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TRANSPORTATION NOTES

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Delay Foils Arbitration Clause

In a recent Ontario Superior Court case, two Canadian companies entered into two agreements in Canada with respect to two shipments of sugar (totalling 20,000 metric tons) from Brazil to a port in Ghana. Disputes arose in respect of both agreements.

One party to the agreements, Star Tropical Import & Export Ltd. ("Star Tropical"), commenced a court action against the other party, International Project Management Consortium Ltd. ("IPMC"). Star Tropical also named the Chief Executive Officer of IPMC as a defendant in that action.

Both agreements had terms requiring disputes arising under the agreements to be submitted to arbitration.

The first agreement required that the arbitration be held in either Paris, France, or Zurich, Switzerland and that the International Chamber of Commerce rules and regulations would apply. The other indicated that disputes are to be resolved by an arbitrator designated by the Refined Sugar Association, pursuant to its rules regarding arbitration and that English law should apply.

Three years after Star Tropical commenced the action in Ontario, the defendant IPMC brought a motion to stay the action in order to allow for the disputes to be arbitrated.

In requesting the stay, the defendant relied on the *Ontario Arbitration Act, 1991* ("Arbitration Act") and the provincial *Courts of Justice Act*. The *Arbitration Act* states that a stay "shall" be granted where the parties have agreed to resolve disputes through arbitration. However, this section also provides a number of exceptions to this mandatory language.

The exception Master Short found most relevant was, "The motion [for a stay of the court proceedings] was brought with undue delay."

The Master also relied upon s. 7(5), which provides that the court "may" stay part of the court proceeding and allow part of it to proceed if the agreement to arbitrate only covers some of the issues in dispute and it is reasonable to separate those issues from those that are not covered by the agreement.

A difficulty for the defendant seeking the stay was that Star Tropical also named the CEO of IPMC as a defendant. The CEO was not a party to the agreements and therefore was not bound to arbitrate, despite his "unilateral statement" that he would submit to having the issues in dispute resolved in this manner.

Further, the way in which the claim was plead made it difficult for the court to separate the issues as against the CEO and the corporate defendant, IPMC. However, the Master was alive to the inequity which might result if an agreement to arbitrate were avoided by merely naming another defendant, not party to the agreement.

In deciding the dispute, the Master's starting point was that agreements requiring parties to arbitrate contractual disputes should be enforced. However, given that three years had passed, the Master thought that delay in bringing the motion to stay the court proceedings was fatal.

In this regard, he also queried whether it was reasonable and proportional (considering the recent amendment to the *Rules of Civil Procedure*) to bifurcate the proceedings and require the two Ontario corporations to incur the costs of arbitrating the disputes in Europe.

The Master then turned to s. 7(5) of the *Arbitration Act* and a recent Ontario decision which held that it would be unreasonable to grant a partial stay of proceedings. It was noted in that case that granting the partial stay could cause a delay in resolving all of the issues, that there would be significant duplication of resources, that there was potential for inconsistent findings, and that granting a partial stay was inconsistent with s. 138 of the *Courts of Justice Act*. As far as possible a multiplicity of proceedings should be avoided.

In reviewing other cases on point, the Master identified a number of factors which should be considered when determining whether a partial stay of proceedings is appropriate: whether the matters *vis-à-vis* the parties to the arbitration agreement are closely related to those in issue with the non-party; whether the claims can be efficiently adjudicated through the arbitration process; whether unfairness could be suffered by either of the parties.

The Master refused to stay the action. He found that the delay in bringing the motion for a stay, the failure to have the matter determined by arbitration promptly after the action had been commenced, the principle of proportionality, and the interests of the parties did not favour a stay of the action.

Star Tropical Import & Export Ltd. v. International Project Management Consortium Ltd., 2011 ONSC 4005

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Rail Dispute to be heard on Commercial list

In *CN v. Holmes*, the Ontario Superior Court considered whether to consolidate two actions and order that they be heard in the same place. At stake was a dispute over an investigation launched by Canadian National Railway Company ("CN") with respect to an employee Scott Holmes ("Holmes") alleged to have run a fraudulent invoice scheme benefitting a number of companies in which he and his wife had an interest. The Court considered a number of factors that, under Ontario law, are meant to guide decisions as to location and consolidation of actions. The Court ultimately found that both actions should be heard in Toronto on the Commercial List, and, in order to maximize efficiency of proceedings, they should be heard "one after the other."

CN claimed approximately $2 million, as well as a number of remedies pertaining to holds on property, against Holmes, his wife, his ex-wife, persons at CN who allegedly assisted Holmes, and a number of companies in which Holmes had an interest. Holmes was a full-time track supervisor at CN responsible for dealing with the maintenance and construction of CN track and in charge of procuring construction services and equipment for CN. In its claim, CN alleged that Holmes arranged for the companies in which he had an interest to provide services and equipment to CN, but without disclosing this interest. CN also alleged that Holmes: obtained the computer passwords of a more senior employee to approve invoices submitted to CN; approved invoices submitted by the companies in which he had an interest for services and equipment which were never provided; and utilized materials owned by CN without compensating for their use.

CN launched its action in August 2008 in Toronto, on the court's Commercial List, which deals with cases involving complex commercial issues. Generally, cases on the Commercial List are closely managed. A designated judge was in charge of supervising the CN action. In parallel, a police investigation was conducted and Holmes and his wife were charged with fraud-related offences in November 2009. In November 2010, a preliminary inquiry was held. The purpose of a preliminary inquiry is to determine whether there is sufficient evidence to proceed with a criminal trial. At this preliminary inquiry, the Crown stayed the charges.

In February 2011, Holmes and other defendants to CN's civil action launched their own action in Hamilton. The action was against CN, certain of its officers and employees and members of the CN police involved in the investigation of the conduct of Holmes and his wife, and against Holmes' ex-wife, who was alleged to have provided information to CN and CN Police. The action claimed abuse of public office, abuse of process, malicious prosecution, injurious falsehood in the form of making false statements in proceedings launched by CN to secure the property of the Holmes companies before trial, and defamation. The allegations were centred on the investigation conducted by CN Police which the plaintiffs claimed was improper and launched for the purpose of obtaining information in the civil action. In response, CN pleaded that it was permitted under the *Railway Safety Act* to conduct the investigation, and that there are no damages as the plaintiffs' conduct would have in any event led to investigation, charges and arrest.

The Court in its decision emphasized principles of effectiveness and proportionality in ruling that the CN action was to remain on the Commercial List, that the Hamilton action was likewise to be placed on the Commercial List in Toronto, and that the actions would be heard one after the other.

The Court was particularly persuaded by the facts that: the parties had already engaged in a number of procedural skirmishes, justifying the need for case-management offered by the Commercial List; the Toronto and Hamilton actions had "substantial facts in common" and "very significant overlap" of evidence" insofar was the issue of whether Holmes had engaged in the wrongful conduct alleged by CN was crucial to both actions. The Court observed that launching the action in Hamilton appeared to be a tactical decision. The Court emphasized the need to keep pre-trial costs "within some manageable range". The Court however found that the actions could not be merged completely, and thus should be heard one after the other.

The Court did not consider the facts that: the parties were not completely identical; some parties had retained different counsel and the plaintiffs in the Hamilton action wanted the case tried by jury to be sufficient as deterrents to having both actions heard in Toronto. The Court found the last point significant, but held that while there might be difficulties with having different triers of fact, the issue of whether the second action could be tried by jury could be revisited once it was more clear how complex the action would be.

CN v. Holmes, 2011 ONSC 4837

Mexico Bilateral

On August 12th the Canadian Minister of Transport announced a new air services agreement between Canada and Mexico. This agreement, which was signed *ad referendum* but which is being applied administratively, will replace the restrictive agreement previously in force. Under the old agreement designation of air carriers was limited, although a series of diplomatic notes had expanded the rights originally granted. Thus, in 2007, WestJet, Air Transat, Skyservice and Sunwing were all designated as Canadian carriers entitled to exercise rights under the agreement. There were also restrictions on routes and associated rights but these as well had been extended on a number of occasions by diplomatic note. Tariffs were filed on a single disapproval basis.

The new agreement will make a clean sweep of the series of notes, many of which are still *ad referendum* and thus not publicly available. There will be no restrictions on the number of carriers who may be designated and the pricing provisions will be liberalized to allow greater flexibility in the setting of fares. The safety and security provisions which are found in most recent agreements will be included.

Mexico is a hugely popular destination for Canada's sun-starved winter population and the charter traffic which ramps up just before Christmas each year and continues strong until mid-March has been a large driver of the increasing traffic. However, Mexico is not exclusively a leisure destination. In 1994 the North American Free Trade Agreement came into force. This trade agreement, which has led to some very significant political debates in Canada, has been associated with a quadrupling of the trade between Canada and Mexico. As a consequence of increased leisure and business travel, Mexico has become Canada's third largest transportation market.

The new agreement should reduce the administrative burden associated with applying for route rights and thus improve the ability to offer more economical air services between the countries.

In 2006 Canada announced its "Blue Sky" policy to encourage more liberal air service agreements, ideally of the "open skies" variety. However, the policy recognizes that open skies will not be possible in every case and evinces a pragmatic willingness to negotiate less than open skies agreements where necessary. Our new agreement with Mexico falls short of open skies and more resembles the agreements, all negotiated in the last 5 years, with Japan, Jordan, Singapore, the Philippines, Morocco, Cuba, Egypt, and Algeria. All of these represent liberal improvements over the agreements which have been replaced.

Aviation Safety Agreement Enters into Force

The Bilateral Aviation Safety Agreement between Canada and the European Union came into force on July 26, 2011. The Agreement, which was signed at the European Union-Canada Summit on May 6, 2009, has now been approved by the Parliaments of Canada and the EU. It sets out the framework for a broader reciprocal acceptance of the certification of aeronautical produces and services. Some of the press releases which followed the coming into force suggested that this would be a "brave new world" overnight. Of course that is not the case.

Article 3 specifically states that the Agreement "shall not be construed to entail reciprocal acceptance of standards or technical regulations" and, except as specified, "shall not entail the mutual recognition of the equivalence of standards or technical regulations". Transport Canada and the European Aviation Safety Agency are charged with the task of agreeing upon Implementation Procedures. The full benefits of the Agreement will not be enjoyed until those procedures are in place.

While there is still a long way to go to full implementation, it is also true that the Agreement does not arise out of a vacuum. Canada has had bilateral agreements on airworthiness with France and Italy for over 20 years and technical arrangements and bilateral airworthiness understandings with a number of European States as well as a technical arrangement on maintenance with the members of the Joint Aviation Authorities.

Developments in Europe in 2002 led to the transition of authority for aeronautics from individual Member States to the European Aviation Safety Agency and this was followed, in 2004, by two arrangements between Transport Canada, Civil Aviation Directorate and the EASA. The first of these is an arrangement which allows for a certain amount of reciprocal recognition of approved maintenance organisations. A maintenance organisation regulated by one Party, and which is compliant with the terms of the arrangement, is authorized to perform maintenance functions on a civil aeronautical product regulated by the other party.

The second arrangement between Transport Canada and EASA, dating from 2004, deals with airworthiness and product certification. This arrangement is not reciprocal. It defines the circumstances in which an aeronautical product approved by Transport Canada may be accepted by EASA without independent verification of standards.

Thus, Canada and its European trading partners have made progress in "recognising the emerging trend towards multinational design, production, and interchange of Civil Aeronautical Products" (in the words of the Recitals to the Agreement). The first objective of the new Agreement is to enable the reciprocal acceptance of approvals relating to airworthiness, certification and maintenance. This objective is to be achieved by defining specified procedures for assessing products and services and confirming their conformity to the requirements of aeronautical laws. Once these procedures have been specified, the Parties agree, subject to the conditions of the Agreement, to accept or recognize the results of the specified procedures. Defining these Implementation Procedures is the work which is now underway.

The Agreement applies to Airworthiness Approval, continuing airworthiness monitoring, approval and monitoring of manufacturing and maintenance facilities, and the environmental approval and testing of civil aeronautical products. It provides for the identification of competent aeronautical authorities capable of assessing the conformity of products or organisations. The Agreement also defines a procedure by which a Party may contest the competence of an aeronautical authority and creates a Joint Committee to which such challenges are to be addressed.

The Parties retain authority to take immediate measures in certain circumstances, irrespective of the other provisions of the Agreement. Thus, a Party can take "all appropriate and immediate measures" to prevent compromise to the health or safety of persons. Subject to a requirement to engage in prior consultations, a Party may suspend its reciprocal acceptance obligations in certain circumstances related to inadequate performance by the other Party.

The "working parts" of the Agreement are found in the two Annexes which specify procedures for the certification of products (Annex A) and maintenance (Annex B). Each Annex creates a Joint Sectorial Committee to establish further working procedures and generally take steps necessary to ensure the proper operation of the Agreement. Annex B reflects a broad agreement on the equivalence of the applicable legislation of each Party, the adequacy of certification practices as proof of compliance, and the equivalence of the "respective standards of the Parties pertaining to licensing of maintenance personnel".

Annex A is considerably more complicated and there is more work to be done to truly streamline certification procedures. The Annex describes a procedure which is to apply to the approval of type certificates, supplemental type certificates, repairs, parts and appliances. The Parties agree that a design organisation approved by one Party will be taken to have the capability to satisfy any requirements of the other Party.

The Importing Party which issues a type certificate to define the required standards of an imported product is required to consult its own standards for a similar product as in force at the time the application for the original type certificate was submitted for approval to the Exporting Party. This is the presumptive certification basis. The Importing Party is entitled to specify exemptions to or deviations from the certification basis but in doing so the Importing Party "shall not be more demanding for the products of the Exporting Party than it would be for similar products of its own."

Each design approval will proceed on the basis of a certification programme which will be under the oversight of the Joint Sectorial Committee on Certification. With respect to type certificates and supplemental type certificates for aircraft, engines or propellers, the Agreement provides that these *shall* be issued by the Importing Party when three conditions are met. The Exporting Party must have issued its own certificate and must have certified to the Importing Party that the design complies with the certification basis defined in the Agreement. These first two conditions are within the control of the Exporting Party, however the third is not. The Importing Party will issue its certificate only when "all issues raised during the certification process have been resolved."

In the case of changes to type design and in respect of repair designs of products for which the Importing Party has issued a certificate a basic distinction is made between two categories. The categories are to be established by procedures determined by the Joint Committee. For those changes which require the involvement of the Importing Party (first category), its approval will be given provided the Exporting Party provides a written statement that the design changes comply with the certification basis. For all other changes approval of the Exporting Party "constitutes a valid approval of the Importing Party without additional action."

With respect to export certificates of airworthiness, the Agreement provides that the Exporting Party shall issue an export certificate of airworthiness which will certify that the aircraft conforms to a type design approved by the Importing Party, that it complies with all airworthiness directives issued by the Importing Party and meets all additional requirements of that Party. There are similar provisions dealing with used aircraft, and authorized release certificates for products and assemblies.

Agreement on Civil Aviation Safety between Canada and the European Community

End Of The Line

At the end of July the Supreme Court of Canada released a decision which marks, we believe, the most important decision in over 20 years on an issue of significance for transportation companies. It adds significantly to the debate concerning the extent to which a government may incur liability in tort. Although the appeals (two related cases were heard together) do not arise from the transportation context the decision is decidedly pertinent to transportation service providers.

The cases arose from health issues associated with tobacco. In each case tobacco companies were sued to recover damages arising from illness caused by smoking and sought to minimize their exposure by bringing contribution claims against the federal government. The Court of Appeal of British Columbia thought the cases should be allowed to proceed to trial but a unanimous Supreme Court of Canada reversed that decision, finding that the claims of the tobacco companies had no reasonable chance of success. The Court did, however, find that the government owed a duty of care to the tobacco companies. Nevertheless, it was entitled to immunity from suit as its actions fell within an area which the Court described as one of "core policy". Its discussion of how the duty arose in the first place, and more particularly, the proper delineation of the government's right to immunity are of particular interest.

With respect to the first issue, namely the circumstances in which a duty of care will arise, the Court identified an important difference in the relationship between the federal government and individual smokers, on the one hand, and that between the government and the tobacco companies on the other. Before discussing that difference it is necessary to very briefly review the facts.

According to the allegations in the tobacco companies' claim (and these are taken to be true as this decision arose from a motion to strike the claim) in the mid 1960's Health Canada became involved in a campaign to persuade smokers to switch to low-tar cigarettes. Furthermore, Agriculture Canada became involved in the development of several strains of low-tar tobacco. It was also said that agencies of the Canadian government negligently misrepresented the health attributes of low-tar cigarettes, both to individual smokers and to the tobacco companies.

It is against this background that the Court considered whether the government owed a duty of care to either the consumers or the tobacco companies. It first observed that there is no precedent for determining whether the relationships alleged might give rise to liability for negligent misstatement. That being the case, Canadian law calls for the application of a two part test: is there a relationship of proximity so as to give rise to a duty of care and, if there is, are there circumstances which should negate the existence of that duty.

The relationship between the government and individual smokers "was limited to Canada's statements to the general public that low-tar cigarettes were less hazardous." In the absence of "specific interactions" no duty of care could be established. Furthermore, there was no statutory basis for liability to consumers as the relevant statutes create general duties to the public and no private law duty.

However, the relationship between the government and the tobacco companies was different. The allegations that government officials played a role in developing special strains of tobacco and advised tobacco companies that these would mitigate the health risks of smoking was enough to create the "specific interactions" which were absent from the relationship with the general public. Thus the Court held there was indeed a duty of care owing to the tobacco companies.

This finding required the Court to consider whether there are considerations which negate the existence of the duty. In concluding that there are indeed such considerations the Court, in our view, made a significant advance in the analysis of that troubling issue. The general point is not contentious—government will be immune from suit if the actions complained of arose out of policy. In Canada it is common to contrast policy decisions and operational decisions. However, confusion begins to enter the analysis when the word "discretion" is introduced, as it often is. Some have considered discretion to be synonymous with policy. If this conflation of ideas is allowed it becomes very difficult to know where the line is to be drawn. Is a local manager's decision to postpone the repair of security related apparatus in a national airport in order to make his year end expenditure figures look better sufficiently discretionary to shield his employer from liability if a security breach results? At one point it would have been possible to argue for immunity in these circumstances. In our view, the Supreme Court has closed the door to such arguments. The only policy decisions which should be granted immunity are those which relate to "core policy" and which are made by persons whose responsibility it is to make such policy. The government in this case acted in the interest of public health. Although it may have been wrong in its assessment of low-tar cigarettes, the error is shielded from liability as a "core policy" decision. The Court concluded that there was no reasonable prospect that the claims against the government could succeed at trial and therefore granted the government's motion to strike all claims.

We do believe that in any case where the government's potential liability to transportation companies is in issue (and security and safety are likely contexts), the Court's clarification of the limited circumstances in which a government will be entitled to policy immunity will need to be carefully considered in the light of the full factual context.

R. v. Imperial Tobacco Canada Ltd., 2011 SCC 42

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