



# TRANSPORTATION REPORT

e-News from Alexander Holburn Beaudin & Lang LLP

## Dangerous Flying - Criminal Prosecution of Pilot

**The weather in Winnipeg** was cloudy with a ceiling of 300-400 feet. Mark Tayfel figured that the fuel tanks on the Piper Navajo Chieftain were about three-quarters full, enough to carry out his planned flight from Winnipeg to Gunisao Lake and back. He was wrong. On the return flight he had barely commenced his approach to Winnipeg when the right engine began to sputter from fuel starvation. He was able to restart and draw fuel from the other tank, but knew fuel was an issue. Altering his ILS approach, Mr. Tayfel came in fast and high, hoping that if both engines failed, he could glide to a landing. Instead, he overshot the approach and ran out of fuel while he was attempting to carry out a go-around. The aircraft crashed into a busy highway intersection, seriously injuring all six passengers, one of whom subsequently died.

*Canadian Aviation Regulations* 703.66 requires a pilot to have sufficient fuel on board to comply with instrument flight rules. Transport Canada charged Mr. Tayfel with a breach of this regulation and suspended his pilot's license for 45 days.

Of greater significance was the decision by Crown prosecutors to lay charges under the *Criminal Code* against Mr. Tayfel for criminal negligence and the dangerous operation of an aircraft. Criminal prosecutions of this kind against a pilot are rare, perhaps because the prosecution must prove that the pilot acted with criminal intent. A pilot may be exonerated if he can show that he did not act intentionally. This

was Mr. Tayfel's defence. He testified that he believed he had enough fuel on board to do the trip safely. He said that he would not have flown the aircraft if he had known it was going to be an unsafe flight or that he would run out of fuel ten minutes before he was to land.

Although the judge accepted Mr. Tayfel's statement, he nonetheless found him guilty on all charges. Mr. Tayfel had made rough calculations of the fuel on board his aircraft and his anticipated flight times, but the judge found those calculations were so unreliable and so inconsistent with the practices of a reasonably prudent pilot that they amounted to criminal negligence.

In his decision, the judge noted that the duties of a pilot imposed a particular standard of care given the inherent risks involved in flying:

*"Because of the very high risk to the lives and safety of others if an aircraft runs out of fuel in flight, checking the fuel level in an aircraft and adhering to the laws regarding the amount of fuel on board is much more important than checking the fuel in any other type of vehicle. As a pilot, the importance of the regulations and the dire consequences of running out of fuel while in flight would have been well known to the accused."*

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## Dangerous Flying...

While the prosecution of Mr. Tayfel may have been driven by the very public and catastrophic nature of the accident which he caused, it seems that the criminal prosecution of pilots may become an increasingly common event.

For more information on aviation matters, please contact Patrick Saul at [psaul@ahbl.ca](mailto:psaul@ahbl.ca) or (604) 484 -1728.

## Ship Arrest

**Maritime claims** are often unrecoverable unless security is obtained early by arresting the ship or cargo whose owner is liable for the claim. Recently, the scope of arrest in the Federal Court of Canada has been expanding, while shrinking in the Supreme Court of British Columbia, as illustrated by two cases.

### Federal Court Arrest Broadens

#### *Phoenix Bulk Carriers v. Kremikovtzi Trade*, 2007 SCC 13

In 2007 the Supreme Court of Canada decided *Phoenix Bulk Carriers v. Kremikovtzi Trade*, 2007 SCC 13 (“*Phoenix*”), overruling the 2001 decision of the Federal Court of Appeal in *Paramount Enterprises International, Inc. v. An Xin Jiang (The)*, 2001 2 F.C. 551 (“*Paramount*”) and expanding the scope of maritime arrest.

In *Paramount*, a ship was chartered to carry cargo. Before loading, the carrier breached the charterparty by arranging for a different shipowner to carry the cargo on a second ship. The first shipowner arrested the cargo and the second ship in the Federal Court. The Federal Court of Appeal set aside both arrests, finding that neither the second ship nor the cargo was “the subject of the action”, which is a requirement for arrest under *Federal Courts Act*, R.S.C. 1985, c.F-7 (as amended), section 43.

In *Paramount*, The Federal Court of Appeal applied the “physical nexus” test to determine whether the property

is the subject of the action, which involves considering the following questions:

1. Did the property cause any damage?
2. Did the property receive any benefit?
3. Is there a maritime lien against the property?
4. Will the plaintiff’s action succeed regardless of who owns or operates the property?

The “physical nexus” test in *Paramount* is narrow and rarely met in any circumstances.

*Phoenix* was appealed to the Supreme Court of Canada on facts very similar to *Paramount*. The Supreme Court of Canada affirmed the “identifiability test” preferred, but not applied, by the Federal Court of Appeal in *Phoenix*. Under the “identifiability test” the question is whether the property subject to arrest is designated in the contract alleged to be breached. The Supreme Court said:

*[...] the action in rem must relate to the specific property contemplated in the contract at issue. To the extent that the cargo can be clearly identified as being the one contemplated under the contract, ... the cargo under arrest is the ‘subject of the action’.*

The test in *Phoenix* is simple, and increases the scope of claims for which security may be obtained.

### Supreme Court of British Columbia Arrest Narrows

#### *Hansen v. The Ship Trinity*, 2007 BCSC 225

In *Hansen v. The Ship Trinity* 2007 BCSC 225 (“*Hansen*”), the Supreme Court of British Columbia set aside the arrest of a ship under its admiralty Rule 55, which resembles the Federal Court arrest rules. In practice, the resemblance is fading.

*Hansen* held that in the Supreme Court of British Columbia, an *ex parte* application for an arrest warrant must:

1. make full and frank disclosure of all material



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- circumstances, including facts in favour of the defendants;
2. provide particulars of the claim;
  3. show that the defendant has an asset within the jurisdiction;
  4. show grounds for believing that there is a risk that the asset will be removed; and
  5. give an undertaking in damages for wrongful arrest.

The Supreme Court of British Columbia set aside the *ex parte* order for an arrest warrant on the ground that the plaintiffs did not advise the Court of a previous unsuccessful application for a *Mareva* injunction against the defendants in parallel proceedings in that Court. The Court found that the plaintiffs had failed to make full and frank disclosure.

*Hansen* is contrary to the practice in the Federal Court, in which an arrest warrant is generally issued as long as the minimal evidence required specified in *Federal Courts Rule* 481 is provided. The faster, simpler Federal Court practice has never required detailed evidence of facts, and certainly not the full and frank disclosure that is required to obtain a *Mareva* injunction.

After *Hansen*, maritime claimants should be wary of arresting in the Supreme Court of British Columbia if the Federal Court of Canada is also a possible forum for the claim.

For more information on maritime matters, please contact Douglas Schmitt at [dschmitt@ahbl.ca](mailto:dschmitt@ahbl.ca) or (604) 484-1754.

## Ban on Smoking in Truck Cabs Extends to Alberta and British Columbia

**Restrictions on smoking** in public places come as no surprise. Most provinces in Canada have eliminated smoking indoors in all provincially owned buildings, bars and restaurants. Governments intend to further extend smoking bans, with the federal government recently amending legislation to eliminate indoor “smoking rooms”.<sup>1</sup>

Legislation in Alberta is now forcing smokers to butt out in any public place or workplace in the province, including truck cabs.<sup>2</sup> The Alberta *Tobacco Reduction Act* came into force on January 1, 2008 and creates a

broad definition of “workplace,” which includes work vehicles<sup>3</sup> A “work vehicle” is defined by the *Act* as one which is “owned or leased by an employer and used by employees during the course of their employment.” The law does not, therefore, apply to privately owned and operated vehicles. Fines for violation of the *Act* range from \$1,000 to \$5,000 for individuals and \$10,000 to \$100,000 for companies.

The Alberta *Tobacco Reduction Act* follows on the heels of Ontario legislation passed in 2006 and similar amendments planned for British Columbia.<sup>4</sup> Penalties under the proposed B.C. Act will include maximum fines from \$2,500 to \$5,000.<sup>5</sup>

While the existence of a law and its enforcement are two different matters, similar smoking bans in Ontario have received mixed

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## Marine Insurers to Register in Canada?

New Canadian legislation, anticipated to come into force in late 2008 or early 2009, may now impose a Canadian registration requirement on certain foreign-based marine insurers. Amendments to the *Insurance Companies Act*, S.C. 1991, c.47, will require such insurers to become registered with the Office of the Superintendent of Financial Institutions (OSFI) if they are “insuring in Canada a risk”. Attempts are being made to clarify that the location of the contract formation, not the site of the risk itself, is the trigger for these Canadian registration requirements. However, foreign-based marine insurers should monitor these Canadian regulatory developments to properly assess the potential need for Canadian registration.

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<sup>1</sup> *Non-smokers' Health Act*, R.S.C., 1985, c. 15 (4th Supp.).

<sup>2</sup> *Tobacco Reduction Act*, S.A. 2005, c. T-3.8 (in force, January 1, 2008)

<sup>3</sup> *Ibid.*, s. 1(k), s.3

<sup>4</sup> Bill 10: *Tobacco Sales (Banning Tobacco and Smoking in Public Places and Schools) Amendment Act*, 2007, s.2.3

<sup>5</sup> *Tobacco Control Act*, R.S.B.C. 1996, c. 451, s.12(1) as amended by *ibid.*, s.6

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reactions. More recently, the Alberta Motor Transport Association has endorsed Alberta legislation, stating that the ban "...seems to be one of the easiest and best ways to improve the quality of life for Albertans."<sup>6</sup>

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## Recent Changes in Railway Regulation

**Canadian railway operators** were kept busy in 2007 dealing with a number of legislative and regulatory developments.

Most Canadian railways are governed by the *Canada Transportation Act (CTA)*, which is administered by the Canadian Transportation Agency ("Agency"), a quasi-judicial tribunal. Rail safety matters are separately administered by Transport Canada (TC) under the *Railway Safety Act (RSA)*.

After some false starts at railway law reform in 2003 and 2005, Parliament completed substantial legislative changes to the *CTA* in 2007, with the implementation of Bill C-44. This Bill made comprehensive changes to a number of areas of rail regulation, including discontinuance rules, mergers and acquisitions, public passenger, service providers, and national transportation policy. Of particular significance was the re-establishment of Agency power to deal with railway noise and vibration regulation. The Agency has now published for consultation draft guidelines on how it proposes to deal with railway noise and vibration complaints.

Late in 2007, Bill C-8 was also introduced in Parliament, and is currently under review. This Bill proposes a number of reforms to enhance rail shipper remedies, including partial regulation of incidental charges and conditions included in railway tariffs, and possible class proceedings by shippers with common interest. Of particular benefit to shippers would be the removal of the current requirement to establish that "substantial commercial harm" has occurred before exercising a remedy against a rail carrier. Bill C-8 also proposes further amendments to the railway discontinuance rules, highlighting the regulator's keen interest in this area.

In response to a number of high-profile derailments, TC appointed an advisory panel in late 2006 to review the *RSA* and make recommendations on improving rail safety. The study is now completed and public release can be expected sometime in 2008.

In November 2007, the Railway Association of Canada and TC signed a new memorandum of understanding on railway security measures, with rail operator security plans being established and reviewed on an annual basis.

Finally, the federal and provincial governments have both been active in working with Canadian rail operators on joint planning and implementation of several infrastructure projects linked to the Pacific Gateway initiatives. The pace of activity is not expected to diminish in 2008.

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<sup>6</sup> "Alberta Smoking Ban" AMTA News Page, [undated] (<http://www.amta.ca/CRA/News.html>)