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Certificate Type Holder Added to Aviation Claim

On November 29, 2009, a DHC-2 de Havilland Beaver crashed shortly after takeoff into Lyall Harbour at Saturna Island, British Columbia. Of the eight occupants, only the pilot and one passenger, Barbara Glenn, survived.

In a report released by the Transportation Safety Board ("TSB") in March 2011, it was found that the occupants of the aircraft were conscious after the crash and able to move around in the cabin but, unfortunately, perished because they were not able to escape the aircraft before drowning. This lead to, among other things, a recommendation by the TSB that Transport Canada require occupants of commercial seaplanes to wear a personal floatation device that would assist in cases where emergency egress is required.

In her claim relating to this incident (as well as in a claim brought by the family of a another, deceased passenger), the plaintiff (Mrs. Glenn) sued the pilot (Francois St. Pierre), the owner and operator (Seair Seaplanes Ltd.), the maintenance provider (Victoria Air Maintenance Ltd.), as well as a party identified as "ABC Corporation". The claim stated that ABC was an "advertently misnamed corporate defendant". The claims alleged that ABC was a corporation whose identity was unknown to the plaintiffs, but that it had:

- performed maintenance and servicing on the Seair Beaver; or,
- provided labour, operational, management or other services to Seair Seaplanes or Victoria Air.

After the expiry of the limitation period, Mrs. Glen (and the other plaintiff, in a separate action) sought to substitute Viking Air Ltd. ("Viking") for ABC or, in the alternative, to add Viking as a defendant in the action.

Viking had already been named as a third party by Seair and St. Pierre in the Glenn action, and had also been named as a defendant in another action arising from the same accident.

The wrinkle was that Viking had neither maintained the aircraft, nor had it supplied any services to Seair or Victoria Air, as alleged in the claim. Rather, Viking's role in the dispute was that it held the type certificate for the Beaver, meaning that it had published the Aircraft Flight Manual and the Maintenance Manuals for the aircraft.

Viking argued that it was not the party contemplated in the claim, by virtue of the fact that the particulars of negligence identified in the claim as against it were demonstrably unmeritorious and, further, that it was now too late to add it as a defendant with a new theory of liability, given that the limitation period had expired.

In support of its position, Viking relied on *Happy Investments Management Ltd. v. Dorio (*1988) 23 B.C.L.R. (2d) 245 (S.C.). In that case, which arose from a house fire, the plaintiff sought to include a building inspector as a defendant after the limitation period had expired. The judge refused the application because she determined that the identity of the house inspector could have been discovered by the plaintiffs before the expiry of the limitation period. Since the plaintiffs chose not to do so, they were statute barred from bringing him into the action some three years after the action had been commenced.

The Court did not accept this argument in the matter at hand. First, it distinguished the *Happy Investments* case (arbitrarily in our view) by noting that in that case the plaintiffs did not move to add the defendant until two years after the expiry of the limitation period, whereas in the present case, the motion was brought during the year following the expiry of the limitation period.

The Court also referred to the British Columbia Court of Appeal's decision in *Amezcua v. Taylor*, 2010 BCCA 128, where that court agreed with the proposition that:

> *It seems clear that limitations defences must now be defeated whenever a claim against a person who would otherwise have had protection of the statute involves questions or issues connected with the relief sought in, or the subject matter of, an existing action brought within the limitation period against others, provided that joinder would be just and convenient. The only questions for the court are whether there is such a connection and whether joinder in the circumstances, be just and convenient between the proposed parties.*

On the basis of this reasoning, the motions judge found that although there was no satisfactory explanation for the delay in adding Viking as a defendant, the delay was not lengthy.

Further, the motions judge found that there was a high degree of connection between the existing claims and the proposal claim, since Viking was already a third party in this action and a defendant in another.

For these reasons, the court held that it was "just and convenient" that Viking be added as a defendant in both actions.

Glenn v. Seair Seaplanes Ltd.,
2012 BCSC 1184

Inside This Issue

Pilots, Mandatory Retirement and *Stare Decisis*

On July 17, 2012, the Federal Court of Appeal (FCA) overturned decisions by the Canadian Human Rights Tribunal (CHRT) and the Federal Court of Canada (FCC) regarding mandatory retirement of Air Canada pilots. Unlike the CHRT and FCC below, the FCA determined that a provision in the collective agreement between Air Canada and the Air Canada Pilots Association (ACPA) that required pilots to retire at age 60 was constitutionally valid.

In his judgment, Justice Denis Pelletier determined that a 1990 Supreme Court of Canada (SCC) decision on the issue of mandatory retirement was a binding precedent. Both the CHRT and the FCC had proceeded on the basis that *McKinney v University of* Guelph, [1990] 3 SCR 229 [*McKinney*] did not apply to the case before them.

In *McKinney*, the SCC had to decide whether a section of the *Ontario Human Rights Code, 1981*, SO 1981, c53, which permitted mandatory retirement beginning at age 65, was a breach of the *Canadian Charter of Rights and Freedoms* (the *Charter*). While the court decided that it did contravene the s. 15 protection against age-based discrimination, it went on to find that this breach was "saved" under s. 1 of the *Charter* as a reasonable limit "demonstrably justified in a free and democratic society."

In the case before the FCA, two pilots named Vilven and Kelly have challenged the constitutionality of a provision of the *Canadian Human Rights Act* (*CHRA*) that is similar but not identical to the provision challenged in *McKinney*. Paragraph 15(1)(c) of the *CHRA* provides that it is not a discriminatory practice if "an individual's employment is terminated because that individual has reached the normal age of retirement for employees working in positions similar to the position of that individual." It is this exception to the prohibition against age-based discrimination that Air Canada and ACPA relied on in justifying their collective agreement's mandatory retirement provision.

As additional background, it should be highlighted that prior to November 2006, the UN's International Civil Aviation Organization (ICAO) did not permit pilots over the age of 60 to act as pilot-in-command of a commercial aircraft operating internationally. As of November 2006, ICAO allows pilots-in-command under the age of 65, but if the pilot-in-command is between 60 and 65 at least one member of the flight crew must be under the age of 60. Prior to and after 2006, ICAO recommended that persons over 60 not act as first officers on international flights.

Surrounding Context

While the FCA decision itself is interesting, the context surrounding it is also worth noting.

First, these proceedings have been ongoing for a number of years. Vilven was forced to retire in 2003 and first filed his complaint with the Canadian Human Rights Commission in 2004. Kelly retired in 2005 and filed his complaint in 2006. The CHRT first heard the two complaints in 2007 and actually dismissed them. In 2009, on judicial review, the FCC overturned that decision and sent the matter back to the CHRT to be reconsidered. Contrary to the CHRT's initial decision, the FCC found that paragraph 15(1)(c) does contravene the equality provision of the *Charter* and ordered the Tribunal to determine whether that breach is justified under s. 1.

Since 2009, while this constitutional question was being considered at various levels, dozens of similar complaints before the CHRT by other pilots have been held in abeyance. As will be seen below, these complaints may continue dormant for some time to come.

In addition, the provision under attack, paragraph 15(1)(c) of the *CHRA*, was actually repealed by the federal budget passed in December 2011. The repeal does not take effect until December 15, 2012, however. This means that, as of December 15, 2012, employers in federally-regulated industries will not be able to terminate employees who have reached the "normal age of retirement."

In fact, since the Supreme Court's decision in *McKinney*, mandatory retirement has been almost entirely eliminated in Canada. Provisions similar in effect to paragraph 15(1)(c) of the *CHRA* have nearly all been repealed over the last several years. As of December 15, 2012, mandatory retirement based purely on age will not be permitted in any Canadian jurisdiction, except in New Brunswick where it is not discriminatory if termination is due to a "*bona fide* retirement or pension plan," which could protect age-related retirement rules contained in such plans.

Amidst all of this, as most readers will know, Air Canada and ACPA have been involved in lengthy and sometimes acrimonious collective bargaining over the last two years. At the end of July of this year, an arbitrator sided with Air Canada in that dispute and imposed its final offer—a five year collective agreement effective until April 2016.

The FCA Decision

As was noted in our edition in March 2011, the FCC decision in this case was 127 pages long. Because Justice Mactavish of the FCC held that paragraph 15(1)(c) is contrary to the *Charter*, she also dealt with the issue of whether the mandatory retirement provision is enforceable under another provision of the *CHRA*: paragraph 15(1)(a) states that it is not a discriminatory practice if "any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement."

Much of Justice Mactavish's decision provided an analysis of the evidence in relation to this latter question. In the result, after assessing the CHRT's evaluation of the evidence, she ended up sending the matter back to the Tribunal once more to reconsider the issues on the existing record. With the repeal of paragraph 15(1)(c) due to come into effect in just 3 months, consideration of *bona fide* occupational requirements is likely to become more important in the future.

That said, Justice Pelletier's decision at the FCA is important both to anyone affected by mandatory retirement provisions in place prior to December 15, 2012, and more generally to the legal doctrine of *stare decisis*, which holds that prior decisions - precedents - must be respected by courts and tribunals.

At the FCA, ACPA and Air Canada challenged two aspects of Justice Mactavish's application of the s. 1 test set out in *R v Oakes*, [1986] 1 SCR 103 to the facts of the case: her finding that paragraph 15(1)(c) did not "minimally impair" the pilots' right to be free from discrimination, and that the benefits achieved by the provision were not "proportional" to its deleterious effects.

Interestingly, while ACPA and Air Canada relied heavily on the reasons in *McKinney*, they did not argue that the FCC was bound to follow that case. Instead, this argument was put forth by the Attorney General of Canada, who participated in the proceedings because the pilots sought a declaration that paragraph 15(1)(c) of the *CHRA* is constitutionally invalid.

Justice Pelletier briefly summarized both the CHRT's and the FCC's analysis of *McKinney*. He noted that while the CHRT reviewed some case law in which *McKinney* had not been followed, its decision failed to address directly the question of whether it was required to follow that decision; it simply proceeded as though it was nor required to follow *McKinney*.

Justice Mactavish, on the other hand, conducted a detailed analysis in this regard. She distinguished this case from *McKinney* for four reasons.

The first reason given was a purported difference between paragraph 15(1)(c) of the *CHRA* and the provision from the *Ontario Human Rights Code* at issue before the SCC. The provision attacked under the old Ontario *Code* was one that limited the prohibition on

Pilots and Mandatory Retirement *(cont'd)*

discrimination in employment on grounds of age to persons between the ages of 18 and 65, meaning that any mandatory retirement rule affecting employees aged 65 or older was not prohibited. Paragraph 15(1)(c) of the *CHRA*, on the other hand, leaves the age at which mandatory retirement becomes permissible dependent on the industry and position.

Justice Mactavish, at the FCC, held that she was not bound to follow *McKinney*, in part, because:

- the legislative history and objectives underlying the two provisions were different;
- the mechanism for deciding the age at which mandatory retirement becomes permissible was different;
- in the case of the *CHRA*, unlike in the case of the former Ontario *Code*, employees could not easily know the age at which they could be subject to mandatory retirement; and
- paragraph 15(1)(c) has greater adverse effects on persons whose labour force participation has been shorter or interrupted, primarily women and immigrants, than did the Ontario *Code*, because it allows mandatory retirement at an age less than 65.

In his decision on appeal, Justice Pelletier ultimately rejected all of these reasons. He found that there is no meaningful distinction between the objectives of the two provisions: both were related to the respective legislatures' concerns regarding "pension plans, youth employment, [and] the desirability of those in the workplace to bargain for and organize their own terms of employment." In addition, he held that while there is a difference in the determination of the age of mandatory retirement, there is no difference in the actual mechanics of the implementation of the two provisions: both schemes can result in mandatory retirement, at one age or other, either being imposed by the employer or as a term of a collective agreement negotiated between the employer and the employees' bargaining agent. Justice Pelletier gave no credence to Justice Mactavish's third point and, on the last point, held that "the presence of a group of persons who are differentially affected is...a point of distinction between mandatory retirement at any age and no mandatory retirement at all."

The CHRA and the former Ontario Code differ in the manner in which either determine the age at which mandatory retirement becomes permissible. This, Justice Pelletier noted, is the only possible point of distinction between this case and *McKinney*. He then proceeded to tackle the three other reasons given by the FCC for not following *McKinney*:

- In *McKinney*, the Supreme Court indicated that it did not consider its decision to be the last word on mandatory retirement;
- The evidentiary record in this case included new expert reports and "new facts which call into question the factual underpinning of the Supreme Court's decision in *McKinney;*" and
- There have been developments in public policy regarding, and in judicial attitudes to, mandatory retirement since the SCC's decision in 1990.

Justice Pelletier, referring to the recent Ontario Court of Appeal decision on bawdy houses and prostitution (*R v Bedford*, 2012 ONCA 186), outlined the doctrine of *stare decisis*. In his view, this doctrine clearly disposed with Justice Mactavish's last three reasons for not following *McKinney*. To the extent that a door was left open to reconsider the issue of mandatory retirement, the principle that courts must follow prior decisions of other courts, and the hierarchy of courts in Canada, meant that the SCC "was holding the door open for itself and not for others." Similarly, the values of certainty and finality which underlie the doctrine of *stare decisis* cannot justify lower courts deciding not to follow the SCC's jurisprudence merely because of differences in the evidentiary records or because there has been an evolution of social policy over time. Rather, it is lower courts' role to allow parties to establish the evidentiary record upon which the SCC can decide whether to reconsider an earlier decision.

With respect to Justice Mactavish's first reason for not following *McKinney*, after a relatively detailed analysis of the reasoning of the SCC in *McKinney*, Justice Pelletier determined that it applies equally to mandatory retirement at an age younger than 65. He ordered that the matter be returned to the CHRT and that the complaints be dismissed.

However, near the end of his judgment, Justice Pelletier also said this: "it may be that conditions have changed to the point where the Supreme Court is prepared to revisit the issue." There are reports that the pilots are planning to seek leave to appeal to the SCC. Stay tuned...

Air Canada Pilots Association v. Kelly et al
2012 FCA 209

End of the Line *(cont'd)*

- the star rating is dependent on ACV's assessment of the resort relative to general standards in Cuba.

In addition, there was evidence that the Garofolis had stayed at this very resort on at least three prior occasions.

The Court then reviewed ACV's limitation of liability clause which reads as follows:

> *[ACV] will not assume responsibility for any claims, losses, damages, costs or expenses arising out of ... inconvenience, loss of enjoyment, upset, disappointment, distress or frustration, whether physical or mental, resulting from any of the following: 'the act or omission of any party other than [ACV] or its employees ...*

The appellate court specifically rejected a finding made by the trial judge that the limitation of liability should not apply in this case as a result of the doctrine of *contra proferentem* because there was no ambiguity in the language of the tour agreement.

The appellate court also rejected the plaintiffs' argument that the terms of the limitation of liability clause should be disregarded because it was not brought to the Garofolis' attention. This argument arises from a line of cases that provides that a defendant who wishes to rely on disclaimer or limitation of liability clause must make reasonable efforts to draw those provisions to the attention of its customer.

On this point, the court noted that the limitation of liability clause in this case was, in fact, incorporated into the "click through agreement" in the acceptance phase of the website booking and that this constituted proper notice of the term.

The court concluded that "by imposing a duty of care on [ACV] that does not exist in law, and by interpreting the terms of the contract so as to disallow the appellant from relying on the applicable exclusionary clause on the basis of *contra proferentem*, the Deputy Judge was not correct in his ruling and committed an palpable and overriding error."

The appeal was allowed, the judgment of the court below was set aside and the case was dismissed.

Garofoli v. Air Canada Vacations
2012 ONSC 4698

End of the Line *(Tour Operator Absolved by Limitation of Liability)*

The Divisional Court in Ontario recently overturned a small claims court decision relating to the liability of tour operators for the actions of their service providers.

The facts of the case were not in dispute. The plaintiffs, Mr. and Mrs. Garofoli, booked an all-inclusive tour online with Air Canada Vacations ("ACV") at the Gran Caribe Club Kawama Resort in Veradero, Cuba. When they arrived on Christmas Day 2010, they discovered that their room was not available and, to add insult to injury, they were treated inhospitably by the resort staff. They decided to return to Canada the same day on the next flight back to Toronto. They commenced a claim against ACV for damages arising from their ruined vacation.

The trial judge had some sympathy for the Garolfolis. He found that ACV had breached its contract with them and as a result, he held that ACV could not rely on a clause in the tour agreement that excluded the possibility that ACV might be liable for acts or omissions of the third party resort. In particular, the trial judge found that ACV failed in its duty of care to supervise the resort and further failed to put procedures in place that would have allowed the plaintiffs to contact ACV's local representative to address the problems that arose. The evidence at trial was that it would have taken a full day for the Garofolis (who were alleged to have been in *extremis* from fatigue and ill health) to have a meeting with an ACV representative.

The appellate court took a different view. It noted that the trial judge failed to address two decisions that ACV argued defined the duties of tour operators in these circumstances, namely: *Craven v. Strand Holidays (Canada) Ltd.* (1982), 142 D.L.R. (3d) 31 (Ont. C.A.) and *Eltaib v. Touram Limited Partnership (c.o.b. Air Canada Vacations)*, [2010] O.J. 995 (S.C.J.).

In *Craven*, the plaintiff sued a tour operator for injuries sustained when a bus operated by a Colombian company overturned. The bus company had been hired by the tour operator. The agreement between the plaintiff and tour operator had a limitation of liability provision applying to the actions of its service providers.

> ***… There was no evidence at trial to suggest that [ACV] had failed to exercise due care in selecting Kawana Resort to be on its roster of resorts.***

In assessing that provision, the Ontario Court of Appeal found that if a tour operator's contract "… is only to provide or arrange for the performance of services then [it] has filled [its] contract if [it] has exercised due care in the selection of a competent contractor. [It] is not responsible if that contractor is negligent in the performance of the actual work or service, for the performance is not part of the contract."

Similarly, in *Eltaib*, the plaintiffs brought a claim against a tour operator for breach of contract and misrepresentation arising from their "disappointing and abbreviated vacation" in Barbados. The Court in that case relied upon a statement of the law, very similar to that which appears in *Craven*, from *Snucins v. Conquest Tours (Toronto) Ltd.* (1990), 74 O.R. (2d) 781 (Div. Ct.).

In the present matter, having in mind the *dicta* from *Craven, Eltaib* and *Snucins*, the Court reiterated the now well established principle that "there is no common law duty for a tour operator to supervise a third party supplier and its employees." The court found that to impose this duty on a tour operator is impractical and ignores the legal reality that the resort is an independent contractor.

The Court then turned to examine the extent to which ACV took care in selecting its third party contractors. In this respect it noted that:

- ACV had a representative at the resort on a regular basis every week;
- ACV had a product buyer as well as its staff from Toronto and Montreal on site on a regular basis — and these representatives had been on site as recently as the month before the incident took place;
- the resort had been listed as an ACV "3 star" resort in Cuba for some 20 years prior to the plaintiffs' stay;
- the resort was included in the ACV roster primarily because it attracts a repeat clientele and because of its beach property; and

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