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TRANSPORTATION NOTES

Legal Decisions and Developments Affecting the Transportation Industry in Canada

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Advertising Air Fares

The last several weeks have seen a number of developments which will shape the way in which air transportation is sold in Canada and beyond. At least three significant events took place in the month of January. The U.S. DOT released its ruling on the issue of full fare advertising, legislation which mandates the development of advertising regulations came into force in Canada, and the Supreme Court of British Columbia released a decision which upholds the right of the province to regulate fare advertising, at least to some extent. (This decision is under appeal.)

One of the controversial issues in the United States is the treatment of government-imposed taxes and fees. The rule which existed before the recent rule-making mandates inclusion of the full fare. However, DOT's enforcement practice had been permissive and carriers were allowed to state government-imposed amounts separately. This practice will now cease as the DOT has determined that "consumers need to be able to see the entire price they need to pay to get to their destination the first time the airfare is presented to them." It does appear curious that the DOT offers, as partial justification for this change in practice, the fact that some carriers offer their products on Facebook and have Twitter feeds to advertise sale fares. This controversial ruling is being challenged by some carriers, including Southwest.

Under the U.S. regulations carriers, having stated the full fare on first presentation to the customer, are allowed to break out the component which represents taxes and government charges, but there are limitations on the way in which this information may be displayed. The information must not be displayed prominently and must be in a significantly smaller font than the all-in fare.

The Canadian legislation which requires the development of regulations came into effect on January 4, 2012. This is a very brief statutory enactment which requires the Canadian Transportation Agency ("the Agency") to "make regulations respecting advertising in all media. . .of prices for air services within, or originating in, Canada". Certain aerial services will be excluded from any Canadian regulations. These include, among others, aerial advertising, fire-fighting, sightseeing and glider towing services. Also, the Canadian legislation treats confidential contracts between carriers and corporate clients differently from consumer contracts in a number of respects and it is likely that confidential contracts will be excluded from air fare regulations. Among other problems, enforcement would be virtually impossible on any consistent basis.

More significantly, the legislation makes a distinction between "costs to the carrier" and "charges and taxes collected by the carrier on behalf of another person". The first of these must be *included* in any advertised price, the second must be *indicated* in the advertisement. Thus, it appears reasonably clear that charges such as fuel surcharges must be included in the advertised price. However, the statute seems to require that government taxes and charges be shown separately. If they are rolled into a single figure, can it be said they are "indicated"? It may also be noted that the explanatory note which appeared in the *Canada Gazette* states that the regulations are to require air carriers "to include all fees, charges and taxes in their advertised prices". However, this note forms no part of the legislation.

The Agency has begun a consultation process and is expected to begin drafting regulations this spring. The resulting regulations will be in place by approximately this time in 2013.

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The Agency is aware of the aforesaid distinction respecting charges and taxes and it will be interesting to see whether the Agency accepts the argument that the wording of the legislation requires the display of a price which does not include taxes and a separate identification of those taxes.

Other issues addressed by the U.S. DOT include the application of price advertising rules to ticket agents, limitations on "each-way" price advertising and prohibition of pre-selected ancillary services which require a customer to opt-out of the suggested bundle. In Canada, the Agency is showing interest in each of these issues and it is highly probable the regulations will address each. It is too early to guess how each will be resolved, but the Agency has clearly been studying the U.S. docket and is likely to be influenced by the U.S. rule-making.

A set of issues which has been addressed by the DOT and which will be addressed by the Agency arises from the increasingly prevalent unbundling of ancillary services. For at least two years now, there has been discussion of "standing-room only" air services and it is conceivable that passengers in the future will be offered the option of "vertical seats" or today's traditional seat. A question which arises from the practice of unbundling is identification of services which are truly optional and others which have been tradi-

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tionally associated with the purchase of a ticket. Should disclosure rules be dependent upon where on the spectrum the unbundled ancillary service sits?

Probably the most significant of these services is the carriage of baggage. The U.S. DOT has required that increase to baggage fees be disclosed on carriers' websites. The notice must be on the homepage and must remain there for three months. Although the detailed information can appear on a page which can be reached from a link on the homepage, that link must be "descriptive, clear and conspicuous".

This last controversial requirement highlights a larger problem which arises because of governmental regulations which mandate notices on websites. The proliferation of such requirements poses a threat to the commercial exploitation of valuable homepage space. When addressing such requirements, we are hopeful that the Agency will seriously consider the possibility of a single "government requirements" link which will take the interested passenger to a page where it will be possible to view mandatory terms and conditions of carriage, tariffs and other government imposed information requirements.

Yet another link on the homepage will, under the DOT rule, take a user to a list of all ancillary fees. The DOT will not allow any value judgment concerning what is "significant". All fees must be listed, period. It considers baggage related fees to be "fundamental to air travel" and stipulates that specific charges must be identified. The practice of providing a range of charges will not be permitted in the case of baggage charges, although it is permissible with respect to other ancillary charges.

Legislators everywhere are frequent air travellers and it is no secret they generally hate baggage charges. It is probable that baggage charges will be singled out for special treatment in the Canadian regulations as well.

The Agency held meetings and accepted submissions throughout February. Publication in Part I of the *Canada Gazette* is anticipated this summer. Following that publication, there will be an official comment period of 75 days. The final regulations should be published in Part II of the *Canada Gazette* in the winter of 2012-2013.

Earlier this month, the major Canadian airlines announced that they would implement "all-in" fare advertising before this is required by regulation and some such advertising is already beginning to appear. However, an early sampling suggests that there may be interesting months ahead. The rules the carriers will voluntarily comply with are not well defined and some old-style advertising can be found side-by-side with ads which seem to respect the spirit of the new "truth in advertising" regulations.

Before moving on to consider a recent case from the Supreme Court of British Columbia we note that in consultation documentation related to fare advertising the Agency has identified a number of provincial laws under the rubric "Air Services Price Advertising: Other Canadian Laws". Listed there are "consumer protection" statutes enacted by a number of Canadian provincial governments. Whether such legislation can be utilized to regulate the advertising of air fares is a controversial issue . The trial court in British Columbia found in favour of this legislation in the case of *Unlu v. Air Canada*. Heard and decided at the same time was an identical claim directed against Lufthansa. In this proposed class proceeding, the carriers brought a summary judgment motion seeking dismissal on constitutional grounds. The reasons for judgment dismissing the summary judgment motion were released on January 18, 2012. That decision is under appeal.

The issue in Unlu is whether the identification of international fuel surcharges by the code "YQ" is a "deceptive act or practice, contrary to the *Business Practices and Consumer Protection Act* ("BPCPA")" of British Columbia. It is alleged that this code is appropriate only for taxes or charges which an air carrier is required to remit to a governmental authority and that the carriers represented it as such while collecting on their own behalf. The issue that was determined in January is the constitutional applicability of the BPCPA. The motions judge determined that the provincial legislation is applicable and dismissed the summary judgment motion. She also directed that the matter should proceed to a certification hearing to determine whether it should be allowed to go forward as a class action.

The constitutional challenge is based on the existence of a federal scheme for the regulation of aviation activities. It has long been established that the federal government has the exclusive authority to legislate on the subject matter of aeronautics. Canadian constitutional law also makes it clear that the exclusive authority of the federal government is not confined to aeronautics in its most narrow technical sense. By way of example, municipal by-laws which could have a detrimental impact on airport operations have been struck down as have provincially created liens by which contractors have sought to encumber the interests of an airport authority.

The carriers relied upon the fact that there are existing federal regulations which address the relations between air carriers and passengers in great detail. These regulations prohibit statements which are "false or misleading with respect to the licensee's service or any service incidental thereto." The BPCPA prohibits "deceptive acts or practices". There is no question that the province of British Columbia has the authority to enact consumer protection legislation and the BPCPA falls within this category. However, in certain circumstances, valid provincial legislation is inapplicable because of the constitutional doctrines of paramountcy and interjurisdictional immunity. The first applies when complying with provincial legislation makes it impossible to comply with federal legislation or, if compliance with both enactments is possible, when complying with the provincial enactment would frustrate a federal purpose. The main thrust of the arguments advanced by the carriers is that existing federal legislation constitutes a comprehensive code with an identified decision-making authority. The purpose of this code would be frustrated by allowing competing provincial regimes. The second doctrine, interjurisdictional immunity, applies when a provincial enactment has a serious impact on a matter at the "core" of the federal legislative authority in question.

The motions judge dismissed both arguments and, in doing so, emphasized the fact that the complaint is very narrow. It does not challenge the ability of an air carrier to levy a fuel surcharge or seek to control an airline's tariffs or conditions of carriage. As the complaint is limited to the allegation of a deceptive practice, the provincial statute was found to be fully operative. It is significant that the Attorney General of Canada did not intervene to challenge the provincial legislation, but that fact is not determinative and the matter is now on the appeal track.

DOT-OST 2010-0140

Section 86.1 of the *Canada Transportation Act*

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Limitation of Liability, continued

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a waybill be presented to a carrier for the delivery of the goods. However, a waybill retains its significance as both a receipt of the goods, and as evidence of the contract of carriage.

In this case, the Court ultimately determined that the Shipping Document was a waybill, and not a bill of lading as argued by the Plaintiffs, and that it was the "best evidence of the contract between the parties." The Court first examined the plain language terms of the Shipping Document, contrasting it to another document that WSL identified as a bill of lading. As the word waybill was found in numerous places on the Shipping Document, including the title, as only one copy was issued and as its presentation was not required on delivery, the Court found that the Shipping Document was a waybill. The Court also found that such characterization of the document accorded with the intent of the parties. Since numerous shipments were made under the annual contract, the Court was persuaded that: "dispensing with the negotiability and title aspects of the bill of lading is indicative of a desire to employ the use of a less onerous shipping document."

Applicable Limitation of Liability for the Original Carrier WSL

While the Plaintiffs argued that the applicable limitation of liability was found in WSL's confidential contract with CN, WSL argued that this term was found in the waybill. The Court agreed with WSL, ultimately determining that in accordance with the waybill, a limitation of liability of 500 USD per package applied. The Court first found that the Confidential Contract addressed the limitation of liability pertaining to CN exclusively. As such, it could not cover the relationship between WSL and Cami. Second, the Court looked to the applicable provision in the waybill, which indicated that the U.S. Carriage of Goods by Sea Act ("COGSA") applied, except where the local law required application of the Hague Rules or the Hague-Visby Rules ("the Hague Rules"), which impose certain obligations on carriers by way of international convention.

The Court found that the Hague Rules were not compulsorily applicable to the dispute, for the simple reason that the Hague Rules were intended to cover disputes pertaining to bills of lading or similar documents of title. Since the Court had already determined that the Shipping Document was a waybill, it could not be the case that the Hague Rules applied. Interestingly, the court noted that jurisdictions such as the UK, South Africa and New Zealand had specifically adopted legislation extending the applicability of the Hague Rules to waybills, which the Court considered a further indication of the fact that its interpretation of the Rules was correct.

Under COGSA, the applicable limitation of liability was 500 USD per "package". This language was mirrored in the Shipping Document, which also provided that even where the value exceeded 500 USD per package, it would be deemed to be at that value, unless a higher value was declared by the shipper in writing and extra freight was paid thereon as required.

As there was no special declaration or supplemental payment, determining the total amount of liability hinged on the meaning of "package". In this respect, the Court looked to the contractual agreement between the parties as well as the surrounding circumstances, including preparation for transportation. In considering all this evidence, the Court ultimately rejected the plaintiff's contention that each auto part being shipped could be seen as a package, and rather found that "a plain language meaning of 'package' must connote some form of preparation for shipment or protection during handling." As such, it was the pallet on which the parts were placed and secured, and which was covered in plastic as a single unit, which was considered a package. Based on the number of pallets which were damaged, the total limitation of liability amounted to $50,000.

Although the value that the Plaintiffs could recover for the shipment was significantly diminished by virtue of the limitation of liability, the Court held: "It was open to Cami to declare the value of the cargo and seek greater coverage. This, of course, would likely have meant a higher premium and increased transportation costs. By acting as it did, Cami made a business decision. It balanced the increased costs of enhanced coverage against the risk of a greater loss in the event of damage to the goods shipped by reasons of the limitation of liability provisions in the shipping document."

Applicable Limitation of Liability for the Subcontracting Carrier CN

As to the limitation of liability applicable to CN, the Court identified two options: either as found in the Confidential Contract, or as found in the Shipping Document.

The Plaintiffs were not privy to the Confidential Contract and thus the question was whether CN could nevertheless rely on this contract in order to limit its liability towards the Plaintiff. The Court found that it could, because of a special rule of bailment law. This rule holds that an owner (shipper) is bound by the contract between a bailee and a sub-bailee, where the owner has expressly or implicitly consented to the terms of the subcontract. In this case, in its agreement with WSL, Cami acknowledged that WSL could subcontract the carriage of the goods on any terms. Although Cami had not seen the terms of the Confidential Contract, it was held to have explicitly consented to the terms of the Confidential Contract.. A further dispute arose as to whether the Contract incorporated a particular tariff set out by CN, or whether the limitation of liability as set out in the *Railway Traffic Liability Regulations* applied. The Court ruled in favour of the latter. These Regulations, in conjunction with the *Canada Transportation Act* allow a carrier to limit its liability to a shipper in certain circumstances. However, there was no evidence to show that any of these circumstances applied.

Not surprisingly then, CN also sought to avail itself of the limitation of liability that applied to WSL, and the Court ruled in its favour. The Court relied on a Himalaya Clause in the Shipping Document, which extends terms of that document to subcontracting third parties. The Court found that WSL signed the Shipping Document as the shipper, thus addressing a requirement of Canadian law that there had to be an agreement signed by the shipper. The Court further relied on the policy reasons for Himalaya clauses in rejecting the argument that CN could not avail itself of the Shipping Document, having already relied on the Confidential Contract. The Court found that by virtue of the Himalaya Clause both the Plaintiffs and WSL "agreed to extend the benefit notwithstanding any terms agreed to in the subcontract." The availability of two potential regimes did not automatically invalidate one or the other. Rather, the sub-bailee was entitled to choose. In this case, CN was entitled to avail itself of the limitation of liability of $50,000 available to WSL.

On appeal, the Federal Court of Appeal did not address the substance of the claim in any detail. Rather, the Court decisively found that "despite the numerous arguments made by counsel for the appellants, we are all of the view that this appeal cannot succeed."

Cami Automotive, Inc. v. Westwood Shipping Lines, Inc. , 2012 FCA 16 (CanLII)

End of the Line: Limitation of Liability

On January 17, 2012, in *Cami Automotive Inc. v. Westwood Shipping Lines Inc.*, 2012 FCA 16, the Federal Court of Appeal summarily dismissed a multi-issue appeal from a decision of the Federal Court which considered the limitations of liability applicable in a claim for a damaged shipment of auto parts, which occurred as a result of a derailment while the cargo was being transported by rail by Canadian National Railway Company ("CN"). Having found that there was a limitation of liability to be found in the waybill drawn up between the shipper and the original carrier, the Federal Court went on to find that CN, to whom the carriage was subcontracted, had the option of relying on either the limitation of liability found in a confidential contract between itself and the shipper, or the limitation of liability as found in the waybill, by virtue of a Himalaya clause.

The Federal Court, in its decision dated June 24, 2009, considered the issue of limitation of liability only, as provided for in an order bifurcating the proceedings. This order specified that the Federal Court was to first establish the applicable limitations of liability, on the assumption that the defendants were liable to the plaintiffs, but specified as well that this was without prejudice to a later determination respecting liability.

The determination of the limitation of liability issue required close examination of the interconnection in contract and in bailment law between the Plaintiffs and Defendants. The Plaintiffs in the action were Cami Automotive Inc. ("Cami"), a manufacturer of automobiles at a plant in Ontario, Canada, and Aisin World Corporation of America ("AWA") which sold auto parts and components manufactured by its parent company in Japan to auto manufacturers in North America, including Cami. The Defendants were WSL Shipping Lines ("WSL"), an American company operating as an ocean carrier and multimodal transportation company serving a number of international ports, including in Japan; AS Borgestadt Shipping ("AS Borgestadt"), which was the registered owner of the ship WSL Annette chartered by WSL; and CN which was responsible for the rail portion of the carriage of the cargo. WSL and AS Borgestadt also claimed against CN for indemnity for any damages or other relief for which they might be deemed responsible.

The shipper-carrier relationship between Cami and WSL was long-standing; since the early 1990s, WSL provided ocean and multimodal carriage to Cami on an annual basis. This relationship was governed by annual service contracts providing for carriage between Japan and Ontario. Shipping documents were issued pursuant to these annual contracts. Both parties understood that both the annual contracts and the shipping documents would constitute the totality of terms of the agreement between them. The shipment at issue in this case consisted of automatic transmission assemblies and automatic transmission control modules ("the Cargo"), which were delivered by AWA to WSL's ship at Nagoya, Japan. Cami purchased these parts from AWA. WSL issued a shipping document ("the Shipping Document") to acknowledge having received the Cargo.

At the material time, there was also a Confidential Transportation Agreement in effect between WSL and CN, which provided that CN would transport commodities for WSL from British Columbia to Ontario. WSL availed itself of this contract in order to complete the shipment of the auto parts from Japan to Ontario. On receipt of the goods, CN created an electronic data interchange waybill, but did not issue any print documents. The derailment occurred while the Cargo was being transported by CN in Ontario.

Nature of Shipping Document

As a preliminary matter, the Federal Court had to determine the nature of the Shipping Document, and particularly whether this document was a bill of lading, a straight bill of lading, or a waybill. The Court provided a detailed examination of the nature of and the distinction between these three documents. The Court highlighted that a bill of lading is a document used to process the carriage of goods by sea, and which has three purposes: as a receipt of the goods; as a contract of carriage and as a document of title. The Court noted that more recently, straight bills of lading and waybills have been put into use. A straight bill of lading is not negotiable but it does name the consignee entitled to delivery. It retains its nature of a document of title. By contrast, the Court explained that a waybill is not a document of title. It is not required that

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