

TRANSPORTATION NOTES

Legal Decisions and Developments Affecting the
Transportation Industry in Canada

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Phoenix Redux: Marine Cargo Dispute Back to Federal Court of Appeal

This dispute arises out of a contract of affreightment (“COA”) under the terms of which Kremikovski Trade (“KT”) agreed to place a cargo of coal on the ship “Far Eastern Marine” for a voyage from Vancouver, Canada to Bourgas, Bulgaria. The cargo was placed on another vessel (the ship “Swift Fortune”) in breach of the COA and the Plaintiff, Phoenix Bulk Carriers, claimed for a loss of profit of some \$390,000. The defendants named in the action, which was commenced in the Federal Court of Canada, were the owners of the cargo and the cargo itself. Accordingly, the plaintiff invoked both the personal and the *in rem* jurisdiction of the Court.

As the chronology is important for resolution of the dispute, it must be considered in detail. The cargo was loaded on the “Swift Fortune” between September 3 and 5, 2005. Phoenix commenced action on September 13 and filed an affidavit in support of a warrant for arrest of the cargo on the same day. On September 14, KT responded with a motion seeking an order to set aside the statement of claim and the warrant of arrest.

This initial motion had quite a complicated history which we reported upon twice before in this Newsletter (February, 2006 and April,

2007). The issue decided in the first round involved the interpretation of a statutory provision which identifies cargos which may be subject to the arrest procedure invoked by Phoenix. The relevant cargos are those which are “the subject of the action”. In brief, the Federal Court of Appeal thought it was bound by a previous decision to find that the cargo in this case did not fit within that statutory definition. It would accordingly have decided the case in favour of KT on that ground. KT also advanced other grounds for striking the statement of claim and warrant, but the Federal Court of Appeal thought it not necessary to deal with those. However, the Supreme Court of Canada reversed the Court of Appeal on the statutory interpretation point. As a result, KT’s motion was returned to the Federal Court of Appeal for resolution of the issues which were not dealt with in the first round.

The issues raised by KT were both procedural and substantive. It took exception to the adequacy of both the affidavit in support of the warrant and the statement of claim. It also challenged a key finding of fact made by the trial judge.

An affidavit in support of a warrant of arrest must set out the basis for invoking the *in rem* jurisdiction of the

Court. The relevant statutory provision establishes that a prerequisite of the exercise of that jurisdiction is a certain factual nexus, namely that the property which is the subject of the action (which we know from round one includes the cargo in this case) must be beneficially owned by a single entity at the time the action is commenced and at the time when the cause of action arose. The affidavit does not specifically aver that this factual nexus was present, but instead avers that the claim “falls under” the relevant statutory provision. KT’s argument that this rendered the affidavit defective was not accepted by the Court.

KT’s next argument was also procedural in nature. It argued that the action *in rem* could not possibly succeed as, in its view of the statement of claim, there was no assertion of personal liability on the part of the beneficial owners of the cargo. While accepting the proposition that a claim *in rem* is really a claim against the owner of the *res* and that the *in rem* action can succeed only if the owner is personally liable, the Court found KT’s construction of the statement of claim overly narrow and technical. The statement of claim could have been drafted with greater precision, but the Court found that the essential allegations were made

with sufficient clarity. The plaintiff is asserting that those who owned the cargo at the time the action was commenced also owned it when the cause of action arose. The identity of that owner, whether it be KT or some other entity, was not material for the purpose of assessing the adequacy of the statement of claim. Again, KT’s arguments failed.

This then brings us to the final question: who was the beneficial owner at the relevant times? In respect of this question there was conflicting evidence. Affidavits were filed on behalf of KT. The affiants stated that property in the cargo did not pass to KT until the vendor was actually paid, that being no earlier than September 13. If this should be a true statement of fact, KT would prevail as it would mean it could not have owned the cargo at the time the cause of action arose, which was not later than (and possibly earlier than) September 5 when the cargo was loaded on the “Swift Fortune”.

There was however conflicting evidence on the question of ownership. One of the persons who swore an affidavit on behalf of KT was cross examined and his evidence appeared to be that the property in the

(Continued on page 2)

Owner's Vicarious Liability for Auto Accidents

Section 192 of the Ontario *Highway Traffic Act* makes the owner of a motor vehicle liable for loss resulting from negligent operation, unless the vehicle was in the possession of another person without the consent of the owner. This provision has been often litigated and the general impact of the provision is well understood, although peculiar fact situations continue to cause some interpretative problems. Once such case, *Henwood v. Coburn*, was decided by the Ontario Court of Appeal on December 14.

Henwood was a travelling salesman. His own truck broke down and the supplier whose goods he sold leased another truck from Ontario Car and Truck Rentals for Henwood's use. The supplier also asked Henwood to take one John Coburn on his rounds, for training purposes. Coburn was neither insured nor licensed to drive and the supplier specified that Coburn was not to be allowed to drive the truck.

After a day on the road, Henwood and Coburn stopped in at a local tavern and had some drinks. Coburn allegedly became belligerent and demanded that Henwood drive him to a destination several hours distant. Henwood refused. Coburn assaulted Henwood, took the keys of the truck and started to drive off with it. Henwood managed to climb on board and occupied the passenger seat. According to Henwood's evidence, Coburn was intoxicated. He knew that Henwood did not want him to be driving but refused to heed requests that he slow down and stop. About 20 minutes after the adventure began, Coburn crashed the truck into a field. Henwood was injured. Among others, he sued Ontario Car, the owner of the vehicle, relying on the statutory vicari-


ous liability provisions of the *Highway Traffic Act*.

For the car owner, the question was whether the person in "possession" of the vehicle had its consent to possession. It was clear on the facts that Henwood had that consent and Coburn did not. The owner sought summary dismissal of the claim against it and in doing so attempted to revive an old argument which was rejected in Ontario some 80 years ago. According to this argument, the only "possession" which should count for the purpose of the vicarious liability analysis is the possession of the person actually operating the vehicle. If this argument had been accepted the car owner would have been free of responsibility. The motions judge refused to accept it and found that it was Henwood who was in "possession". He relied upon the fact that Henwood had managed to get on board the vehicle and continued to assert his claim to take control, although his assertion was ineffective in the circumstances.


The Ontario Court of Appeal disagreed both with the legal argument advanced by the car owner and with the factual determination made by the motions judge.

As to the legal argument of the car owner, the Court noted that the narrow view that only a driver can be in "possession" has been rejected consistently for many years. It was not willing to reconsider that question which was definitively settled by the case of *Thompson v. Bouchier*, decided in 1933. On the other hand, the Court was of the view that the motions judge did not have sufficient facts to justify the conclusion that Henwood remained

in control. An assertion of the right to possession is not the same thing as possession. Only a full trial would allow a court to say who was in possession of the automobile at the time of the accident.



***The car owner
"urges this court to
follow the dissenting
reasons . . . in
Thompson" and
hold "that the
person actually
operating the vehicle
is the only person in
possession. . .
Whatever the logic
of that position, it is
now far too late to
abandon over eighty
years of settled law"***



Henwood v. Coburn
2007 ONCA 882

(Continued from page 1)

cargo passed to KT on "passing the ship's rail". On this view of the matter, KT became the beneficial owner as soon as the cargo was loaded.

Phoenix also advanced a legal argument respecting the relationship between the provisions of the sales agreement and

the consequences of KT's possession and control of the cargo.

In the end, the deciding factor was the nature of the proceedings. KT was seeking dismissal of the claim on a motion for summary judgment. To succeed in such a motion KT needed to prove that Phoenix could not possibly succeed and it was unable to meet this high stan-

dard. The Court concluded that Phoenix has an arguable case that KT was owner at all relevant times. Accordingly, the Court ordered that the action should be allowed to proceed to trial.

Kremikovtzi Trade v. Phoenix Bulk Carriers
2007 FCA 381

“Go-Karts” and Compulsory Auto Insurance

(Continued from page 4)

This case arises out of an accident at an amusement park. Denis Potvin and his father were driving go-karts on a track owned and operated by the defendant Pineland Amusements. The accident is said to have taken place after father and son collided and the son lost control of his machine. Legal action was commenced by the mother as the Litigation Guardian of her son. Both Pineland and the father were named as defendants.

The father was insured under an auto policy issued by Kingsway General. He issued third party proceedings against Kingsway, seeking a ruling that the insurer had a duty to defend and indemnify him in the main action. Kingsway responded by denying that the policy provided coverage in respect of the go-kart.

The issue to be resolved was whether the go-kart is an “automobile” for the purposes of coverage. In accordance with the accepted test, this issue is to be resolved by asking three questions: Is the vehicle an “automobile” in ordinary parlance? If not, is it an “automobile” in the wording of the policy? If not, does the vehicle fall within the enlarged definition of any relevant statute?

The motions judge answered the first two questions in the negative, but did conclude that a go-kart comes within an enlarged statutory definition. Accordingly, he held that Kingsway was obliged to defend and indemnify. This decision was reversed by the Court of Appeal.

Part VI of the *Insurance Act* does provide a definition of “automobile”. That term includes every motor vehicle which is required to be insured under an auto policy. It also includes any vehicle which is designated as a automobile by regulation. It was common ground that the second part of the definition does not apply. Accordingly, the whole question is whether the go-kart was required to be insured under an auto policy.

To answer that question, one must consider the *Compulsory Automobile Insurance Act* (“CAIA”) which provides that “motor vehicle” has the same definition as that given in the *Highway Traffic Act*.

This definition is extremely broad, including any vehicle “propelled or driven otherwise than by muscular power”. However, the question is not whether the go-kart is a motor vehicle, but whether it must be insured. The CAIA deals with compulsory insurance by stipulating that no motor vehicle shall be driven on a highway unless it is insured by a contract of auto insurance.

A go-kart cannot be driven on a highway legally as such a machine does not conform to the requirements of the applicable legislation. On the other hand, it is clearly physically possible to drive a go-kart on a highway. Each of the parties hung his hat on one of these propositions and, of course, argued for opposing results. The insurer argued that if the CAIA is read in context with the *Highway Traffic Act* the purpose of those pieces of legislation dictates the common sense result: there was no intention to suggest that a go-kart is a proper vehicle for driving on a highway and no intention to require insurance. However, the motions judge thought that these were irrelevant considerations.

The Court of Appeal found for the insurer, but without accepting the insurer’s argument. It rather decided the case on a narrower point. Citing a recent precedent from its own jurisprudence, the Court found that the proper question was whether the go-kart “required motor vehicle insurance at the time and in the circumstances of the accident”. As the go-kart was being driven on a track at an amusement park when the accident took place, insurance was not required and the claim for coverage was dismissed. Whether insurance might be required in the event of illegal use on a highway could be left as an open question.

“The motion judge erred in basing his conclusion on the possibility that a go-kart could conceptually be driven on a highway.”

Ontario Court of Appeal
Adams v. Pineland
2007 ONCA 844

cases arising out of that accident, one governed by pure Warsaw, the other by Warsaw/Hague, the Court explored the differing ticket requirements of the two regimes. Under Warsaw, only a “Statement” to the effect that Warsaw may apply is required. Furthermore, even if this statement is lacking, there are no consequences: (*Ludecke v. Canadian Pacific Airlines*; [1979] 2 S.C.R. 63). On the other hand, where the Hague amendments are in effect, there is a requirement for a Notice and failure to supply the required Notice will result in loss of the right to limit liability (*Stampleman v. Canadian Pacific Airlines*; [1977] 2 S.C.R. 793).

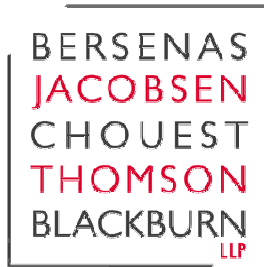
Beyond this, there is the case of *Mack v. Air Canada* which considered the possible application of the Warsaw Convention to a claim for damages arising out of suffering and anguish which preceded death in an air crash. Although the Convention was considered, the Court decided the case on a common law principle which excluded the damages in question and found it was not necessary to consider how the Convention might have affected the analysis but for the common law principle.

In the case of *Sivaco Wire & Nail v. Atlantic Lines & Navigation*, the Supreme Court stated, in a side comment, that Parliament is entitled to legislate on liability in respect of the carriage of goods by air and cited the *Carriage by Air Act* in that regard. In *R. v. Cloutier*, a criminal case involving the importation of narcotics, the Court considered the different evidentiary value of the three original pages of an Air Waybill set as compared to copies.

Thus, since *Ludecke* was considered by the Supreme Court of Canada in the spring of 1979, we have had no substantial guidance from the highest court on any issue relating to the rights and obligations of parties to contracts of international carriage by air. Given that the provincial appellate courts have aligned Canadian law with the international majority view on the major issues this is probably just as well, although no doubt a matter of disappointment for some well prepared barristers!

Plourde v. Skyservice
Croteau v. Air Transat
Cases 32190 and 32191

SCC Bulletin of December 3, 2007



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Toronto, Ontario
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“In my opinion, the words of Art. 3(2) are plain and can admit of no misunderstanding. The absence, irregularity, or loss of a passenger ticket will not affect the existence or validity of the contract of carriage. The benefit of the limitation will be lost only where no ticket is delivered.”

The Supreme Court in the *Ludecke* decision, almost 30 years ago.

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.

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

End of the Line

The Supreme Court of Canada has now dismissed two applications for leave to appeal in a pair of related cases which involve unsuccessful attempts to recover for purely emotional loss under the law applicable to international carriage by air. We reported on the decision of the Quebec Court of Appeal in the cases of *Plourde v. Skyservice* and *Croteau v. Air Transat* in the July 2007, issue of this Newsletter. Those decisions deny recovery for mental distress which is not caused by bodily injury in cases where the rights and obligations of the parties are governed by the Montreal Convention, 1999 or its predecessors. The Quebec Court of Appeal will apparently now be the last word on the subject. We say “apparently” since a refusal to grant leave to appeal does not amount to a formal affirmation of the decision of the Court of Appeal and it is conceivable that the Supreme Court would decide to consider the issue in a subsequent case.

On three occasions in the last decade the Supreme Court of Canada has declined to consider the correctness of decisions of provincial appellate courts on the law of international carriage by air.

In the summer of 1997 the Court was asked to reconsider a decision of the Ontario Court of Appeal in the case of *Quinn v. Canadian Airlines*. In that action the plaintiff sought damages for bodily injury which she claimed to have sustained in a turbulence incident. The trial judge determined that moderate turbulence does not constitute an “accident” for the purposes of the Warsaw Convention and dismissed the claim. The Ontario Court of Appeal upheld that decision. On November 21, 1997, the Supreme Court of Canada refused leave to appeal.

In the fall of 2001, a trial judge in British Columbia ordered FedEx to pay some \$200,000 in respect of a cargo loss. At issue was whether the contractual arrangement which FedEx attempted to put in place was consistent with Article 23 of the Warsaw Convention. The trial judge found the contract offended Article 23 and was of no effect. The Court of Appeal for British Columbia agreed. On May 30, 2003, the Supreme Court of Canada refused leave to appeal.

Most recently, the Supreme Court dismissed an applica-

tion for leave to appeal a DVT case on August 29, 2003. That matter, *McDonald v. Korean Air*, resulted in the dismissal of the passenger’s claim by an Ontario trial judge on a summary judgment motion. The dismissal was upheld by the Court of Appeal and that marks the last word on the issue in Canada.

Another very important case for the interpretation of the international carriage by air conventions in Canada also ended at the provincial appellate level. In *Gal v. Northern Mountain Helicopters* the British Columbia Court of Appeal affirmed, in 1999, that the two year limitation period provided for in the Warsaw Convention is time bar of a special kind which absolutely extinguishes a claim if not complied with. No attempt was made to appeal this matter to the Supreme Court of Canada.

The entirety of the Supreme Court’s substantial jurisprudence on the Warsaw and Montreal Conventions comes down to two cases which arose out of the same accident: the Tokyo crash of March 4, 1966. In two

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