BERSENAS JACOBSEN CHOUEST THOMSON BLACKBURN LLP
BARRISTERS, SOLICITORS

TRANSPORTATION NOTES

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Allegations of Negligence Against Transport Canada to be Tried

On June 16, 2010, an Embraer 145, operated by Trans States Airlines on behalf of United Airlines Express inbound from Washington, D.C., landed on Runway 07 at Ottawa Macdonald-Cartier International Airport. Due to the wet surface, the aircraft overran the runway, resulting in a crash which cost Allianz Global Risks US Insurance Company ("Allianz"), Trans States Airlines' liability insurer, nearly USD$5.5M. There had been at least three prior overruns on Runway 07 since 2000 that occurred when the runway was wet or otherwise contaminated.

After paying out the loss, Allianz commenced legal proceedings claiming contribution and indemnity from NAV Canada and Transport Canada, the regulator of aeronautics in Canada.

The claim against Transport Canada was founded in negligence, broadly characterized as follows:

- Transport Canada negligently designed and constructed Runway 07;
- as owner of the airport, Transport Canada negligently permitted the airport to be used in an unsafe condition; and
- Transport Canada was negligent in certifying the airport as safe by granting and continuing an Airport Certificate, when it knew or ought to have known the airport, and in particular Runway 07, was unsafe, and in failing to take steps to mitigate the known risks associated with Runway 07.

After receiving the statement of claim, Transport Canada brought a motion to strike out the third type of negligence allegation (set out above).

As stated in Transport Canada's factum, the issue on the motion was as follows:

> The central question to be answered in this motion is whether Transport Canada, as a statutory regulator, owes a private law duty of care to an individual airline (and/or its insurers) for alleged negligence in failing to properly oversee the conduct of an airport certified by the regulator.

In support of its position, Transport Canada relied on *Cooper v. Hobart* [2001] 3 SCR 537, for the proposition that governmental authorities do not owe a duty of care for licensing or policy based regulatory issues.

In response, Allianz argued that, in this particular case, the three types of negligence that were pled amount to an "indivisible" factual matrix and, therefore, are "closely integrated components of the negligence claim". As such, it was not appropriate at the pleadings stage to extract a portion of the negligence claim and seek that it be struck out, while not challenging the rest of the allegations of negligence.

In addition, Allianz argued that the more recent case of *Chadwick v. Canada*, 2010 BCSC 1744 (see the December 2010 edition of *Transportation Notes*) demonstrated that, at least at the pleadings stage, it may not be proper to make a determination that no duty of care exists on the part of a regulator.

In that case, the plaintiff alleged that the crash of an aircraft was caused by the negligence of an Aircraft Maintenance Engineer (licensed by Transport Canada). The plaintiff also alleged that Transport Canada should also bear responsibility for the crash because it knew or ought to have known that the maintenance company and the AME in question were not in compliance with the applicable policies and practices, and therefore should not have been licensed. On a similar motion brought in *Chadwick*, the Court chose not to dismiss the claim at the pleadings stage as it was "not plain and obvious that no such duty of care existed … leaving the adjudication on the merits to trial."

The Court accepted Allianz's arguments in the matter at hand. It found that Transport Canada's motion was premature and held that a full factual record would be required in order for the Court to determine whether:

- Transport Canada has any different obligations in relation to granting or renewing an Airport Certificate to an airport with runways to which Transport Canada's knowledge as designer/ builder and previous owner were unsafe; and
- interpreting the *Aeronautics Act* and the *Canadian Aviation Regulations* in order to determine whether the relevant decisions made by the Minister of Transportation are properly characterized as policy decisions (which are not actionable) or operational decisions (which are actionable).

Transport Canada's motion was dismissed.

Allianz Global Risks US Insurance Company v. Canada (Attorney General)
2013 ONSC 7005 (CanLII)

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FCA Clarifies Provision of "Reasonable" Rail Service

This case came before the Federal Court of Appeal (the "FCA") with leave from a Canadian Transportation Agency (the "CTA") decision dated July 17, 2012 (Decision No. 285-R-2012). The CTA found that the Canadian National Railway ("CN") had failed to fulfill its statutory service obligations to Wilkinson Steel and Metals Inc. ("Wilkinson") and granted certain remedies in favour of Wilkinson. CN then appealed the decision, with the CTA acting as the sole respondent.

Before proceeding to the FCA's decision, it is important to get a sense of the somewhat complex facts surrounding the appeal. This case arises out of rail service provided by CN to an industrial park in Saskatoon, Saskatchewan. The main railway line runs North-South through the park, while a series of short railway lines ("spurs") run East-West throughout the park and connect the occupants of the park to the main rail line. It is through these spurs that CN is able to service the occupants of the industrial park, which include Wilkinson. This case centred around the spur that is used to service Wilkinson.

Through a 1960 agreement with the City of Saskatoon, CN was granted a right of way for 20 years over the strip of land on which the Wilkinson spur was built, with a right of renewal for a further period of 20 years. The agreement was renewed in 1980. In 2000, the agreement converted to a yearly renewal, which either the City or CN could terminate upon 6 months' notice.

Complicating matters was that in 1961 the city of Saskatoon sold 600 feet of land to Federated Co-Operatives Limited ("Federated"). The 600 feet formed a portion of the land upon which the spur that would eventually service Wilkinson was located, and was part of a much larger land conveyance. Therefore, from 1961 onward 600 feet of the spur was located on Federated land rather than city land.

In 1965 Wilkinson acquired the land adjacent to Federated's land on the Eastern side and has operated a manufacturing facility on this property since. In 1967 Wilkinson entered into a private siding agreement with CN by which CN agreed to provide rail service to Wilkinson on a private siding constructed on Wilkinson's property and at Wilkinson's expense, which was connected to the spur. From that date, and for approximately 45 years afterward, CN provided inbound freight service via the spur and the private siding.

The initial location of the private siding was the result of negotiations between CN and Wilkinson and, as a result of its final construction, could only be accessed by a train traveling West-to-East. This required CN to move a train along the spur onto Federated property in order to access the siding from the West. In 2001, CN and Wilkinson entered into an agreement under which the private siding was relocated, again at Wilkinson's expense. However, the new location of the siding still required CN to access the Federated section of the spur in order to enter the siding from the West. This created a problem because in 2010 Federated informed CN that the portion of the spur located on its property had to be removed so that Federated could expand a warehouse, which made it impossible for CN to continue to serve Wilkinson as it had been doing for 45 years.

In turn, CN informed Wilkinson that Federated would be removing the portion of the spur that was on its land, and proposed four solutions for Wilkinson, none of which were acceptable to Wilkinson given the significant cost associated with each. As a result, Wilkinson submitted a complaint to the CTA on the basis that CN's failure to rectify the situation at its own expense caused a breach of its statutory obligation to provide rail service under sections 113 and 115 of the *Canada Transportation Act*.

Before the CTA, CN relied primarily on *Koeneman Lumber* (Decision No. 668-R-1999), which states that a railway company has no statutory obligation to provide service to a property to which it has no lawful access. In that case the siding in issue was not connected directly to the railway line and the only possible access was through a property owned by a third party, over which the railway company had no right of way. CN argued that the Wilkinson complaint should be dismissed for the same reasons as the complaint in *Koeneman*. The CTA distinguished *Koeneman* on the basis that in this case, CN was best placed to avoid the impossibility because it could have disclosed to Wilkinson in either of 1965 or 2001 that CN's access to the spur to the West of Wilkinson's property could be lost to lawful acts of Federated.

The leading case on service obligations of railway companies is *Patchett & Sons Ltd. v. Pacific Great Eastern Railway Co.,* [1959] S.C.R. 271, which is authority for the proposition that a rail company's service obligations are no more than what is reasonable in the circumstances and that the customer has a correlative obligation that must be taken into account. In *Patchett,* the rail company was unable to provide service because of unlawful picketers on the plaintiff's property. The court concluded that because the picketers were on the plaintiff's property and not the railway company's, only the plaintiff had the power to rectify the situation and the railway company did not breach its service obligations. In assessing Wilkinson's complaint, the CTA concluded that Wilkinson had discharged its correlative duty by constructing its private siding in 1965 and again in 2001. The CTA was of the opinion that in this case CN was the party with the power to rectify the situation because CN knew about Federated's ownership of the westerly portion of the spur and could have shared this information with Wilkinson in either 1965 or 2001. Having failed to do so, the CTA concluded that CN was now responsible for the impossibility of providing rail service to Wilkinson, and was not aided by *Patchett*.

In reaching its own decision, the FCA quickly dismissed a CN argument that s. 115 of the *Canada Transportation Act* limited its obligation to simply provide reasonable facilities for connecting a private siding to the railway company's own line. The FCA concluded that the CTA was reasonable in finding that the "adequate and suitable accommodation" language in s. 115 recognizes that a railway company's service obligations in relation to private sidings is *not* necessarily limited to what is explicitly described in the section, and that the section is not exhaustive. The FCA then turned its attention to the CTA's treatment of the *Patchett* decision, and found that once the CTA satisfied itself that the access problem was caused by the location of the Wilkinson private siding, it should have considered whether Wilkinson ought reasonably to have informed itself in either 1965 or 2001 as to the legal basis of CN's access to the spur on Federated's property. The FCA held that the CTA's failure to consider this point was an error of law. The FCA also concluded that had the CTA undertaken the proper inquiry into Wilkinson's correlative duty, it would have recognized that there were significant gaps in the evidentiary record and that it was therefore impossible to assess whether Wilkinson was or could have been aware of CN's precarious right to use Federated's portion of the spur.

The FCA declined to provide a directed verdict but instead, sent the matter back to the CTA to revisit the sufficiency of the evidentiary record and to apply the proper law.

Canadian National Railway v. Canadian Transportation Agency and Wilkinson Steel and Metals Inc.
2013 FCA 270

Venue Change Denied in Coverage Case

Lorenzo Girones ("Girones"), a well known personal injury lawyer in the northern Ontario City of Timmins (~700 km north of Toronto), purchased a new Socata TBM 700 aircraft which had a value of $3.4M. The aircraft was insured for its full value with Allianz Global Risks US Insurance Company and XL Insurance Company Limited (collectively, the "insurers").

The policy provided that coverage only applied if the aircraft is being flown by "a pilot while providing *ab initio* instruction to a pilot named in item 5 [i.e. Girones] of the Declaration Page or endorsement".

By October 8, 2012, Girones had completed four of five training days on the aircraft with Robert Reany, an experienced pilot and flight instructor. Unfortunately, tragedy struck on that day. While flying the plane alone, Mr. Reany crashed the aircraft near Calabogie, Ontario. The aircraft was destroyed and Mr. Reany sustained fatal injuries.

Girones submitted a proof of loss approximately two weeks later. Coverage was denied by the insurers a week after that. The reason given by the insurers was as follows:

> We understood that at the time of the accident the aircraft was being flown by Bob Reany. It has been reported that Mr. Reany was en route to Goderich for the purpose of picking up his spouse and taking her to Ottawa for Thanksgiving. Mr. Reany was not an approved pilot whose name was stated in Item 5 of the Declaration Page or in an endorsement to the policy. Nor was he flying the aircraft for the purposes of [providing ab initio instruction to a named pilot].

Girones immediately commenced an action against the insurers for a denial of coverage, choosing his hometown of Timmins as the place of trial. He also requested that the matter be tried by a jury. The insurers counterclaimed, seeking a declaration that coverage does not apply and also that they are not liable to the plaintiff. The insurers requested that the place of trial of the counterclaim be Toronto.

The insurers brought a motion seeking to change the venue of the main action to Toronto and, further, sought to strike the jury notice, meaning that the matter would be heard by judge alone.

Motions to change the venue of a trial are notoriously difficult to win in Ontario. As stated by Justice O'Neill in this case:

> … there must be some issue raised by the moving party which rises above mere inconvenience or a modest expense and results in a finding that a change of trial venue us 'in the interests of justice'.

In the matter at hand, the Court found that a change of venue was not warranted, even though, among other things:

- the insurance policy was issued in Toronto;
- counsel were in Toronto;
- three of four defence witnesses were from Toronto;
- apart from Girones and his spouse (who reside in Timmins, but have a second home in Toronto), nine or ten plaintiff witnesses did not reside in or near Timmins;
- Girones has satellite law offices in Ottawa, Toronto and Sudbury.

Nevertheless, the Court found that the action had no particular connection to Toronto — and noted that the plaintiff had lived in Timmins for over 40 years. It also held, among other things, that the case would be tried more quickly in Timmins than in the backlogged courts of Toronto.

As to striking the jury notice, the insurers argued that s. 108 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43 precluded a jury trial on the basis that the action was for "declaratory relief". Justice O'Neill disagreed. He held that the interpretation of the policy could not be done in a vacuum — and that the Court would have to consider the evidence surrounding the reason why, in fact, Mr. Reany was flying the aircraft alone on the day in question. He found that these sort of inquiries could go to a jury. If, at the end of the day, it was necessary to interpret the policy and make a declaration on its applicability, it was open to the trial judge to ultimately discharge the jury — but this was premature at this time.

The motion was dismissed.

In his closing remarks, Justice O'Neill (who sits on the bench in Timmins) made the following comments regarding Mr. Girones' perceived celebrity in Timmins:

> … counsel for the [insurers] submitted that as [Mr. Girones] was a well known Timmins resident, it might not be possible, in any event, to secure an impartial civil jury to hear the action. My answer to this submission is short. I am satisfied that the population of the District of Cochrane is sufficient such that a sizable panel can be summoned from which a fair and impartial jury can be selected. Further, courts ought to be very careful in discharging a jury on the grounds of a person's popularity or notoriety in a community.

According to the 2011 census, the District of Cochrane has a population of 81,000 - 43,000 of which are Timmins residents.

Girones v. Allianz Global Risks US Insurance Company and XL Insurance Company Limited
2013 ONSC 6993

End of the Line *(cont'd)*

(Continued from page 4)

immunity, Justice Murray then assessed whether the by-law would impair or create conflict between itself and the federal aeronautics power.

He first considered the Supreme Court of Canada's decision in *Construction Montcalm v. The Minium Wages Commission,* which dealt with wages being paid by an independent contractor to employees building runways. In that case the Court held that some provincial laws will be applicable to airports because they do not impair an essential part of the federal competence and that the issue of wages was too far removed from aerial navigation or from the operation of an aircraft such that it does not constrict an integral part of the federal competence over aeronautics. Applying this framework, Justice Murray found that the by-law is designed to regulate the quality of fill and is not targeted specifically at aeronautics. Furthermore, the runway construction must still comply with federal specifications and requiring Airpark to use clean fill for the benefit of other city residents will not have any direct effect upon the operational qualities or suitability of the finished aeronautics product. Before concluding this thought, Justice Murray noted that this was the same conclusion reached by the District Court in *Scugog.*

In concluding his analysis, Justice Murray also considered the Ontario Court of Appeal's decision in *Regina v. TNT Canada Inc.,* which considered the applicability of provincial environmental regulations to interprovincial trucking. In that case the Court of Appeal concluded that regulation requiring certificates of approval in order for trucks to carry PCB waste did not impair the federal power over inter-provincial commerce to any degree and was enacted for the valid provincial purpose of ensuring that no harm was done to persons or property in Ontario. Justice Murray held that the Airpark case was analogous, and that the by-law was validly enacted to protect the health and safety of Burlington residents, as well as the environment, and did not impair the core of the federal power over aeronautics.

Having found the by-law to be *intra vires* the City of Burlington, Justice Murray declared the by-law valid and binding upon Airpark and granted the City's application, while dismissing Airpark's application. Enforcement of the by-law was left to municipal authorities.

Burlington Airpark v. City of Burlington,
2013 ONSC 6990

End of the Line *(Airpark By-laws)*

This case, which was heard by Justice Murray of the Superior Court of Justice in October and decided in November, dealt with two competing applications, heard concurrently, brought by Burlington Airpark ("Airpark") and the City of Burlington, respectively. The City of Burlington sought an Order determining its rights under the *Municipal Act, 2001* and the *Constitution Act, 1867* to enforce by-laws relating to fill operations at an aerodrome. It also sought an Order that the relevant by-law (6-2005) was valid and binding on Airpark, as well as an Order requiring Airpark to comply with the by-law.

Airpark, the owner and operator of Burlington Executive Airport—a registered aerodrome under Part III of section 301.03 of the *Canadian Aviation Regulations*, pursuant to the *Aeronautics Act*—sought a declaration from the court that Burlington had no authority to direct the manner in which the construction of aerodrome improvements are carried out. Airpark also sought an Order directing the City to cease any such activity.

Burlington Executive Airport is located in the northern, rural part of Burlington, which is adjacent to the Niagara Escarpment and is located within the Protected Countryside Area of the province's Greenbelt Plan. The land immediately surrounding the airport is agricultural and rural-residential and is not serviced by either municipal water or sewers. Agricultural property owners in the area rely on groundwater from wells for potable water.

Dating back to 2008, the City of Burlington and the owners of Airpark have been engaged in a dispute over fill operations maintained by Airpark. The issue arose due to concerns that the fill being used by the airport was not clean. Although Airpark made efforts to convince the City of Burlington that the fill posed no risk to the properties neighbouring the airport, it also consistently took the position that as a matter of law, Burlington had no jurisdiction to regulate its fill operations.

The dispute came to a head in the spring of 2013 when the City of Burlington started to receive significant complaints regarding the grading, drainage, noise, dust, traffic safety and possible effects on the groundwater being generated by the fill operation. Fill samples provided to the City reinforced the City's concerns about a potential risk to area groundwater, and in May the City issued an order to Airpark to comply with the by-law by obtaining a permit for the ongoing fill operation. Violation notices were subsequently issued notifying Airpark that it was in breach of the order to comply and in violation of the by-law. Owners of the airport refused to cease accepting fill on its premises and commenced their application to the Superior Court of Justice, to which the City responded with its own application. While the two applications were before the court, Airpark agreed to suspend all fill deliveries pending the court's decision.

In reaching his decision, Justice Murray first briefly described relevant sections of the by-law, which included:

- S. 2.1 No person shall place or dump fill on or alter the grade of any lands in the city without having first obtained a Site Alteration Permit; and
- S. 2.4(a) A person applying for a permit must certify that the fill contains no contaminants within the meaning of the *Environmental Protection Act*.

Other sections of the by-law required that an applicant for a permit provide security for its obligations under the by-law and also allowed the City to require random testing of any fill before it is placed on or removed from the site. Justice Murray noted that there was no question that the airport was subject to the "Aerodrome Standards and Recommended Practices-TP 3128" under Part 111 of the *Canadian Aviation Regulations*, but that these standards did not prescribe or recommend the fill to be used in the grading or construction of airways or shoulders of other facilities.

The only question that the court needed to determine was whether the City's by-law applied to fill operations being conducted by Airpark. If Airpark was carrying on a commercial landfill business on airport land and such operation is unrelated to aeronautics then it would be subject to provincial and/or municipal regulation, as was decided by the Divisional Court in *2241906 Ontario Inc. v. Scugog (Township)* ("*Scugog*"). However, Justice Murray found that despite the existence of facts that suggested that it may be doing so, it was a question of fact that need not be answered, as he was prepared to rule based on the assumption that the fill required by Airpark *was* related to the construction of various airport facilities, including runways.

Justice Murray then conducted a pith and substance analysis and concluded that there was little doubt that the pith and substance of the by-law was a valid exercise of property and civil rights under section 92(13) of the *Constitution Act, 1867*. In assessing whether the by-law ran afoul of interjurisdictional

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Gerard Chouest
(416) 982-3804
chouest@lexcanada.com

James P. Thomson
(416) 982-3805
jthomson@lexcanada.com

Carlos Martins, Editor
(416) 982-3808
cmartins@lexcanada.com

Tae Mee Park
(416) 982-3813
tpark@lexcanada.com

Andrew MacDonald
(416) 982-3830
amacdonald@lexcanada.com

Elliot P. Saccucci
(416) 982-3812
esaccucci@lexcanada.com

BERSENAS JACOBSEN CHOUEST THOMSON BLACKBURN LLP
BARRISTERS, SOLICITORS

33 Yonge Street Suite 201,
Toronto, Ontario, CANADA
Phone: 416 982-3800
Fax: 416 982-3801