

TRANSPORTATION NOTES

Legal Decisions and Developments Affecting the Transportation Industry in Canada

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Carriage of Passengers with Severe Impairments

The Canadian Human Rights Tribunal recently decided a case based on the claim of Eddie Morten, an individual with severe hearing and visual impairments, who asserts the right to travel by air without an attendant. Air Canada took the position that it would be unable to communicate essential safety information to Mr. Morten in the event of an emergency and that, accordingly, an attendant would be required.

Mr. Morten first brought his claim before the Canadian Transportation Agency, asserting that Air Canada's policy constituted an undue obstacle to his mobility contrary to the provisions of the *Canada Transportation Act*. The Agency, in consultation with Transport Canada, upheld Air Canada's position and dismissed the claim.

Rather than appealing the decision of the Agency, Mr. Morten then brought a complaint before the Canadian Human Rights Commission. Air Canada sought to have that claim dismissed on the basis that the complaint was an attempt to do a back-door appeal of the Agency decision. However, the Tribunal refused to dismiss the claim and the complaint was investigated by the Commission.

The Commission found a prima facie case of discrimination and, in accordance with the procedure laid down in the *Canadian Human Rights Act*, referred the matter to a Tribunal. The Tribunal conducted a public hearing over a period of three weeks in the spring of 2008. Its decision was released on January 26, 2009.

The Tribunal found that it was not able to order Air Canada to allow Mr. Morten to travel without an attendant, at least at this stage. His ability to fly without an attendant has not been established. However, the Tribunal also found that Air Canada had not

undertaken a proper assessment of Mr. Morten's abilities. Failure to undertake this assessment was in itself the result of a discriminatory practice, and Air Canada has been ordered to develop an attendant policy in keeping with principles enunciated by the Tribunal and to assess Mr. Morten in accordance with that policy.

We will discuss some of the implications of this order, but before doing so will set out in some further detail the circumstances of the case.

Mr. Morten is profoundly deaf. He cannot receive and process auditory signals to any degree. He has no light perception in one eye and his visual acuity in his remaining eye is very compromised. He has some severely limited central vision and suffers from nystagmus, a condition which, at times, prevents him from fixing his vision on a specific object. His own treating ophthalmologist stated, in a filed report, that in his view it is obvious that Mr. Morten should not travel by air without an attendant. Although this report was in evidence, the Tribunal made no reference to it in its decision.

Mr. Morten has also demonstrated an impressive degree of independence in his daily life. He is physically fit and has taken considerable pains to overcome his impairments. He clearly has managed to do so over a wide range of activities.

However, the evidence did make it clear that there is one limitation he is not able to overcome: in the case of an emergency evacuation, it would not be possible for a flight attendant to communicate the detailed information which may be required to facilitate the safest possible evacuation. In Air Canada's view, regulations enforced by Transport Canada require it to devise some way to communicate this information in the course

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of an emergency evacuation. Air Canada called a witness who has held the position of Flight Attendant Manager and is thus familiar with regulatory requirements. She testified that she could not devise a way of conveying the essential information to Mr. Morten. Although the Tribunal reviewed this evidence, it gave little attention to the conclusion, stating that it "is not particularly relevant as the Tribunal has not ordered that Mr. Morten be able to fly independently without a prior assessment." It is somewhat difficult to understand this conclusion, as it is clear that if assessed against the standard described by the Flight Attendant Manager, Mr. Morten must certainly be found unable to fly without an attendant.

Rather, the Tribunal based its conclusions largely on a decision of the US Department of Transport (DOT) in a 1987 enforcement action against Southwest Airlines. The Tribunal reviewed the 1987 decision in some detail. Based on this case and its reading of the regulations (discussed below), the Tribunal concluded that an air carrier can require an attendant only if that is required for communicating a pre-flight briefing.

A former Associate Administrator for Regulations and Certification in the FAA gave

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CTA in Rail Line Discontinuance Case Upheld on Appeal

On December 12, 2008, the Federal Court of Appeal released a decision interpreting s. 142 (2) of the *Canada Transportation Act*, S.C. 1996, c.10 (the “*Act*”), relating to the process that must be followed when a railway determines that it will discontinue its operations on a particular rail line.

By way of background, Division V of the *Act* starts off this process with the railway continually maintaining and updating a publicly available three-year plan identifying which lines it intends to continue operating, and which lines it intends to take steps to discontinue.

When a decision is taken to dispose of a rail line (through a sale, lease or other form of transfer), s. 142(2) of the *Act* mandates that a railway “shall not take steps to discontinue operating a railway line before the company’s intention to discontinue operating the line has been indicated in its plan for at least twelve months” (the “notice period”). The purpose of the notice period (as stated by a former Minister of Transportation) is to “give [adequate] time for short line purchasers to come along.”

The next stage of the process permits the railway to advertise (in a prescribed manner) the availability of the rail line for sale, lease or other transfer. Such advertisement is to include “a description of the railway line.” Where potential acquirers come forward, the railway is required to consider their offers in good faith, and where a reasonable offer emerges, the railway is required to reach an agreement with the bidder within six months of the date upon which persons were permitted to make their interest known.

Where no reasonable offers materialize, the railway must then offer the rail line to federal, provincial and municipal levels of government for a price not to exceed its net salvage value.

In the event that there are still no offers after this process, pursuant to s. 146 of the *Act*, the railway may, finally, discontinue operating the line, on providing notice to the Canadian Transportation Agency.

The matter at hand became a litigious affair when the Canadian National Railway (the “CNR”) published inconsistent descriptions of a rail line to be discontinued/sold in its three-year plan, and in the subsequent advertisement that was part of the discontinuance process.

More specifically, in December 2004, the

CNR identified its Kinghorn Subdivision line as a candidate for discontinuance on its Three-Year Network Rail Plan. At that time, the rail line in question was described as the line spanning from mile 0.00 to mile 195.60.

In May 2006, the Municipality of Greenstone (the “Municipality”) indicated that it had an interest in acquiring the line — but shortly afterwards decided not to submit an offer, nevertheless reserving its right to purchase it for the net salvage value, if and when it became available at a later stage in the process.

The CNR’s three-year plan was subsequently revised in October 2006 to describe the portion to be discontinued as being from mile 1.70 to mile 193.00.

Unfortunately for CNR, the portion advertised as being available (in accordance with the advertising provisions of the *Act*) was from mile 1.70 to mile 130.0 and 138.1 to 193.0 — i.e., the description did not include miles 130.0 to 138.1.

There being no takers for the advertised line by any private parties, or the federal or provincial governments, the Municipality indicated its interest in acquiring the lines (as they were described in the advertisement) for their net salvage value and asked the CTA for its assistance in determining the acquisition price.

Several days after making the request, having noted the discrepancy between the description in the advertisement and that set out on the CNR’s Plan on its website, the Municipality asked the regulator, the Canadian Transportation Agency (the “CTA”), for clarification on what, specifically, was being offered for sale.

The CTA sought submissions from the CNR and the Municipality on this point, but did not reach a determination until some six weeks after the CNR delivered its notice to the CTA that it would be discontinuing the line because no private or public purchasers had come forward to acquire it.

Notwithstanding the CNR’s notice, after considering the submissions of the parties on what, specifically, was being offered for sale, the CTA determined that, by failing to properly describe the lines to be discontinued in its three-year plan, the CNR failed to comply strictly with the transfer and discontinuance provisions contained in Division V of the *Act* — and, consequently, the CNR was ordered to commence the discontinuance process afresh, meaning that it had to go back to the first step of amending its three-year plan to

accurately reflect the portion of its line that it intended to discontinue.

The CNR appealed.

The Federal Court of Appeal upheld the decision of the CTA, rejecting a number of the arguments made by the CNR out of hand as being “without merit” — it went as far as to decline to “engage into a discussion in the abstract as to the appropriate standard of review” on the unmeritorious grounds.

The Court did, however, explicitly deal with the CNR’s argument that, in the *Act*, the words “railway line” are defined to include “a portion of a railway line.” In other words, CNR’s argument was that, because the definition contemplates a portion of a line (as opposed to the entire line), CNR is at liberty to reduce the amount of rail line being offered for sale within the notice period, without re-engaging the process.

Based on this argument, when the CNR sought to dispose of only a subset of the total Kinghorn line (i.e., that which is set out in the three-year plan, less the 8.1 miles that were not included in the advertisement), s. 142(2) has been complied with and the legislative process has been followed.

The Court rejected this argument, holding that it is critical that potential purchasers be aware of which specific portions of the rail line are for sale. It held that, for example, buyers may “become interested when the discontinuance is ... reduced and becomes more manageable or affordable for them.”

To hold otherwise would deprive prospective purchasers of the full twelve-month period in which they can make an informed decision on whether to acquire the rail line.

Having come to this conclusion, the CNR was ordered to commence the process again, and the Municipality was therefore able to avoid having to commit to the purchase for at least another twelve months.

In the meantime, the CNR must continue its operation on the lines in question.

Canadian National Railway v. Greenstone

[2008] F.C.A. No. 1734

Forum Selection

The Ontario Superior Court of Justice recently had occasion to consider the binding nature of contractual arrangements and forum selection clauses. ITEX Corporation is an American company involved in trading and bartering and promoting alternative currency trade for businesses. ITEX was incorporated in the State of Nevada and had an office in Mississauga, Ontario until August of 2003. However, after 2004 it had no place of business in Ontario and was not registered to carry on business in Ontario.

ITEX had an Ontario client, Wembley Marketing Ltd. Wembley commenced an action against ITEX in Ontario, alleging that it had failed to receive various goods and services which ITEX was supposed to have provided. ITEX brought a motion to have the action dismissed or permanently stayed on the basis of a forum selection clause in its contract with Wembley.

Wembley took the position that it had no formal contract with ITEX, as the only documentation that had been exchanged between them was a Preferred Membership Application which Wembley had completed. On the Application there was a fairly bold heading "Agreement" and beneath that in small, but legible, type a reference to various terms and conditions including the Operating Rules of the ITEX Trade Exchange. This was signed

by Mr. Fuss, as president of Wembley. In the text, there was an acknowledgement that the Operating Rules had been received.

Mr. Fuss claimed that he had not seen the Operating Rules and that indeed he had never really read the agreement very carefully before he signed it. A witness on behalf of ITEX testified that the Rules were sent to every customer of ITEX and that in any event they were available on the website, a reference to which was visible on the Preferred Membership Application form. The Rules contained a clause providing that any action arising under the agreement should be brought in the courts of Sacramento, California and also that the parties would resolve any dispute in accordance with the Commercial Rules of the American Arbitration Association in Sacramento.

The Ontario Superior Court of Justice found firstly that there was a binding agreement between Wembley and ITEX. Mr. Fuss was an experienced businessman who signed the agreement. The Court found that this case bore no resemblance to the *non est factum* line of cases, such as *Tilden Rent-a-Car v. Clendenning*. As the Court stated, "The scenario in this case is a far cry from the situation of the average consumer, leaning over the counter of a busy car rental kiosk, confronted with a non-negotiable, near incom-

prehensible standard form contract. Mr. Fuss is an experienced businessman. There is nothing in the record to suggest that he was subject to any time pressures in considering whether to sign his name to the agreement. He could have inquired about the agreement before signing it. If he did not have a copy of the Rules already (and I am satisfied that it is more probable than not that a copy was sent to Wembley...) he could have asked for a copy. He could have gone to ITEX's website... to examine the ... Rules. Instead, Mr. Fuss did nothing. His failure to act reasonably should not exonerate him from the terms of the contract."

The Court went on to consider whether or not the forum selection clause should be enforced and referred to recent jurisprudence in Ontario to the effect that such clauses should be afforded great deference unless a strong case is demonstrated which goes beyond merely determining the balance of convenience. The Court considered the well-known criteria drawn from the case of the *Eleftheira* and found that most of the criteria referred to therein favoured enforcing the forum selection clause. The Court concluded that the Ontario action should be stayed.

Wembley Marketing Ltd. v. ITEX Corporation,
2008 CanLII 67425

Severe Impairments, Continued

(Continued from page 1)

evidence at the hearing. He explained in great detail the fact that, since the 1987 case, the US DOT and the FAA received and considered numerous submissions on the issue of attendant travel. He reviewed the relevant provisions of 14 CFR Part 382 ("Non-discrimination on the Basis of Disability in Air Travel") and explained that position stated in the 1987 case has been significantly modified with the result that a carrier subject to Part 382 can indeed deny carriage to a person with severe hearing and visual impairments if it concludes that it would be unable to communicate crucial safety information to the individual at any critical stage of flight. The requirement is not limited to the pre-flight briefing. Although this testimony was uncontradicted, the Tribunal made no reference to it.

The Tribunal concluded that it is highly likely that further accommodation is possible and necessary. It compared Mr. Morten's abilities to other passengers who

have physical impairments which restrict their mobility and suggested that it is not reasonable to impose an attendant requirement on someone with severe hearing and visual impairments while allowing persons with severe mobility impairments to travel unattended.

Air Canada has been ordered to "work with the CHRC and Mr. Morten to develop an attendant policy that takes into account the communication strategies utilized by people like Mr. Morten, the inherent risk posed by passengers with compromised mobility who are currently allowed to fly unaccompanied, and the fact that in emergency situations, many able-bodied passengers are unable to receive, process and act on safety-related emergency instructions."

This result raises some significant questions. The decision would require Air Canada to develop an attendant policy and include this in its tariff. This would apparently give the Human Rights Commission and Tribunal a role in the oversight of air

carrier tariffs. Of course, this is a role which has been historically played by the Canadian Transportation Agency. Furthermore, the policy is to define what is required in the name of safety and the Human Rights Commission is to be consulted in determining what is appropriate. It is not apparent how harmony between aviation regulations administered by Transport Canada, on the one hand, and the Commission's directions, on the other, is to be assured.

Finally, the Tribunal awarded damages for hurt feelings. Because Mr. Morten found Air Canada's policy "disempowering" and because he has suffered "headaches, tight muscles, stomach problems, sleeplessness, and the inability to just put this away and forget about it" he was awarded monetary damages of \$10,000.

As of the time this article goes to press, the period of time for filing an appeal has not expired.

Morten v. Air Canada
2009 CHRT 03

End Of The Line

Occasionally, the End of the Line reports on cases that may still, technically, be appealed but chances of that occurring seem quite unlikely. This is one of those cases.

In mid-January, the Federal Court declined to interfere with a decision of the Canadian Human Rights Commission commenced by a passenger, Jocelyn Greaves, against Air Transat.

Ms. Greaves is a 62-year-old black woman who requires a cane to assist her with walking and does not have normal bladder and bowel control.

On October 11, 2005, Ms. Greaves was a passenger on an Air Transat flight from Toronto to London (UK). She was travelling in an aisle seat near the front of the economy class section of the aircraft. In the course of the flight, she alleged that one of the flight attendants in the economy section of the aircraft directed her to use the first class cabin lavatory facilities when Ms. Greaves indicated that she would have trouble accessing the economy class washroom. Ms. Greaves also alleged that when she attempted to use the first class facilities, she was denied access by the flight attendants working in that area — and that she was treated in a rude and discriminatory manner, causing her to lose her bladder and bowel control. It was her assertion that she was not given any assistance after the incident to deal with the effects of her incontinence.

After the incident, she wrote to Air Transat to complain about what had happened, and was, in turn, given a letter of apology and a

voucher which could be credited to the cost of a future Air Transat flight. Ms. Greaves was not satisfied with this response, and, instead, demanded another \$25,000 and, further, that Air Transat conduct an inquiry into the incident, develop a responsive policy within three months and cover her legal fees. Air Transat declined to settle on those terms.

She then initiated a complaint with the Canadian Human Rights Commission, attributing the alleged actions of the Air Transat flight crew to discrimination based on her age, skin colour, gender and disability.

The Commission appointed an investigator who sought submissions from both Ms. Greaves (who also submitted a report from her physician regarding the scope of her disability) and the air carrier.

In carrying out her duties, the investigator considered a to-scale seating plan of the aircraft in question, secured written evidence from two flight attendants, conducted an oral interview of another, and spoke to three passengers on the flight (two from first class, and one who sat parallel to Ms. Greaves in economy class).

The investigator noted that the evidence of the flight crew and Ms. Greaves diverged on key points, so, where appropriate, she gave particular weight to the evidence of the passengers.

In the end, the investigator found that the economy class facilities were actually closer to Ms. Greaves' seat than were the first class facilities, and, further, that she could, in fact, gain access to the economy washrooms, de-

spite her physical limitations.

Secondly, the investigator noted that Ms. Greaves had stated that she left her seat only to use the washroom, but the passengers' recollections were that she also used the first class cabin to stretch, stand and get assistance from the flight crew with her drinks.

Third, the investigator accepted the passengers' views that Ms. Greaves was treated politely by the crew.

Finally, the investigator noted that the passenger sitting parallel to Ms. Greaves did not notice any smell evidencing the alleged incontinence.

The Commission dismissed the complaint.

Ms. Greaves brought an application for a judicial review by the Federal Court of Canada—claiming that the investigation was flawed, conducted in a biased manner and came to incorrect conclusions.

Justice Teitelbaum reviewed the actions of the investigator and found that her methods were unbiased and appropriate. He particularly noted the fact that the investigator relied on the evidence of passengers where there was a difference in the testimony of the air carrier and the complainant.

Justice Teitelbaum also noted, with respect to Ms. Greaves' complaint that the investigator did not fully appreciate the extent of Ms. Greaves' disabilities, that the onus was on the complainant to bring this to light in a report filed by her physician.

The judicial review was denied with costs.

Greaves v. Air Transat Inc. 2009 F.C. 9

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