



Fernandes Hearn LLP  
BARRISTERS & SOLICITORS

# Top Transportation Tips from Toronto... eh?

Transportation and Logistics Council  
Charleston, SC March 19-21, 2018



Fernandes Hearn LLP  
BARRISTERS & SOLICITORS

# The Set-Up...



James Manson

(416) 203-9820 [jmanson@fernandeshearn.com](mailto:jmanson@fernandeshearn.com)



Fernandes Hearn LLP  
BARRISTERS & SOLICITORS

## The Set-Up...

- Shipment of eclipse glasses
- China to Vancouver by ship
- Vancouver to Toronto by rail
- Toronto to Nebraska by road



Fernandes Hearn LLP  
BARRISTERS & SOLICITORS

## Issues and Tips

1. The Canadian Legal System
2. Marine Liability in Canada
3. Freight Forwarding in Canada
4. Railway Liability in Canada
5. Motor Carrier Liability in Canada
6. Claiming Damages in Canada  
(Foreseeability)
7. Conflicts of Laws in Canada



Fernandes Hearn LLP  
BARRISTERS & SOLICITORS

Issue # 1

The  
Canadian  
Legal  
System



James Manson

(416) 203-9820 [jmanson@fernandeshearn.com](mailto:jmanson@fernandeshearn.com)



Fernandes Hearn LLP  
BARRISTERS & SOLICITORS

## Issue # 1

# The Canadian Legal System

- similar in many respects to the US system
- adversarial system
- based on the common law



Fernandes Hearn LLP  
BARRISTERS & SOLICITORS

## Issue # 1

# The Canadian Legal System

- but, many significant differences...
- judges all appointed, never elected
- apolitical



Fernandes Hearn LLP  
BARRISTERS & SOLICITORS

## Issue # 1

# The Canadian Legal System

- not enough money in the system!
- not enough judges
- civil litigation “last at the trough”
- loooooooooong delays
- up to 5 years to get to trial





Fernandes Hearn LLP  
BARRISTERS & SOLICITORS

## Issue # 1

# The Canadian Legal System

- no case management as in the US
- no “rocket docket”
- depositions are different (adds to delay)
- mandatory mediations (further cost and delay)
- jury trials rare in civil litigation



Fernandes Hearn LLP  
BARRISTERS & SOLICITORS

## Issue # 1

# The Canadian Legal System

- costs regime (loser pays – ~60%)
- this drives up costs
- disincentive to commence proceedings
- disincentive to “take risks” or “push the file”



Fernandes Hearn LLP  
BARRISTERS & SOLICITORS

## Issue # 1

# The Canadian Legal System

- Federal Court
- more money in the Federal Court system
- more “practical”
- better case management
- maritime and interprovincial transportation matters
- costs according to tariff, much lower



Fernandes Hearn LLP  
BARRISTERS & SOLICITORS

## Tip # 1

The  
Canadian  
Legal  
System... is  
a horrible  
nightmare!

- BEWARE litigating in Canada!
- not at all what you might expect
- much longer to get a resolution
- tension - spending \$ to “push” v. “letting it sit”



Fernandes Hearn LLP  
BARRISTERS & SOLICITORS

Issue # 2

# Marine Liability in Canada



James Manson

(416) 203-9820 [jmanson@fernandeshearn.com](mailto:jmanson@fernandeshearn.com)



Fernandes Hearn LLP  
BARRISTERS & SOLICITORS

## Issue # 2

# Marine Liability in Canada

- US – COGSA
- Canada – *Marine Liability Act*
- implements several international treaties
- *Hague-Visby Rules*
- basically the same as COGSA
- few important differences



Fernandes Hearn LLP  
BARRISTERS & SOLICITORS

## Issue # 2

# Marine Liability in Canada

- limitation of liability
- COGSA - \$500 per package unless value declared and inserted in the bill of lading
- in Canada, limitation is 666.67 SDR (US\$980)
- roughly double



Fernandes Hearn LLP  
BARRISTERS & SOLICITORS

## Issue # 2

# Marine Liability in Canada

- 1976 Convention on Liability for Maritime Claims
- limits liability to 1.51 million SDR (USD\$2.2M)
- domestic carve-out
- ships under 300 gross tons, maximum liability **CAD\$500,000**



## Tip # 2 –

Marine cases attract different limitations of liability in Canada



Fernandes Hearn LLP  
BARRISTERS & SOLICITORS

- BE AWARE that in Canada, we have a higher limitation of liability than in the US
- may be able to use the CAD\$500,000 limitation for large losses
- would likely be in Federal Court for maritime matters



Fernandes Hearn LLP  
BARRISTERS & SOLICITORS

Issue #3

# Freight Forwarding in Canada



James Manson

(416) 203-9820 [jmanson@fernandeshearn.com](mailto:jmanson@fernandeshearn.com)

## Issue #3

# Freight Forwarding in Canada



Fernandes Hearn LLP

BARRISTERS & SOLICITORS

- in Canada regulated
- two exceptions (QC and ON - not onerous)
- in QC – must register as “freight intermediary”
- in Ontario – must hold money in trust for carriers
- no FMC equivalent
- no distinctions as in US (freight forwarder/NVOCC, etc.)



Fernandes Hearn LLP  
BARRISTERS & SOLICITORS

## Issue #3

# Freight Forwarding in Canada

- CIFFA – Canadian International Freight Forwarders Association – reputable
- CIFFA standard terms and conditions
- depending on whether f/f is principal or agent
- liability principles murky in Canada
- fact specific



Fernandes Hearn LLP  
BARRISTERS & SOLICITORS

## Issue #3

# Freight Forwarding in Canada

- E-manifest requirements (customs)
- in our scenario – not clear whether Intermediary Inc. is a principal or agent

## Tip # 3



Fernandes Hearn LLP

BARRISTERS & SOLICITORS

- BE AWARE – freight forwarders in Canada are not regulated!
- try to use CIFFA members – more reputable
- if operating in QC – is the f/f registered?
- if in Ontario – is the money due the carrier being held in trust?
- do your research – you may not be getting what you think you might be based on US experience



Fernandes Hearn LLP  
BARRISTERS & SOLICITORS

Issue # 4

# Railway Liability in Canada



James Manson

(416) 203-9820 [jmanson@fernandeshearn.com](mailto:jmanson@fernandeshearn.com)



Fernandes Hearn LLP  
BARRISTERS & SOLICITORS

## Issue # 4

# Railway Liability in Canada

- in Canada, railways are federally regulated
- *Canadian Transportation Act* and regs
- essentially, a railway must publish a tariff
- alternatively, can agree on a confidential contract with a shipper
- railway and shipper must also agree on liability
- if not, regulations apply (standard)





Fernandes Hearn LLP  
BARRISTERS & SOLICITORS

## Tip # 4

- look for the tariff!
- if you have lots of volume to ship, try to get a contract with the railway
- be clear on the liability conditions!  
Are you OK with the regulations?



Fernandes Hearn LLP  
BARRISTERS & SOLICITORS

Issue # 5

# Motor Carrier Liability in Canada



James Manson

(416) 203-9820 [jmanson@fernandeshearn.com](mailto:jmanson@fernandeshearn.com)



Fernandes Hearn LLP  
BARRISTERS & SOLICITORS

## Issue # 5

# Motor Carrier Liability in Canada

- regime in Canada quite different
- motor carriage not federally regulated in Canada
- originating province governs
- US – Carmack (full liability absent agreement)
- Canada - **\$2/lb.** (absent value declared on BOL)



Fernandes Hearn LLP  
BARRISTERS & SOLICITORS

## Issue # 5

# Motor Carrier Liability in Canada

- most (not all) provinces have enacted “Uniform Conditions of Carriage”
- specify carriers’ defences, responsibilities and the \$2/lb. limitation
- also specify what information on BOL
- important – different provinces, different results



Fernandes Hearn LLP  
BARRISTERS & SOLICITORS

## Issue # 5

# Motor Carrier Liability in Canada

- British Columbia – courts have held NO limitation applies in absence of properly drafted BOL
- Ontario – regulates “contract of carriage” not BOL – has led to some confusion
- also not settled as to whether \$2/lb applies to consequential damages (loss of profit)



Fernandes Hearn LLP  
BARRISTERS & SOLICITORS

## Tip # 5

- BE AWARE, in Canada the limitations are much different
- every province is different, but largely \$2/lb
- BUT – freedom of contract
- put a transportation agreement in place?
- specify a higher liability amount, full Carmack?

Issue # 6

Claiming  
Damages in  
Canada  
(Foreseeabi  
lity)



Fernandes Hearn LLP  
BARRISTERS & SOLICITORS





Fernandes Hearn LLP  
BARRISTERS & SOLICITORS

## Issue # 6

# Claiming Damages in Canada (Foreseeability)

- damages, don't get "everything under the Sun"
- punitive damages MUCH lower
- damages have to be "reasonably foreseeable"
- *Hadley v. Baxendale* – still good law
- carrier has to have knowledge of "special circumstances"





Fernandes Hearn LLP  
BARRISTERS & SOLICITORS

## Issue # 6

# Claiming Damages in Canada (Foreseeability)

- In our case, no one seems to have told anyone about any special circumstances
- “obvious”?
- blueberries – air freight justified?
- Persian rugs – held up for 16 months – loss of profits reasonable
- not loss of business altogether



Fernandes Hearn LLP  
BARRISTERS & SOLICITORS

## Tip # 6

- if your shipment is of a critical nature, or very time sensitive...
- if extraordinary damages will take place...
- ... TELL THE CARRIER!
- put it in writing!
- otherwise, very difficult to get the carrier found liable for extraordinary damages
- again, unclear whether \$2/lb. will apply to consequential damages (loss of profit)



Fernandes Hearn LLP  
BARRISTERS & SOLICITORS

Issue # 7

Conflict of  
Laws  
Analysis in  
Canada



James Manson

(416) 203-9820 [jmanson@fernandeshearn.com](mailto:jmanson@fernandeshearn.com)



Fernandes Hearn LLP  
BARRISTERS & SOLICITORS

## Issue # 7

# Conflict of Laws Analysis in Canada

- in our fact pattern – where would you sue?
- what law would apply?
- this engages a conflicts of law analysis
- very technical area of law



Fernandes Hearn LLP  
BARRISTERS & SOLICITORS

## Issue # 7

# Conflict of Laws Analysis in Canada

- could you get into Canadian court?
- “real and substantial connection” to Canada
- presumptive connecting factors
- defendant carries on business in Canada, has a presence in Canada
- contract made in Canada, tort takes place in Canada



Fernandes Hearn LLP  
BARRISTERS & SOLICITORS

## Issue # 7

# Conflict of Laws Analysis in Canada

- we need more information about the parties in this case – where are they based? Where was the contract agreed to?
- what does the contract say?
- that said, Federal Court would likely have jurisdiction (maritime connection) if a through bill of lading



Fernandes Hearn LLP  
BARRISTERS & SOLICITORS

## Issue # 7

# Conflict of Laws Analysis in Canada

- what law applies?
- law chosen by parties will generally apply
- if no agreement, Canadian courts apply the law with the closest connection to the events in question
- fact-specific exercise



Fernandes Hearn LLP  
BARRISTERS & SOLICITORS

## Tip # 7

- BE AWARE of the hurdles to clear if you want to bring suit in Canada
- here, could likely sue in Federal Court (maritime/rail connection)
- here, hard to say which law would apply, but likely NOT Carmack





Fernandes Hearn LLP  
BARRISTERS & SOLICITORS

Questions?



Fernandes Hearn LLP  
BARRISTERS & SOLICITORS

Thank you, eh!

James Manson

Fernandes Hearn LLP

[jmanson@fernandeshearn.com](mailto:jmanson@fernandeshearn.com)

416-203-9820