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IATA vindicated in dispute with Sabre over PaxIS

An important decision regarding the use that IATA can make of data obtained from the global distribution system ("GDS") was released by Justice Spence of the Ontario Superior Court of Justice on January 11, 2011.

As many of our readers know, the vast majority of air travel undertaken on major commercial air carriers is booked through various private GDS's (of which there are four in Canada). These GDS's are accessed by travel agents (of the brick-and-mortar, as well as the online variety) when customers seek to purchase airline tickets.

Typically each travel agency will work exclusively with one GDS. The plaintiff in this case, Sabre Inc. ("Sabre"), is one of the four GDS's operating in Canada.

Some background: Through its expenditure of significant resources, Sabre created and enhanced a number of computer programs, systems and databases that enable travel agents to view, book reservations for, ticket and account for the sale of airline products and services. In the course of operating these databases, Sabre was also able to develop sophisticated computer systems that it used to collect, assemble, select, compile, verify, structure, organize and arrange information that it obtains from travel agents, airlines and IATA related to fares, schedules and flight availability.

In order to access the Sabre GDS, travel agents enter into agreements with Sabre. Typically, travel agencies do not pay for this access. In fact, they are provided with incentives to book through the Sabre GDS. Sabre's revenues for these bookings are derived from booking fees paid by airlines on ticket sales.

In the normal course, Sabre collects the ticketing information for bookings made through its GDS, and transmits it in a consolidated form to airlines, travel agents and, most notably, to the IATA-contracted data processing centres ("DPCs") of the IATA Billing and Settlement Plan ("BSP").

Being positioned at such a critical point in the ticketing process and by virtue of the volume of tickets that are booked through the Sabre GDS, Sabre is privy to a significant collection of commercially valuable information.

Apart from its role in facilitating the purchase of airline tickets, Sabre began to compile this information, in order to sell it in a processed form to air carriers as "MIDT" data. MIDT data reflects all bookings made on all air carriers in the Sabre GDS by all travel agency users. The MIDT data provides valuable insight for capacity/route planning, marketing and sales purposes. Sabre also sells a related TCN product (from data collected in the same manner) which reports on all tickets issued via the Sabre GDS on particular airlines. Annual revenues from the MIDT and TCN products have run in the tens of millions of dollars.

In the summer of 2005, IATA began marketing a competing product, PaxIS. The data inputs for the PaxIS system are derived from raw data from issued ticket information collected from the IATA DPCs under the relevant BSP. The PaxIS product includes "data analysis, calibration and market intelligence together with a web tool created for access to the PaxIS data and reports by IATA customers". PaxIS is not derived from the Sabre MIDT data. In fact, IATA has no access to such data.

The arrangements between Sabre and IATA regarding the transmission of the raw data are governed by an agreement signed in 1995, which was then called the Automated Ticketing System Provider Agreement ("ATSPA"). ATSPA was replaced with the Electronic Ticketing System Provider Agreement ("ETSPA") when the industry moved to electronic ticketing.

Both ATSPA and ETSPA contained confidentiality provisions that flowed only one way: Sabre was to safeguard the confidentiality of the airlines' data, but no reciprocal requirement existed whereby IATA agreed to protect any of Sabre's data.

Following IATA's introduction of the PaxIS system, Sabre noted that certain of its MIDT customers ceased purchasing the Sabre product.

Sabre commenced the legal proceedings that are the subject of this report as a reaction to the foregoing. In short, Sabre alleged that it had a cause of action against IATA for "breach of confidence". The substance of the allegation was that the raw data transmitted by Sabre to the IATA-contracted DPCs was confidential and that IATA's use of it in creating the PaxIS system was unauthorized.

Because the confidentiality provisions in the ATSPA/ETSPA did not explicitly require IATA to treat the data transmitted by Sabre in a confidential manner, Sabre had to revert to the common law for a remedy.

Breach of confidence, as a cause of action, has been well entrenched in Canadian jurisprudence since the Supreme Court of Canada's ruling in *Lac Minerals v. International Corona Resources Ltd.* [1989] 2 S.C.R. 574. In that case, the Court established a three-part analysis to be used for proving the tort. It held that the questions to be considered when determining whether a breach of confidence has been made out are:

- whether the information conveyed has

Inside This Issue

IATA vindicated in dispute with Sabre over PaxIS *(cont'd)*

the necessary quality of confidence;

- whether the information was communicated in confidence; and
- whether the information was misused by the party to whom it was communicated.

This three-part analysis has been subsequently applied by the Supreme Court of Canada in another case and, more recently, by the Ontario Court of Appeal.

The court in the matter at hand considered the facts of this case through the analytical lens of *Lac Minerals*.

Justice Spence did not come to a definitive answer in his reasons on the first branch of the analysis. On this point, he explored two considerations.

First, he concluded that for information to be properly characterized as "confidential", it cannot be publicly available. He also commented, however, that private information is not "confidential" merely because it is not publicly available. In this regard, he ruled that "[f]or there to be a duty of confidence there must be a person to whom the duty is owed and a person who owes that duty."

On the issue of whether the data in question was "public", Justice Spence noted that each passenger who purchases a ticket has knowledge of the raw data that Sabre transmits through the GDS for his/her own travel arrangements. Based on this observation, it appeared that the court was leaning towards ruling that the information in question in this case was not confidential because it was publicly available (piecemeal) to individual travelers. However, Justice Spence then noted that the data conveyed by Sabre to the DPCs is actually a compilation of passenger data, not individual passenger records sent one at a time — thereby suggesting that the compilation of the data (which is not publicly available) may somehow change its otherwise publicly available character.

Because these conflicting observations are not clearly reconciled in the decision, the court's ruling on the first branch of the *Lac Minerals* analysis is unclear.

The court then considered the second branch of the *LAC Minerals* decision: namely, whether the communication of the passenger data by Sabre to the DPC was in confidence. To make this determination, the court applied the "reasonable man" test, as cited in *Lac Minerals*, formulating the inquiry as follows:

> *[W]ould IATA, on entering into the ETSPA, have realized, if it were acting reasonably, that the information which [Sabre] would henceforth be transmitting to the DPC, be given on the confidential basis alleged by Sabre, i.e. that the information was to be used only by the DPC and only for billing and settlement purposes?*

On this point, the court considered the provisions in the ATSPA/ETSPA that imposed confidentiality obligations on Sabre only. In doing so, the court also noted that both Sabre and IATA were "sophisticated business companies which can reasonably be taken to be well acquainted with the use of confidentiality clauses in agreements for the disclosure of information."

Justice Spence was not prepared to accept Sabre's argument that, because the information was sensitive to airlines, the reasonable expectation was that its transmission was confidential. The court held that, while it may be the case that the information was sensitive, this should not necessarily prompt IATA to conclude that Sabre transmitted the booking data on a confidential basis.

The court also considered Sabre's argument that it had a confidentiality interest in the transmitted data because "the information 'reflects' the creative work done by it as a GDS in developing advice for travel agents in the form of itinerary options." This argument was dispatched summarily on the basis that the data transmitted to the DPC "consists solely of ticket sales information … [that] does not disclose the advice which the GDS have given to travel agents."

The court went on to note that there were instances in the past where both IATA and Sabre were aware that some BSPs were providing limited market share information to airlines based on ticketing data obtained through the GDS system. It was, therefore, reasonable for Sabre to expect that this practice would continue — and, in fact, this is precisely how the PaxIS system operates, but to a more wide-spread extent.

Finally, using the "reasonable man" formulation described above, the court considered whether, by virtue of the fact that the information was commercially valuable, IATA (acting as a "reasonable man") should have inferred the existence of some duty of confidentiality.

Here, the court looked at the negotiation of the ETSPA and noted that the Sabre representative "knew very little if anything about the MIDT" and that he did not turn his mind to the commercial value of any of the data that is used by that program. This Sabre representative gave conflicting evidence on this point. On one hand, he testified "it would have been absurd to think that the data transmitted … was not confidential information." However, the evidence showed that he had sent an internal email suggesting that airlines should pool their ticket sales information to create a market share information facility. Because of this apparent inconsistency, the trial judge found his evidence to be unreliable.

For these reasons, the court declined to infer that IATA should have considered the information confidential as a result of its commercial value — when such value did not seem obvious even to the Sabre representative negotiating the ETSPA.

Finally, still on this second branch of the *Lac Minerals* analysis, the court considered Sabre's argument that IATA was not authorized to create the PaxIS system because it acts as an agent for its member airlines, and as those airlines had not authorized IATA to use the data in this way, it acted inappropriately in doing so.

In this regard, the court reviewed the provisions of the IATA Passenger Agency Conference, Resolution 850e which deals with the responsibility for the management and efficient operation of the IATA Industry Settlement System and concluded that, in fact, IATA is authorized by its member airlines to use the data received by the DPCs for the BSP to support the PaxIS system.

The court noted that "[f]rom the point of view of an airline, it is hard to see how the availability of PaxIS could be viewed as other than beneficial. It is a competitive source of valuable information. Its revenues are earned by the association of the air industry and are applied by it against the costs of the BSP system which the airlines must pay."

As to the third branch of the *Lac Minerals* analysis, the court found that, as a result of the findings reported above, there is no merit to the assertion that the information was "misused" by IATA, even though the PaxIS system operates to the detriment of Sabre.

As a parting comment, the court noted that Sabre is at liberty to terminate the ETSPA agreement on 60 days notice and that, as a result, "[i]t can end the alleged misuse any time it wants to."

The court made some findings on the damages suffered by Sabre as a result of the PaxIS system (as is customary) in the event that an appeal results in the reversal of the trial decision — but the magnitude of such damages is not determinable without reference to the exhibits filed at trial.

Sabre Inc. v. International Air Transport Association, 2011 ONSC 206 (CanLII)

Prosecution of the Unruly Passenger

Patrick Minot is an electronics engineer and a French citizen. On August 15, 2009 he was a passenger on an American Airlines flight from Paris to Boston. The flight was diverted to Gander, Newfoundland, because of Mr. Minot's antics on board. The result was conviction on two charges, a sentence of time served (3 days) plus 3 months probation, a restitution order of $22,000 and a fine of $10,000. The Court of Appeal for Newfoundland and Labrador has now reviewed the convictions and sentencing and upheld them in all respects. The decision, released on January 11th, discusses some interesting issues relating to the Canadian legal tools for prosecuting the unruly passenger.

Minot was travelling to a convention where he intended to demonstrate some new electronics manufactured by his company. He was observed to be using a number of "weird devices" in the course of the flight. He affixed at least one of these to the wall of the aircraft cabin and refused to relinquish the devices to cabin crew when told he must do so. He also used his cell phone and activated a GPS. He refused to heed the requests of the flight crew with respect to these devices.

The flight was diverted to Gander and police officers met Minot on arrival. He was arrested and charged with mischief under the *Criminal Code* and with interference under the *Aeronautics Act*. He spent the next three days in jail and then appeared in court to answer the charges. In the meantime he retained counsel and spoke to a representative of the French Embassy. When the matter came before the court, Minot pled guilty and agreed to a statement of facts which made it clear that he had indeed operated the devices while on board even after having been instructed not to do so. The provincial court judge imposed the sentencing described earlier in this note.

Although he pled guilty, he later had a change of heart and sought to appeal both the convictions and the sentencing. The first interesting issue in the case was the jurisdiction of the provincial court judge. Minot had not objected to the court's jurisdiction, but the Court of Appeal had no difficulty determining that this was not dispositive. If the court lacked jurisdiction no consent of Minot could create that jurisdiction. As the acts which gave rise to the charges took place on an aircraft it was necessary to consider the provisions of sections 7(1) and 7(7) of the *Criminal Code*. These provisions make a basic distinction between Canadian registered aircraft and foreign registered aircraft. In the latter case, which of course is the relevant case for our purposes, Canadian jurisdiction may be established if the acts in question took place while the aircraft was in flight and the flight terminated in Canada. If those conditions are met, and if the acts in question would have been punishable by indictment if committed in Canada, the acts are deemed to have been committed in Canada. Thus the jurisdiction of the Canadian courts is established. However, there is a further qualification. As Minot is not a Canadian citizen, he can be prosecuted only if the consent of the Attorney General of Canada is obtained within 8 days of commencement of the proceedings.

The first factual complication arose from the fact that the offences under the *Code* and *Aeronautics Act* are both "hybrid offences". In the case of hybrid offences, the prosecutor is entitled to elect to proceed by summary conviction or by way of indictment, the latter being the appropriate form of proceeding for more serious offences. A further complication arose because there were two prosecutors—a federal prosecutor in the case of the charge under the *Aeronautics Act* and a provincial prosecutor in respect of the *Code* offence. The federal prosecutor proceeded summarily and the provincial prosecutor by way of indictment.

Thus the first issue which arose was whether the charge under the *Aeronautics Act* should be thrown out. The court concluded, rightly we believe, that the charge should stand. The acts which supported the charge were punishable by way of indictment and that is all the law requires. The fact that the prosecutor elected not to proceed by way of indictment did not destroy the jurisdiction of the court.

Minot next objected that there was no evidence on the record that the Attorney General of Canada had consented to the prosecution. While this was a correct statement of the facts, it was not determinative. The prosecutor was not required to establish, as part of its case, that the AG had consented. That was assumed until questioned. In response to the challenge, the prosecutor was allowed to introduce evidence which confirmed that the consent had indeed been obtained within the time required. Thus this objection failed as well.

Minot also argued that, although he had pled guilty, the facts accepted as true did not support the convictions and accordingly he should be acquitted on appeal. The first objection concerned the requirements of conviction under the *Aeronautics Act*, s. 7.41, which states: "No person shall engage in any behaviour that endangers the safety. . . of and aircraft in flight or of persons on board an aircraft . . . ." Minot argued that there must be evidence of actual endangerment to support a conviction. There was no such evidence. This argument failed on two grounds. In the first place, the conditions for overturning a conviction following a plea of guilty were not met. More significantly, the court went on to hold that, taking into account the purpose of the legislation, there is no requirement of actual proof of endangerment, "as long as the risk of endangerment can reasonably be inferred from the context of the situation".

Finally, Minot argued that the flight "terminated" in Boston, not Gander and that this resulted in lack of jurisdiction. The relevant section states that the court's jurisdiction is established if "the flight terminated in Canada". The term "terminated" is not defined, but the term "in flight" is. An aircraft is "in flight" "from the time when all external doors are closed following embarkation until the time at which any external door is opened for the purpose of disembarkation". The court distinguished between ultimate destination of a service and termination of a flight segment. Once a door was opened to allow Minot to disembark at Gander, the aircraft was no longer "in flight" and accordingly the flight had terminated. That was enough to establish Canadian jurisdiction.

With respect to sentencing, Minot argued that the judge did not give enough consideration to his "low moral culpability". He was, Minot said, "merely being uncooperative". He was not aware this was "causing a disturbance to the flight crew". The court was not buying. While his conduct was not the most serious that could be envisioned, it was "deliberate, defiant, surreptitious and persistent". The trial judge quite properly considered the consequences of Minot's behaviour and a restitutionary award to American Airlines was appropriate. With respect to the fine under the *Aeronautics Act*, the court noted that the fine imposed ($10,000) is less than half of the maximum ($25,000) allowable. It was not "clearly unreasonable or demonstrably unfit" and the appeal court declined to interfere.

A unanimous court dismissed every ground of appeal advanced.

R. v Minot, 2011 NLCA 7

End of the Line: Approval of Class Action Settlements

The Ontario Superior Court of Justice recently approved the settlement of a class action lawsuit against the now defunct Skyservice Airlines. While the decision of Justice Perell does not mark a change in the factors that a court must consider when evaluating such a settlement, it does provide a good summary of the issues that are at play, and, as such, we chose to report on it in that context.

The claim emanated from a flight from Toronto to Punta Cana, Dominican Republic on May 22, 2005. On landing at Punta Cana, the Skyservice B767 violently landed nose first and bounced off the runway several times before coming to a stop. The aircraft sustained major structural damage and the g-forces resulting from this very hard landing subjected all of the passengers to violent whip lash motions.

A class action law suit was commenced defining two classes of plaintiffs: (a) passengers on the flight; and (b) non-passenger family members who were able to claim under the *Family Law Act* (Ontario) for loss of care, guidance and companionship of those members in the first class. The certification motion was originally scheduled for February 2006, but was adjourned to allow for two rounds of settlement discussions. The motion was further delayed by the fact that Skyservice went into receivership in April 2010.

The classes were finally certified in November 2010 — but, by then, the certification was on consent, in order to facilitate the settlement of the claim.

The proposed terms of the settlement were that Skyservice would pay bodily injury damages (to be agreed or determined pursuant to a court monitored claims/arbitration process described in the settlement agreement) as well as *Family Law Act* damages to class members (from a Preliminary Settlement fund of $600,000), reimburse the provincial public health care provider (OHIP) for costs associated with the medical care of the injured passengers, as well as pre-judgment interest. A fee of $200,000 was proposed for class counsel. In addition, Skyservice agreed to pay an additional "10% of the total damages obtained for Class Members who are successful in claiming for bodily injury under the terms and conditions of the settlement".

The court approved the settlement. In doing so, it made reference to *Dabbs v. Sun Life Assurance Company of Canada* (1998) O.R. (3d) 429 (Gen. Div), aff'd (1998) 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused October 22, 1998, where the court set out the following criteria to be used in assessing the suitability of a class action settlement:

- the likelihood of recovery or likelihood of success;
- the amount and nature of discovery, evidence or investigation;
- settlement terms and conditions;
- recommendation and experience of counsel;
- future expenses and likely duration of litigation and risk;
- recommendations of neutral parties;
- the number of objectors, if any, and the nature of the objections;
- the presence of good faith, arms-length bargaining and the absence of collusion;
- the degree and nature of communications of counsel and the representative parties with Class Members during the litigation; and
- information conveying to the court the dynamics of and the positions taken by the parties during the negotiation.

Having regard to these factors, the court concluded that the settlement was "fair and reasonable" and "in the best interests of the class members". On this point, the court noted that "[i]ndeed, the settlement in this case represents an excellent result for the Class Members."

The court also approved the counsel fee, having regard to the factors set out in *Smith v. National Money Mart* [2010] O.J. No. 8723 (S.C.J.), which are:

- the factual and legal complexities of the case;
- the risk undertaken, including the risk that the matter might not be certified;
- the degree of responsibility assumed by class counsel;
- the monetary value of the matters in issue;
- the importance of the matter to the class;
- the degree of skill and competence demonstrated by class counsel;
- the results achieved;
- the ability of the class to pay;
- the expectations of the class as to the amount of the fees; and
- the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.

Maggisano v. Skyservice Airlines Inc. [2010] ONSC 7169 (CanLII)

Gerard Chouest
(416) 982-3804
chouest@lexcanada.com

Tae Mee Park
(416) 982-3813
tpark@lexcanada.com

James P. Thomson
(416) 982-3805
jthomson@lexcanada.com

Ioana Bala
(416) 982-3810
ibala@lexcanada.com

Carlos Martins
(416) 982-3808
cmartins@lexcanada.com

Chris Dearden
(416) 982-3812
cdearden@lexcanada.com

IATA | Strategic Partner

BERSENAS JACOBSEN CHOUEST THOMSON BLACKBURN LLP
BARRISTERS, SOLICITORS

33 Yonge Street Suite 201,
Toronto, Ontario, CANADA
Phone: 416 982-3800
Fax: 416 982-3801

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