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TRANSPORTATION NOTES

Legal Decisions and Developments Affecting the Transportation Industry in Canada

Volume 9, Issue 3 — March 2013

Air Canada Air Waybill Provisions Found Inapplicable

In a recent lengthy decision of the Provincial Court of Alberta, the limitation of liability provisions in Air Canada's standard-form air waybill were found to be inapplicable. This case illustrates the manner and extent to which lower level courts in Canada will go to find in favour of individual plaintiffs in cargo cases. While the case is of interest in understanding how courts of equity (such as Small Claims Courts) deal with these cases, we do not take the position that this case sets out the current state of the law.

The matter arises from a 38 kg shipment of ten laptop computers shipped by Dr. Obioha Nnamdi Durunna from Edmonton to Abuja, Nigeria (via London). The actual cost of the computers to Dr. Durunna was $4,619.90.

On November 19, 2010, Dr. Durunna made his first attempt to ship the computers when he attended at the Edmonton Air Freight Offices of Air Canada. On that attendance, the Air Canada agent on duty began the required paperwork. At that time, Dr. Durunna advised the agent of the content of the shipment. For reasons discussed below in this article, this caused the agent to advise Dr. Durunna that, prior to shipping his cargo, Dr. Durunna would have to obtain an Export Declaration Form B13A from Canada Customs.

Dr. Durunna returned to the Freight Office on November 25, 2010 with the required documentation as well as stickers that were to be affixed to the packaging, indicating that the contents included lithium batteries. A different agent was on duty on this date.

Dr. Durunna's evidence at trial was that, on his second attendance at the Freight Office on November 25, he advised the agent on duty that the value of the shipment was $4,000. Nevertheless, the air waybill indicated "NDV" (i.e. No Declared Value") in the "Declared Value" box. In addition, the box marked "Declared Value for Customs" indicated "NCV" (i.e. No Customs Value).

Dr. Durunna argued that these entries on the air waybill made no sense because he had unequivocally advised the Air Canada agent that day that the shipment had a value of $4,000. Dr. Durunna was also adamant that neither of the two agents that he dealt with offered insurance for his shipment.

When asked in cross-examination why the air waybill's entries did not match the actual value of the goods, Dr. Durunna responded that he did not have the opportunity to "read the contract". Rather, it was presented to him in a nearly completed form when he returned to the Freight Office on the second attendance. As a result, he testified that he did not have the opportunity to review the face of the document and, much less, the terms and conditions on the reverse (which include the limitation of liability provisions discussed below). The document was never signed by Dr. Durunna.

Dr. Durunna paid $800.80 in freight charges. He did not purchase insurance. The laptop computers never arrived at their final destination.

Dr. Durunna commenced an action, seeking $4,000 (the amount that he declared to the Freight Office agent) together with his shipping costs. This amount exceeded the prescribed limits available to him under the *Montreal Convention*. He alleged that had he been offered insurance coverage, he would have purchased it and thus would have been made whole for his loss. The cost of the insurance would have been $0.85 per $100 of declared value — $34.00.

At trial, Karen Jackson of Air Canada's Claims Office in Halifax explained that in this sort of situation, the typical procedure would be for the Air Canada agent to create the air waybill and hold it in abeyance pending the return of the shipper with the required export documentation. Once the shipper returned, a new air waybill is prepared, based on the information communicated in the shipper's first attendance, but with updated shipping dates.

In her testimony, Ms. Jackson acknowledged that computers and cell phones that are shipped to other countries are highly susceptible to theft. Nevertheless, she explained that the recommendation to purchase insurance is not up to the Air Canada agents but, rather, is left to the customer. She stated that it was her own view that it is the shipper's responsibility to ask the appropriate questions and place the necessary insurance on the shipment. She testified that, if asked, Air Canada agents have immediate access to particulars relating to insurance in a "177 Manual".

The court also heard from the Air Canada agent that first dealt with Dr. Durunna. The Agent had some recollection of his dealings with the plaintiff and, in particular, recalled that he required the Export Declaration Form having advised that the shipment was to contain laptop computers — which included lithium batteries. This served to demonstrate that, from the outset, Air Canada was aware that the items to be shipped did, in fact, have some value. The air waybill included three key provisions.

On the face page, it read:

> It is agreed that the goods described

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Air Canada Air Waybill Provisions Inapplicable *(cont'd)*

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> herein are accepted in apparent good order and condition... SUBJECT TO THE CONDITIONS OF CONTRACT ON THE REVERSE HEREOF... THE SHIPPER'S ATTENTION IS DRAWN TO THE NOTICE CONCERNING CARRIER'S LIMITATION OF LIABILITY. Shipper may increase such limitation of liability by declaring a higher value for carriage and paying a supplemental charge if required.

Lower, in the same box, is a notation relating to insurance which reads:

> INSURANCE - If Carrier offers insurance, and such insurance is requested in accordance with conditions on reverse hereof, indicate amount to be insured in figures in box marked 'amount of insurance'.

On the reverse, a notice appears, which reads:

> NOTICE CONCERNING CARRIERS' LIMITATION OF LIABILITY
>
> If the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention or the Montreal Convention may be applicable and in most cases limit the liability of the Carrier in respect of loss of, damage or delay to cargo. Depending on the applicable regime, and unless a higher value is declared, liability of the Carrier may be limited to 17 Special Drawing Rights per kilogram under the Montreal Convention.

The Court was tasked with the job of determining whether, in these circumstances, Air Canada could rely on the limitation of liability provisions contained in its air waybill.

The Court started from the proposition in *Boutchev v. DHL International Express Ltd.*, [2000] A.J. No. 1, aff'd [2001] A.J. No. 297 that "in order for a limitation of liability to be effective, it must, firstly, give notice of the limitation, secondly, be clear and unambiguous, and thirdly, it must specifically limit liability for what caused the loss."

In beginning its analysis here, the Court had to deal with Air Canada's argument that notice is not explicitly required under the *Montreal Convention*, so failure to give same does not disentitle air carriers from availing themselves of the *Convention*'s protections.

Judge Skitsko rejected this argument. In doing so, he relied, in part, on *Foord v. United Air Lines Inc.*, [2006] A.J. No. 1183, a case in which the court held that "the *Montreal Convention* must be interpreted in light of the common law regarding common carriers and bailment".

In support of his finding, he also cited the preamble of the *Montreal Convention* which emphasizes "… the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution" as justification for rejecting Air Canada's argument.

Judge Skitsko then went on to consider whether the terms contained in the air waybill provide sufficient notice of the limitation of liability. On this point, he noted that Article 7 of the *Montreal Convention* requires that the air waybill "shall be signed by the consignor". In this case, the evidence was that the document was not so endorsed. He also cited *Boutchev, supra*, where the court held that a limitation of liability clause did not apply — even where the air waybill was signed — because it was not "brought to the attention of the aggrieved party or ... set out in such a fashion to be so obvious that the aggrieved party cannot be reasonably heard to say that he or she was not aware of the exclusion".

Air Canada countered by arguing the principle from *Lotepro Engineering & Construction v. Air Canada and Canadian National Railway Company*, [1981] A.J. No. 862 that the requirement for notice was met by giving the shipper the opportunity to read the contract and by having the tariff available for the information of the [shipper] upon request. Judge Skitsko distinguished *Lotepro* by noting that that case involved a *signed* air waybill and a sophisticated commercial shipper.

Dr. Durunna further argued that, in any event, even if the *Montreal Convention* governed this transaction, the limitation of liability clause should not be enforced because the provision "appeared on the reverse side of the [air waybill] in very small print, buried amongst other words under a heading that was not indicative of a limitation of liability clause".

Although Judge Skitsko did not accept these arguments and described the liability-limiting language as "clear and succinct", he found that the provision could not be enforced because the Air Canada agent used the terms "NCV" and "NVD" in the form — terms that were unfamiliar to Mr. Durruna. Therefore, not knowing what the terms meant, Dr. Durunna "would have no way of knowing that the waybill would show that he had not made a declaration of the value of his goods".

The Court then considered whether Dr. Durunna was required to make a "special declaration of interest in delivery" regarding his shipment in order to obtain the full value for it. In this regard, Article 22(3) of the *Montreal Convention* reads:

> In the carriage of cargo, the liability of the carrier in the case of destruction, loss, damage or delay is limited to a sum of 17 Special Drawing Rights per kilogramme, unless the consignor has made, at the time when the package was handed over to the carrier ***a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires***. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the consignor's actual interest in delivery at destination.

Justice Skitsko noted that the air waybill in the matter at hand makes no reference to the requirement for a "special declaration of interest in delivery". He held that "[i]f Dr. Durunna had read the contract, he might very well have interpreted these provisions to mean that by simply declaring the value of the laptops at $4,000.00, he was declaring a higher value than what he would be entitled to recover under the *Montreal Convention*".

In any event, the Court noted that the term "special declaration" is not defined in the *Montreal Convention* — and, further, that no form of "special declaration" is prescribed. It also noted that in *Foord*, *supra*, the only declaration made was that the cargo consisted of a "valuable bicycle" without reference to its monetary value. Therefore, Judge Skitsko held in the present case that "a simple statement regarding the contents of the cargo is sufficient to be considered a 'special declaration'". He also cited *Koliada v. Lufthansa*, [2001] O.J. 2960 for the proposition that a "verbal declaration of value is sufficient".

Based on the above analysis, the Court found that, in this case, Dr. Durunna made a special declaration within the meaning of the *Montreal Convention*, even though the "special declaration" did not appear on the air waybill.

The issue then turned to whether a "supplemental sum" had to be paid, as contemplated in Article 22(3). The court that the language of the *Montreal Convention* does not require such payment. In fact, this provision specifically states that the "supplemental sum" is only to be collected "if the case so requires".

Dr. Durunna prevailed. He was awarded $4,000 (being the value that he declared to the Air Canada agent), the $808.80 spent in shipping fees and costs.

Durunna v, Air Canada
2013 ABPC 31 (CanLII)

Edmonton Flying Club Action Not to be Severed

We have previously reported on the dispute surrounding the possible closure of the Edmonton City Centre Airport (the "Airport") in the June and December 2010 editions of *Transportation Notes*. The Alberta Court of Appeal has rendered the latest pronouncement in this long-running saga.

To recap, in the last decade an economic decision was made to close the Airport, as the Edmonton International Airport has the capacity to serve the needs of the community.

Prior to this decision being made, in 1996, the City of Edmonton (which operated the Airport) entered into a 56 year lease with the Edmonton Regional Airports Authority (the "ERAA") wherein the ERAA agreed to operate the airport as a public airport offering general aviation services for private aircraft, small charter companies and air ambulances.

One of the sub-lessees at the Airport is the Edmonton Flying Club ("EFC"), which has a lease expiring at the end of 2028. The EFC sublease does not expressly require the ERAA to keep the Airport in operation, nor does it contemplate the closure of the Airport.

In 2009, both the City and the ERAA passed resolutions enabling the closure of the Airport. The lands were surrendered to the City in 2010. One runway was closed in 2010 and the other is slated for closure in 2015. The City intends to obtain surrenders of the various subleases before 2015, after which the lands will be redeveloped for other uses.

Some of the sub-lessees have sued the City and the ERAA, claiming that the closure of the first runway, and the Airport altogether, are breaches of an express or implied covenant that the Airport will continue in operation.

Uniquely, the EFC's action is for specific performance or an injunction preventing the closure of the Airport or, in the alternative, damages. The City and the ERAA applied to a judge in chambers for an order to have all of the actions tried together. The EFC applied for a severance of the trial — requesting that the issues of: (a) whether there was a breach of the sublease; and (b) whether is it entitled to an injunction, be tried first. EFC undertook that should it be successful in obtaining injunctive relief, it would not to pursue its claim for damages.

A chambers judge granted the relief requested by the EFC and dismissed the application to try all of the actions together.

In coming to this decision, the chambers judge considered, among other things, arguments that:

- there would be little overlap on the issue of liability;
- the issue of liability could be conclusively decided, one way or the other, in the first trial;
- little evidence would be required on the entitlement to an injunction;
- the injunction would require significantly less discovery compared to the damages action;
- the EFC's case did not require extensive findings of fact because the nature of the club (being a not-for-profit corporation) was not contentious; and
- the claim for injunctive relief was straightforward and could likely be lead by way of an agreed statement of facts.

The availability of an injunction is in part predicated on the inadequacy of a remedy in damages, and the two issues cannot be realistically separated.

In granting the EFC the relief it was requesting, the chambers judge held that:

- there was a potential for significant costs savings;
- there was a "good probability" that the second trial would not be necessary, because of the not-for-profit nature of the EFC's structure and the nature of the leased premises;
- the injunction would be much shorter than the damages trial;
- the proceedings were at a very early stage;
- there was a disparity between the financial resources of the EFC and the defendants — making economy in litigation even more desirable;
- no party could be prejudiced by severance because damages could still be litigated; and
- if the request for an injunction was successful, that would end the suit because the claim for damages would not be pursued.

After the chambers judge issued her reasons, but before the formal order was entered, the City commenced expropriation proceedings that would lead to the compulsory acquisition of the balance of the term of the sublease. The City and the ERAA also appealed the decision to the Alberta Court of Appeal.

The appellate court determined that the decision of the chambers judge was of a discretionary procedural nature and, as a result, the standard of review was such that the decision could only be overturned if it was found to be unreasonable.

As to the merits of the appeal, the court was unimpressed by the chambers judge's ruling. In particular, it noted that:

- the reasons of the chambers judge were inconsistent on whether there would be overlapping evidence about the financial circumstances of the EFC;
- injunctions are often founded upon the question of whether damages are an adequate remedy. This will be a "key issue" at an injunction trial;
- the availability of an injunction depends heavily on the factual context;
- trying the injunction first inverts the legal process. Rather than deciding if damages are adequate, the order seeks to pursue an extraordinary remedy (an injunction) before deciding whether a normal remedy (damages) is available;
- there is no rule of law that says that not-for-profit organizations cannot be made whole with damages;
- it is unrealistic to expect that the "uniqueness of an airport" will not result in extensive evidence; and
- extensive evidence on policy issues will be required to address the issue of the motivations for the closure of the Airport and the legitimacy of the concerns relating to the existence of two airports in Edmonton.

In the end, the appellate court held that "[t]he order to sever the trial is founded on errors of law and is unreasonable".

The appeal was allowed and cross-applications for consolidation of the actions was returned to the case management judge for further directions.

Edmonton Flying Club v. Edmonton Regional Airports Authority, 2013 ABCA 91

End of the Line *(Judicial Reviews by Minister of TATC Decisions)*

In 2011, two pilots with Canadian North Airlines underwent a Pilot Proficiency Check (PPC) administered by Transport Canada. The PPC included entering a specific holding pattern on approach to Vancouver International Airport. This engaged the autopilot system. The pilot flying the aircraft turned the "heading bug" to the right to make a right turn, but turned it too far, causing the plane to bank left, not right. Both pilots then attempted to reset the bug, but failed. Concerned about tailwinds, the pilot flying the plane suggested continuing the left turn and the other pilot agreed with this course of action. At that point, the Inspector from Transport Canada terminated the PPC on the basis that the crew had demonstrated an inability to operate the autopilot system. Both pilots were suspended.

The pilots sought a review of the Inspector's decision before the Transportation Appeal Tribunal of Canada (TATC). The TATC allowed their application and referred the matter back to the Minister of Transport for reconsideration. The Minister brought an application for judicial review, seeking to have the Federal Court quash the TATC's finding that the pilots' actions should not have resulted in a failure on the PPC.

The court first examined the correct standard of review to be applied to decisions of the TATC. The court found that decisions of the TATC can be appealed to a three member appeal panel - judicial review of a decision of this panel is conducted on a reasonableness standard. The appeal panel is considered to have expertise in transportation matters and is charged with making decisions to protect public safety. A single member of the TATC is considered an expert decision-maker serving a similar purpose.

The TATC considered all of the testimony before it and concluded that the pilots took the safest option in the circumstances, one which allowed them to complete the assigned exercise successfully. They discussed the options and chose an acceptable course. The TATC noted that this kind of decision making should not be taken away from a flight crew.

The court found that this suggested that the reasonableness standard should thus apply to a single member as well. Another factor supporting this conclusion was that the appeal panel must show deference to decisions of the TATC:

> . . . it would be odd to have a situation in which, in order to succeed, a person seeking to overturn a decision of the TATC would have to persuade an appeal panel that the tribunal's decision was unreasonable, while the Minister could successfully overturn a TATC's decision by showing that it was incorrect. . . . fairness suggests that the parties should have parallel remedies.

The court then looked at whether the TATC's decision to send the matter back to the Minister was unreasonable. The Minister's position was that the pilots failed to operate the autopilot properly and thus failed the PPC. The Minister argued that the TATC's conclusion that "their corrective actions were appropriate in the circumstances" was "indefensible". The court noted that the TATC had referred to Transport Canada's Flight Test Guide, which allowed pilots to "score a passing grade even in situations where 'major deviations from the qualifications standard occur' so long as they are 'recognized and corrected in a timely manner'".

The court concluded that the TATC's decision was "intelligible, transparent and justified":

> The TATC considered all of the testimony before it and concluded that the pilots took the safest option in the circumstances, one which allowed them to complete the assigned exercise successfully. They discussed the options and chose an acceptable course. The TATC noted that this kind of decision-making should not be taken away from a flight crew.

The Federal Court dismissed the Minister's application for judicial review, finding that the TATC's decision was not unreasonable.

Attorney General of Canada v. Annon and McLaren, 2013 FC 5 (CanLII)

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