

# TRANSPORTATION NOTES

Legal Decisions and Developments Affecting the  
Transportation Industry in Canada

VOLUME 2, ISSUE 1  
JANUARY, 2006

## Mooring Warranty Upheld

*It was manifestly reasonable for the insurer to stipulate that its insured permanently moor the floating home - given the, well, fluid nature of a floating home's footing, anything other than permanent moorage would surely affect the insurer's risk."*

*Mr. Justice Rogers of the British Columbia Supreme Court*

In a decision released on December 5, 2005, the Supreme Court of British Columbia considered a coverage dispute between the Plaintiff, Mr. Abell, and M. J. Oppenheim in his capacity as attorney in Canada for Lloyd's Underwriters. Mr. Abell purchased a floating home and continued the insurance policy held by the vendors. The policy contained a warranty that the dwelling would be permanently moored at the location described in the policy. Mr. Abell moved his new home to a floating home community called Queensgate, which was under development at the time. He advised the insurer that the home would be moored at Queensgate and they processed the change to the policy.

However, Mr. Abell's deal to buy a lot at Queensgate fell through and the owners of the development required him to move his floating home. After he ignored several warnings, the owners moved it for him, to an undeveloped part of the property, where it was tied with rope to offshore pilings. There was no security or fire service available in

that part of the development.

At one point, the roof of the home was damaged as a result of banging against the pilings and the insurer sent an adjuster to examine the damage. On that occasion, the adjuster told Mr. Abell that he may have some problems with respect to his insurance coverage, but Mr. Abell took no steps to address the issue. Subsequently, the floating home was completely destroyed by fire. Lloyd's denied coverage on the basis that Mr. Abell had breached the warranty in the policy and that there had been a material change in risk.

The Court found for the insurer on both points. With respect to the breach of warranty, the Court found that the warranty was reasonable, that Mr. Abell was aware of it and that it had been breached. With respect to material change in the risk, the Court stated that the test for materiality is "...whether a fact would be of such a nature that if it were known to a prudent and reasonable insurer it would have influenced the insurer to either

decline the risk or charge a higher premium". In this case, it was found that the insurer would only have insured the floating home if it were moored in a location where security and fire services are available.

Mr. Abell tried several other arguments including that the policy was ambiguous and that he should be entitled to relief from forfeiture. These arguments were rejected. He argued that the insurer should not be entitled to rely on the breach of warranty, because its adjuster had seen the location of the floating home when it investigated the damage to the roof. However, the Court held that Mr. Abell had not pleaded estoppel and that in any event the evidence fell short of establishing that the insurer was sufficiently informed of the location of the floating home so as to trigger an obligation to notify Mr. Abell that his coverage had been terminated.

*Abell v. M. J. Oppenheim, 2005 BCSC 1715*

### INSIDE THIS ISSUE:

Medical Oxygen	2
Derailments	2
Policy Termination	3
Psychological Loss	3
End of the Line	4

### BULLETIN BOARD

- *Bombardier reports 3Q loss but secures 3rd customer, Lufthansa, for CRJ-900;*
- *Wendy Tadros replaces Charlie Simpson as Acting Chair of TSB;*
- *Nav Canada proposes changes to charging rules and increase of RSA to \$75M;*
- *Embraer 190 obtains Canadian certification and Air Canada takes delivery of its first;*
- *New study finds banning ocean vessels from the Great Lakes less costly than combating invasive species: <http://www.gvsu.edu/forms/business/OceanShippingReport091105.pdf>*
- *Air Canada reduces number of interline agreements;*
- *WestJet announces intention to begin interline arrangements in fall 2006;*
- *TSB releases investigation report on Air Cargo Carriers Inc. accident of December 16, 2004.*

## Medical Oxygen: Practices Determined to Constitute Obstacles to Mobility

On December 13, 2005, the Canadian Transportation Agency released its decision on multiple applications under Part V of the *Canadian Transportation Act* filed by or on behalf of persons who require medical oxygen during air travel. There were 25 applicants against Air Canada and one applicant against WestJet.

Transport Canada gives discretion to carriers to decide whether to provide medical oxygen to their passengers or to allow passengers to bring their own equipment. Air Canada's policy does not permit passengers to use their own equipment in the aircraft passenger cabin during flight; instead it provides medical oxygen service for all domestic, transborder and international flights. In contrast, WestJet allows passengers to use their own medical oxygen in the aircraft passenger cabin during domestic flights, but does not allow passengers to use their own medical oxygen for transborder or international travel, nor does it provide medical oxygen for transborder or international travel.

The U.S. Department of Transportation (DOT) prohibits the carriage of passenger-supplied oxygen on flights that take off or land in the U.S.A. The DOT, by way of a notice of proposed rulemaking (NPRM) dated September 7, 2005, proposes to provide greater accommodations in air travel for persons with respiratory disabilities. This NPRM applies to the U.S.A. and for foreign carriers operating flights in, to and from the U.S.A. The proposed rule establishes procedures for the carriage and use of portable respiration-related assistive

devices and medical oxygen devices. The Agency noted its awareness of the DOT's NPRM and its invitation to interested parties to submit comments by January 30, 2006. While the Agency noted the impact of DOT rulemaking on Canadian carriers, it held that it has the statutory mandate to investigate Part V applications and will proceed with its investigation.

The Agency held that it is appropriate for carriers to exercise the discretion conferred on them by Transport Canada to decide whether to provide medical oxygen to their passengers or to allow passengers to provide it themselves with their own equipment. Thus, the Agency's decision was limited to the medical oxygen policies of the airlines and the consideration of the obstacles that may exist in the policies. The Agency held that this is a case of persons with clear or obvious disabilities.

The range of the complaints against Air Canada's policy include: the advance notice requirement for an oxygen request; the requirement that a "fitness for travel" (FFT) form be sent by the treating doctor prior to each travel; the non-provision of oxygen prior to departure, during stopovers/connections, and/or upon arrival; the availability of portable emergency oxygen tanks for use on onboard washrooms; the encroachment of the oxygen tank into the floor space in front of the passenger; the seating policy for passengers with oxygen; the limited provision of humidifiers; the level of service concerning the reliability of Air Canada's oxygen service; the cost of the service. The majority of the

complaints concern the cost of the oxygen service.

The Agency found the following obstacles: the advance request policy; the FFT; the service costs; the non-availability of oxygen outside of the airplane; the non-availability of portable oxygen tanks; the placement of the tanks in the floor space; the non-provision of humidifiers for flights under 10 hours; some of the issues surrounding the reliability of oxygen services.

The complaint against WestJet concerned its refusal to transport persons with disabilities who require medical oxygen on international and transborder flights, due to the prohibition of passenger-supplied oxygen equipment and the non-provision of medical oxygen service by WestJet.

The Agency noted that WestJet's policy constitutes an obstacle.

The Agency concluded that it will continue its investigation into whether the obstacles found to exist are undue. This will include an oral hearing in order to gather further information from the respondents and expert witnesses, and to provide the respondents with an opportunity to present and test evidence regarding undueness and any possible corrective measures, should undueness be found to exist. It is expected that such a hearing may transpire in the spring of 2006.

*CTA Decision 720-AT-A-2005  
December 13, 2005*

## CN Cut Down to Size After Derailments

On December 7, 2005, Transport Minister Jean-C. Lapierre announced that the Canadian National Railway Company ("CN") had been ordered to limit the length of its trains to 80 cars while operating northbound on the twisting and mountainous route between Squamish and Clinton in the Province of British Columbia. This Order applies to all trains, including trains operated by distributed power, and follows an Order of

November 4, 2005, which applied to conventional trains only. A distributed power train has locomotives in the body of the train, as well as at the front. The previous Order followed three derailments which occurred on the same stretch of track in a short period of time. On August 4, 2005 six CN cars derailed and spilled sodium hydroxide into the Cheakamus River, destroying the fish population. On October 24, nine empty

flat cars derailed in the same area and on November 3, another nine cars derailed near Sunset Marina, north of Horseshoe Bay. The Transportation Safety Board is investigating the causes of the derailments and CN has been asked to provide Transport Canada with its own comprehensive risk assessment.

*Transport Canada  
News Release, P07/05*

## Joint and Several Insureds and Rights of Termination

The appellant, Transportation Lease Systems, leased an automobile. It required its lessee to obtain insurance covering its interests, including coverage for physical damage to the vehicle. The coverage was obtained and both the appellant and its lessee were included as named insureds. The lessee, apparently because he intended to put the car away for the winter, gave the insurer, The Guarantee Company of North America, notice that he wished to delete all coverage with the exception of fire and theft. The insurer then deleted liability, accident benefit and collision coverage effective January 8, 2002. It gave notice of this deletion to the lessor on February 11, 2002. Ten days later the lessee, who was still operating the vehicle, was involved in an accident. The vehicle was a total loss. The question which arose for decision was whether the lessor's rights under the insurance policy were defeated by the action of its lessee in deleting the relevant coverage.

The trial judge determined the case in favour of the insurer. The Court of Appeal unanimously agreed that this decision could not stand, although the reasons given for coming to this conclu-

sion differ in one important respect.

All the appellate judges agreed that the first step of the analysis required them to consider whether the contract between the insurer and the two named insureds created, as between themselves, joint or several rights and obligations. The analysis, based on a review of the terms of the contract, the governing statutory conditions and the commercial circumstances in which the coverage had been placed, led the court to conclude that the rights were several and not joint. From this, the further conclusion that the lessee could not unilaterally affect the rights of the lessor seems inevitable and the Court so found.

Having come to this conclusion, two of the appellate judges thought it necessary to consider what an insurer which receives a request to delete coverage from one insured might do to protect itself from any claim by another named insured to whom it is liable on a several basis. They concluded that an insurer could attain this objective by giving the other named insured 15 days notice of prospective deletion of coverage. Deletion would then affect the named in-

sured if he consented to it. Failure to respond to the notice might amount to consent. It is notable that the court created this obligation, and the consequences of the notice, by analogy from statutory conditions which admittedly do not apply directly. Nothing in the Insurance Act nor the policy terms requires such a notice or provides that by giving such notice the rights of an insured may possibly be terminated.

The third appellate judge agreed in the result. The rights were several and the rights of the lessor could not be affected without the latter's consent. He expressed the view that the creation, by the majority, of a notice requirement "is unnecessary and creates the potential for complications in future cases that raise a similar issue". It does seem to this writer that the position of the third appellate judge is the preferable one and that the majority approach to the question adds the potential for poor results in future cases without contributing to the justification of the issue determined, correctly we would submit, on appeal.

*TLS v. The Guarantee Company,  
Ontario C.A., Docket C4218*

## Psychological Damages Alone Excluded from Class Action

On March 18, 2005, Skyservice flight 468 departed Montreal with a destination of Cancun. While enroute it suffered an engine failure. The aircraft made an unscheduled landing at Orlando, Florida without serious incident. A number of the passengers aboard claimed to have suffered trauma, disruption of vacation plans and delay. A group represented by one Gabriel Plourde sought certification of class proceedings. On December 5, 2005, the Superior Court of the province of Quebec allowed the class proceedings to proceed, but only with respect to the claim for damages arising out of delay.

Under the Quebec class actions legislation, there are four basic requirements which are common to many jurisdictions. There must be common issues of fact or law, the composition of the group must be such that the normal procedures are difficult or impractical,

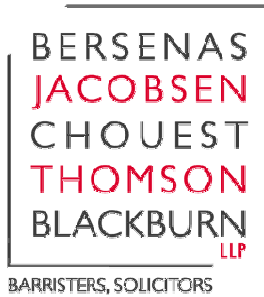
the proposed representative must be able to adequately represent the members and the facts alleged must justify the conclusions sought. In the present case, it was conceded that all except the last requirement had been met. Accordingly, the question came down to whether the class representative had identified a legally possible theory of responsibility. It was agreed, for the purposes of the certification motion, that the only injury suffered by the representative plaintiff was a psychological injury. It was also agreed that the rights and responsibilities of the parties would be governed by the Montreal Convention, 1999.

At the outset, the Court cited a few recent decisions from Quebec and Ontario for the proposition that in the interpretation of an international convention, a court should not rely on the domestic law but should seek to promote uniformity of interpretation, having

regard to decisions in other contracting states. The court accepted this proposition and proceeded to consider the decisions in *Eastern Airlines v. Floyd*, *Kotsambasis v. Singapore Airlines*, *Morris v. KLM* and *Chau v. Delta Airlines*. It found in this international jurisprudence (the last case is from Ontario which, vis à vis Quebec, is still a foreign jurisdiction) a "devastating" rebuttal of the plaintiff's claim for damages arising out of Article 17 (bodily injury). Claims for psychological damages alone are precluded by the Convention.

The Court then turned to Article 19. On behalf of the carrier it was argued that delay claims are limited to special damages. The Court found the cited jurisprudence inconclusive and accordingly allowed certification of the class action to advance a claim for special and general damages arising from delay.

*Plourde v. Skyservice,  
No 500-06-000283-057*



33 Yonge Street Suite 201  
Toronto, Ontario  
CANADA

Phone: 416 982 3800  
Fax: 416 982 3801

*Law with a Sense of  
Direction.*

[www.lexcanada.com](http://www.lexcanada.com)

*“... the Agency accepts that there are no common carrier obligations that require air carriers to provide a specialized service such as a stretcher service... However, where a person with a disability wishes to travel by air, but cannot travel in the manner in which the carrier offers, then the issue becomes one of reasonable accommodation of that individual’s needs. The Agency’s mandate pursuant to the CTA does not preclude a consideration of services which are not required under common carrier obligations, to determine whether the lack of such services constitutes an undue obstacle...”*

*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.*

	James P. Thomson	James R. Lane	
Gerard Chouest	(416) 982-3805	(416) 982-3807	Carlos Martins
(416) 982-3804	jthomson@lexcanada.com	jlane@lexcanada.com	(416) 982-3808
chouest@lexcanada.com	Rinku Deswal	Tae Mee Park	cmartins@lexcanada.com
	(416) 982-3810	(416) 982-3813	
	rdeswal@lexcanada.com	tpark@lexcanada.com	

## End of the Line?

On December 8, 2005, the Canadian Transportation Agency released a decision which confirms that air carriers have no common law obligation to provide a stretcher service.

In the summer of 2005, Air Canada announced that it proposed to discontinue stretcher service on international routes. It filed a tariff amendment, which was to be effective in August/September 2005. A number of carriers have taken similar action within the last year, apparently reacting to the high cost of providing a service for which there is relatively little demand.

Although the Agency had not challenged the filing of similar tariffs by certain foreign carriers, it appears to have taken Air Canada’s status as “flag carrier” into account in subjecting its filing to greater scrutiny. The Agency suspended application of the tariff pending investigation and asked Air Canada to provide submissions in its response on whether, at common law, common carriers are required to accommodate passengers who

require a stretcher in order to travel.

Air Canada relied upon common law jurisprudence for the proposition that there are limits on what common carriers are required to carry.

At common law, common carriers have a duty to carry, but only within the limits of their vehicles and equipment. They are not required to secure additional equipment or modify existing equipment. As stretchers are not standard equipment on passenger aircraft, a common carrier is not required to acquire and/or install stretchers.

Air Canada’s wish to abandon stretcher service was opposed by a disability rights advocacy group, the Council for Canadians with Disabilities. CCD submitted that this was a human rights issue, and that, notwithstanding the common carrier case law, the human rights legislation has since overtaken those cases.

The Agency accepted Air Canada’s argument that, as a common carrier, its only obligation is to carry passengers

who are prepared to pay the fare for the service and accept the carrier’s terms of service. The Agency noted that air carriers are required to carry passengers, “subject only to certain specific limitations based on the efficiency of the carrier’s services and the safety, convenience and comfort of other passengers”.

Although the Agency did ultimately approve the amended tariff, it did leave the matter open, stating “The Agency’s mandate pursuant to the [Canada Transportation Act] does not preclude a consideration of services which are not required under common carrier obligations, to determine whether the lack of such services constitutes an undue obstacle to persons with disabilities.”

At present there is no proceeding before the Agency to challenge the right of a common carrier to deny stretcher service. Whether this is really the end of the line remains to be seen.