

# TRANSPORTATION NOTES

Legal Decisions and Developments Affecting the  
Transportation Industry in Canada

DECEMBER 2005

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## BULLETIN BOARD

- *Pearson opens 10 new gates on November 1;*
- *TSB recommends stability standards for small fishing vessels;*
- *WestJet net earnings up 43.6% over 3Q04, yield to 18.3 cents;*
- *Air Canada's order for 777's and 787's back on;*
- *Air Transat designated for scheduled service to Greece following bilateral expansion;*
- *Jean-Marc Fortier appointed to Transportation Appeal Tribunal;*
- *\$26.9 M funding for additional marine facility security announced;*
- *Review panel to consider CATSA enhancements;*
- *CN ordered to limit train lengths following BC derailments;*
- *Air Canada Jazz IPO back on following government flip-flop on taxation of income trusts;*
- *Air India inquiry ordered 20 years after crash.*

## Open Skies Agreement: Canada and the United States

Canada and the United States negotiated a partial Open Skies agreement early in 1995. Discussions of further liberalization have taken place over the last ten years. The sense of likely change had been strong in the last year and those discussions came to fruition in November. The terms of a new air services agreement have been agreed upon and are scheduled to come into effect on September 1, 2006.

The most significant changes are opening the door to behind and beyond markets and removal of the restrictions on co-terminalization on all cargo flights.

Annex I of the existing agreement deals with scheduled air transportation and defines route authorities, places special restrictions on all-cargo services, provides for very limited fifth freedom services and reasonably generous route flexibility. The liberal aspects of this

Annex will be continued and extended. In particular, route authority will be extended to include traffic carried from behind points via the home state of the carrier, onward to the granting state via intermediate points and, finally, points beyond the granting state. Of course, exercise of these rights will depend upon the home state having appropriate traffic rights with the behind, intermediate and beyond states involved.

The new agreement also provides for increased operational flexibility. Behind, intermediate and beyond points may be served in any combination and in any order. Change of gauge will be permitted at any point, and, in the case of all-cargo services, the need for any connection with the home state of the carrier will be eliminated. Effectively, seventh freedoms will be available for all-cargo operations. The Canadian Transportation Agency has in fact been granting seventh

freedoms for all-cargo charter operations on a liberal basis for some time now.

The objections, raised vigorously by some Canadian all-cargo operators, to co-terminalization will go by the boards. Whether this change will have the significant economic impact predicted by some remains to be seen but, to this writer, that seems unlikely.

In another development this month, the U.S. DOT announced a proposal which would introduce a more liberal analysis of foreign control. Only states which have an Open Skies agreement with the United States would qualify. The prospects of a Canadian investor taking advantage of this proposed regime plus the availability of more favourable anti-trust immunity consideration may be factors behind Canada's addition to the Open Skies parade.

## Ship Fined \$70,000 for Oil Pollution

A Newfoundland and Labrador Provincial Court Judge has ordered the ship *Nordic Fighter* (previously known as the *Front Fighter*) to pay a \$70,000 fine for illegally discharging a pollutant in Canadian waters.

In June of 2004, the *Front Fighter* was traveling from Yorktown, Virginia toward

Whiffen Head, Newfoundland and Labrador, when a Transport Canada marine pollution surveillance flight detected three oil slicks behind the vessel.

When the vessel arrived at Whiffen Head, Transport Canada Marine Safety Inspectors boarded her and conducted an investigation

which confirmed that the oil had originated from the vessel. Transport Canada laid charges under the *Pollution Prevention Regulations* pursuant to the *Canada Shipping Act*. The vessel pleaded guilty and was fined \$70,000.

## Aeronautics and Navigation & Shipping in SCC

*Attorney General of British Columbia vs. Lafarge Canada Inc. et al*

The Supreme Court of Canada has recently agreed to hear an appeal from a decision of the Court of Appeal for British Columbia in a matter which has interesting implications with respect to the powers of the Federal Government in matters of navigation and shipping. The Vancouver Port Authority proposed to lease land in the Port of Vancouver to Lafarge Canada Inc. ("Lafarge") for the purpose of constructing a concrete mixing plant. The project was opposed by a local citizens' group, which brought an application to the British Columbia Supreme Court for a ruling that the project violated the zoning by-laws of the City of Vancouver.

The Port Authority and Lafarge advanced several arguments as to why the zoning by-laws of the City of Vancouver should not apply to the Port Authority, which is a federal crown corporation. One argument was that the determination of the use to which the land is to be put falls within the exclusive power of the federal government to

legislate in the area of navigation and shipping.

The B.C. Supreme Court held that the determination of the use of the land in the Port was not a matter of navigation and shipping because a concrete mixing facility was not integral to the operations of the Port. The court stated: "A marine facility may well be commercially desirable for the efficient operation of a (concrete) plant, but that does not mean that a plant that makes concrete is necessary to the operation of a marine facility".

The B.C. Court of Appeal overturned the decision of the B.C. Supreme Court [(2004) 237 D.L.R. (4<sup>th</sup>) 466]. It held that the court below had been misguided in embarking on an analysis of whether or not a concrete plant is integral to the operation of a port facility. The correct test, the Court of Appeal decided, is "...not whether the specific activity of making concrete is essential to navigation and shipping, but whether the Port Authority's powers to plan and regulate land use development within the Port form a vital

part of the exclusive federal legislative jurisdiction over navigation and shipping". It answered this question in the affirmative, drawing an analogy with the cases which have concluded that the operation of airports is an integral part of the Federal Government's power to legislate in the area of aeronautics.



- "Accordingly, if in the aeronautics context, the ability to control the building design and operational quality of airports is a vital part of the federal jurisdiction over aeronautics, as the Ontario Court of Appeal recently confirmed in *Mississauga v. GTAA*, so too should the ability to plan and regulate the development and use of port lands, which is essential to ensuring the operational quality of the port, be considered a vital part of the federal jurisdiction over navigation and shipping."

## TSB Finds No Significant Anomalies on Air France 358

On November 16, the Transportation Safety Board issued an Investigation Update re Air France 358, the flight which overshot runway 24L at Pearson International on August 2, 2005.

Although the aircraft came to rest in a ravine and caught fire, there were no fatalities. Of the 297 passengers and 12 crew members on board, it is said there

were a total of 11 serious injuries.

The TSB has found no significant anomalies of the aircraft systems. "The flight controls functioned as expected, spoilers were deployed on touchdown, the tires and braking system worked as per design, the thrust reversers were found in the deployed position."

The accident has prompted some discussion of possible mandatory safety zones which could create a problem at airports, such as Pearson, where runways extend very close to boundaries or against topographical limitations such as ravines. The end result could be shorter runways not conducive to larger aircraft types such as the new A 380.

## Pearson Has Highest Landing Fees in the World

The combination of a 6.9% increase in landing fees at Toronto's Pearson International Airport, and the recent 20% reduction in landing fees at Narita has made Toronto the most expensive place in the world to land a commercial aircraft. For example, it will now cost more than CAD\$13,000 to land a 747-400 at Pearson, compared to CAD\$7,300 for the same aircraft at Narita.

The revolt against the high cost of Pearson has been in the making for some time. Last spring, WestJet, Canada's largest low cost carrier, set its fares from Hamilton International Airport (75 km southwest of Pearson) to other destinations at CAD\$20 less than flights to/from Pearson. In September, Air Canada began offering flights from Hamilton for service to Montreal and Ottawa.

After the announced increase, Robert Milton, the Chairman of Air Canada, commented that the air carrier would schedule more flights in and out of Pearson if the fees were lowered.

## Class Actions: Developments in B.C. and Ontario

*Ernewein v. General Motors of Canada Ltd., 2005 BCCA 540; Pearson v. Inco Limited, Ontario CA, Docket 20051118*

On November 3, 2005 the British Columbia Court of Appeal released its reasons in an appeal from the Order of a Supreme Court Judge in Chambers which certified an action as a class proceeding pursuant to the *Class Proceedings Act of British Columbia*. The proposed class of plaintiffs consisted of the owners of pick-up trucks manufactured by General Motors of Canada between 1973 and 1991. These trucks had their fuel tanks mounted outside the "rails" of the vehicles, which allegedly created a risk of explosion in side-impact collisions.

The proceeding was certified as a class proceeding by the Chambers Judge, but this decision was overturned by the Court of Appeal. While recognizing that, in general, products liability cases are well-suited to class proceedings, the Court of Appeal found that there was not a sufficient evidentiary basis for a commonality of interest between the class members in this case. There was insufficient evidence produced to establish that the location of the fuel tanks outside the rails of the vehicles raised a question common to all of the plaintiffs. Rather, the defendants produced evidence to the effect that the pick-up trucks manufactured between 1973 and 1991 incorporated a number of unique fuel system designs and that it was impossible to generalize on how a vehicle would perform in a particular crash.

The Court of Appeal may have been influenced in its decision by the underlying facts of the case. While there was evidence that a class proceeding with respect to the same trucks had been settled in Louisiana, there had never been a recall of the subject vehicles and there was no evidence of anyone having suffered a serious injury or death as a result of an exploding fuel tank. It was the contention of the plaintiffs that the value of their vehicles had been diminished by reason of the faulty location of the fuel tank. However, the representative plaintiff deposed that he had acquired his vehicle in 1982 but subsequently admitted that he had accepted it in forgiveness of a debt in 1987. The evidence was that none of the subject vehicles would have a value of more than \$100.

There was evidence that the litigation in both the United States and Canada had been inspired by an NBC news report in which staged collisions resulted in the subject vehicles erupting in flames. It was subsequently revealed that many aspects of the staged collisions had been falsely depicted. Among other things, it turned out that the eruptions of the fuel tanks were aided by toy rocket engines which ignited the fuel carried by the vehicles.

On November 18th the Court of Appeal for Ontario allowed the certification of

a class action seeking damages against Inco arising out of its nickel processing activities in Port Colborne. In doing so, it overturned the well-reasoned decision of a judge who has considerable experience with the certification of class actions and whose decision would normally be accorded significant deference. It also overturned a decision of the Divisional Court which agreed with the motions judge.

The decisions are lengthy and complicated and could be the subject of significant comment. In this brief note we wish to highlight one interesting feature of the litigation. As originally formulated, the claim sought wide-ranging relief and alleged numerous forms of damage. A central concern of the courts below was the fact that the individual issues were multiple and extremely complex. The motions judge concluded that a class action was not the preferable procedure for resolving these issues.

The plaintiff then amended the claim to focus on one issue: the alleged loss of real property value consequent on exposure to contaminants released by Inco. This change in focus, plus a recent case (*Cloud v. AG Canada*) which arguably introduces a more liberal approach to certification, were enough to overturn the lower court decisions.

## ATAC 2005 AGM Proceeds in Montreal

The annual general meeting of the Air Transportation Association of Canada (ATAC) took place in Montreal on November 6 to 8, 2005. The theme was "Back to the future...Or is it? Managing a New Era of Growth in Air Travel".

According to Ted Larkin, Director of Research at Orion Securities (a speaker at the Plenary Session), the future of the aviation industry in Canada is a rosy one – with the main current antagonist being high fuel costs.

Most speakers gave high marks to the Canadian government for the recent reductions to the airport rents payable to the federal Crown, although Pearson

remains a sore spot.

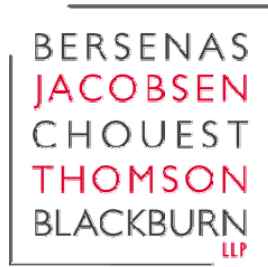
Also during the Plenary Session, Claude Lauzon, Director - Business Development and Strategic Planning, Pratt & Whitney Canada made a compelling case for the future of private air taxi operations for executives. Very light jet aircraft (VLJs) could, in his view, viably supplement the traditional hub and spoke system currently used by the industry for business travellers.

Among the topics discussed at various committee meetings was the accommodation of passengers with disabilities. A productive discussion ensued on this issue at the Cabin Operations Commit-

tee when a disabled person was invited to address the group on accessibility concerns.

Other committees discussed various topics of interest to the industry such as new fare advertising rules proposed for air carriers (*Bill C-44*), the implementation of Safety Management Systems (SMS) (*Bill C-62*) as a form of self-reporting to Transport Canada by air carriers on safety concerns, and the challenges of recruiting qualified flight crew quickly, given the upturn in demand post-911 and SARS.

Next year's AGM is scheduled to take place in Victoria, British Columbia from November 5 to 7.



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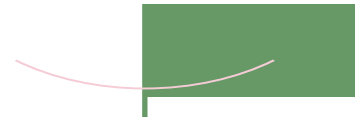
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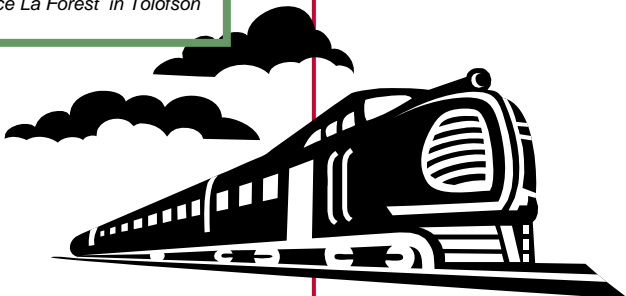


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*To permit a court . . . to impose its views . . . to determine the consequences of wrongs that take place (in another) jurisdiction would invite the forum shopping that is to be avoided if we are to attain the consistency of result an effective system of conflict of laws should seek to foster.*

Justice La Forest in *Tolofson*



*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.*

*In these Transportation Notes, we review a range of decisions, actions and events which impact on the interests of participants in the transportation sector. These include decisions of direct relevance, in the sense that the parties are participants in the industry, as well as decisions which raise issues of general importance, although not arising in a transportation context.*

*We welcome your comments and suggestions.*

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## End of the Line

Transportation companies, by the very nature of the industry in which they are engaged, typically are confronted with difficult issues which arise when an accident in one jurisdiction gives rise to injuries in another. The conflict of laws issue which plagues such cases is sometimes solved by applicable international conventions but in the absence of such a convention, the issue can be very troublesome. In Canada, for example, each province is “foreign” to every other province for the purpose of conflict of laws. Since the rules of the Warsaw/Montreal Conventions do not apply to flights entirely within Canada, the question of the applicable limitation period could arise in any accident involving a domestic flight.

Over 10 years ago, in the

seminal case of *Tolofson v. Jensen*, the Supreme Court of Canada appears to have solved the problem. In *Tolofson*, the Court cleared a path through a number of confusing precedents and established the clear rule that cases in tort should be decided by the law of the place where the accident took place. In particular, limitation periods applicable in the place where the accident took place are to govern any action, irrespective of where that action might be pursued. The Court identified forum shopping as an evil to be avoided by the application of this rule.

The clarity provided by *Tolofson* was threatened in a case arising out of the province of Alberta where a local limitation statute, enacted after the *Tolofson* decision, attempts to interfere with the operation of the rule established by the Court.

The case of *Castillo v. Castillo* arose out of an automobile accident in the state of California. A wife was injured; her husband was the driver. Both are residents of Alberta. The wife sued in Alberta two years less a day after the accident. The Alberta limitation period was two years. For the purposes

of the proceedings it was assumed (though not proved) that the applicable limitation period in California was one year.

Under *Tolofson* the result is clear: the California statute prevails and the action is out of time. However, the Alberta statute provides a twist: the Act purports to apply even when the claim is to be adjudicated under the substantial law of another jurisdiction.

The Alberta courts refused to allow this enactment to change the *Tolofson* analysis. The case is governed by California law and if the matter is not actionable in California, it should not be actionable anywhere.

The Supreme Court heard the appeal on November 16, 2005, and dismissed it from the bench. Reasons are to follow. We will be reporting further once the reasons of the Court are released, but it does appear that this case is good news for defendants who are generally not well served by forum shopping excursions.

*Castillo v. Castillo*  
Supreme Court of Canada  
November 16, 2005