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Aviation Insurer Decision to Deny Coverage Upheld

In the October 2010 edition of *Transportation Notes*, we reported on the perverse decision made by an Alberta Master regarding the interpretation of an aviation insurance policy. This decision has been overturned on appeal.

On August 19, 2006, Nicholas Gudzinski was killed when he crashed his Cessna Cardinal. At the time of the accident, he held a private pilot's licence, but his medical certificate had expired. His wife, as executor of his estate, sought recovery for damages to the aircraft from the insurer, Allianz Global Risks US Insurance Company.

Allianz denied coverage on the basis that Gudzinski did not have the requisite authority to operate the aircraft on the fateful day because his medical certificate was invalid. The policy wording provided that "… insurance applies [where the insured] has the required licence or endorsements to fly [the] aircraft."

On a motion, the plaintiff's counsel managed to persuade an Alberta Master to apply the *contra proferetem* rule and conclude that the loss was covered. The policy wording, it was said, required the insured to hold a licence. It did not specify that the medical certificate must be valid. Allianz appealed.

On the appeal, Allianz was permitted to lead new evidence of the wording that appears on the face of a Canadian private pilot's licence. In particular, this language states that "[t]his licence is valid only for the period specified in the Medical Certificate … which must accompany this licence."

In addition, Allianz was allowed to lead new evidence that the following language appears on an aviation medical certificate in Canada: "[t]his certificate is part of a Personnel Permit or Licence issued under the *Canadian Aviation Regulations*. It constitutes medical validation and must be carried with the Permit or Licence it validates".

At the appeal, Allianz argued that the insurance policy must be interpreted within its "factual matrix", in the context of the circumstances in which the contract was entered into. It's position was that there was no ambiguity in the insurance contract, and, as a result, the doctrine of *contra proferentem* does not apply.

In effect, Allianz`s submissions were focused on the fact that the policy wording "required licence … to fly" should be interpreted as "licence to fly required *by law*" — and that without the valid medical certificate, Gudzinksi was not able to legally operate the aircraft.

It would be contrary to public policy to find that the Policy encouraged flying aircraft without the appropriate legal permission. That would be dangerous and contrary to public policy.

Allianz also argued that it was absurd and contrary to public policy to find that Gudzinksi should be insured for illegal activity, relying on the *dicta* from *Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Company*, [1980], 1 S.C.R. 888, where the Supreme Court of Canada held that:

> … the courts should be loath to support a construction which would either enable the insurer to pocket the premium without risk or the insured to achieve a recovery which could neither be sensibly sought, nor anticipated at the time of the contract.

The Estate`s argument was a simple one. It`s position was that the insurance policy only required that the insured have a licence — and, in this case, he did. There was an attempt to make the distinction between having a licence, and having the ability to exercise the licence. In this regard, the Estate argued, albeit unconvincingly, that the insurer`s main concern was that the insured should have the knowledge and ability to fly. The insurer was not so concerned that the insured should be able to exercise continuously the privileges of his licence.

The appellate court was not persuaded. It concluded that the wording on the licence and the medical certificate (which was not available to the Master) was unambiguously an integral link to the private pilot`s licence.

Justice Browne noted that "it stretches the bounds of common sense to find that an invalid licence is still a licence and that insurance coverage is valid".

He went on to note that Gudzinski had been a pilot since 1993 and the owner of an aircraft for some time. In addition, he had obtained medical certificates in the past. He therefore held that it was appropriate to presume some basic knowledge of the requirements of the relevant regulations.

In the end, the Court found that the Master hearing the original motion had erred in law, and, as a result, the appeal was allowed.

Gudzinski Estate v. Allianz Global Risks US Insurance Company, 2011 ABQB 283

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Limitations Issues to be Argued at Certification of Class Action

The plaintiffs, James and Liliane Bellefeuille, owned property in Cartier, Ontario. The Canadian Pacific Railway Limited and Canadian Pacific Railway Company ("CPR") also owned property in Cartier, which had been used as a railroad and as a fuelling and maintenance facility from 1950 until 1981.

CPR had built a water treatment system as part of this facility and the system served other properties in Cartier, including several residential properties and the municipal fire station. During CPR's use of the property, unintended leaks and spills of diesel fuel led to soil contamination on part of its property and on surrounding properties.

In 1999, CPR discovered that groundwater outside its property had been affected by the soil contamination. On October 20, 2000, CPR issued a press release stating that it would decommission the water system. A community meeting was held several days later to discuss the decommissioning of the water system, as well as the installation of wells and the purchase of properties in the affected area.

The Bellefeuilles sued CPR for damages due to environmental contamination of their property on September 20, 2004, within the six year limitation period that applied at the time (the plaintiffs conceded that the limitation had started to run on October 26, 2000, and thus expired on October 26, 2006).

Fifty-four other individual actions were also brought against CPR for environmental contamination, and all of these plaintiffs were represented by the same lawyer. The Bellefeuilles stated on the motion which we discuss in this note that the individual plaintiffs had considered bringing a class action before issuing their individual claims, but had decided that a court would refuse to certify a class action for environmental damage claims because of the Ontario Superior Court decision in *Pearson v. Inco Ltd*.

The Divisional Court had upheld the refusal to certify the Pearson action, but the Court of Appeal overturned this decision and certified the action. However, this occurred in 2005, after the Bellefeuilles and others had filed their individual claims against CPR.

In 2008, the Bellefeuilles brought a motion to amend their claim to convert it to a class action on behalf of Cartier property owners, previous property owners and business owners. This proposed amendment would result in 95 additional properties becoming the subject of a claim against CPR. The motion judge granted the motion but held that CPR should be compensated for its costs thrown away for defending the individual actions. CPR applied for leave to appeal to the Divisional Court.

It argued that it met the test for granting leave to appeal as there was reason to doubt the correctness of the motion judge's decision, there were conflicting decisions with regard to the limitations issue and these issues were important so as to merit consideration from an appellate court.

On the leave application, CPR argued that:

(1) the court had no jurisdiction to change an individual claim to a class action;

(2) the court had applied the wrong test in granting leave to amend; and

(3) the amendment should not be allowed if it would add otherwise statute-barred claims to the action.

Taking into account that the Rules are to be interpreted in harmony with the purposes of class proceedings, I am not convinced that there is any bar to amending an individual action so that it may become a proceeding under the CPA. Therefore the court may allow plaintiffs to amend their pleadings in order to bring a class proceeding, where on a threshold analysis, the purposes of a class proceeding will be fulfilled by such amendment.

Power to convert a claim into a class action

The motion judge noted that there was no prohibition against converting a claim to a class action, nor was there a policy reason against doing so. She found that the Court could allow plaintiffs to amend their pleadings as the claim appeared to have "the essential elements of a class action".

The motion judge referred to the Ontario *Rules of Civil Procedure*, which apply to class proceedings. She cited *Rule* 1.04, which requires that "the rules be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceedings on its merits" and the rule that requires that pleadings shall be amended unless there would be non-compensable prejudice (*Rule* 26.01).

She also noted the flexibility of the *Class Proceedings Act* ("*CPA*") in allowing proposed class proceedings that fail certification to continue as individual claims.

She thus found that she had jurisdiction to convert the actions to a class proceeding and the Divisional Court judge hearing the leave application affirmed the correctness of this part of her decision.

The test for granting leave to amend

The motion judge then considered whether she should grant the amendment. She had already conducted a threshold analysis and had decided that the claim appeared to have the essential elements of a class action and thus decided she should grant the amendment according to *Rule* 26.01.

On appeal, CPR argued that the threshold test should be more stringent, and that the plaintiffs should be required "to explain and justify the failure to initiate the class proceeding at the outset."

The Divisional Court noted that the Bellefeuilles had in fact already given a reason for not starting a class action, namely that they did not think it would be certified given the state of the law under *Pearson*. The motion judge had also noted that CPR had not advanced the actions and had not identified any prejudice arising from the delay, except for the cost of entering defences for 55 actions. The motion judge dealt with this by awarding CPR costs thrown away for defending these individual actions.

The Divisional Court also affirmed the correctness of this second part of the motion judge's decision.

Allowing amendments that may add statute-barred claims to a class action

On the leave application, CPR argued that the amendment added 95 statute-barred claims to the proceeding. The motion judge had held that the limitation issue did not arise in the context of the proposed amendment as it was a procedural, not a substantive change. Any limitations issue would arise in the definition of the class and thus the addition of any new claims would best be dealt with in the certification process. Before the Divisional Court, CPR argued that the motion judge had ignored a case from the Ontario Court of Appeal that had refused an amendment because it created a new, statute-barred claim.

The Divisional Court distinguished this case on the basis that it did not involve a class action: "The *CPA* provides a specialized process including a certification proceeding at which the definition of the class will be addressed."

The Divisional Court affirmed the correctness of this last part of the motion judge's decision and dismissed CPR's motion for leave to appeal.

End of the Line (*Tokyo Convention*) *(cont'd)*

(Continued from page 4)

quired to disembark and they were turned over to the local police. Although the local police declined to press charges, the Captain refused to allow the passengers to re-board the aircraft for the flight to Las Vegas, apparently commenting that "his flight attendant would not allow it." The passengers were re-booked on America West although someone from Alaska reportedly contacted America West to urge them to refuse carriage.

As a result of the delay, the plaintiffs missed a scheduled business meeting and possibly lost a commercial opportunity.

It is against this unappealing, and unproven, background that the court reached its decision. It seems to us, and apparently to the dissenting judge, that the majority was unduly influenced by this tale of woe. Their account of the facts includes "such tidbits as whether the passengers' conversations with one another were pleasant or not" and it seems likely they were repelled by vindictive behaviour on the part of the flight attendant.

If you read the majority decision in isolation, and without reference to the principal purpose of the *Tokyo Convention*, you may likely conclude there is nothing much amiss. The relevant section begins by discussing two possible standards of care: reasonableness vs. arbitrary and capricious. The treaty adopts the standard of reasonableness, the majority affirms. That is indeed the word the treaty uses. And, the majority asserts: "the treaty and its drafting history say nothing about 'arbitrary and capricious'." This is where the wheels come off—where the majority reveals its intent to do whatever is necessary to impose its views of the superiority of its own tradition of negligence analysis and subject an international treaty to literal interpretation with blindfold firmly in place. The assertion that there is no reference to "arbitrary and capricious" in the drafting history is astounding and incorrect. The majority itself quotes from comments made by the U.S. delegate to the *Tokyo Convention* on the meaning of "reasonable grounds" but if what is a true challenge to belief stops one sentence short. The majority ignores the fact that the U.S. delegate ends his explanation with the following words: "In other words, the aircraft commander could not act arbitrarily or capriciously."

The majority would will this inconvenient phrase out of existence and with it the discretion of the captain to make difficult decisions without being subjected to second guessing by those who have all the time in the world to posit more reasonable alternatives to the actions actually taken. Nowhere does the majority state that they are imposing a negligence standard to determine whether the captain is entitled to immunity, but it is clear that they would leave the question of "reasonable grounds" for the jury to decide on the basis of considerations appropriate to a negligence action. Did the captain adequately inform himself before taking action? Should he have delayed his decision to take action by asking more questions? Would another reasonable captain have acted differently?

The majority begins its analysis with the observation that where the text of a treaty is clear the court has "no power to insert an amendment". Being persuaded that the meaning of "reasonable grounds" is perfectly clear the majority saw no reason to consult the purpose of the treaty. Again, the dissenting judge has the better argument. The term "reasonable" has clear common law links to the law of negligence, but that should not be taken to support the proposition that the immunity conferred by this international treaty should be constrained by the reasonableness standard as it has been developed by American courts. The legal systems of the states which are party to the *Tokyo Convention* differ in many particulars and settling on the meaning of a crucial term by reference to a single legal system risks missing the intended effect. Furthermore, even U.S. courts have recognized that the phrase "reasonable grounds" can be ambiguous. Thus, the dissent concludes, the intended standard "cannot be resolved solely by reference to the text".

The majority pays insufficient attention to the primary objectives of the *Tokyo Convention.* These are stated as follows in the brief submitted by IATA as amicus curiae in the proceedings:

- "to establish a positive rule of international law allowing for a Contracting State to exercise jurisdiction over certain offences and acts committed on board an aircraft;
- to provide the aircraft commander with the necessary authority to deal with persons who have committed, are about to commit or may commit a crime or act jeopardizing safety and without fear of subsequent retaliation through civil suit or otherwise;
- to establish the duties and responsibilities of a Contracting State in which an aircraft lands after the commission of a crime or other relevant act jeopardizing good order and discipline on board the aircraft; and
- to address to a limited extent the unlawful seizure of aircraft (i.e., "hijacking")."

When the issue of the interpretation of the *Tokyo Convention* is raised in a Canadian court, we expect considerably more attention and respect will be given to the objects of that treaty. In 1998 the Supreme Court of Canada, in what is possibly the most frequently quoted passage when the issue is statutory interpretation, affirmed that "statutory interpretation cannot be founded on the wording of the legislation alone" and cited a well-known scholarly work for the following proposition:

"Today there is only one principle or approach, namely the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

This approach has been cited with approval in several more recent cases from the Supreme Court. Although it speaks to the interpretation of domestic statutes we believe it would apply with even more force to the interpretation of an international treaty.

Although we have included this note in our "End of the Line" bin, we do not believe the decision of the Ninth Circuit truly marks the final stage of this argument. There are clearly dissenting voices within the United States. The fact that the Supreme Court did not grant *certiorari* may simply mean the Justices do not believe the issue is yet ready for final appeal and we believe there is good reason to believe a Canadian court, given an opportunity to review the *Tokyo Convention*, would be more persuaded by the dissenting opinion than that of the majority. That unfortunately is cold comfort for aircraft captains who cannot put everything on hold until the law speaks again!

Eid v. Alaska Airlines
No. 06-16457 (9th Cir. 30 July 2010)

End of the Line *(Tokyo Convention)*

An unfortunate decision from the United States Court of Appeals for the Ninth Circuit undermines significantly the authority of the captain of an aircraft to maintain good order and discipline on board and ensure the safety of the flight. The Supreme Court of the United States has very recently refused to hear an appeal from the decision. As the court in *Eid v. Alaska Airlines* engaged in the interpretation of an international treaty to which Canada is also a party, and as there is no Canadian jurisprudence on the interpretation of this treaty, the case is of significance for the Canadian aviation community.

The *Convention on Offenses and Certain Other Acts Committed on Board Aircraft*, commonly known as the *Tokyo Convention*, was adopted over 40 years ago. It has for its principal object the protection of civil aircraft, while engaged in international carriage, from violent and disruptive acts. The state representatives who gathered in Tokyo in 1963 were primarily concerned with hijacking, a form of interference then on the rise. It was agreed that the captain of an aircraft should be given authority to take decisive measures to avoid the endangering of the aircraft and crew. It was understood that an aircraft captain ("commander" is the word used in the *Convention*) should be able to take the necessary steps without the fear of exposing himself to civil or penal claims.

The delegates were not insensitive to the civil rights issue which necessarily arises whenever one person is given powers which may be exercised to restrict the rights and freedoms of another. Concern for rights of the suspected unruly passenger is reflected in limitations on the commander's authority. While the commander is given broad powers to restrain a passenger, to refuse further transportation and to render the passenger to civil authorities, he can do so only if he has "reasonable grounds to believe" that the conduct in question may jeopardize safety, good order or discipline on an international flight.

The dispute in *Eid* turns on the standard to be applied in determining whether a captain had reasonable grounds to believe his flight might be endangered when he decided to divert a flight and require a number of passengers to disembark. Should the captain's conduct be judged on principles applicable to negligence actions? In that case the immunity from prosecution given him by the *Convention* would be lost if it were found he was negligent in coming to his conclusion. Alternatively, should the captain be entitled to immunity so long as his actions were not "arbitrary or capricious"? In the latter case the scope of the immunity would clearly be much broader. A majority on the Ninth Circuit panel opted for the negligence standard while the dissenting judge would have affirmed the lower "arbitrary or capricious" standard. The Supreme Court of the United States has declined to hear the appeal. Of course, the Supreme Court, in the States as in Canada, may decline to hear an appeal for any number of reasons. The refusal is by no means an affirmation of the decision of the Ninth Circuit and we believe there is reason to believe a Canadian court would not follow this precedent. We will return to the legal analysis after a brief review of the circumstances which led to this decision.

It is often observed that bad facts make bad law and, if the plaintiffs' account is to be believed, there are plenty of bad facts here. It should be kept in mind however that the *Eid* decision was determined on summary judgment. The court made no determination of whether the captain acted reasonably but rather affirmed that the question may be sent to a jury for determination.

It is agreed by all that a group of Egyptian businessmen and spouses boarded an Alaska Airlines flight in Vancouver with a destination of Las Vegas. They were in the first class cabin. Other than this group there was only one other passenger at the front of the aircraft.

According to the plaintiffs, a flight attendant began behaving unreasonably quite early on in the flight. Her conduct became more and more confrontational and irrational. She spoke in a loud and menacing tone and threatened to have the passengers sent to jail. When not satisfied that the passengers showed sufficient respect for her authority she "went ballistic", picked up the interphone and announced to the Captain that she had "lost control of the first class cabin". The essential elements of this account are corroborated by the only other passenger in the cabin. However, as the dissenting judge observed, this "independent" witness "has a dog in this fight as she was a fellow first class passenger inconvenienced because her flight was diverted."

When the Captain received this alarming call he very quickly determined to divert to Reno. He did not ask the flight attendant for details and did not turn around to look into the cabin as he would have been able to do. He testified that he heard shouting and was concerned that the aircraft could indeed be endangered. The diversion saved about 25 minutes of flight time.

On arrival at Reno the passengers were re-

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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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