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IATA Prevails Once Again on PaxIS Appeal

In the January 2011 edition of *Transportation Notes*, we reported on a decision of the Ontario Superior Court of Justice holding that IATA did not breach any confidentiality undertakings in marketing its PaxIS product. Sabre Inc., one of the world's major GDS and the party challenging IATA's right to market the PaxIS product, appealed that decision to the Ontario Court of Appeal.

The dispute centres around IATA's creation and marketing of PaxIS, a product designed for air carriers that compiles passenger booking data in a form that assists airlines with capacity/ route planning, marketing and sales. 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". The raw data for PaxIS is derived from information collected through the BSP process.

Sabre contends that PaxIS is based on information taken from the BSP system which was input into the system by Sabre (though its GDS function) — and that this information was entered into the BSP system on a confidential basis. It is noteworthy that PaxIS competes with Sabre's own product, MIDT.

The agreements governing the transmission of raw data entered into BSP database contain confidentiality clauses that flow only one way: Sabre is to treat the airlines' data as confidential.

As there could be no contractual breach (because there are no contractual confidentiality obligations owed to Sabre), Sabre resorted to the common law in arguing that IATA had breached a duty not to use the raw data for the PaxIS product.

Sabre relied on the Supreme Court of Canada's decision in *Lac Minerals v. International Corona Resources Ltd.* [1989] 2 S.C.R. 574 which established a three-part analysis to be used in making out a case for the tort of "breach of confidence". The Supreme Court found the relevant questions are:

- did the information conveyed have the necessary quality of confidence;
- was the information communicated in confidence; and
- was the information misused by the party to whom it was communicated.

The trial judge resolved these questions in favour of IATA. Sabre challenged these findings.

With respect to the first branch of the *Lac Minerals* test, the appellate court acknowledged Sabre's reliance on the *dicta* in *Coco v. A.N. Clark (Engineers) Ltd.*, [1969] R.P.C. 41 (Ch), where Megarry, J. wrote:

> … if the circumstances are such that any reasonable man standing in the shoes of the recipient of that information would have realized the upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence.

However, the appellate court upheld the trial judge's ruling on this point, noting that his "analysis correctly reflects the fact-sensitive nature of the analysis required."

As to the second branch of the *Lac Minerals* test, Sabre had to address the problem arising from the one-way nature of the confidentiality clause in the BSP agreements. In reaching his decision, the trial judge placed significant emphasis on the fact that these agreements contained an explicit confidentiality clause in favour of the airlines, but that it was silent on whether there were any similar obligations attaching to data entered into the system by Sabre. Because the issue of confidentiality had been contemplated when the agreements were drafted, and because no obligations were explicitly imposed with respect to data entered by Sabre, the trial judge found that, in the circumstance of this case, there were none.

Sabre argued that the trial judge failed to appreciate the true nature of the BSP agreements, the actual parties to those agreements and their purpose. In this regard, Sabre argued that: (i) the agreements were not between Sabre and IATA — but rather, between Sabre and various airlines; (ii) the BSP agreements were not commercial agreements in the "normal" sense, but, rather technical industry agreements designed to create narrow and clearly delineated "zones of cooperation" in a "fiercely competitive business"; and (iii) that the agreements had nothing to do with use of the data outside the BSP process.

The appellate court did not accept these submissions — holding that Sabre ignored: (i) IATA's very direct involvement in the creation of the BSP; (ii) the evidence that it was IATA's lawyers who drafted the confidentiality provisions in the first place; and (iii) that IATA was indeed a signatory to the agreements in various capacities over the years.

Next, Sabre argued that the trial judge erred in failing to place a "heavy onus" on IATA to rebut the conclusion that the information was imparted in confidence. Once again, Sabre's counsel cited Megarry in *Coco*:

> ...where information of a commercial value is given on a business-like basis with some avowed common object in mind … I would regard the recipient as carrying a heavy burden if he seeks to repel a contention that he was bound by an obligation of confidence.

The appellate court distinguished *Coco* on this point because of the "prospective nature of the information sharing contemplated by

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IATA *(cont'd)*

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the parties" and, as well, on the basis that unlike in *Coco*, there was an explicit confidentiality provision in place.

Sabre then argued that the trial judge erred by imposing a requirement that Sabre "clearly communicate" the confidential nature of the data. This argument was also rejected. The appellate court noted that the trial judge was faced with a situation involving sophisticated business entities, who were aware of the nature of the information being provided and the commercial use of that information — and that they had contemplated circumstances in which confidentiality would apply to the information. Accordingly, the appellate court found that it was open to the trial judge to give considerable weight to the agreements' silence on confidentiality of information entered into the BSP by Sabre.

Finally, and related to the third branch of the *Lac Minerals* test, the appellate court dealt with Sabre's argument that the trial judge erred in holding that no duty of confidence could arise unless a reasonable person would have in mind the particular misuse of the information that ultimately led to the dispute. In other words, Sabre argued that because PaxIS did not even exist when the information began to flow from Sabre to IATA, it would be unfair to require that Sabre foresee the creation of PaxIS in order to have its data protected.

The appellate court did not accept this argument and found that the trial judge had "captured the nature of the claim," noting that the "outcome of the case depended on whether a reasonable person would understand that Sabre's information was to be used only in the context of the BSPs."

In the end, the appellate court found that the legal principles, the elements of the claim and most of the primary facts were not in dispute. It held that the question was "whether a reasonable person in IATA's position would in all the circumstances appreciate that the information from the ticket sales was given to it in confidence by Sabre."

The Court found that the trial judge considered the relevant factors, attributed the relevant significance to those factors and made a reasonable assessment of them.

The appeal was dismissed, with costs to IATA.

Sabre Inc. v. International Air Transport Association,
2011 ONCA 747

Summary Judgment Denied in Rail Case

In a recent decision, Justice Roberts of the Ontario Superior Court dismissed a summary judgment motion brought by General Electric ("GE"), based on its proposed interpretation of section 137(1) of the *Canada Transportation Act* that a written agreement physically signed by a shipper is strictly required in order for a limitation of liability to be considered effective with respect to carriage of goods by rail. The case involves a claim for damages of over $7 million by GE as a result of the derailment of a shipment of wind energy equipment. The shipment order was placed with CSX Transportation Inc., a U.S. rail company, ("CSX") and originated in Pensacola, Florida. The shipment was destined for Sault Ste. Marie, Ontario. It was picked up in Buffalo, New York by Canadian Pacific Railway ("CPR") and was further transferred in Sudbury, Ontario to Huron Central Railway Inc. ("Huron"), a short-line operator. The shipment derailed while it was transported by Huron.

A primary issue in the case involves whether the defendants can avail themselves of a limitation of liability with respect to the derailed shipment. The defendants maintained that there was a limitation in place of $25,000 per car; a dramatically lower amount of potential recovery than that claimed by GE. GE brought its motion against CPR and Huron, but not CSX, based on its proposed interpretation of the *Canada Transportation Act* and requirements of Canadian law. The motions judge considered the omission of CSX as a respondent to be "fatal" to the success of the motion. This is because the judge found that in order to determine whether CPR or Huron could benefit from a limitation of liability provision, it was first necessary to determine what constituted the contract of carriage between GE and CSX, as well as various other questions flowing from this, such as whether CSX acted as agent for the other rail carriers, and whether a separate contract existed with the other rail carriers. Any determination with respect to the parties other than CSX could result in a multiplicity of proceedings, inconsistent findings and unnecessary incursion of costs and delay.

Moreover, Justice Roberts found that the nature of the contract, that is whether the contract was for a "through rate shipment" and what terms attached thereto, were all genuine issues requiring a trial.

The summary judgment regime has changed in Ontario as of January 1, 2010, and the new summary judgment rule provides expanded powers to judges to decide a case on summary judgment, including the powers to weigh evidence and assess credibility. The Ontario Court of Appeal has recently issued an in-depth examination of the new rule (*Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764). In light of these developments, Justice Roberts found that even with the enhanced powers, the factual disputes involved could not be resolved by way of a summary judgment motion. Affidavit materials submitted by the defendants raised a genuine issue requiring a trial to determine whether the past course of dealings, and communications and other actions taken by the parties with respect to this particular shipment such as the terms on which GE finally paid for the shipment, constituted a binding contract including a term for limitation of liability. The parties' intentions needed to be ascertained with live evidence.

As to GE's proposed interpretation of section 137(1) of the *Canada Transportation Act*, the judge made two findings. First, she found that the course of dealings between the parties could still be relevant regardless of the *prima facie* requirements of this section, insofar as the section does not preclude a different arrangement between the parties. The judge also found that the interpretation of this section was a novel question of law that should not be determined by way of summary judgment. As acknowledged by the plaintiff's counsel in an affidavit, the interpretation of this section has wide-reaching impact, not just for the parties involved, but for the industry at large. Some evidence was presented on the motion as to the practice of railway companies with respect to the placement of shipping orders, and whether this currently occurs exclusively in electronic form. The court found that a fuller evidentiary record was required for the determination of this question.

A final issue raised on the motion was the proper law of contract. The physical signature requirement which GE maintains is imposed by section 137(1) of the *Canada Transportation Act* does not have an equivalent in American law. A finding as to the nature of the contract, not possible on the existing record, was also required for the determination of which legal regime applied.

General Electric Company v.
CSX Transportation Inc., et. al.,
2011 ONSC 7167

Ferry Master's Termination Upheld

On March 21, 2006, the ferry "Queen of the North" went aground and sank, requiring an emergency evacuation and resulting in the presumed death of two passengers. The master of the ferry, the appellant, Mr. Henthorne, had retired for the night at the time of the incident and had left the second officer and a quartermaster on navigational watch.

Mr. Henthorne's employer, British Columbia Ferry Services Inc., held an inquiry into the incident. The second officer and quarter master refused to provide information and Mr. Henthorne told the inquiry that he was unable to explain why the ferry had failed to change course when required.

When asked about possible reasons it might have failed, he referred to two safety concerns he had had with the ferry: a module on the autopilot (that had been resolved after several years) and a rescue boat davit (that had been launched weekly without causing injuries). He then prepared a list of safety concerns he had had with the ferry to which his employer had not responded. He submitted an 11-page list describing 52 issues, some of which had not been resolved by the time of the sinking. He later conceded that none of these items had caused or contributed to the sinking.

The inquiry concluded that the second officer and quartermaster had not kept a proper watch and that "casual watchkeeping behavior", including playing music on the bridge, was practised at times under Master Henthorne. Mr. Henthorne had not raised any of these issues during the inquiry.

In January 2007, his employer terminated Mr. Henthorne, stating that after a review of operational and staff requirements, it no longer required his services. It did not allege cause and proposed to pay Mr. Henthorne until April 15, 2008.

In January 2008, Mr. Henthorne filed a complaint with the Workers' Compensation Board (WCB) under s. 151 of the *Workers' Compensation Act*, the "whistleblower" provision. He alleged that he had been terminated for voicing safety concerns to the inquiry and sought re-instatement.

The WCB case officer found that at least part of the motivation for the termination was the employer's displeasure with Mr. Henthorne's attitude towards safety issues as a member of management and ordered the employer to reinstate him to his former position by May 25, 2009.

The employer appealed to the Workers' Compensation Appeal Tribunal (WCAT). The two employer's witnesses (who had recommended Mr. Henthorne's termination) testified that it was an expectation of maritime culture that a ferry master's career was on the line after a sinking, even if no fault was attributed to him. They were also concerned that Mr. Henthorne would not address critical safety issues around watchkeeping at the inquiry. They had recommended his termination and the employer's executive had ratified their recommendation. The WCAT allowed the appeal. It found that the employer's motivation was not tainted and that it was not Mr. Henthorne's raising of safety concerns that was the reason for his termination, but his failure to address critical safety issues during the inquiry.

Mr. Henthorne sought judicial review of this decision at the Superior Court, arguing that the WCAT did not have evidence about the "state of mind" or motivation of each of the individuals who made the decision to terminate him and that the employer had failed to adduce evidence to show that the termination had not been tainted. The chambers judge found that the WCAT's decision was owed considerable deference and was not patently unreasonable. She dismissed the application.

Mr. Henthorne appealed to the Court of Appeal. The Court of Appeal found that the employer was not required as matter of law to produce evidence of "state of mind" of each individual who decided to terminate Mr. Henthorne, but rather to produce evidence of the "directing mind" of the corporation; in this case, evidence showing sufficient insight into the employer's motivation for the termination decision:

". . . [the evidence given at the tribunal by the decision-makers], together with the very strong evidence of the maritime ethos which requires a captain to take responsibility for the sinking of his ship, and the concern of Captains Carpacci and Taylor regarding Mr. Henthorne's failure to do so, led the Tribunal to reach the conclusion it did."

The Court of Appeal found that, as the WCAT's findings of fact regarding the motivation of the employer were not patently unreasonable, the chambers judge was correct in dismissing the application for judicial review. The Court of Appeal dismissed the appeal.

Henthorne v. British Columbia Ferry Services Inc.
2011 BCCA 476

End of the Line *(cont'd)*

a case that involved two administrative tribunals with concurrent jurisdiction over a complaint. In *Figliola*, the Supreme Court held that when a tribunal is considering a request that it not hear a proceeding because the subject matter of the proceeding has previously been the subject of adjudication by another tribunal, the tribunal should be guided less by precise doctrinal catechisms and more by the goals of fairness and finality in decision-making. The avoidance of re-litigation of issues already decided by a decision-maker with the authority to resolve them is to be given particular importance. Applying these principles to the Tribunal's decision in Morten, the FCA concluded that the Tribunal was "complicit" in an attempt to collaterally appeal the merits of the Agency's decision, and that the Tribunal improperly dismissed Air Canada's preliminary motion for a stay on technical grounds without considering the unfairness inherent in serial forum shopping. The FCA held that any concern about the Agency's application of human rights principles ought to have been addressed through the appeal process for Agency decisions and noted that Air Canada advised Morten, after he had failed to file an application for leave to appeal in the time specified, that it would not seek to take advantage of this failure if Morten were to drop the Commission proceedings and seek appeal in the normal course.

It is important to note that *CCD v. Via Rail* was not about competing tribunals – in that case, the Supreme Court was not comparing the Agency's jurisdiction over a particular complaint to that of the Tribunal. The issue of whether the Agency and the Tribunal have concurrent jurisdiction over discrimination complaints in the transportation network has not yet been decided by an appellate court. As things now stand the only direct authority on the subject is from the Federal Court decision in Morten—a decision which upholds the exclusive jurisdiction of the Agency in relation to complaints concerning accessibility of the federal transportation network.

Canada (Human Rights Commission) v. Canadian Transportation Agency
2011 FCA 332

End of the Line: Jurisdiction of the CTA

We have previously reported on the case of Eddy Morten, the profoundly deaf and blind passenger who filed a complaint against Air Canada because of its denial of his request to travel without a personal attendant. The complaint worked its way through two administrative tribunals, the Federal Court and most recently, the Federal Court of Appeal. In the most recent and probably final decision on the matter, the Federal Court of Appeal in essence restored the decision of the initial decision-maker, the Canadian Transportation Agency (the "Agency"). The Agency had dismissed Morten's complaint and found Air Canada's attendant policy did not constitute an undue obstacle to the mobility of a person with a disability.

Morten is profoundly deaf and has extreme visual disabilities. He has no light perception in his left eye and only extremely limited vision through the right. He also suffers from nystagmus, a condition that causes objects in his limited visual field to appear to move erratically and hinders balance and coordination.

In the summer of 2004, Air Canada decided that Morten would require an attendant to travel on one of its flights. Morten disagreed and filed a complaint with the Agency in February of 2005. The Agency upheld Air Canada's action on the basis that the carrier's decision was justified in light of its safety-related concerns. It was reasonable to conclude that Morten would require the assistance of an attendant in the event of an emergency evacuation or decompression.

Instead of seeking to appeal the Agency's decision, Morten filed the same complaint with the Canadian Human Rights Commission (the "Commission") in the fall of 2005. Air Canada brought a motion to the Canadian Human Rights Tribunal (the "Tribunal") to have the Commission's investigation stayed on the basis that the matter had already been dealt with by the Agency. The Tribunal disagreed, the investigation proceeded and the Commission subsequently referred the matter to the Tribunal for a full hearing on the merits of the complaint.

The Tribunal conducted an 11 day hearing in 2008. There were numerous witnesses including several experts. In January 2009, the Tribunal released its decision. It found that it had jurisdiction to consider the complaint, although the Agency had made a prior determination on the same set of facts. The Tribunal held that it was not possible to determine whether Morten should be allowed to travel unattended until Morten was provided the opportunity to have his individual level of self-reliance assessed fairly and accurately. To that end, Air Canada was ordered to develop an attendant policy in conjunction with the Commission and Morten. While the Tribunal purported not to order what that policy should provide, it essentially restrained any independent decision making by its expressed views of what could be done consistent with aviation safety regulations.

Air Canada brought an application to the Federal Court for judicial review of the Tribunal's decision. It argued that the Tribunal did not have—or alternatively ought not to have exercised-- jurisdiction to adjudicate. It also argued that the Tribunal committed several errors of law and misinterpreted the evidence. The Agency also brought an application for judicial review of the Tribunal decision, arguing that the Agency has exclusive jurisdiction to adjudicate disability related disputes which arise within the Canadian transportation network.

The Federal Court set aside the Tribunal decision on the basis that the Commission and Tribunal exceeded their jurisdiction in the present case. In light of its decision on jurisdiction, the Federal Court declined to review the merits of the decision.

The Commission appealed the Federal Court decision to the Federal Court of Appeal ("FCA"). On appeal, the Agency reiterated its position that it has exclusive jurisdiction over such transportation related complaints. It relied on the Supreme Court of Canada's decision in *CCD v. Via Rail*, which established that the Agency has a special role to play in applying its expertise to human rights complaints in the transportation context and that the relevant section of the Agency's enabling *Act* is essentially human rights legislation. Air Canada supported the Agency's position but argued that in the alternative, if it should be found that the Agency and the Tribunal have concurrent jurisdiction, then the Tribunal should have declined to hear the complaint which had been previously adjudicated. The decision should therefore be set aside on the basis of the common law finality doctrines, namely issue estoppel, abuse of process and collateral attack.

The FCA held that for the purpose of the appeal, it was sufficient to assume, without deciding, that the Tribunal did have concurrent jurisdiction with the Agency to deal with a complaint concerning discrimination within the federal transportation network. The FCA then applied the recent Supreme Court of Canada decision of *British Columbia (Workers' Compensation Board) v. Figliola*,

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