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BARRISTERS, SOLICITORS

TRANSPORTATION NOTES

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Internal Legal Seminar is Solicitor Client Privileged

On January 21, 2006, a chartered Cessna 208 Caravan operated by International Express Aircharter Ltd. (IEAC) crashed on Vancouver Island on a flight from Tofino to Vancouver. The pilot and two passengers perished.

On the day following the flight, the Minister of Transport revoked Todd Chapman's authority to serve as IEAC's operations manager on the basis that the Minister did not believe that the aircraft had been properly maintained prior to the accident. Canadian law requires that each air operator have an authorized operations manager — and, given that Mr. Chapman's authority had been revoked, IEAC's air operator certificate was suspended.

Trevor Heryet, a Ministry employee, was particularly involved in the revocation and the suspension. At a minimum, he was the person who communicated the decisions to IEAC.

IEAC sought a review of the revocation and suspension by the Transportation Appeal Tribunal. The TAT heard the matter in July 2006 and referred it back to the Minister for a reconsideration. On February 11, 2008, the reconsideration panel concluded that the Minister's reasons were not supported.

In January 2008, IEAC, now in bankruptcy proceedings (allegedly as a result of the suspension of the AOC), sued the Crown for, among other things, negligence and misfeasance in public office.

In particular, IEAC alleged that:

- the Crown owed IEAC a duty of care;
- the Crown acted in excess of its legal authority, with malice and in bad faith, when the suspension was issued; and
- the Minister owed IEAC a duty to provide training to Transport Canada staff in the exercise of their functions and procedures relating to the suspension of an air operator certificate.

In the course of the discoveries, Mr. Heryet was asked about the training he received in this regard. His testimony was that such training had been provided and that the course materials consisted of a PowerPoint presentation handout.

Counsel for the Crown refused to provide the course materials on the grounds that they were protected by solicitor-client privilege.

IEAC brought a motion to compel disclosure. On the motion, in support of its position, the Crown filed the affidavit of Lorne Lachance, the General Counsel with the Department of Justice who acted as one of the presenters of the course.

Mr. Lachance's unchallenged affidavit evidence on the motion was that the course was given by Crown lawyers to Ministry staff in order to teach the attendees how to manage the legal risks associated with their employment duties, answer questions about their legal responsibilities, address concerns about Crown liability, provide an overview of the judicial process and offer information about available legal support. Attendees were encouraged to ask questions and discuss prepared case studies to obtain legal advice about circumstances they may have faced, or might face in the future.

In deciding that the course materials were indeed privileged, Master MacNaughton of the Supreme Court of British Columbia noted that the Supreme Court of Canada in, *R. v. Campbell* 1 S.C.R. 565, had already determined that not every service provided by the Department of Justice lawyers is protected by solicitor-client privilege. Rather, each situation "depends on the nature of the relationship, the subject matter of the advice and circumstances in which it is sought and rendered."

In coming to his decision, Master MacNaughton was particularly persuaded by the Court's ruling in *Samson Indian Nation and Band v. Canada* [1995] 2 F.C. 762 where the Federal Court of Appeal held that:

> The legal advice privilege protects all communications … between a solicitor and a client that are directly related to the seeking, formulating or giving of legal advice, as long as it can be placed within the continuum of communication in which the solicitor tenders advice: it is not confined to telling the client the law and it includes advice as to what should be done in the relevant legal context.

The Court then went on to consider whether the Crown had waived privilege in this case. IEAC argued that privilege was waived because the Crown had pled that it owed no duty of care to IEAC and also, that it had no knowledge that the suspension was unlawful. Therefore, argued IEAC, the Crown's state of mind was in issue in the litigation and, as a result, privilege was waived.

Master MacNaughton did not accept this argument. He noted that, in this case, the Crown did not rely on legal advice given to Mr. Heryet as part of its defence and therefore, privilege was not waived.

The Court ordered that the training materials were privileged and that there was no waiver of privilege. The Crown's refusal to produce these document was upheld.

Gill v. Canada (Attorney General)
2012 BCSC 1807

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CNR Injunction Against Protest Continued

The plaintiff and moving party, Canadian National Railway Company ("CNR"), brought a motion to continue an injunction order preventing protesters from blocking rail traffic on its St. Clair Industrial Spur Line.

It also sought to set dates for: (i) a motion for a contempt order against one of the protesters and (ii) a motion for an order against the Chief of the Sarnia Police Service, requiring him to explain the steps taken by the Sarnia Police Service to enforce the injunction order.

CNR sought the continued injunction order because, although the injunction order was granted on December 21, 2012, protesters from the Chippewa of Sarnia First Nation Band were continuing to block the Spur Line. On December 27, 2012, this resulted in over 1,000 rail cars being backed up, some of which contained a supply of propane used by rural customers for home heating. Other rail cars contained key raw ingredients for a major petrochemical and plastics company, and this company, a customer of CNR's, gave evidence that if the blockade continued it would shut down its operating plants within the week. Another company would be forced to lay off its 130 employees indefinitely on December 31, 2012 if the blockade continued.

CNR presented evidence that the Sarnia Police had advised CNR that they would attempt peaceful measures with the protesters, that their regular police officers would not attend at the blockade, that the police force would only attempt to negotiate with the protesters and that the matter would not likely be resolved unless the federal government got involved. The court noted that the police did not appear in court on the motion and that this non-appearance was taken by the court to be disrespectful.

The court set out the three factors to be weighed by a court in dealing with an injunction motion:

> (i) was there a serious issue to be tried;
>
> (ii) had the moving party demonstrated that it would suffer irreparable harm if an injunction was not granted; and
>
> (iii) did the balance of convenience favour the moving party, in that it would suffer the greater harm if the injunction was not granted.

The court found that the protesters were trespassing on CNR's property, a serious issue, and that this protest had nothing to do with the ownership of the land, but instead was done to exert political pressure on various government authorities to try to force them to deal with the protesters. CNR and its customers were caught in the middle. The court found that CNR and its customers were suffering irreparable harm because of the blockade.

The court then turned to the balance of convenience test, stating that while in an ordinary case, the balance of convenience would overwhelmingly favour CNR, in this case further analysis was required as the protesters were representing themselves as members of a First Nation.

The court referred to two Ontario Court of Appeal cases, *Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council* and *Frontenac Ventures Corp. v. Ardoch Algonquin First Nation*, which require a court to consider "other dimensions" of the rule of law on a motion where a private landowner seeks an injunction against aboriginal protesters. The court cited *Henco* as follows:

> The rule of law requires a justice system that can ensure orders of the court are enforced and the process of the court is respected.
>
> Other dimensions of the rule of law, however, have a significant role in this dispute. These other dimensions include respect for minority rights, reconciliation of Aboriginal and non-Aboriginal interests through negotiations, fair procedural safeguards for those subject to criminal proceedings, respect for Crown and police discretion, respect for the separation of the executive, legislative and judicial branches of government and respect for Crown property rights.

The motions judge considered these factors and concluded that the blockade by aboriginal protesters in this case did not involve a claim to aboriginal title or aboriginal rights and so did not regard the aboriginal identity of the protesters as "immunizing them from the standard balance of convenience analysis".

The court also found that the unwillingness of the Sarnia Police to enforce the injunction was a factor that weighed heavily in the balance of convenience analysis. After acknowledging that the police must retain "tactical discretion to choose the time and pace of enforcement", the court continued:

> . . . the discretion of the Sarnia Police about when and how barriers blocking the Spur Line were to be removed had to be exercised within the plain and obvious direction to the transgressors to remove the blockade "forthwith". It was not open to the Sarnia Police to interpret the Injunction Order as permitting the blockade to remain indefinitely. Such an interpretation would make no sense in the face of the plain language of the Order. Yet, six days after making the Injunction Order, the blockade remains in place and the evidence indicates that the Sarnia Police have taken no active steps to enforce the Order – "forthwith" passed by many days ago.
>
> With all due respect to the Sarnia Police, local police agencies cannot ignore judicial orders under the guise of contemplating how best to use their tactical discretion. Such an approach would have the practical effect of neutering court orders. It is not the purpose of a court order simply to initiate talks or consultations between the police and those whom the court has found to have breached the law.
>
> . . . it appears the Sarnia Police are looking for some way to resolve the public misconduct of the protesters other than by enforcing the Injunction Order.

The court then stated that if civilian authorities have decided that "the writ of the courts does not run against particular groups", courts may not involve themselves in such situations, so as to avoid creating remedies that cannot be enforced, which would "undermine the authority and concomitant legitimacy of the courts."

However, the court went on to grant CNR's request for a continued injunction, even in the face of its concerns that the injunction order would not be enforced, based on the court's finding that the blockade was causing irreparable harm.

The court refused to grant CNR's request for motion dates for (i) its proposed contempt motion and (ii) its motion to have the Chief of Police explain the steps taken to enforce the injunction, although it stated that these motions could be brought on very short notice, if necessary.

CNR v. Chief Chris Plain,
2012 ONSC 7356

Plaintiffs Denied Ability to Withdraw Admission in Lawsuit

On December 5, 2012, Justice Willcock of the British Columbia Supreme Court ruled on an application to withdraw admissions made in response to an earlier notice to admit. The applicants seeking the withdrawal are the plaintiffs in the underlying action (scheduled for a hearing over 34 days commencing in February 2013), the owner and the lessor, respectively, of a helicopter that had been damaged in an accident in October 2007.

The plaintiff, Rilpa Enterprises ("Rilpa"), was the owner of a Bell 204B helicopter that it leased to the plaintiff, Advantage Helicopters Inc. ("Advantage"). At the time of the accident in 2007, Advantage was using the helicopter to perform heli-logging operations for a company called Meadow Creek Cedar.

Following the accident at the centre of the action, it was decided that a replacement helicopter would be built using some of the components of the damaged helicopter. The replacement helicopter was back in operation in August 2008.

The plaintiffs claim damages against the defendant, Heliponents, for lost revenue and lost lease payments. Heliponents sought particulars from the plaintiffs with respect to these claims for damages. In response, former counsel for the plaintiffs stated that Rilpa was claiming that it had lost revenue and lease payments it would have earned under its lease agreement for use of the helicopter with Advantage had the accident not occurred, but could not provide specific particulars of the amount of the loss. Similarly, the response noted that Advantage was claiming for loss of revenue it would have received pursuant to its logging agreement with Meadow Creek Cedar, but provided no specific particulars of the loss.

Subsequently, counsel for Heliponents sought the following admissions through a notice to admit:

1. Advantage does not advance a claim for lost revenue under its contract with Meadow Creek Cedar for any period after December 31, 2007.

2. Rilpa does not advance a claim for lost lease payments for any period after December 31, 2007.

3. The claim advanced by Rilpa for lease payments is restricted to one for those payments it alleges would have been made by Advantage under the contract between the plaintiffs.

Counsel for Advantage and Rilpa made these admissions on behalf of his clients in April 2011.

Subrule 7-7(5) of the British Columbia *Rules of Court* states only that a party may not withdraw an admission made in response to a notice to admit except by consent or with leave of the court. After reviewing some of the case law on applications to withdraw admissions, Justice Willcock determined that courts are reluctant to enunciate a test any more specific than determining "whether, in all the circumstances, there is a triable issue which ought to be tried in the interests of justice."

He noted that the court should not assess the prospects of the applicant's success on the amended plea, were the withdrawal allowed, but should simply satisfy itself that there is a case to be tried.

However, the judge agreed that the cases often refer to the weighing of several factors when determining whether there is a case that ought to be tried in the interests of justice.

The plaintiffs pointed to a list of factors found in *Hamilton v Ahmed* (1999), 28 CPC (4th) 139 (BCSC), which include:

- whether the admission was made hastily, inadvertently, or without knowledge of the facts;
- whether prejudice in the conduct of the litigation would be occasioned by the withdrawal of the admission;
- whether the fact admitted is not true;
- whether the fact admitted is one of mixed fact and law;
- whether there has been delay in applying to withdraw the admission.

By way of affidavit evidence, the principals of both Rilpa and Advantage asserted that they believed that making the admissions would advance negotiations and, it was hoped, lead to the settlement of the claim. Each affirmed that he believed that providing the admissions would not prohibit reconsideration of the position taken or bar them from pursuing the entire claim in the future.

Countering this evidence, counsel for Heliponents stated that no settlement discussions or proposals occurred prior to mediation in late November or early December 2011. In addition, because examinations for discovery and documentary production had already occurred, withdrawal of the admissions limiting the claim would make further documentary production necessary.

Former counsel for Rilpa and Advantage also swore an affidavit and produced excerpts from his file. It was determined that this evidence could be entered because the plaintiffs' affidavits constituted a limited waiver of solicitor-client privilege. It was relatively clear from this evidence that the plaintiffs had considered the issues at stake and had determined that claiming damages beyond December 31, 2007 would require too much time and effort to be worth pursuing.

Justice Willcock first found that it was clear there was a case to be tried in relation to lost revenue and lease payments in 2008. However, in weighing other factors, he determined that it was clear that the admissions were not made in haste or through inadvertence on the part of the plaintiffs' former counsel. In addition, Justice Willcock held that prejudice would result if the plaintiffs were allowed to withdraw their admissions. The trial date, set for February 2013, would have to be pushed back by at least one year, some expense would have to be thrown away and discovery would have to be repeated.

In addition, the judge noted that the principal of Advantage testified to the difficulty even he would have in substantiating a claim for lost revenue more than three years after the material time.

While Justice Willcock agreed that, strictly speaking, the plaintiffs had filed their application promptly after learning that they could not withdraw the admissions at their sole discretion, he held that there had been delay in formulating the 2008 income loss case: "In the year since they learned last November the admissions could not be withdrawn without leave, they have apparently done nothing to advance their claim."

He stated that the plaintiffs could have provided the particulars of the claim to the defendant months before the hearing and "might have put the defendant in the uncomfortable position of relying on its own inactivity to establish prejudice."

Justice Willcock therefore decided that it would be unjust to the defendant to allow withdrawal the admissions and dismissed the application.

Advantage Helicopters Inc v Heliponents, Inc, 2012 BCSC 1938

End of the Line *(Safety Management Systems)*

James Ratt, a passenger, was injured in the crash of a King Air 100. The aircraft struck terrain on a short gravel strip in Sandy Bay, Saskatchewan in January 2007, following a go-around.

He commenced legal proceedings against a number of parties, including the Minister of Transport (the "Minister") and the Government of Canada (the "Government").

The nub of his claim against the Minister and the Government was that their implementation of Safety Management Systems (SMS) within the regime created by the *Canadian Aviation Regulations* (CARs) created a lax regulatory environment that contributed to the circumstances of the crash.

In essence, SMS (implemented in May 2005) amounts to a significant transfer of oversight from the Ministry of Transport to air operators who are now required to establish, maintain and adhere to their own safety protocols. In addition, rather than the traditional inspections carried out by Transport Canada, air operators are now required to self-report safety glitches to the Ministry.

The allegations against the Minister and the Government were that that they were negligent in that they:

- failed to implement appropriate regulations governing the airline industry in the Province of Saskatchewan;
- implemented the SMS system, which was inadequate for the prevention of airline traffic accidents; and
- failed to ensure that [the air operator] was capable of safely discharging the duties and responsibilities assigned to it by the Minister.

The Minister and the Government moved to strike the claims against them on the basis that they disclose no cause of action.

In support of their position, the Minister and Government relied on jurisprudence which distinguishes between operational activities carried out by the government (which may give rise to a duty of care to the public) and policy-making functions (which do not give rise to such a duty of care).

As to the first two allegations, Justice Gabrielson of the Saskatchewan Queen's Bench had no trouble determining that they were not actionable as they were clearly policy-making functions exercised by the government.

As to the third, the allegation of negligence, as pled, only creates a duty of care between the government and the air operator — and not between the government and the public at large.

In support of this finding, Justice Gabrielson cited *R. v. Imperial Tobacco Canada Ltd.* 2011 SCC 42, a case in which Imperial Tobacco sought contribution from the government of Canada for any damages that it had to pay for health complications experienced by smokers.

In *Imperial*, the Supreme Court of Canada held that there were no specific interactions between the government and consumers and, therefore, the proximity necessary to give rise to a duty of care in a negligence analysis could only come from the governing statutes.

As was the case in *Imperial*, the court found no statutorily imposed duty of care sufficient to satisfy the public in the matter at hand. This led to the inevitable conclusion that neither the Minister nor the Government owed a duty of care to Mr. Ratt.

The Court also distinguished three other aviation cases in which there were allegations against government defendants. Those cases were allowed to proceed on the basis that the government was alleged to have failed to enforce regulations against air operators — i.e. failed to carry out operational functions, as opposed to engaging in faulty policy making.

In this regard, see *Swanson Estate v. Canada* [1992] 1 F.C. 408, affirming [1990] 2 F.C. 619, *Sunmere v. Transport Canada* [2009] O.J. No. 4213, and *Chadwick v. Canada* 2010 BCSC 1744

Having determined that the allegations of negligence pled by Mr. Ratt did not give rise to a duty of care, the Court held that it was plain and obvious that Mr. Ratt's claims against the Minister and Government disclosed no reasonable cause of action.

The claims against those parties were struck.

Ratt v. 101004597 Saskatchewan Ltd., 2012 SKQB 532

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