BERSENAS JACOBSEN CHOUEST THOMSON BLACKBURN LLP
BARRISTERS, SOLICITORS

TRANSPORTATION NOTES

Legal Decisions and Developments Affecting the Transportation Industry in Canada

Volume 9, Issue 2 — February 2013

Litigation Privilege Denied in Aviation Insurance Case

Jetport Inc., an executive aircraft charter operation, took delivery of a Bombardier Global Business Jet 5000 in July 2007. The aircraft was insured for $40 million by a consortium of insurers in which Global Aerospace was the lead underwriter. The policy had a pilot training clause requiring any pilot operating the aircraft to have completed a certain amount of classroom and flight training hours.

The aircraft was to be flown by, among others, Jetport's Chief Pilot, Roger Adair. Upon Jetport's purchase of the aircraft, Capt. Adair took part in Bombardier classroom and simulator training. After this training was complete, both Transport Canada and Bombardier certified Capt. Adair as qualified to fly the aircraft.

On November 11, 2007, while being piloted by Capt. Adair, the aircraft was rendered a total loss after it touched down short of the runway at Fox Harbour, New Brunswick. The occupants of the aircraft were injured, but there were no fatalities. Airclaims was retained to conduct an investigation into the accident.

Jetport sought recovery for the $40 million loss from the insurers under the insurance policy, through its broker, Jones Brown.

On December 7, 2007, Grant Robinson (of Jones Brown) advised Jetport that Global might deny coverage because Capt. Adair's training may have been insufficient to meet the requirements of the pilot training clause. More specifically, Global was alleging that Capt. Adair had not completed the required number of hours. Jetport retained litigation counsel the next day.

In January 2008, Airclaims delivered its report to Global — part of which was an investigation into whether Capt. Adair's training complied with the requirements of the pilot training clause.

On January 28, 2008, Global delivered a "reservation of rights" letter indicating that Jetport had violated the terms of the policy. A number of email communications ensued between Timothy Armstrong (Jetport's President and General Counsel) and Mr. Robinson.

On February 15 and March 19, 2008, Global advised Jetport that it was denying the claim. In the following weeks, representatives of Jetport and Jones Brown convened a meeting to discuss, according to Mr. Robinson, "strategizing about getting facts in order so that we could figure out how to get the claim paid".

Three actions were commenced as a result of the insurance dispute, namely:

- Jetport claimed against Global and the following insurers for denying the claim;
- Global sued Jones Brown and Robinson (personally) for contribution and indemnity in the event that Jetport succeeded in the above referenced action. Jetport was added as a third party to this action; and
- Jetport sued Jones Brown for negligence, breach of contract and its costs in the first action referred to above.

All three actions were consolidated on consent.

In the course of determining which documents to produce in the litigation, counsel for Jones Brown and Robinson located the emails exchanged between Messrs. Armstrong and Robinson in February and early March 2008. They were surprised that Jetport had not produced these documents in its productions. Jetport's explanation was that they were not produced because they were subject to litigation privilege — that is, the privilege that attaches to certain documents which result from work undertaken in the course of litigation. In the Province of Ontario, in order for a document to be protected by litigation privilege, the document must have been produced when litigation was in contemplation and the "dominant purpose" for preparing the document must relate to the obtaining of legal advice.

In the course of the examinations for discovery, counsel for Global Aerospace requested production of the allegedly privileged emails from Mr. Robinson. Jetport rejected the request on the grounds that the documents were common-interest litigation privileged. Jetport also objected to questions relating to the spring meeting on the same basis.

Global brought a motion challenging the refusals before Master Graham. The Master ordered that the documents be produced and that the questions relating to the spring meeting be answered.

The key section of Master Graham's endorsement was as follows:

> In order to successfully assert this privilege, which was first claimed in 2011, Jetport must first put evidence before the court … that the dominant purpose for which the documents were created was the litigation. Although the documents post-date the re-

(Continued on page 2)

Inside This Issue

Litigation Privilege Denied *(cont'd)*

(Continued from page 1)

> tainer by Jetport of outside counsel … and the first reservation of right letter … there is no specific evidence that they were prepared primarily for the purpose of contemplated litigation. The response … [by Mr. Robinson] as to what transpired at a meeting … was that "we are simply strategizing about getting facts in order so we could figure out how to get the claim paid." This would suggest that the focus at that point was still advancing the claim rather than commencing litigation.
>
> I conclude that Jetport has not met the evidentiary onus to substantiate its claim of litigation privilege and these documents must be produced.

Jetport appealed this ruling.

The appellate court had to consider two issues:

- first, did Master Graham err in determining that Jetport failed to establish and evidentiary basis for its assertion of the privilege; and
- second, even if he did err, should the appeal be dismissed because litigation privilege has been dissolved.

On the first issue, in order for Jetport to succeed, it would have to establish that: (a) at the time the emails were sent, there was a reasonable contemplation of litigation; and (b) the emails were created for the *dominant* purpose of litigation.

The appellate court found that there was enough evidence available to the Master to find that at the time the emails were prepared, litigation was in contemplation by the parties. However, the appellate court was also not persuaded that the Master had misapprehended the evidence when he decided that the 'dominant' purpose of preparing the emails was not litigation. The Court found that the chronology of events does not necessarily lead to the conclusion that the emails were prepared for this purpose. The Court noted, for example, that the mere retainer of litigation counsel in December 2007 does not automatically mean that all discussions conducted from then on were for the dominant purpose of litigation. He also noted that Mr. Robinson's evidence was that the spring 2008 meeting was geared towards "get[ting] the claim paid", which does not necessarily mean that this would be accomplished through litigation.

Justice Goldstein wrote:

> Most of the evidence that Jetport relies on to advance its claim of litigation privilege goes to the issue of the date upon which there was a reasonable contemplation of litigation rather than the purpose of the communications.
>
> …
>
> If the law in Ontario were that it merely be sufficient that litigation be a "substantial" purpose for the creation of a document, I might be persuaded that litigation cloaks the six documents and the spring 2008 meeting.

He upheld the Master in finding that Jetport had failed to demonstrate that the emails were protected by privilege.

> ***… the retention of counsel is some evidence as to the purpose of the discussions. That said, the Master, in evaluating the evidence, was entitled to conclude that it was not enough in the circumstances.***

Finally, the Court considered whether litigation privilege would have been dissolved in any event, given that Jetport and Jones Brown were adverse to each other. In order to make this determination, Justice Goldstein referenced Justice Blair's *dicta* in *General Accident Assurance Co. v. Chruz* [1999] O.J. No. 3291, where he held that:

> … litigation privilege is a protection only against an adversary … but a document in the hand of an outsider will only be protected by a privilege if there is a common interest in litigation or its prospect.

Given that all of the actions were consolidated, and also given that Jetport and Jones Brown had commenced legal proceedings against each other in the claims being decided, the Court had no difficulty in finding that the common interest privilege had been lost, if it ever existed. Justice Goldstein ruled that:

> I acknowledge that Jetport and Jones Brown may still have some interests in common — for example, if Jetport were to be successful against Global, it would no longer have an interest in recovering against Jones Brown. I find, however, that in the circumstances of this case if there was litigation privilege attaching to the emails and the spring 2008 meeting, it has been dissolved by reason of Jetport's action against Jones Brown.

The appeal was dismissed. The documents were ordered to be produced.

Jetport v. Global Aerospace.,
2013 ONSC 235

End of the Line *(cont'd)*

(Continued from page 4)

whether there were enough certified crew on the vessel. Justice Rowe, in dissent, determined that sections 38-41 and Table 2 of the *Crewing Regulations* required one mate to hold a Fishing Master IV certificate. Because nobody other than Captain Ralph held such a qualification and he could not be both master and mate, Justice Rowe agreed with the courts below in finding that the requirement had been contravened.

Justice Welsh, with the concurrence of Justice Barry, disagreed. She held that sections 38-41 state only that the deck watch required "a person holding an appropriate radio operator's certificate who was 'capable' of operating both the navigational and radio equipment." Any requirement that a member of the crew hold a Fishing Master IV certificate could only possibly be found in section 29. Under that section, because of the size of the vessel (less than 200 tons), there was no requirement for a first mate. Accordingly, the table referenced by Justice Rowe, which only applies to persons acting as "master" or "first mate", did not apply and could not require that a member of Captain Ralph's crew hold a Fishing Master IV certificate. The conviction was overturned accordingly.

Justice Welsh also disagreed with Justice Rowe on the charge concerning a steamship certificate. In dismissing the Crown's appeal, she agreed with the Trial Division appeal judge in the result, but for different reasons. The entire court agreed that the Trial Division judge had erred in holding that a certificate was not required as the *Melina & Keith II* was not a "steamship" as defined under the *Crewing Regulations*, because the relevant definition is to be found in section 2 of the Act and not in the regulations.

The vessel's qualification as a "steamship" under the Act was sufficient for Justice Rowe to allow the Crown's appeal. Like the Provincial Court judge, he held that Captain Ralph should be convicted because the certificate that all agreed existed was "invalid" due to the fact that its conditions were not fully complied with. Justice Welsh disagreed that the validity of the certificate depended on whether Captain Ralph was in compliance with its terms. Instead, the requirement for a "valid certificate" necessitates only that there be a certificate that "is a properly issued certificate, for the particular vessel, which has not expired." Because Captain Ralph had obtained the certificate and it remained in force, he had not committed the offence charged.

R. v. Ralph,
2013 NLCA 1

Railway Injunction Ends Disruptive Protest

The moving party, Canadian National Railway Company ("CNR") sought an *ex parte* interim injunction to move protesters. The protesters who were blocking CNR's Toronto -Montreal main line and had brought freight and passenger traffic to a halt.

CNR spoke to the protesters, and was told that the reason for the blockade was to show support for First Nations Chiefs in their upcoming meeting with the Prime Minister and that they had no issue with CNR. They advised that their blockade had no time limit. The blockade occurred at the point at which the main line meets the Tyendinaga First Nation, but the Chief of the Tyendinaga First Nation advised that neither he nor the First Nation Council supported the blockade and that there was not (and had never been) a land claim over the land being blockaded.

CNR appeared in court at 9:30 pm that night. The Court granted the order, requiring the protesters to cease their blockade by 12:01 am the next morning, and delivered written reasons the next day.

During the hearing, the Court heard evidence that the Toronto-Montreal line is one of the busiest in the entire CN rail service, carrying freight for over 90 customers a day, including fuel and freight to local communities. The value of the commodities CNR handles using this main line is over $80 million per day. CNR also has agreements with VIA Rail Canada (VIA) for rail passenger trains to run on this line, with 24 passenger trains using the line daily.

The blockade began at about 4 pm on Saturday January 5th, 2013. By 8 pm that night, 5 trains (and over 600 railcars) were blocked – there would be 10 more trains held back by 7 am the next morning. Over 1,000 passengers (on four passenger trains), had already had to be to be moved to their destinations in buses, after significant delays and incurring significant costs to VIA. More than 20 trains and 7,000 passengers would be affected if the blockade continued into the next day, one of the busiest days of the year for VIA travel on the main line.

The Court found that the blockade would have a significant economic impact on CNR – there was no work-around to the part of the line being blockaded, many of its customers freight shipments were extremely time sensitive (for example food stuffs and jet fuel delivered daily to Air Canada). It concluded that the blockade would cause irreparable harm to CNR's operations, including:

> (a) the layoff of employees, as the cessation of rail service beyond one day would result in layoffs,
>
> (b) delays in the delivery of goods, including hazardous commodities, perishables, and freight highly sensitive to damage or theft,
>
> (c) increased yard congestion,
>
> (d) disruption of engine cycles and routings, and
>
> (e) loss of revenue to CNR and losses to its customers.

The Court then set out the test for granting an *ex parte* interim injunction:

> (i) the moving party must demonstrate a serious questions to be tried;
>
> (ii) the moving party must convince the court that it will suffer irreparable harm if the relief is not granted; and
>
> (iii) the court must assess the balance of convenience, and "in addition to the damage each party alleges it will suffer, the interest of the public must be taken into account."

The Court found that CNR's evidence showed an overwhelming case that the protesters were trespassing and tortiously interfering with CNR and VIA's use of the main line, and CNR had thus met the first branch of the test. The Court further found that CNR's evidence regarding the impact of the blockade clearly demonstrated that the conduct of the protesters had caused and would continue to cause irreparable harm to CNR, VIA and their customers.

The Court then addressed the final branch and concluded that the balance of convenience overwhelmingly favoured CNR: "simply put, the protesters had no legal right to be doing what they were doing":

> While expressive conduct by lawful means enjoys strong protection in our system of governance, expressive conduct by unlawful means does not. No one can seriously suggest that a person can block freight and passenger traffic on one of the main arteries of our economy and then cloak himself with protection by asserting freedom of expression.

The Court also concluded that the stated aim of the protesters at the blockade, to show support for First Nations Chiefs in an upcoming meeting with the Prime Minister, had nothing to do with sorting out land or usage claims, and so did not require the "highly nuanced" analysis required when injunction motions do involve such claims. This was a "straightforward political protest" and thus the "aboriginal identity of the protesters or their message" did not immunize them from the standard balance of convenience analysis on an injunction motion.

Next, the Court considered whether a court, in performing its balance of convenience analysis, should take into account the willingness of the local police agency to enforce an injunction order. That the protesters in this case could be allowed to block the main line for five hours before CNR could get to court, only a week after a similar blockade, raised concerns for the Court regarding the willingness of the police to enforce the law. The Court granted the injunction due to the significant harm caused, but continued:

> The repeated applications by a major railway owner to this Court in the past few weeks to secure injunctions to remove blockades of their operating lines prompt the larger questions of why, in these sorts of circumstances, a property owner has to resort to the courts for a remedy.

Under the *Courts of Justice Act*, civil court orders are enforced by a sheriff, not the police; however, a sheriff may require a police officer to accompany him in executing the order. The Court discovered that the injunction order it had granted was served on the sheriff, who contacted the Ontario Provincial Police (OPP) to ask for assistance in enforcing the order. The OPP refused, stating that it was too dangerous to enforce the order that night, but that they would accompany the sheriff the next morning:

> Saturday night I made a time-sensitive order because the evidence showed that significant irreparable harm resulted from each hour the blockade remained in place, yet the OPP would not assist the local sheriff to ensure the order was served by the time stipulated for the removal of the blockade. Such an approach by the OPP was most disappointing because it undercut the practical effect of the Injunction Order. That kind of passivity by the police leads me to doubt that a future exists in the province for the use of court injunctions in cases of public demonstrations.

The Court found that the evidence filed by CNR raised questions about whether the protesters' trespass had a criminal aspect and might contravene the *Railway Safety Act* or the *Trespass to Property Act* or constitute mischief under the *Criminal Code*:

> I do not understand why the Main Line between Toronto and Montreal had to remain shut for several hours while a rail operator rushed off to court while the police simply stood by, inactive, and I do not understand why a judge of this Court cannot predict with certainty whether a police agency will assist in enforcing his or her court order. A simpler solution under the law exists.

Canadian National Railway Co. v. John Doe, 2013 ONSC 115

End of the Line *(Charges under the* Canada Shipping Act*)*

In September 2005, the *Melina & Keith II*, a small fishing vessel, rolled over and sank in choppy waters near Bonavista, off the north-east coast of Newfoundland. Four of the eight crew members perished in the incident and a Transportation Safety Board (TSB) investigation ensued. In 2007, the TSB released a report making recommendations with a view to improving safety.

At about the same time, the captain of the vessel was charged with eight regulatory offences under the *Canada Shipping Act* (the "Act") and the regulations thereunder. In 2008, a Provincial Court judge convicted Captain Shawn Ralph for five of the offences:

i) failure to ensure that crew understood lifesaving and fire fighting equipment;

ii) failure to maintain a proper deck watch;

iii) failure to keep a proper lookout;

iv) operating the vessel without certified crew to ensure a proper deck watch; and

v) operating a "steamship" without a valid certificate to do so.

Captain Ralph appealed to the Trial Division, where all convictions except the last were upheld. The Crown sought to have the overturned conviction restored and Captain Ralph cross-appealed his convictions for the other four offences to the Court of Appeal; coincidentally, the appeal hearing took place exactly seven years after the vessel was lost. The court's decision was released on January 4, 2013.

Captain Ralph was convicted only of (i) and (iii) above and was required to pay $400 and $800 in respect of those convictions.

Under section 839 of the *Criminal Code*, leave to appeal a decision of the Trial Division can only be granted on a ground that involves a question of law alone. While noting that the appeal of the conviction for failure to ensure the crew understood lifesaving and fire fighting equipment did not seem to involve a question of law, the three-judge appeal panel dealt with the issue nonetheless.

Justice Rowe saw no reason to interfere with the findings of the Provincial Court judge, who, after reviewing Captain Ralph's evidence, determined that he had made only "passing efforts" at training his crew. There was evidence that certain members of the crew had not been particularly interested in Captain Ralph's demonstration of the immersion suits and, in one case, preferred to be outside smoking a cigarette during the training. While this may have been frustrating, it did not relieve the captain from his duties.

The *Crewing Regulations*, made pursuant to the Act, incorporate the Seafarer's Training, Certification and Watchkeeping Code, which governs the maintenance of a proper deck watch. Under this code, among other requirements, the bridge is never to be left unattended. The evidence showed that just prior to the sinking, all hands on-board, including Captain Ralph, were engaged in hauling the nets and retrieving fish. No one had been assigned to keep watch.

Before the Court of Appeal, Captain Ralph argued that the vessel had been equipped "more thoroughly and extensively than most, if not all, other comparable vessels" and was very "technologically advanced". The court did not accept this argument, noting that nothing in the regulatory provisions allows for the substitution of a person on the bridge with advanced technology.

Rule 5 of the *Collision Regulations* requires every vessel to maintain a proper lookout "by sight and hearing…in the prevailing circumstances…so as to make a full appraisal of the situation and the risk of collision". Captain Ralph relied on his advanced technology argument once again. In convicting him on this charge, the trial judge incorporated his findings on the deck watch charge and also noted that the captain could not have been keeping a proper lookout while he was "in the galley making sandwiches".

While the convictions were upheld on both of these charges, the court found that the rule in *R v Kienapple*, a 1975 Supreme Court of Canada decision, applied such that the deck watch conviction should be stayed. The rule in that case prevents multiple convictions where the same act grounds different charges and the second offence does not contain any additional element distinguishing it from the first. Because maintaining a proper deck watch is how a proper lookout is generally maintained and the failure to do each arose out of the fact that the bridge was left unattended, the rule applied and the less serious of the two charges was stayed.

There was a split decision on the issue of

(Continued on page 2)

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

Adrienne Lee
(416) 982-3809
alee@lexcanada.com

Ioana Bala
(416) 982-3810
ibala@lexcanada.com

Andrew MacDonald
(416) 982-3830
amacdonald@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