BERSENAS JACOBSEN CHOUEST THOMSON BLACKBURN LLP
BARRISTERS, SOLICITORS

TRANSPORTATION NOTES

Legal Decisions and Developments Affecting the Transportation Industry in Canada

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More from the CTA on Accommodating Disabled Pax

The resolution of complaints by persons with disabilities continues to remain a core function of the Canadian Transportation Agency (the "Agency"). In that regard, the Agency recently released two separate noteworthy decisions affecting passengers with cat allergies and passengers with mobility issues.

The first decision relates to the policies of Air Canada, Air Canada Jazz and WestJet regarding the carriage of cats as pets in aircraft cabins. Before discussing the decision, we will provide a brief review of the prior cat allergy decisions leading up to it.

The Agency takes a broad approach to the definition of disability and requires that a complaint demonstrate an impairment, and both an activity limitation and a participation restriction, in the context of the transportation network, in order to qualify as a person with a disability. The Agency initially determined that allergy to cat dander did not constitute a disability, *per se* and that it would examine complaints on a case by case basis. The Agency then determined that a cat allergy itself is an impairment, and that the particular complainants in the present case had allergies which were severe enough (the activity/participation restriction) to reach the disability threshold.

The complainants sought a ban on the carriage of all pets in the cabin. They took the broad position that the Agency should not limit its consideration to cats. The Agency did not agree and limited its consideration to the carriage of cats as pets in the passenger cabin and the consideration of what policies would constitute appropriate accommodation. The Agency found that an allergen-free environment, including one free of cat allergens, is impossible to implement in an aircraft cabin, given that carriers cannot control the presence of animal dander on passengers' clothing and personal effects. Therefore, the Agency limited itself to the following question: what is the appropriate accommodation for persons with a cat allergy disability, taking into account the respondents' pet policies that allow the carriage of cats in aircraft cabins? The Agency held that there are two basic approaches to appropriate accommodation, either of which would be adequate: (1) a carrier may decide to ban the carriage of pet cats in the aircraft cabin in which a person with a significant allergy to cats is travelling; (2) the carrier may not need to implement the ban if it can provide a set of measures, including the use of air circulation/ventilation systems using High Efficiency Particulate Air (HEPA) filters and the physical separation of the person with the allergy from the cat, to address the problem. The Agency members were divided on the number of rows required for the physical separation, with the majority in favour of five rows.

On June 14, 2012, the Agency released its decision based on its review of the current and proposed pet policies of the carriers to determine whether they provide appropriate accommodation. WestJet's proposed policy provided the following measures: a seating separation of at least five rows; the use of HEPA filters; limiting the number of cats that can be carried in the cabin; and requiring that the cats remain in a pet carrier during the flight. These were found to be adequate measures by the Agency. As for WestJet's requirement for advance notification by persons with a cat allergy disability, which guaranteed seating separation of at least five rows when the carrier is notified at least 48 hours prior to departure and best efforts to provide accommodation where the notice is within 48 hours of flight departure (with the provision of alternate flight arrangements or reimbursement if accommodation cannot be provided prior to departure), the Agency found this to be adequate. In finding so, the Agency rejected one of the requests by a complainant that it should be the persons travelling with cats in the cabin who book within 48 hours of departure who should be "bumped", rather than the person with the disability. The Agency also accepted WestJet's proposed measures to maintain the seating separation during boarding/deplaning and on board and its procedural process to ensure accommodation.

Air Canada's proposed policy provided the following measures: use of HEPA filters or 100% un-recirculated fresh air; limits to the number of cats that can be carried in the cabin; the requirement that cats stay in the pet carrier; and a seating separation of at least five rows (with certain modifications for executive class cabins). These measures were found to be adequate by the Agency. Similar to WestJet's policy, Air Canada's policy would provide accommodation with advance notice of at least 48 hours and best efforts to provide accommodation within 48 hours of departure. As part of that advance notice, Air Canada required a medical clearance for persons with a disability as a result of their "severe" allergy to cats (the clearance is valid for 10 years for adults). This clearance requirement was opposed by a complainant as being unduly stringent. The Agency held that the requirement for a medical clearance, by way of information provided by the passenger's physician, was acceptable on the basis of the long-standing recognition that carriers are entitled to information regarding a person's fitness for travel if they are providing additional services to meet the needs of persons with a disability. The Agency required some additional detail on Air Canada's proposed measures to maintain the seating separation during boarding/deplaning and on

(Continued on page 3)

Inside This Issue

Putative Oral Indemnity Agreement Found Unenforceable

This case is an interesting tale, and a cautionary tale. Justice Hughes started his decision by summarizing the facts: "It was dark at Brigade Bay. It was cold. The tide was dropping. The front end of the truck was in the water; the rear axle was on the barge. A rope was tied to the rear of the truck and attached to the tug in a desperate attempt to pull the truck onto the barge. Ed Menczel, the truck driver, went into the water a second time to release the air brakes on the truck so that it could be pulled up. As he did so, the barge swung. The truck toppled into fifty-five feet of water. Ed swam for his life. He reached shore and phoned his boss."

While stated more technically in the decision, the issues before the Court were: Who is at-fault for the loss? Did certain conversations between parties result in one undertaking to indemnify another? Is there a claim *in rem* against the barge? Do the *Hague-Visby Rules* apply?

The facts, less dramatically presented, are as follows. Wells Fargo Equipment Finance Company leased a flatbed truck (the "Truck") to C&C Machine Movers & Warehousing Inc. ("C&C"). The barge was named MLT-3 (the "Barge") and was chartered by Mercury Launch & Tug Ltd. ("Mercury Tug").

Mr. White hired C&C to move cargo from the mainland near Vancouver to an island off the coast of British Columbia. On December 4, 2007 C&C loaded the Barge with the cargo and the Truck. The Barge, with the cargo and the Truck, was towed to Brigade Bay by Mercury Tug. Upon arrival at Brigade Bay, the cargo was loaded onto the Truck and the Truck drove off the Barge onto a concrete ramp on shore. In order to secure the Barge against the shore while the cargo was offloaded, the tug reversed into the stern of the Barge and left the tug's engines in reverse. After the Barge was against the ramp on shore, two mooring ropes from shore were tied to the Barge for further security.

The Truck was delayed in returning to the Barge and the tide had begun letting out. The skipper of the tug released the mooring ropes, as they were reaching their limits due to the sinking water level. When the Truck returned, it positioned itself to back onto the barge. The driver began backing the Truck onto the Barge and once the back wheels were on the deck, the driver felt the Barge move away from the shore. The driver applied the brakes to prevent the tug from moving any further. Before the Truck could be pulled onto the deck of the Barge, the Barge swung unexpectedly and the Truck fell into the water.

The Truck's insurer brought an action to recover the value of the Truck against the Barge *in rem* and others *in personam*.

The Court found that the skipper was 90% at-fault because he directed the driver to back the Truck onto the Barge when the mooring ropes were not secured. The Court held that the tug's skipper should have released and re-tied the mooring ropes to allow more line when the water level dropped. The driver of the truck was found 10% at-fault because there was some evidence that when he felt the barge move he should have "booted it" instead of applying the brakes. If the driver of the Truck had accelerated when he felt the Barge move, the rotation of the Truck's wheels would have pulled the Barge back against the shore.

"...the "contracts for carriage of goods" in respect of which subsection 43(2) of the* Marine Liability Act *makes the* Hague-Visby Rules *applicable, is a contract which is incorporated into or evidenced by a bill of lading or a similar document of title. If there is no bill of lading or similar document, then subsection 43(2) does not make the* Hague-Visby Rules *applicable to carriage of goods from one place in Canada to another place in Canada. In short, there must be a document; oral contracts not evidenced by or incorporated into a bill of lading or similar document are not caught by subsection 43(2) of the* Marine Liability Act*."

Part of the cautionary tale arises out of events occurring before the Truck plunged into Brigade Bay. The principals of C&C and Mercury Tug had developed a business relationship and made many similar deliveries prior to the day in question. Mr. Crandlemire of C&C stated that he asked Mr. Errington of Mercury Tug what would happen if a truck were lost while on the Barge. Mr. Crandlemire testified that Mr. Errington said that Mercury Tug had insurance to cover such an event. Mr. Errington denied saying this. Justice Hughes wrote, "Considering the evidence, I do believe that Crandlemire did raise the issue of insurance and liability with Errington. However, Crandlemire did not memorialize the discussion in any way, nor did he confirm in writing any of these discussions with Errington." As a result, the Court held that this discussion did not constitute an undertaking by Mercury Tug to indemnify C&C for the loss of the Truck.

There was also a conversation between the two men following the loss. It was Mr. Crandlemire's evidence that he called Mr. Errington and Mr. Errington agreed to "take care of everything." Mr. Errington denied saying this. Again, the conversation was not confirmed in writing and as a result the Court could not accept this conversation as Mercury Tug's undertaking to indemnify C&C.

The plaintiffs brought an action *in rem* against the Barge. However, the claim was dismissed because the Barge changed ownership between the time the incident in question occurred and the time the action was commenced. Subsection 43(3) of the *Federal Courts Act* removes the jurisdiction to maintain an action *in rem* under subsection 22(2) where such circumstances exist. Plaintiffs' counsel argued that under paragraph 22(2)(d) the owner of the Barge could be held liable for damage "caused by a ship," as stated in that paragraph. The Court further held that "damage caused by a ship" is a term of art in maritime law and that the ship itself must be the instrument of the damage in order for the damage to be "caused by a ship." As stated above, the Court found that the damage was caused by the actions of the skipper and the truck driver. As such, the Barge was not the "instrument by which the damage was done."

The defendants in this action argued that the *Hague-Visby Rules*, as incorporated into Canadian law by the *Marine Liability Act,* applied to the action and that the one-year limitation period therein served to time-bar this action. The *Marine Liability Act* extends application of the *Hague-Visby Rules* to contracts for the carriage of goods when delivery of the goods is within Canada, unless there is no bill of lading and the contract (which must be contained in or evidenced by a bill of lading) stipulates that the *Hague-Visby Rules* do not apply. In this case, Mr. White rented the tug and the Barge on an hourly basis and no bill of lading was issued, nor was one intended to be issued. The Court held that oral contracts not evidenced by or incorporated into a bill of lading are not caught by s. 43(2) of the *Marine Liability Act*. Therefore, the Court found, the *Hague-Visby Rules* and the limitation period therein did not apply to this action.

In summary, the Court awarded 90% of the damages claimed by the insurer in accordance with the Court's assessment of liability. The lessons to be learned from this case are that if you are backing a truck onto a barge and you feel the barge pull away from the shore, you should "boot it" and if you have a conversation that you intend to rely on later, you should confirm it in writing.

Wells Fargo Equipment Finance Company v. Barge "MLT-3", 2012 FC 738

Accommodating Disabled Passengers *(cont'd)*

(Continued from page 1)

board and its procedural process. The Agency also ordered a partial ban in the case of certain smaller aircraft, or aircraft with inadequate air circulation.

In a separate decision unrelated to allergies, the Agency adjudicated the complaint, brought on behalf of an elderly passenger against Air Canada, for the carrier's alleged failure to accommodate the passenger ("B") on her flight from London to Calgary. The complainants and B travelled from Calgary to London. B subsequently suffered a stroke in London. The complainants booked an early return flight. The complainants alleged that the carrier failed to properly assess B's fitness to travel as there was confusion over whether B was cleared to travel without oxygen. It was also alleged that the carrier failed to provide proper wheelchair assistance at Heathrow and at the Calgary airport, that it failed to pre-board B and that it failed to properly seat her on the flight.

The majority of the complaints were dismissed. As a preliminary matter, the Agency held that it did not have jurisdiction over the service provider at Heathrow responsible for wheelchair assistance. Furthermore, the Agency held that the carrier's fitness to fly assessment process in relation to B was in order and that the complainants did not meet their onus to satisfy the Agency that their version of events was more probable than the carrier's version. The Agency also held that the failure to pre-board B on the London to Calgary flight did not have an impact on B's mobility. With the exception of one complaint relating to the wheelchair issue, all of the various complaints relating to wheelchair assistance were dismissed as the complainants did not provide adequate and timely notice of their wheelchair requests, or they deliberately chose not to wait for a wheelchair when one was not forthcoming immediately. The Agency ultimately concluded that only two of the complaints had merit: (1) the carrier should have contacted the airport service provider responsible for the wheelchair service at Heathrow to communicate a need for assistance between the boarding gate and the aircraft; (2) the carrier should have attempted to reseat passengers to allow B to be seated next to a vacant seat on board in order to provide space for B's medical oxygen. The carrier was ordered to issue a bulletin to its personnel involved in the processing of requests for wheelchair assistance to remind them of their obligation at each step of the transportation process at Heathrow to promptly relay requests for wheelchair assistance. It was also ordered to issue a bulletin to in-flight personnel regarding positioning of the medical oxygen and the need for best efforts to accommodate any need for space.

The two aforementioned decisions highlight the Agency's recent approach to disabilities and reasonable accommodation. The cat allergies decision was the final step in a series of decisions on the much publicized topic of carriage of animals as pets in the cabin resulting in the Agency clearly rejecting a total ban on the carriage of pets in the cabin, despite significant pressure from various interest groups. Finally, the mobility decision reflects the ability of the Agency to appreciate carriers' attempts to reasonably accommodate passengers with mobility issues.

CTA Decision Nos. .227-AT-A-2012 [Cat Allergies] and *211-AT-A-2012* [Mobility Complaint]

End of the Line: Skyservice Airlines Insolvency *(cont'd)*

(Continued from page 4)

menced an application for an order under the *ATMMA*. Counsel for the lessors attended that day and made submissions.

On April 6, 2010, NAV Canada and the Airport Authority for Ottawa brought similar applications. On that day, an order was made preserving the status quo until the matter could be heard on its merits. The hearing took place in two days in June 2010.

At the hearing on the merits, the application judge applied the test set out in *Canada 3000* and held in favour of the airports and NAV Canada, confirming that, pursuant to *CANSCA* and *ATMMA*, they could recoup their fees through the seizure. The court relied heavily upon *Canada 3000* and also considered the decision in *Zoom*.

The lessors appealed to the Ontario Court of Appeal.

The Court of Appeal was unsympathetic to the lessors' arguments, holding that, since the lower court judge found the lessees in question had not asserted physical possession of the aircraft before the stay, their situation fell squarely within the ruling of the Supreme Court in *Canada 3000.*

In this regard, the court accepted the lower court's finding that "… Skyservice was the 'owner' or 'operator' of the aircraft at the time of the status quo order on the basis that Skyservice was the registered owner, was in possession of the airplanes, and none of the lessors had completed a repossession in the manner set out in *Zoom*."

The Court rejected as irrelevant and/or unfounded the four arguments made by the lessors attempting to distinguish the Skyservice situation from the facts in *Canada 3000*, namely that: (i) Skyservice went into receivership with no intention to continuing to operate, whereas Canada 3000 shut down with a view to temporarily cease operations and restart with new financing; (ii) Transport Canada suspended Skyservice's AOC, whereas there is no evidence that this occurred in *Canada 3000*; (iii) the active steps taken by lessors in purporting to terminate leases with Skyservice were sufficient to come within the exception that was applied in *Zoom*; and (iv) policy considerations had changed since *Canada 3000.* The lessors argued that airport authorities and NAV Canada have a broader array of enforcement options now than when Canada 3000 became insolvent.

Of particular note, with respect to the above arguments, the Court of Appeal specifically found that the lessors had not advanced any support for the proposition that the suspension of an AOC in any way affects its status as a "registered owner" of an aircraft.

The Court also held that because Skyservice was in possession of the aircraft at the time of the status quo order, it was the "operator", despite the fact that it "may not have had the ability to operate the [aircraft]."

In the end, the court held that "[g]iven the application of the definition of "operator", there is no basis on which to find that the application judge erred in concluding that Skyservice 'operated' the aircraft in spite of Transport Canada suspending the [AOC] …"

The lessors' appeal was dismissed with costs to each of the airport authorities and NAV Canada.

Greater Toronto Airports Authority v. IAI Inc.
2012 ONCA 283

End of the Line: Skyservice Airlines Insolvency

In March 2010, Skyservice Airlines Inc. became yet another casualty in the history of Canadian low cost carriers. On its demise, it left over $1.5M in unpaid airport charges and fees for air navigation services. The Ontario Court of Appeal recently had to decide who would bear these costs: the service providers, or the lessors of the aircraft.

Before getting into the substance of the Skyservice scenario, it is helpful to note that this question had already been grappled with by the Supreme Court of Canada in *Re Canada 3000 Inc.* 2006 SCC 24.

It is also important to understand the legislation that governs. Pursuant to s. 9 of the *Airport Transfer (Miscellaneous Matters) Act,* S.C. 1992, c. C-5 ("*ATMMA*") and s. 56 of the *Civil Air Navigation Services Commercialization Act*, S. C. 1996, c. 20 ("*CANSCA*"), in order for an airport authority or NAV Canada to successfully obtain a seizure of the aircraft (and thereby be in a position to collect outstanding fees as a result of that seizure), two requirements must be satisfied: (i) the fees must be owing (not an issue in *Canada 3000* or the Skyservice case); and (ii) the air carrier must "own" or "operate" the aircraft at the time of seizure. The result in these cases usually turns on the interpretation of the terms "own" and "operate".

The sequence in *Canada 3000* was as follows: On November 8, 2001, Canada 3000 filed for protection from its creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36 ("*CCAA*"). This resulted in a Court order which permitted the airline's operations to continue, while staying all proceedings by creditors pending the filing of a plan of arrangement. The Canada 3000 fleet was grounded the next day and, on that following day, the directors and officers of the airline resigned and the company was put into bankruptcy.

Some of Canada 3000's aircraft leases were terminated and the lessors became entitled to repossession as a result of the *CCAA* order, but the very same order acted as an interim bar to repossession by the lessors.

In the coming weeks various airport authorities and NAV Canada brought applications for seizure of the leased aircraft (pursuant to *CANSCA* and *ATMMA*) in order to recover their fees. The Lessors opposed these applications.

In determining the meaning of the term "owner", Justice Binnie of the Supreme Court of Canada found that "[t]he policy and practice throughout the federal regulatory scheme is to use the term 'owner' to refer to the person in legal custody and control of the aircraft [i.e. the airline/lessee], not the legal titleholder [i.e. the lessor]."

Justice Binnie also noted, with respect to the term "operator" that the *Aeronautics Act,* R.S.C. 1985, c.A-2, defines the term as "the person that has possession of the aircraft as owner, lessee or otherwise". He also remarked that, at the time of the *CCAA* order, Canada 3000 remained the "registered owner" of the aircraft, as the lessors had not yet taken physical possession of the aircraft prior to the stay. Accordingly, the airport authorities and NAV Canada were able to satisfy their outstanding debts by seizing the aircraft, even though the lessors were the legal titleholders.

Canada 3000 was distinguished in *Calgary Airport Authority v. AerCap Group Services Inc. 2009* ABCA 306 ("*Zoom*") because, in that case, the lessor, AerCap, served a notice of default on the airline on August 25, 2008 at 2:23 p.m., and on August 27, 2008, boarded the aircraft to which it was the titleholder and advised the pilot that it was taking possession of the aircraft and collected the certificate of airworthiness, certificate of registration and the log books.

Unfortunately for the airport authority in *Zoom*, it was not able to obtain a seizure and detention order under *ATMMA* until 97 minutes after the AerCap repossession.

Given those facts, the Alberta Court of Appeal distinguished that case from *Canada 3000* and held that the lessor's repossession defeated the airport's attempt to seize the aircraft because AerCap became the "owner" of the aircraft on the transfer of legal custody and control to the AerCap agent.

And now, the sequence in the Skyservice case: On March 31, 2010, Skyservice went into receivership when the Ontario Superior Court of Justice issued a receivership order pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.C-43.

In that order, the receiver was required to wind the company down, but not to operate it. The Order also stayed all proceedings in respect of the airline. At the same time, Transport Canada suspended Skyservice's Air Operator Certificate ("AOC"). This was done because Skyservice was no longer able to meet the requirements of certification.

This action constituted an event of default under Skyservice's aircraft leases, which would have permitted lessors to exercise remedies under the leases. However, the lessors who were parties to this proceeding did not take physical possession of the aircraft prior to the granting of the receivership order. As an aside, we note that some of Skyservice's leased aircraft had been returned to the lessors prior to the receivership. Those aircraft were not affected by the proceeding.

Later in the day of March 31, 2010, the Greater Toronto Airports Authority com-

(Continued on page 3)

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

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

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

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

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

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

BERSENAS JACOBSEN CHOUEST THOMSON BLACKBURN LLP
BARRISTERS, SOLICITORS

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