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TRANSPORTATION NOTES

Legal Decisions and Developments Affecting the Transportation Industry in Canada

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CTA Defines "Effective Transfer Assistance" for Disabled Pax

The Canadian Transportation Agency (the "Agency") recently considered an accessibility complaint brought against Air Canada by James Glasbergen, a quadriplegic person who requires a two person transfer from a wheelchair to an aircraft seat. Mr. Glasbergen is 6'2" and weighs 200 lbs.

The complaint relates specifically to the difficulties encountered in transferring a person with Mr. Glasbergen's requirements and stature into the "pod" seats installed in the business class cabin of many of the aircraft operated by Air Canada. The pod seats differ significantly from the former business class seats used in much of Air Canada's fleet, which were larger, plusher versions of the economy class seats. The pod seats, which are positioned on a diagonal, are separated from other seats by a half-wall.

As with all complaints brought under s. 172 (1) of the *Canada Transportation Act* (the "*Act*") the adjudication of this dispute involved a three stage inquiry, whereby the Agency had to determine whether:

1. the person who is the subject of the application has a disability for the purposes of the CTA;
2. an obstacle exists because the person was not provided with appropriate accommodation to address their disability-related needs. An obstacle is a rule, policy, practice, physical barrier, etc. that has the effect of denying equal access to services offered by the transportation service provider that are available to others; and,
3. the obstacle is "undue." An obstacle is undue unless the transportation service provider demonstrates that there are constraints that make the removal of the obstacle either unreasonable, impracticable or impossible, such that to provide any form of accommodation would cause the transportation service provider undue hardship. If the obstacle is found to be undue, the Agency may order corrective measures necessary to remove the undue obstacle.

The Agency broke this analysis into four questions in this complaint, as set out below.

***Question 1*: Is Mr. Glasbergen a person with a disability for the purpose of Part V of the Act?**

Air Canada did not argue that Mr. Glasbergen was not a person with a disability. Accordingly, the Agency did not have any trouble finding in his favour on this portion of the complaint.

***Question 2*: What measures provide appropriate accommodation/ reasonable accommodation to persons with disabilities, including Mr. Glasbergen, who require a two-person transfer to and from the pod seats?**

In its analysis of this question, the Agency made the point that the accommodation measure offered by air carriers does not necessarily have to be that which is requested by the passenger. It must, however, be effective. The Agency noted that the duty to accommodate has been met if it allows the person who requires the accommodation to benefit from the same level of transportation that is afforded to others.

In this case, the focus of the analysis was whether, as a matter of fact, a passenger who requires a two person transfer can be transferred to and from the Air Canada pod seats.

Mr. Glasbergen's request was that Air Canada modify rows of seats in its cabin by installing the old form of business class seats that he argued "would make a world of difference to travelers like [him]." He argued that while the new premium economy seating that was to be installed on Air Canada Rouge (Air Canada's new LCC) was a positive development, that this sort of seating was not generally available on Air Canada mainline routes.

Air Canada's argument was that it was required to provide accessible seats to "passengers with any combination of disability". It also made the point that Mr. Glasbergen's height and weight, as well as his refusal to have his personal attendant assist in the transfer, made the transfer particularly "challenging".

In determining this point, the Agency recognized that there is no "one-size-fits-all" solution to accommodating passengers with disabilities. However, relying on the previous decision of *Sabbagh v. VIA Rail*, CTA Decision No. 178-AT-R-2013, it ruled that the appropriate accommodation measures must result in an equal opportunity for the disabled person to attain the level of transportation services experienced by others. In this particular case this includes providing an opportunity for Mr. Glasbergen (who requires a two-person transfer) to travel in a pod seat.

In deliberating on this point, the Agency considered videos of a demonstration provided by Air Canada and a transfer assistance demonstration that took place for the benefit of the Agency at Air Canada's training facility in Toronto. This resulted in a finding that the appropriate level of accommodation required Air Canada to provide "effective transportation assistance", which it defined as follows:

> "Effective transfer assistance" consists of transfer assistance to and from a pod seat, which is provided by station attendants or ground handlers under the instruction of the carrier or airport authority personnel during boarding and deplaning, and by carrier personnel providing assistance to the passenger's attendant where needed during the flight. This transfer assistance:

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Air Service *(cont'd)*

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available" and, as a result, a licence from the Agency would not be required.

After setting out the goal posts by answering the four questions above, the Agency went on to consider the boundaries of private carriage and, in particular, personal and corporate use of aircraft.

In the case of private carriage, the Agency noted that a person that is not engaged ***in the business of*** transporting passengers and/ or goods by aircraft would not be engaged in operating a publicly available air service. In order for a service to be considered as such, members of the public must be able enter into a contractual or other arrangement to acquire the right to such a service.

As to personal use of an aircraft, the Agency clarified that the transportation of family, friends and other personal acquaintances is considered private carriage and not "publicly available".

On the issue of corporate aircraft, the Agency held that corporate operation of an aircraft for the use and transportation of the corporation's officials, directors, employees, contractors and suppliers in the conduct of company business is also generally considered private carriage. The Agency specifically noted that the same concept would apply to the transportation of the corporation's clients and customers where travel is not pursuant to a contract or other arrangement for consideration.

In its closing remarks, the Agency reiterated that every case is unique and therefore subject to examination.

The Agency explicitly invited any "person that believes that the criteria set out in [the Agency's decision] may impact a previous determination of their requirement to hold an Agency licence [to] request the Agency to reconsider the matter."

Given the guidance provided by the Agency in this decision, it seems likely that a result of such a reconsideration would favour the casino in the *Marina District* case.

IN THE MATTER OF determination of what constitutes an "air service",
CTA Decision No. 390-A-2013

Anti-SLAPP, Round 2

At the end of September, there was a further development in the ongoing court battles being waged between Dr. Jeremy Cooperstock and United Air Lines. As was reported in these pages in May, Cooperstock is a McGill University engineering professor who has operated a website dedicated to criticizing United Air Lines for more than 15 years. After United merged with Continental Airlines, they commenced two court proceedings against Cooperstock.

The first is a copyright and trademark infringement action brought in Federal Court – the parties are engaged in pre-trial discovery in that action. In the second proceeding, which is the one of concern to us here, the airlines brought a motion for a permanent injunction in Quebec's Superior Court and are seeking the removal from Cooperstock's website of all contact information for three of their employees.

Cooperstock brought a motion to put an early stop to the airlines' bid for a permanent injunction and relied, in part, on Quebec's anti-SLAPP provisions of the *Code of Civil Procedure*. These provisions, which remain the only ones on the books in Canada whose aim is to prevent "strategic lawsuits against public participation," came into force in 2009. In February, a judge of the Superior Court dismissed Cooperstock's motion and went about setting a timetable for the injunction proceeding.

Cooperstock who considers himself a consumer advocate and has pursued his advocacy as a self-represented litigant through the courts on several occasions, does not back down in the face of defeat, so he sought leave to appeal this Superior Court decision. As was reported in May, Justice Marie St-Pierre, the single judge of the Court of Appeal who heard his submissions, declined to either grant or deny leave and instead referred the matter to a panel of three appeal court judges.

Having been present for the dress rehearsal, Justice St-Pierre was joined by Justices Vézina and Journet for the second hearing on the motion for leave to appeal; the panel heard about 20 minutes of argument from each side and ruled from the bench. In reasons much shorter than those written by Justice St-Pierre in the spring, the Court granted both leave and the appeal. In the result, the Court of Appeal quashed Justice Casgrain's judgment below and ordered that Cooperstock's anti-SLAPP motion be re-heard by the Superior Court.

Cooperstock had actually brought two motions to dismiss the airlines' motion for an injunction. In addition to the anti-SLAPP motion, which is governed by articles 54.1 through 54.6 of the *Code of Civil Procedure*, he brought a more conventional motion to dismiss under article 165. Under article 165 (4), a court may dismiss an action if "[t]he suit is unfounded in law, even if the facts alleged are true." The court must simply determine whether the action, or motion, cannot succeed on the face of the pleading.

By contrast, a court hearing an anti-SLAPP motion must consider the larger context, including evidence, should any be brought forward, by the parties. This was the source of Justice Casgrain's error. He dismissed both of Cooperstock's motions, apparently in tandem, and did not factor in evidence tendered by Cooperstock in support of his anti-SLAPP motion, Specifically, Cooperstock had entered evidence to show that the contact information of the airlines' employees posted on his website was made available on the internet by the airlines themselves.

Justice Casgrain (or one of his colleagues) must now hear and consider Cooperstock's evidence in determining whether the airlines' request for an injunction is an improper use of the courts, meant only to silence and/or intimidate Cooperstock. We will keep you updated on how the case progresses.

One further note: we reported in May that Quebec was the only jurisdiction in Canada with anti-SLAPP legislation, but that Ontario had recently introduced a bill in its legislature.

Although Quebec remains alone, in Ontario the anti-SLAPP legislation has received grass roots support from dozens of vocal organizations and appears to have all-party support. However, the bill brought by the Liberal minority government has only made it through its first reading in the legislature.

Cooperstock c United Air Lines Inc,
2013 QCCA 1670

"Effective Transfer Assistance" for Disabled Pax *(cont'd)*

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> (a) must be provided in a dignified manner;
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> (b) must not impose an unreasonable degree of risk of injury or accident;
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> (c) must be performed by personnel who have received adequate training on transferring persons with disabilities;
>
> (d) must be performed using a wheelchair and/or device (e.g. transfer board, sling) that remains stable during the transfer; and,
>
> (e) must be performed by appropriate personnel who have been assigned to effect the transfer at the point of boarding and deplaning having due regard to the height and weight of the passenger and the nature of their disability.

***Question 3*: Do the design and configuration of the pod seats in Air Canada's aircraft constitute an undue obstacle to the mobility of Mr. Glasbergen and persons with disabilities who require a two-person transfer to and from the pod seats?**

In order to consider this question, the Agency undertook a detailed analysis of the transfer demonstration that was performed on Mr. Glasbergen by two in-flight training specialists at Air Canada's training facility.

It was common ground that the transfer was challenging. As stated above, Air Canada attributed this to Mr. Glasbergen's height and weight, as well as his refusal to allow his personal attendant to assist in the transfer. The Agency was not persuaded by this argument. It found that Mr. Glasbergen's height and weight were within the normal range for an adult male and that any passenger whose stature permits them to occupy a pod seat should be able to do so. Moreover, it held that "carriers must provide transfer assistance regardless of the nature of a person's disability or size, unless they have demonstrated that to do so would cause undue hardship."

The Agency then went on to cite the *Personnel Training for the Assistance of Persons with Disabilities Regulations,* which require Canadian carriers to provide employees and contractors with a level of training appropriate to the requirements of their function for transferring a person with a disability. The Agency also noted that carriers have an obligation to inform themselves in advance as to the nature of a passenger's disability and, in respect of transfer, their size.

In the specific case of Mr. Glasbergen, the Agency was of the view that a proper transfer from the wheelchair could be accomplished by modifying the techniques used in the demonstration. On the other hand, it held that while Air Canada should strive or limit the number of repositioning maneuvers, it is not unreasonable for the carrier to require a limited number of additional movements in order to effect a transfer into a pod seat compared to a regular seat.

Despite the challenges encountered in Mr. Glasbergen's transfer, the Agency held that the previously videotaped transfer demonstration showed that it was possible to provide "effective transfer assistance" into a pod seat for a passenger who required a two-person transfer.

As a result, the Agency found that the design and configuration of the pod seats do not constitute an obstacle to the mobility of persons with disabilities that require a two-person transfer to and from pod seats.

***Question 4*: Does Air Canada's transfer assistance policy constitute an undue obstacle to the mobility of Mr. Glasbergen and persons with disabilities who require a two-person transfer to and from pod seats?**

At the time the application was commenced, Air Canada's policy was that only self-reliant passengers were accepted into pod seats. The policy changed subsequently to allow persons who are not self-reliant to travel with an attendant, subject to a review by its MEDA desk on a case-by-case basis. In the application, Air Canada explained that an attendant is expected to be able to provide the assistance necessary at all stages of the flight, including emergencies. Air Canada also noted that the procedure portrayed in the demonstration video was only applicable to transfers while the aircraft is on the ground, in order not to risk injury to its flight attendants. Accordingly, Air Canada argued that it could not implement "full access" to pod seats to non-self reliant passengers with mobility impairments unless they have an attendant who can conduct a transfer.

Air Canada also emphasized that, with the exception of Toronto, where it has a special team to perform challenging transfers, not all stations are able to accommodate transfers of the sort being contemplated in this application. Moreover, in other jurisdictions, such as the EU, regulations require transfers to be performed by agents retained by airport authorities. In Asia, the transfers are sometimes the responsibility of the carrier, and other times, the airport. In Latin America, the function is normally carried out by ground handlers. As a result, Air Canada argued that because the transfers are not always within its control, it could not implement a two-person transfer procedure for pod seats because in locales where the transfers were conducted by another organization, people requiring a two person transfer from a pods seat could be left without adequate assistance at their final destination.

In considering these arguments, the Agency held that Air Canada's policy not to provide two-person transfer assistance to pod seats constitutes an obstacle to the mobility of persons who require such transfers. The question then turned to whether this obstacle was undue.

The Agency considered Air Canada's argument that the responsibility for transfer varies from jurisdiction to jurisdiction. For example, the Agency considered the EU regulations which provide that:

> Assistance and arrangements necessary to enable disabled persons and persons with reduced mobility to board/deboard the aircraft, with the provision of lifts, wheelchairs or other assistance needed, as appropriate are under the responsibility of the managing bodies of airports.

Notwithstanding the very explicit language in this regulation, in ruling against Air Canada, the Agency relied on *Boyko v. Air Canada*, CTA Decision No. 211-AT-A-2012, for the proposition that air carriers are responsible for communicating these sorts of need to foreign airport authorities and collaborating with them to ensure that the assistance is provided.

The Agency ruled that in this application Air Canada failed to provide evidence that foreign airport authorities would not provide "effective transfer assistance" for passengers sitting in pod seats. Further, the Agency noted that Air Canada had not indicated whether it had made enquiries of foreign airport authorities in this regard. The Agency questioned whether such foreign airport authorities may already be providing this sort of assistance to disabled passengers.

In the end, the Agency found that Air Canada had not demonstrated that it had adequately taken steps to ensure that its passengers were receiving effective transfer assistance at its foreign stations where the responsibility to provide same rests with third parties, such as airport authorities. Accordingly, the Agency found that Air Canada had not proven that the provision of such a level of service constitutes "undue hardship". The Agency determined that Air Canada's transfer assistance policy constitutes an undue obstacle to persons requiring a two -person transfer in its pod seating.

Conclusion

Air Canada was ordered to develop and implement a policy and related procedures necessary to provide appropriate accommodation and to provide the necessary training to its staff to ensure "effective transfer assistance" for pod seating. Air Canada was also ordered to develop and implement a policy and related procedures necessary to communicate its passengers' needs for "effective transfer assistance" in other jurisdictions.

These policies and procedures are to be filed with Agency and posted on the Air Canada website by October 21, 2013.

Glasbergen v. Air Canada,
CTA Decision No. 349-AT-A-2013

End of the Line *(CTA Defines a "Publicly Available Air Service")*

In the August 2013 edition of *Transportation Notes*, we reported on the case of *Marina District Development Company v. Attorney General of Canada*, 2013 FC 800, where the Federal Court grappled with the difficulties of defining the boundaries of a "publicly available air service" — a characterization which triggers the regulatory oversight of the Canadian Transportation Agency (the "Agency").

In that decision, the Court found that a definition which was crafted by the Appeal Panel of the Transportation Appeal Tribunal of Canada bordered on "tautology". As a result, the issue was sent back to the Appeal Panel for redetermination.

Following the release of that decision, the Agency released its own decision based, in the abstract, on to what constitutes a "publicly available air service".

The decision starts with s. 55(1) of the *Canada Transportation Act*, which defines "air service" as:

> … a service, provided by means of an aircraft, that is publicly available for the transportation of passengers or goods, or both.

The key phrase which requires interpretation is "publicly available" — which the Agency noted has historically been considered on a case-by-case basis. The Agency stated in its decision that little information has been provided on its past rulings interpreting the term due to the need to maintain particulars of the applications confidential.

The Agency commented that the evolving nature of air transportation has led it to review the concept of "publicly available" in the context of the Agency's objectives.

In coming to its decision, the Agency found that it had to consider four essential questions in order to determine whether a particular operator is operating an "air service" which comes under its regulatory oversight. These are set out below:

(i) Is the service offered and made available to the public?

This portion of the analysis, in our view, is the core of the issue. In this respect, the Agency noted that the following characteristics make a particular operation more likely to be found to be "publicly available":

- the services are offered through some form of promotion, advertisement or solicitation — including by word of mouth;
- the service is the subject of promotional material, known routes, schedules, fares, conditions of carriage and ticket distribution systems;
- extensive or aggressive promotion of the service is not required. Neither does the service have to be made available to all members of the public;
- the person to whom the service is offered should be able to avail him/herself of the service;
- the passenger should be able to contact the service provider and arrange for air transportation; and
- the service provider may impose restrictive eligibility conditions on the user to ensure that an air service reaches an intended group.

(ii) Is the service provided by means of an aircraft?

The Agency found that this question was straightforward. It did not provide any further elaboration.

(iii) Is the service provided pursuant to contract or arrangement for the transportation of passengers or goods?

The Agency noted that a key factor in determining whether an air service is subject to the Agency's oversight is whether there is a contractual or other arrangement that authorizes the use of an air service. The Agency held that this was consistent with the *Air Transportation Regulations* which defines a "passenger" as a person that boards an aircraft pursuant to a valid contract or arrangement.

The Agency found that where there is no contractual right to transportation, the service is not publicly available and, as a result, no Agency licence is required.

(iv) Is the service offered for consideration?

The Agency found that the right to use an air service is typically established through the provision of consideration (for example, air fare). Where the service is provided with no contractual obligation to provide consideration for the service, the Agency held that the carriage would not be considered "publicly

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