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TRANSPORTATION NOTES

Legal Decisions and Developments Affecting the Transportation Industry in Canada

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GEXR Added as Defendant at Late Stage in Proceedings

The plaintiffs, Terry and Melissa Sutherland, were involved in a motor vehicle accident on December 4, 2006. In April 2007, their lawyer notified Via Rail Canada Inc. ("Via Rail") that they intended to bring a claim against Via Rail. Via Rail notified Goderich-Exeter Railway Company Limited ("GEXR") of the notice of claim on April 9, 2007, as GEXR may have been responsible for the tracks and signals for the crossing involved. The plaintiffs brought their claim against Via Rail in May 2008. Via Rail provided its Affidavit of Documents on February 26, 2009, and this contained the first "oblique" reference to GEXR.

In March 2010, the plaintiffs held their discovery of Via Rail and only then discovered that GEXR might be involved. The plaintiffs brought their motion to add GEXR as a defendant on October 27, 2010. On March 7, 2012, the Ontario Superior Court granted the plaintiffs' motion to add GEXR as a defendant to the action and amend the Statement of Claim to add allegations against GEXR. GEXR was also granted leave to plead a limitation defence.

Via Rail and GEXR brought a motion for leave to appeal this order to the Divisional Court. GEXR also sought leave to appeal the costs award made against it on the motion (no costs award was made against Via Rail).

The Court reviewed the test for granting leave to appeal, noting that leave should be granted only where:

(i) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter being appealed; or

(ii) there is good reason to doubt the correctness of the order being appealed and the matter being appealed involves matters of such importance that leave should be granted.

Via Rail and GEXR argued that there was good reason to doubt the order made, as the motion judge had failed to properly apply the relevant sections of the *Limitations Act* (the "*Act*") and had failed to place the onus on the plaintiffs to show they should not reasonably have discovered the involvement of GEXR earlier and had shown the due diligence required by the *Act*. The motions judge had concluded that plaintiffs' counsel had treated the file reasonably and with due diligence.

GEXR also argued that it had been prejudiced by the delay between the time of the accident in December 2006 and the time it was added to the action six years later. The motions judge noted that GEXR had not asserted that it could not produce necessary witnesses or, because of the passage of time, no longer possessed "relevant, important documents on which it would otherwise rely." The Divisional Court noted, however:

> [The motions judge noted] . . . that GEXR was aware of the accident within hours of its occurrence and had a report prepared with respect to the state of the crossing and the operational function of the various signs. I agree with his statement that it should have been obvious to GEXR that an action for damages would likely be brought against them. . . . 'If GEXR did not do its own due diligence in assessing the state of the tracks and the crossing and signal lights, take statements from possible witnesses and maintain all relevant records, it did so at its peril.'

The Divisional Court also concluded that GEXR was not prejudiced with respect to a limitations defence as the motions judge had ruled that that defence was still available to them. The Court also did not agree that there were other conflicting decisions dealing with the matters under appeal.

Finally, GEXR argued that the proposed appeal dealt with issues of "justice, limitation periods and the due diligence of counsel in relation to discoverability." The Court disagreed, finding that the proposed appeal did not deal with matters of "such importance" that leave to appeal should be granted. Via Rail had argued that the issues in the appeal were important to the railway industry in that the order under appeal suggested "the introduction of a remarkably lax and dilatory approach to the investigation and prosecution of civil proceedings arising out of any railway train-vehicle incident". The Divisional Court dismissed this argument, stating that the motions judge "did not purport to articulate any broader principles of law and his decision has no such precedential impact". Any possibly precedential arguments could be raised by GEXR in its limitations defence either at summary judgment or at trial. The Divisional Court denied the leave to appeal motion.

The Divisional Court also denied GEXR's motion for leave to appeal the costs order against it. The Court rejected GEXR's argument that it should be compensated in costs for having been added as a defendant and stated that there was no reason to doubt the correctness of the motions judge's discretionary costs order.

Via Rail Canada Inc. v. Goderich-Exeter Railway Company Limited (2012 ONSC 6014)

Inside This Issue

Charter-Party Agreements and the *Marine Liability Act*

The Federal Court of Appeal (FCA) recently delivered its judgment in an appeal involving a motion for a stay of third party proceedings in favour of arbitration proceedings or, in the alternative, on the basis of *forum non conveniens*.

Underlying Facts

In 2004, Companhia Siderurgica Paulista-Cosipa (COSIPA), a Brazilian company that manufactures and exports steel products, concluded a Gencon-form voyage charter-party with Fednav International Ltd (Fednav) in respect of steel products from Brazil to Canada. The Ship (*M/V Federal Ems*) was owned by Canada Moon Shipping Co. Ltd. (Canada Moon) and was operated under a time charter-party between Canada Moon and Fednav.

The voyage charter-party between COSIPA and Fednav included an arbitration clause that stated that any dispute would be referred to three persons at New York.

A second clause addressed the loading and offloading of the cargo. In short, clause 5(a) provided that the loading and securing of the cargo was the responsibility of the Charterers and the discharge was the responsibility of the receivers. The owners were to be free of any risk.

Prior to loading, a dispute arose between COSIPA, the Master of the Ship and Fednav with respect to the use of plastic covers. As a result, COSIPA issued a letter of indemnity (LOI) to Fednav, acting on behalf of both Fednav and Canada Moon, that specifically referenced the voyage charter-party between COSIPA and Fednav. The LOI provided that COSIPA would hold the "Master/Vessel/Owners/Managers…harmless for any possible cargo damage by moisture condensation under the plastic covers".

Two transferable bills of lading negotiated by COSIPA were issued for and on behalf of the Master of the Ship to COSIPA as shipper, and subsequently presented by T. Co Metals LLC (T. Co. Metals), the cargo consignee, to obtain delivery at Toronto. The bills of lading were explicitly made subject to the terms and conditions of the voyage charter-party between COSIPA and Fednav, "including arbitration clause".

In 2008, T. Co. Metals commenced an action in the Federal Court against Canada Moon and Fednav for damage to the cargo. Canada Moon and Fednav filed a common statement of defence and a common third party claim against COSIPA, invoking clause 5(a) of the voyage charter-party and the LOI. COSIPA then brought its motion for a stay of proceedings.

Decisions Below

Prothonotary Morneau refused to give effect to the arbitration clause found in the voyage charter-party and, as a result, dismissed COSIPA's motion. Section 46(1) of the *Marine Liability Act* (the Act) provides that "contracts for the carriage of goods by water" with sufficient ties to Canada can be adjudicated in Canada despite any arbitration or forum selection clause in the contract. It was held that s. 46(1) applied to the voyage charter-party in this case. In addition, it was held that the LOI constituted a mere amendment to the charter-party.

Finally, the prothonotary applied the *Spar Aerospace* test and determined that COSIPA had failed to show that Brazil was a clearly superior jurisdiction to the Federal Court.

The Federal Court overturned this decision. While Justice Scott concluded that the ordinary meaning of "contract for the carriage of goods by water" is wide enough to include charter-parties, after considering the scheme and object of the Act, the intention of Parliament and Canada's international obligations, he held that s. 46(1) does not apply to these instruments. Justice Scott therefore granted COSIPA's motion for a stay of proceedings against both Canada Moon and Fednav.

Federal Court of Appeal Decision

The FCA, in the result, split the difference. In large part, the Federal Court decision was upheld on appeal, but the FCA distinguished between the positions of Canada Moon and Fednav.

Contrary to the appellants' argument, Justice Gauthier held that, under the modern rule of construction, the "entire context" must be considered before concluding whether a legislative provision is ambiguous. Having so held, Justice Gauthier proceeded to explain why she reached the same conclusion as Scott J. with respect to the non-application of s. 46(1) to charter-parties.

When the *Marine Liability Act* was enacted in 2001, it consolidated several statutes into one. Gauthier JA explained that the part of the Act in which s. 46(1) is found "essentially reproduced the 1993 statute giving effect in stages to two international conventions not ratified by Canada." The two conventions are the *Hague-Visby Rules*, adopted in 1968, and the *Hamburg Rules* of 1978.

Because these two conventions form part of the legal context for s. 46(1), the court described at some length the interesting history of the law of international carriage of goods by water since the late 19th century. Charter-parties have typically not been regulated in the same way as other contracts of carriage. The fundamental reason for this is that the imbalance in bargaining power that is common in the liner trade, necessitating restrictions on the freedom to contract, do not exist in relation to charter-parties. So, while the *Hamburg Rules* include provisions similar to those in s. 46(1) which address arbitration and jurisdiction specifically, like conventions that came before, they do not apply to charter-parties.

Justice Gauthier also noted that arbitration has been the traditional dispute-resolution mechanism for charter-party disputes. Finally, the court considered the scheme of the Act, and the mischief s. 46 was meant to cure, in this larger context and concluded that the voyage charter-party between COSIPA and Fednav is not covered by s. 46(1).

As applied to Fednav, Justice Gauthier agreed with Justice Scott that the LOI constituted an amendment to the charter-party and not a stand-alone agreement. Fednav was thus found to be bound to arbitrate its dispute with COSIPA in New York.

However, a different analysis applied to Canada Moon, which was not a party to the voyage charter-party. At the time the LOI was negotiated, the cargo had not been accepted by the Master of the Ship and no bills of lading had been issued; therefore no legal relationship existed between Canada Moon and COSIPA.

In these circumstances, Justice Gauthier held that the LOI constituted a stand-alone agreement. While the law of contract has developed to allow the conferral of a benefit on a stranger to a contract, it does not allow the imposition of an obligation. When the LOI was issued, Canada Moon was not subject to the voyage charter-party's arbitration clause.

Even if the LOI was an amendment to the charter-party, it was held that Canada Moon was not bound by the arbitration clause because, unlike in the case of the bills of lading, there was no reference to it in the LOI. The LOI was intended to confer a benefit on Canada Moon and this benefit was not to be qualified by the arbitration clause.

Finally, Justice Gauthier agreed with the prothonotary's *forum non conveniens* analysis and dismissed COSIPA's motion for a stay of proceedings as against Canada Moon.

Canada Moon Shipping Co. Ltd. v. Companhia Siderurgica Paulista-Cosipa, 2012 FCA 284

Medical Clearance for Epileptic Pax

The Canadian Transportation Agency recently decided a complaint involving the validity of a medical clearance that was given without full information.

On March 14, 2012, Selena Tannahill arrived at the Air Canada check-in counter in Edmonton to obtain a boarding pass for a flight to Toronto. During the check-in process, the agent raised the fact that Ms. Tannahill was noted to have suffered an epileptic seizure approximately one month earlier on a flight from Toronto to Edmonton. Ms. Tannahill was asked to obtain a medical clearance before she could travel. In order to do so, she was assessed by telephone by an Air Canada physician, who cleared her for travel. She was given a boarding pass.

Ms. Tannahill alleged that, at the gate, another Air Canada employee examined the boarding pass and denied boarding because of the previous epileptic incident. She was able to return to Toronto two days later with another airline.

Air Canada filed written statements in support of the denied boarding, signed by its Customer Service Lead Agent, the Service Director and the Captain of the flight in question — all of whom had direct interactions with Ms. Tannahill.

Air Canada's evidence was that when Ms. Tannahill presented herself for boarding, the check-in agent noticed on the departure control record that Air Canada Medical Approval (MEDA) clearance was required due to the previous incident. Accordingly, Ms. Tannahill was directed to the Air Canada ticketing desk where she made a call to the MEDA office for clearance. Air Canada's physician granted the clearance based on Ms. Tannahill's representation that she had no seizures in the past month and that she had been taking her medication. At no time during the medical assessment did Ms. Tannahill advise Air Canada's physician that she required oxygen or the use of overhead vents for the flight.

The Service Director's evidence was that at the gate, Ms. Tannahill asked (for the first time) that the Service Director "keep an eye on her" as she was prone to seizures if she did not get oxygen when needed. At this point, Ms. Tannahill was also alleged to have requested supplemental oxygen and use of the aircraft's overhead vents to prevent her from overheating. The medical clearance did not stipulate that supplemental oxygen was to be provided.

Air Canada took the position that, at this point, the previously granted medical clearance was no longer valid, as the information concerning the supplemental oxygen had not been conveyed to Air Canada's physician.

It also came to light at this point, according to Air Canada's witnesses, that the reason that Ms. Tannahill had lost consciousness on the previous flight was that the passengers next to her had closed their overhead vents.

Nevertheless, the Service Director informed the Captain of the request for supplemental oxygen and the assured use of the overhead vents. The Captain did not grant permission to use the onboard emergency oxygen, as this was reserved for emergency purposes only. Moreover, supplemental oxygen service could not be arranged on such short notice — as there were no available Medipaks. The Captain concluded that because the last minute request could not be accommodated, her presence in the cabin created a risk that the flight could not be completed as planned. She was denied boarding.

Air Canada's position was that this course of action was the right one, given that Air Canada's Tariff allows it to refuse carriage on a good faith determination that a passenger's medical condition may be aggravated by air travel and may cause that passenger to require urgent medical in-flight attention.

In response, Ms. Tannahill denied that she requested supplemental oxygen at the gate — but acknowledged that she would be "fine with overhead air vents".

The issue then became a matter of credibility, where the complainant holds the burden of proof. The Agency found that Ms. Tannahill's evidence was unsupported by anyone else (while Air Canada had consistent testimony from several employees). The Agency also noted that Ms. Tannahill's evidence was at times contradictory. For example, Ms. Tannahill provided conflicting submissions by arguing that oxygen is contraindicated for persons experiencing seizures, while referring to a situation in which oxygen was provided to her while travelling with another airline to help recover from a seizure.

Having failed to meet the onus on the balance of probabilities, Ms. Tannahill's complaint was dismissed. The Agency specifically noted that the Captain's decision, in the circumstances and based on the information available to him, was reasonable.

Tannahill v. Air Canada
Decision No. 442-C-A-2012

End of the Line *(cont'd)*

(Continued from page 4)

with the continued denial of the allegations, further cast doubt on Mr. Boutin's credibility.

Air Canada refused to lift the ban and relied on two previous Agency decisions which found that Air Canada could impose such a sanction: *Fuentes v. Air Canada*, Decision No. 493-C-A-2006 and *Flynn v. Air Canada*, Decision No. 278-C-A-2006. In these cases, a ban was upheld following the use of abusive language by a passenger against Air Canada employees. Air Canada also noted that such bans had been upheld even when there was contradictory evidence filed as to the events that lead to the imposition of the ban.

Air Canada submitted that the ban was issued pursuant to the provisions set out in Rule 25 of its Tariff, which provides that Air Canada must take necessary measures to ensure the physical comfort and safety of other passengers or employees when a passenger engages in prohibited conduct. It argued that the incidents of February 29, 2012 (and the continued denial thereof) demonstrate that Mr. Boutin maintains a lack of concern for the authority of the Air Canada agents and, further, given his abusive language and attempt to grab an Air Canada employee, that it was reasonable to conclude that he could physically interfere with the comfort or safety of Air Canada's passengers or employees.

In coming to its decision, the Agency noted that Rule 25(C)(A)(2) of Air Canada's Tariff specifically calls for a travel ban when there are reasonable grounds to believe that a passenger has engaged in unacceptable behaviour.

Although the accounts of the events in question were contradictory, the Agency noted that while Mr. Boutin's travel companion supported his story, the remaining statements filed by him from his acquaintances were given little weight because those persons did not witness the events in question.

In the end, the Agency accepted Air Canada's submission that Mr. Boutin had the burden of proving that Air Canada had incorrectly applied the terms of its Tariff and, based on the statement filed, he had not done so on the preponderance of the evidence.

The Agency denied the complaint, upheld the ban but, given that this was a "one-time event", urged Air Canada to reconsider the indeterminate length of the ban.

Boutin v, Air Canada
CTA Decision No. 444-C-A-2102

End of the Line *(Unruly Passenger Ban Upheld by CTA)*

The Canadian Transportation Agency recently dealt with a complaint by a passenger who sought the lifting of a travel ban imposed by Air Canada, as well as a request by that passenger for $30,000 in monetary compensation for events surrounding an incident involving a missed a flight.

The complainant, Mr. Guillaume Boutin, alleged that on February 29, 2012, he and his travel companion were awaiting their flight home to Montreal in the Business Lounge at the Cancun Airport when he was misinformed by an Air Canada employee about the departure time, causing him to miss his departure.

Mr. Boutin alleged, after missing his flight, that he asked the employee to arrange to have the aircraft return to the gate so he could board it or, in the alternative, to place him on the next flight bound for Montreal. Mr. Boutin's testimony was that the Air Canada employees that he dealt with were "uncompromising, very rude and arrogant."

Despite the events described below, Mr. Boutin was placed on an Air Canada flight the next day for an additional fee.

After returning home, he received a letter from Air Canada notifying him that we was no longer welcome on board Air Canada flights because his demonstrated aggression represented a danger to other passengers. Although Mr. Boutin acknowledged he was upset, he maintained that he did not swear, nor did he try to "grab" an Air Canada agent, as was alleged.

As is often the case in unruly passenger complaints, the air carrier had a different version of events. Air Canada's account was supported by written statements from employees who had witnessed the events in question.

Air Canada's position was that while Mr. Boutin was in the Lounge, he notified the concierge that he had forgotten his wallet and cell phone at the hotel. In order to assist him, the lounge concierge put him in touch with the hotel by telephone.

When the time came to board the flight, the concierge notified all of the passengers in the lounge that they should proceed to the gate. In addition, information respecting the boarding of the flight was displayed on all the screens within the lounge. Despite these notices, the concierge observed that Mr. Boutin decided to stay in the lounge, and continued his telephone call with the hotel. The concierge proceeded to notify Mr. Boutin (personally) that the flight was boarding, but he continued his telephone discussion with the hotel.

Mr. Boutin and his companion vehemently denied these facts and claimed that they never would have remained in the lounge had they been repeatedly advised to board the aircraft.

Nevertheless, Mr. Boutin's name was removed from the flight's passenger list just nine minutes before the scheduled departure time. (Air Canada's tariff stipulates that passengers must be at the gate at least 30 minutes prior).

Air Canada's evidence before the Agency was that upon hearing that he would not be able to board the flight, Mr. Boutin became aggressive towards the Air Canada counter agent and customer service supervisor. He was alleged to have used abusive and vulgar language and also to have threatened that he would ensure that they lost their jobs. He was also alleged to have hit the service desk and attempted to grab the counter agent.

On May 30, 2012, Mr. Boutin wrote to Air Canada contesting the airline's version of events, claiming that the Air Canada employees in question could not be correct because they would not have been able to identify him. The Agency noted in its decision that this submission casts doubt on Mr. Boutin's credibility because he had provided them with his passport in the course of the altercation.

Mr. Boutin wrote a further letter to Air Canada requesting a lift of the travel ban. In that letter, he continued to deny Air Canada's version of events. He also claimed that since the incident, he had travelled on seven Air Canada flights without incident. Air Canada submitted its reservation system revealed that he had only travelled on four Air Canada segments and that this discrepancy, coupled

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