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## The Last Flight of Norseman CF-AZE

HELEN NORDWALL

Fred Ludditt is a sixty-four-year-old British Columbia miner of whom few have ever heard; nor would they be likely to. He was born in England in 1907 and his family came to Canada when he was two years old. His father was a stonemason and, like many other immigrants in the early 1900s, joined Sir Clifford Sifton's great surge west to the prairies settling in Regina. In 1926, as a youth of nineteen, Fred left his family and headed for the mines of British Columbia, where he has been mining and prospecting ever since.

The incident which sparks this particular story occurred in November 1940, when Ludditt was returning to a mining job at Zeballos on the west coast of Vancouver Island. There had been an important gold strike at Zeballos in 1936, and he had joined the rush. Within three years this remote, sparsely populated community had grown to a town of 1000. Ludditt worked for Privateer Mine, one of the first and richest strikes in the area, producing between 1936 and 1945 \$13 million in gold. In 1913, the CPR *Princess Maquinna* was the main link for tiny fishing, logging, and Indian villages along the west coast of Vancouver Island with Victoria and the mainland. And she maintained her three-trip-a-month schedule for more than forty years before being retired from service. But with the increased logging and mining activity, a pioneer BC airline, Ginger Coote Airways Limited, backed by the Gibson Brothers, obtained a license in 1939 to provide a tri-weekly service to the west coast of the Island. Ginger Coote took over a substantial portion of the *Maquinna's* passenger traffic.

Fred Ludditt had made many flights back and forth between Vancouver and Zeballos by Ginger Coote by 1941. He took for granted the convenience and economy of air travel and was not nervous flying in the small Norseman and Waco float planes used in these early days of commercial flying on the BC coast. He also knew that when he bought his air ticket he had to sign some "special conditions" on the back of it which released the company from responsibility. At some time he had undoubtedly read these conditions and, like the other passengers, understood what they meant, but people have a way of mentally opting out of the unpleasant

realities of life; personal disasters happen every day, but until they actually relate to us, they are only abstractions. The only thought in Fred Ludditt's mind on November 29, 1940, was that a holiday was over and he was anxious to get back to work as quickly as possible. His signing the ticket was merely routine procedure, but the flight of Norseman CF-AZE on that day turned out to be anything but routine, and over the next seven years it was to cost this Zeballos miner a great deal more than the \$25 he had paid for his ticket.

The pilot and six male passengers left Nanaimo for Tofino and Zeballos. Fifteen minutes after takeoff a defective heating unit caused the fabric of the plane to catch fire and to spread rapidly. The pilot concentrated on getting the plane down, while Ludditt and two other passengers worked frantically to prevent the spread of the fire. No one could locate a fire extinguisher, which was later found to be empty in any case. The three men stuffed articles of clothing against the fabric of the plane in an attempt to smother the fire, but small wisps of burning fabric kept blowing into the cabin and setting things alight all over. Although it took only a few minutes for the pilot to bring the plane down, by the time it hit the water most of the fabric had burned off, exposing the metal framework. The pilot gunned the plane for shore where it hit with such impact that he and another passenger were thrown out. The passengers panicked as they struggled to get out of the burning plane, and Ludditt, seeing water below him, dived in. Still dazed with fright, he had not realized where the plane was and had dived into eighteen inches of water, striking his head so severely that he damaged his collarbone.

All six passengers gathered on the shore and watched flames engulf the plane. At this point, Ludditt asked the pilot about their baggage but was warned not to go near the plane, because the gas tanks could explode. He was also told not to worry anyway, because it was all covered by insurance.

A small plane which had been flying near the Norseman when it caught fire came to their assistance. Fred Ludditt and the two other injured passengers, Bill Parker and Jack Steeves, were taken on board and taxied to Nanaimo Hospital. The other uninjured passengers were later returned to Vancouver and put in a hotel at the airline company's expense. The following day they were told to go to Arnold & Quigley, a Vancouver men's outfitter, and replace their lost belongings at the company's expense, which they did. They were subsequently put on another aircraft and safely transported to their original destination.<sup>1</sup>

Meanwhile the three injured passengers were in Nanaimo Hospital. They had been assured by the pilot at the time of the accident that their medical expenses would be taken care of, and when they got to Vancouver they

<sup>1</sup>Interview with Ludditt, January 19, 1969.

were to contact the company. Steeves suffered least injury of the three and was released December 7, Ludditt not until December 29, exactly one month after the accident, while Parker was in hospital until February 2, 1941. All of them had lost their jobs, personal clothing, and baggage; they had all suffered great pain and were left with permanent scars; all of them required continuing medical attention after they were released from hospital. The clothing they had been wearing at the time of the accident had been disposed of by hospital officials, and to enable them to leave they had to have clothing sent to them by relatives.

Early in January Fred Ludditt called at the company's airport office to enquire about his belongings. He was shown a large garbage can, which contained the charred remains of items salvaged from the plane, outside the back door of the office. He recovered his birth certificate and a few other such items, but nothing else was in usable condition. He was told he would have to make a list of the items lost, but on presentation of this list a few days later, he was informed by company officials that he should see a lawyer, as his claim would have to be settled in court. This came as a shock to Ludditt, since he knew, from personal contact, that the uninjured passengers had had their belongings replaced. Apparently the company had reversed its policy in the interval.

Two things made legal aid difficult to obtain: lack of funds for the customary deposit fee, and the fact that on the very day of the accident, Ginger Coote Airways Limited had been sold to the CPR with the result that many lawyers shied away from the case. They felt that their client would have little chance of success against such a powerful adversary as the CPR, and, as it turned out, Ludditt would have done well to heed this advice. However, he finally found a lawyer, who was willing to take the case, Paul Murphy of Murphy & Murphy, and to avoid duplication of expense, Ludditt, Parker, and Steeves consolidated their claim. The case was prepared and the Examination for Discovery held in March 1941. As yet, none of the three was physically able to return to work.

On May 18, 1941, the trial was called in the Supreme Court of British Columbia, the Hon. Mr. Justice Sidney Smith presiding. At the trial, the airline company's negligence was established by the fact that the heating unit had been defective, fire extinguishers were not readily available, and when one was later located by Department of Transport Officials in the baggage compartment, it was found to be empty. The company's main defence was that each of the plaintiffs had signed a liability release clause on the back of the ticket issued to them which stated:

**THIS TICKET IS EXPRESSLY SUBJECT TO CONDITIONS BELOW  
LIABILITY RELEASE**

In consideration of the Ginger Coote Airways Ltd. of Vancouver, B.C., permitting me, at my own risk against all casualties to fly as a passenger in any

aircraft owned or operated by the said Ginger Coote Airways Ltd., that such flight is, and shall be at my own risk against all casualties to myself or my property and that I take all risk of every kind, no matter how caused, and I hereby release and discharge the Ginger Coote Airways Ltd. and indemnify it of and from all actions, claims, and demands of every nature and kind whatsoever, which I, or my heirs, executors, administrators or assigns may now, or may or can or on account of any loss, damage or injury to me, my person or property to or from, into or off, or in or out thereof; or in any manner in connection with or in consequence of such flights and whether any such loss, damage or injury be caused by negligence, default or misconduct of the Ginger Coote Airways Ltd. itself, servants, agents or members, or otherwise howsoever.

It is further agreed that Ginger Coote Airways Ltd. is not bound to carry any passenger or baggage except when space is available nor shall it be liable for any delay or detention of any passenger or baggage for any reason whatsoever. Ginger Coote Airways Ltd. may refuse to commence or complete any flight whatsoever for any reason without any liability.

Thirty-five (35) pounds of baggage only per passenger shall be carried free; any excess subject to charge at the Company's rates.

I hereby acknowledge having read and agreed to the above conditions.

(signed) FRED LUDDITT

Witness: M. FANE

(Passenger Signature)<sup>2</sup>

It was further pointed out by defence lawyer, C. W. Tysoe, that the company's Regulations for Carriage, filed with the Board of Transport Commissioners August 28, 1939, stated under part I, in a section relating to liability, that "these rules and regulations cover transportation over the routes of Ginger Coote Airways Ltd. in accordance with the terms and conditions of the company's passenger tickets," and that the company's passenger tickets relieved it of any or all responsibility.<sup>3</sup>

The trial judge, however, found that "there was no evidence . . . these actual terms and conditions were ever placed before the Board of Transport Commissioners. Moreover, even if they were I think that such Board under its general authority to make rules and regulations conferred upon it by Section 33 of the Act has no power to abolish liability for negligence."<sup>4</sup> He found for the plaintiffs, basing his judgment on an English Court of Appeal case, *Clarke v. West Ham Corpn.* (1909), in which it was established that a common carrier could not contract out of its liability without giving passengers the option of travelling at a higher rate without limitation of the company's liability: "The carrier is bound to carry any passenger who tenders the maximum rate; he cannot escape from this liability by alleging his willingness to carry on other terms not accepted by the passenger and he cannot force such terms on the passenger by refusing to

<sup>2</sup>Actual passenger ticket still in the possession of F. Ludditt.

<sup>3</sup>*Record of Proceedings*. Appeal Book to the Privy Council, prepared by Paul D. Murphy (Atlas Printers, Exhibit No. 19), p. 112.

<sup>4</sup>*Ibid.*, p. 54.

carry on any other.”<sup>5</sup> The only passenger tariff filed with the Board of Transport Commissioners by Ginger Coote Airways covering service to points on the west coast of Vancouver Island cited the fare to Zeballos as \$25. However, when a passenger purchased a ticket, he found that a limitation of liability was attached to this fare, of which he had not previously been aware, and the company was unwilling to transport him at any other fare without release of liability.

Damages awarded to the plaintiffs totalled \$10,407.77, and were distributed amongst the three men:

As to damages, the Plaintiff Parker was the most seriously injured. . . . I allow him damages as follows –

Special damages: (Loss of belongings	\$ 215.00
Special damages: (Doctor and hospital bills, etc.	545.77
General damages:	\$5,000.00

The Plaintiff Ludditt was also seriously injured. . . . I allow him damages as follows –

Special damages: (Loss of belongings	\$ 200.00
Special damages: (Doctor and hospital bills, etc.	438.00
General damages:	\$3,000.00

The Plaintiff Steeves suffered the least injuries. . . . I allow him damages as follows –

Special damages: (Loss of belongings	\$105.00
Special damages: (Doctor and hospital bills, etc.	104.00
General damages:	\$800.00

There will be judgment accordingly. The Plaintiffs are entitled to their costs.

Vancouver, B.C.

SIDNEY SMITH

June 25, 1941.

J.<sup>6</sup>

By July 7, Ginger Coote had filed an appeal to the Court of Appeal for British Columbia. All three plaintiffs had been satisfied with the judgment, but none of them was in a position to finance further legal proceedings in order to uphold that judgment. They had all been out of work since the accident, and Parker was faced with changing his profession entirely because of the effects of the accident. At a meeting in Murphy's office, however, they agreed to fight the appeal, despite the financial hardships. (Ludditt returned to a job with Privateer at Zeballos, this time via Canadian Airways, a competitive company which also insisted on a liability release. This time Ludditt refused to sign and the pilot would not accept him as a passenger. Ludditt telephoned from the airport to Paul Murphy, who told him to go ahead and sign the release and make his flight, since the chances of his being involved in another accident were so remote.) Late in July 1941 Murphy wrote to Ludditt at Zeballos outlining the procedure for the appeal and estimating a cost of \$150 for the preparation of the

<sup>5</sup>*Ibid.*

<sup>6</sup>*Ibid.*, pp. 54-5.

factum. He added: "We would also be glad to hear what kind of a job you have . . . . Steeves has lined up a job and Parker has a chance to receive training in an engineering branch which would later place him in a job in connection with aeroplane construction, which is a very lucky thing for him."

By October 5 Ludditt managed to raise his \$50 share of the legal costs. Bill Parker had already paid his \$50, but according to a letter of October 14 from Murphy to Ludditt, Steeves still owed \$40. In any case the appeal was heard in the Supreme Court January 13, 1942, with three judges presiding. Judgment was split, 2 judges to 1 in favour of the company and its liability release, and the original judgment of Sidney Smith was set aside, with costs awarded to the company.

The main reasons for reversal of the trial judge's decision were that, in the opinion of the Hon. Mr. Justice McDonald, the case upon which Smith had based his judgment – *Clark v. West Ham Corpn.* – constituted "bad law."<sup>7</sup> As far as he was concerned, the overriding factor was that a release had been signed and that the passengers were aware of the conditions under which they were travelling: "The Plaintiffs recovered fairly large damages but neither the quantum of damages nor the negligence is questioned in this appeal. The defendants' whole case here is as it was below, that the action was barred by special contract. . . ."<sup>8</sup> He made much of the point that the Transport Act of 1938 required that a licensee file a "Standard Tariff," which was a maximum rate. But there was nothing in the Act which required it to be unconditional, and he further emphasized that there was provision under section 20 of the Act for the filing of a "Special Tariff," which specifies a toll lower than the Standard Tariff. He pointed out that the tariff filed by Ginger Coote was clearly headed "Special Passenger & Goods Tariff," but he failed to deal with the fact that no "Standard Tariff" had been filed with the Board, or that if such a tariff did in fact exist, it had never been offered to the travelling public. McDonald leaned heavily on the Privy Council decision in *Grand Trunk Railway of Canada v. Robinson (1915)*, A.C. 740:

. . . The only right to be carried will be one which arises under the terms of the contract itself, and these terms must be accepted in their entirety. The company owes the passenger no duty which the contract is expressed on the face of it to exclude, and if he has approbated that contract by travelling under it he cannot afterwards reprobate it by claiming a right inconsistent with it, for the only footing on which he has been accepted as a passenger is simply that which the contract has defined.<sup>9</sup>

Again the Judge did not comment on the essential difference in the Grand

<sup>7</sup>*Ibid.*, p. 65.

<sup>8</sup>*Ibid.*, p. 61.

<sup>9</sup>*Ibid.*, p. 69; quoted from p. 748 of original decision.

Trunk case, where there had in fact been a concession in fare to justify the limitation of the company's liability.

The Hon. Mr. Justice Sloan concurred with Mr. Justice McDonald's decision, on the basis that he "could find nothing in the common law to prevent a consignor of goods and a common carrier from entering into special contracts in relation to the carrier's liability therefor, nor to limit the right of the carrier to carry his passengers upon such conditions as he might impose and they would accept."<sup>10</sup> Mr. Justice McQuarrie opposed the appeal on the grounds that the passengers had signed the liability release on the assumption that the aircraft would be mechanically sound and not a ". . . veritable death trap as disclosed by the particulars set out in said paragraph 7":<sup>11</sup> "I think it will be taken for granted that any person not mentally deficient, intending to make an air journey, who knew enough of the true condition of the plane would not have considered for a moment travelling in it and certainly would not have signed the said conditions."<sup>12</sup>

McQuarrie dealt extensively with the newness of air transportation and the absence of adequate legislation to deal with all its aspects:

It is well known that certain distinguished pioneers in air navigation . . . with more experience in flying than in business or commercial matters, embarked on the idea of organizing air lines in many parts of Canada without the funds necessary for such a venture, and more or less on a shoestring basis, and on the strength of their reputations were allowed to carry on in air transportation of the general public.<sup>13</sup>

He expanded on the capital cost of planes and the fact that many small airlines were operating equipment which was neither suitable nor safe. He concluded with the mildest of understatements: "It is fortunate that the control of such public utility companies has been given over to the Board of Transport Commissioners, but it may be that the Transport Act, together with the regulations and orders of the Board, require some checking up and strengthening."<sup>14</sup>

With the granting of the Appeal, the three men, instead of compensation for their losses, were now faced with heavy legal costs. At this point, four judges had heard the case and their judgments were split two in favour and two against. By February 1942, largely at Murphy's urging, they had decided to appeal the case to the Supreme Court of Canada, and Ludditt, Parker, and Steeves were busy trying to raise funds to meet the required costs. They borrowed from relatives and friends and took

<sup>10</sup>*Ibid.*, p. 71.

<sup>11</sup>*Ibid.*, p. 74.

<sup>12</sup>*Ibid.*, p. 75.

<sup>13</sup>*Ibid.*

<sup>14</sup>*Ibid.*, p. 75.

out loans from banks and finance houses, against which Ludditt assigned half his pay each month. The immediate need was \$500 Security into Court and an estimated \$300 for printing of the appeal books. Additionally, Murphy decided that he should go to Ottawa personally when the case came up, and it is interesting, thirty years later, to note his comments concerning personal expenses:

You will notice there is one change in the figures from the last statement I sent you, and that is, on the question of travelling expenses. I have reserved a return ticket and berth both ways to Ottawa, and have to pay \$184.10 for same. The balance of the money (\$65.90), of course, represents meals, etc., and that I will have to spend. I don't think I have overdone this estimate, because I will be away three weeks altogether, depending upon how long the argument lasts. I think you will agree that the estimate of travelling expenses of \$250.00 is conservative. As I told you before, I hope to stay with friends, so as to save hotel bills, which I understand are ferocious in Ottawa at the present time.<sup>15</sup>

The case came before the Supreme Court on May 5 and lasted for three days. Ginger Coote was represented by C. W. Tysoe (now the Hon. Mr. Justice Tysoe). Murphy, in a letter to Ludditt of May 14, 1942, commented: "I argued for a little less than two days, and Tysoe for a little more than two hours. He just read his points from his factum and told them on what pages they were developed. It seemed rather a waste of time for him to go all the way down to Ottawa to do that, but the fact that this was his first appearance before them might have had something to do with it."

First appearance or no, Tysoe's two-hour argument must have had its impact, because judgment was again in favour of the company. But again the decision was split by only one vote. Five Supreme Court judges had heard the case; three favoured dismissal of the appeal, whereas two would have allowed it and reinstated the trial judge's decision. Again there had been considerable variation of opinion and interpretation of the main points by the five judges. The Hon. Mr. Justice Rinfret and the Hon. Mr. Justice Kerwin placed opposing interpretations on the Special Passenger & Goods Tariff which had been filed with the Board of Transport Commissioners. Rinfret held that it was perfectly acceptable under the provisions of the Transport Act and since it specifically referred to "conditions printed on the company's passenger tickets," then it had to be assumed that the Board was aware of what the conditions were, even although they did not specifically appear in the Tariff.<sup>16</sup>

Kerwin, on the other hand, pointed out that clause 6 (e) of the Board of Transport Commissioners' General Order no. 580, required "all rules and regulations which govern the tariff(s) shall be stated in clear and

<sup>15</sup>P. Murphy to F. Ludditt, April 11, 1942, in Mr. Ludditt's possession.

<sup>16</sup>*Record of Proceedings*, p. 79.

explicit terms so as to leave no doubt as to their proper application.”<sup>17</sup> Since this was not done, the conditions of the tickets were illegal.

The Supreme Court’s decision was a bitter disappointment to Ludditt and the others, and probably most of all to Paul Murphy who, by this point, seemed to have taken up this case a personal crusade. The real frustration was that they were being so narrowly defeated. Nine judges had now heard the case and the decisions were split 5 to 4. They were all so far out of pocket by this time that it was no longer a fight to recover financial losses; they were convinced that a principle of justice was at stake. This case was establishing a precedent, and it was imperative that it be decided in their favour, if only for the future protection of the air travelling public. Again they met in Murphy’s office and unanimously decided to apply to the Judicial Committee of the Privy Council in London for special leave to appeal the decision of the Supreme Court of Canada.

English law is considerably more complicated than “colonial law,” as it was then termed. In Canada, it is only necessary to engage the services of a lawyer, who does all the preparation and presentation of the case in court – even to federal Supreme Court level. In England, one must have a solicitor, a king’s counsel, and a barrister. Accordingly, Murphy located a legal firm in Liverpool to act as his agents, and they in turn obtained the services of a firm of solicitors in London, who engaged Mr. D. N. Pritt, KC, MP, as chief counsel, and Mr. K. Diplock as his “learned junior.”<sup>18</sup> All negotiations with Pritt had to be conducted through his clerk. In a letter to Paul Murphy of May 16, 1944, the Liverpool agents informed him that Security into Court of 400 pounds was required, and that Pritt’s fee, after a great deal of haggling, would be 200 guineas; Mr. Diplock’s would be 133 guineas. It was decided that the preparation and printing of appeal books would be done in Canada, and the rules to be followed were forwarded to Murphy by his British agents.

On May 4, 1944, the petition for Special Leave to Appeal was placed before five members of the Judicial Committee of the Privy Council in the British House of Lords. The case for the petitioners was prepared by Diplock and presented to the Committee by Pritt. Pritt’s main point was that where a franchise is granted a company to carry passengers “the normal law – I do not think I need put it any higher than that – lays upon them the obligation when they do carry, to carry safely.”<sup>19</sup> To which Lord MacMillan replied:

There is no doubt that there is a question worth trying here, and an important question. . . . The Defendants have won by one. . . . The main question, whether you are entitled to contract out your negligence and liabilities,

<sup>17</sup>*Ibid.*, p. 88-9.

<sup>18</sup>Privy Council, *Record of Petition for Special Leave to Appeal*, London, May 4, 1944.

<sup>19</sup>*Ibid.*

is the important point. I should have thought the Defendants themselves would have wished for authority . . . it is left in a very unsatisfactory position.<sup>20</sup>

Mr. H. G. Robertson, acting for Ginger Coote, interposed:

My Lords, in my submission your Lordships should not grant this Petition, having regard to the rule which was laid down by your Lordships in the case of *Clergue v. Murray* (1903) AC521. This is an appeal from the Supreme Court of Canada and the parties have the option of going to one Court or the other. . . .<sup>21</sup>

Lord Wright commented that there was no binding rule and it was up to the Committee to use its discretion. Viscount Maugham then announced that "their Lordships are of the opinion in this somewhat special case that leave to appeal should be granted in the usual terms, and will humbly advise His Majesty accordingly."<sup>22</sup>

An enthusiastic Murphy wrote to Fred Ludditt on May 8, after he received a cable from England that the application to appeal had been accepted: "It may be that Tysoe will make us an offer or if we make him an offer he may accept it. As you know the position now is that the Privy Council has heard the Application and decided we have a case that should be heard before them. We are, therefore, in a strong position and we should take advantage of it at once." However, Ludditt's enthusiasm had apparently been waning in the face of astronomical costs, because, on June 9, Murphy again wrote to him:

I have just been speaking to Mrs. Scobee [Ludditt's employer] and she told me that you advised her that you did not wish to go ahead with the Privy Council Hearing. I thought there must be some mistake about the matter and am, therefore, writing you in connection with it.

I saw Bill yesterday and he has arranged his \$500.00. I am doing everything possible to reduce the amount that we have to put up but as the two letters that I am enclosing indicate, we must get the printing done immediately and deposit the security of 400 pounds. We may be able to save something on the Counsel fees but I am not sure of this yet. I am quite sure that Mrs. Scobee is willing to advance you \$500.00 on the security of your signature and mine to start repaying it for, at least three months from now. I am quite sure you do not wish to abandon this business now when everything looks so favourable. You can see from the letters enclosed how favourable it does look. As you know, I have spent my own money in helping you on this case and I am sure you do not wish to abandon the whole thing and have me draw up a bill against you and try to collect it.

It seems from this letter that Paul Murphy was so deeply involved financially in this case that he had no alternative but to proceed with it, or perhaps he was just convinced of the rightness of it and his ultimate ability

<sup>20</sup>*Ibid.*, p. 2.

<sup>21</sup>*Ibid.*, p. 3.

<sup>22</sup>*Ibid.*, p. 4.

to carry it off. In any event, the fact that the Privy Council had agreed to hear it was certainly a valid reason for optimism.

On July 19 Murphy again wrote to Ludditt, who was then in Creston, BC, and as usual, he was pressing for money:

I was very glad to hear that you expect to be in Vancouver about the 25th of this month. If there is anything you can do there to raise the money, please do it before you come in. Our deadline is about the end of this month to raise the amount. Bill has got his together and I have written Jack Steeves asking him to send us \$200.00 in cash and advising him that we will all have to sign notes for the balance.

In 1944 the exchange rate on the pound sterling was approximately \$4.25, so the Security into Court amounted to roughly \$1300. In addition, a deposit of approximately \$1500 had to be cabled to England against their own counsel's fees. One way and another, the men managed to raise the money, and on March 8, 1945, it was cabled to their English solicitors.

But apparently the wheels of British justice turn almost imperceptibly, if at all, because it took nearly two years after the money had been sent, for the case to come up. In October 1946 Murphy informed Ludditt, who was now in Barkerville, that he had made arrangements to fly to London as he had received a cable that the case would be coming up on November 1. He added: "The round fare cost me \$1,069.60 and I will require something for expenses while in London. I have written Bill and asked him to send me \$250 and I thought probably you could raise the same amount and sent it to me." And then on October 18:

We were almost put off again for this Sitting, but I phoned Mr. Pritt in London and received a very unsatisfactory reply and I then spent \$45.00 on a cable to a Vancouver lawyer, who is in London attending the Privy Council on a case that started long after ours did and he had our Case restored to the present list. I am advised by him that it is going to be on about the first of November.

I am therefore going to England, at my own expense and with Bill's assistance, to make sure that your interests and Bill's and mine are adequately protected. I am sure that you appreciate that this involves considerable personal sacrifice.

Paul Murphy flew to London, only to run into difficulties there with his counsel. Two years had passed since the agreement on costs had been reached, but apparently these arrangements were no longer acceptable to Pritt. In utter frustration, Murphy wrote to Pritt from the Strand Palace Hotel:

November 6th, 1944

DEAR MR. PRITT:

I wish in the first place to tell you that I am acting for a group of poor men in the *Ludditt versus Ginger Coote* case. As the result of that fact - and as

soon as special leave was granted in our case – I asked my Agents to find out what you would charge for arguing the appeal itself.

May I quote from my Agents' letter of May 12th, 1944 – 'Mr. Pritt's clerk at first said he would take 300 guineas but finally said he would take 200 guineas.'

It was also pointed out that you would require one refresher of 50 guineas presuming the case lasted two days. Since receiving that letter my Agents confirmed the information on November 2nd, 1944. Up to Monday afternoon last, I had not been advised of any change in this matter, but then I received a letter from my Agents saying that your clerk insisted that you receive 350 guineas. I arrived in London on Sunday, the 27th October, and from the following day forward my Solicitor has been trying to make an appointment with you for me. Only yesterday morning, of course, did I see you. Even then I was not permitted to see you until your clerk had told me that you would not act in this case unless I promised to pay you 300 guineas and 100 guineas as a refresher.

I have come to London at my own expense to see this case through. The Judgment in this case, translated into Pounds, is 2500 pounds. I understand that we cannot tax more than about 100 guineas for Counsel and therefore to pay you 300 guineas for the first day and 100 guineas as a refresher is prohibitive.

Again I say my clients are poor men. I have had to help them out to get to the Privy Council. As I say I am in London at my own expense. Unless, therefore, you are prepared to take this case at the fee arranged by your clerk in May 1944, I very much regret to say that I cannot commit my clients to the extra expenses.

When I found out what your fee would be for you to argue the Appeal, my clients borrowed all the money they could – in addition to security of 400 pounds – and I came to their aid, and we believed a bargain had been made. Your clerk now repudiates that bargain, although it was the basis upon which the decision to come here was founded. I am not instructed to agree to the new terms. I therefore arranged to carry out the bargain and the money was cabled to England March 8th, 1945, but that is as far as I can go.

I would be obliged if you would let me know at the earliest possible moment what your decision in this matter is as, of course, Mr. Diplock has to prepare himself to argue the case if you are not going to do so.<sup>23</sup>

Difficulties with Pritt must have been straightened out, although there is no actual record of the final financial arrangements. The case opened before the Privy Council on November 7, 1946, with the Committee comprising Lords MacMillan, Wright, Porter, Simonds, and Uthwatt. Pritt and Diplock argued the case for three days, reviewing the previous judgments, restating previous arguments, and citing new reference cases. On the third day, everyone was taken by surprise when Sir David Maxwell Fyfe, KC, strode into the courtroom to represent Ginger Coote Airways. Sir David was then chief prosecution lawyer at the Nuremberg trials and he had been flown from Germany, in the midst of these trials, for the sole purpose of fighting this \$10,000 judgment. The case was reported in the

<sup>23</sup>Copy of letter forwarded to Ludditt by Murphy, in the possession of Mr. Ludditt.

local Vancouver newspapers, and an excerpt from the *Sun* (November 13, 1945), fairly describes the stature and reputation of this outstanding lawyer:

*FAMOUS LAWYERS ARGUE B.C. CASE IN PRIVY COUNCIL.* London, Nov. 12 (CP Cable) – A five-hour argument by Sir David Maxwell Fyfe Monday closed the case for Ginger Coote Airways Ltd., Vancouver, before the Law Lords of the Privy Council.

After a brief rebuttal by D. N. Pritt, K.C., for the three Vancouver passengers injured in a 1940 airplane crash, the lords will decide the issue: whether conditions printed on tickets by the Airways Company excluded it from liability.

Upholding a judgment by the Supreme Court of Canada – from which the passengers are appealing – dark, voluble Sir David exhibited the same cool deliberation with which he indicted the war criminals at the Nuremberg Trials. . . .

Apparently the overwhelming appearance of Sir David Maxwell Fyfe and his five-hour argument were totally convincing; on February 5, 1947, formal judgment on the case was handed down by the Privy Council, dismissing the appeal, as follows:

HELD, that the obligation of a carrier of passengers at common law to carry 'with due care' might, subject to such statutory restrictions as existed, be superseded by a specific contract which might either enlarge, diminish or exclude it. There was no reason to hold that any statutory restrictions had been infringed in this case, and no reason under the Transport Act, 1938, of the Dominion, to set aside or refuse to give effect to a specific contract which the law authorized. The contract embodied in the ticket containing the condition was therefore valid and enforceable, and the appellants' claim failed.<sup>24</sup>

Perhaps the futility of the entire litigation is best summed up in an editorial which appeared shortly afterwards in the *Vancouver Sun*:

#### EXPENSIVE PRIVY COUNCIL APPEALS

Readers might like to hear about the experiences of three Vancouver working men who took a case to the Privy Council. They lost it but that's not the major point of the story. The point is that others like them may be tempted into similar expensive experience unless the Dominion Government makes up its mind pretty soon to abolish appeals to the Privy Council.

The three men would have been saved a large and to them perhaps critical sum if Canada had ceased a few months ago to export its litigation for judicial settlement abroad. Canada has the power to stop this needless subsidization of the Inner Temple any time the Parliament at Ottawa cares to act.

This particular case arose out of a damage action in the B.C. Supreme Court for injuries suffered by the men in an airplane accident. An award of \$10,000 was made to them because the aviation company was allegedly negligent.

The company contended it wasn't liable for the negligence and the B.C. Court of Appeal agreed by a split decision. The Supreme Court of Canada also split, but the majority found for the company. The injured men paid £623 for their own expenses and put up £400 more to cover the cost of the company

<sup>24</sup>(1947) L.R.A.C., pp. 233-4.

to seek conclusive decision in London. They did so in the belief, supported by correspondence from English solicitors, that these sums should be sufficient to meet their entire obligation.

The Privy Council dismissed the appeal, which was a sorry blow to the men. But now the extra bills for legal expenses have come in. Their own solicitors in England ask for a balance of £154, senior counsel wants £783 and junior counsel £426. The aviation company's counsel claim a balance of £470 above the £400 originally posted. At the rate of \$4 to the pound, the men are liable for about \$12,000 in English legal costs, not counting \$500 spent to have the appeal books printed in Vancouver. All this is on top of their costs in Canadian courts in pursuit of their \$10,000 award. They'd have been far better off to have suffered their injuries in silence. At least, they recovered from those.<sup>25</sup>

If there was any lesson to be learned from this case, it was that Privy Council appeals were for rich, corporate bodies, not for the ordinary wage-earner. Obviously the out-dated red tape of the British legal system was out of harmony with Canadian character, unpolished and "colonial" though it may have been in the 1940s. If the incredible sequence of events and negotiations detailed in Paul Murphy's letter to D. N. Pritt was in any way typical of the rigmarole necessary to take a case to the Privy Council, then it certainly was high time, as the *Sun* editorial suggested, that this expensive and unnecessary temptation be removed from unsuccessful litigants in Canada.

From 1941, Fred Ludditt had personally expended \$5403.26 in legal costs; add to this his original out of pocket expenses of \$638 (which was all he had wanted in the first place), and we have a total outlay of \$6041.26 to collect a \$3000 judgment. Bill Parker had contributed approximately the same as Ludditt, and Steeves only a nominal portion of the expenses. All the time these men were under constant pressure from Murphy to beg, borrow, or steal more and more money to pour into this litigation. Between July 28, 1941, and December 29, 1947, Murphy wrote thirty letters to Ludditt, nineteen of which asked for money, and it can be assumed that he was generating similar appeals towards Parker and Steeves. He certainly was not the cleverest lawyer in the world – most of his correspondence is long-winded and highly repetitive – but had he been more of a mathematician, he would have seen that the whole idea of taking the case to England was ill-conceived. Paul Murphy died in 1948. Ludditt has never received any statement of monies received or expended; he does not know whether Murphy retained anything for his own fees, or if it all went to pay the legal fees owing in Canada and England. He does not even know if all the outstanding costs were paid. He has heard nothing more of the case since 1947.

The other obvious conclusion of the case is a legal one. It was evident from the split of judicial decisions that there was just no existing legislation

<sup>25</sup>Vancouver *Sun*, February 8, 1947.

on which a decision could be based. By the end of the 1930s commercial air transportation was developing rapidly in Canada but haphazardly and without proper financial backing, and neither the Aeronautics Act of 1919, its revision in 1927, nor the Transport Act of 1938 laid down any real standards for control. The only reference to standards appeared in section 25 of the Transport Act, 1938, which required that “every licensee shall, according to his powers and within the limits of the capacity of the ships or aircraft specified in the licence, afford to all persons and companies all reasonable and proper facilities for the receiving, forwarding and delivering of traffic.”<sup>26</sup> This was the only existing regulation on which judgment could be made in the Ginger Coote case, and the wording is vague enough to mean nothing or anything.

As pointed out by Judge McQuarrie in the Supreme Court of Canada, early efforts to provide air service on a regular basis were so hampered by costs that small companies like Ginger Coote were operating on a hand-to-mouth basis. They provided as much safety as they could afford, but that was very little; they were busy pioneering routes and, particularly in British Columbia, aviation was being hailed as a long-awaited solution to problems presented by high mountains and a rugged coastline. Commercially it was opening up areas which could not be reached before. But it also involved peoples’ lives and clearly there was a need for government control. Morally, it was evident then, as it is now, that this case should have been decided in favour of the passengers. Even the Privy Council judgment stressed that it was the *Absence* of legislation to prevent limitation of liability, and the *Absence* of government safety standards, that made it impossible to decide in favour of the injured passengers. Had there not been such an obvious moral injustice, the judicial decisions would not have been so divided, and the Privy Council would never agreed to hear the case.

In *Ludditt v. Ginger Coote* there was no precedent on which to base judgment; in fact, judgment in the Ginger Coote case was establishing a precedent of the future. The two main cases cited – *Clarke v. West Ham Corpn.*, and *Robertson v. the Grand Trunk Railway Co.* – while similar, differed in the crucial point that, in both of these cases, a financial concession had been granted in lieu of liability. In the course of the Privy Council Hearing of the petition for Special Leave to Appeal, the airline company’s junior counsel, H. G. Robertson, argued: “The question is whether that contract contravenes the Canadian Statutes. The Supreme Court of Canada has decided that it does not. Is that a question of public importance? If the Canadian Legislature thinks that decision is wrong, they can alter their Statute.”<sup>27</sup> Again, in the Privy Council Reasons for Judgment, Lord Wright states that, under the Transport Act of 1938, the Board of Transport Commissioners “were taking under their control a wide variety of

<sup>26</sup>Transport Act, 1938, 2 Geo. VI, R.S., c. 53, p. 402.

services, and accordingly special attention is drawn to the 'Foreword' forming part of General Order 580 in which the Board announces its intention not to exercise its powers by imposing forthwith a pre-conceived plan for the detailed control of air services, but to impose on the traffic arrangements of individual carriers such modifications or restrictions as experience may show to be necessary."<sup>28</sup> We can assume then that the plight of Parker, Ludditt, and Steeves was a necessary part of this "experience" which the Board needed before it woke up to the desperate need for passenger protection.

None of this would happen today. After Ginger Coote and Canadian Airways were bought out by the CPR, there is no record that such a liability release was ever used again. In 1944, an amendment to the Aeronautics Act of 1927, created the Air Transport Board, under the Minister of Transport, and full responsibility for aerial transport in Canada was turned over to this newly created body. Section 12 (4) of this Act states that "the Board shall not issue any such licence unless and until an operating certificate has been issued by the Minister to the operator of the proposed commercial air service certifying that the holder thereof is adequately equipped and able to conduct a safe operation as an air carrier over the prescribed route."<sup>29</sup> This is the first mention in any government legislation of the need to provide safety, and under section 13 of this Act, one of the functions of the new Board was to review all existing licenses.

Since 1944 the Air Transport Board has shaped the sensible development of Canadian air transportation, and its steady objective has been to achieve greater and greater passenger safety. In these years, Canadian airlines have "grown up," and the exciting days of "seat of the pants" flying are behind us, at least as far as commercial air travel is concerned. While for Fred Ludditt and Bill Parker the "time was out of joint," and they must have had many a moment of bitter reflection, they must also feel a certain pride that their experiences may have played a part in laying the foundation for the passenger protection which the air travelling public enjoys today.

<sup>27</sup>London, House of Lords, *Petition for Special Leave of Appeal* (Transcript of the shorthand notes of Marten, Meredith & Co.), p. 4.

<sup>28</sup>L.R.A.C. (1947), p. 244.

<sup>29</sup>An Act to amend the Aeronautics Act, 1944, 8 Geo. VI, R.S. c. 28, p. 172.