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Warsaw Article 29 Cannot Be Tolled by Local Law

In late March 2011, a motions judge of the Ontario Superior Court of Justice followed the majority of the international jurisprudence on Article 29 of the *Warsaw Convention* by holding that claims which are not commenced within the prescribed two year time limit should be summarily dismissed, notwithstanding provisions in the local law permitting minors and persons under a disability to have the time limit tolled.

The plaintiff in the case was Marwa Sakka, a 34 year old woman suffering from cerebral palsy. Ms. Sakka was travelling with her mother in May 2003 on a return Air France ticket from Canada to Syria with a stop in Paris. The claim alleges that, on arrival at Paris, the plaintiff's mother made several requests for assistance in transferring her daughter from her seat to a wheelchair, through the bridge, to the interior of the terminal where another wheelchair was awaiting.

The claim also alleges that these requests were not fulfilled, so the plaintiff's mother attempted to carry the plaintiff through the bridge herself. While doing so, the mother tripped on the uneven surface where the bridge meets the exit door of the aircraft, causing the daughter to injure her knees.

Ms. Sakka retained Jacques Gauthier (Ontario counsel) to seek damages from Air France after the incident, but Mr. Gauthier did not commence a claim within two years. In fact, a claim was not commenced until six years after the fall when Ms. Sakka sued Air France for the knee injuries, as well as her former counsel for not bringing an action within the prescribed time.

Air France brought a motion for summary judgment as against it on the basis that the claim was barred by Article 29 of the *Warsaw Convention*. The plaintiff did not oppose this motion, but Mr. Gauthier did.

He brought a cross motion for a declaration that, since the accident took place in France, French law applies — and that, under French law, the claim could survive given that the Article 29 time bar was tolled because the plaintiff was under a disability.

A review of the* Minutes of the Second Conference on Private Aeronautical Law *indicates that the delegates to the* Convention *sought to avoid a situation where each signatories' domestic law might apply and create uncertainty surrounding the two year limitation period.

In arguing this motion, Mr. Gauthier filed expert affidavit evidence from a French lawyer to the effect that "in France the 'law is clear' that Article 29 of the *Warsaw Convention* is a statute of limitations and is capable of being tolled by the minority or disability of the plaintiff pursuant to the French *Civil Code*." French jurisprudence supporting this statement was also submitted to the Ontario Court for consideration on the motion.

As a secondary argument, Gauthier's counsel argued that there is no evidence that the Ontario courts have jurisdiction over the claim in any event, because that there was no evidence before the Court respecting the circumstances in which the ticket was purchased.

The Ontario Court was not persuaded by Gauthier's arguments.

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It commenced its analysis by citing the well known jurisprudence standing for the proposition that the *Warsaw Convention* should be applied in a consistent manner internationally, without reference the local laws of the High Contracting Parties. In this regard, the Court cited the U.S. Supreme Court's decision in *El Al vs. Tseng 119 S. Ct. 662* as well as the House of Lords' decision in *Sidhu v. British Airways* [1997] 1 All E.R. 193.

On this point, the Court also cited Article 31 of the *Vienna Convention on the Law of Treaties* which requires that international treaties be interpreted in good faith, in accordance with their ordinary meaning in their context and in light of the object or purpose.

The Court went on to consider the fact that Article 32 of the *Vienna Convention* permits an adjudicator to consider the preparatory work pertaining to a treaty when there is any ambiguity in interpreting the ordinary meaning of a treaty provision. In this regard, the *Warsaw Convention* preparatory papers show a clear desire on the part of the drafters to enact a liability regime which is to be applied uniformly in all participating jurisdictions.

The motions judge then tuned to the issue of Article 29, more specifically. In this context, he considered the British Columbia Court of Appeal case of *Gal v. Northern Helicopters* (1999), 177 D.L.R. (4th) 249 where that Court found that Article 29 is not capable of bearing more than one interpretation — and

B.C. Carbon Tax for Marine Operators

A recent decision from the British Columbia Supreme Court interpreted the meaning of "inter-jurisdictional leg" for the purposes of exemption under the British Columbia *Carbon Tax Act* ("the *Act*").

Under the *Act*, carbon-emitting fuels used in British Columbia are taxed while fuel used on any inter-jurisdictional portion is tax exempt.

The petitioner, Island Tug & Barge Ltd. ("ITB") tows barges owned by a US company from Tacoma, Washington. The barges are filled with calcium carbonate which is delivered to three pulp mills in British Columbia. After the goods are delivered, the barge is either towed back to Tacoma empty, or loaded with cargo while in British Columbia to be transported and discharged back in Tacoma.

Pursuant to the provisions of the *Act*, ITB pays carbon tax on all of the fuel used by its tugs to conduct the above referenced voyages. ITB submitted an application for a refund of carbon tax paid on the fuel used by its tugs for inter-jurisdictional transport.

The application was rejected, so ITB appealed to the Court. At issue on appeal was the proper interpretation of the *Act*. More specifically, when does an inter-jurisdictional trip cease to be inter-jurisdictional and taxable pursuant to the *Act*?

It appears beyond argument that the trip began in Tacoma. ...The trip ends when the vessel has completed its unloading at its final destination in BC. The trip back to Tacoma likewise begins after the unloading and ends in Tacoma. The fact that the vessel stops to pick up further product on its return to Tacoma does not change the inter-jurisdictional nature of the trip. Both trips are composed entirely of inter-jurisdictional legs.

As noted by the Court, the applicable exemption section under the *Act* provides that if a trip includes an inter-jurisdictional portion, a refund is payable for fuel used on those legs of the voyage that are between jurisdictions.

The term "inter-jurisdictional leg" is defined as a portion of a trip that:

(a) begins at a port or other similar place that is in a foreign state and ends at a location in British Columbia, or

(b) ends at a port or other similar place that is in a foreign state and begins at a location in British Columbia.

The Court found that the *Act* appears to use the term "trip" to mean the whole of the activity from home port to a final destination and a "leg" as a segment of the trip.

In deciding the matter, the Court considered the purpose of the *Act* and its other provisions for assistance in interpretation, as well as the protocols developed by the Intergovernmental Panel on Climate Change ("IPCC") for assistance.

It concluded that, under the IPCC protocol, the trip from Tacoma to a British Columbian port is inter-jurisdictional but that any travel between ports in British Columbia would be intra-jurisdictional to the extent that goods are loaded at one port within the province and unloaded at another port within the Province.

The point in dispute was whether voyages between ports within the province should be characterized as "intra-jurisdictional" (and thus subject to tax) irrespective of whether cargos were transported between one such provincial port and another. As might be expected, the province argued for an expansive reading of the legislation but this was rejected by the Court as it ignores the significance of the underlying commercial activity. The term "inter-jurisdictional leg", when read in the context of the *Act*, requires consideration of the commercial activity, not merely of the movements of the vessel.

The Court granted ITB's appeal and found that the trips in question are constituted of inter-jurisdictional legs for the purposes of the *Act* and thus entitled to carbon tax exemption.

Island Tug & Barge Ltd. v. British Columbia, 2011 BCSC 396

Warsaw Art. 29 *(cont'd)*

that attempts to extend the time to commence an action beyond the prescribed time should fail.

The motions judge noted that the approach in *Gal* is consistent with that of the U.S. decisions in *Fishman v. Delta Airlines* 132 F. 3d (1998) (2nd Cir.) and *Kahn* v. *Trans World Airlines* 443 N.Y.S. 2d 79; 82 A.D. 2d 696 (N.Y.A.D. 1981) The motions judge observed that the "overwhelming weight of authorities supports the interpretation of Article 29 advanced by … Air France in the within proceeding."

In addressing the French law which seems to contradict the international jurisprudence, the Court noted that the Ontario Court should "look to the decisions of courts of other countries for guidance however it is not bound to follow any decision of any particular country in interpreting a treaty."

In the end, with respect to the Article 29 argument, the Court followed the reasoning in *Gal* and held that "the only matter to be determined … is whether the plaintiffs commenced the action within two years of the date specified in Article 29." They had not.

With respect to the Article 28 argument, the Court found, somewhat questionably, that it was for Air France to challenge the jurisdiction of the Ontario Courts, not Mr. Gauthier. In any event, on the facts of this case, there could be no question that the Ontario courts had jurisdiction to hear this case on a plain reading of Article 28 and the case law pertaining to same. *Balani v. Lufthansa* 2010 ONSC 3003 was cited on this point. (See the November 2010 edition of *Transportation Notes* for a summary of this case).

The claim was summarily dismissed as against Air France — leaving the hapless Mr. Gauthier to fend for himself.

Sakka v. Société Air France, 2011 ONSC 1995

CHRC to Reconsider Longshoreman Discrimination Complaint

In the case *Cerescorp Company v. Marshall* the applicant, Cerescorp, sought a judicial review of a decision of the Canadian Human Rights Commission (the "Commission") which referred a particular complaint to the Canadian Human Rights Tribunal (the "Tribunal") for an inquiry.

In doing so, the Court considered two issues. First, whether the Commission's decision to refer the complaint to the Tribunal reasonable; and second, whether the Commission's investigator (the "Investigator") breach the principles of natural justice and procedural fairness when carrying out her investigation for the Commission.

The complainant in this case, Linda Marshall, was a longshore worker providing stevedoring, terminal operations and ancillary services at cruise ship terminals in Vancouver.

In 2006 Cerescorp obtained a contract to provide longshore services in Vancouver. It then hired three people in supervisory postions. There were 65 candidates and Ms. Marshall was the only female among them.

Ms. Marshall alleged that Cerescorp told her that she was interviewed as a "courtesy" after the three positions had been filled. Cerescorp did not conduct a formal interview process and the candidates were largely assessed by managements' knowledge of the candidates and their suitability for the positions.

Shortly thereafter, the Respondent filed a complaint with the Commission, alleging that she had been discriminated against on the basis of sex.

Prior to the Commission receiving submissions respecting Ms. Marshall's complaint, Ms. Marshall and Cerescorp entered into a settlement agreement designed to create and implement a development plan to assist Ms. Marshall with a promotion to a supervisory position in the future. After Ms. Marshall became unsatisfied with Cerescorp's efforts respecting its obligations under the settlement agreement, she amended her complaint to the Commission and the Commission commenced an investigation.

An investigation undertaken pursuant to the *Canadian Human Rights Act* is an initial screening process to determine whether there is sufficient evidence to warrant the convening of the Tribunal to conduct a formal inquiry into the complaint.

Courts have held that this is a low threshold. However, the Commission and its investigator are bound by the principles of procedural fairness, which requires thoroughness and neutrality in the investigation.

After conducting an investigation, the Investigator reported to the Commission recommending that the Tribunal convene to hear Ms. Marshall's complaint. The Commission accepted the Investigator's recommendation, and did so without written reasons. Where the Commission takes this approach, the reasons set out in the Investigator's report are deemed to be the reasons of the Commission.

Cerescorp took the position that the Commission's decision to refer the matter to the Tribunal was unreasonable because sufficient evidence to warrant the convening of the Tribunal was not disclosed by the Investigator's report. It also argued that the Commission did not fulfill its duty of fairness when investigating Ms. Marshall's complaint.

With respect to the former, Cerescorp contended that the Commission erred by taking Ms. Marshall's allegations at face value, without verifying them or properly considering the direct evidence refuting them. With respect to the latter, Cerescorp argued that it had not been given an opportunity to respond to some of the issues raised in the report.

The Court held that the decision to refer Ms. Marshall's complaint to the Tribunal is to be reviewed on the standard of reasonableness, i.e. whether the decision falls within a range of possible, acceptable outcomes.

The Court then reiterated the test applicable hiring decisions where discrimination is alleged:

> "[the complainant must prove] that the complainant was qualified for the particular employment; that the complainant was not hired; and that someone no better qualified but lacking the distinguishing feature (i.e.: race, colour, etc.) subsequently obtained the position.
>
> If the employer does provide a reasonable explanation for otherwise discriminatory behaviour, the applicant has the burden of demonstrating that the explanation was pre-textual, and that the true motivation was discriminatory."

The Court found that, at the time of hiring, Ms. Marshall was not sufficiently qualified to be considered for a supervisory position and had the Investigator interviewed witnesses on this point and paid heed to Cerescorp's evidence in this regard, it would have been clear that Ms. Marshall was lacking a fundamental skill required by the job.

It was held that failure to take this into consideration rendered the decision to refer the complaint to the Tribunal unreasonable.

The second issue, regarding procedural fairness in the investigation, was reviewed on the standard of correctness. The Court noted that at the investigative stage neither party is entitled to the full range of rights afforded under the name of "natural justice", but that the investigator nevertheless does have a duty of fairness to the parties.

In reviewing the role of the Court in considering human rights tribunal decisions, a recent decision of the Federal Court was cited, as follows:

> "The Court's intervention is justified only where obviously crucial evidence remains un-investigated or where the "investigative flaws … are so fundamental that they cannot be remedied by the parties' further responding submissions."

What the Court found most concerning was that the issue of systemic discrimination was raised on the investigator's own initiative, it was based on evidence that was not provided to either Ms. Marshall or Cerescorp, and that Cerescorp was not informed that this was an issue being considered by the Investigator, thereby depriving it of the opportunity to respond.

After receiving a copy of the Investigator's report, Cerescorp provided the Commission with submissions addressing this issue. However, as noted above, the Commission merely adopted the Investigator's report and did not address these subsequent submissions when making its decision to refer the matter to the Tribunal. The Court held that this "was a travesty of procedural fairness."

The Court set aside the Commission's decision to refer Ms. Marshall's complaint to the Tribunal. However, the Court did refer the issue of whether there was systemic discrimination against women at Cerescorp back to the Commission for a further investigation (by a different investigator) and subsequent decision by the Commission with respect to whether this issue should be referred to the Tribunal.

Cerescorp Company v. Marshall
2011 FC 468

End of the Line *(Recovery of Defence Costs in Air India 182 Prosecution)*

In October 2000, Ripudaman Singh Malik and several others were charged with multiple counts of murder arising from the bombing of Air India 182 off the coast of Ireland on June 23, 1985, as well as a second bombing that killed two baggage handlers at Narita on the same day.

The trial commenced in April 2003 and ended nearly two years later with the acquittal of Mr. Malik.

Shortly after being charged in 2000, Mr. Malik applied for bail. In this application, it was in his interests to demonstrate that he was a "man of substance". And he did so. He filed evidence in the bail application that he and his wife had a net worth of over $11 million.

Curiously, though, within the next year Mr. Malik's fortunes seem to have reversed quite markedly. In November 2001, he approached the government for financial assistance with his defence because he did not have the resources to fund it himself.

He was granted this assistance, pursuant to two agreements that, in essence, required him to commit all of his available resources to his defence, and also required that he not encumber what assets he had. The second of these agreements required Mr. Malik to transfer all of his assets to the Province, and to assist in the identification of those assets.

By January 2003, the government did not feel that Mr. Malik was living up to his undertakings, so it notified him that his defence funding would be cut off, unless he signed an indemnity. Mr. Malik refused to do so, unless he could obtain a *Rowbotham* order to cover off the remainder of his defence. He applied for such an order.

In Canada, (as a result of *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1), a person accused of a criminal offence may obtain public funding for his/her defence if s/he:

- has been denied legal representation and all legal representation appeal processes have been exhausted;
- does not have the financial resources to retain a lawyer privately;
- faces a serious and complex trial; and
- cannot defend him or herself because the case is too complex and the person does not have the skills given his or her educational and work background.

The judge denied the *Rowbotham* application finding that "[t]he evidence shows that Mr. Malik and his family have tried to arrange his financial affairs to minimize the value of his estate, to render him insolvent, and therefore to limit the amount of his contribution [to the costs of his defence], or to eliminate that obligation entirely."

After the dismissal of this application, the government entered into a further agreement with Mr. Malik, requiring him to acknowledge the previous indebtedness and to provide security for the past legal fees, as well as the fees yet to be incurred.

To date, $5.3 million in legal defence costs remain unreturned to the government. Instead of repaying these, in March 2007, Mr. Malik, who was acquitted of the murder charge, commenced an action against the government for malicious prosecution.

Several months after the Malik claim was commenced, the government commenced its own claim against Mr. Malik, his wife and his son (a lawyer), among others, seeking to recover the unpaid legal costs. The government claim alleged breach of contract, conspiracy and fraud.

In pursuing that action, the government obtained an *ex parte Anton Pillar* order that permitted the search of the Malik residence, the law offices of Mr. Malik's son and the office of one of Mr. Malik's companies. A number of documents and computer files were seized in the course of those searches.

At issue before the Supreme Court of Canada recently was the question of whether it was appropriate for the government to use the judicial findings from the *Rowbotham* order as evidence supporting the *ex parte* issuance of an *Anton Pillar* order.

The Supreme Court found that it was appropriate for the Court to consider the *Rowbotham* ruling on the *ex parte* application. The Court found that the *Rowbotham* application had been initiated by Mr. Malik, involved members of his family — and related to the same series of family transactions, and allegations of manipulation.

The Supreme Court found that it would have been "wasteful of litigation resources and potentially productive of mischief and inconsistent findings to have required the chambers judge to require the [government] to litigate the *Rowbotham* facts *de novo* at the *ex parte* stage of an interlocutory motion."

Moreover, the Court noted that the Maliks could have challenged the findings from the *Rowbotham* application when they later sought to set aside the *Anton Pillar* order. Moreover, the Court noted that the Maliks did not lead any evidence relating to the transactions when challenging the validity of the Anton Pillar order.

The Court concluded that the *Anton Pillar* order was properly issued, thereby permitting the government to use the evidence collected through the search and seizure in its fee collection litigation.

British Columbia (Attorney General) v. Malik, 2011 SCC 18

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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.

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