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TRANSPORTATION NOTES

Legal Decisions and Developments Affecting the Transportation Industry in Canada

Volume 9, Issue 4 — April 2013

Summary Judgment Denied in Tour Operator Case

In 2010, the rules respecting motions for summary judgment in Ontario were relaxed somewhat to allow motions judges to exercise some discretion in the process. These rules have now been interpreted by the Ontario Court of Appeal in *Combined Air Mechanical Services Inc et al v. Flesch et al* 2011 ONCA 764 (on appeal to the Supreme Court of Canada). The end result is that, while the text of the rule has changed, Courts are still reluctant to grant this form of relief without a full evidentiary record before them.

A recent decision of the Ontario Superior Court of Justice emphasizes the dangers of rushing into a motion for summary judgment without full discovery — as well as the prejudice that can ensue from information posted on litigants' websites, as well as third party websites such as Wikipedia.

The case arose from injuries sustained by Daniel DiGregorio when a balcony attached to his hotel suite collapsed. The incident occurred while he was vacationing at the Dream Resort in Punta Cana, Dominican Republic on January 1, 2011.

Mr. DiGregorio and his family members sued the tour operator, Sunwing Vacations Inc. (who had no involvement in this motion), as well as AM Resorts, the supposed operator of the resort.

Immediately after the incident involving he collapsed balcony, one of the plaintiffs went to the front desk at the resort only to be informed that the manager was not on site. He was advised that the property was, in fact, operated by AM Resorts, LLC and was invited to refer to that company's website in order to obtain more information.

On reviewing the contents of the website, the plaintiffs learned that AM Resorts had its principal place of business at an address in Pennsylvania. A corporate search confirmed this.

A Wikipedia posting revealed that AM Resorts is a hotel management company operating some 28 hotels in Mexico, the Dominican Republic and Jamaica.

With all of this information in hand, the plaintiffs named AM Resorts as a defendant in the action.

In October 2012, before examinations for discovery were commenced, AM Resorts served a motion for summary judgment on the plaintiffs which included, in the supporting materials, a copy of the Hotel Management Agreement for the Dreams Punta Cana Resort which identified AMR Resort Management, LLC (not AM Resorts, LLC) as the operator of the resort.

Another corporate search revealed that AMR Resort Management LLC is domiciled at the same address as AM Resorts and shares some directors with AMR Resort Management, LLC.

> *… this is a classic example of one where the interests of justice require that the normal process of production of documents and oral discovery be completed before a party is required to respond to a summary judgment motion ...*

Moreover, clause 3.1 of the Hotel Management Agreement demonstrated that AMR Resort Management, LLC actually engaged AM Resorts, LLC to provide certain hotel management services — and, in some cases, such as marketing and advertising, these duties overlapped between the two corporate entities.

The Court found that the combination of the above factors amounted to a situation where AM Resorts, LLC held itself out to the public to be an operator of the Dreams Resort in Punta Cana.

The Court found, on the limited record before it, that there is a close relationship between AM Resorts, LLC and AMR Resort Management, LLC and that they may have overlapping responsibilities relating to the operation and control of the hotel in question.

As there was contradictory information in the record as to which part was the true operator of the hotel, the Court found that it could not determine the issue of occupiers' liability without permitting the plaintiffs a full opportunity to develop their case.

AM Resorts, LLC's motion for summary judgment was dismissed with costs.

DiGregorio v. Sunwing Vacations et al
2013 ONSC 1194 (CanLII)

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End of the Line *(YQ Surcharges) (cont'd)*

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(b) when a provincial law is incompatible with the purpose of the federal legislation.

On the issue of "operational conflict", the appellate court upheld the lower court's ruling that there was none. The Court of Appeal found that, in order for the operational conflict to be found, the Provincial Act would have to prohibit a deceptive statement (which is does) and the Federal Act would have to require a deceptive statement (which it unsurprisingly does not).

Nevertheless, the air carriers argued that they are required to follow the terms of their tariff which requires them to identify the fuel charges in the way that they appeared on the tickets in question.

The appellate court was unimpressed by this argument and held that "[t]he fallacy in the [air carriers'] argument is that neither the federal legislation nor the tariff requires the appellants to show the fuel surcharge as a tax on the ticket … The [air carriers] are not correct in their assertion that the federal legislation says 'yes you must', because the legislation does not require the surcharge to be shown as tax."

In making its decision on this point, the Court noted that since the case had been commenced new advertising regulations had been implemented under the Federal Act which prohibited the use of the word "tax" to be used to describe an air transportation charge. The Court made three points with respect to the amended federal advertising regulations.

First, they do not apply to this instance as they related to advertising, and not to the information identified on an already purchased ticket. Second, that the new federal regulations were not inconsistent with the Provincial Act and finally, that there was no operational conflict between the new advertising regulations and the Provincial Act.

The Court then went on to deal with the issue of whether the Provincial Act "frustrated the federal purpose". Again, the appellate court accepted the finding of the lower court that it does not.

The air carriers argued that the Federal Act and the *ATR*s are a complete code for the regulation of all matters related to air travel, including airline tariffs and tickets, and that the CTA is intended to be the final decision maker in respect of these matters. The air carriers further argued that the purpose of the Federal Act would be frustrated if the provincial legislatures were permitted to intrude on the CTA's domain.

In support of their argument, the airlines referenced s. 18(b) of the *ATR*s, which prohibits licencee air carriers from making misleading public statements with respect to their air services. The air carriers argued that this demonstrates that the CTA has already been granted authority to deal with misrepresentation as a result of this provision.

The Court of Appeal rejected this argument, holding that the plaintiffs' allegations against the air carriers did not relate to "publicly made" statements, but rather, representations printed on purchased tickets.

> *...section 5 of the Provincial Act, which protects consumers against deceptive acts and practices, is entirely compatible with the federal legislation and, in particular within the context of the plaintiffs' claims, s. 5 is compatible with s. 135.91 of the [*ATR*s], which prohibits the use of the term "tax" in an advertisement to describe an air transportation charge of an airline.*

The Court similarly rejected the air carriers' argument that the CTA has jurisdiction to deal with the issue of the YQ surcharges because, under s. 113.1 of the *ATR*s, it can order an airline to pay compensation for losses suffered by a passenger when an air carrier fails to apply its tariffs. The Court found that this case was not about the application of tariffs — it was about the way in which surcharges were represented on tickets issued by the air carriers.

The Court also found that, because the issue in the matter at hand was not the "reasonableness of the surcharges", s. 111 of the *ATR*s also had no application. (This section of the *ATR*s allows individuals to challenge tariffs that they believe are not "just and reasonable").

On the issue of "frustrating the federal purpose", the Court referenced the regulatory impact statement that was prepared when the above referenced advertising regulations came into place. In that document, the drafters specifically indicated that "[t]he advertising of products and services is subject to consumer protection of general application … at the provincial level through provincial legislation … It is the advertisers' responsibility to ensure that they comply with all applicable legislation respecting advertising, not just the [*ATR*s]."

Finally, the Court had to determine whether the doctrine of inter-jurisdictional immunity applied to this case. This doctrine protects the core of a federal power from provincial legislation where the provincial legislation in question trenches on the core of a federal power and such transgression is serious enough to prevent the provincial enactment from being applied. The appellate court agreed with the lower court's finding that even if carrying passengers by air was part of the core of the federal jurisdiction over aeronautics, the seriousness of the impairment of that core by the Provincial Act was not sufficient to attract the doctrine of inter-jurisdictional immunity.

In this regard, the Court of Appeal noted that the protection afforded to the public against deceptive practices in entirely consistent with , for example, the new advertising regulations which also prohibit the use of the word "tax" to described an air transportation charge imposed by an airline.

The Court found in favour of the plaintiffs and permitted the complaint with respect to s. 172 of the Provincial Act to proceed.

Costs of the appeal were awarded to the plaintiffs.

Unlu v. Air Canada,
2013 BCCA 112

Passengers Required to Prove *Montreal Convention* Damages

On March 20, 2013, Justice Jimmy Vallée issued his reasons and judgment in two claims brought before the Court of Québec. The two actions were brought by the plaintiffs, Mr. S. and Ms. S., after the arrival of their baggage on a trip to Beirut, Lebanon from Montreal was delayed nine days.

The plaintiffs each claimed a total of $7,000 in damages, made up of $1,900 for the cost of the airline ticket, $1,550 for the cost of buying replacement clothing and other items in Beirut, and $3,550 for mental anguish, stress and lost time. They sued not only the airline that issued their tickets, Middle East Airline-Airliban ("MEA"), but also Air Canada, which operated the plaintiffs' flight from Montreal to Paris, before they boarded an MEA flight to Beirut; Kurban Travel, the travel agency from which the plaintiffs purchased their tickets; and Coseco/Co-operators, the couple's home insurance provider.

The plaintiffs travelled in the latter part of December 2010. They gave evidence that, prior to their departure and during their journey, they were worried that their four pieces of checked baggage might not make it to Beirut with them because of a large winter storm in Paris at the time of their travel. Despite the weather, their flights to Paris from Montreal and to Beirut from Paris both arrived at their destinations but their luggage did not, until more than a week after their arrival, and after they had made frequent inquiries of both airlines and their travel agency about its whereabouts.

The plaintiffs argued that the purchase of their airline tickets involved a consumer and adhesion contract and that, as a result, Québec's consumer protection laws should apply. Justice Vallée noted that, as their argument was based in contract, the plaintiffs had cast their nets quite widely in choosing to name so many defendants in their actions.

Accordingly, the court dismissed the claim against Kurban Travel: the travel agency had no responsibility when it came to the transportation of baggage.

Similarly, Justice Vallée held that the insurance policy held by the plaintiffs only insured against loss or damage to goods. As the couple's belongings were intact, if delayed, there was no recourse to be had against the insurance provider.

The two airline defendants argued that the *Montreal Convention*, which has been incorporated into the law of Canada by the *Carriage by Air Act*, R.S.C. 1985, c.C-26, governed the plaintiffs' claim. The reasons do not state whether the plaintiffs' tickets were one-way or return, but as both Canada and Lebanon are State Parties to the *Montreal Convention*, Justice Vallée correctly held that the *Convention* applied.

After setting out certain provisions of the *Montreal Convention*, including Article 19 (Delay), and Article 22 (Limits of Liability in Relation to Delay, Baggage and Cargo), the judge found that there could be no claim against Air Canada by the plaintiffs. The plaintiffs had purchased tickets issued by MEA and so MEA was the "carrier" that was subject to the terms of the *Convention* in this case.

As such, pursuant to the presumption contained in the first part of Article 19, MEA was "liable for damage occasioned by delay in the carriage by air of…baggage." The second part of the provision allows the carrier to defeat this presumption if it "proves that it … took all measures that could reasonably be required to avoid the damage or that it was impossible for it … to take such measures." In this regard, MEA simply relied on the difficult meteorological conditions in Paris and the disorganization that prevailed at Charles-de-Gaulle airport – at one point, its representative told the court, there were 25,000 pieces of luggage at the airport; it took several days for the airport's staff to track down the plaintiffs' bags and MEA should not be held responsible for this delay.

Justice Vallée found this argument insufficient. No evidence was given as to what steps MEA took to try to find the bags or showing why it might have been impossible for it to take some sort of steps in this regard. He therefore found that MEA was liable for the delay in the arrival of the plaintiffs' luggage.

Before turning to the issue of damages, Justice Vallée noted that under the *Montreal Convention*'s provision regarding the limits of liability, each plaintiff was entitled to a maximum of 1,131 Special Drawing Rights, which was equivalent to CAD $1,741.74 at the time of judgment

The judge noted that the plaintiffs had some difficulty justifying why it was that they were claiming the full cost of their airline tickets. Under the contract, MEA was obliged to transport the couple from Montreal to Beirut, via Paris; this was done, even if the luggage's itinerary did not quite match that of its owners. The claims for this head of damage were dismissed accordingly.

After taking note that Mr. S. had indicated to the court that he was travelling to Beirut on business (he was a vice president of a Canadian bank), Justice Vallée scrutinized the receipts making up the second part of the plaintiffs' claims. He noted that he found it difficult to see a grocery receipt and a restaurant bill could be tied to the delay of their suitcases and rejected these. While the judge accepted that certain kinds of clothing were required and reasonable for a business meeting, he found that a $240 Versace shirt and a $285 pair of jeans were not necessary purchases. The plaintiffs had not shown that they had sought to minimize their damages.

Justice Vallée awarded each plaintiff $750 less $100, which had been given to them by MEA while they were in Lebanon.

Finally, the judge rejected the claims for mental anguish and stress, relying on Québec jurisprudence that had held that these types of damages were not recoverable under the *Montreal Convention*.

In the result, the plaintiffs were each awarded $650 plus $70 in costs, to be paid by MEA. However, each of them was also ordered to pay $194 in costs to the insurance provider, and another $194 in costs to Air Canada, meaning their take-home awards amounted to $332 each – more than enough to buy a Versace shirt.

Middle-East Airline-Airliban,
2013 QCCQ 2630

Thibodeau Update

In the July 2011, January 2012 and September 2012 editions of *Transportation Notes*, we reported on the case of *Thibodeau v. Air Canada* where the plaintiffs, passengers on Air Canada flights, sought to enforce provisions of the federal *Official Languages Act* on Air Canada — such provisions being at odds with the *Montreal Convention*.

On September 25, 2012, the Federal Court of Appeal ruled in Air Canada's favour and made the strongest statement to date in the Canadian jurisprudence to the effect that the *Convention* is the only source of remedies available to passengers on flights on which it applies — a position that has been clearly stated in England (*Sidhu v. British Airways*) and in the United States (*El Al v. Tseng*).

The plaintiffs have applied for and recently been granted leave to appeal the Federal Court of Appeal's decision to the Supreme Court of Canada.

We expect that the Supreme Court will likely release a ruling on the appeal in 12 to 18 months' time.

Thibodeau v. Air Canada
2013 CanLII 23494 (SCC)

End of the Line *(YQ Surcharges Class Action)*

In the February 2012 edition of *Transportation Notes*, we reported on the Supreme Court of British Columbia's ruling in *Unlu v. Air Canada*. This decision was recently upheld by the British Columbia Court of Appeal.

The case relates to the practice of several air carriers of identifying the fuel surcharge levied on their tickets in a manner that may cause passengers to believe these charges are taxes collected by a third party, when in fact, fuel surcharges are collected by the airline for its own benefit.

In the case at hand, the plaintiffs complained about to two flights between Vancouver and Germany, where the fuel surcharges in question were identified under the code "YQ" on electronic tickets under the heading of "tax".

In the case of Lufthansa, the amount of the fuel surcharge was shown on its own. In the case of Air Canada, it was comingled with three other charges under the heading of "tax".

The plaintiffs allege that this practice contravenes the provincial *Business Practices and Consumer Protection Act*, S.B.C. 2004. c. 2 (the "Provincial Act"), which provides that suppliers shall not engage in a "deceptive act or practice". A "deceptive act or practice" includes making a representation or engaging in conduct "that has the capability, tendency or effect of deceiving or misleading a consumer …"

As a principle of Canadian constitutional law, matters relating to aeronautics fall under the jurisdiction of the federal government.

The doctrine of paramountcy has developed to address situations where provincial legislatures pass laws whose operational effects are incompatible with federal legislation. Where this occurs in cases relating to aeronautics (as well as other subject matter that is the domain of the federal government), the doctrine of federal paramountcy arises, giving effect to the federal enactment over its provincial counterpart.

> *The plaintiff's claims against the appellant airlines are made under s. 5 of the Provincial Act, which prohibits deceptive acts and practices in respect of consumer transactions. It is the intention of the plaintiff to apply to have the action certified as a class proceeding under the Class Proceedings Act, R.S.B.C. 1996, c. 50.*

In this case, Air Canada and Lufthansa challenged the applicability of the Provincial Act over their operations in a summary trial in a lower court because, they argued, rates and fees associated with international air travel are governed by s. 110 of the *Air Transportation Regulations*, SOR/88-58, (the "*ATR*s") enacted pursuant to s. 86 of the *Canada Transportation Act*, S.C. 1996, c. 10 (the "Federal Act").

More specifically, s. 110 of the *ATR*s requires an air carrier operating an international service to file a tariff with the Canadian Transportation Agency (the "CTA"). Section 122 of the *ATR*s mandates the information that must be contained in the tariff, including the fares rates and charges that may be charged by the airline.

When beginning its analysis, the Court emphasized that the plaintiffs were not alleging in this litigation that the air carriers did not have the right to levy a fuel surcharge, nor were they alleging that the amount of the surcharge was unreasonable. There was also no issue raised with respect to the wording of the tariffs filed by the air carriers. The only issue to be decided was whether the Provincial Act had any place in the dispute at all.

The Court set out the test from *Québec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39 which provides that the doctrine of federal paramountcy is engaged (thereby rendering a provincial enactment inoperative) when:

(a) there is an operational conflict between federal and provincial laws; or

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