

TRANSPORTATION NOTES

Legal Decisions and Developments Affecting the
Transportation Industry in Canada

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Liability Limits and Gratuitous Passengers

A recent decision from the British Columbia Supreme Court has held that the liability limits in the *Marine Liability Act*, S.C. 2001, c. 6 (the "Act") with its inclusion of the liability limits in the *Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974*, 1463 U.N.T.S. 19 (the "Athens Convention"), applies to a gratuitous passenger in a marine accident. The decision also provides an interesting discussion of the difficulty in breaking those limits.

The plaintiff, Gundersen, was on board the "Coastal Launch", a commercial water taxi operated by the defendant, Godfrey and owned by his company Finn Marine Ltd., when it collided into Nose Point on Salt Spring Island, causing serious injuries to both Gundersen and Godfrey. At the time of the collision, the water taxi was on its way to pick up paying customers and Gundersen was on board as a non-paying guest.

Gundersen brought an action for damages for personal injury. The defendants applied for a declaration that the limit of their liability to Gundersen as a gratuitous passenger is governed by Part 4 of the Act. The plaintiff disputed this limit. The issues resolved in the decision are as follows: 1) Is the monetary extent of the defendants' liability gov-

erned by the provisions of Part 4 of the Act as submitted by the defendants, which limits liability to 175,000 "units of account", or approximately CDN \$300,000? Or is the monetary extent of the defendants' liability governed by the provisions of Part 3 of the Act, as submitted by the plaintiff, which limits liability to two million "units of account", or approximately CDN \$3.4 million? 2) Does Article 13 of the *Athens Convention*, which has the force of law in Canada under s. 37, Part 4 of the Act, preclude the defendants from relying upon the limitation provisions of the Act, as submitted by the plaintiff in the alternative?

Godfrey is an experienced seaman qualified to operate the Coastal Launch as a commercial water taxi. Gundersen is a friend of Godfrey who had been with him on the water taxi for most of the working day on the day of the incident. The working day started at 10 a.m. and ended sometime after midnight the next day when the collision occurred. It was also found on the balance of probabilities that the collision occurred because Godfrey fell asleep at the helm.

The judge held that the monetary value of Gundersen's claims is limited by the provisions in Part 4 of the Act and Article 7 of the

Athens Convention. He noted that while the *Athens Convention's* definition of "passenger" excludes non-paying guests and accordingly at common law, a person in Gundersen's position would not be monetarily limited in her right to recover damages, it is also true that she would not have the benefit of the reverse onus provisions of Article 3 of the *Athens Convention*, if it did not apply; thus, the submission that any ambiguities in the provisions of the Act should be resolved in the plaintiff's favour carry less weight. In any case, the judge held that there is no real conflict or overlap between the provisions of Parts 3 and 4 of the Act. The judge accepted the defendants' submission that any possible overlap between the *Athens Convention* and the *General Limitation Convention* arises only where the total amount payable to all claimants under the *Athens Convention* would exceed that of the global fund calculated under the *General Limitation Convention*. The judge noted that although there are no cases directly on point, at least three cases have considered the applicability of the *Athens Convention* limits in respect of personal injury claims subject to the Act. Such cases lead to the conclusion that in cases involving injury to passengers and in this case, a non-paying passenger,

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Athens Convention limits, rather than *General Limitation Convention* limits, will apply except in those circumstances in which Article 7 of the *General Limitation Convention* is relied on by the carrier. The judge relied on the cases of *Cuppen v. Queen Charlotte Lodge*, 2005 BCSC 880, *MacKay v. Russell* (2007), 284 D.L.R. (4th) 528 and *Frugoli v. Services Aériens des cantons de L'Est Inc.*, 2007 QCCS 6203 for support for the following propositions respectively: the higher liability limits of Part 3 of the Act will not apply when what is at issue is liability for carriage of passengers by water in respect of which Part 4 and the *Athens Convention* limits will apply; the *Athens Convention* applies to carriage of all passengers for commercial or public purposes regardless of whether they are aboard under a contract of carriage; s. 37(2) (b) of the Act would not differentiate between a domestic passenger under a contract of carriage and a "person" aboard a vessel in gratuitous circumstances. The judge concluded that s. 37(2)(a) and s. 37(2)(b) of Part 4 of the Act should be read harmoniously so that domestic gratuitous passengers on a vessel operated for a commercial purpose

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Provincial Laws and Airport Construction

Under Canada's Constitution, the power to legislate in respect of aeronautics rests exclusively with the federal government while the provinces have jurisdiction in respect of the regulation of health and safety in the workplace. Separate enactments passed by the federal and provincial governments have often come into conflict and the airport has often been the scene of turf wars. The most recent presented the following question: What is to happen when a province enacts legislation which affects persons employed on airport property and engaged in works related to aeronautics?

Canadian constitutional law recognizes the possibility of coexisting enactments from each of the two levels of government. Thus, if a provincial statute has what is deemed to be a "merely incidental" effect on a company which is primarily subject to federal jurisdiction, there is no reason to disallow the provincial statute. However, there are circumstances in which the two legislative regimes cannot stand together. Determining when that state of things has been reached, and what the consequences should be, is the subject of the doctrine of interjurisdictional immunity. This doctrine has been used to render inapplicable provincial enactments which are found to have invaded the "basic, minimum and unassailable content" of valid federal legislation.

The doctrine of interjurisdictional immunity has received a good deal of attention lately, the Supreme Court of Canada having most recently weighed in on the ambit of the doctrine in May of 2007. The key question is whether the impugned legislation "impairs"—which is more than "affects" but less than "sterilizes"—an important objective of the federal legislation in a way which places the core competence of the federal scheme in jeopardy.

The facts in *R. v. EllisDon Construction Ltd.* arose against this constitutional background. The international airport at Toronto has been the scene of major construction for some years now. The Greater Toronto Airports Authority (GTAA) operates the airport under a long term lease and has overall responsibility for the construction. It awarded the general contract for the expansion of Terminal 3 to EllisDon and the latter

entered into a number of subcontracts. A sub-sub-contractor, Blenkhorn, was responsible for structural steel work. One of Blenkhorn's employees was injured on the job and the province took the position that it had the authority to investigate and lay charges under the Ontario *Occupational Health and Safety Act*. It did so and charges were laid against the general contractor, Blenkhorn, and employees of each. The accused objected on the basis that provincial jurisdiction was ousted as their activities were closely integrated with an aeronautical undertaking. This argument succeeded at first instance but was overturned on an intermediate appeal. The Ontario Court of Appeal has now upheld the intermediate appeal and affirmed that the provincial health and safety legislation does not do such violence to the federal scheme for the regulation of aeronautics as to require the province to step aside.

The construction companies and their employees faced a formidable barrier as they launched their argument. Twenty years ago, almost to the date, the Supreme Court of Canada affirmed that a provincial legislature can enact legislation affecting labour conditions, including regulation of wages, which is binding on employees engaged in airport construction. Although there was a respectable dissent in the case of *Construction Montcalm Inc. v. Minimum Wage Commission*, its holding has generally been accepted as the law of Canada for two decades. In an attempt to avoid the obvious problem posed by *Montcalm*, the construction companies called attention to the fact that the earlier case involved the original construction of an airport whereas they were involved in a very complicated project which required that they coordinate their efforts with the airport authority to allow the continued operation of a functioning airport while the construction was underway. This arrangement implied a much closer "physical and operational connection" with the airport authority. It was common ground that the provincial occupational health and safety legislation could not apply to the airport authority because of the latter's vital connection to the operation of the airport. The construction companies argued that it would be folly to apply the scheme to them. They pointed to the possibility that provincial investigators might, for example, decide

to "shut down all or part of the airport to uphold provincial safety standards in the event of a serious accident".

It appears to us that there could be some attraction in such an argument. Unfortunately for the contractors, the airport authority pulled the rug out from under them. The GTAA actually agreed with the province that the contractors engaged in the project should be subject to the provincial legislation. The Court found this a "particularly telling" point. Before reaching this decisive point, the Court reviewed other factors which are to be taken into account when considering whether the doctrine of interjurisdictional immunity is available. All weighed against the construction companies. While the companies had significant experience with airport projects they were, first and foremost, construction companies. They did not have a division of employees dedicated to airport work and had no corporate relationship with the GTAA. In the case of Blenkhorn, some 29% of its work was airport related. EllisDon's was considerably lower. An earlier case had suggested that anything much below 80% would indicate an insufficient weighting in the federally regulated undertaking to invoke interjurisdictional immunity.

Surely, if there were a serious threat . . . that busy-body provincial inspectors . . . would interfere in some way with the airport's operations, the GTAA would have asserted interjurisdictional immunity."

In response to the "ace" of the construction companies—that they needed to coordinate very closely with the GTAA to keep the airport open—the opposition countered that what the GTAA was telling them was not "work with us to run this airport" but rather "keep out of the way". The fact that the GTAA did not itself claim interjurisdictional immunity for its contractors seemed to lend support to this characterization of its view of their role.

R. v. EllisDon Corporation Ltd.,
2008 ONCA 789

Elk Valley, continued

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entered into the agreement and that the contractual rates should be open to negotiation in accordance with the reopener clause. Westshore opposed revision of the rates, and argued that the parties' intention was to avoid a situation where the rate structure was unaffordable. The reopener clause could not be invoked for any other purpose.

The arbitrator found that the reopener clause could not be used to address the sudden rise in the price of coal. While there may have been a presumption, based on historical trends, that the price of coal would fall within a certain range, that did not imply a common intention to renegotiate the rate should prices rise above that historic range. The arbitrator found that it was not the intention of the parties to put in place a cap on the rate. Rather, the agreement was chiefly concerned with whether the rates, and in particular the floor price, would be viable or economic for both parties.

In seeking leave to appeal the arbitrator's decision, Elk Valley argued that the arbitrator had erred by wrongly restricting the scope of the reopener provision. The arbitrator also erred in his construction of intention and failed to recognize that there was an expectation regarding the price of coal which determined the choice of a percentage rate formula. Elk Valley also argued that the arbitrator had erred by looking outside of the contract and to the positions of the parties during the negotiation of the new agreement.

Elk Valley's application was successful at the British Columbia Supreme Court. According to British Columbia's *Commercial Arbitration Act*, an appeal from the decision of an arbitrator may be taken

on a question of law if a court grants leave to appeal. The Court outlined principles governing such leave applications: (i) the importance of the result to the parties; (ii) the prevention a miscarriage of justice where the determination of a point of law is at issue; and (iii) the appropriateness of granting leave as an exercise of judicial discretion. The Court underlined that the merits of the appeal would also be a relevant consideration.

The BC Supreme Court found that, based on the amounts of money involved alone, leave to appeal should be granted; there would be "a substantial effect on the balance sheets of the respective parties."

Further, the BC Supreme Court found that there was an error of law that went to the heart of the arbitrator's decision. Namely, the Court held that the interpretation of the applicability of the reopener clause was a question of law. While some deference must be paid to the choice of the parties to refer the issue to arbitration, deference could not foreclose a court's jurisdiction to grant leave to appeal in appropriate meritorious cases. The Court was persuaded that this was such a case.

The Court of Appeal, to which Westshore appealed, was not so persuaded. It took a much more deferential approach to the arbitrator's findings.

First, the Court of Appeal rejected the argument that an arbitrator could not look to evidence of the negotiation between the parties. While the usual contractual interpretation rules state that interpretation must start with the wording of the contract (as well as end there if the contract is found to be unambiguous), in this case, the provision called for an examination of the intentions and expectations of the parties. The Court

undertook a thorough review of the evidence of negotiations between the parties and pinpointed evidence that indicated that the main concern of the parties was to ensure that each would make a viable income from the agreement. Westshore was concerned that its costs would always be covered and Elk Valley was concerned that it could afford the rates charged, even when prices took a serious dip.

The Court was also emphatic that arbitration should be encouraged as a means of resolution in commercial disputes and therefore, that courts should accord deference to the decisions of arbitrators. In this case, the Court was satisfied that the arbitrator had not interpreted the clause too narrowly by holding that it was meant to address a situation where it would be uneconomic for both parties, because he did not rule out the possibility that this could occur even where prices unexpectedly rose (although both he and the Court were at a loss to articulate what such a situation would look like).

Furthermore, the Court underlined that, given the unique provision in the contract allowing the arbitrator to consider the intention of the parties, the issue was one of "mixed fact and law". Therefore, the arbitrator was free to make findings of fact that should not be disturbed by the court. In particular, the Court endorsed the arbitrator's finding that the parties did not contemplate, at the time the agreement was formed, that the rate should be capped in the event that coal prices should rise beyond the historical range.

Elk Valley Coal Partnership v. Westshore Terminals Ltd
2006 BCSC 1526
2008 BCCA 154

Liability Limits in Maritime Claims, Continued

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are subject to the same limitations of liability that apply to domestic paying passengers under a "contract of carriage". To read otherwise would lead to anomalous results and would be contrary to Parliament's intention in enacting comprehensive legislation to domes-

ticate an international maritime convention.

Having decided that Gundersen's claims are subject to the limitation provisions of Part 4 of the Act, the judge also had to determine whether the defendants are precluded by their conduct from relying on those provisions. After an interesting discussion of the case law, he concluded

that the plaintiff could not avail herself of the provision in the *Athens Convention* which precludes a defendant from relying on its limits due to the operator's conduct.

Gundersen v. Finn Marine Ltd.,
2008 BCSC 1665

NOTE: This is an abridged version of an article prepared by Tae Mee Park. The full article is found on our web site in our electronic library.

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The arbitrator “had to have regard to the manner in which the agreement came into being and what the parties were trying to achieve . . . the modified initial rates and sliding scale rate based on coal prices was a methodology for sharing the pain and gain by the contracting parties.”

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

First, a brief update. In our edition of August, 2008, we reported on the decision of the Federal Court of Appeal in the case of *Mazda v. Mitsui*, a case involving section 46 of the *Marine Liability Act*. On December 4, 2008, the Supreme Court of Canada refused leave to appeal and accordingly the decision of the Federal Court of Appeal stands as the last word on the subject.

On the same day, December 4, 2008, the Supreme Court of Canada brought an end to a legal dispute arising out of a somewhat unconventional price adjustment clause in a contract between a coal producer and a terminal operator. The leave to appeal application of Elk Valley Coal Partnership (“Elk Valley”) was dismissed and an arbitrator’s judgment denying Elk Valley the ability to renegotiate the terms of a rate contract, between itself and Westshore Terminals Ltd. (“Westshore”), was reaffirmed.

Elk Valley is the owner and operator of a coal mine and Westshore operates a large coal export terminal where unloading, storage, and ship-loading services were performed for producers. The rate contract which is the subject of the litigation sets out the terms on which these ser-

vices were performed. In the summer of 2000, a time when coal prices were very low and coal producers subject to economic hardship, the parties renegotiated their rate agreement. The fixed rates charged by Westshore had become unsustainable for Elk Valley and the parties came to an agreement described as one “sharing pain and gain”. The rates charged by Westshore would be based on a sliding scale, tied to the price of coal in conjunction with an escalating fixed floor price. The latter would ensure that Westshore’s revenues did not dip below its actual costs.

At issue in the case was the application of a provision in the 2000 sliding scale rate agreement — a so-called re-opener clause — which stated that either party could request a review of the rates within a certain time period and that if no agreement could be reached, the issue would be submitted to mediation and ultimately to arbitration. Specifically, this provision stated that an arbitrator could consider “whether the rates used to calculate the Charge have operated in a manner inconsistent with the original intention of the parties.”

As the BC Court of Appeal noted, this was a highly unusual provision. Generally,

when courts or adjudicators are called upon to interpret a contract, they will only look to the terms of the contract and not to extraneous evidence of the intention of the parties, unless the court finds that the contract on its face can be interpreted in several reasonable ways. In this case, the very terms of the contract invited the arbitrator to determine whether the contract was operating in accordance with the original intention of the parties.

Elk Valley invoked this provision some years after the agreement came into effect and at a time when coal prices had dramatically risen. A rate of 9% of the coal price applied at that time, which was the highest percentage that could apply on the “sliding scale”. This rate was triggered when coal reached the price of \$70 per tonne. The actual price, at the time of the dispute, had risen to \$130 per tonne. Elk Valley argued that the contract was not meant to apply if coal prices shot up beyond the \$50 to \$70 price per tonne range that the industry was historically accustomed to. Elk Valley argued that this was beyond the reasonable expectation of the parties at the time that they

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