

TRANSPORTATION NOTES

Legal Decisions and Developments Affecting the Transportation Industry in Canada

Volume 8, Issue 3 — March 2012

Competition Trumps CTA Attempt to Regulate Fares

A recently decided pricing complaint illustrates the extent and limit of the Canadian Transportation Agency's (the "Agency") ability to regulate the price of domestic airfares in Canada.

The issue arose in a complaint filed by Mr. Deryk Jackson who, on December 16, 2010, sought to book a return trip from Toronto to Timmins, Ontario over the Christmas holidays — only to find that the fares offered by Air Canada at this late stage were not to his liking. As a consequence, he filed a complaint with the Agency, pursuant to section 66 of the *Canada Transportation Act*, S.C. 1996, c.10 (the "CTA"), alleging that Air Canada was "gouging" its passengers.

Timmins is a fairly remote community 566 km north of Toronto with approximately 45,000 residents. The strength of Timmins' economy is inextricably tied to the volatile prices of the base metals and gold that are mined just outside of the city centre. At the time of the complaint, Air Canada was the only air carrier offering non-stop service from Toronto, through a combination of Dash-8-100 (37 seats) and Q-400 (74 seat) turbo-prop aircraft.

The Agency's ability to deal with the complaint is framed by section 66 of the CTA which permits it to take remedial action where it finds that:

- (a) an air carrier offering a fare is the only carrier offering a domestic service between two points; and
- (b) the fare in question is unreasonable; and/or
- (c) the air carrier is offering an inadequate range of fares in respect of that service.

With regard to the determination of the issues of "reasonableness of fares" and the "adequacy of a range of fares", subsection 66 (3) of the CTA requires the Agency to consider:

- historical data respecting fares applicable to domestic services between the two points;
- fares applicable to similar domestic services offered by the air carrier in question and one or more of its competitors using similar aircraft, including terms and conditions of transportation and number of seats available at those fares; and
- any other information that may be provided by the licensee.

As a preliminary matter, the Agency dismissed the complaint that Air Canada offered Mr. Jackson an "unreasonable fare", as he did not identify a particular fare in his complaint. The Agency accepted Air Canada's submission on this point that it was "impossible to know which fare group Mr. Jackson is challenging."

The Agency did not view this lack of specificity as an obstacle to proceeding with the complaint that Mr. Jackson was presented with an "inadequate range of fares". On this point, the Agency chose to consider the complaint on the basis that it had sufficient details, and also noting that "[a]ccording to Mr. Jackson, these fares often exceed the ones for transatlantic flights and are significantly higher than for other small communities, such as Sudbury and Thunder Bay, for which a monopoly does not exist."

As a result of these preliminary determinations, the only issues to be decided on the complaint were: (i) whether Air Canada was the only "person" providing a domestic service between the points of Toronto and Timmins; and, if so, (ii) was the range of fares offered on that route inadequate?

Was Air Canada the Only Provider?

Air Canada acknowledged in its submissions that it was the only air carrier that operated a non-stop service between Toronto and Timmins, but argued that another operator, Bear-

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skin Airlines, offered a reasonable alternative to Timmins from Kitchener-Waterloo, Ontario (82 km southwest of Toronto), connecting in Sudbury and Ottawa. The Agency did not accept that the Bearskin Airlines service was comparable to that which was offered by Air Canada. In doing so, it cited its own *Decision No. 484-P-A-2005* where the Agency held that a "point" is an individual origin or destination city. (In that decision, the Agency found that Hamilton, 78 km southwest of Toronto, and Toronto were not the same "point").

Air Canada did not accept the test set out in *Decision No. 484-P-A-2005*, but it does not appear that an alternative interpretation of the legislation was argued at any length.

Given Air Canada's admission that it was the only carrier operating the service on a non-stop basis from Toronto to Timmins and, relying on *Decision No. 484-P-A-2005*, the Agency found that it had the jurisdiction to deal with the complaint about the alleged inadequate range of fares.

Was There an Adequate Range of Fares?

In order to assess whether a range of fares offered by an air carrier on a domestic route for which there is no competition, the legislation requires the Agency to compare the route in question to fares offered by the same air carrier on "similar competitive routes". In order to identify suitable comparators, the CTA provides that the Agency should consider the following factors:

- whether there are other air carriers offering a domestic service between the two

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CTA Regulation of Domestic Air Fares (cont'd)

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points;

- the type of aircraft used by the air carrier to operate its service between the two points;
- the air mileage between the two points; and
- the origin-destination passenger volume between the two points.

After combing the Canadian market for comparable domestic city pairs, the Agency found that the following routes, in which Air Canada operated and encountered competition from other air carriers, could serve this function:

- Rouyn-Noranda/ Montreal;
- Winnipeg/ Thunder Bay;
- Cranbrook/ Vancouver; and
- Calgary/ Grand Prairie,

(collectively, the “Comparison Routes”).

Although Air Canada did not offer any alternative city pairs as possible points of comparison, it made submissions that other factors should also be considered when identifying suitable comparators, such as size of catchment area, number of daily flights between the airports in question, passenger mix, network contribution and comparison of the trend of fares on the routes being examined.

The Agency rejected this submission, once again citing *Decision No. 484-P-A-2005*, this time as authority for the proposition that the inclusion of additional factors would either severely limit the ability to find comparable routes, or perhaps result in a situation where every market is considered unique.

Having identified the Comparison Routes, the Agency then conducted a granular comparison between Air Canada’s fares on the Toronto/ Timmins city pair and Air Canada’s fares on each of the Comparison Routes over a period of two years.

In summary, the Agency’s findings (for the two year period) were as follows:

- The difference in the highest and lowest fares charged on the Toronto/ Timmins route was stable and comparable to the span of fares on the comparable routes, although the Toronto/ Timmins fares were higher — particularly at the lower end of the fare range.
- The number of different fares offered in in the Toronto/ Timmins routes was not

significantly different from the number of fares offered on the Comparison Routes.

- For three of the four Comparison Routes, the most generous discount offered by Air Canada was significantly less on the Toronto/ Timmins routes (that is, the most discounted fare on the Toronto/ Timmins route was 71%; while the most discounted fare, on average, for three of the Comparison Routes was 85%).
- When considering the lowest fares offered on the Toronto/ Timmins route and the Comparison Routes, the Toronto/ Timmins lowest fares were consistently and significantly higher. In this regard, the Agency referenced fare differences ranging between 62% and 184%.
- The range of fares on each of the routes was comparable over the two year period that was considered.

... [T]he intent of Parliament was to give the Agency jurisdiction over fares on inadequately served routes but not on routes on which there was a reasonable alternative service. This reflects an underlying assumption that appropriate pricing is established through competition. Furthermore, the remedy contained in [the legislation] pertains to market failure relating to monopoly pricing. The Agency finds that the capacity Porter has deployed on the route constitutes a reasonable alternative service.

Having made the observations set out above, the Agency found that Air Canada’s range of fares on the Toronto/ Timmins route was, in fact, inadequate.

As a result, on January 13, 2012, the Agency directed Air Canada to amend its tariff to increase its range of fares on the Toronto/ Timmins route by offering one additional fare at the low end of each of its current Lati-

tude, Tango Plus and Tango fare classes, as follows:

- **Latitude:** At least 16% lower than its rate on the date of the order;
- **Tango Plus:** At least 37% lower than its rate on the date of the order; and
- **Tango:** At least 46% lower than its rate on the date of the order.

Ironically, it was Air Canada’s competitor, Porter Airlines, that inadvertently came to the rescue!

On January 16, 2012, just three days after the Agency’s ruling, Porter commenced service from Toronto (via another airport) to Timmins.

The Porter service:

- operated 36 non-stop flights per week to Timmins (compared to 64 for Air Canada);
- also utilized the Q400 aircraft;
- had a weekly capacity of 2,530 seats (compared to Air Canada’s 3,401); and
- had virtually identical travel times.

As the Porter service was so similar to the Air Canada service, the Agency determined that Porter provided travellers with reasonable alternative services, and, as a result, the Agency no longer had the jurisdiction under the CTA to make a ruling on the matter as there was competition in the market.

The remedial order was found to be no longer necessary and, as such, was rescinded.

And there you have it: An elegant little proof of the existence of Adam Smith’s “invisible hand” — but this time, the regulator reacted more quickly than the market, even if only by three days.

Jackson v. Air Canada,
Canadian Transportation Agency,
Decision No. 15--P-A-2012 (Jan. 13, 2012); and
Decision No. 76-P-A-2012 (Mar. 5, 2012)

Interpretation of “Common Carrier” in Insurance Policy

On August 3, 2008, Mark McLean (“McLean”) was killed in the crash of a Grumman G-21-A Goose floatplane in a remote area of Vancouver Island. At the time of the crash, McLean worked as a log barge loader for Seaspan International Ltd. (“Seaspan”) and was *en route*, with five other Seaspan employees, from Port Hardy to Chamiss Bay, British Columbia as part of his employment.

The flight was operated by Pacific Coastal Airlines (“PCA”) under charter to Seaspan. Seaspan had arranged and paid for the flight and had given instructions as to the destination, departure time and employees to be carried on the fateful flight. The arrival time was coordinated to correspond to the availability of a barge and tugboat, for use by the Seaspan employees.

PCA, a licensed “domestic air carrier” under the *Canada Transportation Act*, also operated a scheduled air service in British Columbia, but the flight in question was purely undertaken pursuant to the Seaspan charter — and not available to any members of the public. In fact, PCA only serves Chamiss Bay when hired on a charter basis to do so.

Following McLean’s death, his wife, Debra, sought recovery as the beneficiary under her husband’s life insurance policy issued by Canadian Premier Life Insurance Company (the “life insurer”). The policy provided coverage in the amount of \$25,000 (which was paid by the life insurer without controversy) and, in addition, an accidental death benefit rider granted coverage for \$1,000,000. In order to collect under the rider, Mrs. McLean would have to establish that her husband’s death fell within the following language:

PART 1—BENEFIT FOR TRAVEL BY COMMON CARRIER

If a Covered Person suffers a Loss as a direct result of a collision, crash or sinking of a duly licensed Common Carrier while riding as a fare paying passenger inside such Common Carrier, we will pay the applicable benefit stated on the Summary of Coverage page.

The term “common carrier” was defined in the policy as follows:

COMMON CARRIER means a public conveyance which is:

1. licensed to transport passengers for hire; and
2. Provided and operated (a) for regular passenger service by land, water or air, and (b) on a regular passenger route with a definite regular schedule of departures and arrivals between established and recognized points of departure and arrival; and
3. Provided and operated under a Common

Carrier licence at the time of the Loss.

In a bid to have the rider apply to the death of her husband, Mrs. McLean commenced an action in British Columbia alleging that the definition of “common carrier” was ambiguous and, as a consequence, the policy should be interpreted in her favour as a result of the rule of *contra proferentem*.

As a starting point, she argued that, in this case, the term “common carrier” refers to PCA, and not a type of transportation (i.e. aircraft) because, following along in the definition of the term, only a business entity can be licenced under the legislation, not a particular aircraft.

Mrs. McLean argued that if she were correct on this point, then a great deal of ambiguity exists in the accidental death rider. That is, the wording that triggers coverage (“*riding as a fare paying passenger inside [a] Common Carrier*”) does not make sense because a passenger does not ride inside a business entity that is licensed to offer passenger services.

Further, Mrs. McLean argued that if the term “Common Carrier” meant PCA, then the words “public conveyance” (in the definition of “common carrier”) cannot also mean a mode of transportation (such as an aircraft), but rather, must mean a public conveyer (i.e. the business entity that provides the transportation).

Mrs. McLean argued that, if the following changes were made to the policy wordings, then no ambiguity would arise and she would be entitled to collect the \$1,000,000 benefit:

PART 1—BENEFIT FOR TRAVEL BY COMMON CARRIER

If a Covered Person suffers a Loss as a direct result of a collision, crash or sinking of a duly licensed Common Carrier while riding as a fare paying passenger **of inside** such Common Carrier, we will pay the applicable benefit stated on the Summary of Coverage page.

...

COMMON CARRIER means a public **conveyer conveyance** which is:

1. licensed to transport passengers for hire; and
2. Provided and operated (a) for regular passenger service by land, water or air, and (b) on a regular passenger route with a definite regular schedule of departures and arrivals between established and recognized points of departure and arrival; and
3. Provided and operated under a Common Carrier licence at the time of the Loss.

Finally, Mrs. McLean argued that her husband was, in fact, a “fare paying passenger”,

even though he was not the person who paid the fee. Her counsel made the point that it was never intended that McLean would be transported without charge.

In short, Mrs. McLean’s position was that the above confusion resulting from the allegedly poor wording resulted in ambiguity and, therefore, the ambiguity should be resolved in her favour.

Not surprisingly, the life insurer argued that the definition in the rider is clear and unambiguous. It argued that “public conveyance” means the aircraft in which McLean was carried — and not the business entity which operated the aircraft. It argued that this interpretation was bolstered by the fact that payment of the benefit is triggered when a fare paying passenger is injured *inside* the common carrier. Further, the language in the rider speaks to a “collision, crash or sinking” of a common carrier — meaning a physical object, not a business entity.

Additionally, the life insurer argued that, at the time of the crash, PCA was not operating a service that was consistent with the definition of a common carrier. On this point, it argued that:

- even though PCA did, in other instances, offer scheduled transportation for hire to the public, it was not doing so in this instance;
- there was no regular schedule of departures between established and recognized points under the Seaspan charter; and
- Seaspan, not PCA, determined who the passengers would be — meaning the flights were not available to the public.

The Court accepted the life insurer’s arguments, concluding that the crash did not occur on a “common carrier”, as defined in the policy. The Court also found that it is not necessary to interpret the words of the rider in a way consistent with the *Canada Transportation Act*’s terminology.

Mrs. Maclean’s action was dismissed. Her recovery under the policy was restricted to the \$25,000 that had already been paid to her.

McLean v. Canadian Premier Life,
2012 BCSC 163

End of the Line: *Marine Liability Act* Liability Limits

In July 2006, Joe William Buckley, his son Bradley Buckley and two children stayed at the Eagle Lake Sportsmen's Lodge on Vermilion Bay in northwestern Ontario. The Lodge was a fishing resort, owned by the respondents, James Buhlman and Cindy Maissonville. Guests were offered the use of a motorboat as part of the Lodge's services.

On July 22, 2006, the Bucleys went to the dock for an evening tour of Eagle Lake. William and Bradley Buckley drove a seventeen foot Lund Outfitter motorboat while Mr. Buhlman took the Buckley children on a Crestliner boat of a similar size. On the return trip to the dock, the Buhlman-operated motorboat collided with the motorboat the Bucleys were operating. Both William and Bradley Buckley sustained bodily injuries.

William and Bradley Buckley (the "Bucleys"), along with their wives, sued Mr. Buhlman and Ms. Maissonville for negligence, seeking damages in the amount of \$8.2 million. The defendants sought summary judgment in the Federal Court against the plaintiffs, seeking to limit their liability under section 28 of the *Marine Liability Act* ("MLA"). The Federal Court found that the maximum liability for claims for bodily injury arising out of the accident was \$1,000,000, pursuant to section 28 of the *MLA*.

The Federal Court motions judge found that the Bucleys' claims for personal injury were maritime claims, as defined under section 24 of the *MLA*. The *MLA* refers to article 2 of the *Convention on Limitation of Liability for Maritime Claims, 1976*, which limits liability for personal injury "occurring on board or in direct connexion with the operation of the

ship". The motions judge found that the higher limit of liability (\$3,000,000, under section 29(2) of the *MLA*) did not apply because the Bucleys were not on board the "striking ship" (the ship whose operator and owners were seeking to limit liability). She found that the lower limit of liability applied to the plaintiffs. The plaintiffs appealed.

The plaintiffs argued that the motions judge had erred in finding that the section did not apply to them, as section 29(2) referred to ships "operated for a commercial or public purpose" and the Crestliner had been operated for a commercial purpose, as the tour and the use of the motorboats was part of their resort fees. The Federal Court of Appeal found this to be a misreading of the section, which did not focus on the use of the ship to determine limits of liability, but on the status of the ship.

The Court first looked at the purpose of the *MLA*, concluding that section 29 was enacted to afford "certainty regarding limits of potential liability" and to enable "the owners of ships and their concomitant insurers to set a global limit of potential liability limits arising from claims advanced by their passengers." The *MLA* was intended to give "shipowners and insurers a clearer indication of what they would be liable for and to what degree."

The Court of Appeal concluded that the motions judge had correctly framed the issue as being "the status of the Bucleys *vis-à-vis* the motorboat operated by the defendants" – were they passengers on the striking ship? The Court pointed to Article 7 of the *Convention*, the source of section 29, which sets the limits for personal injury claims brought by passengers, as support for the judge's reason-

ing:

Article 7

2. For the purposes of this Article "claims for loss of life or personal injury to passengers of a ship" shall mean any such claims brought by or on behalf of any person carried in that ship.

The Federal Court of Appeal concluded:

... a combined reading of Article 7 of the Convention and of section 29 of the *MLA* favours the Judge's interpretation that subsection 29(2) of the *MLA* refers to persons on the ship seeking to limit liability. ... Together, subsections 29 (1) and (2) of the *MLA* provide for the **class of persons on board a vessel**, either as passengers or as persons carried on a ship otherwise than under a contract of carriage. [*emphasis added*]

The Federal Court of Appeal concluded that, as the Bucleys were not passengers on the ship seeking to limit its liability – they were passengers on the other ship, whose liability was not in question - section 29 did not apply to them and the lower limit of liability in section 28 applied. The Federal Court of Appeal dismissed the appeal with costs.

Buckley v. Buhlman, 2012 FCA 9

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