

Transportation Notes: Air Passenger Rights Group Challenges CTA Statements on COVID-19 Vouchers

November 6, 2020

By Carlos Martins, Emma Romano

In the wake of travel restrictions and sweeping flight cancellations due to the COVID-19 pandemic, the Canadian Transportation Agency (“CTA”) issued two public statements on its website suggesting that it could be reasonable for airlines to provide travel vouchers for flights cancelled as a result of the pandemic, rather than providing refunds to passengers.

An advocacy group called Air Passengers Rights (“APR”) commenced an application for judicial review of the CTA’s public statements, asserting that they were in violation of the CTA’s Code of Conduct, and they misled passengers as to their rights when flights are cancelled.

APR sought a temporary injunction for the following relief:

1. An Order requiring that the statements be removed from the CTA’s website; and
2. An Order preventing the members of the CTA from dealing with passenger complaints regarding refunds on the basis that a reasonable apprehension of bias exists on their part as a result of the CTA’s public statements.

Justice MacTavish of the Federal Court of Appeal dismissed the motion, concluding that APR had not met the high bar for ordering a temporary injunction.

The CTA’s Statements

On March 25, 2020, the CTA posted a statement on its website regarding flight cancellations relating to COVID-19.

The “Statement on Vouchers” noted that that passengers who have no prospect of completing itineraries “should not be out-of-pocket for the cost of cancelled flights”.

The statement also noted that airlines facing sharply declining passenger volumes and revenues “should not be expected to take steps that could threaten their economic viability”.

The statement provided that any complaint brought to the CTA would be considered on its own merits. However, the statement notes that “an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time”, suggesting that a 24-month period for the redemption of vouchers “would be considered reasonable in most cases”.

On the same date, the CTA also published an amendment to a notice previously published on its website entitled “Important Information for Travellers During COVID-19”, which referenced the “Statement on Vouchers”.

Position of the Applicant

APR argued that previous CTA decisions confirm that passengers have the right to a refund where air carriers are unable to provide transportation, including when flights are cancelled for reasons beyond the airline's control.

APR noted that the governing legislation requires airlines to develop reasonable policies for refunds when airlines are unable to complete an itinerary.

APR submitted that the statements on the CTA's website purport to relieve airlines from their obligation to provide refunds when flights are cancelled for reasons both outside and within the airlines' control, including where cancellation is required for safety reasons.

APR further argued that the statements created a reasonable apprehension that CTA members would not deal with passenger complaints about COVID-19-related cancellations fairly, as the statements were tantamount to an advance ruling on passenger complaints seeking refunds from air carriers where flights were cancelled due to COVID-19.

Decision

The Federal Court of Appeal held that APR's motion did not meet the test for a temporary injunction.

That test requires the moving party to prove that:

1. There is a serious issue to be tried in the underlying matter;
2. Irreparable harm would result if the injunction were not granted; and
3. The balance of convenience favours granting the injunction.

In relation to the question of whether CTA members should be precluded from dealing with passenger complaints on the basis that a reasonable apprehension of bias existed on their part, the Court found that APR had "satisfied the serious issue component of the injunctive test".

However, the Court held that, because APR was seeking an injunction compelling the CTA to take action before a determination of the underlying application on the merits, it was appropriate to apply a higher threshold than usual. The Court found that it must, in the circumstances, consider whether APR had made out a strong case.

In this case, the Court found that the impugned actions – namely, the publication of two statements on the CTA's website – were not amenable to judicial review because they did not "affect rights, impose legal obligations, or cause prejudicial effects on either APR or airline passengers."

The Court distinguished the CTA's statements in this case from those in *Larne Holdings Ltd. v. Canada (Minister of Health)*, [2002 FCT 750](#), where the statement in issue clearly identified how the law was to be interpreted and the statement in issue was intended to be coercive in nature.

With respect to the question of irreparable harm, the Court found that APR did not meet this component of the test because APR had not argued that it would itself suffer irreparable harm if the injunction were not granted.

APR relied on harm to Canadian airline passengers whose flights were cancelled due to COVID-19. However, the Court noted that APR had not sought or been granted standing to make this argument on behalf of passengers.

The Court was also not convinced by the argument that passengers were being misled by airlines and others in the travel industry citing the CTA's statements as a basis to deny reimbursement to passengers. The Court held that "[i]f third parties are misrepresenting what the CTA has stated, recourse is available against those third parties and the alleged harm is thus not irreparable."

In addressing APR's argument that the CTA's statements displayed bias, the Court commented on the role and function of the CTA, stating:

"As is the case with many administrative bodies, the CTA carries out both regulatory and adjudicative functions. It resolves specific commercial and consumer transportation-related disputes and acts as an industry regulator issuing permits and licences to transportation providers. The CTA also provides the transportation industry and the travelling public with non-binding guidance with respect to the rights and obligations of transportation service providers and consumers.

There is no evidence before me that the members of the CTA were involved in the formulation of the statements at issue here, or that they have endorsed them. Courts have, moreover, rejected the notion that a "corporate taint" can arise based on statements by non-adjudicator members of multi-function organizations..."

The Court found that on the question of bias, APR's argument could be advanced in the context of an actual passenger complaint. Relief could then be sought in the Federal Court if the complainant was not persuaded that they had received a fair hearing. As such, the Court found the alleged harm was not irreparable.

The Court therefore dismissed APR's motion seeking an injunction against the CTA.

CTA's Motion to Dismiss APR's Judicial Review Application

Following the release of Justice Mactavish's decision regarding the injunction, the CTA moved to have APR's application for judicial review struck altogether.

The CTA argued that, pursuant to Justice Mactavish's finding that the CTA's statements did not "affect rights, impose legal obligations, or cause prejudicial effects on either APR or airline passengers", the application was not amenable to judicial review.

APR argued that the Supreme Court of Canada had altered the test to determine when judicial review will be available.

In October 2020, Justice Webb of the Federal Court of Appeal released a decision on the motion to strike.

The Court did not accept APR's arguments that the test for when judicial review is available was altered by the Supreme Court of Canada.

However, the Court noted that Justice Mactavish *did* find that there was a serious issue to be tried in the judicial review application with respect to whether the CTA's statements displayed a reasonable apprehension of bias.

Given that there remained a serious issue to be tried, the Court dismissed the CTA's motion to strike.

Comment

This case will be of interest to those in the travel industry relying on the statements made by the CTA with respect to vouchers and reimbursement.

Carriers and other travel industry participants should be careful in describing the CTA's guidance, so as not to give the impression that the CTA has already determined that passengers will not be entitled to a refund for flights cancelled due to COVID-19.

[Air Passengers Rights v. Canadian Transportation Agency, 2020 FCA 92](#)

[Air Passenger Rights v. Canadian Transportation Agency, 2020 FCA 155](#)

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

For more information or inquiries:



Carlos Martins

Toronto
416.619.6284

Email:
cmartins@weirfoulds.com

Carlos Martins is a skilled litigator with over 25 years' experience providing legal advice in diverse sectors. He is a member of the firm's Commercial Litigation Practice Group and specializes in aviation and defamation law.



Emma Romano

Toronto
416.619.6298

Email:
eromano@weirfoulds.com

Emma is a Partner in the firm's Commercial Litigation Practice Group.

WeirFouldsLLP

www.weirfoulds.com

Toronto Office

4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office

1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035