

TRANSPORTATION NOTES

Legal Decisions and Developments Affecting the Transportation Industry in Canada

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Transport Canada has No Duty of Care to Operator for Improperly Suspended AOC

Sonicblue Airways (“Sonicblue”), formerly operated by International Express Aircharter Ltd. (“IEA”), was an airline based in Vancouver, British Columbia. On January 21, 2006, a Sonicblue Cessna 208 Caravan crashed at Port Alberni en route to Vancouver from Tofino. The crash was reported to have been related to engine failure. One crew member and two passengers perished. There were five survivors.

The crash - and IEA’s safety record - quickly attracted media attention and Transport Canada took immediate action, suspending Sonicblue’s Air Operator Certificate (“AOC”), effective at 11:59 pm the day after the crash, Sunday, January 22, 2006.

IEA’s business was affected right away. Its bank made a formal demand for payment of IEA’s indebtedness on January 26, 2006. On January 30, 2006, Transport Canada officials arrived at IEA’s place of business for a scheduled audit to find that its operations and maintenance facilities had been closed. A receiver was appointed on March 14, 2006.

On March 17, 2006, Transport Canada’s enforcement division laid five charges against IEA for violations of the Canadian Aviation Regulations (“CARs”) and fined the company a total of CAD \$125,000. On March 22, 2006, Transport Canada cancelled IEA’s AOC outright based on “the public interest and, in particular, the aviation record” of the company.

Transport Canada’s quick and decisive action was informed by its history of involvement with IEA and Sonicblue. After a series of incidents between 2002 and mid-2004, which resulted in several charges and fines for violations of the CARs, IEA was put under a Transport Canada Enhanced Monitoring

Program. IEA was subject to this program from August 1, 2004 to January 10, 2006, just days before the crash occurred.

However, immediately after the program came to an official end, unannounced inspections took place on January 11 and 12, 2006. Six IEA aircraft were found to be overdue for required scheduled maintenance and problems with record keeping were noted. Two months later, IEA was fined the maximum allowed (CAD \$25,000 per violation) for five violations of maintenance requirements under the CARs.

While this was going on, in February 2006, IEA applied to the Transportation Appeal Tribunal of Canada (“TATC”) for a review of Transport Canada’s decision to issue the January notice of suspension. The TATC is intended to provide an independent review of administrative or enforcement actions taken by the Minister of Transport and certain other specified persons. A single member of the TATC heard evidence over the course of four days in March and April.

On July 11, 2006 - well after IEA’s AOC had been cancelled and it had been put into bankruptcy - the TATC found that Transport Canada had erred on several grounds in issuing the original notice of suspension. The matter was sent back to the Minister for reconsideration.

On February 11, 2008, a reconsideration panel of Transport Canada upheld the decision of the TATC and recommended that “... the Minister’s reason for suspending Sonicblue’s AOC ... not be supported”.

A year and a half after the crash, the Transportation Safety Board (“TSB”) investigation revealed that the crash was, in fact, caused by

a manufacturing defect and not a maintenance issue. The TSB found that the engine lost power when a compressor turbine blade failed as a result of overstress extension of a fatigue-generated crack.

By this time, of course, it was too late for IEA and Sonicblue. Following the various enforcement actions taken by Transport Canada, IEA’s bankruptcy had resulted in significant financial losses to its owner, Ranjit Singh Gill (“Gill”).

In 2008, Gill commenced legal proceedings against Transport Canada, as well as Trevor Heryet (Transport Canada’s Pacific Region Manager of Commercial and Business Aviation) and David Nowzek (the Director of Civil Aviation), alleging that they were liable to him for negligence in having suspended IEA’s AOC. He also claimed that Mr. Heryet and Mr. Nowzek were liable for misfeasance in public office. He claimed as damages his business losses and alleged these to be in the range of CAD\$10 to CAD\$12M.

Mr. Gill’s case was dismissed by the trial court in April 2014. The claim in negligence was rejected on a finding that Transport Canada did not owe a duty of care to Sonicblue, while the claim in misfeasance was not made out because Transport Canada’s officials were found not to have acted in a malicious, arbitrary, high-handed or oppressive manner. (reported at 2014 BCSC 582).

Gill appealed the dismissal of his claim in negligence, but not in misfeasance in public office. The decision of the three-judge panel of the British Columbia Court of Appeal was released on July 28, 2015.

A private law duty of care is the first element
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No Duty of Care to Operator for Improperly Suspended AOC (*cont'd*)

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that must be established in any action in negligence. The analysis of whether or not a government regulator owes such a duty exists to those affected by its regulatory mandate and actions must take into account the surrounding regulatory context, which “may contemplate the existence of a duty of care, be inconsistent with one, or be neutral.”

As the appeal court noted, “as a general proposition, statutory duties or powers imposed on a regulator to promote the public interest do not create a duty of care to specific members of the public” and that this was to be distinguished from a regime that “intends to benefit or protect the interests of particular persons or a discrete class of persons, in which case a duty of care may arise.”

The authority to suspend an AOC is found in sections 6 to 7.21 of the *Aeronautics Act* (the “*Act*”). Transport Canada had suspended IEA’s AOC on the basis of its revocation of its operations manager’s authority because of purported failures to properly discharge his responsibilities. Because an operator must have an operations manager to hold an AOC, this revocation led to the decision to suspend.

As noted above, this basis for suspension was later found to be invalid. In fact, the operations manager was not responsible for the issues potentially engaged by the January 21,

2006 crash at all, making the revocation of his authority baseless. Further, as it turned out, the crash had nothing to do with IEA or its maintenance program at all.

Nevertheless, the Court of Appeal upheld the trial judge’s decision that Mr. Gill had not established that Transport Canada owed him or IEA a duty of care and that, therefore, his claim could not succeed.

The Court held that the trial judge had been correct in identifying public safety as the “overriding purpose of the power to suspend an AOC” and that the promotion of safety was owed to the traveling public as a whole.

While there is no statement of purpose in the *Act*, section 4.2 gives the Minister a number of broad powers, which were viewed by the appeal court:

as reflecting statutory purposes consistent with the promotion of the public interest in an efficient and safe aeronautical industry, but not as reflecting specific obligations to protect the specific interests of particular participants in that industry.

The Court also reproduced a lengthy section of the trial court’s review of the principal elements of the regulatory regime, including pertinent provisions of the CARs and the grounds for cancellation or suspension of an AOC under the *Act*. The Court of Appeal

held that the “evident and overriding purpose” of the regulatory scheme “is to ensure public safety” and rejected the suggestion that in discharging its duties Transport Canada has a duty to consider the economic consequences for the operator if its AOC is suspended.

The Court distinguished from a 2007 decision of the Supreme Court of Canada in which it was found that a police officer owed a duty of care to a particularized suspect he is investigating. The suspect had been arrested, tried and wrongfully convicted and jailed for crimes he had not committed. While the 2007 case dealt with the suspect’s liberty interest and a criminal investigation into harm that had already occurred, the Court held that Transport Canada’s actions only engaged economic interests and that “the suspension of the AOC should be seen as an investigation into public safety and a step taken to prevent the potential of future harm to public safety.”

While it was clear in this case that Transport Canada and IEA had a history of close and direct interactions, because Transport Canada was found to have acted in the public interest and in its capacity as regulator, no private law action in negligence could lie.

Gill v. Canada (Minister of Transport),
2015 BCCA 344

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