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TRANSPORTATION NOTES

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Denied Boarding Claim Dismissed by Court

On September 18, 2011, Alton A. Robotham was going through a "career change". He had had enough of his position in the pest control and extermination business — and was moving on to a new venture in the area of home design and construction in Toronto. Having just begun his metamorphosis, he decided to reward himself with a seven day trip to Jamaica. He booked a flight with WestJet, appeared at the airport on the appointed day and was able to obtain a boarding pass on the strength of his Canadian citizenship card.

After a week in Montego Bay, he presented himself for boarding at the airport anxious to return to Toronto in order to get back to work. The WestJet counter representative asked Mr. Robotham for his passport, but alas, he did not have it. Instead, he presented his Canadian driver's licence, health card and social insurance card.

The WestJet Duty Manager was called over to carry out the grim task of advising the plaintiff that this would not suffice. Mr. Robotham protested — arguing that the citizenship card alone was sufficient for him to travel to Jamaica. He also threatened to sue WestJet if he could not board the flight, as he had to attend immediately to the demands of his nascent business. The Duty Manager changed the restrictions on Mr. Robotham's ticket — so that he could use it on a later date when he returned with a valid passport.

For the next two weeks, Mr Robotham did not determine whether another airline would carry him to Canada, nor did he seek an emergency Canadian passport. Instead, on October 9, 2011, he rebooked his return via the internet and attended at the airport with a Jamaican passport and his Canadian citizenship card. He was successfully repatriated. He then sued WestJet for breach of contract, claiming damages for:

- earnings he would have made on the project he was to return to in Canada;
- amounts payable by him to subcontractors on that project; and
- losses arising from being deprived of the experience and competence that he would have gained had he completed that project.

The matter was heard by Justice Spence of the Ontario Superior Court of Justice. Justice Spence began his analysis by setting out WestJet's statutory requirement to thoroughly screen passengers travelling to Canada to ensure that when they present themselves to a Canadian Border Service Agency ("CBSA") officer in Canada, they will be permitted to enter the country.

He also noted that WestJet's publicly filed tariff places the onus on passengers to obtain all necessary travel documents.

He then turned to the *Immigration and Refugee Protection Act*, S.C. 2001, c.C-27 (the "*IRPA*") which provides that WestJet "must not carry to Canada a person who is prescribed or does not hold a prescribed document or who an officer directs cannot be carried." Justice Spence described, in some detail, the adverse consequences that air carriers face should they not comply with this provision (which include fines and the obligation to remove the inadmissible passenger from Canadian soil).

As it is required to do by legislation, the CBSA publishes the *Guide for Transporters* which provides direction to air carriers on the practicalities of passenger screening. The *Guide* provides, among other things, that:

> … To be accepted for travel, Canadian citizens … must be able to produce satisfactory evidence of their identity and status. … A passport is the only reliable and universally accepted identification document, and it proves that they have a right to return to Canada. [Airlines] may require travellers to present a passport. Therefore, Canadian citizens who present other documents, such as ... citizenship cards … may face delays or may not be allowed to board the [aircraft].
> …
> A Canadian citizenship certificate is not a travel document.

In the course of the trial, a WestJet employee testified that CBSA's Migration Integrity Officers had encouraged airlines to be vigilant in screening passengers travelling from Jamaica to Canada because they had encountered difficulties with passengers substituting photos on Canadian citizenship cards. The Court heard evidence that the MIO based in Jamaica had sent correspondence to WestJet recommending that it always deny boarding to passengers who present only a Canadian citizenship card as proof of their right to enter Canada.

In considering this evidence, Justice Spence found that, by denying boarding to Mr. Robotham, WestJet did not act unreasonably and that it was following directions of the CBSA. In support of this finding, he cited *Tsanova v. Austrian Airlines*, 2007 QCCQ 11463 (where the Court held that a Canadian citizenship card, a heath card or other similar government-issued documents do not prove a right of entry into Canada) as well as *Bousiba v. Air France*, 2009 QCCQ 11660 and *Turner v. Air Transat A.T. Inc.* 2013 QCCQ 16411 (both for the proposition that it is the passenger's responsibility to ensure he has the required travel documents and that air carriers are not liable for denying boarding when these documents are not presented at the time of boarding).

Justice Spence also noted that, in all of the above cases, the problem with the travel documents arose on the return segment of the itinerary.

For the above reasons, the Court found that

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Force Majeure Trumps Delay Claim in Québec Aviation Case

A Québec court recently released a decision interpreting Articles 17 and 19 of the *Montreal Convention* (the "*Convention*") in the context of an airport labour dispute. In that case, the plaintiff, Anca Tismanariu (travelling from Montreal to Bucharest via Paris), sought damages for delay, as well as personal injury arising from the transfer of her own bags from one terminal to another at Charles-de-Gaulle Airport in Paris ("CDG").

On arrival at CDG, Ms. Tismanariu was informed that her connecting flight to Bucharest was delayed. No reason was provided — although she later learned that the airport was experiencing an unforeseeable labour disruption by aircraft re-fuelers. After some time in the terminal, she was directed to board the connecting Air France flight to Bucharest, only to be subjected to a one hour tarmac delay, after which the flight was cancelled and the passengers were instructed to collect their bags from the carousel.

After she collected her luggage, Air France rebooked the plaintiff on a Lufthansa flight to Bucharest, via Munich. In order to board that flight, she had to change terminals, which required walking 200 metres, descending a staircase with her luggage and taking a lengthy airport train shuttle. In the course of changing terminals with her baggage, Ms. Tismanariu experienced pain in her right arm and elbow.

The new itinerary resulted in the plaintiff arriving in Bucharest well after several of her scheduled business meetings were to take place— although she was able to attend some of these by telephone.

Shortly after returning home to Montreal, the plaintiff saw her family doctor, complaining of pain in her arm and difficulty flexing at the elbow. She was diagnosed with epicondylitis (also known as tennis elbow).

Ms. Tismanariu sent two demand letters to Air France prior to launching the claim seeking compensation for damages arsing from: (a) the delay that caused her to miss her business meetings; and (b) personal injury caused as a result of having to transfer her own bags from one terminal to the other at CDG. Air France provided her with 5,000 "Flying Blue" points as a goodwill gesture.

It was Air France's position, with respect to the delay claim, that because Air France was not aware of the strike at CDG before the aircraft left Montreal, it could not have done anything to avoid the delay of the connecting flight and as a result, there could be no damages awarded under Article 19 of the *Convention*, given that it was impossible for the airline to have taken any reasonable measures that would have avoided the delay. The Court characterized the strike as being an instance of *force majeure*.

With regards to the personal injury claim, it was Air France's position that the circumstances that led to the injuries sustained in the transfer of terminals at CDG did not amount to an "accident" as contemplated by Article 17 of the *Convention*, on the basis that Ms. Tismanariu's injuries were a physical reaction to the exertion of carrying a suitcase and not an "accident [that]… took place on board the aircraft or in the course of … embarking or disembarking". In accepting this argument, the Court analysed the level of control that Air France had over the transfer between terminals and between airlines and, on this issue, considered the case of *Day v. Transworld Airlines*, 528 F. 2d 31 (U.S. Court of Appeals, 2nd Circuit, December 22, 1975), where the determining factors were found to be:

a) the activity in which the passenger is engaged;

b) the existence of restrictions on the passenger's movement (ie. freedom to roam at will); and

c) the location of the accident.

In undertaking this analysis, the Court found that Ms. Tismanariu's pain occurred when she transported her luggage from one terminal to the other. At that time, she was no longer under the control of Air France, nor was she under the control of any other airline, despite the fact that she was making her way to the Lufthansa customer service counter. There was nothing stopping her from sitting to eat or browsing in the shops en route.

In addition, the Court noted that Ms. Tismanariu's baggage had wheels and a retractable handle, thus the lifting involved in transit would not have been strenuous.

In the end, the Court found that the assistance rendered in the circumstances of this "force majeure" to be reasonable and dismissed her claim.

Tismanariu c. Société Air France, 2014 QCCQ 2847

Denied Board Claim Dismissed *(cont'd)*

there is no liability for breach of contract on the part of WestJet. It also rejected a claim for negligence against the airline arguing that only a contractual duty arises in this case and that the airline has no duty of care in tort towards the passenger in these circumstances.

As is the custom in Canada, Justice Spence assessed the damages even though the claim was dismissed, a step which would have been relevant if the ruling on liability were reversed on appeal.

As to the $30,000 claimed for loss of income on his housing project, the Court found that the reason that Mr. Robotham lost the contract was that he refused to hire a contractor that his client wished to be retained on the project — and not because of the two week delay. Accordingly, this loss of income was not attributable to the delay experienced by Mr. Robotham in returning to Canada.

As to the $5,681 claimed for monies payable to subcontractors as a result of the delay, the Court found that the invoices in question were 2½ years old and had never been paid. Moreover, Mr. Robotham claimed that the work performed by these subcontractors was shoddy in any event and that he would not have paid these accounts on that basis. Accordingly, there was no avenue for recovery in this respect either.

Finally, the plaintiff claimed $1M in damages for "foreseeable losses" (as he termed them) — which amount to the loss of experience on the project that would have translated into future work on his construction business. In dealing with this claim, the trial judge cited the case of *Hadley v. Baxendale*, [1843-60] All ER Rep at 461 where the Court held that:

> Where two parties have made a contract which one of them has broken the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally, *i.e.*, according to the usual course of things, or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract as the probable result of the breach of it.

The Court found that, since Mr. Robotham did not advise WestJet of the scope of the possible damages at the time he entered into the contract of carriage, it was not aware of the possible business projects of the plaintiff and how they might be affected by a delay of his trip. The court found, therefore, that no damages were awardable under this head either.

The case was dismissed.

Robotham v. WestJet Airlines, 2014 ONSC 3141

End of the Line *(Power of the Governor in Council) (cont'd)*

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of law and jurisdiction, the GiC had made an error in this case in rescinding the decision of the Agency.

The Federal Court of Appeal reversed the lower Court and applied the more deferential standard of review of "reasonableness" to the GiC's decision. The appellate Court found that the GiC's holding that a tariff provision that was given effect by a confidential contract was indeed reviewable by the Agency "was supported by the evidence and fell within a range of outcomes defensible in respect of the facts and law."

The matter then came before the Supreme Court of Canada, which had to decide four issues:

1. What was the nature of the question answered by the GiC in this case?
2. What is the scope of the GiC's authority under s. 40 of the *Act*?
3. What is the applicable standard of review?
4. Does the GiC's decision withstand judicial review?

Before delving into these questions, the Court conducted a brief review of the regulatory scheme at play and the history of confidential contracts in the rail industry in Canada. In particular, the Court noted that section 120.1 came into force following a 2001 statutory review of the *Act*. At the time, shippers had expressed concerns relating to the unilateral imposition of "incidental" and "ancillary" charges that were being levied on them by rail operators. These fees were charged, for example, to cover the cleaning of railcars, weighing product, demurrage and storing railcars. The shippers' concern was that there was no avenue for challenge, as only rates for "movement of traffic" were subject to the final offer arbitration process. Accordingly, the legislative amendments were implemented in order to rebalance the power dynamic between rail operators and shippers.

The Court then briefly considered the 1987 amendments to the *Act*, which permitted rail operators to enter into confidential contracts with terms and conditions that diverged from those in the publicly filed tariffs. The goal at the time was to provide rail operators and shippers with some flexibility in negotiations for rates and services. The Court noted in this section of the decision that "it is a common railway industry practice to include a term in confidential contracts which incorporates by reference all of the railway's tariffs covering ancillary and incidental charges."

The Court then turned to the four issues that required resolution in this appeal. The first of these issues related to the definition of what, precisely, was at issue in this litigation. PRC argued that, at first instance, the Agency misunderstood the dispute by simply seeing it as an attempt by PRC to change the terms of its confidential contract. PRC argued that this was not the nature of what it was trying to do. Rather, PRC was trying more generally to challenge the reasonableness of Tariff 7402 (which applied to other shippers as well). Its position was that, if such a finding affected the confidential contract, this was incidental to the dispute.

On this point, the Court noted that the GiC (which accepted PRC's argument) made two key findings, namely that:

- PRC's complaint was for the benefit of all shippers that were subject to Tariff 7402 and, as such, the complaint was properly brought under s. 120.1 of the *Act*; and
- the existence of a confidential contract incorporating Tariff 7402 by reference has no bearing on the reasonableness of a charge that is applied to more than one shipper.

The Court found that these two findings are a result of basic principles of statutory interpretation and, as a result, the dispute amounts to a question of law. The Court explicitly found that, even though this determination may raise a number of policy considerations, this does not transform the issue into something other than a question of law.

The Court then went on to consider the second issue: the scope of the GiC's authority under s. 40 of the *Act*. CN argued that the GiC does not have jurisdiction to decide matters of law and therefore its decision was of no effect. The Court disagreed. By reviewing *prima facie* wording of the *Act*, the Court noted that the GiC has *broader* power than even the Court — given the specific text of sections 40 and 41, which define the review provisions.

Section 40 provides, in the case of the GiC, that:

> The [GiC] may, at any time, in the discretion of the [GiC] … vary or rescind ***any*** decision, order, rule or regulation of the Agency, whether the decision or order is made *inter partes* or otherwise and whether the rule or regulation is general or limited in its scope and application, and any order that the [GiC] may make to do so is binding on the Agency and all parties.
>
> [***emphasis added***]

Section 41(1) provides, in the case of the reviewing court, that:

> An appeal lies from the Agency to the Federal Court of Appeal ***on a question of law or a question of jurisdiction*** on leave to appeal being obtained from that Court …
>
> [***emphasis added***]

The Court found, based on the basic rules of statutory interpretation, that the GiC's powers are virtually unrestrained, given that it does not have any statutory limit imposed on its review function, as does the Federal Court of Appeal. The Court also cited case law giving support to this interpretation of the GiC's broad power.

The Court then went on to consider the third issue, being the standard of review applicable to the GiC's determination on a judicial review. After considering the jurisprudence on the point, the Court had little difficulty in deciding that the principle in *Dunsmuir v. New Brunswick*, 2008 SCC 9 applied to decisions made by the GiC. Put simply, *Dunsmuir* requires that deference is to be afforded to the decision of a specialized tribunal where it is interpreting its own statute or statues closely connected to its function. The Court emphasized that the GiC had a long history in the field of economic regulation of rail operators. Accordingly, any court reviewing the GiC's decision in this matter must allow the GiC's determination to stand so long as the decision reasonably falls within a range of possible outcomes.

The Court's attention then turned to the last issue, being whether the GiC's decision was "reasonable". The Court held that it was persuaded that the wording of s. 120.1 of the *Act* does allow the Agency to rule on the issue of whether a tariff provision that is incorporated by reference into a confidential contract is reasonable — so long as the requirements of s. 120.1 are met, namely:

- the shipper bringing the complaint must be subjected to the charges in question;
- the charges must be found in the tariff;
- the tariff must apply to more than one shipper; and
- the tariff must not be of the variety that should be the subject of final offer arbitration.

Before concluding its reasons, the Court clarified that it had not determined in this case whether the charges complained of are, in fact, properly characterized as "rates for the movement of traffic". This was left as a live issue for the Agency to determine.

CN's appeal was dismissed with costs.

Canadian National Railway v. Canada (Attorney General), 2014 SCC 40

End of the Line *(Power of the Governor in Council)*

The Supreme Court of Canada recently released a decision in a rail case that significantly emphasizes the power of the Governor in Council (the "GiC") on issues pertaining to the regulation of rail tariffs.

In Canada (as in many Commonwealth countries), the GiC is the term used to describe the Governor General, acting on the advice of the federal cabinet. In other words, the GiC is effectively the executive branch of government, flowing through the Governor General, whose role is that of a figurehead.

The GiC has a long history in the sphere of rail regulation. As early as the passing of *The Railway Act*, S.C. 1868, c. 68, the GiC had the exclusive power to approve railway freight rates in Canada. This power was later devolved to the Board of Railway Commissioners, now the Canadian Transportation Agency (the "Agency") — but the GiC retains oversight on many aspects of rail regulation to this day under the *Canada Transportation Act*, S.C. 1996, c. 10 (the "*Act*").

The matter at hand involves a confidential contract between the Canadian National Railway ("CN") and a shipper, Peace River Coal Inc. ("PRC"), for the shipment of coal between two facilities in British Columbia, spanning the period of January 1, 2008 to June 30, 2010. Confidential contracts (which deviate from the publicly filed tariff rates) have been explicitly allowed in Canada since they were introduced in 1987 by amendments to the *Act*.

As is the custom in the industry, the confidential contract in this case defined the freight rates for the movement of coal and also incorporated by reference Fuel Surcharge Tariff CN-7402 and any "supplements thereto or reissues thereof". CN's Tariff 7402, which was publicly filed, imposes a fuel surcharge on any rail services when highway diesel fuel hits a strike price of $1.25 per gallon. In the confidential contract, CN reserved the right to unilaterally amend Tariff 7402. There was no mechanism for PRC to challenge any such amendments.

Shortly after the confidential contract went into force, CN announced that, as of April 1, 2008, it would be introducing Tariff 7403 which would increase the fuel surcharge strike price to $2.30 per gallon. As this was a more favourable scenario for PRC, it asked CN to apply Tariff 7403 to the confidential contract. CN refused.

As a result, PRC applied to the Agency under section 120.1 of the *Act* for a determination that Tariff 7402 was "unreasonable". A specific request was made to amend Tariff 7402 to reflect the strike price contained in Tariff 7403.

CN brought a motion seeking to dismiss the complaint on the bases that: (i) the complaint was an attempt by PRC to amend the confidential contract — which the Agency is not authorized to do; and (ii) in any event, fuel surcharges are part of the "rate for the movement of traffic" and therefore should be dealt with by way of final offer arbitration, not pursuant to s. 120.1 of the *Act*.

The Agency accepted CN's arguments and dismissed PRC's complaint on the basis that it did not have the jurisdiction to amend a confidential contract, as this was a private arrangement between CN and PRC. Having made this finding, the Agency declined to rule on whether the imposition of the fuel surcharge was, in fact, compensation for "movement of traffic". PRC did not appeal this decision.

Six months later, the Canadian Industrial Transportation Association ("CITA"), a trade association of which PRC is a member, filed a petition with the GiC requesting a variance of the Agency's earlier decision pursuant to section 40 of the *Act*. CITA requested that the GiC direct the Agency that the existence of the confidential contract between PRC and CN does not preclude the Agency from assessing the reasonableness of Tariff 7402.

On June 10, 2010, the GiC rescinded the Agency's decision, deciding that, while the existence and terms and conditions of a confidential contract are relevant to whether PRC will benefit from an order made by the Agency, the existence of the confidential contract has no bearing on the reasonableness of a charge in a tariff that applies to more than one shipper.

CN launched a judicial review of the GiC's decision to the Federal Court. Justice Hughes reversed the GiC's ruling on a "correctness standard" and, in agreeing with the Agency's reasoning, held that PRC was using the *Act* in an attempt to gain more favourable terms in the confidential contract. However, Justice Hughes also held that the surcharge did, in fact, relate to the rate for the "movement of traffic" and was therefore exempt from review by the Agency under s. 120.1(7) of the *Act*. Justice Hughes found that, although the GiC has the authority to determine questions

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