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Remedial Order in *Thibodeau* Stayed Pending Appeal

In the July 2011 edition of *Transportation Notes*, we reported on the Federal Court's decision in *Thibodeau v. Air Canada,* where Air Canada was ordered to take a number of remedial measures after it was found to have violated the *Official Languages Act* (Canada) (the "*OLA*") when it failed to provide bilingual services to the Thibodeaus in four instances.

Two of the remedial measures required Air Canada to:

- make every reasonable effort to comply with all of its duties under … the *OLA* (the "Compliance Order"); and
- introduce ... a proper monitoring system and procedures to quickly identify, document and quantify potential violations of its language duties, as set out [in the *OLA*], particularly by introducing a procedure to identify and document occasions on which Jazz [Air Canada's affiliate] does not assign flight attendants able to provide services in French on board flights on which there is a significant demand for services in French (the "Monitoring Order").

Air Canada appealed several aspects of the Federal Court's decision. It also applied to stay the Compliance and Monitoring Orders, pending the decision on the appeal.

The issue of the stay was recently decided by the Federal Court of Appeal, where that Court applied the usual three-part test found in the Supreme Court of Canada's decision in *RJR-MacDonald Inc. v. Canada (Attorney General),* [1994] 1 SCR 311 ("*RJR*"). In that case, the Court held that a motion for stay may be granted only if the applicant demonstrates that:

- there is a **serious question** to be determined;
- **irreparable harm** will result if the stay is not granted; and
- the **balance of convenience** favours the applicant.

On the issue of whether there was a serious question to be determined, Air Canada argued that the Compliance Order perpetually exposed it to the threat of contempt proceedings and, as a result, the matter was not frivolous or vexatious. The Thibodeaus and the Commissioner of Official Languages (an intervener in the proceedings) conceded the first branch of the *RJR* test noting that, since *Charter* rights and the public interest were in issue, the subject matter of the appeal was indeed serious. The Court accepted these submissions and held that the first branch of the test had been satisfied. The Court then turned to the issue of "irreparable harm".

The Court noted, from *RJR*, that this branch of the test refers to the nature of the harm, rather than its magnitude. The Court then noted, also from *RJR*, that the fact that one party may be impecunious does not automatically determine the motion, although it may be a relevant consideration.

With regard to the Compliance Order, the Court observed the vagueness of the requirements imposed on Air Canada, as well as the fact that compliance orders of this sort are almost always applied to situations where a litigant is being compelled to comply with a court order, not a piece of legislation (which does not require a court mandating compliance in order to give effect to its provisions). Because it was unclear to the Court as to whether the Compliance Order added any additional duty to comply with the *OLA*, and because of the above referenced "vagueness", the Court concluded that "it is preferable to stay its application until such time as the Court of Appeal rules on its merits and scope".

On the issue of the Monitoring Order, Air Canada had already agreed that it would comply with the wording specific to Jazz and it did not seek to resile from doing so in the stay application. It did, however, seek to stay the more ambiguous requirements imposed in the first half that Order.

Air Canada argued that, apart from the wording being unclear as to what was required, full compliance would almost certainly affect some 7,500 flight attendants and 2,600 passenger services employees working in airports in areas as diverse as boarding kiosks, concierge services, private lounges, check-in counters, luggage drop off counters, ticket offices, baggage claim counters and special boarding and deplaning assistance. Air Canada argued that implementing such a system-wide effort would involve a complex and irreversible process, the cost of which is difficult to quantify and, in any event, could never be repaid by the respondents.

The Commissioner argued that this did not satisfy the requirement to show "irreparable harm" because the evidence adduced amounted to a "generality" as opposed to demonstrating "the actual existence or real probability of harm that cannot be repaired later." The Court did not accept this argument and found that "the harm that Air Canada would sustain if a stay were denied is far from hypothetical." The Court found that Air Canada "would have difficulty not only meeting the requirements of a vague order, but also, if victorious on appeal, dismantling a system that no doubt would have taken months to set up."

Finally, on the issue of "balance of convenience", the Court held that the balance favoured Air Canada. It took special note of the fact that only 12 *OLA* complaints were made in approximately 47 million points of contact (0.0000255%) — and, in any event, implementing a monitoring system would not prevent further *OLA* breaches during the appeal period — it would only identify them.

The stay was granted, with costs in the cause.

Air Canada v. Thibodeau et al,
2011 FCA 343

Inside This Issue

Accommodation of Persons with Allergies

The Canadian Transportation Agency has had occasion to consider complaints of persons with allergies who object to conditions encountered while travelling by air on several occasions. The most well known, and litigated, cases involve persons who are allergic to nuts and cats. We have reported on the progress of the nut allergy complaints in previous editions—most recently in June of 2011—and in our weekly summaries of Agency decisions. More recently, the carriage of pets in the cabin has been the focus of Agency jurisprudence on the allergy front. On December 15, 2011 the Agency released an important decision which confirms that carriers may carry cats as pets in the cabin subject to meeting certain conditions designed to accommodate persons who are allergic to cats. We will review the history and details of that case, but will first say a few words to place the particular case in perspective.

The *Canada Transportation Act* gives the Agency the responsibility for eliminating, within the Canadian transportation network, undue obstacles to the mobility of persons with disabilities. The Agency, with the support of the Supreme Court of Canada, has given a very broad definition to "disability". Some 10 years ago the Agency adopted the language and procedures of the World Health Organization and its International Classification of Functioning and Disability. Any person with an "impairment" (itself very broadly defined) coupled with an "activity limitation" or a "participation restriction" will qualify as a person with a disability according to the WHO. The Agency has adopted this approach with some modification. In particular, the Agency requires that a complaint demonstrate both an activity limitation and a participation restriction in the context of the transportation network in order to qualify.

In May of 2002 the Agency applied this approach to a number of complaints of persons with allergies, mainly to cats, and determined that an allergy is an impairment but that there was no evidence that all persons with allergies will experience limitations and restrictions in the transportation network. Therefore, allergy is not, *per se,* a disability. The Agency concluded it would examine complaints on a case by case basis.

In February of 2010, the Agency considered the complaints of three individuals who presented evidence of allergy to cats. It continued to accept a very broad definition of impairment and concluded that an allergy is in itself an impairment, irrespective, it seems, of the severity of the sensitivity. However, it did impose some restriction on the class of persons who should qualify for accommodation in its discussion of the requirement that there be an activity limitation. This limitation must, the Agency found, be "significant enough to result in an inherent difficulty in executing a task or action." Thus, a person whose allergic reaction is "limited to throat and eye irritation and a runny nose" will not qualify. On the other hand, a person will not need to establish that his condition is "at the most severe end of the spectrum" in order to be considered a person with a disability.

Applying these principles in 2010, the Agency found that three complainants were persons with allergies to cats and that in each case the severity of the allergy was enough to reach the disability threshold. The complainants sought a ban on the carriage of all pets in the cabin and argued that the Agency should not limit its consideration to cats. The Agency did not agree and concluded that it would limit its consideration to the carriage of cats as pets in the passenger cabin. It would determine whether the policies of the carriers involved in the case (Air Canada, Jazz and WestJet) constituted an obstacle to the complainants.

The decision released in December, 2011 marks the conclusion of the examination of the obstacle issue. Over the last few years the Agency has developed an increasingly defined and formalized approach to the identification of obstacles. Once a person is found to have a disability the Agency asks what steps are required to meet the person's needs and provide him equal access to the national transportation network. These responsive measures are referred to as "appropriate accommodation". If appropriate accommodation is found to exist, the person with a disability has not encountered an obstacle. Therefore, in recent cases the Agency has, at the obstacle stage of the inquiry, established what it considers to be appropriate accommodation. The carrier is then given an opportunity to provide that accommodation or, alternatively, to demonstrate that providing the accommodation would impose undue hardship upon it.

In the case decided last December, all the complaints sought one primary accommodation—a complete ban on cats in the passenger cabin. In its strictest form, this ban would apply whether or not a particular flight included among its passengers a person with an allergy to cats. The Agency refused to consider such an extreme measure but did conclude that a ban on cats carried as pets in the passenger cabin of an aircraft which included among its passengers a person with an allergy to cats, would be an appropriate form of accommodation. However, the Agency gave consideration to other steps, including ventilation and filtration of cabin air, which can be taken to minimize exposure to cat dander and concluded that a ban on cats in the cabin is not the only form of appropriate accommodation.

Air Canada and WestJet introduced evidence that cabin air in all their aircraft is filtered through high efficiency particulate air filters. These HEPA filters are designed to "eliminate 99.97 percent of contaminants with a particle size of 0.3 microns". Particle size is clearly an important consideration. Although some participants in the proceeding sought to cast doubt on the efficiency of the HEPA filters, the Agency concluded that the best evidence on file is to the effect that particles of cat dander are approximately 2.5 microns in size and noted that this is several times larger than the smallest particles the filters are able to eliminate. Thus the use of HEPA filters is an important element in a package of alternate appropriate accommodation.

Two other elements are air circulation and physical separation of the person with the allergy from the cat. A medical doctor who provided advice to the Agency noted that "in aircraft cabins that have 20 to 30 air exchanges per hour, the air ventilation removal rates would be more significant and efficient means of allergen elimination." All aircraft in WestJet and Air Canada fleets provide this level of air exchange.

The carriers involved in the proceeding all had policies in place to ensure separation between cats carried in the cabin and allergic passengers but the Agency determined that these policies should specify a minimum separation which they did not at the time.

After considering the alternatives put forward, the Agency concluded that there are two basic approaches to appropriate accommodation, either of which would be adequate. A carrier may decide to ban the carriage of pet cats in the cabin of an aircraft in which a person with a significant allergy to cats is travelling, but need not do so if it can provide a set of measures including air filtration and circulation and physical separation to address the problem. The majority decided the separation should be five rows. A single member dissented on this point. In his view the evidence supports no more than two rows of separation.

In this case, as in the decision dealing with the accommodation of persons with allergies to nuts, the Agency has shown sensitivity to the fact that it is not possible to eliminate all allergens from an aircraft cabin and to the unacceptable implications of attempting to exclude from the cabin all substances to which some individual may be allergic.

Decision No 430-AT-A-2011

Aviation Insurance Coverage Requires Valid Medical

In the October 2010 and May 2011 editions of *Transportation Notes*, we summarized the rulings in *Gudzinski v. Allianz* where the Estate of Nicholas Gudzinski sought recovery of the value of Mr. Gudzinki's Cessna Cardinal, after it was destroyed in a crash. Mr. Gudzinksi, the owner and pilot of the aircraft at the time, perished in the accident along with his three passengers.

At issue in this case was whether insurance coverage was in force, due to the fact that Mr. Gudzinski was "out-of-medical" when the accident occurred. The nub of the matter was the fact that the insurance policy stated that it "applies only if [the insured's] aircraft is flown by an approved pilot who has ***the required licence*** … to fly …".

The Estate's argument was rather difficult to accept. Its position was that Mr. Gudzinksi did indeed have the "required licence" but, because of the particular wording of s. 403.03 of the *Canadian Aviation Regulations*, he was merely ***not permitted to exercise the privileges of the licence*** unless he held a valid medical certificate.

Incredibly, the Master hearing the case at first instance accepted this argument, applied the rule of *contra proferentem* and found that coverage was, indeed, in place!

Fear not, though. On appeal to the Alberta Queen's Bench, the Master's decision was overturned. However, in order to get to that decision, Allianz had to move to introduce new evidence on the appeal — being a copy of a standard form pilot's licence which reads on its face:

> This Licence is valid only for the period specified in the Medical Certificate (Form 26-0055) which must accompany this licence.

Also newly introduced into evidence was the wording on Medical Certificates in use at the time which read:

> This certificate is part of a … Permit or Licence issued under the *Canadian Aviation Regulations*.

The Court noted that each of these documents, by their own wording, incorporate the other by reference. With the new evidence, the Alberta Queen's Bench had no trouble reversing the Master's decision by finding that there was no longer any ambiguity on the issue of whether Mr. Gudzinski "had the required licence." The Estate appealed.

The Alberta Court of Appeal completely upheld the decision of the Queen's Bench, adding that a reference to a licence means, in law and in ordinary speech, a licence that is in force. It stated that "[a] former licence is not a licence and does not let one fly. In law, it is wastepaper."

Such a paper may be decorative, or a precious souvenir, but it is not a licence. An expired lease gives nothing.

Some other procedural considerations were raised in the Court of Appeal's decision on the particular procedure in Alberta relating to the leading of new evidence on appeal, but these are of limited interest to our readers, so we will not discuss these here.

Allianz was successful on having the appeal dismissed — meaning its decision to deny coverage was upheld.

Because Allianz did not "raise the winning point", nor the facts (i.e. the forms of licence and medical certificate) before the Master, the parties were ordered to bear their own costs in all three levels of court.

Gudzinski Estate v. Allianz Global Risks US Insurance Company Limited 2012 ABCA 5

End of the Line *(cont'd)*

(Continued from page 4)

legal rights, impose legal obligations or cause prejudicial effects" on the applicant for relief.

After considering the content of Bulletin #1 and #2, Justice Stratas found that none of these consequences occurred —and, for that reason alone, Air Canada's appeal should fail. He noted that "[i]n reality, Air Canada does not attack anything the first bulletin does or describes. Instead, Air Canada is really attacking the [TPA's] earlier allocation of … slots to Porter, an earlier decision that is not now the subject of the judicial review." The Court came to the same conclusion with respect to Bulletin #2.

Although the above finding was dispositive of the matter, the Court went on to consider two other arguments raised at the hearing.

First, the TPA argued that decisions on the allocation of slots are not the class of action that would properly be the subject of a judicial review in the first place because such decisions arise from circumstances where a public authority is exercising a power of a private nature — actions which the previous jurisprudence has confirmed are not subject to scrutiny on a judicial review.

In coming to this conclusion, the Court noted that:

- the *Canada Marine Act* and the TPA's Letters Patent permit the TPA to pursue private purposes, such as revenue generation;
- in no way, can the TPA be said to be woven into the network of government or exercising a power as part of that network;
- there is no statute or regulation that constrains the TPA's discretion, nor is there any statute or regulation that supplies criteria for the decision-making concerning the subject-matters discussed in the bulletins;
- there is no evidence showing that on the matters described in the bulletins, and indeed in the operation and maintenance of the City Airport, that the TPA is instructed, directed controlled or significantly influenced by government or another public entity; and
- there is no evidence that would suggest that the matters described in the bulletins fall within the exceptional category of cases where conduct has attained a serious public dimension or an exceptional effect on the rights or interests of broad segment of the public, such that a public law remedy is warranted.

Second, as to Air Canada's argument that it was not accorded procedural fairness by the TPA, the Federal Court of Appeal held that, insofar as the bulletins and the conduct described in them are concerned (the only matters that were the subject of the judicial review), there is no evidence to suggest that the TPA and Porter were doing anything more than engaging in normal, reasonable commercial activity.

Air Canada's appeal was dismissed, with costs.

Air Canada v. Toronto Port Authority and Porter Airlines 2011 FCA 347

End of the Line: Slots at Toronto City Airport

We have previously reported on the ongoing battle for slots between Air Canada and Porter Airlines ("Porter") at Toronto City Airport (the "Airport"), a small airport located on an island in Lake Ontario, very close to the city's financial core.

Our last article on this saga appeared in the July 2010 edition of *Transportation Notes*, where we chronicled the Federal Court's vindication of the Toronto Port Authority's (the "TPA") distribution of two bulletins describing, among other things, the process by which slots would be allocated at the Airport. This decision was recently upheld by the Federal Court of Appeal.

Some background: The Airport has been in existence since 1939 and was, for many years, used mainly for small aircraft and hobby fliers. It is now a bustling commercial airport. In 1990, Air Canada began its operations there serving, mainly business passengers travelling to Ottawa and Montreal.

By 2002, the Airport was operating at a loss. To remedy the situation, the TPA attempted to persuade Air Canada to commit to continuing its service at the Airport and, further, to contribute towards the enhancement of its operations. At the same time, the TPA began negotiations with Porter Airlines (which was not yet operating) for slots. At this time, Porter received clearance from Canadian Competition Bureau to acquire 143 of the 167 slots at the Airport.

All the while, Air Canada was winding down its operations. By 2006, Jazz (Air Canada's affiliate) declined to renew its Commercial Carrier Operating Agreement with the TPA and ceased operations altogether at the Airport. Soon afterward, Porter commenced operations, having signed its own agreement with the Airport in 2005.

After Porter announced the commencement of its service, Jazz announced its plans to reinstate operations at the Airport. Air Canada also commenced legal proceedings against the TPA at that time, alleging that the TPA had given Porter a monopoly on terminal facilities as well as the vast majority of slots at the Airport. These proceedings were later abandoned.

Meanwhile, Porter invested $49M in the Airport's infrastructure. Its operations flourished, adding several new Dash 8s to its fleet and expanding its services throughout eastern Canada and the northeastern United States.

In September 2009, Air Canada announced a a renewed interest in commencing operations at the Airport. Coincidentally at this time, the TPA was studying the possibility of adding new slots. The TPA discussed these plans with various carriers, including Air Canada.

On December 24, 2009, the TPA issued a bulletin ("Bulletin #1"):

- announcing the results of a noise impact study and capacity assessment for the Airport;
- announcing that the TPA intended to solicit formal business proposals for additional airline service at the Airport;
- disclosing the appointment of a slot coordinator for the Airport;
- stating that all airlines providing service to the Airport would have to enter into an agreement with the TPA and secure terminal space from the landlord; and
- announcing further capital expenditures by the Airport to accommodate the new traffic.

Although Air Canada has never expressed any concern with any of the statements contained in Bulletin #1, this document is the first of two documents that form the basis of Air Canada's judicial review.

On April 9, 2010, the TPA issued a second bulletin ("Bulletin #2"):

- announcing that two airlines (one of which was Air Canada) expressed interest in participating in an RFP for additional service at the Airport;
- appointing an independent party to review the proposals and allocate the additional slots; and
- announcing results from a capacity assessment report indicating that 90 new slots could be made available.

Once again, Air Canada did not take particular issue with any of the statements contained in Bulletin #2, but, nevertheless, Bulletin #2 forms the second document that is the subject of this judicial review.

On the date that Bulletin #2 was issued, unbeknownst to Air Canada, the TPA entered into a new Commercial Carrier Operating Agreement with Porter which grandfathered Porter's existing slots, meaning that it now occupied 157 of the 202 available slots at the Airport. Very significantly, Air Canada has never formally challenged the TPA's decision to enter into this agreement with Porter directly.

At first instance, Air Canada challenged the TPA's decision to issue Bulletin #1 and #2 — but, as recounted in our previous article, the Federal Court dismissed the application, primarily because the sort of action taken by the TPA in this case is not of the sort that is properly the subject of a judicial review.

The same result arose on appeal. In reviewing the decision of the Federal Court, Justice Stratas (writing on behalf of a unanimous three judge panel), held that in order for a judicial review to be triggered, the governmental authority in question must "affect

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