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TRANSPORTATION NOTES

Legal Decisions and Developments Affecting the Transportation Industry in Canada

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Aircraft lasering continues to attract soft sanction

In 2010, Transport Canada's Civil Aviation Daily Occurrence Reporting System (CADORS) recorded 209 incidents in which ground-based lasers were pointed at aircraft, thereby disrupting flight. Many of these incidents have affected commercial and air ambulance operations.

This figure is an 88% increase from the 2009 reports. There has been a logarithmic increase in reports of this behaviour since 2005 (when only three incidents were recorded).

The Courts have been, in our view, unduly lenient towards offenders — and this trend continues, as evidenced in a recent Alberta decision.

On an August 2009 evening in Edmonton, Alvin Vargus Bautista sat in his car in the parking area of an apartment complex, waiting for his wife who was assisting a friend.

To pass the time, he began "testing" a malfunctioning laser pointer that he had stored in his glove compartment. It is common ground that Mr. Bautista had been explicitly warned that the laser could pose a serious hazard to a person's eyes, and the safety of aircraft in flight.

Because Mr. Bautista felt crowded in the car, he decided to continue with the testing outside. Before exiting his car, he removed the tip of the device which was designed to cause a dispersion of the light from the laser — resulting in the laser being able to emit a stronger beam.

After initially testing the laser on some trees, he decided to continue the experiment by pointing it straight up into the sky, but only after he had checked for aircraft. After a short while, he heard a helicopter coming, and discontinued all further testing.

Around this time, Constables Chaulk and Bohochyk of the Edmonton Police force were in flight in a police helicopter, not far away. Chaulk, the pilot, was struck in the eyes with the green light from the laser several times, causing him to lose sight of the instruments and the horizon. The flight officer took control of the helicopter and flew in the direction of the light source using his peripheral vision.

Baustista was apprehended, charged and ultimately convicted under s. 601.20 of the *Canadian Aviation Regulations* which prohibits a person from "projecting … a directed bright light source into navigable airspace in such a manner as to create a hazard to aviation safety …".

This is a strict liability offence, meaning that the prosecutor need not prove that the offender intended to create the hazard — just that the hazard was created.

A number of factors were considered by the Court in determining the sentence — in accordance with the usual Canadian jurisprudence on sentencing. The Court also examined previous cases where offenders were found to have pointed laser beams at aircraft.

One such case was *R. v. Mackow*, 2008 ABPC 204, where the accused intentionally struck a commercial aircraft and a helicopter and, as a result was fined $1,000. Bautista's counsel characterized this sentence as a "starting point" in the matter at hand.

Also referred to were the unreported cases of *R. v. Pelaez* where the accused plead guilty to the same charge and was fined $1,000 as well as *R. v. Cote* where the accused was found to have intentionally pointed the beam at an aircraft and received a suspended sentence with probation.

In sentencing Mr. Bautista, the Court noted that the incident was "not as serious as made out by [the prosecutor]." The sentencing judge noted that the pilot did not lose control of the aircraft, and that he was merely "momentarily blinded from viewing his instruments" — adding that the pilot recognized the light as being from a laser and was familiar with the dangers of lights from lasers.

The judge also commented that he was not satisfied, from the records submitted by the prosecutor, that a prevalence of "unintended interference of aircrafts by the use of lasers" (*sic*) was demonstrated.

In Bautista's favour, the judge found, among other things, that he possessed no prior criminal record, had "a momentary loss of common sense" (even though he had been specifically warned about the dangers of laser pointers), was remorseful in that he had apologized, and gave the laser to the officer voluntarily.

The sentencing judge rejected the defence argument that the offence was committed "unknowingly". Rather, he held that "the offender failed to recognize the dangerous nature of … the laser and he did not proceed with a high degree of caution."

Mr. Bautista was fined $500. His laser was forfeited.

R. v. Bautista,
2011 ABPC 59

Inside This Issue

Maritime limits of liability

In its recent decision in *Buhlman v. Buckley*, the Federal Court of Canada interpreted the *Marine Liability Act*, S.C. 2001, c. 6 ("the Act") and the *Convention on Limitation of Liability for Maritime Claims* ("the *Convention*") in the context of a summary judgment motion to limit liability with respect to a boating accident which resulted in catastrophic injuries.

The action underlying the Federal Court ruling was brought in Superior Court by the injured person and his family members ("the claimants").

The claimants were guests of Eagle Lake Sportsmen's Lodge, which was owned by the respondents in the Superior Court action. Rental of a motor-operated fishing boat was included in the claimants' vacation package and this boat was also owned by the respondents.

Two of the claimants, a son and father, went on a tour of Eagle Lake in this rental boat. They were accompanied by one of the respondents and his two children, in another boat. During this excursion the respondents' boat collided with the claimants' boat. As a result, the son sustained "serious and catastrophic personal injuries." The claimants brought a suit in negligence and under the *Family Law Act* for approximately $8.2 million in damages in Superior Court.

The Federal Court ruled that a limitation of liability in the amount of $1 million applied.

The Court first considered whether it was Part 3 of the *Act* entitled "Limitation of Liability for Maritime Claims", or Part 4 of the *Act* entitled "Liability for Carriage of Passenger by Water" which applied.

The Court concluded that Part 3 was the relevant part. Part 4 applies where there is a contract for carriage "from one point to another by a carrier", which was not the case here. Moreover, Part 3 applies to pleasure craft, while Part 4 does not.

The Court next ruled that this was a claim that fell under the definition of a "maritime claim" as set out in both the *Act* and the *Convention*. This definition includes "claims in respect of loss of life or personal injury or loss of damage to property . . . occurring on board or in direct connexion with the operation of the ship or with salvage operations, and consequential loss resulting therefrom." The Court ruled that this applied to a ship operated on inland navigable waters.

Given that Part 3 applied, it was necessary to consider sections 28 and 29, as they stood at the time, to determine the limitation amount. In the current Act, as a result of amendments made in 2009, these sections have essentially been reversed: what is now section 29 was then 28, and what is now 28 is similar to what was then 29.

The respondents in the action in Superior Court (being plaintiffs in the limitation action in Federal Court) successfully relied on section 28. This section limited (as section 29 does today) liability for maritime claims involving loss of life or personal injury to $1 million.

The claimants (defendants in the limitation action) sought to bring the claim within section 29 which provides for a higher limitation amount. They pointed to section 29(2) which applies to persons carried on a ship otherwise than under a contract of passenger carriage. The respondents countered by referring to section 29(3) which creates an exception. Section 29(2) does not apply to a person carried on a ship which is not operated "for a commercial or public purpose." The respondents argued that as the purpose of the voyage was sports fishing there was no "commercial or public purpose" and accordingly no possibility of invoking the section 29(2) limitation amount.

The Court agreed with the respondents in the result. The applicable limitation amount is that specified in section 28. However, it disagreed with the arguments advanced by both parties. The real question was not the nature of the voyage, but the role of the vessel for which the limitation of liability was sought. In this case, the vessel which sought to limit liability was not that operated by the claimants and owned by the respondents, but the vessel operated by the respondents. Section 29 can apply only to claims made by persons who are onboard the vessel which seeks to limit liability.

Section 28, however, did apply. Section 28 applies to "maritime claims that arise on any distinct occasion involving a ship with a gross tonnage of less than 300 tons, other than claims mentioned in section 29." This section was to be read together with the definition of maritime claims and applied insofar as the claim was "in direct connexion" with the operation of the vessel at issue (which also met the requisite weight limitation.) Liability was thus limited in accordance with the provisions of this section at $1 million.

The limitation amount does not include prejudgment interest. No costs were awarded, the Court noting that the Plaintiffs "succeeded upon an argument that they did not raise and the Defendants did not answer".

Buhlman et. al. v. Buckley et. al., 2011 FC 73

Sikorsky *(cont'd)*

forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation ... "

Before leaving this issue, Justice LeBlanc addressed the participation of the Lloyd's interests in the litigation. He noted that it was the claim itself, and not the residence of the parties that established jurisdiction. In the case of the Lloyd's interests, he specifically indicated that "the claim of Lloyds 20 and Lloyd's Underwriters cannot be seen to be separate and apart from that of Cougar. The claim of each of the plaintiffs is grounded on the same factual basis …"

Finally, on the fourth issue, namely whether Newfoundland was the most convenient forum to deal with the claim.

In determining the fourth issue, namely whether Newfoundland was the most convenient forum to deal with the claim, Justice LeBlanc noted first that, based on the jurisprudence, a party loses the ability to argue *forum non conveniens* once it attorns to the jurisdiction.

But for the attornment, a review of the non-exhaustive list of factors set out in *Muscutt, Van Breda* and *Teck Cominco Metals Ltd. V. Lloyd's Underwriters* (2009) SCC 211 would lead to the same conclusion. The Court agreed that Sikorsky would face additional costs litigating in Newfoundland and that witnesses would have to be called from out of the jurisdiction. However:

- the same would apply if the matter were heard in Connecticut;
- the claim could be presented primarily through witnesses resident in Newfoundland;
- it was not clear that the laws of Connecticut would apply, given that the claim in founded in tort, not contract;
- there would not necessarily be a multiplicity of proceedings, given that the Connecticut court had not yet ruled on the application before it;
- if the action were pursued in Connecticut, the plaintiffs would be at a juridical disadvantage in that, in that jurisdiction, they would not be able to recover pure economic loss in a products liability proceeding of this sort; and
- the evidence from the Canadian regulators in this case would be more important than that from the FAA.

Sikorsky's motion was dismissed with costs.

Cougar Helicopters Inc. v. Sikorsky Aircraft Corp. 2010 NLTD(G) 213.

Sikorsky ordered to proceed in Newfoundland action

On March 12, 2009, a Sikorsky S-92 helicopter operated by Cougar Helicopters Inc. crashed approximately 35 miles off the coast of Newfoundland, resulting in the deaths of 17 passengers and crew, and a total loss of the helicopter. There was one surviving passenger. The flight was carrying oil workers to an offshore drilling rig.

The helicopter in question was originally purchased by CHC Helicopter Corporation as part of the sale of 12 such rotorcraft. That sales agreement provided that the law of Connecticut governed.

The helicopter was then sold by CHC to Lloyds TSB General Leasing (No. 20) Limited ("Lloyds 20") who, together with certain Lloyd's Underwriters, are the beneficial owners of it.

On the sale of the aircraft to Lloyd's 20, a novation agreement was executed wherein the obligations taken on by CHC were transferred to Lloyds 20 — which became bound by the original contract of sale — with the exception that Sikorsky now accepted that the law of England and Wales applied and that the exclusive jurisdiction for the resolution of disputes was the English courts.

In March 2007, Cougar leased the helicopter from Lloyds 20. Under the terms of that lease, Lloyds 20 was to be the loss payee under the insurance that was to be procured for the helicopter.

Two separate legal proceedings ensued as a result of the crash.

The first, commenced in June 2010, involved Sikorsky commencing an action against Cougar and Lloyds 20 seeking a declaratory order that any claim related to the crash would be adjudicated in Connecticut, in accordance with Connecticut law, and further, seeking an order prohibiting Cougar, Lloyd's 20 or the Lloyds underwriters from commencing litigation in any other jurisdiction. This application was opposed.

Eight days after the Connecticut application was filed, Sikorsky was served with a Newfoundland claim commenced by Cougar and the Lloyd's interests (as well as others).

As an aside, it is important to note that one of the "others" was Helicopter Support Inc. ("HSI"). After commencement of this proceeding, the plaintiffs served a Notice of Discontinuance with respect to the HSI claim — and the proposed issuance of such notice was unsuccessfully challenged by Sikorsky.

The overall claim was based on alleged torts that had occurred in Newfoundland, more specifically: negligent design and manufacture of the main gearbox on the helicopter, negligent/ willful/ fraudulent misrepresentation and failure to warn. No breach of contract is identified in the claim — and, indeed, there is no contract between Cougar and Sikorsky (although Lloyds and Sikorsky are contractually linked, as discussed above).

On receiving the claim in the Newfoundland action, Sikorsky sought to prevent Cougar and Lloyd's from proceeding with the Newfoundland claim for a number of reasons.

In short, the Newfoundland Court had to decide whether:

1. in contesting the discontinuance against HSI, had Sikorsky attorned to the jurisdiction of the Newfoundland courts;
2. it was appropriate to order a temporary stay of the Newfoundland action while the Connecticut application was determined (and while a case involving somewhat similar issues was determined by the Supreme Court of Canada);
3. the claim had a real and substantive connection to Newfoundland; and
4. the Newfoundland court was the most convenient *forum* to deal with the claim.

It is of some importance to note that no contract exists as between Cougar … and Sikorsky. No breach of contract is alleged by any of the plaintiffs ...

On the first issue, the Court held that Sikorsky's actions with respect to HSI had, indeed, constituted attornment.

The Court went through the jurisprudence on attornment — and found that Sikorsky had gone beyond what was permitted (i.e. merely challenge the jurisdiction of the Court to deal with the claim that was issued) in order to avoid a finding of attornment.

On this point, Justice LeBlanc took special note of the fact that Sikorsky not only opposed the discontinuance against HSI, it went so far as to (unsuccessfully) seek an order further barring the plaintiffs from commencing further proceedings against HSI on the theory that any such action should be taken in Connecticut.

On the issue of staying the matter pending the decision of the Connecticut court, and the critical decision of the Supreme Court in *Van Breda v. Village Resorts Ltd.* (which is to be argued in March 2011), the Court was equally unsympathetic.

With regard to the Connecticut litigation, the Court noted that, although the decision was expected to be released imminently, it was still outstanding — and the judge in that case had indicated that further evidence and argument may be required before a ruling on that case could be made.

Regarding the *Van Breda* decision, the Court noted that, while the decision of the Supreme Court would be relevant to the assessment of the matter of territorial jurisdiction, it was unlikely that the decision would be released until late 2011.

Accordingly, Justice LeBlanc decided that a temporary stay would not be appropriate, given, among other things, the delay that would arise and the substantial losses that had been incurred.

On the third issue, the "real and substantial connection" to Newfoundland, Justice LeBlanc placed heavy reliance on the test set out in the Ontario Court of Appeal in *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (C.A), as modified in *Van Breda v. Village Resorts Ltd.* 2010 ONCA 84. He found a "real and substantial connection" based on the following:

- the courts of Newfoundland are presumed to have jurisdiction as the rules of practice *prima facie* permit the service of a claim in that province (because it is a claim "founded on a tort committed in the province");
- although Sikorsky's defence relies (at least in part) on contract law principles, the claim is entirely founded in tort;
- although the crash did not occur in Newfoundland proper (it occurred 35 miles offshore), the alleged misrepresentations were relied upon by Cougar in the province (where the most significant part of its business operates — even though the president of Cougar resides in British Columbia);
- there were significant losses accruing to Cougar in the province — for example, lost profits, payroll and administration costs, public relations management costs, monies paid to families of employees and cost for search and rescue flights;
- in accordance with the Supreme Court of Canada's ruling in *Moran v. Pyle National (Canada) Ltd.* [1975] 1 S.C.R. 393, "[b]y tendering … products in the market place directly or through normal distributive channels, a manufacturer ought to assume the burden of defending those products wherever they cause harm as long as the

End of the Line (Air France class action)

First, an update: in the November 2010 edition of this newsletter we reported on the dismissal of a claim brought against Lufthansa by a passenger who complained of the failure of the carrier to provide her with a wheelchair on arrival at Toronto. At the time of writing that note an appeal was pending. That appeal has now been abandoned. Furthermore, cross-claiming co-defendants have abandoned their cross-claims. Accordingly, the case of *Balani v. Lufthansa* has now been finally concluded in Lufthansa's favour.

For this week's note, we turn to a decision of the Ontario Superior Court of Justice which recently approved an important settlement. This approval will bring an end to the class action commenced to recover damages arising from the runway overrun of Air France flight 358 on August 2, 2005.

There were 297 passengers on board the aircraft. Of these 68 entered into early settlements with Air France and 47 initially opted out of the class. Of the opt-outs three later rejoined the class. Accordingly there are currently 44 opt out cases which have not been settled. Of the 68 passengers who settled with Air France alone, most will be entitled to additional compensation because of the settlement. The settlement also covered the claims of 454 persons who claimed as family members of passengers.

The recent settlement was the last of a number of partial settlements. By June of 2010 all defendants except NAV Canada had concluded settlements with the class members and obtained judicial approval of these settlements. There was one curious gap in that the settlement arrived at by Air France did not include three claims as the persons advancing these claims were not members of the class at the time the partial settlement was reached.

The agreed contributions were: Air France $10 million; Goodrich Corporation and Airbus jointly $1.65 million; the Greater Toronto Airports authority $2 million.

As of this point NAV Canada had not settled any claims. However, in November of 2010 an agreement was reached under the terms of which NAV Canada and Air France would pay an additional $7.1 million. The individual contributions of Air France and NAV have not been made public but it may be noted that Air France was paying to settle only the three excluded claims while NAV was buying its way out of the claims of the entire class.

Court approval of the settlement was required and the matter came on for hearing before Justice Strathy on January 14 of this year. His judgment approving the settlement was released on January 21.

Justice Strathy commented on aspects of this case which take it out of the ordinary. In particular he noted the fact that the various defendants were subject to different liability regimes. The claims against Air France were governed by the Montreal and Warsaw conventions while claims against other defendants were governed by Canadian common law. It was accepted by all parties that the damages which can be awarded under the conventions are more limited than those recoverable under common law.

A distinction was made between "Convention Damages" and "Extra-Convention Damages". The basic thrust of all the agreements was that Air France should be responsible for all Convention Damages and each co-defendant should be responsible for its several share of the Extra-Convention Damages.

Justice Strathy was required to determine whether the proposed settlement was "fair, reasonable and in the best interests of the class as a whole". He unequivocally found that all these requirements were met and was in a good position to make this assessment, having presided over several motions and case conferences as case management judge.

In approving the settlement he noted the representation of class counsel that each class member would receive approximately 80% of the damages which would likely have been assessed had the matter proceeded to trial. Communications with the class members seems to have been clear and detailed and there was no opposition to the settlement. Justice Strathy observed that the "settlement is the result of an extensive and hard-fought negotiating process".

In a separate judgment released the same day as the settlement approval order, Justice Strathy approved class counsel's request for a fee of $6,225,000 plus disbursements and costs. He commended class counsel for "hard work, outstanding organization, tactical and legal skills and persistence".

While this marks the end of the line for the class action there remain some 44 opt-out cases, some of which are at a very early stage of development.

Abdulrahim v. Air France
2011 ONSC 398

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