

# TRANSPORTATION NOTES

Legal Decisions and Developments Affecting the  
Transportation Industry in Canada

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## Supreme Court of Canada Limits the Application of the *Canada Shipping Act*

The Supreme Court of Canada has overturned decisions of the Federal Court of Canada and the Federal Court of Appeal relating to whether the limitation provisions of the *Canada Shipping Act* should apply to an injury sustained while securing a boat for the purposes of land transport.

On an August day in 1999, Mr. Isen and his friend, Dr. Simms, spent the day boating on Ontario's Lake Muskoka. At the end of the day, Isen's 17 foot motorboat was hauled out of the water and placed on a trailer to be towed home. Inside the boat was an engine cover which had a tendency to blow open and flap in the wind when the boat was being towed on the highway. Consequently, Isen would secure it in place with a bungee cord. On the day in question, Simms was standing by the boat watching Isen secure the engine cover. The bungee cord slipped out of Isen's hand and flew toward Simms, striking him in the eye and causing serious injury.

Simms sued for \$2,000,000 and his wife sued for \$200,000 pursuant to the *Family Law Act*. Isen sought a declaration from the Federal Court that in the event that he was found liable for the injury, he should be entitled to limit his liability to \$1,000,000 pursuant to Section 577 of the *Canada Shipping Act*.

The Federal Court ruled that the accident was sufficiently connected to navigation and shipping to bring it within the ambit of maritime law because: (1) the hooks of the bungee cord were applied to a boat; (2) the cord was used to secure the engine cover of a boat; (3) the incident arose immediately following use of the boat on a lake; and (4) the incident occurred just before the boat was to be transported to another lake. The Federal Court of Appeal agreed.

The Supreme Court of Canada considered the leading Canadian cases which defined the ambit of Canadian Maritime Law, including *ITO — International Terminal Operators Ltd. v. Miida Electronics Inc.* (the "*Buenos Aires Maru*") and *Whitbread v. Walley*. In the *Buenos Aires Maru* case, it was held that the theft of cargo from a warehouse operated by stevedores in the port area fell within Parliament's jurisdiction over shipping. According to the Supreme Court of Canada, this is a reflection of the commercial reality that commercial shipping requires not only the carriage of goods by sea, but the movement of goods on and off of a ship. *Whitbread v. Walley* considered an accident involving a pleasure craft which was being navigated in Canadian waters. The Supreme Court pointed out that it was a practical neces-

sity for Parliament to have jurisdiction over the tortious liability of pleasure craft for negligent navigation on Canadian waterways. As commercial ships and pleasure craft share the same navigational network across Canada, a uniform federal body of law governing the navigational "rules of the road", standards of good seamanship, and any tortious liability resulting from the use of the waterways is necessary.

The Supreme Court went on to say that Parliament does not have jurisdiction over pleasure craft *per se* but only over their navigation. It is therefore necessary to determine if the allegedly negligent acts are integrally connected to navigation and shipping. In this case the Supreme Court held that the boat was being secured for transport on a provincial highway, which is an area of provincial jurisdiction. It was like any other piece of cargo. The fact that it happened to be a boat did not make the matter subject to Canadian maritime law. The Court agreed with Décar, J.A., who dissented in the Federal Court of Appeal and said:

"The accident occurred on land. The injury was caused on land by a person who was neither on the boat nor in the water. There is no contract for carriage of goods by sea. (continued, p. 2)

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- *Canadian government announces \$42 million investment in marine security;*
- *Bombardier secures \$685 million contract to supply French National Railways and another contract to provide fourth regional jet for Nigeria's new Arik Air;*
- *ACE Aviation Holdings completes first rollout of shares in Air Canada under IPO that generated \$525 million;*
- *Canadian government announces "Blue Sky" plan to start negotiating open-sky agreements with more countries;*
- *Porter Airlines announces expanding its routes to Montreal, beginning December 11.*

## AMPs Levy on Whitehorse International Airport Affirmed

On April 14, 2004, the Minister of Transport issued four Notices of Assessment against the Whitehorse International Airport (“WIA”) in the Yukon Territory which levied Administrative Monetary Penalties (“AMPs”) amounting to a total of \$7,500.

The Notices named the WIA as a party which had contravened certain stipulated airport security measures under the *Aeronautics Act*, including a failure to obtain security clearances for two individuals who had been issued airport restricted area passes.

WIA, however, is not a legal entity, the airport being owned and operated by the government of the Yukon Territory.

On receipt of the Notices, the Government of the Yukon Territories challenged the issuance of the AMPs before the Transportation Appeal Tribunal of Canada (“TATC”). The challenge was not on the merits of the alleged infractions. Rather, it was argued that, because the Notices were not issued to a legal person or entity subject to the regulatory control of the Minister, they were a nullity.

At the appeal before the TATC, the Minister was permitted to amend the Notices to insert the Yukon Government as a party. Because the Yukon Government did not then mount a substantive challenge to the allegations, the TATC confirmed the contraventions.

The Yukon Government then challenged that ruling by way of an appeal to a three member contingent of the TATC Appeals Panel.

In this appeal, the Yukon Government asserted that the Notices of Assessment were a nullity (for the reasons described above) and that it was prejudiced by having to proceed through a hearing on the merits before knowing whether it was, in fact, a party to the proceeding.

The Appeal Panel reversed the decision of the TATC and accepted the arguments of the Yukon Government. It found that the common defect in the Notices was so fundamental that they could not be amended.

The Minister sought a judicial review of the Appeal Panel’s decision from the Federal Court.

The Federal Court found that the standard of review was that of “correctness” given that the appeal went to the root of the TATC Appeal Tribunal’s authority, following the decision of *Canada (Attorney-General) v. Woods* [2002] 1 F.C.J. No. 1267.

The Federal Court took a different view from the TATC Panel and sided with the Minister.

It cited previous cases that affirmed the TATC’s power to amend a charging document, so long as the party subject to regulatory sanction has proper notice of the charges. The Court also commented that, while the judicial review was based on an alleged excess of jurisdiction by the TATC Appeal Panel

(and therefore subject to the standard of “correctness” on review), insofar as procedural matters were concerned (such as the amendment of the Notices of Assessment during the hearing), the TATC was entitled to considerable deference.

The Court then turned to the Yukon Government’s argument that it had been denied procedural fairness by having to proceed to the hearing, not knowing whether it was a party.

The Court was unimpressed by the argument.

It held that there was nothing inherently unfair about the process used by the TATC. It held that “[a]lthough the Yukon Government claimed that it did not know whether it was in jeopardy during the hearing, its counsel, nevertheless, participated in the proceeding. In addition [he] repeatedly stated that [he] did not intend to challenge the Minister’s allegations on the merits and [he] obviously had no intention of presenting a substantive defence. If [the Yukon Government] had any real concern that it was put to a disadvantage, it could and should have requested an adjournment at the close of the Minister’s case. It failed to do so.”

The Court set aside the Appeal Panel’s decision, and remitted the matter back to the Appeal Panel for re-determination in accordance with the Court’s findings.

*Canada (Attorney-General) v. Yukon* [2006] F.C.J. No. 1671.

## S.C.C. Limits Application of the *Canada Shipping Act* (cont’d)

There are no goods at issue. Nothing has happened on water which could be said to be directly or even indirectly related to the accident. There is no issue as to the seaworthiness of the ship, the issue at best being one as to the roadworthiness of a boat being prepared on land for road transportation. There are no *in rem* proceedings. There are no concerns of good seamanship. *There are no specialized admiralty laws, rules, principles or practices applicable.* The

accident has nothing to do with navigation nor with shipping. There is no practical necessity for a uniform federal law prescribing how to secure the engine cover from flapping in the wind when a pleasure craft is transported on land on a boat trailer. The sole factor possibly connected to maritime law is that the pleasure craft had just come out of the water and was still being secured on the trailer when the accident happened. This was not enough to constitute an integral

connection with navigation and shipping and an encroachment of civil rights and property.”

Consequently, the Court ruled that the accident was not a matter of Canadian maritime law and was subject to provincial law. Simms could not limit his liability pursuant to the *Canada Shipping Act*.

*Isen v. Simms*, 2006 SCC 41 (CanLII)

## No Recall Rights for Former Delta Employee

In *McIntosh v. Delta Airlines Inc.*, the B.C. Supreme Court dismissed the claim of a former Delta employee for breach of contract for failure to recall him to full-time employment when Delta resumed a one flight per day service to Vancouver in 2003.

The plaintiff was a former full-time employee in Delta's cargo operation in Vancouver. He was off work due to back injuries when Delta announced a reduction in its workforce in 1995. During the restructuring, Delta gave its full-time employees the option to leave, work a split shift or work part-time.

The plaintiff chose part-time employment in the passenger service department, with a five year right to be recalled to a full-time position. He was later offered full-time employment for a restricted period of time which he refused because of its temporary nature. The plaintiff was unaware that this refusal would result in a loss of his recall rights.

The Court found that Delta had an obligation to explain to the plaintiff that this position was equivalent to a full-time permanent position and refusal would

result in loss of recall rights. Although the Court found that the plaintiff did not lose his recall rights when he refused the position, this made no difference, as he lost his recall rights when he was eventually terminated when Delta closed its Vancouver operations in 1998. During the severance negotiations, the plaintiff tried to argue that his loss of full-time status and attached recall rights required compensation. Delta rejected this claim and offered a severance package in a letter. The plaintiff accepted the offer and signed a release at the bottom of the letter, which outlined that the defendant had no obligation to the plaintiff other than as a part-time employee without recall rights. The Court upheld the 1998 release as valid and found that even if the release was invalid, the plaintiff's recall rights expired at the latest in February of 2003, five years after termination, but before Delta resumed its scaled down Vancouver operation in May, 2003. In any event, there were no full-time permanent positions to offer when it resumed its operations.

*McIntosh v. Delta Air Lines Inc.* [2006] B.C.J. No. 2873 (S.C.)

## Pilot Victim of Stolen Fuel

In *E&M Investments Inc. v. Rodger*, the Small Claims Court in Woodstock, Ontario, awarded damages to the plaintiff, a tobacco farmer, whose field was damaged due to the electrical failure of fans used in the curing process after the defendant had crashed his ultra-light aircraft into several electrical lines, resulting in power loss to 1,100 customers, including the plaintiff.

The accident was said to have occurred as a result of fuel starvation following someone's theft of fuel from the aircraft.

In putting forth his defence, the defendant argued that he was the victim of a criminal act and reasonably expected that he had enough fuel as he had checked the fuel tanks two days before the flight. The aircraft had no fuel gauge, and therefore, the fuel level was determined by dipstick.

The Court did not accept this defence and found that the defendant was negligent because he failed to check the dipstick immediately before the flight.

*Ontario Small Claims Court*

## Health Canada to De-Identify Potable Water Test Results

Health Canada has made an important ruling on a recent freedom of information request for access to the results of potable water testing from Canadian commercial aircraft.

The water testing issue came to light in September 2005, when the federal Commissioner for the Environment and Sustainable Development released a report criticising the government for its record on inspecting water quality in aircraft.

Notwithstanding this criticism of the government, commercial carriers in Canada had already implemented their own internal procedures for monitoring the quality of the water in aircraft lavatories. In many cases, these procedures had been in place well before May 2005 when Health Canada requested that air carriers develop a "voluntary compliance and monitoring program."

In response to the comments made by

the Commissioner, many large commercial carriers agreed to share the results of their water testing with Health Canada, with the expectation and understanding that the results would remain confidential.

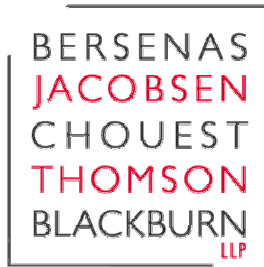
Earlier this year, an anonymous person made a request under the *Access to Information Act* for copies of these test results in a manner that would identify each set of results to a corresponding air carrier.

Several air carriers opposed the request by filing written submissions citing sections 20(1)(a) and (b) of the *Act* which requires the department to deny access to the information sought where the records contain (a) "financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently

in a confidential manner by the third party"; or (b) "information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of a third party."

After considering the representations of the air carriers, Health Canada determined it would release the test results, but not in a fashion that would allow the person requesting the information to correlate which test results came from which air carriers.

This decision underscores the importance of responding to access requests that, if acceded to, could result in unnecessary and unmeritorious civil proceedings.



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*"... A bailee who loses the property  
has an obligation to take reasonable  
steps to minimize the bailor's loss.*

*This includes taking steps to recover  
the goods if reasonable in the  
circumstances..."*

*- Siegel, J. in British Airways PLC v.  
Ministry of the Attorney General of  
Canada*

*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.*

*These Transportation Notes are intended to provide general information and do not constitute legal advice. Readers should consult legal counsel on matters of interest or concern raised by anything in this publication.*

*We welcome your comments and suggestions.*

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## End of the Line

British Airways recently won an application for a declaration that goods seized by the Canada Border Services Agency should be returned to the air carrier because it was a bailee, as shipper of the goods. The decision has not been appealed.

Concept Images Private Ltd. ("Concept") sold a shipment of jewellery to Parson Enterprises Inc. ("Parson"). The jewellery was shipped to Seattle, Washington, where it was stored by Aeroground Inc. ("Aeroground").

Prior to the shipment, Aeroground alerted Canadian and U.S. customs authorities of the shipment destined for Parson, as it was requested to do by Canada Customs. The jewellery was released to an individual from Parson (Sandhu), and it was later intercepted by the Canada Border Services Agency when Sandhu tried to bring it into Canada.

British Airways requested that, in accordance with s. 138 of the *Customs Act*, the Minister declare that British Airways' interest in the jewellery was not affected by the seizure. The Minister refused to make such a declaration, stating that British

Airways, as bailee of the jewellery, did not have a sufficient interest under that section. British Airways then applied under s. 139.1 of the *Customs Act* for a judicial hearing to determine its interest.

Sections 138-139 of the *Customs Act* provide that an applicant whose goods are seized or detained under the *Act* and claims an interest in the goods as owner, mortgagee, hypothecary creditor, lien-holder or **holder of any like interest**, may apply to the Minister for a determination that its interest in the goods is not affected by its seizure or detention.

British Airways argued that as shipper of the jewellery, it is a bailee and such an interest is sufficient for the purposes of the *Act*. It argued that a bailee has an ownership interest in goods in its possession that allows it to maintain an action against a third party or "stranger" for damages to the property's destruction or injury. Therefore, it either had an ownership interest in the jewellery or a "like interest" for the purposes of the statute.

The AG argued that a bailee who has given up possession of goods is no longer a

bailee and that British Airways lost any ownership interest when it voluntarily gave up possession to Parson. Alternatively, the phrase "holder of a like interest" must be interpreted narrowly to mean an interest like that of a "lien-holder". BA clearly did not have a lien on the cargo.

The court held that the common law imposes obligations on the bailee, including the obligation to obtain recovery of goods against a third party possessing the goods. The rights and obligations of the bailee survive the loss of property subject to a bailment and continue until such time as the bailee obtains a return of the property. The court held that the common law rights of a bailee seeking to recover lost property constitutes "ownership" for the purposes of recovery under the *Act* or alternatively, "like interest" under the *Act*. The court rejected the AG's narrow interpretation of the provision, granted the declaration and awarded costs against the Crown, in accordance with the *Crown Liability and Proceedings Act*.

*British Airways PLC v. Ministry  
of the Attorney General*