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TRANSPORTATION NOTES

Legal Decisions and Developments Affecting the Transportation Industry in Canada

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CTA Implements *Interline Baggage Rules for Canada*

On April 15, 2014, the Canadian Transportation Agency issued a Decision and associated Interpretation Note to define the baggage rules air carriers will be expected to apply to interline itineraries with a point of origin or ultimate destination in Canada. The rules, referred to as the *Interline Baggage Rules for Canada*, will apply to carriage pursuant to a single ticket with an effective date of October 1, 2014. The types of rules contemplated include the number of allowable bags (checked and carry-on), charges related to bag handling and transportation, acceptance of special items, and excess, oversize and weight restrictions. Although both checked and carry-on bags are subject to the Decision, the Agency has recognized that practical considerations may make it impossible to require that all carriers involved in an itinerary implement identical policies respecting what a passenger can carry in the cabin—the operator of a B-777 and that of a Q400 cannot be expected to apply the same acceptance rules.

The Decision follows public consultations and the consideration of two possible models for defining baggage rules in the interline context: *IATA Resolution 302* and the U.S. DOT *Rule* 399.87. Fortunately, the Agency decided it is not necessary to introduce a third, "made in Canada" approach. It has basically adopted the U.S. approach, although preserving one element of the *IATA Resolution*.

The essential features of the *IATA Resolution* which resulted in it being unacceptable to the Agency are two-fold: it allows for the possible application of more than one set of rules to a complex itinerary and it does not provide for disclosure to passengers. While such a regime might be in accordance with the principle (accepted by the Agency as one of two fundamental principles applicable to its decision) that any regime should be "harmonized and practical" for the industry it is not compatible with the first principle; namely that the regime selected should be "seamless and transparent" for passengers.

The most basic thrust of the new regime is that for applicable interline itineraries a single set of baggage rules should apply throughout, regardless of the complexities of the itinerary. The carrier whose code is identified with the first flight segment is referred to by the Agency as the "selecting carrier". Provided this carrier has a baggage tariff on file with the Agency, it will be entitled to select (subject to the restriction noted below) which rules will apply. It can select its own rules or the rules of the "Most Significant Carrier" ("MSC") as that term is defined in *IATA Resolution 302*. This "selection" is not free selection. The MSC can only be identified as a result of applying the IATA methodology. Generally the MSC is identified as the first carrier to operate a flight segment which crosses an international boundary or an IATA traffic conference area.

The new regime is also applicable to travel that is entirely domestic, but with one change. The concept of an MSC has no application to domestic travel. There is no "selection" to be made. The carrier whose code is on the first segment must apply its own rules throughout.

The *Interline Baggage Rules for Canada* have a number of implications for the content of tariffs but before identifying these, and as an aside, we would note that the Decision is notable for the Agency's forceful statement of the importance of tariffs as defining what air carriers are permitted to do and of its own role in the enforcement of tariff obligations, whether on complaint or acting on its own initiative. These comments are potentially relevant over a broader range of cases, including those giving rise to competition issues. However, returning to the immediate issue, carriers are required to review their tariffs to ensure that these indicate how they will select the applicable baggage rules, apply the rules selected by another carrier where necessary and comply with passenger disclosure requirements.

The last issue, passenger disclosure, requires some attention. Some basic defined information must be disclosed on each e-ticket itinerary/receipt and, in the case of online purchase, on the summary page which is presented to the passenger at the end of the purchase transaction. This must include identification of the applicable rules (i.e. which carrier's rules apply), baggage free allowance and fees, size and weight limits, special terms applicable to frequent flyers, any applicable embargoes and how any charges are applied (e.g. once per direction or at each stopover point). In addition to these specific disclosures, the general obligation of a carrier to have all of its tariff rules, including those affecting the carriage of passenger bags, on its website, continue to apply.

The Agency has given notice that these rules "will be enforced for tickets issued on or after October 1, 2014" and has stressed the requirement that carrier tariffs reflect the requirements of the new regime.

Decision No. 144-A-2014,
Canadian Transportation Agency

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Misnomer vs. Adding Parties in BC Admiralty Case

The plaintiff, Zdenka Sperling, brought an application to correct a misnomer or, in the alternative, to add parties in a claim against the "Queen of Nanaimo" in an admiralty action *in rem*. The claim named certain defendants as John Doe 1, John Doe 2 and ABC Company. The plaintiff sought to replace the "placeholder" defendant "ABC Company" ("ABC") with four separate companies, namely Kamewa Canada Inc. (now known as Ulstein Maritime Ltd.), Rolls-Royce Canada Limited, Rolls-Royce PLC and Vickers PLC. The plaintiff argued, in the alternative, that the companies be added as parties.

Justice Kent of the British Columbia Supreme Court ruled that, for the reasons explained below, Ulstein Maritime Ltd. and Rolls-Royce Canada Limited could be added as defendants but denied all other relief.

The claim centres on allegations that the plaintiff was injured in August 2010 while a passenger on a ferry when it ran into the terminal on Mayne Island, B.C. The plaintiff is alleged to have hit her head on a pole after being thrown from her seat during the "hard docking".

The report from BC Ferries' ("BCF") internal investigation identified concerns with the ferry's propulsion equipment. The 1950s built ferry relied on two tapered dowels to secure the port propeller hub's position. Apparently, the wrong dowels had been installed in the port oil distribution box before the accident. The dowels became loose and fell out, allowing the hub to drift to a full ahead pitch position, unbeknownst to the crew.

The Notice of Civil Claim was filed two years less a day from the date of the accident. The application to add parties or correct a misnomer was filed a year thereafter. In January 2013, the plaintiff received documents identifying Kamewa Canada Inc. and Rolls-Royce Canada Limited as companies involved in the maintenance of the ship's propulsion equipment.

In setting out the test for misnomer, Kent J. relied heavily on *Jackson v. Bubela, et al.* (1972), 28 D.L.R. 3(d) 500 (B.C.C.A.) to explain the use of "John Doe" or "ABC Company" defendants:

> "...for generations they have come to be accepted, used and understood, both in legal and common parlance as indicating a real person existing and identifiable but whose name is not known or available to the person referring to him."

The test for amendment based on misnomer is an objective one: "how would a reasonable person receiving the document take it? If in all circumstances of the case and looking at the document as a whole, he would say to himself, 'Of course it must mean me, but they have got my name wrong' then there is a case of mere misnomer. If, on the other hand, he would say: 'I cannot tell from the document itself whether they mean me or not and I shall have to make inquiries', then it seems to me that one is getting beyond the realm of misnomer."

It does not matter whether the misnaming is advertent or inadvertent. In the case of ABC, it was clear that the incorrect identification of a defendant was advertent. The issue was whether the party was sufficiently described in the Notice of Civil Claim as an identifiable and identified party, "whether by role, responsibility or involvement in the particular circumstances, such that on a reasonable and objective reading of the pleading the person in question would say 'they do not have my name but they obviously mean me'."

In this respect, the plaintiff pleaded that:

- ABC is a commercial entity
- ABC was an independent contractor of BCF. Alternatively ABC was a subcontractor of Prime Mover Controls Inc. ("PMC") and/or an agent of BCF or PMC;
- BCF, John Doe 1, PMC, and/or ABC, and each of them, their employees and/or agents, were responsible, wholly or in part, for the design, construction, installation, maintenance, service, inspection, refit and/or repairs of the operating systems, equipment and/or machinery of the Ferry, including but not limited to those relating to its propulsion, braking and/or steering systems.

In holding that this was not a case of misnomer, Justice Kent opined that the pleadings lacked enough particularity to "point the litigating finger" at any distinct entity and the allegations could apply to a number of people. A further concern was that the plaintiff was not simply looking to replace ABC with one entity but with four.

The expiry of a limitation period is one factor to be considered by the court when deciding whether to add a defendant. It is generally understood that the limitation period for marine liability claims is set out in the *Marine Liability Act*, S.C. 2001 c. 6 (the "*MLA*"). Section 140 of the *MLA* establishes a three year limitation period from the date that the cause of action arises. However, section 37 also ratifies the *Athens Convention* which creates a right of action by a passenger against a carrier for personal injury with a time-bar of two years after the date of disembarkation. The judge commented that the *Athens Convention* was restricted to actions against carriers and therefore, the application of the limitation period set out therein should be likewise restricted. Thus, the proposed defendants, who were not carriers, would not enjoy the benefit of the provisions of the *Athens Convention* but instead would be subject to the three year limitation period set out in section 140.

The defendants argued that the alleged negligence had nothing to do with navigation and shipping. Kent J. did not decide the issue, holding that the discoverability principle operated to postpone the triggering of the claim and that the limitation period had not yet expired.

The finding that the claims were made within the limitation period weighed in favour of permitting the addition of two of the proposed defendants. *Rule* 6-2(7)(c) of the *British Columbia Supreme Court Civil Rules* states that a court may order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with,

(i) any relief claimed in the proceeding, or

(ii) the subject matter of the proceeding, that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

It is a low threshold that the Court ruled was met in the circumstances.

In *obiter*, Justice Kent considered the doctrine of interjurisdictional immunity and set out the test to trigger its application as:

1. to firstly determine whether the Provincial law (here the *Limitation Act*) trenches on the protected "core" of a federal competence (here parliament's jurisdiction over navigation and shipping); and
2. if so, to determine whether the Provincial law's effect on the exercise of the protected federal power is sufficiently serious that it rises to the level of impairment.

The variety of provincial limitation periods could indeed affect the application of one uniform maritime law across Canada. The judge did not make a determination on this point but noted that not only could interjurisdictional immunity be triggered but potentially the doctrine of federal paramountcy. This issue was left for another day.

Sperling v. Queen of Nanaimo (Ship), 2014 BCSC 326

CN Wins *Ex Parte* Injunction Against Protestors

On March 19th the Ontario Superior Court of Justice in Belleville heard an *ex parte* motion brought by the Canadian National Railway Company ("CN") for an interim injunction restraining protestors from protesting on the Toronto to Montreal railway Main Line. The day before, a number of protestors had blockaded the Main Line at 9:00 pm— bringing freight and passenger traffic to a standstill.

To understand the urgency of CN's motion it is necessary to provide some background regarding CN's Main Line. The Main Line is tremendously important to CN's operations and runs from Manitoba east to Toronto, Montreal and Halifax. In the area between Belleville and Kingston the Main Line is a two-track rail corridor, which allows trains to travel both east and west at the same time, and is the main rail line between Toronto and Montreal. CN also owns the property on which the Main Line operates.

The Main Line carries every manner and type of rail freight, including metal products, food products (including perishable items), lumber, wheat, fuels, paper, and finished automobiles. It is one of the busiest lines in the entire CN Rail service. As many as 20 CN trains are scheduled to travel eastbound and westbound along the Main Line daily between Toronto and Montreal, and the trains operating on it can span 90 to 110 cars in length, while carrying freight for as many as 90 different customers. CN also operates a number of shorter, dedicated trains that operate solely for a specific company, many of which are based in Belleville and Brockville. The total value of commodities handled by CN on the Main Line amounts to more than $80,000,000 daily, and CN also has operating agreements with Via Rail Inc. ("Via") for trains to run eastbound and westbound on the Main Line. Via runs 24 passenger trains daily, with 14 operating between Toronto and Montreal and 10 travelling between Toronto and Ottawa, which earn CN substantial revenue.

On March 18th CN's Superintendent for the East Region received a call at 9:20pm from the Senior Chief Train Dispatcher as well as the Superintendent of the Greater Toronto Area Operations Centre. They informed him that an unidentified person had just telephoned the CN police hotline and advised that he and a number of other people were blocking the Main Line at the Wyman's Road Crossing in the Kingston subdivision at Milepost 209.03. As a result, CN began to slow trains down and stop trains on the Main Line in the affected area. Within five minutes, traffic on the entire line was suspended. Although the CN Police intended to respond to the blockade, they did not anticipate being able to do so until daylight. At 9:40pm the Belleville Train Master attended at the Wyman's Road Crossing and found approximately a dozen people blocking the crossing. There were also vehicles and bonfires close to the tracks. Although the CN Police and the OPP did attend at the blockade in the morning, they were unable to get close enough to the protestors to identify any of them individually.

At the time that CN brought its motion, it had ceased running trains through the Wyman's Road Crossing, which had a severe impact on CN and Via's operations. More than 4,022 passengers per day were being affected by the blockade, in addition to 19 freight trains which were prevented from operating. As a result of the blockade significant operational challenges were created for CN operating yards in both Canada and the United States. CN summarized the irreparable harm the blockade would cause if the injunction was not granted as follows:

- a layoff of employees would become necessary, and productivity would suffer greatly;
- delays in the delivery of bulk commodities and goods and extended yard or line holding of such goods, including chemicals and hazardous commodities, cars, food and other perishable items, fuel and forestry products;
- increased yard congestion and increased costs of yard crew activities;
- the disruption of motive power cycles;
- loss of revenue to CN and increased costs to CN customers, including Via; and
- the suspension of passenger traffic of 4,022 passengers per day,

all of which CN described as being extremely difficult, if not impossible, to quantify in monetary terms.

In determining whether to grant the injunction the court applied the well-known test from the Supreme Court of Canada's decision in *R.J.R. MacDonald* - namely that:

(a) the moving party must demonstrate a serious question to be tried;

(b) the moving party must demonstrate that it would suffer irreparable harm if not granted the injunction; and

(c) the balance of convenience, including the interest of the public, must favour the moving party.

Also relevant to the court's decision was the need for the moving party to provide full and frank disclosure of all material facts, including the arguments the responding party would likely make if the motion were not being brought on an *ex parte* basis. In this case the court was satisfied that CN had provided a detailed accounting of all material facts and so was prepared to hear the motion in the absence of the responding parties.

The court then undertook the analysis provided by the *R.J.R. MacDonald* test. In considering the first branch of the test, the court required very little analysis in order to satisfy itself that the evidence clearly demonstrated that the protestors were tortuously interfering with the use of the Main Line by CN and Via and so there was a serious question to be tried. In assessing the second branch, the Court was also satisfied that the evidence presented by CN demonstrated that the impact of the blockade and the conduct of the protestors had caused and would continue to cause irreparable harm to CN, Via and the many users of the Main Line. The Court then analyzed the balance of convenience.

Under a "standard analysis", the court found that the balance of convenience overwhelmingly favoured CN. It was also necessary in this case, however, to consider the issue of freedom of expression of the protestors. In considering freedom of expression, the court noted that the reasons behind the protesting was unknown to both CN and the Court. The Court also noted that while expressive conduct by way of lawful means enjoys significant judicial protection, expression by unlawful means does not.

The Court was not prepared to find that the protestors' conduct could be justified by freedom of expression, stating that "No one can seriously suggest that a person can block freight and passenger traffic on one of the main arteries of a rail line and then argue that it is freedom of expression. The *Canadian Charter of Rights and Freedoms* does not afford such protection." The Court was also unmoved by the fact that the protestors were First Nation peoples, since neither the court nor CN was made aware of the actual reasons for the protest. Therefore, the court was also satisfied that the third branch of *R.J.R.* had been met.

Canadian National Railway Company v. Persons Unknown, 2014 ONSC 1945

End of the Line *(Appeals from the CTA)*

Decisions of the Canadian Transportation Agency may be appealed directly to the Federal Court of Appeal, but only with leave of that Court and only where the point in issue is either the jurisdiction of the Agency or a question of law. There is no right to appeal findings of fact. A recent decision of the Federal Court of Appeal in which leave to appeal was denied illustrates yet again that the Court is not inclined to stretch the concept of what amounts to a legal issue in order to assert its appellate jurisdiction. Agency decisions are accorded quite significant deference.

Before turning to the facts in the case of *Nawrot v. Sunwing* we will round out the picture of possible challenges to an Agency decision. In the first place, the Agency is authorized to review its own decisions and orders if there has been a "change in the facts or circumstances". It will sometimes undertake such a review and may rescind or vary a decision where the circumstances warrant. However, the Agency is rather sparing in the exercise of its review jurisdiction and does insist on a clear showing of a change in the underlying facts or circumstances as an essential precondition of embarking on such a review. There is also the possibility of a political review and variation of Agency decisions (as well as of rules and regulations made by the Agency) by the responsible Minister of the Crown, acting through the Governor in Council. This process is rarely resorted to. Finally, attempts have been made to do an end-run around the Agency by invoking the jurisdiction of another tribunal to reconsider a matter which the Agency has already decided. The Canadian Human Rights Commission has in the past asserted a right to conduct an independent investigation of complaints after rejection of those complaints by the Agency, notwithstanding that the Agency was acting within its jurisdiction. As a result of decisions of the Supreme Court of Canada and the Federal Court of Appeal in late 2011, it is now virtually certain that any such attempt will fail.

The *Canada Transportation Act* specifically provides that the Agency's determination of facts within its jurisdiction "is binding and conclusive." Furthermore, its determination of questions of law will almost always be reviewed on a deferential standard. Such determinations will not be overturned unless they are found to be unreasonable. In short, the Agency is a senior quasi-judicial body with authority to decide with finality most issues falling within its jurisdiction.

We now return to the *Nawrot* case which arose out of a flight which was twice delayed. A family group complained and the Agency dismissed their claims. Everything turned on credibility. According to the claimants they were denied boarding following the second flight delay despite having arrived at the counter within the prescribed check-in time. According to the carrier they arrived late.

On the face of it, the case looks like a garden-variety factual determination which is final and binding. The claimants, in a case which was argued with more vigour and skill than one commonly sees where the financial amount at stake is so modest, attempted to distinguish the case by concentrating not on the facts which had been found, but on the way in which the Agency went about finding those facts. They appeared to have a foot in the door because of a curious feature of the case which must have been the result of a clerical error. Recall that the same flight was twice delayed. The carrier made no attempt to justify the first delay but formally admitted responsibility to pay compensation. The carrier's defence addressed only the reasons for the denial of boarding following the second delay. Nevertheless, the Agency dismissed the entire complaint, even that based on the first delay. This did suggest that there may have been something amiss in the way in which the Agency assessed the evidence.

After an exhaustive review of the evidence, which included tickets for the train service to the Gatwick Airport and electronic records showing the time at which the family checked-in at an airport hotel following the denial of boarding, counsel for the complainants alleged various errors in the fact determination process which, he said, amounted to errors in law. These included failure to give adequate reasons, failure to analyze relevant evidence, improper application of an elevated standard of proof, failure to apply mandatory legal provisions and improper fettering, by the Agency, of its own discretion.

None of these arguments were successful. The Court dismissed the application for leave, with costs. In keeping with its standard practice, the Court of Appeal did not give reasons for its disposition.

Nawrot v. Sunwing Airlines,
Federal Court of Appeal, Docket 13-A-37

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Our transportation law group represents the interests of carriers in litigation of personal injury, property loss and commercial disputes. We also advise on insurance and regulatory issues and represent clients before the courts, agencies, tribunals and authorities with important jurisdiction over transportation undertakings.

We welcome your comments and suggestions.