

TRANSPORTATION NOTES

Legal Decisions and Developments Affecting the Transportation Industry in Canada

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Production of Cockpit Voice Recorder

On December 9th the Ontario Superior Court of Justice released a careful and important decision which reviews the circumstances in which a recording of conversations on the flight deck of a commercial airliner may be released to persons not involved in an official accident investigation. The decision in *Société Air France v. Greater Toronto Airports Authority* is one of very few Canadian cases which have allowed access to information protected by a qualified privilege under our accident investigation legislation.

The case arose out of the accident involving Air France flight 358 on August 2, 2005. The crew attempted landing in very threatening weather and were not able to bring the aircraft to a stop on the runway. The aircraft pitched into a ravine beyond the end of the runway and was consumed by fire. There were no fatalities but there were some serious injuries and, of course, substantial property damage. Actions have been commenced by and on behalf of passengers and there are also claims for damages by and against the Greater Toronto Airports Authority. Air France seeks contribution and indemnity from NAV Canada and Environment Canada relating to the provision of information to the flight crew.

The aircraft was equipped, as is mandatory, with an on-board recording device, the cockpit voice recorder or CVR. This was retrieved following the accident and it was possible to recover the data which had been recorded, thus allowing investigators to know what conversation passed between the pilots on the flight deck during the last two hours of flight. NAV Canada made an application for production of the CVR.

The use which can be made of a CVR is addressed in the *Canadian Transportation Accident Investigation and Safety Board Act* (the “TSB Act”). The investigative body created by the TSB Act is the Transportation Safety Board (the “TSB”). Section 28 of the Act

provides that a CVR is privileged and shall not be released by the TSB unless a court first concludes that “the public interest in the proper administration of justice outweighs the importance of the privilege”. The TSB Act also creates a similarly qualified privilege in respect of statements given to TSB investigators.

The practice in Canada has favoured maintenance of the privilege and in this Canada is markedly different from the United States where the NTSB necessarily makes public those parts of a recording it finds relevant to the accident. The TSB is not obliged, and indeed not allowed, to make public any part of a CVR without court order.

When a party seeks production of a CVR, the recording must first be reviewed by a judge, in camera. The judge must allow the TSB to make submissions respecting the proper treatment of the recording and must determine whether the “public interest in the proper administration of justice” outweighs factors which count in favour of the privilege.

The debate concerning the extent of the privilege has been before Canadian courts on approximately a dozen occasions. The outline of the debate is clear, although the emphasis given to the conflicting principles differs somewhat from case to case. In favour of the privilege, it is said that strict enforcement is necessary to encourage openness in the investigation process. If, the argument goes, those with knowledge relevant to the reconstruction of the events leading to an accident fear that they may be penalized as a consequence of speaking frankly, they may “clam-up”. It is also argued that recording workplace conversations is a remarkable invasion of privacy and that pilots deserve a degree of protection from the consequences of this intrusive act. On the other hand, it is well recognized that the CVR is a very important tool which can assist in accident reconstruction. Failure to make it available to parties in

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litigation may lead to an unjust result.

Mr. Justice Strathy, in the Air France case, undertakes a careful review of some ten decisions of Canadian courts which have attempted to reconcile the differing policy objectives. In doing so, he has noted the factors considered and has arrived at a synthesis which he applies to the resolution of this particular case. The reasons for decision should be consulted by anyone interested in the past judicial treatment, in Canada, of this difficult question.

It is often argued that when the information on the CVR may be obtained from different sources, access to the CVR should be denied. Thus the TSB, which always vigorously supports privileged treatment, often points out that the information is already available in the official accident report. As Justice Strathy points out there are at least two problems with this proposal. In the first place, the TSB accident report cannot be introduced in evidence in civil proceedings. Furthermore, every report will involve selection of factual sources and interpretation. The truth as perceived by the TSB, and as embodied in its report, may not be beyond question. The same may be said of other sources of information. Reliability is always a potential issue and no litigant with an interest, lacking knowledge of what the CVR may contain, will be pleased if told he should rely on other evidence as the CVR must remain privileged.

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CVR to be Produced, continued

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“The utility of the TSB report lies primarily in its informational value. It is not admissible in evidence as proof of the pilots’ conversations or as proof of the content of the CVR. While one might say that it gives all parties knowledge of the facts of the accident, it is simply the TSB’s version of the facts, based on the investigation it carried out.”

The learned judge was sensitive to some basic requirements which should be taken into account when considering how to treat a production request. In the first place, any irrelevant personal communications should be excluded unless it might be said that the very fact of participating in such a conversation may be relevant to the happening of the accident or incident. Furthermore any information of a sensational or disturbing nature, such as exclamations at the moment disaster is imminent, should generally be excluded. Most fundamentally of all, the reviewing judge must satisfy himself that the content of the CVR is relevant to the resolution of issues in the law suit.

Once the court is satisfied that the information is relevant and reliable it must identify and assess the public interest. The relevant public interest, Justice Strathy found, is primarily “the public interest in the fairness of the trial process”. This is an interest which extends beyond the immediate interests of the parties and “includes an interest in the integrity of the judicial fact-finding process and the reliability of the evidence before the court”. He identifies as well one additional aspect of the public interest—behaviour modification which is an “important goal of class actions”. There is a public interest in ensuring that a court has the best possible evidentiary record to identify the cause of mass wrongs and force those responsible to correct their errors.

Turning to the facts of the case, Justice Strathy confirmed that the CVR is “highly relevant, probative and reliable”. It is important to the numerous litigants, the amounts at stake are significant, and, while there is a large volume of additional evidence, in some cases reliability is in question. The recording contains no personal communications or communications of a “sensational or disturbing nature”, there are no pending disciplinary or criminal proceedings and any concerns

respecting privacy can be addressed. Turning to the resolution of the important competing principles, he concluded that the public interest in the administration of justice favours access. Without access the court might be deprived of the best and most reliable evidence bearing on the central issues in the case. While recognizing the importance of the privilege, Justice Strathy found that he could not conclude that release would interfere with accident investigation in general or with aviation safety.

Having come to these conclusions, the learned judge ordered the TSB to produce a copy of the CVR and transcript to NAV Canada. Disclosure is limited to the parties and their professional advisors. He concluded by noting that “the provisions of s. 28(7) of the *TSB Act* will, of course, apply”. This subsection provides that the CVR may not be “used against” the pilots in other legal proceedings. It is interesting to note that a judge of the British Columbia Supreme Court cited s. 28(7) as one of the reasons for refusing production of a privileged statement in the case of *Webber v. Canadian Aviation Insurance Managers*. There would be no purpose in ordering production “as they could not be used in this trial in any event”.

The *Webber* case arose out of a mid-air collision. The plaintiff commenced action against his insurers to recover under an insurance policy. The identity of the pilot at the time of the crash was in question. If the plaintiff was the pilot flying he was entitled to coverage, otherwise not. The insurer wanted the privileged statement, which had been given by the plaintiff, to determine what light it might shed on this issue. Thus, it was very clear that the statement might, if produced, be directly contrary to the interests of the plaintiff. It appears that the only likely use insurers could make of the statement would be to support, at trial, a denial of coverage position. This would be using the statement against the maker and such use would be prohibited by s. 28(7).

Justice Strathy offers no comment on the observation that production, in such circumstances, might serve no purpose. The facts in the *Air France* case are certainly more complex. The purposes for which the CVR might conceivably be used might not be limited to use against the pilots. The information on the recording might exonerate one party, for example, or cast light on operational procedures without directly focusing blame on the pilots. However, it would appear likely that some rather delicate issues respecting the exact use which may be made of the CVR will arise as the case progresses.

Société Air France v. Greater Toronto Airports Authority,
[2009] O.J. No. 5337

Criminal Law

In the spring of 2008 the Manitoba Court of Queen’s Bench tried a criminal case arising out of an aviation accident and registered convictions on three charges. This is one of very few cases in Canada in which criminal sanctions were brought to bear on a pilot involved in a crash. The Manitoba Court of Appeal has recently dismissed two of the charges.

The aircraft in question, a Navajo Chieftain, was operated by Keystone Air Service, a small operator which provided scheduled and charter air services in Manitoba. On June 11, 2002, Mark Tayfel, as pilot in command, operated an early morning trip to a fishing camp some 200 miles north of Winnipeg. He dropped off one group and picked up another for return to Winnipeg. He failed to ensure adequate fuel for the return flight and began noticing a problem about 40 miles north of Winnipeg. In overcast conditions he made an approach to the runway but was forced to pull out and make a second attempt. Before he could complete the approach, both engines failed over downtown Winnipeg and he was forced to land on a city avenue. Five of the six passengers were injured, and one of these died of complications.

An investigation followed, and Tayfel was charged and found guilty of two offences under the *Canadian Aviation Regulations*. The one of relevance for the subsequent criminal prosecution was s. 703.20, which stipulates that no person shall commence a flight unless the aircraft carries sufficient fuel to meet defined regulatory requirements. Tayfel’s pilot’s licence was suspended for 45 days.

In most cases, this would have been the end of the matter. However, in this case a criminal prosecution was initiated. The pilot was charged with criminal negligence causing death, criminal negligence causing bodily harm and dangerous operation of an aircraft, all offences under the *Criminal Code*. Convictions were registered under each charge.

An appeal was taken to the Manitoba Court of Appeal which released its reasons for decision on December 16, 2009. The conviction for dangerous operation of an aircraft was upheld, but the convictions for criminal negligence were set aside. The evidence did not establish a “wanton or reckless disregard for the lives and safety of others”. Although Tayfel erred in failing to assess his fuel requirements, there was no evidence to call into question his piloting in general or the measures he took to avoid a crash once the problem was apparent. The dangerous operation offence carried a lower standard of proof and accordingly that conviction was upheld.

R. Tayfel,
[2009] M.J. No. 415

Jurisdiction over Freight Forwarders, continued

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case, and rail carriers in the other.

The dissenting justices criticize the “originalism” implicit in the majority’s reasons, that is to say, the emphasis on what the framers of the Constitution intended in 1867. By scrutinizing early texts the majority concluded that the primary jurisdiction over “Works and Undertakings” is provincial and that federal jurisdiction can only be justified in an exceptional case. This, the dissent argues, results in a decision which is taken without sufficient attention to “the business realities of 2009”.

“However, methods of transportation and communication have evolved since 1867, as have the methods by which businesses organize themselves to deliver such services. In an era where contracting out elements of a service business is commonplace, the modalities of how a truly interprovincial transportation operation ‘undertakes’ to move its customers’ freight from one part of Canada and deliver it to another should not contrive to defeat federal jurisdiction. Checkerboard provincial regulation is antithetical to the coherent operation of a single functionally integrated indivisible national transportation service.”

The dissent, having begun with this clear call for an approach which takes into account current business conditions, undertakes a review of the cases considered and either relied upon, or distinguished, by the majority. It comes to quite different conclusions respecting the essential teaching of some, and the reliability of others, of these authorities.

Of central importance is the Alberta Government Telephones case. The majority, it will be recalled, distinguished this case on the basis that the technologies in the two industries, telecommunications and transportation, differ. Of course, the dissent concedes that the technologies differ, but insists “no distinction has been drawn in our cases to date between the *legal test* applicable to communication undertakings and that applied to transportation undertakings”. The essential

question for the dissenting justices is the nature of the service the company undertakes to provide. This requires a consideration of the details. The fact that its customers deal only with Fastfrate, that the actual carrier is invisible to the customers, that Fastfrate accepts responsibility for damage or loss and that its “interprovincial undertaking is managed interprovincially” requires the conclusion that it is properly a federally regulated enterprise.

It will be years, we believe, before the full implications of the Fastfrate case can be known. Of course, on the surface, it appears exceedingly clear. No enterprise involved in providing transportation services will, by reason of the nature of the service it provides, fall within the sphere of federal regulation unless it actually moves people or goods over provincial boundaries. However, there is likely to be academic debate over whether the majority or the dissent did a better job of explicating what each took to be persuasive precedents. According to the dissent, the decision of the majority is effectively a reversal of the Alberta Government Telephones case as well as of the related case of *United Transportation Union v. Central Western Railway Corp.* The majority justices clearly do not agree, but whether Fastfrate can live comfortably with UTC and ATC remains to be seen.

If the pendulum were to eventually swing in the other direction, thus reuniting the approach taken to transportation and telecommunications regulation, the implications for other participants in the transportation industry could be of interest. Currently, travel intermediaries—tour operators and travel agents—are regulated at the provincial level. Three Canadian provinces, Quebec, British Columbia, and Ontario, have enacted legislative schemes to regulate the conduct of travel intermediaries. These schemes involve the existence of specialized tribunals and the administration of trust funds intended to provide protection for the travelling public in the event of the insolvency of a travel service provider.

Would these perhaps be vulnerable to constitutional challenge on the theory that travel intermediaries are providing an interprovincial (and international) service? A detailed review of the services actually provided by the intermediaries might yield varying results, for the participants range from “mom and pop” travel agents to huge operators with operations on many continents who certainly might be said to provide a service which spans many jurisdictional boundaries.

The fear that travel intermediaries may be swept into the federal net underlay at least one of the judgments referred to in the Fastfrate decision. Thus, the Ontario Superior Court, in an earlier case involving the status of a freight forwarder, justified its decision to require a

strict “actual carriage” requirement in part by observing: “To hold otherwise would mean that any travel broker or other person engaged in general commerce could, by contract, provide interprovincial undertakings, even though he had no facilities whatsoever, and thereby claim that he was not subject to provincial jurisdiction”.

The Attorney General for Ontario, who intervened in the appeal, shared this concern, noting that if the view espoused by the dissent were to prevail “travel agencies whose ‘regular and continuous’ dominant purpose is to facilitate interprovincial and international travel could become subject to federal jurisdiction”.

Given the decision in Fastfrate, there would appear to be no immediate reason to fear the absorption of travel intermediaries into the federal sphere of jurisdiction and indeed there are reasons which could be advanced to support such an accretion to federal jurisdiction. In the world of carriage by air, for example, it might make good sense to have all the major participants subject to a single legislative scheme. However, we will not pursue that possibility here but will end with a suggested parallel between a determination which is routinely made under the *Canada Transportation Act* and the determination by the Court in Fastfrate. The Canadian Transportation Agency has the responsibility to determine, for licensing purposes, whether any particular entity is providing a publicly available air service. The entity which provides the air service must be licensed. To identify that entity, the Agency asks who has commercial control of the service. This may not necessarily be the airline which “flies the metal”, and it is the party in commercial control which will require the licence, in the eyes of the Agency.

Thus, it appears to us, the Agency makes its determinations in a way consistent with that of the dissenting justices in Fastfrate. Of course, the legal contexts are very different. One involves the interpretation of an ordinary statute, the other division of constitutional powers. It is not suggested that the approach taken by the Court in Fastfrate should revolutionize practice before the Agency. However, there is an interesting parallel which may bear further examination. In each case it is clear a transportation service is being provided and the question is “who is providing it?” To this writer at least, it is difficult to accept the proposition that we can answer that question by simply identifying who is flying the plane or driving the truck. The approach taken by the dissenting justices pays more respect to the reality of the business transaction. We predict that, in the very long run, it will prevail.

Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters, 2009 SCC 53

End of the Line (Jurisdiction over Freight Forwarders)

On November 26 a sharply divided bench of the Supreme Court of Canada released a decision respecting legislative jurisdiction over freight forwarders. While the specific decision is of interest to a limited section of the transportation industry, the differing approaches of the majority and dissenting justices have implications for all participants in the industry—implications which indeed extend beyond any particular industrial segment.

The issue presented in *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters* was whether Fastfrate is subject to provincial or federal labour relations laws. This question would be resolved by interpretation of a provision of the *Constitution Act, 1867* which assigns to the federal Parliament of Canada jurisdiction over “Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province”. This constitutional provision makes it clear that the federal Parliament has the sole authority to legislate in relation to matters affecting the core business of, for example, companies which provide interprovincial air or rail service.

Of course, interprovincial air and rail carriers actually transport people and goods over provincial boundaries. Fastfrate does not. It receives and consolidates freight in one province and, typically through another of its branches in another province, deconsolidates the freight and arranges local delivery. For the interprovincial haul it contracts with rail and road carriers. From the perspective of the consignor and consignee, Fastfrate is the relevant entity. Fastfrate’s customers receive

one bill of lading and cannot determine the identity of any third party carrier from the shipping documentation. Fastfrate assumes responsibility for any claims and purchases insurance as an indemnity against its legal liability. The business of the company is managed centrally and not at the branch level. All of these factors suggest that Fastfrate is offering its customers an interprovincial transportation service. However, Fastfrate does not actually carry goods across provincial boundaries. The crux of the case is whether this last fact matters. For the majority, it is the entire case. For the dissenting justices, it is irrelevant.

The sharp division in the Supreme Court of Canada is also found in the decisions below. In the first instance, the Alberta Labour Relations Board (“ALRB”) concentrated on the integrated corporate structure and the presence of Fastfrate at both ends of the transportation chain. It found Fastfrate was subject to federal regulation. Fastfrate instituted judicial review proceedings in the Court of Queen’s Bench and succeeded. The reviewing judge agreed that “physical involvement in the interprovincial carriage of goods” was essential and that in its absence, provincial regulation should prevail. This case then went to the Court of Appeal where a dissenting justice “focused on the specific services that Fastfrate performs, rather than the services which it contracts out” and would have opted for provincial regulation. However, the majority agreed with the ALRB. In the Supreme Court of Canada the tables were turned again. A majority of six found in favour of provincial regulation whereas three justices in dissent would have restored the decision of the

ALRB and confirmed the existence of federal jurisdiction.

The decision of the majority certainly does provide clarity and simplicity of application. The biggest challenge for the majority was to reconcile their decision with an earlier decision which affirmed that a telecommunications company which has a physical presence limited to a single province can nevertheless provide an interprovincial telecommunications service by virtue of contracts with other telephone companies. Because it provides such a service, it is, in the words of the *Constitution Act, 1867* an “Undertaking connecting the Province with any other or others of the Provinces” and is accordingly subject to federal regulation. The constitutional qualification is the same as that in question in the present case.

That telecommunications case, *Alberta Government Telephones v. Canada*, has a firm place in Canadian jurisprudence and appears to be a significant precedent in favour of a finding of federal jurisdiction over Fastfrate. However, the majority rejected this view. They seized upon the following distinction: “whereas communication works and undertakings can facilitate interprovincial communication from a fixed location, transportation, by definition, involves mobility of goods, persons and transportation equipment”. It is this difference which allows the majority to find that there is no inconsistency in treating Alberta Government Telephones differently than Fastfrate, although both are entities which hold out an interprovincial service and provide it by way of contracts with third parties—other telephone companies in one

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