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TRANSPORTATION NOTES

Legal Decisions and Developments Affecting the Transportation Industry in Canada

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Passenger Found to Have Taken Advantage of Mistaken Fare Ordered to Pay Costs

In 2014, we reported on a trilogy of decisions of the Canadian Transportation Agency (the "Agency") that accepted a new argument applicable when errors are made in the price of air carrier fares offered to passengers. In the "Mistaken Fares Trilogy", it was held that in certain circumstances air carriers can cancel tickets sold to passengers – and reimburse the price paid – where it could show that there had been a mistake in the price. The issue came before the Agency again in late 2015.

Mr. Nan Liu purchased four round-trip business class tickets on United Airlines, Inc. ("United") for travel from London, UK to Omaha, Nebraska, via Montreal and Chicago, and returning to London from Omaha via Chicago and New York City. Mr. Liu, a resident of Omaha, purchased all four tickets for a total price of approximately USD $320.

While the reservation was confirmed and tickets were issued, on the day that Mr. Liu made the purchase, United cancelled the tickets and refunded his money, citing " an error with a vendor's currency exchange rates."

Mr. Liu brought a complaint to the Agency seeking the reinstatement of his tickets at the original price and for the same class of service and routing.

It was United's evidence that the error was very specific: the exchange rate between the Pound Sterling and the Danish Krone used on its Danish-facing website, was incorrect. The result of this error was that flights originating in the United Kingdom and denominated in Danish Krone were presented at a fraction of their actual or intended prices.

United further submitted that several online travel blogs and forums reported this error and gave guidance to people seeking to take advantage of it. According to United, in making his purchase, Mr. Liu misrepresented Denmark as his country of origin and falsely stated that he was a resident of Copenhagen and that the billing address for his credit card was in Denmark.

When the error was discovered, United voided all affected transactions, reversed all associated charges and contacted customers through email to inform them of the mistake.

There is no indication that Mr. Liu made any attempt to counter the allegation that he made several misrepresentations when making his purchase. Rather, his evidence seems to have mirrored that given by some of the passengers in the Mistaken Fares Trilogy: he argued that it would not be difficult for United to implement a system that would prevent the sale of tickets below a certain amount; that the fact that United does not have such a system indicates that they do sometimes sell fares at very low prices; that the intense competition in air transport meant that carriers often do offer very low fares; and that it is therefore extremely difficult for travellers to know whether a low fare is a "mistake" or a "great deal."

United relied explicitly on the Agency's decisions in the Mistaken Fares Trilogy. In those decisions, the Agency adopted the reasoning and the doctrine of mistake in contract law.

While it is a principle of contract law that courts will not interfere in a bargain made between two parties and will normally enforce its terms under the doctrine of mistake, it has long been held that the court will exercise its equitable jurisdiction to relieve against mistake where one party, knowing that a mistake has been made by the other in the very terms of an offer, remains silent about the mistake and enters into the contract on the mistaken terms.

United submitted that Mr. Liu knew that the fare offered was a mistake. In support, the carrier pointed to the online forums that highlighted the error, Mr. Liu's use of the Danish website despite having no tie to Denmark, his misrepresentation of his country of origin and billing address, his decision not to make the reservation using his United membership account (because this would have revealed his true country of origin) and the fact that the correct price would have been seen in Pounds Sterling during the booking process.

The case law on which United relied, including the Agency's decisions in the Mistaken Fares Trilogy, does not require the party seeking relief to prove actual knowledge of the mistake. Courts will also act where it is convinced that the party benefitting from the mistake "either proceeds on a course of willful ignorance designed to inhibit his own actual knowledge of the other's mistake, or deliberately sets out to ensure that the other party does not become aware of the mistake." Where the mistake is made in respect of a fundamental term of the contract, courts will hold that there has been no "meeting of the minds" between the parties and, therefore, no valid contract was ever entered into. In these cases, the court will declare the contract void.

In the Mistaken Fares Trilogy and in the *Liu* decision, the Agency followed a decision of Chief Justice McLachlin of the Supreme Court of Canada, which she rendered as a trial court judge in British Columbia in 1989. In that decision (*First City Capital Ltd v BC*

(Continued on page 2)

Passenger Pays Price for Attempt to Enforce Mistaken Fare *(cont'd)*

(Continued from page 1)

Building Corp), Chief Justice McLachlin summarized the holding in the following way:

> In summary therefore, the equitable jurisdiction of the Courts to relieve against mistake in contract comprehends situations where one party, who knows or ought to know of another's mistake in a fundamental term, remains silent and snaps at the offer, seeking to take advantage of the other's mistake. In such cases, it would be unconscionable to enforce the bargain and equity will set aside the contract.

United argued that even if Mr. Liu did not have actual knowledge of the mistake, he ought to have known of it and the contract should be declared void because there was never a meeting of the minds.

Based on the evidence before it, the Agency made a determination that Mr. Liu had not raised the mistake in the fare offered by United with the intention of benefiting from this mistake. Further, it held that the factual framework was similar or analogous to the factual frameworks considered in the Mistaken Fares Trilogy and that it should therefore follow the holdings in those decisions. On that basis, the Agency found that no valid contract had been entered into between United and Mr. Liu and dismissed Mr. Liu's application.

The Agency did not end the matter there. Instead, it went on to consider whether it should award costs against Mr. Liu for having brought his application.

Section 25.1 of the *Canada Transportation Act* gives the Agency full discretion to award costs. This power is only rarely used against individual applicants. As noted in the *Liu* decision, the Agency has typically declined to award costs against individual applicants due to a "concern that future applicants might hesitate in filing an application with the Agency." Proceedings before the Agency are intended to be accessible and, on that basis, parties are normally required to bear their own costs.

The factors considered by the Agency when a party seeks an award of costs include whether the party seeking its costs:

- has a substantial interest in the proceeding;
- has participated in the proceeding in a responsible manner;
- has made a significant contribution that is relevant to the proceeding; and
- has contributed to a better understanding of the issues by all the parties before the Agency.

In addition, the Agency will consider the importance and complexity of the issues, the amount of work, and the result of the proceeding when considering whether to make an award of costs.

In this case, however, the Agency emphasized other factors:

> The evidence indicates that Mr. Liu knew that the ticket price he obtained was the result of a mistake. United provided evidence that Mr. Liu used a false address to obtain the erroneous fare. This suggests that Mr. Liu had been made aware of a glitch in the calculation of the exchange rate resulting in fares being set at a fraction of their intended prices and that he purposefully set about to exploit this. Mr. Liu offered no explanation in response to the evidence submitted by United.

The Agency held that Mr. Liu's application was based on a deception and was not filed in good faith, in addition to being devoid of merit. On that basis, Mr. Liu was ordered to pay costs of CAD $1,000 to United.

Liu et al v United Airlines, Inc.,
CTA Decision No. 307-C-A-2015

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