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International Transportation Law

GERALD F. MURPHY, CATHERINE A. PAWLUCH AND STEVEN J. SEIDEN*

I. U.S. Aviation Legal Developments

A. DOT PROPOSES THIRD CONSUMER PROTECTION RULE

Building on its December 2009¹ and April 2011² rules that significantly expanded the rights of airline passengers, the U.S. Department of Transportation (DOT), on May 23, 2014, unveiled a controversial third set of consumer rules, this time focusing on enhanced disclosure of fee information for “basic ancillary services” to Global Distribution Systems (GDSs) and proposing additional disclosure and reporting requirements on airlines and ticket agents. With the issuance of its “Transparency of Airline Ancillary Fees and Other Consumer Protection Issues” Notice of Proposed Rulemaking (NPRM or “Proposal”),³ DOT voiced its concern that “some consumers may be unable to understand the true cost of travel while searching for airfares” due to “insufficient information concerning fees for ancillary services.”⁴

The NPRM, if made final, would: (1) require airlines and ticket agents to disclose fees for first and second checked bags, one carry-on item, and advance seat selection at all points of sale; (2) expand the pool of carriers required to report information regarding on-time performance, oversales, and mishandled baggage rates; (3) codify DOT’s definition of a “ticket agent” to encompass GDSs and other entities that offer a flight search tool displaying fare, schedule, and availability information (e.g., Kayak and Google), and require them to provide specific disclosures to consumers; (4) prohibit undisclosed biasing by airlines and ticket agents on websites that display multiple carriers’ fare and schedule information; and (5) establish a new category of “large ticket agents” that would be re-

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1. See *Enhancing Airline Passenger Protections*, 74 Fed. Reg. 68,983 (Dec. 30, 2009).

2. See *Enhancing Airline Passenger Protections*, 76 Fed. Reg. 23,110 (Apr. 25, 2011).

3. 79 Fed. Reg. 29,970 (May 23, 2014).

4. *Id.*

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quired to adopt minimum customer service standards.⁵ These requirements would generally apply to all carriers and ticket agents that do business in the U.S.⁶

The NPRM generated over 700 comments from a wide spectrum of stakeholders. Consumer advocates lauded the Proposal as a necessary measure to enhance airfare pricing transparency and consumers' ability to "comparison shop" when making purchasing decisions.⁷ Lamenting what they perceive as the airlines' "deceptive" practice of "dismantl[ing] the airfares into components parts" and then publishing "what are in effect partial prices for airline transportation," these groups urged DOT to promptly issue a final rule.⁸ The airlines, meanwhile, stood united in opposition to the Proposal, assailing it as unnecessary, beyond DOT's statutory authority, and too costly in comparison to any benefits the requirements might provide.⁹ In addition to the "massive" compliance costs that the Proposal would impose on carriers—which Airlines for America (A4A) estimates to be \$7.21 million for each of the affected 167 carriers—airlines stressed that existing DOT regulations and competitive market pressures are already providing consumers sufficient access to the fee information DOT is proposing to further regulate.¹⁰ Although the comment period closed in August 2014, the debate will likely continue well into 2015 or until the final rule is issued.

Beyond the third consumer rulemaking, DOT's consumer protection efforts are expected to continue in full force in 2015 with its anticipated issuance of: (1) a final rule requiring large certificated air carriers to report more detailed revenue information on ancillary fees collected from passengers and changing the way mishandled baggage rates are computed and reported;¹¹ (2) a final rule banning smoking of electronic cigarettes on aircraft;¹² (3) new requirements regarding the accessibility of airports, covering subjects including service animal relief areas, closed captioning of televisions, and audio-visual displays for airports;¹³ and (4) a proposal to restrict voice communications on passengers' mobile wireless devices on scheduled flights to and from the U.S.¹⁴

5. *Id.* at 29,984-85.

6. *Id.* at 30,001.

7. *Comments of Travelers United, Inc. and National Consumers League*, Docket DOT-OST-2014-0056 (Sept. 29, 2014), at 3.

8. *Id.* at 4, 43.

9. *See, e.g., Comments of Airlines for America*, Docket DOT-OST-2014-0056-0726 (Sept. 29, 2014).

10. *Id.* at 2.

11. *See Reporting Ancillary Airline Passenger Revenues*, 76 Fed. Reg. 41,726 (July 15, 2011). The comment period on this proposal ended September 13, 2011. *Id.* A final rule is expected in June 2015. *See Report on DOT Significant Rulemakings* (Dec. 2014), at 96.

12. *Smoking of Electronic Cigarettes on Aircraft*, 76 Fed. Reg. 57,008 (Sept. 14, 2011). The comment period on this proposal ended November 14, 2011. *Id.* A final rule is expected in March 2015. *See Report on DOT Significant Rulemakings* (Dec. 2014), at 90.

13. *Accessibility of Airports*, 76 Fed. Reg. 60,426 (Sept. 29, 2011). The comment period on this proposal ended November 28, 2011. *Id.* A final rule is expected in May 2015. *See Report on DOT Significant Rulemakings* (Dec. 2014), at 89.

14. *Use of Mobile Wireless Devices for Voice Calls on Aircraft*, 79 Fed. Reg. 10,049 (Feb. 24, 2014). The comment period on this ANPRM ended March 26, 2014. *Id.* An NPRM is expected in May 2015. *See Report on DOT Significant Rulemakings* (Dec. 2014), at 95.

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B. FEDERAL AVIATION ADMINISTRATION AUTHORIZES FIRST COMMERCIAL DRONE FLIGHTS; PROPOSES REGULATIONS FOR SMALL UNMANNED AIRCRAFT SYSTEMS

Drones continued to grab headlines in the United States in 2014, as proponents of the technology heralded the vast economic and commercial potential of these so-called unmanned aircraft systems (UAS), while critics expressed concerns about privacy and potential collisions with manned aircraft. Although the Federal Aviation Administration (FAA) was then still years away from issuing final regulations governing the widespread use of civil UAS, on September 25, 2014, the agency took the first concrete step toward accommodating them commercially in the national airspace system (NAS) when it exercised its authority under Section 333 of the FAA Modernization and Reform Act of 2012 (FMRA),¹⁵ coupled with its authority to grant relief from its rules via issuance of exemptions,¹⁶ to grant regulatory exemptions to six aerial photo and video production companies belonging to the Motion Picture Association of America (the “MPAA Exemptions”).

The MPAA Exemptions authorized these firms to operate small, less than fifty-five pound UAS in a scripted, closed-set filming environment for the motion picture and television industry.¹⁷ To ensure their UAS operations would not adversely affect safety or would provide at least an equivalent level of safety compared to the current regulatory structure that applies to manned aircraft, the petitioners agreed to require their UAS pilots to hold private pilot certificates, keep the UAS within line of sight at all times, and restrict flights to the sterile area on the set.¹⁸ Between September 2014 and March 2015, FAA granted over sixty additional, similarly restrictive Section 333 exemptions—to utilize UAS in commercial film production; aerial surveying and photography; construction site monitoring; oil rig, utility, flare stack, and roof inspections; precision agriculture; and more.¹⁹

The MPAA Exemptions and the dozens that came in the months thereafter were a welcome development for a burgeoning UAS community in the United States that is growing increasingly impatient with FAA’s methodical approach to UAS integration. Despite a Congressional directive requiring FAA to, among other things, issue regulations for the operation of small UAS (sUAS) by August 2014 and complete the safe integration of UAS into the NAS by September 2015,²⁰ insufficient agency resources, political gridlock, and cautious regulatory oversight conspired to derail this schedule. Indeed, a June 2014 DOT Inspector General’s audit report revealed that FAA has missed deadlines for the

15. FAA Modernization and Reform Act of 2012 (FMRA), Pub. L. No. 112-95, §§ 331-336, 126 Stat. 11 (2012). Section 333 requires FAA to determine if certain safe, low-risk UAS operations may be conducted in the NAS prior to other UAS-related rulemakings required by the FMRA. *Id.* § 333. See *Report on DOT Significant Rulemakings* (Dec. 2014), at 9.

16. See generally 14 C.F.R. §§ 11.81-11.103 (2015).

17. See, e.g., *FAA Grant of Exemption No. 11062*, Docket FAA-2014-0352 (Sept. 25, 2014), at 23-29.

18. *Id.*

19. FAA, *Authorizations Granted Via Section 333 Exemptions* (rev. Mar. 30, 2015), available at https://www.faa.gov/uas/legislative_programs/section_333/333_authorizations/.

20. FMRA, § 332.

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majority of the FMRA's 17 UAS-related provisions, and concluded that such delays will prevent FAA from meeting Congress's September 30, 2015, integration deadline.²¹

FAA finally published the sUAS NPRM on February 23, 2015.²² Among other things, the proposed rule would require sUAS operators to obtain a newly established "unmanned aircraft operator certificate," and limit flights to daylight hours, below 500 feet, and within visual line of sight of the operator or a visual observer.²³ As of this writing, the NPRM had already garnered over 2,000 public comments²⁴ and is expected to attract tens of thousands more—covering an unprecedented range of constituencies—that FAA must consider and address before making it final.

In the interim, FAA remains committed to vigorously enforcing its rules against unauthorized or hazardous UAS users. Citing its statutory responsibility to protect the safety of the American people in the air and on the ground, the agency has adopted an aggressive enforcement posture with respect to "anyone who operates a UAS in a way that endangers the safety of the [NAS]." ²⁵ Remarkably, FAA's authority to enforce this policy was briefly called into question when an NTSB Administrative Law Judge (ALJ) dismissed a \$10,000 FAA fine against an individual for operating a five-pound Ritewing Zephyr to film the University of Virginia campus in 2011 on the basis that FAA had not issued enforceable regulations regarding such "model" aircraft.²⁶ But the ALJ's decision was decisively overturned on November 18, 2014, by a four-member NTSB panel.²⁷ Concluding that model aircraft and UAS are, indeed, aircraft and thus subject to FAA regulations and enforcement, the panel affirmed FAA's authority to take enforcement action against anyone who operates such an aircraft in a careless or reckless manner and remanded the case to the ALJ to make a factual determination on whether Pirker's operation was, in fact, "careless or reckless."²⁸

C. DOT REFUSES TO GRANT NORWEGIAN AIR SHUTTLE AN EXEMPTION TO OPERATE TO THE U.S.

On December 3, 2013, discount airline Norwegian Air Shuttle AS (hereinafter "Norwegian") ignited one of the most complex and hotly-contested proceedings to come before DOT in years when its new affiliate, Norwegian Airlines International Limited (NAI), applied for a foreign air carrier permit and interim exemption authority to inaugurate scheduled flights between Europe and the United States.²⁹ NAI's business model would be the first of its kind to serve the United States: the airline would be wholly-owned by Norwegian but base its operations in Ireland despite operating no flights from that coun-

21. See DOT, Office of Inspector General Audit Report: *FAA Faces Significant Barriers to Safely Integrate Unmanned Aircraft Systems into the National Airspace System*, Report No. AV-2014-061 (June 26, 2014).

22. See *Operation and Certification of Small Unmanned Aircraft Systems; Notice of Proposed Rulemaking*, 80 Fed. Reg. 9544 (Feb. 23, 2015).

23. *Id.*

24. See Docket No. FAA-2015-0150, <http://www.regulations.gov/#!docketDetail;D=FAA-2015-0150>.

25. Press Release, *FAA Statement on Texas Equusearch UAS Court Decision* (July 18, 2014).

26. *FAA v. Pirker*, Decisional Order, Docket No. CP-217 (N.T.S.B. Mar. 6, 2014).

27. *FAA v. Pirker*, Opinion and Order, Docket No. CP-217 (N.T.S.B. Nov. 18, 2014).

28. *Id.*

29. Application of Norwegian Air International Limited for an Exemption and Foreign Air Carrier Permit, Docket DOT-OST-2013-0204-0001 (Dec. 3, 2013).

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try, hire pilots and other employees from Europe, Asia, and the U.S.—and compete with U.S. and European airlines on major transatlantic routes.

In support of its proposal, NAI stated that its U.S.-EU flights would serve the public interest by increasing transatlantic competition, opening new nonstop routes, and “provid[ing] competitive, low-fare, high-quality service with new Boeing 787 Dreamliner aircraft.”³⁰ But Norwegian’s decision to establish NAI in Ireland instead of Norway (or elsewhere) raised questions about the company’s business objectives, and the ensuing public debate quickly mushroomed into a full-scale referendum on international airline competition and labor policy.

Norwegian insisted that it established NAI in Ireland because: (1) Norway is not a member of the EU and the airline needed a foothold there to operate routes to Asia, Africa, and South America under the expansive air traffic rights permitted under the U.S.-EU open skies agreement; and (2) a base in Ireland offered favorable aircraft financing conditions.³¹ But U.S. and European airlines and labor organizations were skeptical; they insisted that Norwegian was simply forum shopping for the most favorable regulatory framework, and that it engineered the NAI model to evade European labor laws and gain a competitive advantage over other airlines operating transatlantic routes.³²

Norwegian’s critics further asserted that in addition to being contrary to the public interest, the application was inconsistent with the U.S.-EU open skies agreement.³³ They cited a provision in the Agreement, Article 17 *bis*, that recognizes the importance of “high labour standards” and cautions that “[t]he opportunities created by the Agreement are not intended to undermine labour standards or the labour-related rights and principles contained in the Parties’ respective laws.”³⁴ Airlines and labor groups, in particular, argued that NAI’s so-called “flag of convenience” strategy was incongruous with Article 17 *bis* which, according to them, was included in the Agreement “to prevent exactly what NAI is trying to do.”³⁵

NAI, supported by the Irish Civil Aviation Authority, select travel associations, consumer groups, U.S. airports, and cargo carriers, countered these arguments by maintaining that Article 17 *bis* does not provide a basis for DOT to unilaterally deny its application and urged DOT not to “bow to the overt political pressure from special interests, who seek to block a new competitor on transatlantic air routes.”³⁶

30. *Consolidated Reply of NAI*, Docket DOT-OST-2013-0204 (Dec. 31, 2013), at 3.

31. *Reply of NAI*, DOT-OST-2013-0204 (Feb. 21, 2014), at 7-8.

32. See, e.g., *Joint Reply of Delta Air Lines, Inc., United Airlines, Inc., American Airlines, Inc. and US Airways, Inc.*, Docket DOT-OST-2010-0204 (Dec. 20, 2013); *Joint Reply of Air France and KLM*, Docket DOT-OST-2013-0204 (Feb. 21, 2014); *Joint Reply of ALPA, TTD, AFL-CIO, and the European Cockpit Association*, Docket No. OST-2013-0204 (Feb. 21, 2014).

33. *Air Transport Agreement between the U.S. and the European Community and its Member States*, DOT-OST-2013-0204 (Apr. 30, 2007), as amended (the “Agreement”).

34. *Id.*, art. 17 *bis*.

35. *Joint Reply of Delta Air Lines, Inc. United Airlines, Inc., American Airlines, Inc. and US Airways, Inc.*, Docket DOT-OST-2010-0204 (Dec. 20, 2013), at 3. To inform DOT’s consideration of this issue, Secretary of Transportation Anthony Foxx initiated a July 14, 2014 U.S.-EU government-to-government meeting in Brussels to hear the EU’s views on the legal meaning and applicability of Article 17, *bis*. See *DOT Notice* (Aug. 4, 2014).

36. *Reply of NAI* (Aug. 25, 2014), at 14.

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After nine months of heated debate in the public docket, DOT dismissed the exemption request on procedural grounds pending further examination of the more significant permit request, stating that DOT “typically reserves its exemption powers in awarding foreign air carrier authority to situations where the circumstances of a case are sufficiently clear-cut.”³⁷ DOT reached this decision despite eleventh-hour pleas of support for NAI’s application from three former DOT Secretaries³⁸ and the two former Chairmen of the U.S. and EU delegations who led the negotiation of the Agreement.³⁹ While DOT’s denial of the exemption was a setback for Norwegian, the airline will continue to operate flights to the U.S. under its existing authority pending DOT’s decision on the substantive merits of the NAI formal permit application.

Controversial open skies issues are primed to spill over into 2015. In addition to the NAI proceeding, three major U.S. airlines—American, United, and Delta—have launched a full-scale political campaign in Washington against Middle East rivals Emirates, Etihad, and Qatar Airways, decrying their rapid expansion into U.S. markets and what they perceive to be the Gulf carriers’ unfair advantage over U.S. airlines fueled, they say, by billions of dollars in subsidies and other relief from the UAE and Qatar governments.⁴⁰ The three U.S. airlines have asked the Obama administration to confront the Gulf states about the fair-competition provisions in the open skies agreements and, if necessary, modify or annul the agreements to level the playing field.⁴¹ In response, the Gulf carriers assailed the U.S. airlines’ campaign as “protectionist,” steadfastly denied that they receive subsidies or exploit other unfair advantages, and cited what they believe to be their superior aircraft and service as the reasons for their success.⁴²

Whether these growing fissures in the open skies framework can be mended remains to be seen. It goes without saying that these two open skies disputes will be worth watching in 2015.

II. Canadian International Transportation Law Developments

A. REVIEW OF THE CANADA TRANSPORTATION ACT

A confluence of factors has prompted the Canadian government to launch a comprehensive statutory review of the *Canada Transportation Act*⁴³ one year earlier than expected. The review will assess a range of issues including infrastructure, regulatory harmonization, and transportation safety and environmental regulation.⁴⁴ It is anticipated that the statutory review will lead to a number of significant amendments affecting virtually all modes of transport and carriers operating in, to, and from Canada.

37. *Order Dismissing Exemption*, Order 2014-9-1 (Sept. 2, 2014) at 3.

38. See Andrew Card, Norman Mineta and Mary Peters, *An Open Letter to the U.S. Congress*. . . , OPEN OUR SKIES (July 15, 2014), <http://www.openourskies.com/an-open-letter-to-the-u-s-congress/>.

39. See *Joint Declaration of John Byerly and Daniel Calleja*, Docket No. OST-2013-0204 (Aug. 25, 2014).

40. See Susan Carey, *U.S. Airlines Clash over Rivals from Persian Gulf*, WALL ST. J. (Feb. 23, 2015), <http://www.wsj.com/articles/u-s-airlines-clash-over-rivals-from-persian-gulf-1424737494>.

41. See *id.*

42. See *id.*

43. S.C. 1996, c. 10 (Can.).

44. S.C. 1996, c. 10, art. 53 (Can.).

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B. RAIL REGULATORY REFORM

The transportation of hazardous fuels by rail has expanded exponentially in North America. In July 2013, more than forty people were killed when an unattended freight train carrying Bakken formation crude oil ran away and derailed resulting in multiple explosions in Lac-Mégantic, Quebec.⁴⁵ As a result, the Transportation Safety Board of Canada has recommended sweeping changes, including a new regulatory scheme to govern the transport of hazardous fuels by rail.⁴⁶ Greater oversight in key areas such as car design, operating procedures, classification and description requirements, carrier accountability, safety response planning, and audit requirements is expected. These changes will require an extensive review of regulatory compliance by Canadian and U.S. rail carriers, many of which transport shipments to and from Canada.

C. UNMANNED AERIAL VEHICLES

Perhaps the most interesting technological development affecting transportation in Canada is the proliferation of unmanned aerial vehicles (UAVs). Canadian regulators have begun to adapt existing aviation laws to these new applications and have taken a bold step forward in easing restrictions, with a view to promoting growth and innovation in this important sector. In November 2014, Transport Canada announced two new exemptions that are expected to make it easier for businesses to fly small UAVs.⁴⁷ Under the new exemptions, very small (under 2 kg) and small (between 2 kg and 25 kg) UAVs will no longer require a Special Flight Operations Certificate (SFOC), as long as the conditions set out in the *Canadian Aviation Regulations*⁴⁸ are met at all times.⁴⁹

For sUAS between 2 kg and 25 kg, the exemption requires the operator to comply with fifty-nine conditions that relate to height restrictions, minimum distances from aerodromes and other hazards, pilot training conditions, insurance requirements, as well as flight within specific airspace, and visual line-of-sight.⁵⁰ For sUAS under 2 kg, the exemption requires the operator to comply with fewer conditions, thirty-seven in all, that relate to aspects similar to those identified above.⁵¹

The exemptions are in effect until December 21, 2016, unless the conditions are breached by the operator.⁵² The Minister of Transport has reserved the right to cancel the exemptions “*where she is of the opinion that the exemption is no longer in the public interest, or is likely to adversely affect aviation safety.*”⁵³

Operators that use UAVs over 25 kg for work or research must apply for an SFOC, which Transport Canada issues under the *Canadian Aviation Regulations*.⁵⁴ Special certifi-

45. *Lac-Mégantic Train Explosion: Three Charged in Quebec*, BBC (May 13, 2014), www.bbc.com/news/world-us-canada-27387287.

46. See *Railway Investigation Report*, R13D0054 (Can.).

47. See *Exemption From Sections 602.41 and 603.66 of the Canadian Aviation Regulations* (Nov. 26, 2014), available at www.tc.gc.ca/civilaviation/regserv/affairs/exemptions/docs/en/2879.html.

48. SOR/96-433.

49. See *Exemption From Sections 602.41 and 603.66 of the Canadian Aviation Regulations*, *supra* note 44.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

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ates must generally be obtained prior to each flight. In some cases certificates have been granted for a prescribed location for as long as one year. Certificates are subject to a number of conditions, including the requirement that the operator maintain visual contact with the UAV.⁵⁵ Restrictions on the weight of the UAV and limitations on flights in or near urban areas apply.⁵⁶

The focus of the next regulatory initiative will be on operations beyond visual line of sight and larger UAV systems.

D. NEW INTERLINE BAGGAGE RULES FOR CANADA

The Canadian Transportation Agency, established under the *Canada Transportation Act*, is an independent, quasi-judicial agency, that makes decisions concerning air, rail, and marine matters and whose jurisdiction extends to economic regulation and consumer protection.⁵⁷ The Agency is the main regulator in transport law.

It has introduced new interline baggage rules for Canada, with a view to creating harmonization and consistency.⁵⁸ Foreign-based and Canadian international airlines are expected to apply the rules defined by the Agency to interline itineraries with a point of origin or ultimate destination in Canada. The Rules will be enforced for tickets issued on or after April 1, 2015.⁵⁹ Amendments to carrier tariffs must be filed forty-five days before the amendments take effect, i.e. before February 15, 2015.⁶⁰

The Agency has essentially adopted the U.S. approach,⁶¹ although preserving one element of IATA Resolution 302.⁶² The basic thrust of the new regime is that for applicable interline itineraries, a single set of baggage rules should apply throughout, regardless of the complexities of the itinerary.

International air carriers that operate flights to and from Canada are advised to review their tariffs on file with the Agency to ensure that these indicate how they will select the applicable baggage rules, apply the rules selected by another carrier where necessary, and comply with passenger disclosure requirements.

Defined information must be disclosed on each e-ticket itinerary/receipt. In the case of online purchases, defined information must be disclosed on the summary page that is presented to the passenger at the end of the purchase transaction.⁶³ Specific disclosures include: (i) the identification of the applicable rules, i.e., which carrier's rules apply; (ii) baggage free allowance and fees, size and weight limits; (iii) special terms applicable to frequent flyers; (iv) any applicable embargoes; and (v) how any charges are applied, e.g., once per direction or at each stopover point.⁶⁴ There is a general obligation that requires

55. See *Exemption From Sections 602.41 and 603.66 of the Canadian Aviation Regulations*, *supra* note 44.

56. *Id.*

57. *Our Organization and Role*, Canadian Transportation Agency, <https://www.otc-cta.gc.ca/eng/our-organization-and-role> (last visited Mar. 28, 2015).

58. See *Decision No. 144-A-2014* (Apr. 16, 2014), and *Order No. 2014-A-158* (Aug. 22, 2014).

59. *Order No. 2014-A-158* (Aug. 22, 2014).

60. *Id.*

61. As exemplified by 14 C.F.R. § 399.87 (2012).

62. See *Decision No. 144-A-2014* (Apr. 16, 2014).

63. *Id.*

64. See Canadian Transportation Agency, *Interline Baggage Rules for Canada: Interpretation Note*, at 6.

an international airlines to have all of its tariff rules, including those affecting the carriage of passenger bags, on its website.

E. CANADA PROPOSES NEW DRINKING WATER REGULATIONS FOR COMMON CARRIERS

In May 2014, the Public Health Agency of Canada published new draft regulations, the *Potable Water on Board Trains, Vessels, Aircraft and Buses Regulations* (hereinafter “Regulations”),⁶⁵ to modernize the regime governing the safety and quality of drinking water on federally regulated airplanes, trains, ships and buses. The changes were made due to potential public health risks associated with water and to protect the traveling public.

The proposed Regulations will be much more specific with respect to applicability, quality control, sampling, testing, and recordkeeping. The Regulations will apply to “operators” (meaning persons or entities that carry on a business of transporting passengers) of “conveyances” (meaning all aircraft, vessels, buses, and trains used for interprovincial or international transportation of passengers and authorized under a Canadian or foreign law to transport at least twenty-five persons).⁶⁶ “Passenger” is defined as a person who is carried on board a conveyance under a contract, but excludes the master, pilot or driver, or a crew member working on board.⁶⁷ Under the Regulations, requirements in relation to potable water will be extended beyond drinking water to apply also to water used for the preparation of food and for hand washing or oral hygiene.⁶⁸ While the Regulations are generally consistent with comparable international standards, they impose sampling and record-keeping requirements that may be more stringent in certain important respects; for example, eight annual E. coli tests per aircraft will be required.⁶⁹ International operators need to be aware of how the new Regulations may impose requirements more onerous than other national and international drinking water safety regimes such as the WHO Guide to Hygiene and Sanitation in Aviation, the U.S. Aircraft Drinking Water Rule, and European Union Council Directive 98/83/EC.

Following a public comment period, publication of the revised regulations is targeted for Spring 2015, and they are expected to come into force in late 2015. That said, Ebola has pushed many other initiatives to the back-burner at the Public Health Agency of Canada.

F. SUPREME COURT UPHOLDS EXCLUSIVITY OF *Montreal Convention*

In a recent decision, the Supreme Court of Canada considered a claim for damages by two passengers on the basis that Air Canada had breached its obligation to supply services in French under the *Official Languages Act* on international flights.⁷⁰ The complainants’ appeal to the Supreme Court was supported by the Commissioner of Official Languages

65. *Potable Water on Board Trains, Vessels, Aircraft, and Buses Regulations*, C. Gaz. (Vol. 148, No. 19, May 10, 2014).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at s. 9(1).

70. *Thibodeau v. Air Canada*, 2014 SCC 67 (Oct. 28, 2014).

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of Canada. The Court (in a 5-2 split decision) held that the *Montreal Convention's* uniform and exclusive scheme of damages liability for international air carriers does not permit an award of damages for breach of language rights during international carriage by air.⁷¹ The Court judicially recognized that the *Montreal Convention* (which was made law in Canada under the *Carriage by Air Act*) provides the exclusive recourse against airlines for various types of claims arising in the course of international carriage by air.⁷²

71. *Id.*
72. *Id.*