's waiver of the protection afforded by the *BLA* can be express or implied, but is not to be presumed from the silence of the parties;
>
> 4. The term 'freight prepaid' may, on the evidence, amount to a waiver if it is found to be a representation to the consignee that the freight charges have been paid.

The Court found that the bills of lading which referenced a "contract between the Shipper, Consignee or Third Party and the carrier" were not meant to incorporate the contract between Canada One and the GOC into the bill of lading. It was further held that the GOC did not displace its onus to prove that the protection of s. 2 of the *BLA* had been waived.

The Court found significant support for this conclusion. The GOC knew the freight charges had not been paid, given the payment process defined in its contract with Canada One. Furthermore, Cassidy informed the GOC that Canada One was not paying Cassidy's invoices and Cassidy subsequently commenced this action to recover freight charges. Even so, the GOC continued to pay Canada One's invoices rather than paying Cassidy and setting those amounts off against Canada One's invoices. Finally, there was no evidence that Cassidy had waived the protection of the *BLA*.

In the end, the Court expressed a strong view on the GOC's position in the litigation, stating: "[The GOC's] persistent refusal to deal with the plaintiff on the ground that all of its obligations were contained in the contract with Canada One was a failure to realistically consider its liability under the *Bills of Lading Act*."

Judgment was awarded to Cassidy for the full amount claimed.

Cassidy's Transfer & Storage Limited v. 144736 Ontario Inc., 2011 ONSC 2871

Inside This Issue

Nut Allergies and Air Travel

On June 16th the Canadian Transportation Agency released another in a series of decisions which have considered how persons with allergies to nuts should be accommodated when travelling by air. Although the conclusions the Agency has arrived at will have an impact on all carriers operating in Canada eventually, the decisions are strictly binding only on Air Canada as they result from a complaint brought against that carrier.

The recent decision is primarily concerned with the distinction between meals and snacks which may contain trace amounts of peanuts (or nuts generally) because of accidental contamination by nut products and meals and snacks which contain nuts as visible or otherwise known components. However, to understand the significance of the decision it is necessary to place it in a wider context and this we will briefly undertake.

The *Canada Transportation Act* gives the Agency the responsibility for eliminating, within the Canadian transportation network, undue obstacles to the mobility of persons with disabilities. The Agency, with the support of the Supreme Court of Canada, has given a very broad definition to "disability". Some 10 years ago the Agency adopted the language and procedures of the World Health Organization and its *International Classification of Functioning and Disability*. Any person with an "impairment" (itself very broadly defined) coupled with an "activity limitation" or a "participation restriction" will qualify as a person with a disability. Using this approach to disability the Agency determined, in 2002, that some persons who have allergies may be disabled for the purposes of the Act.

Having come to this conclusion, the Agency has received and considered a number of complaints from individuals who allege allergies of different sorts. Among these are persons who claim to be allergic to nuts. As the Agency determined that there was not sufficient evidence of the possible impact of exposure to nuts on board an aircraft it received the evidence of two medical doctors with appropriate expertise. The testimony of these expert witnesses included a description of the nature and severity of allergic reactions to nuts as well as consideration of the likely forms of exposure. On the basis of this evidence, the Agency found that the complainants were indeed persons with disabilities who encountered obstacles to their mobility in the transportation system.

This being the case, the Agency was asked to define an appropriate accommodation for these allergy sufferers. A number of alternatives were put forward, including a complete ban on serving nuts or food containing nuts and the adoption of procedures which would require flight attendants to intervene by injecting epinephrine in some cases.

In the course of determining how broad a form of accommodation to require, the Agency considered the air filtration systems in place in Air Canada's aircraft. In a decision released in January 2010 it concluded that "the risk of an allergic reaction due to the inhalation of peanut or nut particles on aircraft is significantly reduced on modern generation aircraft" and agreed the risk of a serious allergic reaction from ingestion of air borne nut protein is slight. This then turned attention to limiting the possibility of accidental ingestion of food containing nuts and made it unnecessary to consider further the most draconian measure of a complete ban. The Agency also gave no further consideration to the controversial suggestion that flight attendants be required to administer epinephrine.

In the decision of January 2010, the Agency announced that the appropriate accommodation would be the creation of a buffer zone. It directed Air Canada to state its position on two points: how much advance notice would it require to create a buffer zone and what would be the appropriate size of a zone.

In October 2010, after having received additional representations, the Agency released a further decision to define the accommodation more specifically. It determined the following:

A person requesting a buffer zone should give notice at least 48 hours in advance.

The size of the buffer zone will depend on class of service. In the case of economy seating the zone will be the bank of seats in which the allergic person is seated and the banks directly in front and behind.

Only nut free foods are to be served in the buffer zone.

Air Canada is to instruct other passengers seated in the buffer zone that they are not to consume products containing nuts. It is also required to make arrangements to deal with non-compliant passengers.

This then was where things stood before the decision of June 16, 2011. Air Canada was, with reason, concerned with the breadth of the order that it serve, in the buffer zone, only nut free foods. It claimed that this order would cause it "undue hardship" (which is a key phrase for determining the scope of a duty to accommodate) as "there are currently no flight kitchens able to deliver" on an "nut-free" promise.

The Agency went some distance to meet Air Canada's concerns. It recognized that it would be unreasonable to require Air Canada to guarantee that food served on board would be nut free. It received evidence of the way in which food is prepared in flight kitchens and accepted that the possibility of cross-contamination cannot be eliminated.

However, Air Canada also pointed out that it deals with more than 50 caterers who in turn obtain their supplies from many sources. This makes it very difficult, if not impossible, to control the composition of meals served. Finally, it pointed out that the total exclusion of nut products would cause a problem for certain passengers who rely on nuts as a main source of protein. This applies in particular to passengers who prefer vegetarian and similar diets.

With respect to the last argument, the Agency responded that its proposed order would not prevent the service of special meals containing nuts. Such meals could be served outside of the buffer zone.

With respect to the effective impossibility of controlling the composition of meals, the Agency noted that Air Canada does inform its caterers of certain products which must not be used or added to food purchased by Air Canada. The existing list of prohibited items includes "any item containing Peanut". The Agency concluded that Air Canada can issue appropriate instructions to its caterers to allow it to restrict service within the buffer zone to snacks and meals which "do not contain peanuts or nuts as visible or known components".

The result of the June ruling is that the October 2010 order is varied. Whereas the original version ordered Air Canada to refrain from serving any nut products in the buffer zone the amended version is limited. Air Canada is ordered "to only serve within the buffer zone snacks and meals which do not contain peanuts or nuts as visible or known components, but which may contain traces of peanuts or nuts as a result of cross-contamination".

As noted previously, this order, strictly speaking, binds only Air Canada. However, any carrier operating in Canada should recognize that if it is challenged on its nut service policy a similar order is likely to be the result.

Huyer and Nugent v. Air Canada,
CTA Decision 228-AT-A-2011

Right to Sue under *Marine Liability Act* Upheld

David and Joseph Ryan were brothers who fished off the coast of Newfoundland. On September 19, 2004, they died when their ship capsized. Their families received compensation from the Workplace Health, Safety and Compensation Commission (the "Commission").

In 2006, their families and estates sued the shipbuilders for negligence and breach of contract in the design and construction of the vessel. They also sued Transport Canada for negligent inspection of the vessel.

In 2007, some of the shipbuilder defendants applied to the Commission for a determination that the plaintiffs were barred from bringing their action by the *Workplace Health, Safety and Compensation Act* (the "*Act*"). The Commission found the action was barred by the *Act*.

The plaintiffs applied to the Newfoundland Trial Division for judicial review of this decision. The Trial Division held that the plaintiffs could continue with their action. The Commission and shipbuilders appealed to the Court of Appeal.

The Court of Appeal dealt with two issues on appeal:

(1) Should the appellants have served a Notice of Constitutional Question on the Attorneys General of Canada and Newfoundland and, if so, what was the legal effect of this failure?; and

(2) Did the Trial Division err in concluding that the *Act* did not bar the action?

Notice of Constitutional Question – no prejudice to the Crown

The Newfoundland *Judicature Act* requires that a Notice of Constitutional Question be served where the constitutional validity of a piece of legislation is brought into question.

The Attorney General of Newfoundland argued that since no Notice had been served on it, the proceedings below were a nullity and the Court could not hear the appeal.

The Court of Appeal disagreed and concluded that there was no prejudice to the Crown in proceeding to hear the appeal. The Court found that this was not a case where the record needed to be augmented and the Attorney General conceded that it would not be prejudiced so long as it was given the opportunity to make submissions on the appeal.

In any event, the Court of Appeal found that the constitutional validity of the *Act* was not in question, and so no Notice of Constitutional Question was required.

***Right of action under the federal* Marine Liability Act**

The Court found that the problem presented by the case resulted from the federal and provincial governments operating two different but apparently overlapping regimes to deal with workplace injuries in a marine environment.

The federal government has jurisdiction over navigation and shipping. Pursuant to this jurisdiction, it enacted section 6(2) of the *Marine Liability Act.* This provision extends a right to sue, for wrongful death, to dependents of a deceased. This right is not circumscribed by the fact that the death resulted from workplace injury.

The province, on the other hand, had eliminated fault-based tort law and substituted a no-fault insurance scheme administered by the Commission. Section 44 of the *Act* states that the right to compensation under the *Act* replaces rights of action of a worker or his dependents. The Commission's position was that this provision of the provincial act operated to bar not only the right to sue under provincial law but also the right under federal maritime law.

The Court did not agree. It began its analysis by stating that, although a provincial statute may incidentally affect matters beyond the province's jurisdiction without being unconstitutional, the limit to this extra-jurisdictional reach is that "it must not impair the 'core' content of a head of power of the other level of government." This is known as the doctrine of "inter-jurisdictional immunity". In order to determine whether the doctrine applies, a court must answer two questions:

(i) does the provincial law trench on the protected "core" of federal competence?;and

(ii) is the provincial law's effect on the exercise of the protected federal power "sufficiently serious" such that it invokes the doctrine?

The doctrine of inter-jurisdictional immunity applies even where the federal government has not legislated in the area of its core competence. Where it has in fact legislated, and the two pieces of legislation are in conflict, the doctrine of "paramountcy" applies – federal legislation must prevail and the provincial legislation is rendered inoperable to the extent of the conflict.

The Court found the pith and substance of the provincial legislation (property and civil rights) to be provincial, but noted that it might have an incidental effect on a federal power (navigation and shipping).

The Court then examined whether the subject matter at issue in the action was within the federal sphere of navigation and shipping, or whether it only raised a local concern regarding property and civil rights. The Court found the action had a maritime aspect as, although it dealt with compensation for workplace injuries, it also dealt with compensation "in relation to safety at sea resulting from alleged design, construction and inspection deficiencies of vessels operating at sea."

As the provincial statute purported to "wipe out" a right to sue in tort, including under maritime negligence law, the Court then examined whether it trenched on the "core" of the federal power. The Court cited the Supreme Court of Canada's decision in *Ordon Estate v. Grail* ([1998] 3 S.C.R. 437) in finding that it did:

> Maritime negligence law is a core element of Parliament's jurisdiction over maritime law. The determination of the standard, elements, and terms of liability for negligence between vessels or those responsible for vessels has long been an essential aspect of maritime law . . . where the application of a provincial statute of general application would have the effect of regulating indirectly an issue of maritime negligence law, this is an intrusion upon the unassailable core of federal maritime law and as such is constitutionally impermissible.

The Court then asked whether the effect of the provincial statute was sufficiently serious such that it "impaired", rather than simply "affected", the federal power.

The Court found that the provincial statute did impair the federal power, in that it purported to eliminate reliance on maritime negligence law for compensation for death or injury arising from maritime workplace accidents. The Court concluded that the doctrine of inter-jurisdictional immunity applied and that s. 44 must be read down to ensure that its application did not impair the federal power over navigation and shipping.

Finally, the Court reviewed the doctrine of paramountcy and found that the provincial enactment conflicted with the federal statute – if a maritime claimant wanted to sue under the federal act, he would be precluded from doing so by the provincial act. The Court ruled that a province cannot unilaterally eliminate a federally-created right, and that the paramountcy doctrine applied to s. 44 so that it was inoperative to the extent that it was incompatible with s. 6(2) of the *Marine Liability Act*.

The Court of Appeal affirmed the Trial Division's decision and dismissed the appeal.

Newfoundland (Workplace Health, Safety and Compensation Commission) v. Ryan Estate (2011 NLCA 42)

End of the Line *(Pilot Training Bond Contracts)*

Ryan Van Haren is a commercial pilot who accepted a Vancouver-based position as a Beech 1900 co-pilot for Northern Thunderbird Air ("NTA"), commencing in the spring of 2007.

In August of that year, he successfully applied for a position at NTA flying a Beechcraft 350 air ambulance, based in Prince George, British Columbia. Mr. Van Haren's application letter contained the statement: "This is a letter of commitment for two years on the contract, should I be chosen."

Mr. Van Haren was trained (at the expense of NTA) on the Beechcraft 350 — and, after the training was complete, he commenced work in Prince George.

In February 2008, Mr. Van Haren advised NTA's general manager that another airline wished to interview him, and that the other airline may request a reference.

Apart from raising questions about Mr. Van Haren's long term employment commitment at NTA, this comment also set the stage for a strained environment in the workplace between Mr. Van Haren and his superiors. Shortly after this incident, Mr. Van Haren was transferred by NTA back to Vancouver to fly another aircraft type.

Also in February 2008, NTA and Mr. Van Haren signed a Pilot Training Bond ("PTB"), whereby NTA agreed to train him on the Beechcraft 350, and to allow him to fly it once qualified.

In exchange, Mr. Van Haren agreed to being indebted for the sum of $10,000, the debt being reduced by 1/24 for each month that he remained in the employ of NTA. A promissory note for $10,000 was executed by Mr. Van Haren in favour of NTA in this regard.

The PTB was back-dated to June 1, 2007.

In considering the validity of the PTB, it is important to note that:

- it was signed after the Beechcraft 350 training was complete; and
- by the time the PTB was signed, Mr. Van Haren had already been transferred to Vancouver, and assigned another aircraft.

On May 1, 2008, Mr. Van Haren resigned.

NTA commenced an action in the British Columbia Small Claims Court — claiming $5,416.16, being the balance owing on the back-dated PTB.

It is a fundamental precept of contract law that the court will only enforce a bargain — as distinct from a mere promise — and that the formulation of a bargain requires consideration.

The trial judge found that the PTB was not enforceable "due in part to the lack of consideration" — given that, at the time it was signed, the training was already complete, and Mr. Van Haren was no longer assigned to the Beechcraft 350.

Accordingly, the judge held that he did not receive anything of value in exchange for his promise of payment when he signed the PTB.

The NTA appealed to the British Columbia Supreme Court.

Justice Ballance did not accept NTA's argument that the PTB was merely the written manifestation of the verbal agreement that has been concluded when Mr. Van Haren accepted a position as co-pilot on the 350 in August 2007.

Instead, she found that the terms of the agreement, as set out in the PTB, were not contemplated by the parties in August 2007. In particular there had been no explicit discussion of reimbursement for pilot training expenses, the amount of the expenses, or the time over which the reimbursement was to take place. The appellate judge found that these issues were not even discussed in "more general terms".

Justice Ballance held that the trial judge "would have committed reviewable error had he held that the measure of damages later discussed by the parties and subsequently articulated in the [PTB], formed part of their earlier oral agreement made in August 2007."

The appellate court also made a number of determinations with respect to the calculation of damages by the trial judge. Of these rulings, one is particularly noteworthy.

In considering the damages that were sought, Justice Ballance noted that, in fact, NTA had deprived itself of the benefits of the agreement by transferring Mr. Van Haren to another aircraft type.

She ruled that "[i]n my view, it was a consideration worthy of significant weight in Mr. Van Haren's favour in the quantification of damages."

The appeal was dismissed with costs to Mr. Van Haren.

Northern Thunderbird Air Inc. v. Van Haren, 2011 BCSC 837

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