

1942

## Canadian Law of Civil Aviation 1937-1942

B. V. Richardson

Follow this and additional works at: <https://scholar.smu.edu/jalc>

---

### Recommended Citation

B. V. Richardson, *Canadian Law of Civil Aviation 1937-1942*, 13 J. AIR L. & COM. 195 (1942)  
<https://scholar.smu.edu/jalc/vol13/iss3/1>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

# THE JOURNAL OF AIR LAW AND COMMERCE

---

Volume 13

JULY, 1942

Number 3

---

## CANADIAN LAW OF CIVIL AVIATION 1937-1942

BY B. V. RICHARDSON, K.C., LL.B., WINNIPEG

Canadian Law of Civil Aviation was the subject matter of a paper delivered by myself to the Canadian Bar Association in 1937. The paper was reprinted in this Journal, April, 1938, page 201. In 1939 and again in 1941, in additional papers delivered to the Canadian Bar Association, I dealt with the further Canadian developments in this branch of the law. There have been still further and more recent changes and at the request of the editor-in-chief of the Journal I here attempt to bring up to date the article found in the April, 1938, number.

### *Statute Law*

The original article noted the Air Board Act, passed in 1919, by the Dominion and that the name of the Act was in 1922 changed to the Aeronautics Act. It should here be noted that the duties of control and supervision of civil aviation originally given by the Air Board Act to the Minister of National Defense and later (in 1936) transferred to the Minister of Transport were on July 8, 1940, by Order-in-Council PC 3076 transferred to the Minister of Munitions and Supply.

In 1938 the Dominion passed The Transport Act 1938 (cap. 53) being an Act to establish a Board of Transport Commissioners for Canada with authority in respect of transport by railways, ships, and aircraft. The Act empowers the Board to license aircraft to transport passengers and/or goods between specified points or places in Canada, or between specified points or places outside Canada. The Board may in the license prescribe the route or routes which the aircraft may follow and the schedule of services which shall be maintained (s. 13). Subject to the provisions of the Act no goods

or passengers are to be transported by air by means of any aircraft other than an aircraft licensed under the Act.

Then in 1939 the Dominion passed the Carriage by Air Act, 1939, being cap. 12 of the Statutes of Canada, 1939 (First Session). This Act was passed to give effect to what is known as the Warsaw Convention being the international convention for the unification of certain rules relating to international carriage by air, and to make provision for applying the rules pertaining to the Convention, subject to certain exceptions, adaptations and modifications, to carriage by air, which is not international carriage within the meaning of the Convention. This Act, however, does not come into force, in whole or in part, until proclaimed by the Governor in Council and there has as yet been no such proclamation and it is almost a certainty that it will not be proclaimed at least until after the present war, or without substantial amendment.

The Air Board Act or the Aeronautics Act as it is now called authorized the Minister of Munitions and Supplies to make air regulations which were made and which have from time to time been substantially amended.

#### *Constitutional Aspects*

It is obvious that some of the provisions of the Carriage by Air Act, 1939, cut across a field which had previously been exclusively dealt with by provincial laws. For instance, various provincial Acts deal with compensation to relatives of deceased persons where the circumstances disclose negligence on the part of some person or persons. This Dominion legislation will supersede those Acts on occasion. Nevertheless it would appear to be valid legislation within the rule laid down by the Judicial Committee of the Privy Council in the Aeronautics Reference (1932) 1 D.L.R. 58, A. C. 54, (1931) 3 W.W.R. 625, as explained by the Committee in the Weekly Rest Reference (1937) 1 D.L.R. 673, A.C. 326, 1 W.W.R. 299. Since the Carriage by Air Act 1939 has been passed to carry out international obligations of a similar nature to those on which the Aeronautics Act was founded its validity can be justified on the same grounds, although the remarks of Lord Atkin may raise a doubt as to whether the Dominion, rather than the Provinces, has jurisdiction to make the provisions of the Warsaw Convention or the Rome Convention the law of Canada.

*Negligence Generally*

Almost all the Canadian Aviation cases based on negligence have been decided since the publication of the original article. The first is *McInnery v. McDougall*, (1938) 1 D.L.R. 22, 47 C.R.C. 229, 47 Man. R. 119, (1937) 3 W.W.R. 625. McDougall, the pilot (who had apparently flown sufficient solo time to entitle him to carry passengers), had on the morning of the day of the flight in question, passed the required tests. One may question, therefore, the relevancy and admissibility of certain evidence which was introduced, indicating that, some six weeks before, McDougall had failed to pass and that the inspectors considered his flying then very unsatisfactory and that he required more dual instruction. The accident happened on September 24, 1933, and the defendant had held a pilot's certificate in the United States since 1931. His dual control machine had been signed out as airworthy, but after it had been in the air only about 20 minutes it developed engine trouble and began to slow up noticeably. The pilot decided to land. He picked out a field which was found on the evidence to be in all respects suitable, flew over it and examined it, noted from nearby water the direction of the wind, and prepared to land. As his machine was not then into the wind he began to turn which, of course, required him to bank. To quote the judgment: "Something then happened. The plane went straight down, crashed, and McInnery died shortly from the injuries he received." Several explanations as to how the accident happened were made at various times by the pilot. The truth probably is that he did not know. On one occasion he said he was side-slipping into the field when he suddenly felt the machine go limp; at another time, that he thought he was going to over-shoot the field, started to bank the plane, lost air speed, one wing dropped and the plane turned over; that he lost speed and when he attempted to make the turn he had not sufficient momentum to carry the plane around. On his examination for discovery he said he felt the rudder go sluggish and that the only explanation he could give was that the passenger must have put his foot on the rudder bar. It should be mentioned that the regulations required him to cut off the dual control and that he had not done so. This, however, was found, and rightly I think, not in itself to constitute negligence. At the trial he said that in the turn he hit an air bump or downward current which shot him up and the craft down again and seemed to quiver. He cut off the motor just before the crash. There was

no evidence to support the theory that the passenger had interfered with the controls. The Court did not accept the suggestion about the air bump but found that the area was not a bumpy one and that it was not reasonable for a bump to occur at a low altitude. Without suggesting that the finding that a bump had been the cause of the mishap in this case was erroneous, I make bold to suggest that expert evidence would show that bumps are likely to occur near the ground. The Court found that the pilot had allowed his plane to lose the necessary speed at an altitude where it was impossible to regain control. This may have happened while the pilot was engrossed in watching his landing rather than his instruments. The pilot intimated that he was attempting a cross-wind landing. The Court found that there was no excuse for his making such an attempt. It must be remembered, however, that by this time he was quite close to the ground and in an emergency because of his defective motor. The finding was that the cause of the plane falling was that the defendant did not maintain proper flying speed. One wonders whether, having regard to the engine trouble and the close proximity to the ground, this was not demanding too high a degree of care.

The second case is that of *Galer v. Wings Ltd.*, (1939) 1 D.L.R. 13, 48 C.R.C. 322, 47 Man. R. 281, (1938) 3 W.W.R. 481. In this case the accident happened on April 10, 1936, while winter flying conditions still existed. The take-off was made from ice. When the plane was only a short distance up one of the blades of the propeller broke, resulting immediately in the engine being torn away from the plane which caught fire and fell on the ice. The learned trial Judge held that ordinary principles of the law of negligence must be applied. It was conceded by counsel for the defendant company that the defendant was in the legal position of a common carrier of passengers by air. Such an admission carries with it sundry implications, for every common carrier is, in the absence of a special contract, liable in tort for negligence. In the United States, a common carrier of passengers by air cannot limit its liability but this is not the law of Canada and liability can be limited, at all events until the *Carriage by Air Act, 1939* (hereinbefore referred to) comes into force. Here it was contended by the defendant that there existed a special contract relieving the carrier from liability, contained in apt language endorsed on the ticket made out by the defendant company for the plaintiff and the two other passengers. The

tickets, however, were never delivered. The passengers were not asked to sign in the place left for that purpose and were not given the usual duplicate carbon copies. The passengers were told that they might pay at the commencement of the trip or on their return. They agreed to pay on their return. The plaintiff had made many trips in the plane of the defendant company. He admitted that he had on some such occasions read the ticket and had sometimes signed it and that he knew that the tickets contained a release, and was also aware that all Canadian air transport companies had release clauses on their tickets. He understood that they were not binding on a passenger, whether signed or not. The Court said that if the releases were a part of the contract, that alone would seem to dispose of the plaintiff's action. On the evidence the Court found it impossible to hold that a special contract had been distinctly declared and deliberately accepted. The Court held it was a fact that the ticket was never issued to the plaintiff and that he did not expressly or impliedly assent to the release appearing thereon.

' At trial the defendant amended its pleadings and set up that it was a custom and usage in Manitoba, and in Canada generally, for passengers to assume all risk of injuries while being carried by air. The Court found that the evidence failed to establish the notoriety and certainty of such custom as would be required, and made no finding as to whether such a usage could be held to be reasonable; that the contract to carry in this case was made by the booking of passage by the plaintiff with no conditions attached; and that there was an implied obligation upon the defendant to use all reasonable care and diligence to carry the passenger safely to the agreed destination.

On the question of negligence the Court pointed out that the onus lay first with the plaintiff; that it does not appear that a higher degree of care is demanded of a common carrier than of a private carrier; that carriers of passengers are not insurers of the safety of passengers whom they carry nor do they warrant the soundness or sufficiency of their vehicles; that their undertaking is to take all due care and carry safely so far as reasonable care and forethought can attain that end; and the care required is of a very high degree; that while they do not warrant the soundness or sufficiency of their vehicles they are answerable for any defects that careful and reasonable examination would reveal; that periodical testing and examination

is a duty and that the fact that an aircraft breaks down, as it did in this case, is *prima facie* evidence of negligence; that if they have taken all reasonable care and used the best of precautions in known practical use for securing safety, carriers are not liable for accidents due to latent defects in their vehicles which precaution does not discover (see p. 19 D.L.R., p. 329 C.R.C., p. 488 W.W.R.). The Court held that the plaintiff, having shown that a propeller blade broke, which is something that in the ordinary course does not happen if proper care is exercised, had satisfied the initial onus which rested upon him and the defendant was called on for an explanation.

The propeller had been manufactured in the United States. The type had the approval of the Department of Transport at Ottawa (but it was proved that license to manufacture that type of propeller had been cancelled by the Government Department in the United States). The propeller had been in use by the defendant and previous owners since August, 1932, but, of course, not continuously. In July, 1935, the propeller had been overhauled and the blades etched. As already stated the accident happened on April the 10th. On April the 8th the plane had been flown from Sioux Lookout in Ontario to Winnipeg in Manitoba. The pilot who flew it reported roughness in the machine to the defendant's chief engineer, and someone from the defendant company advised the local agents for the propeller manufacturer that the propeller was being sent in, presumably for checking. The party in charge of the checking suggested to the defendant company that the blades from their appearance required smoothing out. He was told that the propeller was wanted almost at once and that there was not time for that, and the propeller was sent to the defendant. The supervisor of the works, himself a pilot, said there was nothing to justify him in saying that the blades were not airworthy; that he would not have returned them if he had thought so and that they were in fair serviceable condition; that he would have been prepared to use them himself without hesitation. The defendant's chief engineer said that the instructions given by him to the propeller company's agent were to check the pitch and balance and to remedy anything which might cause roughness. The propeller was found slightly out of pitch and slightly out of balance. It was taken apart to balance it and one blade (the unbroken one) loaded a little by adding lead in the hole in the shank. The pitch was reset and the balance again checked and

found satisfactory. It was returned to the defendant after 3½ or 4 hours' work. The plane was signed out on the day in question by an air engineer. It was then sent off for a 2½ or 3½ hour trip, and according to his evidence, the pilot found it then to be satisfactory in every respect. On behalf of the plaintiff, passengers on trips several days just prior to the accident swore that the engine vibration seemed excessive. Mechanics had worked on the motor including the propeller for an hour or more just before the plane started on the fatal trip.

There was also considerable evidence given respecting the condition of the spark plugs, which had been found to be oiling up, a possible cause of roughness. After this last work was done, and before the passengers were taken on, there was no air test. However, on the day in question, the same pilot who was at the controls at the time of the crash had flown the machine on a routine trip for 2½ hours in which he had made five stops. He had no trouble except on the return trip when he noticed a roughness due, he added, to the plugs, which were then examined and two replaced. Just prior to the takeoff it was found on ground test that the engine was perfectly normal in every respect. It was established through expert testimony at the trial that the break was a fatigue failure. The conclusion of the expert which the Court accepted was that the failure was rapid, a matter of minutes at the most.

Weighing a great mass of evidence the Court found these facts. "The cause of the blade failing was that it was inherently defective in design. As a result the stresses operating on it at the point were too high and impaired the margin of safety intended to be provided. The normal service of the blade superimposed on the original weakness caused the break. The material was flawless; it was broken by fatigue." (p. 33 D.L.R., p. 345 C.R.C.) The evidence showed that the roughness in operation could be caused either by a defective propeller, by oily spark plugs, or in other ways. The evidence had established that roughness was reported on the return trip taken on the 8th of April; again on the 9th. The pilot had found roughness again in the earlier trip on the 10th. The Court found that on each occasion it was a temporary condition probably caused by foul spark plugs and that this was on each occasion corrected. The Court also found that scientific knowledge as to the failure of propellers due to fatigue could not reasonably be expected of

the defendant company's officials; that the company had no doubt as to the airworthiness of the propeller and no reason to suspect that the blade was in any way defective; that it was not reasonable to expect the company to install a new or other propeller; that the company was not negligent in not having the machine tested in the air before the final flight, pointing out that the air regulations did not call for this being done after spark plugs have been changed. Dismissing the action, the Court did so without costs, stating, "I see no reason why experience in commercial aviation should be purchased solely at the expense of passengers." (p. 44 D.L.R., p. 358 C.R.C.)

It would seem that both these cases to which I have referred might have been decided differently had the learned Judge in the first case not required an exceptional degree of skill from a pilot faced with an emergency for which he was not responsible; had he been able to satisfy himself in the second case that the defendant had omitted to do something or know something which would have enabled it to prevent the accident. The action of another passenger in the plane last referred to is awaiting judgment and such judgment should prove interesting.

See also the cases mentioned under the subheadings of *res ipsa loquitur* and of Aircraft Carriers Limiting Liability.

#### *Res Ipsa Loquitur*

In *McInnerny v. McDougall* (supra), the Court held that the doctrine of *res ipsa loquitur* applied; that the accident itself was sufficient proof of negligence and that "while he was making a simple landing an accident happened, which would not, in the ordinary course of things, have happened without negligence." (p. 27 D.L.R. p. 235 C.R.C.). One might ask whether in fact the pilot was making "a simple landing." It was an emergency landing, presumably from necessity, close to the ground, with a failing engine. The Court said: "The defendant has not rebutted the prima facie case made out by the application of the above rule of evidence. He has not satisfied the onus placed upon him." The statement in respect of onus could not have been intended as a statement that the onus was on the defendant from the first, because, of course, it was not.

In *Galer v. Wings Ltd.* (supra) it will have been noted that the Court held the onus shifted by the plaintiff to the defendant

upon the plaintiff's proving that the accident had happened when a propeller on the aeroplane had broken in flight but then proceeded to hold that the defendant had satisfied the onus. In *McCoy v. Stinson Aircraft Corp.*, the decision of Kelly J. of the High Court of Justice for Ontario, November 23, 1939 (digested 5 D.R.S. 41), the Court refused to apply the doctrine in an action against the manufacturer of the aeroplane although the wing of the plane broke in mid-air. The plaintiff's case was put entirely on alleged negligence in and about the welding of a gusset to a wing. It was alleged that in the nature of the aeroplane structure it was a negligent thing to weld a gusset to the wing, that it was negligent because the welding operation would weaken the plate which did break and so caused the crash. The second ground was that the welding itself was done negligently so that it formed a weak bond which in itself caused the crash. The judge found that the welding did not in any way weaken the plate, or, at any rate, weaken the plate as regards the force which brought about the crash; second, that it had not been proven that a weak weld was the cause of the break, that is, in the original plate. The repair job was done in September, the plane was in continuous operation from September to January except for a period of about five weeks. It was held that the plaintiff fell far short of eliminating extraneous causes which might have accounted for the defective condition which undoubtedly brought about the crash. Further, it was held that on the evidence there was no negligence, that there was nothing of which the defendant corporation was under a duty to warn anybody; and that the repair was a matter of good practice, and that the action should be dismissed.

In *Malone v. Trans-Canada Air Lines*, (1941), 3 D.L.R. 781, O.W.N. 238, is reported the disposition of a motion made by the defendant before the Master (whose decision was appealed from unsuccessfully to a Judge in Chambers) for an order for particulars of negligence. The defendant maintained that it was entitled to know what negligence, if any, was alleged by the plaintiff. The action arose out of the crash of the defendant's aeroplane near Armstrong, Ontario. A general allegation of negligence was set out in the statement of claim and, evidently, the plaintiff relied on the doctrine *res ipsa loquitur*. Counsel for the defendant contended that the principle could not apply in this case because the aeroplane had been in flight for some hours before the accident happened. The Court, however, de-

clared that there was no difference in the application of the principle when an aeroplane was about to make a landing and when it was about to take off as in the case of *Fosbroke-Hobbes v. Airwork Ltd.*, (1937) 1 All E.R. 108, and accordingly it was held that the plaintiff in this present case should not be required to give particulars of negligence of which he knew nothing. This case would appear to indicate a further tendency on the part of the Canadian Courts to allow the claimants the rather liberal use of the doctrine. It will be remembered that the crew of three, and all passengers, were killed and the accident happened at night making observation difficult, to say the least.

*Malone v. Trans-Canada Air Lines*, went to trial before a jury in March, 1942, and the following are the questions submitted to and the answers given by the jury.

1. Q. Has the Defendant satisfied you that the accident was not caused by negligence on its part? A. No.

2. Q. Was there negligence on the part of the Defendant which caused or contributed to the cause of the accident? A. Yes.

3. Q. If so, in what did such negligence consist? Answer fully. A. The pilot made an error in judgment and brought the plane too low in his approach toward the runway causing the plane to hit the tree-tops and consequently crash.

On these answers the trial judge entered judgment for the plaintiff. It will have been noted that the first question appears to have been based on the assumption that the onus was on or had been shifted to the defendant, and that in any event by the answer to the second question negligence has been found by the jury on the part of the defendant. On review, the Court of Appeal for Ontario dismissed the appeal of the defendant.

#### *Aircraft Carriers Limiting Liability*

The original article said that "In Canada a carrier of passengers whether common or private can contract out of liability by apt words" (page 217). To the law there cited should be added the obita dicta of Montague J. in *Galer v. Wings Ltd.*, (supra) where he said, referring to the release on the face of the ticket, "The signing of this by the passenger is contemplated. If this, in fact, were a part of the contract, it would seem in my opinion to dispose of the plaintiff's action". The learned trial

judge then proceeded to point out that the release, however, had not been signed and to find that it had not been brought sufficiently to the attention of the plaintiff passenger.

Then came the case of *Ludditt v. Ginger Coote Airways Ltd.*, which raised the question of the effect of the Transport Act upon the terms of a contract purporting to limit liability.

In this case the plaintiffs booked passage on the defendant's aeroplane for a trip from Vancouver to Zeballos. The defendant had been granted a license under the Transport Act, 1938 (Can.), c. 53. The schedule provided for a tri-weekly service between Vancouver and Zeballos. Under the approved schedule and charges the passenger fare between those two points was \$25.00.

During the course of the trip a fire occurred on board the plane, forcing it to land on the surface of the water and, in consequence, the plaintiffs lost their baggage and were severely injured. It was found as a fact at the trial that the fire was due to the negligent operation of the plane.

The tickets issued to the plaintiffs were expressed to be subject to certain conditions, set out on the backs, to the effect that the defendant company should in no case be liable to the passenger for injury, loss or damage to person or property where the injury loss or damage was caused by negligence or default or misconduct by its agent, servants, or otherwise howsoever.

The argument for the plaintiffs (accepted by a trial judge for British Columbia, 1941, 3 D.L.R. 504, 2 W.W.R. 397, but reversed in the Court of Appeals for that province, 1942, 2 D.L.R. 29) was that as the fare between the two points had been established under the statutory regulations, the defendant could not attach conditions to the contract of carriage abolishing its liability, at least not without a new and valuable consideration.

In a comprehensive judgment on appeal McDonald J. A. (now Chief Justice (B.C.)), reached the conclusion that a common carrier has the right to contract out of liability and that this right is an ancient one which it required the intervention of the Legislature in England to set aside as was done by the Railway and Canal Traffic Act, 1854, c. 31, in the case of carriage of goods only. Sloan J.A. agreed in the result while McQuarrie J.A. dissented on the ground that the release was not binding on the respondents having regard to the implied warranty that the air-

craft was reasonably fit to encounter the ordinary perils of the flight, which it was not.

In spite of the Ludditt case the question cannot yet be considered settled, see Chitty on Contracts, 19th ed., p. 724. It is obviously unreasonable on the part of a carrier to ask a passenger paying full fare to exempt him from the consequences of the carrier's neglect or default and this has been recognized by the Courts in the case of carriers of goods, see *Peek v. North Staffordshire R. Co.*, 10 H.L., 473, per Lord Blackburn, p. 511, and 4 Hals. (2nd ed.), p. 42, note (d).

It may be noted that by s. 5 (1) (d) of the Transport Act (1938) the Board, in considering the application for a license to operate aircraft for reward, is authorized to consider, inter alia, the financial responsibility of the applicant, including adequate provision for the protection of the applicant, including adequate provision for the protection of passengers, shippers and the general public by means of insurance. Presumably, such insurance as is contemplated would indemnify the licensee against liability imposed by law in the same manner and to the same extent as a standard owner's automobile policy. Such an insurance coverage would not adequately protect the passenger where the licensee had contracted out of liability. Therefore, it would appear to follow that the Board may withhold an operating license from a carrier by aircraft who attempts to carry goods or passengers without accepting any risk.

The Ludditt case has gone to the Supreme Court of Canada. After hearing argument that court has reserved its judgment which judgment can be expected in the next several months.

Then, on April 2, 1942, Chief Justice Greenshields of the Supreme Court of the Province of Quebec handed down judgment in the cases of *Turgeon vs. Quebec Airways Ltd.*, and *Cote vs. Quebec Airways Ltd.*, tried jointly and as yet unreported in any law report. One Davidson, who was interested in certain timber limits in Labrador, contracted verbally with DeBlicquy, then general manager of the defendant company, for an aircraft to fly him and his forest engineer, one Cote, from Montreal to Northwest River, Labrador, and return. At the time the contract was made Davidson selected one of the defendant's aircraft and also named DeBlicquy and another pilot, Forrester, as the pilots. It was agreed that the aircraft would be equipped

with a portable radio to enable the pilot or passenger to communicate with a radio station in an emergency and also a ration box, sufficient to maintain the three men for two or three days in case of necessity.

The party started from Montreal about 1 p. m. on the 10th of September, 1939, with DeBlicquy at the controls. They reached Manicouagan near Baie Comeau, P. Q., about 4:15 p. m. on the same day. There is no record of what took place on the following day but on September 12, DeBlicquy for the first time informed Davidson and Cote that he was unable to continue the trip. Instead of arranging for Forrester to take over, DeBlicquy told them that the plane would be piloted by one Fecteau, who, DeBlicquy said, was familiar with the territory over which the flight was to be made and was a skilful and experienced pilot.

The plane left Manicouagan on the 12th of September piloted by Fecteau and proceeded to Moisie from which it departed at 2:30 p.m. after taking on 76 gallons of gas, to continue the trip to Northwest River, a distance of about 360 miles. That night the pilot landed on an unnamed lake 20 miles north of the Hamilton River. On the following morning the pilot started the plane about 8:30 a.m. but got lost, going too far north, and eventually turned east and landed on a large inlet of the north Atlantic Ocean about 120 miles off his course. The party spent the night of the 13th at this inlet and continued their flight about noon on the following day going south down the coast but the supply of gasoline failed and the pilot turned inland and landed on a lake approximately 117 miles north of the village of Northwest River. The events which took place after the plane left Manicouagan were recorded in the pilot's log book, written up by Fecteau, the first entry dated 31st of October, 1939, and in the official log book of the plane the last entry is under date of the 14th of September, 1939. There was no hint of bad flying weather. There were also various other documents under different dates, most damaging to the defendant's case which indicated that the plane had run out of gas and that the gasoline gauge had indicated gasoline in the tanks when there was none; that the radio was never of any use as it was out of repair. Production of these documents was objected to by defendant's counsel but was allowed in the case of Fecteau's writing on the ground that he continued to be in charge of the plane and his admissions were in the same class as those of a captain of a ship recorded in

the log, and the court found as a fact that the gasoline gauge was defective and that the radio was not a proper radio for the purpose for which it was carried. All three men died, as a result of their exposure, about the latter part of November or the early part of December, 1939 and the bodies were discovered in March, 1940. The widows of Turgeon and Cote sued the Airway line.

In addition to the allegations of negligence in respect of the faulty gasoline gauge and radio and that the defendant's pilot was incompetent and unfamiliar with the territory, it was alleged that although the safe arrival of the aircraft at Northwest River was to have been immediately reported by radio to the defendant's station at Manicouagan, the defendant company failed to send out search parties on being informed by Northwest River that the plane had not arrived until the 24th of September when bad weather, owing to the near approach of winter, hampered the search. In any event the searching parties did not cover the territory where the plane had come down as it was so far out of the course and the search was abandoned on the 20th of October, 1939.

The defense relied on a release contained in two tickets which DeBlicquy produced at Manicouagan. There was no suggestion of limitation of liability in the contract completed between the parties at Montreal and the court found that the tickets were either carried by DeBlicquy and never exhibited to Davidson or were made out by DeBlicquy and handed to Fecteau with instructions to have Davidson and Cote sign them and to witness their signatures. As a matter of fact Davidson and Cote both signed the tickets which contained the following condition: "I take all risks of every kind no matter how caused and I hereby absolutely release and discharge the company of and from all actions, causes of actions, claims and demands of every kind whatsoever which I or my heirs, executors, administrators or assigns, may now or may or can at any time hereafter have against the company for or on account of any loss, damage or injury to me, my person or property while so travelling, whether in or on any such aircraft or getting into or off or in or out such aircraft or in any manner in connection with or as a consequence of such journey or any delay therein by reason of such aircraft and whether any loss, damage or injury be caused by the negligence, fault or misconduct wilful or other-

wise, by the company, its agents or servants or otherwise howsoever."

Furthermore, the defense alleged that as the accident which caused the deaths occurred within the limits of the territory of Newfoundland the question of liability had to be determined by the laws of Newfoundland whereby it was claimed the plaintiffs were debarred from recovery on account of the release contained in the tickets.

However, the court held that the wrongful acts which brought about the deaths of the men were committed by the defendant and its employees in the Province of Quebec and it was, therefore, the law of Quebec which governed the rights of the plaintiff and the obligations of the defendant.

So far as the conditions contained in the tickets were concerned the court held that it was not called upon to decide whether these conditions would avail under the law of the Province of Quebec in any action that might have been taken by the contracting parties since the plaintiffs' actions were personal actions and in no way representative and any agreement or contract made by the deceased husbands could not under the law of Quebec avail as a defense.

This case serves to illustrate differences between the Quebec Civil Code and the common law. The decision is really a matter of interest rather than of authority for the common law provinces. Several points which arose in the case were resolved in a manner contrary to the ideas prevailing elsewhere in Canada. Reference may be made here particularly to:

The Judge's observations on the release contained in the tickets and its lack of effect in an action brought by the widows. In this connection, the judge is reported as saying "There is no doubt that the deceased, Davidson and Cote, both signed the so-called tickets containing the conditions above mentioned. Whether these conditions would avail under the Province of Quebec as a defense to any action which might be taken by the contracting parties, Davidson and Cote, I do not and I am not called upon to decide but what I do decide and hold is that they are not a defense to the action of the present plaintiffs. As has already been said the plaintiff's actions are personal actions and in no way representative and any agreement or contract made by the deceased husbands cannot avail as a defense to the plaintiffs'

actions." Furthermore, the court expressed the opinion that in regard to the contract made between the deceaseds and the defendant company at Montreal, as the plaintiffs were not parties they were not bound thereby, nevertheless "it might be that if the defendant violated that contract by doing something not covered by the contract but contrary to the terms of the contract or did something it ought not to have done under the terms of the contract which amounted to an act of commission or omission, amounting in law to a fault, it might, indeed, engage the liability of the defendant". In other words, for one purpose the defendant was bound but not for another.

The judge treated the whole case as a rising *ex delicto* for what the common lawyer would call a tort as distinct from contract. However, it would be a novel doctrine in the common law provinces to suggest that where there is a contract in existence the terms of that contract can be completely disregarded by a person who prefers to sue in tort rather than in contract.

Dealing with the terms of the contract made between the parties in Montreal the court held that when DeBlicquy informed the deceaseds that he did not intend to continue the trip they had no alternative but to take the pilot whom he nominated then or to return to Montreal. The judge did not deal with the question (and apparently taking the view he did it was not necessary to do so) whether a new contract was entered into between the parties at Manicouagan. It would seem as though there would be a lot of weight to such a contention. Undoubtedly the deceaseds, on the terms of their original contract, could have thrown up the trip and returned to Montreal and sued the defendant for breach of contract. They did not do so but chose to continue the trip and in that it might well be argued that there was a new contract between the parties and that the tickets evidencing such a contract were valid. If that view is correct then the very important question arises as to whether under Quebec law the deceaseds were bound by the release contained in the ticket. That point the court did not feel it necessary to decide although it did decide the almost equally important point, whether the immediate relatives of the deceaseds were bound by the conditions in favor of the plaintiffs. As we have already mentioned such a finding is not, in our opinion, in accordance with the law laid down in England and elsewhere in Canada.

*Conclusion*

It will already have been noted that Canada will shortly have the decision of the Supreme Court of Canada in the Ludditt case and in *Malone v. Trans-Canada* the defendant has intimated a present intention of appealing to that Court. It is also reasonable to expect that the Quebec Airways case will at least go to the Privincial Court of Appeal. Another action is also pending arising out of the same accident considered in *Galer v. Wings Ltd.*, based on the same and additional evidence. The trial has taken place and judgment is being awaited.