

Court File No.97-CV-135179A

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**PATRICK BERRY, JAMES DELUCE,
JEFFREY KARELSEN, ROBERT JAMES SIMERSON
and ERNEST ZURKAN**

Plaintiffs

-and-

**CHRIS PULLEY, TOM FRASER,
LARS T. JENSEN and JAMES GRIFFITH**

Defendants
(Plaintiff to Third
Party Claim)

-and-

MICHAEL LYNCH

Defendant to
Third Party Claim

DEFENCE TO THIRD PARTY CLAIM

A. POSITION OF THE THIRD PARTY

1. The third party admits the allegations contained in paragraphs **4 and 5** of the Third Party Claim.
2. The third party denies the allegations contained in paragraphs **1, 2, 3, 6, 7, 9, 11, 12, 13 and 14** of the Third Party Claim.
3. The third party has no knowledge of the allegations contained paragraph **8 and 10** of

B. THE PARTIES TO THE MAIN AND THIRD PARTY ACTIONS

i. The Plaintiffs

4. The plaintiffs in the Main Action are a class of all pilots employed by Air Ontario Inc., an 'Air Canada' regional carrier, who were members of the Canadian Air Line Pilots Association ("CALPA") on March 28, 1995. The pilots in the plaintiff class are now members of the Air Line Pilots Association ("ALPA") as a result of a merger between CALPA and ALPA on February 1, 1997.

ii. The Defendants

5. The defendants in the Main Action are a class of all pilots employed by Air Canada Inc. who were members of CALPA on March 28, 1995. On or about November 14, 1995, pursuant to the provisions in the *Canada Labour Code*, the defendants defected from CALPA and became members of CALPA's rival association, the Air Canada Pilots Association ("ACPA"). ACPA now represents the proposed defendant class in their relations with Air Canada.

iii. The Third Party

6. The Third Party, Captain Kent Hardisty, represents the members of ALPA.
7. ALPA is an unincorporated association with the primary purpose of representing airline pilots in collective bargaining with their employers.
8. Effective February 1, 1997, CALPA was merged into ALPA.

C. DEFENDANTS' CLAIM

9. The defendants claim that the third party is liable to indemnify them for any damages the Court may award to the plaintiffs in the main action.

10. The plaintiffs in the main action allege that the defendants are liable to them in tort as a result of certain actions that the defendants are alleged to have committed during the period March 1995 to November 1995.

D. CANADIAN AIR LINE PILOTS ASSOCIATION

i. General

14. Prior to February 1, 1997 the Canadian Air Lines Pilots Association (“CALPA”) was an unincorporated association whose primary purpose was the regulation of relations between pilots and certain employers.
15. Prior to November 14, 1995 CALPA was certified under the *Canada Labour Code*, R.S.C. 1985, c. L-2, as amended, to represent various bargaining units of pilots, including separate bargaining units at Air Canada and five “regional airlines” known as Air Nova, Air Alliance, Air Ontario, AirBC and NWT Air.
16. At all material times the CALPA Constitution, Amended January 1995 (the “Constitution”) and the CALPA Administrative Policy (the “Administrative Policy”) applied to all CALPA members including the plaintiffs and the defendants.

ii. Governing bodies

17. Under Article IV, Section 1(a) of the Constitution, Local Councils consisted of all active CALPA members who were employed by the same airline and based at the same location.
18. Under Article IV, Section 2, the Local Councils elect a Local Council Executive consisting of a Chairman, a number of Vice-Chairman and a number of Local Executive Councilmen.

19. The Constitution also provided for the existence of a Master Executive Council (“MEC”) where there existed a bargaining unit with more than one location and thus more than one Local Council. A Master Executive Council consisted of the Chairmen and Vice-Chairmen of each of the Local Councils relating to a particular airline.
20. Under the Constitution, each MEC was to have a Chairman elected by and from the members of the MEC, or by the members of the Local Council where necessary.
21. The Constitution further provided for the existence of a Board of Directors (the “Board”) consisting of the MEC Chairmen, certain officers, including the President, and regional directors elected at the time of CALPA’s biennial convention.
22. Pursuant to Article VI, Section 6 of the Constitution, the role of the President included planning, coordinating and controlling the affairs of CALPA, as well as, among other duties, signing all collective agreements, Letters of Understanding, contracts, deeds and all other legal documents in the name of the CALPA.

iii. CALPA’s Merger Policy

23. Section IV, Subsection A of the Administrative Policy, entitled “Mergers” (the Merger Policy”), provided a process for the integration of seniority lists when, in the opinion of CALPA’s President, there was a pending merger or consolidation between airlines with whom CALPA had bargaining rights.
24. Articles 3, 4 and 5 of the Merger Policy concerned a process to develop an integrated seniority list for a bargaining unit created as a result of the merger. The development of the list involved negotiations between representatives of each of the affected MECs, a process of mediation involving representatives of each of the affected MECs, the decision of an arbitrator after hearing representations from each affected MECs.

25. Article 7 of the Merger Policy, stated that CALPA was to accept the seniority list resulting from the processes described in Articles 3, 4 and/or 5 of the Merger Policy. Further, CALPA was to meet with the successor airline to the merged airlines, with the intent of negotiating the acceptance of the integrated seniority list by the successor airline.
- iv. ***CALPA Merger Process Relating to Air Canada and the Regional Airlines***
26. On March 1, 1991 CALPA's President, Captain Rob McInnis, declared a merger pursuant to the Merger Policy, relating to Air Canada and the Regional Airlines.
27. The merger representatives of the relevant pilot groups, appointed in accordance with Article 1(c) of the Merger Policy and accountable to their respective MECs, were unable to achieve an integrated seniority list pursuant to Articles 3 and 4 of the Merger Policy. The matter of the integrated seniority list was therefore arbitrated before Arbitrator Michel Picher pursuant to Article 5 of the Merger Policy.
28. On March 28, 1995 Arbitrator Picher issued an award setting out the basic rules under which a merged seniority list was to be constructed.
29. Following the issuance of the March 28, 1995 Picher award, CALPA's President proposed that Air Canada accept the concept of an integrated seniority list as part of a new collective agreement then being negotiated. Air Canada did not accept the proposal.
30. On November 7, 1995 Arbitrator Picher issued a subsequent award containing a final integrated seniority list. The award integrated the bottom 15% of the Air Canada seniority list with the seniority lists for all of the regional carriers.

31. By order of the Canada Labour Relations Board, dated November 14, 1995, ACPA was certified as the exclusive bargaining agent for pilots who were employed by Air Canada.

E. THE MAIN ACTION

i. The Plaintiffs' Claims

32. On November 4, 1997 the Plaintiffs in the Main Action commenced an action against the proposed class of Defendants claiming damages in the amount of \$300 000 000.00 for alleged breaches of contract. The Plaintiffs' Statement of Claim was amended on July 6, 1998 and further amended on October 29, 1998 to include allegations of conspiracy, unlawful interference with economic interests and interference with contractual relations.
33. In short, the Plaintiffs allege that the Defendants either refused to implement or failed to ensure the implementation of the Picher Award.
34. The Plaintiffs allege that after the release of the Picher Award on March 28, 1995, the Defendants set upon a course of conduct to obstruct the implementation of the award until November 14, 1995 when the Defendants, with the purpose of obstructing the implementation of the Award, defected from CALPA.

ii. The Defendants' Defence in the Main Action

35. The proposed class of defendants in the Main Action filed a Statement of Defence on November 19, 1997, an amended Statement of Defence on July 9, 1998, and a further Amended Statement of Defence on November 3, 1998.

36. The Defendants do not dispute the factual events as discussed above. Specifically, they do not dispute that they were dissatisfied with the Picher Award and took steps to obstruct its implementation, up to and including the eventual de-certification of CALPA.

F. THE THIRD PARTY CLAIM

37. On November 16, 1998, the Defendants filed a Third Party Action against Michael Lynch as a representative of a proposed class of persons consisting of all members of ALPA.
38. The Defendants filed the claim seeking indemnification from Michael Lynch, as a representative of the members of ALPA, in the event that the proposed Defendant class is found liable to the Plaintiffs for the alleged conspiracy, interference with economic interests and interference with contractual relations. The Defendants also seek indemnification for their legal costs of defending the Main Action.
39. The Defendants also claim that the Third Party is liable to indemnify the Defendants Pulley and Fraser, members of the Air Canada MEC, the Air Canada Merger Representatives and/or members of the Air Canada Negotiating Committee.
40. The Third Party's alleged involvement in this matter arises from the merger on February 1, 1997 of the predecessor trade union CALPA with ALPA. At all material times in respect of the events recited in the pleadings, CALPA and not ALPA was the trade union involved.

G. THE PROCEEDINGS THUS FAR

41. On or about April 21, 1998, the defendants filed a Motion for summary judgment seeking dismissal of the plaintiffs' claims. On June 4, 1999, the Court rendered a decision on the defendants' motion. The Court held that there was a genuine issue for trial with respect to the plaintiffs' claims in tort and dismissed the claims in contract. Both the plaintiffs and the defendants appealed the decision of Mr. Justice Winkler. The Ontario Court of Appeal, in a decision dated April 28, 2000, dismissed both of the appeals. The plaintiffs sought and were granted leave by the Supreme Court of Canada to appeal the decision of the Ontario Court of Appeal. Argument before the Supreme Court has not yet been scheduled.
42. The defendants filed a Third Party Claim against Michael Lynch as a representative defendant of the members of ALPA on March 16, 1998. The third party's motion to dismiss the defendants' claim was dismissed by decision of the Court dated April 6, 1999. On consent of the parties, by order of Mr. Justice Cumming, given orally on February 19, 2001, the defendants were granted a representation order pursuant to rule 12.07 of the *Rules of Civil Procedure*, naming Captain Michael Hardisty a representative of the members of the Air Line Pilots' Association.
43. By order of Mr. Justice Cumming, dated March 13, 2001, the Court granted the plaintiffs' motion, with certain conditions, for an order certifying both a defendant and plaintiff class with respect to the main action.

H. THE INDEMNIFICATION CLAUSE

44. Prior to the merger of CALPA with ALPA, CALPA's internal affairs were governed by the *Constitution and Administrative Policy*.
45. The *Constitution and Administrative Policy* was in force during the period March 28, 1995 to November 14, 1995, that is, from the issuance of the Picher Award until the de-certification of CALPA as the bargaining agent of the Air Canada Pilot group.
46. The indemnification clause upon which the Defendants rely is section 1(A)(4) of CALPA's Administrative Policy which reads as follows: (*paragraph numbers have been added for ease of identification*)

Liability of Association of Directors, Officers and Staff Members

1. The Association shall protect and hold harmless its President and designated officers and staff members from any legal liability arising from actions done in the course of their duties with the Association and shall defend them in any lawsuits therefrom.
2. Moreover, the Association shall provide individual written notification of such hold harmless undertakings to each of those designated directors, officers and staff members.
3. The Association shall further protect and hold harmless any other officer, member or employee from any legal liability to third parties arising from authorized and lawful actions done in good faith on behalf of the Association and within the scope of and in the course of his authorized duties with the Association.
4. The Association may, at its sole discretion provide part or all of this provision through liability insurance.
5. This protection shall not apply in the event of gross negligence or wilful misconduct or where alternative recourse is available, whether or not it is exercised.

47. The indemnification clause upon which the Defendants rely has a number of exceptions and exclusions to its application. These preclude the claim against the Third Party Defendant based on the factual allegations in the further amended Statement of Claim, all of which is discussed further below.

i. Paragraph 1 “President and designated officers and staff members”

48. Paragraph 1 of the indemnification clause restricts indemnification to “its President and designated officers and staff members”. It does not provide indemnification to CALPA members at large, and as such they are not covered under paragraph 1 of the indemnification clause.

49. The Defendants including, Fraser, the members of the Air Canada MEC, the Air Canada Merger Representatives and/or the members of the Air Canada Negotiating Team are also not covered under paragraph 1 of the indemnification clause as “President and designated officers and staff members.”

50. The *Constitution* of CALPA defines the directors and officers of the Association as follows:

Directors:

The Board of Directors shall consist of the President, who shall be the Chairman of the Board of Directors, the First Vice President, the Master Executive Council Chairmen, who shall be ex-officio vice presidents of the Association, the Vice President Finance and, in addition, one Director for each of the following regions:

Pacific – (British Columbia)

Western – (Alberta, Saskatchewan, Manitoba, Northwest Territories, Yukon)

Central Canada – (Ontario)

Eastern Canada – (Quebec and Atlantic Provinces)

51. Article 6, Section 2(a), page 20 CALPA Constitution

Officers:

The Officers of the Association, shall be the President, the First Vice President, the Vice President, Finance, the Vice Presidents (Master Executive Council Chairmen), and the Director(s).

52. Members of the Association, members of the Air Canada MEC, Air Canada Merger representatives, members of the Air Canada Negotiating Committee and members of Local Councils and Local Council Executives are not directors or officers of the association as defined in the CALPA Constitution. There is no suggestion in any of the pleadings and material filed that any of the Defendants was a staff member of CALPA.
53. Aside from the MEC Chairman, none of the other Directors or Officers of the Association are being sued on the basis of their former positions which they held within CALPA or in their capacities as representatives of CALPA.
54. Aside from the MEC Chairman, the Plaintiffs do not make any claim against the President, designated officers or staff of CALPA. The claim is against all pilots who were employed by Air Canada and who were members of CALPA on March 28, 1995.

ii. Paragraph 1 "in the course of their duties with the Association"

55. The alleged conduct for which the Defendants have been sued, including Pulley and Fraser, members of the Air Canada MEC, the Air Canada Merger representatives and/or members of the Air Canada Negotiating Committee that is the subject of the claim by the Plaintiffs or even the conduct asserted by the Defendants themselves in their Statement of Defence and Third Party claim was not "...in the course of their **duties** with the Association..." Insofar as the Defendants claim that their conduct was in the discharge of some concept of "duty" it is apparent that this amounts to conduct to themselves, not respecting any duty owed to CALPA.

56. In the past, CALPA gave limited effect to the Administrative Policy indemnification clause. For example, the clause was invoked when the President or an officer of CALPA had been sued or a claim was filed naming such person as a defendant or respondent because of action taken by such person in furtherance of the interests of CALPA. More precisely, the indemnification clause was triggered when a fair representation complainant named the President or an officer of CALPA as a party respondent to an allegation of unfair labour practice based on the *Canada Labour Code* statutory duty of fair representation by a trade union to the members in the particular bargaining unit represented by the trade union.
57. That the indemnification clause could be invoked to provide protection to CALPA member(s) for participating in their defection from CALPA, as is claimed in the instant Third Party Action, is completely inconsistent with and antithetical to the indemnification clause on a plain reading, and to its underlying policy objective.
58. CALPA's policy objective in creating the Administrative Policy respecting indemnification was to encourage CALPA members to seek leadership positions in CALPA –as officers and staff – not unlike director's liability insurance –by ensuring that they would be indemnified for their actions as officers and/or staff members on behalf of CALPA “...*arising from action done in the course of their duties with the Association...*” That is why the indemnification provision includes the promise to “defend them in any lawsuits arising therefrom” that is, “*from action done in the course of their duties with the Association.*”

59. An officer's duties to the Association as outlined in the CALPA *Constitution* Article VI, Section 6(e) for example, with respect to a Chair of a Master Executive Council:

The Chairman of a Master Executive Council shall

(iv) be responsible for the implementation and administration of the policies of the Association as they pertain to his Master Executive Council; ...

(vii) be the Association's representative to the airline for the purpose of implementing the objectives and policies of the Association

60. The alleged improper conduct of the Defendants (in refusing to implement the Picher Award) was not and could not have been in the discharge of any duty to CALPA.
61. It was in fact the duty of any person to whom the indemnification clause, would apply, to ensure the implementation of the Picher award.
62. The conduct of the Defendants reflected their own interests in avoiding the effect of the Picher Award, not the interests of CALPA. When those efforts did not succeed, the action of the Defendants was to engineer and support the de-certification of CALPA as the Defendants' bargaining agent and the emergence of the newly certified ACPA on November 14, 1995 committed to oppose CALPA and any seniority integration.
63. It is a complete misconstruction of their duties for the Defendants to believe that the alleged improper conduct in refusing to implement the Picher Award and participating in the de-certification of CALPA was done in good faith as part of their duties to the Association.

iii. Paragraph 1 "and shall defend them"

64. The terms of the indemnification clause when invoked require that the Association protect and hold harmless and "***shall defend***" its President and designated officers and staff members.

iv. Paragraph 2 “shall provide individual written notification”

65. Paragraph 2 of the indemnification clause states that the Association “**shall provide individual written notification** of such hold harmless undertakings to each of these designated directors, officers and staff members.”
66. Individual written notifications of hold harmless undertakings have never been provided to any person. None of the Defendants has ever received individual written notification of hold harmless undertakings.

v. Paragraph 3

67. Paragraph 3 of the indemnification clause provides protection to “any other” officer, member or employee in respect of liability “to third parties from authorized and lawful action done in good faith on behalf of the Association and within the scope of and in the course of his authorized duties with the Association.”

vi. Paragraph 3 “third parties”

68. The Defendants are seeking indemnification for a claim which is brought by CALPA members, namely Air Ontario and regional carrier pilots who are members of CALPA (now ALPA). The Plaintiffs are not “third parties” within the meaning of or for the purposes of paragraph 3 of the Administrative Policy.

vii. Paragraph 3 “authorized”

69. At no time were the Defendants authorized by CALPA to refuse to implement the Picher Award, nor were they authorized to form ACPA and defect from CALPA with the purpose of obstructing the implementation of the Picher Award.

70. The vast majority of the proposed Defendant class did not have any authorized duties with CALPA and those who may have had some duties engaged in conduct which was not within the scope of and in the course of their authorized duties.

viii. Paragraph 3 “actions done in good faith on behalf of the Association”

71. The conduct of the Defendants which arguably might result in liability to the Plaintiffs is their opposition to the Picher Award, their opposition to any form of seniority integration, their defection from CALPA and their support for and their formation of a rival association, ACPA. These actions were not within the scope of their duties to CALPA.

I. IMPLIED TERM OF THE CALPA CONSTITUTION

72. There is no implied term of the CALPA Constitution which provides that any judgment obtained as a result of a private action against a member of CALPA resulting from group action by a CALPA bargaining unit on matters related to collective bargaining, is capable of execution only against the property and assets of CALPA.

73. In any event, the proposed Defendant class is not being sued on matters relating to collective bargaining. The Main Action is founded on the Defendants' actions in not giving effect to or seeking to implement the Picher Award, and then leaving CALPA to insulate Air Canada CALPA pilots from the Picher Award.

J. SUMMARY OF THE THIRD PARTY'S POSITION

74. The third party denies that the defendants, or any of them, are entitled to claim indemnification under the *Administrative Policy*, should the Court determine that the defendants, or any of them, are liable to the plaintiffs, on the basis that in such

eventuality the defendants would not have been acting within the scope of their duties as members or officers of CALPA. As such the clause does not apply to them. Further, those members who are found liable to the plaintiff class were not performing functions which are encompassed in the scope of the indemnity clause. As such, the clause does not apply to them.

K. RELIEF SOUGHT BY THE THIRD PARTY

75. The third party seeks to have the Third Party Claim dismissed with costs on a solicitor and client basis.

Date: **May 2, 2001**

Shell Jacobs Lawyers
Barristers and Solicitors
672 Dupont Street, Suite 401
Toronto, Ontario
M6G 1Z6

Brian Shell
Tel: (416) 539-0226 Ext. 201
Fax: (416) 539-0380
LSUC No. 19595S 1A
Solicitor for the Third Party

Barry Wadsworth
Tel: (416) 539-0226 Ext. 211
Fax: (416) 539-0380
LSUC No. 42985H
Solicitor for the Third Party

TO: BORDEN LADNER GERVAIS
Barristers & Solicitors
40 King Street W.
Scotia Plaza
Toronto, ON M5H 3Y4

Frank J.C. Newbould, Q.C.
LSUC 11398R15 IB
Tel: (416) 367-6026
Fax: (416) 361-2729
Solicitor for the Plaintiffs

AND TO: NELLIGAN POWER
Barristers and Solicitors
1900-66 Slater Street
Ottawa, ON K1P 5H1

Dougald Brown
LSUC 0223434T
Tel: (613) 238-8080
FAX: (613) 238-2098
Solicitor for the Defendants
(Third Party Claimants)

**ATRICK BERRY, JAMES DELUCE,
EFFREY KARELSEN, ROBERT
AMES SIMERSON
and ERNEST ZURKAN**
(Plaintiffs)

and

**CHRIS PULLEY, TOM FRASER
LARS T. JENSEN and JAMES GRIFFITH**

(Defendants, Third Party Claimants)

MICHAEL LYNCH
(Third Party)

Court File No. 97-CV-135179A

SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

**DEFENCE TO THE THIRD PARTY CLAIM
BY THE THIRD PARTY MICHAEL LYNCH**

SHELL JACOBS LAWYERS

672 Dupont Street, Suite 401
Toronto, ON
M6G 1Z6

Tel: (416) 539-0226 ext.201

Fax: (416) 539-0565

Attention: Brian Shell
LSUC#: 19695S

Solicitor for the Third Party