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Registered Owner Retains Title to Aircraft

In the August 2010 edition of *Transportation Notes*, we reported on the case of *Gunderson v. Whitefox et al*, a case in which the Saskatchewan Queen's Bench upheld a lower court ruling that the registered owner of a Cessna P210N aircraft should, pursuant to the provisions of the *Criminal Code*, be entitled to receive possession of that aircraft, which had been seized by the police in the course of investigating a crime. The losing party with a competing interest was operating the aircraft at the time of the seizure. That was far from the end of the matter however. The orders made were interim in nature and the ownership dispute continued to a full trial. Judgment was rendered on October 31, 2011. The registered owner, Whitefox Air Inc., ("Whitefox") again prevailed.

In the litigation before the Saskatchewan Queen's Bench Whitefox, produced a trust agreement demonstrating that it held the aircraft in trust for Whitefox Technologies U.S.A. Inc. ("Whitefox USA"). The evidence at the hearing was that this trust agreement was valid at all relevant times. Whitefox also filed documentation showing that it had purchased the aircraft from Claude and Pamela Cage in May 2007 for US$600,000 and that payment was made by Whitefox to these vendors.

On the other hand, Chase Bryant (which had been associated with Robert Gunderson, the person from whom the aircraft was seized) argued that it was the true owner of the aircraft.

Chase Bryant argued, supported mainly by Gunderson's evidence, that it had purchased the aircraft, from Polymicron Technologies Inc., through a Conditional Sales Agreement (the "CSA") in September 2008. The agreement in question was executed by Sharon Oates (Gunderson's sister).

Ms. Oates was not a shareholder or director of Chase Bryant. She agreed at the hearing that she had no documented authority to execute the CSA on behalf of Chase Bryant. Gunderson, a former director of Chase Bryant, testified that Ms. Oates signed the CSA because he was in the Netherlands at the time, and had no ready means of obtaining, signing and re-transmitting the document. Mr. Gunderson also gave contradictory evidence to the effect that he asked his mother (the President of Chase Bryant) to sign the CSA. His mother did not testify at the hearing and no explanation was given for her failure to sign.

The purchase price set out in the CSA was US$650,000. According to Ms. Oates, Chase Bryant sold a condo in Victoria, British Columbia in order to fund the purchase. No documents filed in Court provide any evidence of such a sale.

"When asked why the documents were not provided in the hearing before the [Court, Gunderson] claimed he had given them to the lawyer who acted on his behalf and the lawyer decided not to provide them to the court."

Gunderson sought to explain the purchase agreement filed by Whitefox in a manner consistent with his own position. He testified that while Whitefox advanced the purchase money the amount was really owed to him for unpaid salary. He filed no documents supporting this allegation.

Also filed at the hearing was an Aircraft Security Agreement pertaining to the aircraft, which was purportedly filed with the FAA (after the aircraft was seized) identifying Gunderson as a secured party with an interest in the aircraft. The Court noted, however, that in his testimony, Gunderson failed to disclose that this document was rejected by the FAA because it was not executed by Whitefox.

Gunderson raised additional specious arguments to suggest Whitefox was not the true owner of the aircraft. These included a claim that Whitefox USA was an "undisclosed agent" for Polymicron, the company from which, according to Gunderson, Chase Bryant purchased the aircraft.

In the end, the Court found that Gunderson was not a credible witness and expressed significant reservations about the documents that he filed in support of Chase Bryant's position. The Court also referenced the fact that Gunderson had been the subject of an order from the Law Society of British Columbia in 1999 prohibiting him from, among other things, offering legal advice or holding himself out as a lawyer.

The Court found that Chase Bryant failed to establish that it was the owner of the aircraft and held that Whitefox USA is the owner of the aircraft, which is held in trust by Whitefox.

Chase Bryant's claim was dismissed and costs were awarded to the defendants.

Chase Bryant Inc. v. Polymicron Technologies Inc., 2011 SKQB 411

Inside This Issue

Limitation Periods: Air and Rail Contrasted

A recent decision of the Supreme Court of Nova Scotia has upheld the application of Article 35 of the Montreal Convention and confirmed that it cannot be made subject to a provincial enactment which provides for the discretionary extension of a limitation period. The plaintiff, seeking an order extending the limitation period, sought to rely on a rail case to justify the extension. The trial judge summarily, and correctly, dismissed this argument but without delving into the very interesting history of limitation of action provisions in rail cases. In this note we will consider that history, explore the reasons for subjecting the limitation provisions of the *Railway Act* to provincial legislation in most cases, and explain why analogous provisions in the *Carriage by Air Act* and related international conventions stand on a different footing.

Rita Lemieux sued Air Canada and the Halifax International Airport Authority for damages related to a fall. It was common ground that her bodily injury occurred in the course of boarding an international flight operated by Air Canada and that the Montreal Convention applied. Article 35 of the Convention imposes a two year limitation period which has consistently been found to be substantive and not merely procedural. The action was commenced some five and a half years after the accident and accordingly the claim appears, on its face, to be barred.

The plaintiff sought to rely on section 3 of the Nova Scotia *Limitation of Actions Act* which vests in a court the discretion to disallow a defence based on time limitation "and allow the action to proceed if it appears to the court to be equitable" to do so. The plaintiff sought application of this section and relied upon the case of *Tate v. Canadian National Railway* in which a predecessor of section 3 had been invoked to defeat the limitation period provided for by the *Railway Act*. Reliance on *Tate* is surprising as the reasoning in that case (although not the result) has been overruled by the Supreme Court of Canada. There is a great deal more to be said about the limitation of actions provision of the *Railway Act*, both as to construction and constitutional status, than was canvassed in *Tate* and we will return to this point.

The judge in the *Lemieux* case did not consider the constitutional issues affecting the rail and air legislative schemes, but concentrated on the international interpretation and international nature of the Montreal Convention. The plaintiff seized upon the second paragraph of Article 35 to bolster her case. This paragraph provides that the method of calculating the limitation period "shall be determined by the law of the court seized of the case". Thus, the plaintiff argued, local law can be resorted to to extend the two year period. The court rejected this argument, turning first to decision of the English Court of Appeal in *Laroche v. Spirit of Adventure (UK) Limited*. That case confirms that the only thing the Convention "leaves for determination by the court seized of the case is the calculation of the precise dates of the beginning and end of the relevant two year period and the determination of whether the action has been brought within that two year period". The court also cited *Fishman v. Delta Airlines Inc.* for the same proposition.

With respect to the plaintiff's reliance on *Tate v CNR* the motions judge simply noted that the *Railway Act* "is not a statute dealing with international matters and not intended to be a codification and harmonization" of the rights and obligations of carriers and passengers. While we believe that this distinction does indeed point to the real nature of the difference between the rail and air regimes, the legal justification for the differing treatment is more complex.

The *Tate* decision pits the limitation provision of the *Railway Act*, a Canadian federal statute, against the predecessor of the Nova Scotia provision relied upon by Lemieux. In *Tate* the Nova Scotia Supreme Court thought itself bound to accept the constitutional applicability of the federal statute. This, as the Supreme Court of Canada would explain some four years later in the case of *Clark v. Canadian National Railway*, was an error. Having made this assumption, the trial court went on to find that the federal and provincial enactments could "stand side by side" with the provincial right to discretionary extension applying to the federal limitation period. That this was also an error is confirmed by the Supreme Court of Canada in *Clark*. The true position is that if the *Railway Act* limitation provision is constitutionally applicable, it would defeat the operation of any provincial statute in respect of any claim to which the federal statute properly applied.

The important distinction is the last mentioned—the federal statute governs any case to which it applies. Most of the early cases, including *Tate* are cases in which the question involves the application of the federal statute to provincial causes of action. The confusion which was swept aside in *Clark* arose in the early days of Confederation and became doctrinal when adopted, without detailed consideration, by two Supreme Court of Canada decisions almost one hundred years ago. These had assumed, without argument, that the provisions of federal railway legislation providing for limitation of actions were within the legislative authority of Parliament. It is certainly correct that Parliament has exclusive jurisdiction over the construction and operation of interprovincial railways. On the other hand, the provinces are clearly entitled to enact legislation affecting "property and civil rights". It is universally agreed that limitation provisions do affect property and civil rights. Federal and provincial legislation may thus come into conflict as each legislative body may encroach on the jurisdiction of the other while pursuing objectives within its own competence. When this happens a number of doctrines, which have developed over many years, are called upon to resolve the conflict. In the case of the conflict between the provisions of federal rail legislation and provincial legislation affecting property and civil rights, the early cases did not seriously engage in this resolution. A point made by the Supreme Court of Canada in *Clark* is that the limitation provision of the *Railway Act* can and should be "read down" to apply only to those causes of action created by the *Railway Act*. To the extent that the federal limitation rule purports to apply to limit a provincial cause of action (and, importantly, an action in negligence is a provincial cause of action) it is beyond the legislative authority of Parliament.

Thus, the present rule in Canada is that an action in negligence against an interprovincial railway may be commenced at any time permitted by the laws of the province where the accident occurred, notwithstanding anything to the contrary in the *Railway Act*. On the other hand, any rights created by the *Railway Act* itself, must be exercised subject to the conditions imposed by that Act, including the limitation of actions provision.

However, the *Carriage by Air Act* and Conventions stand on an entirely different footing. While the *Railway Act* creates its own causes of action and leaves the otherwise applicable common law undisturbed, the Convention regime is exclusive. For loss and damaged incurred in international carriage by air, the passenger or shipper has those rights of action created by the Convention, and no others. Accordingly, all claims against the air carrier are limited by Article 35 and provincial limitation enactments cannot be considered. It may be noted that the rule which applies in maritime cases is the same as that which applies in the air mode. In that case the Supreme Court of Canada has confirmed that "tortious liability which arises in a maritime context is governed by a body of maritime law within the exclusive legislative jurisdiction of Parliament". In both cases, the right to limit the rights conferred come within the exclusive jurisdiction of Parliament as well.

Lemieux v. Halifax International Airport, 2011 NSSC 396

Rail Noise and Vibration Complaint

The *Canada Transportation Act* contains provisions which address the noise and vibration associated with constructing or operating a railway. These stipulate that a railway shall cause only so much noise or vibration as is reasonable, taking into account the railway's obligation to provide facilities for receiving and loading traffic, operational factors, and the area where the operation takes place.

The Canadian Transportation Agency has jurisdiction to hear and adjudicate noise and vibration complaints and is authorized to create guidelines for, among other things, the implementation of collaborative resolution measures. Finally, the Act stipulates that in those cases where the Agency has published guidelines it must be satisfied that any collaborative measures required by the guidelines have been exhausted before it undertakes an investigation or hearing.

The Agency has in fact published such guidelines.

In the summer of 2008, the Quayside Community Board, which claims to represent over 2,000 local residents, filed a complaint with the Agency respecting rail operations in the New Westminster Rail Yard in British Columbia. This was the culmination of a long dispute concerning the noise resulting from rail operations in the yard. In accordance with the applicable guidelines, the complaint was referred to mediation.

On December 10, 2008, the matter was settled. A confidential settlement agreement was signed by two representatives of the Community Board, by each rail carrier and by the city. The parties, as well as the two mediators, also signed a Disposition Statement which confirmed the full resolution of the dispute to the satisfaction of all parties. All parties consented to the closing of the Agency's file.

However, the settlement was not for long. In the words of the Board, the agreement "was never intended as an enduring document which would prevent the filing of a subsequent complaint". A new complaint was indeed filed in the spring of 2010.

The railway companies do not share the Board's assessment of the agreement and assert that the there is a final and binding agreement which ousts the Agency's jurisdiction to deal with the complaint.

The second complaint alleges that the "mediated solution has failed" but it does not allege a change in facts or circumstances—an allegation which is essential when seeking a reconsideration of a matter previously decided by the Agency. In a later filing, the Board alleged that the railway companies had "been unable or intentionally failed to comply" and that there had been an irreparable breach of the agreement. In statements to the press, representatives of the Board allege that train traffic continues throughout the night, in breach of the terms of the agreement.

The Agency accepted that, although complaint had been made on two occasions, there was in fact only one complaint. It defined the preliminary issue: does the Agency have jurisdiction to adjudicate this complaint? Specifically, it did not treat the complaint filed in the spring of 2010 as an allegation that the settlement agreement had been breached. It made the following findings:

1. The mediation was not a replacement for its adjudicative process.
2. A settlement agreement is not equivalent to an order of the Agency.
3. As the agreement is not an order of the Agency, the principles of *issue estoppel* and *functus officio* do not apply.
4. The Disposition Statement was not signed by a member of the Agency and is not akin to a consent judgment.
5. As there was no order or judgment there is no basis for barring the Agency from hearing the complaint.

The Agency then declared that all collaborative measures had been exhausted and the formal adjudication process could proceed.

It should be noted at this point that the central debate between the rail companies and residents had not be adjudicated upon. The railways maintain that the agreement was intended to be final and binding. The residents deny this. The circumstances of the signing of the agreement and Disposition Statement appear to tilt towards the position of the rail companies, but the Agency did not make a finding, and this would be critical to the decision of the Federal Court of Appeal when the Agency's action was challenged.

Under the *Canada Transportation Act* a party to Agency proceedings can appeal directly to the Federal Court of Appeal, but only with leave and only on a question of law or jurisdiction. When a decision of the Agency is appealed the Agency decision is generally afforded considerable deference. However, where the issue is jurisdiction or certain limited questions of law the Agency can be held to a higher standard. In the language of judicial review, where the Agency is entitled to deference its decision will be upheld if reasonable, even if incorrect. Where no special deference is due the Agency decision will be upheld only if it is correct.

The rail carriers were granted leave to appeal and the appeal was heard in the fall of this year. The Federal Court of Appeal found that it was not necessary to decide whether to apply a correctness standard or a reasonableness standard. The decision was unreasonable and, even on the more deferential standard, the decision should be overturned. The central problem identified by the Court was the Agency's failure to determine whether there was a final and binding settlement which barred the Board from re-litigating the issues. As Madame Justice Dawson forcefully stated the issue, the Agency, in deciding to adjudicate the case without determining the nature of the settlement, failed to give any force to the collaborative measures which the Agency itself had established.

"Where the parties have finally resolved a complaint in a settlement agreement, the practical effect of a decision of the Agency to ignore the settlement agreement and adjudicate issues previously resolved would be to denude the collaborative measures of any effect. No properly advised litigant would enter mediation if the litigant understood that the time and resources devoted to reaching a mediated result would be wasted if the other side later regretted its bargain and simply decided that the mediated solution was no longer desirable."

Costs are rarely awarded against the Agency but in this case a single set of costs was awarded to the rail companies. The reason for this is breach of an often repeated, and often ignored, injunction that the Agency, when it appears in the Federal Court of Appeal in support of one of its decisions, is to restrict itself to argument touching on questions of jurisdiction. It is said Agency counsel should not "give reasons for Reasons". The Court found the submissions made in this case crossed the line and that a costs award was thus appropriate.

BNSF Railway Company v. Canadian Transportation Agency, 2011 FCA 269

End of the Line (Air Cargo Surcharges Class Action)

The air cargo surcharges class action continues to wind its way through the Ontario courts. In late October, the Superior Court of Justice certified, on consent, the claims as against SAS, Qantas, Cargolux and Singapore Airlines, solely for the purpose of settlement. When certification is sought solely for this purpose, the court will apply a much less rigorous test for determining whether certification is appropriate.

As its contribution to the settlement, SAS agreed to pay CAD$300,000 for the benefit of class members. The Court noted that SAS did not operate any flights into or out of Canada during the relevant period. Rather, its shipments between Canada and other countries were routed through the United States. The materials filed on the certification motion also indicated that a primary objective for class counsel in negotiating with SAS was ensuring the receipt of continued cooperation in the litigation. The amount paid was said to reflect "a significant portion of the fuel surcharges imposed" by SAS.

Qantas, which was described along with SAS as a very minor participant in the Canadian air cargo market, agreed to pay CAD$237,000 — being the total fuel charges imposed by Qantas during the relevant period.

Cargolux, which pled guilty in Canada, and settled its US litigation, agreed to pay CAD$1.8M for the benefit of class members. It also agreed to provide substantial cooperation to the plaintiffs in the continued prosecution of the litigation. The Court noted that this settlement was intended to be roughly proportional to the Cargolux settlement in the US, plus a contribution to notice and administrative costs. Singapore Airlines, which has not pled guilty, and has not settled its US litigation, agreed to pay CAD$1.05M for the benefit of class members, of which up to CAD$250,000 is allocated towards Singapore's proportionate share of administration and notice costs, without refund should such costs be less. (In fact, Singapore's share of costs was ~CAD$47,000. The excess funds are to be distributed to the settlement class members).

The Court noted that Singapore's settlement roughly reflects the relative terms of the US Cargolux settlement, with accommodation for the fact that, in Canada, Singapore was a "smaller defendant" and had a smaller volume of commerce relative to Cargolux during the class period. Singapore also agreed to cooperate in the prosecution of the litigation, but such cooperation will be "delayed until after the delivery of the relevant documents or information in the US litigation."

As was the case when Lufthansa agreed on settlement terms, SAS, Qantas, Cargolux, and Singapore requested a "bar order" (which was not opposed by the class and the non-settling defendants) barring all claims for contribution and indemnity against these defendants (excluding claims made by persons who have opted out of the settlement).

According to the terms of the Lufthansa settlement, non-settling defendants were permitted, as of right, to require documentary and oral discovery of Lufthansa In seeking approval of the present settlement, SAS, Cargolux and Singapore argued that the non-settling defendants should be required to obtain leave , by way of a motion made on notice to the settling defendants, before burdening them with discovery obligations. This would allow the settling defendants to challenge the right of the non-settling defendants to institute discovery in situations where the demands sought to be imposed on them might not be "proportionate" to their involvement in the chain of events leading to the litigation.

The Court accepted this proviso, indicating that it represents a fair balancing of interests between the settling and non-settling defendants. The requirement for this "balancing of interests" comes from the Ontario Court's decision in *Ontario New Home Warranty v. Chevron Chemical Co.* [1999] O.J. 2245 (S.C) and is reflected in recent changes to the *Rules of Civil Procedure*.

On this point, Qantas argued that it should not be required to submit to discovery because it had not previously been part of the action, and was added only in the certification motion for the purposes of facilitating settlement. Qantas also argued that its position is bolstered by the fact that its settlement was explicitly made on the basis that it did not admit any liability and that it had agreed to this resolution solely for the purpose of avoiding any further expense, inconvenience and litigation burden. By returning the full value of the fuel surcharges collected, it should be able to "put to rest this controversy". The Court accepted Qantas' submission. Qantas was added as a party to the litigation, the class was certified as against SAS, Qantas, Cargolux and Singapore Airlines, the settlement was approved, and the bar order was imposed.

Airia Brands Inc. et al v. Air Canada et al,
2011 ONSC 6286

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