BULLETIN
TRANSPORTATION DISTRICT 140
DISTRICT DES TRANSPORTS 140
International Association of Machinists and Aerospace Workers
Association internationale des machinistes et des travailleurs et travailleuses de l'aérospatiale

TO ALL IAMAW MEMBERS WORKING AT AIR CANADA

Dear Brothers and Sisters:

The Ontario Superior Court has now released its decision on the Air Canada Public Participation Act (ACPPA).

The decision is deeply disappointing. On the central question of whether Air Canada is in compliance with its obligation "to maintain operational and overhaul centres in the City of Winnipeg, the City of Mississauga and the Montreal Urban Community, the Court found that ACPPA's requirement "was vague and no doubt purposely so".

Mr. Justice Newbould concluded that "Air Canada does maintain operational and overhaul centres [...] by maintaining overhaul operations under its contracts with Aveos and by itself maintaining certain overhaul functions through its line maintenance operations".

The decision does not deal with the extensive legislative debates in Parliament put before the Court by Union counsel. During these debates, Air Canada's own CEO and legislators had described the Act as obliging Air Canada to maintain "overhaul centres" and defined overhaul centres as centres capable of carrying out C and D checks on aircraft.

Instead, the Court held that "the natural meaning of the words *overhaul centre* must be that it is a place or centre in which overhaul work is performed", and accepted Air Canada's statements that it "performs some overhaul tasks in its line maintenance group" as sufficient to meet the statutory requirement.

The Court did make reference to some Parliamentary debates showing legislators' concern with ensuring that jobs remain in the named cities, but only in support of its finding that Air Canada can meet the requirements of the legislation by having the work carried out on contract with Aveos in those cities.

In favour of Aveos and Air Canada, the Court also based its decision on a number of legal arguments the companies made to the effect that the Union and General Vice President Ritchie had no standing to bring forward this application.

The Court's decision is included on the following pages. As the hearings were held in English, this official court document was only released in English.

As a result of this decision, the collective bargaining process will be suspended indefinitely while we consider our options for moving forward. More information will be provided as soon as it becomes available.

In solidarity,

Chuck Atkinson
President and Directing General Chairperson

CA:mcb

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CITATION: IAMAW v. Air Canada et al, 2011 ONSC 3190
COURT FILE NO.: 11-CV-00009146-00CL
DATE: 20110525

SUPERIOR COURT OF JUSTICE - ONTARIO
COMMERCIAL LIST

BETWEEN:

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS and DAVID RITCHIE

Applicants

- and -

AIR CANADA and AVEOS FLEET PERFORMANCE INC.

Respondents

BEFORE: Justice Newbould

COUNSEL: Paul J.J. Cavalluzzo and Stephen J. Moreau, for the Applicants

Sean Dunphy, Daniel S. Murdoch and Jennifer Imrie, for Air Canada

Gerald L.R. Ranking and Sarah J. Armstrong, for Aveos Fleet Performance Inc.

DATE HEARD: May 18, 2011

Newbould J.

[1] The applicant International Association of Machinists and Aerospace Workers ("IAMAW") applies for various heads of relief, including declarations of rights and injunctive relief, arising from the sale by Air Canada of part of its heavy maintenance operations and the transfer of employees from Air Canada to the respondent Aveos Fleet Performance Inc. ("Aveos"). On the hearing of this application, IAMAW limited its claims at this stage to declaratory relief.

[2] This application was commenced on March 18, 2011. Several heads of relief are applied for, some of which are (i) a declaration that Air Canada is in breach of section 6(1)(d) of the Air Canada Public Participation Act, R.S.C. 1985, c. 35 (4th Supp.) ("ACPPA ") which requires Air Canada to include in its corporate articles provisions requiring Air Canada to "maintain operational and overhaul centres" in Winnipeg, Montreal and Mississauga; (ii) a declaration that Air Canada is in breach of s. 6(1)(d) of ACPPA because its articles do not contain provisions requiring Air Canada to maintain operational and overhaul centres in Winnipeg, Montreal and Mississauga and an order requiring Air Canada to include those provisions in its articles; (iii) a declaration that Air Canada is not in compliance with ACPPA and its articles because it is not maintaining operational and overhaul centres in Winnipeg, Montreal and Mississauga (iv) an order directing Air Canada to maintain operational and overhaul centres in Winnipeg, Montreal and Mississauga; and (v) a permanent injunction restraining Air Canada from breaching ACPPA or its articles.

[3] On April 13, 2011 I dismissed a motion by IAMAW for an interlocutory injunction to restrain Air Canada and Aveos from proceeding with the transfer of employees of Air Canada to Aveos.

[4] Although IAMAW claimed in its application and on the injunction motion that the articles of Air Canada did not contain the provisions as required in section 6(1)(d) of ACPPA, on the hearing of the application it took the position that the articles were in compliance with ACPPA and that the issue was whether Air Canada was in compliance with its articles.

Relevant history

(i) ACPPA and Air Canada's Articles

[5] In connection with the Government of Canada's initial sale of a minority interest in Air Canada, the ACPPA came into force on August 18, 1988. The ACPPA provided in section 6(1)(d) that the articles of continuance of Air Canada would include "provisions requiring the Corporation to maintain operational and overhaul centres in the City of Winnipeg, the Montreal Urban Community and the City of Mississauga".

[6] Air Canada's articles of continuance have at all times since 1988 provided that Air Canada "shall maintain operational and overhaul centres for its aircraft or their components in the City of Winnipeg, the City of Mississauga and the Montreal Urban Community." These articles were filed by the Government of Canada with the relevant authority under the CBCA in 1988 and have at all times been a matter of public record. The words in the Air Canada article "for its aircraft or their components" are not in section 6(1)(d) of ACPPA and IAMAW took the position before the hearing of this application that the words "or their components" renders the article contrary to ACPPA. On the hearing, it dropped that position and said that the articles were in compliance with ACPPA.

(ii) 2004 Air Canada Restructuring

[7] On April 1, 2003, Air Canada filed for protection from its creditors pursuant to the provisions of the Companies' Creditors Arrangement Act. The restructuring process lasted 18 months, involved extensive negotiations and compromise among Air Canada's creditors, as well as IAMAW and other unions, culminating in Air Canada implementing a plan of reorganization, compromise and arrangement on September 30, 2004. Pursuant to the Plan, creditors holding approximately $8.3 billion of claims agreed to the compromise of their claims in return for equity in a newly created holding company named ACE Aviation Holdings Inc. ("ACE").

[8] ACE was formed as a holding company having the ownership of Air Canada and certain former subsidiaries and unincorporated divisions of Air Canada which later were converted into sister enterprises of Air Canada underneath the common ownership of ACE. Among the businesses transferred to ACE ownership at the time were Air Canada Technical Services ("ACTS"), Jazz Air LP ("Jazz") and Aeroplan Limited Partnership ("Aeroplan").

(iii) Sale of maintenance business

[9] Upon completion of the restructuring on September 30, 2004, Air Canada transferred to ACTS the portion of Air Canada's technical operations division engaged in heavy maintenance, engine maintenance, component maintenance and supply chain business and

operations as such were then conducted but excluding Air Canada's line maintenance business and operations.

[10] Coincident with this transfer, Air Canada and ACTS entered into a memorandum of agreement, pursuant to which Air Canada agreed to second to ACTS at ACTS' expense those unionized employees required in the business.

[11] On November 24, 2006 Air Canada completed an IPO of 25% of its equity. In connection with the IPO transaction, Air Canada monetized its preferred LP units in ACTS issued to Air Canada in 2004, receiving approximately $600 million. At the same time, ACTS was re-organized and all of its assets were transferred to a newly formed limited partnership, ACTS LP. ACTS LP succeeded to all of the rights of ACTS. At the time, ACE indicated its intention to monetize its investment in ACTS LP as it had already done in relation to Aeroplan and Jazz, two other former subsidiaries of Air Canada received by ACE under the 2004 restructuring.

(iv) Sale of maintenance business to Aveos

[12] On June 22, 2007, ACE announced the completion of the sale of the business and assets of ACTS LP to a consortium of private equity investors. The transaction closed on October 16, 2007. The entity that resulted from the transaction was ACTS Aero Technical Support and Services Inc., which following a name change in September, 2008 became Aveos Fleet Performance Inc.("Aveos"). The Air Canada employees who had been seconded to ACTS LP were seconded to Aveos and have continued to work for Aveos under Aveos management and supervision.

[13] The sale documentation to Aveos provided that it constituted a sale of a business under the Canada Labour Code and provided that the parties were to consider and address the consequences the sale would have on Air Canada employees represented by IAMAW.

[14] The parties did not agree on whether Aveos was a separate employer for purposes of the Canada Labour Code and thus whether Air Canada and Aveos constituted separate

bargaining units. IAMAW took the position that Air Canada and Aveos were a single employer and Air Canada and Aveos took the position that they were separate employers and that the bargaining units should be severed.

(v) The CIRB Complaint and the Transition MOA

[15] On December 14, 2006, IAMAW filed a complaint with the CIRB regarding what it contended were failures in providing it with access to information regarding the sales process affecting ACTS LP. Air Canada and ACTS LP were named respondents. This was before the sale of ACTS LP to Aveos.

[16] The complaint was placed in abeyance. Eventually the parties, including Aveos after its purchase, attempted to negotiate a resolution of several matters.

[17] The parties did not reach agreement with respect to whether Aveos would become a separate employer for bargaining purposes with IAMAW. However, by a memorandum of agreement dated January 8, 2009 (the "Transition MOA") among Aveos, Air Canada and IAMAW, the CIRB complaint was settled and a procedure was set out for the transition of employees to Aveos in the event that the CIRB ordered the severance of the Air Canada and Aveos bargaining units.

[18] The Transition MOA contained a recital that it was being entered into to resolve any remaining issues in the relevant CIRB files and to achieve the following objectives in the event of the CIRB ordering the severance of the bargaining units:

> i. facilitate the orderly transition of certain Air Canada employees to Aveos in accordance with the expressed preference of those employees;
> ii. establish terms and conditions of employment that would apply to those Air Canada employees who elected to become employees of Aveos.

[19] The Transition MOA contained six conditions precedent to its obligations being enforceable. The first condition precedent, and the one relevant to this application, was a

condition that the CIRB order the severance of the current relevant bargaining units into two separate bargaining units in which Air Canada and Aveos were named as separate employers.

[20] The Transition MOA set out a detailed procedure to be followed upon the CIRB issuing a decision severing the bargaining units, including a number of options the affected employees were to be given and the timing for the exercise of elections by the affected employees. They were given seven options, including electing to remain employees of Air Canada or become employed by Aveos. The affected employees were given 74 days from the decision of the CIRB to make their elections.

(vi) Release clause

[21] The Transition MOA contained a release of rights clause as follows:

> 13. The parties acknowledge and agree that the terms of this Memorandum of Agreement together with the award of arbitrator Martin Teplitsky or such other arbitrator as he may designate and related orders or directions of the CIRB are exhaustive of the rights of any Air Canada Employee affected by the sale of the business of ACTS LP and that no party will assert any claim, demand or grievance related or arising from the transitioning of Air Canada Employees to Aveos except in accordance with this Memorandum of Agreement.

(vii) CIRB orders

[22] In June 2010, Aveos and Air Canada asked Arbitrator Martin Teplitsky to rule on the appropriateness of proceeding with the joint application to the CIRB contemplated by, and attached in draft form to, the Transition MOA. Arbitrator Teplitsky found it was appropriate to proceed with the Joint Application. His award dated June 16, 2010 states:

> It is now a number of years since the sale to Aveos by Air Canada of its heavy maintenance, components and engine businesses. The affected employees remain employees of Air Canada although they work for Aveos. It is time to bring closure. The CIRB is the appropriate forum. Accordingly, the employers, or either of them, may proceed with an application to the CIRB.

[23] On June 25, 2010, Aveos and Air Canada made a joint application to the CIRB requesting a variety of orders to give effect to the split in the bargaining unit consequent upon the sale of the business to Aveos.

[24] On October 1, 2010, IAMAW filed an application to the CIRB for a declaration that Air Canada and Aveos were a single employer

[25] On January 31, 2011 the CIRB issued orders granting the joint application of Air Canada and Aveos and dismissing the application by IAMAW. The orders severed the bargaining units and ordered that Aveos was the successor employer to ACTS LP. The order included a term that the parties, being Air Canada, Aveos and IAMAW, were to fully comply with the terms of the Transition MOA dated January 8, 2009, including a provision that the transition process was to follow the timelines contained in the Transition MOA. The orders concluded with the following declaration regarding the final disposition of matters pertaining to the sale of the business to Aveos:

> AND FURTHERMORE, The Canada Industrial Relations Board hereby declares that the January 8, 2009 MOA, ... and the present Order properly and fully dispose of all matters arising from the sale of the business from ACTS LP to Aveos Fleet Performance Inc. or related to the consequences of such sale, whether under the *Code*, the applicable collective agreement or otherwise.

[26] Following the CIRB decision, IAMAW served notices to commence collective bargaining on each of Air Canada and Aveos.

[27] As a result of the CIRB decision, the elections of the affected Air Canada employees under the Transition MOA were to be made by April 15, 2011. As of April 13, 2011 at the time of the hearing of the motion by IAMAW for an interim injunction preventing the deadline from being followed, 2194 employees had made their elections. As a result of the dismissal of the interim injunction motion, the elections had to be made by April 15, 2011.

Standing

[28] Air Canada and Aveos contend that neither IAMAW nor David Ritchie has standing to bring this application. As the application is now based not on an alleged breach of ACPPA but rather an alleged breach of Air Canada's articles of continuance, the issue of standing is whether IAMAW or Mr. Ritchie has standing to apply under section 247 of the CBCA. That section provides:

> 247. If a corporation … does not comply with this Act, … Articles, a complainant … of the corporation may, in addition to any other right they have, apply to a court for an order directing any such person to comply with, or restraining any such person from acting in breach of, any provisions thereof, and on such application the court may so order and make any further order it thinks fit.

[29] A complainant is defined in section 238 of the CBCA to included:

> "complainant" means
>
> (a) a registered holder or beneficial owner… of a security of a corporation …,
>
> (d) any other person who, in the discretion of a court, is a proper person to make an application under this Part.

[30] IAMAW is not a shareholder of Air Canada. Mr. Ritchie is an officer of IAMAW and purchased one share of Air Canada in January 2009.

(a) IAMAW

[31] IAMAW seeks to be a complainant under the basket clause as being a person who in the discretion of the court is a proper person to make an application.

[32] There are a number of authorities in actions brought for oppression that provide that section 238(d) of the CBCA or section 245(c) of the OBCA confers on the court an unfettered discretion to determine whether an applicant is a proper person to commence oppression proceedings and that this overall flexibility is essential for the broad remedial purposes of the oppression provisions. See *Olympia & York Developments Ltd. v. Olympia & York Realty Corp.* (2003), 68 O.R. (3d) 544 (C.A.) per Goudge J.A. at para. 45 and *PMSM Investments Ltd. v.*

Bureau (1995), 25 O.R. (3d) 586. I see no reason why that unfettered discretion does not apply in considering whether someone can be a complainant in an action under section 247 of the CBCA, although it is by no means clear that it can be said that section 247 has broad remedial purposes as do the oppression provisions in the CBCA or OBCA.

[33] IAMAW seeks to be a complainant because of its status as the certified bargaining agent of its members who are affected by their transfer to Aveos, and it is said that each member would have their own right to seek a section 247 remedy. IAMAW relies on *Berry v. Pulley*, [2002] 2 S.C.R. 293 which established that trade unions have legal status to sue, and on *Professional Institute of the Public Service of Canada v. Canada (Attorney General)* (2002), 62 O.R. (3d) 695 (C.A.). In the latter action, a trade union was held to have standing to sue to attacked federal pension legislation. Goudge J.A. stated the following, which is relied on by IAMAW:

> 49. The respondent acknowledges that the appellants are all trade unions whose objects include, in each case, regulating relations between its members and their employer. As with all unions, the appellants' raison d'être is to represent the interests of their members in matters that affect their employment circumstances. The courts have long recognized that this may take them well beyond the strict limits of contract negotiation and administration. See, for example, Lavigne v. OPSEU, [1991] 2 S.C.R. 211 at 288 per Wilson J.; Delisle v. Canada (Deputy Attorney General), [1999] 2 S.C.R. 989 at 1021. This recognition reflects the reality that the modern workplace is the product of many forces and, if a union is to do its job, it must try to influence those forces on behalf of its members.
>
> 50. Here it is true that the appellants cannot compel the employers to bargain collectively about pensions. However, the pension legislation attacked in these actions would change important conditions of employment for the appellants' members. Challenging the legality of such a change on behalf of their members comes within the core function we expect of unions in representing their members and their interests. Viewed in this way, the appellants' representational role requires them to be directly interested in this legislation in a way that goes well beyond the interest a member of the general public might have.

[34] IAMAW asserts that it thus should be afforded status to be a complainant in this action under section 247, and that the court should recognize the reality of IAMAW as the sole bargaining agent of its members. I accept that the court should recognize the reality of IAMAW

as the sole bargaining agent of its members. It has acted throughout on behalf of its members and bringing this action comports with the language of Goudge J.A. in Professional *Institute of the Public Service of Canada v. Canada (Attorney General).*

[35] The issue is whether IAMAW, or any of its affected members for that matter, is a proper person to make this application. In my view, it is not.

[36] In the negotiations prior to the CIRB hearing and decision of January 31, 2011, the parties signed the Transition MOA in which they agreed in section 13 that the Transition MOA and related orders or directions of the CIRB were exhaustive of the rights of any Air Canada employee affected by the sale of the business of ACTS LP and that no party would assert any claim, demand or grievance related to or arising from the transitioning of Air Canada employees to Aveos except in accordance with the Transition MOA.

[37] IAMAW takes the position that the release in paragraph 13 of the Transition MOA does not apply to this application involving the articles of Air Canada and the ACPPA. In my view it does, which I will deal with more fully in these reasons. The release is binding on IAMAW and any affected employee. To now seek to change the result effected by the Transition MOA and the broad CIRB orders of January 31, 2011 in which the CIRB ordered the parties to comply with the Transition MOA flies in the face of the Transition MOA and they CIRB orders.

[38] The essential nature of IAMAW's claim in this application relates to labour relations matters. Mr. Cavalluzzo said in argument that the case would not have been brought had IAMAW been successful before the CIRB in seeking a single employer ruling that would not have severed the bargaining unit of Aveos from the Air Canada bargaining unit.

[39] IAMAW seeks relief that it was unable to obtain in the CIRB proceedings. In *Air Canada Pilots Assn. v. Air Canada Ace Aviation Holdings Inc.*, (2007), 26 B.L.R. (4th) 124, Cumming J. was influenced by similar considerations in concluding that the union was not a proper party to be a complainant in an oppression action.

[40] I hold that IAMAW is not a proper party to be a complainant in this application in light of the release agreed to in the Transition MOA and the CIRB orders that IAMAW seeks to circumvent.

(b) Mr. Ritchie

[41] Mr. Ritchie is a shareholder of Air Canada. Thus he has standing under section 247 of the CBCA to apply to court to seek relief under that section. What relief, if any, he is entitled to is another matter.

[42] Mr. Ritchie is being used to advance the interests of IAMAW. He seeks no relief to protect his shareholder interest in Air Canada. His complaint is of labour relations matters and the harm allegedly being caused by the transfer of IAMAW member employees to Aveos as a result of the decision of the CRIB on January 31, 2011 that severed the bargaining units and made Aveos the successor employer to ACTS LP. There is no evidence that any harm is being caused to Air Canada by this. No doubt Air Canada acted in its best interests in negotiating a settlement with IAMAW in the Transition MOA and in applying to the CIRB to have the bargaining units severed, and it presumably would not be opposing this application of IAMAW if it considered that Air Canada or its shareholders would be better served by the success of the application.

[43] Relief under section 247 of the CBCA is discretionary. I would not grant any relief to Mr. Ritchie under it unless it could be shown that Air Canada or its shareholders were being harmed by the conduct complained of. That is not the case here. See *Cheong v. Noble China Inc.*, (1996), 34 B.L.R. (2d) 172 (Gen. Div.) at para. 19 per Blair J. (as he then was) and *Polar Star Mining Corp. v. Willock* (2009) 57 B.L.R. (4th) 71 at para. 62 per Hoy J. for the use of this principle in corporate injunction matters.

[44] Moreover, Mr. Ritchie is an officer of IAMAW, which signed a release precluding this application. In considering whether discretion to make an order under section 247 should be exercised, Mr. Ritchie cannot be divorced from the actions of IAMAW.

[45] In the circumstances, I would not grant any relief to Mr. Ritchie under section 247 of the CBCA.

Release

[46] IAMAW asserts that the release in paragraph 13 of the Transition MOA was not intended to release any litigation regarding ACPPA and the articles of Air Canada. It says that the only application it had made to the CIRB that was settled by the Transition MOA was its unfair labour practice complaint alleging that Air Canada had failed to disclose its monetization plans to IAMAW. Its points out that the Transition MOA was negotiated starting in December 2008 once Aveos and Air Canada had made significant disclosure of complex financial and other documents and had given IAMAW sufficient time to review these. It also points out that ACPPA was not raised by the parties in the course of the negotiations.[1] Nor is ACPPA mentioned in the Transition MOA.

[47] The Transition MOA is a contract and to be interpreted in accordance with the rules of contract interpretation. In interpreting a contract, the goal is to determine the intent of the parties by reference to the words that they chose. The plain meaning of the words is to be given effect, read harmoniously and in the context of other provisions of the contract, and in light of the factual matrix as a whole. Interpretations that give effect to all the terms of a contract should be preferred over interpretations that render one or more terms superfluous or ineffective. See an excellent discussion of these principles in *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust* (2007), 29 B.L.R. (4th) 292; aff'd (2007) 85 O.R. (3d) 254 (C.A.).

[48] While the only outstanding CIRB application prior to the Transition MOA was the unfair labour practice complaint alleging that Air Canada had failed to disclose its monetization plans to IAMAW, the negotiations that took place commenced two years later after significant disclosure had been made. The Transition MOA did not deal with the disclosure issues that IAMAW had previously had, but rather with the transition of employees to Aveos, dependant on

[1] While the admissibility of this statement of what did or did not take place in negotiations is questionable, it is agreed by the parties that ACPPA was not raised in the negotiations.

the satisfaction of six conditions, all of which occurred. One such condition was an order of the CIRB severing the bargaining units, which the parties did not agree on.

[49] The Transition MOA recites its purpose as follows:

> AND WHERAS the parties entered into this Memorandum of Agreement in order to resolve any remaining issues in Board File No. 26054-the Caisse, and in order to achieve the following objectives in the event that the CIRB issues an order severing the current TMOS and Clerical Units as a result of the sale of ACTS LP:
>
> > i. facilitate the orderly transition of certain Air Canada employees to Aveos in accordance with the expressed preference of those employees;
> >
> > ii. establish terms and conditions of employment that would apply to those Air Canada employees who elected to become employees of Aveos.

[50] Thus it is clear that the purpose of the Transition MOA was to deal with the transition of employees to Aveos and their terms and conditions of employment.

[51] IAMAW bargained for and obtained enhanced benefits for its members in the Transition MOA, including:

> (a) a right for each employee to elect whether to remain an employee of Air Canada or to accept available employment with Aveos through 7 different options. These options include things like the opportunity to retire or resign from Air Canada in order to accept a one-time offer of employment from Aveos. These options were included at the request of the IAMAW seeking to protect the interests of its members;
>
> (b) a period of 74 days within which employees could consider their options and make their selection;
>
> (c) enhanced job security in the form of an agreement between Air Canada and Aveos providing that Aveos is to remain the exclusive provider of heavy maintenance services to Air Canada until at least June 30, 2013;
>
> (d) an agreement to arbitrate the contracting of Air Canada work to third parties until June 30, 2013;

> (e) travel privileges for Aveos employees. Such travel privileges were not part of the Air Canada collective agreement and would not have otherwise been independently provided by Aveos because it is not an airline; and,
>
> (f) an agreement to submit five outstanding issues (the "Outstanding Issues") to an interest arbitrator so that they would be decided in advance of employees having to decide which employment option to choose.[2]

[52] The language of the release in clause 13 of the Transition MOA that no party will assert any claim related or arising from the transitioning of Air Canada employees to Aveos except in accordance with the MOA on its face covers any claim such as raised in this application arising from the transfer of employees to Aveos. The factual matrix surrounding the negotiations leading to the Transition MOA, including the benefits obtained by IAMAW for its members, supports this interpretation.

[53] While ACPPA may not have been raised in the negotiations, the issue of whether Air Canada complied with it was well known to both parties. As Mr. Dunphy put it, it was an elephant in the room. IAMAW was aware of ACCPA from its initiation. The obligation on Air Canada in ACPPA to maintain overhaul facilities was referred to by IAMAW in its unfair labour application to the CIRB in December 2006 that was settled by the Transition MOA.

[54] The evidence indicates that IAMAW made a decision not to litigate this issue but rather negotiate to obtain benefits not available through litigating the ACCPA issue it now raises. Following the Transition MOA, the CIRB received a large number of unfair labour practice complaints from IAMAW members complaining that IAMAW had not fairly represented them. The complaints included complaints that the sale to Aveos was in breach of ACPPA. In response, on March 6, 2009 IAMAW filed lengthy submissions to the CIRB which included the following:

> 4. In the course of these settlement negotiations leadership of the Union worked tirelessly to achieve benefits and protections for its members, many or most of which could not have been achieved had the Union instead chosen to litigate the consequences of the sale. Throughout, the Union sought and received advice from legal counsel and from other experts… as well as assistance from the CIRB which…

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[2] These issues were subsequently submitted to arbitration and determined by Arbitrator Teplitsky on March, 2009.

issued an order recognizing the MOA as a settlement of the Union's unfair labour practice complaint and as being in compliance with the Canada Labour Code.

7. The MOA is... a settlement of issues that would otherwise be resolved through litigation. The resulting MOA represents the Union's good faith and very extensively considered judgment-based on expert advice... as to what additional job security protections, personal choices and enhanced benefits could be obtained for members through settlement rather than litigation.

80. An issue in many of the applications is the view that the Union should have "considered" or pursued litigation under the Air Canada Public Participation Act ["ACPPA"]. While not relevant to the outcome of this application, we can provide an assurance that the ACPPA has been extensively considered by this Union over many years.

81. The IAMAWAW has always been well aware of Air Canada's obligations under the ACPPA to include in its articles of continuance provisions that require the Corporation to maintain operational and overhaul centres in the City of Winnipeg, the Montreal Urban Community and the City of Mississauga. In fact these obligations were cited in the 2006 application to the Board in the Unfair Labour Practice that commenced these discussions.

82. The IAMAWAW's objective throughout the settlement discussions has been to use all available leverage to obtain the best outcome and job security for its members. The Union sought legal advice concerning the ACPPA and reached a considered conclusion that – at least for the time being – pursuing this settlement, with its concrete protections out to 2013, and the potential for longer term job security, was preferable to commencing litigation under the ACPPA.

85. The Union sees its obligation as being to protect its members, and its decision no follow the course of action it did was made in light of the uncertain outcome of litigation, the certain loss of benefits of settlement and the impossibility of obtaining an order that would directly preserve the members' job security.

[55] Mr. Cavalluzzo points to paragraph 86 of the union response as an indication that IAMAW had no intention of releasing a claim regarding ACPPA resulting from the sale of ACTS LP to Aveos. That paragraph stated:

> 86. The IAMAW does however take the view that the Act represents political will and a substantive obligation to keep real jobs in these locations, and fully intends to use the legislation alongside all other means at its disposal to ensure that this obligation is met.

[56] I do not read that paragraph in the way Mr. Cavalluzzo asserts. In the context of the points IAMAW was making to the CIRB, including paragraphs 80 to 85, it was leaving open the possibility that at some time in the future, after the transition of Air Canada employees to Aveos had been completed, it would use ACPPA if necessary to maintain a level of jobs in Montreal, Winnipeg and Mississauga that it thought should be maintained. It cannot be read as saying that the settlement in the Transition MOA did not intend to waive reliance on ACPPA in fighting the sale to Aveos. To do so would mean that all the other paragraphs in its submission to the CIRB were misleading.

[57] IAMAW asserts in the alternative that if the release covers this application, it would amount to Air Canada contracting out of its obligations under the ACPPA and the CBCA and thus be void as being contrary to public policy. It relies on *Ontario (Human Rights Commission) v. Etobicoke (Borough),* [1982] 1 S.C.R. 202 which held that a collective agreement could not contract for age restrictions of employment as that would permit parties to contract out of the Ontario Human Rights Code which the parties were not competent to do.

[58] I do not think that this case is of assistance to IAMAW. The parties did not contract out of the CBCA, which is what this application concerns, or out of ACPPA. IAMAW asserted to the CIRB that whether ACPPA was being violated was questionable. Just because one party in the litigation would take the view that ACPPA or the Air Canada articles were being violated does not make a settlement of this issue contrary to public policy. The parties agreed to negotiate a number of things, mainly enhanced benefits for IAMAW members in return for labour peace resulting from the sale to Aveos. I cannot accept that the parties were unable to settle their differences, a term of which precluded a possible CBCA application over those differences. It happens every day. There was no contracting out of the CBCA. If the position of IAMAW were correct, it would mean that this application IAMAW has brought could not be settled out of court. I do not accept that.

[59] The parties bargained for labour peace. IAMAW on behalf of its members waived any further litigation ("any claim, demand or grievance") arising from the transitioning of employees to Aveos except under the terms of the Transition MOA. By its terms, the release precluded this application from being brought.

Breach of Air Canada's Articles of Continuance

[60] In light of my previous findings regarding standing and the effect of the release clause, it is not necessary to deal with the argument of IAMAW that Air Canada is not in compliance with its articles of continuance that require that it shall maintain operational and overhaul centres for its aircraft or their components in the City of Winnipeg, the City of Mississauga and the Montreal Urban Community. However, in light of the extensive arguments made in this application, I shall do so.

[61] Section 6(1)(d) of ACPPA provides that the articles of continuance of Air Canada shall contain:

> (d) provisions requiring the Corporation to maintain operational and overhaul centres in the City of Winnipeg, the Montreal Urban Community and the City of Mississauga;

[62] The articles of Air Canada contain the following provision:

> The Corporation shall maintain operational and overhaul centres for its aircraft or their components in the City of Winnipeg, the City of Mississauga and the Montreal Urban Community.

[63] On the injunction motion, IAMAW took the position that these articles contravened section 6(1)(d) of ACPPA. It now says that they do conform and that the issue is whether Air Canada is in compliance with its articles. However, IAMAW asserts that to deal with that issue requires a consideration of what section 6(1)(d) of ACPPA means. I agree with that.

[64] At the time of the initial restructuring in 2004, Air Canada transferred to ACE its Air Canada Technical Services ("ACTS") business. Air Canada transferred to ACTS the portion of Air Canada's technical operations division engaged in heavy maintenance, engine maintenance,

component maintenance and supply chain business and operations as such were then conducted but excluding Air Canada's line maintenance business and operations. It was this maintenance business transferred to ACTS that was later transferred to ACTS LP and then to Aveos.

[65] The parties differ as to whether Air Canada itself is today performing operational and overhaul maintenance apart from what Aveos is doing under contract with Air Canada. Air Canada says it is and IAMAW says it is not. But there is no doubt that Aveos is doing a large part of the overhaul maintenance that at the time of ACPPA was being done by Air Canada.

[66] Aveos, like ACTS LP before it, does heavy maintenance work under contract to Air Canada. At the time ACTS was formed, Air Canada seconded its employees to ACTS who did the maintenance work for ACTS. The secondment agreement was later assigned to ACTS LP and then to Aveos when Aveos acquired the business from ACTS LP. This was the situation at the time of the Transition MOA in January, 2009.

[67] In 2007, ACE sold ACTS LP to Aveos in an asset sale in which Aveos acquired the equipment necessary to carry out the overhaul of aircraft, engines and aeronautical components. In addition, Air Canada sold to Aveos the Engine Maintenance facility at Dorval. The other hangars and component shops used for maintenance, repair and overhaul functions, including the aircraft, engine and component overhaul facilities in Winnipeg, Mississauga and Dorval were and are leased by Air Canada to Aveos.

[68] IAMAW's primary contention is that to "maintain" the operational and overhaul centres, Air Canada must own and control those centres, which it is not doing as a result of the sale of the business by ACE first to ACTS LP and then to Aveos. That is, IAMAW asserts that to "maintain" means to own and control the centres and not to have them operated by Aveos under various contracts and leases.

[69] IAMAW relies on the case of *Toronto (Department of Buildings and Inspections) v. Ramkumar* (1990), 73 O.R. (2d) 264 (C.A.), which held that an owner of a supermarket required by by-law to provide and maintain a parking lot was in breach of the by-law as he had no parking

lot on his premises. The owner unsuccessfully argued that a public parking lot owned by the City 100 metres down the street was sufficient.

[70] I do not think this case assists IAMAW or stands for the proposition that in order to maintain a facility, it is not sufficient that it be maintained by someone else under contract. This is clear from the following statements by Morden A.C.J.O.:

> Parking facilities which happen to be within 300 metres of the premises of the owner or occupant, but which he or she does not own or control, could, because of general demand, be fully occupied and unavailable for use by the customers of the owner or occupant. In no reasonable sense could it be said that the owner or occupant has "provided and maintained" such parking facilities.
>
> We need not, in this case, express ourselves on the nature or degree of the control which may be required because the respondents had no connection at all with the parking facility 100 metres away.

[71] IAMAW refers to the New Oxford English Dictionary definition of "maintain":

> To keep up, preserve, cause to continue in being (a state of things, a condition or activity, etc.); to keep vigorous, effective, or unimpaired; to guard from loss or derogation...
>
> To cause to continue in a specified state, relation, or position,...

[72] This dictionary definition does not advance matters too much, but if anything would seem to assist Air Canada. "To cause to continue" is perhaps different from " to continue" and may carry the connotation that so long as Air Canada is causing the centres to continue by having someone else do that under contract, it is maintaining the centres.

[73] What did Parliament mean by providing that Air Canada had to maintain these centres? The modern approach to statutory interpretation has been described as follows:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

> *Bell Express Vu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, at para. 26, quoting E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 87

[74] Both sides have made reference to parliamentary committee proceedings that occurred at the time ACPPA was being considered in 1998. It should be remembered, however, that while a court may look to legislative debates, committee reports and other materials that make up the legislative history of a statute, such sources are secondary to the grammatical and ordinary sense of the language in the statute at issue. It was stated in *Rizzo & Rizzo Ltd.* [1998] 1 S.C.R. 27, at para. 35:

> Although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation. Writing for the Court in *R. v. Morgentaler*, [1993] 3 S.C.R. 463 (S.C.C.), at p. 484, Sopinka J. stated:
>
> > ...until recently the courts have balked at admitting evidence of legislative debates and speeches....The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legislative history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation.

[75] Nowhere in the debates referred to by IAMAW is there any indication that Parliament was concerned with whether the persons who did the maintenance work at the three locations were employed by Air Canada or by another entity under contract with Air Canada. The speech to Parliament by Mr. Minaker, the member of the government in power in whose riding the Winnipeg overhaul maintenance facility was located, and relied on by IAMAW, indicated that the concern being addressed in ACPPA was that the facilities remain where they were and that jobs remain in Winnipeg. No mention was made of any other labour issues at all. Included in his speech was the following:

> The legislation that is before us states very clearly that the Government wants the maintenance base to remain in Winnipeg. It also wants the bases to remain in Toronto and in Montreal. That is in the legislation that we are dealing with today. Those maintenance bases will remain where they are and, I say, rightfully so. Not

> only that the locations of the maintenance bases in Winnipeg, Toronto and Montreal will be in the Articles of Incorporation of the new company.
>
> If in the future, the company that operates Air Canada as a private corporation decides that it wants to move a maintenance base, it will have to come here, to the House of Commons, to get the legislation changed. I suggest that there could not be a better safeguard than that.
>
> The PC Government wants to protect the jobs in Winnipeg, not like the Liberals of 1966 to 1969.

[76] In the Senate debates, a passage from Senator Roblin relied on by IAMAW does not indicate a desire that it be air Canada employees and not employees under a contract with Air Canada who are to do the work, but rather that the centres maintain the expertise and back-up support shops. He stated:

> The management of Air Canada gave us the particulars with respect to the number of person-hours required to perform these checks in connection with, for example, a 727 type aircraft. A "C": check requires about 500 person-hours and a "D" check takes approximately 15,000 person hours. In order to have the capability of doing that kind of heavy airframe work, these centres would need to maintain the expertise and back-up support shops required for these checks. The phrase that attracts my eye is "The need to maintain the expertise and back up support shops required for these kinds of checks"

[77] Too much should not be made of these speeches, but they do not support IAMAW's position as to the meaning of "maintain".

[78] It is clear that Parliament did not want to build in any specific job protection provisions in the legislation. Concerns were expressed by the opposition parties in the House of Commons that ss. 6(1)(d) provided insufficient protection for these maintenance centres. For example, one MP stated that the provision "does not provide for the volume of operations or the number of jobs at these centres. This means that the private board of directors could reduce operations and increase lay-offs as it saw fit."

[79] A representative of the Canadian Labour Congress, Ms. Riche, raised the same concern before the Senate committee and stated:

> The bill says: ". . . maintain the overhaul centres at Winnipeg, Montreal and Mississauga." It does not say that the company cannot take some of the maintenance and move it somewhere else, for example to Vancouver. Therefore, instead of maintaining 100 people in Winnipeg, there is nothing in the bill that says they cannot move some of those jobs elsewhere... What I am saying is that the bill is not clear; what "maintain" and "overhaul centre" means is not clear to the employees who work in Air Canada who are members of our unions. It is clear when it is discussed in the committee, but it is not clear within the legislation itself... the bill does not allow for staffing levels to be maintained or increased. It simply says: "...maintain overhaul centre". This may sound extreme, but does it mean two people and two wrenches? We do not know, and I think it is important to check that out.

[80] An opposition MP attempted to introduce amending language in Parliament that the three centres "shall maintain their staffing levels equal to those attained in the 1987-88 financial year end". This proposed amendment failed, and ACPPA was not revised to incorporate operational or employment guarantees.

[81] My conclusion is that IAMAW has not established that Air Canada is in breach of its articles by contracting out maintenance work to ACTS LP and now Aveos. On my reading of the legislation, and thus of the articles of Air Canada, there is nothing to prevent Air Canada from contracting that work out.

[82] It should be noted that no argument was raised by IAMAW that Aveos has not been carrying out the maintenance work as required using the Air Canada employees seconded up to now to Aveos. The maintenance of aircraft in Canada is heavily regulated, and includes a maintenance planning document for each particular aircraft and a maintenance program developed for each aircraft by Air Canada known as a "Pub 864". There is no suggestion or evidence that the Air Canada aircraft are not now or in the future are not likely to be maintained in accordance with all applicable regulations.

[83] Air Canada maintains that apart from what Aveos is doing under contract, Air Canada is carrying out operational and overhaul work in Montreal, Winnipeg and Toronto. This leads to the question what is meant by the term "operational and overhaul centres" in Air Canada's articles and in ACPPA.

[84] Extensive evidence was given by Mr. Jeanniot, the then president and chief executive officer of Air Canada, to the Commons and Senate committees considering the bill in 1988. He explained that checks, or maintenance, were broken down into smaller checks done overnight or during a 24 hour layover, being A and B checks, and larger checks, C and D checks, being heavy airframe work that required airplanes being brought into a hangar for weeks at a time. The latter work he said was referred to as "overhaul" work.

[85] Mr. Jeanniot's evidence was that Montreal and Winnipeg were overhaul centres as they had the capacity to do the heavy airframe work required during C and D checks. He said that Toronto was not an overhaul centre.

[86] I was referred to no evidence given to these committees in 1988 as to what was meant by "operational" work. On December 14, 2010, Mr. Michel Bissonette, the Air Canada maintenance director whose affidavit evidence is relied on by Air Canada, testified to a committee of Parliament that operational centres could be considered as line maintenance operations and that overhaul centres performed heavier, long-term maintenance.

[87] IAMAW asserts that Air Canada is not doing the overhaul work as described by Mr. Jeanniot to Parliament and the Senate in 1988, as that has been contracted out to Aveos. It asserts that Air Canada has and continues to do "line maintenance" work, being the smaller maintenance work of the kind in 1988 that constituted A and B checks, but that it does not do any overhaul or heavy maintenance work as that is being done by Aveos.

[88] IAMAW concedes that as was the case in 1988, Toronto is not an overhaul centre. Yet section 6(1)(d) of ACPPA and Air Canada's articles require Air Canada to "maintain operational and overhaul centres in the City of Winnipeg, the Montreal Urban Community and the City of Mississauga". If the meaning of "overhaul" work is what IAMAW contends, it would mean that Air Canada has never been in compliance with the requirement to maintain an overhead centre in Mississauga. That, asserts Air Canada, is an indication that IAMAW is incorrect in its assertion as to what is meant by "overhaul" in the statute.

[89] Air Canada's case is based on the evidence of Mr. Bissonette, the senior director, engine and airframe maintenance of Air Canada. It is to the effect that the line maintenance work done by Air Canada has always included work that can be described as "overhaul" work. Air Canada asserts that overhaul is an aspect of maintenance and points to ss. 101.01 of the Canadian Aviation Regulations in which "maintenance" is defined as "the overhaul, repair, required inspection or modification of an aeronautical product, or the removal of a component from or its installation on an aeronautical product . . .". Thus Air Canada asserts that there is no bright line separating "line maintenance" and "overhaul" work nor is overhaul work limited to engines and airframes.

[90] Mr. Bissonette's evidence in his affidavits and cross-examination is extensive. It includes the following:

> (i) Air Canada's maintenance programs have fundamentally altered since 1988 in order to accommodate technical changes and improvements. This is not surprising. He testified that Air Canada formerly had a letter-system of checks extending both to engines and airframes but now only uses the letter checks for airframes. Today, the line maintenance group continues to perform "A" checks (maintenance more commonly associated with what is referred to as "line maintenance") while Aveos performs most of Air Canada's "C" checks (maintenance more commonly associated with what is sometimes referred to as "heavy maintenance"). However, the content of the letter checks changes over time as tasks are allocated by Air Canada to maximize efficiency.
>
> (ii) The feature which makes a "C" check a "heavier" check than an "A" check is not necessarily the type of work done but the volume of work done and the time required to do it. The primary determining factor which makes an airline choose to batch a large volume of checks into a single large outage versus a smaller number of checks into multiple shorter-duration outages is efficiency. For the same reason, tasks which were part of a "C" check in 1988 may be part of an "A" check now, or vice versa.

(iii) In the past, Air Canada has chosen to manage the entirety of the maintenance program for a particular aircraft type (the Canadair Regional Jet) within the line maintenance unit, batching up what might otherwise have been done in a lengthy "C" check into more frequent and longer "A" checks. Although this aircraft is no longer flown by Air Canada mainline operations, the example demonstrates how subjective the boundary between "line maintenance" and "heavy maintenance" is and how efficiency is in fact the prime driver in allocating tasks as between Air Canada's line maintenance group and its various third party suppliers including Aveos.

(iv) Air Canada performs some "overhaul" tasks in its line maintenance group and, as the experience with the CRJ demonstrates, has the capacity to do more if it chooses to reconfigure the maintenance programme of present or future aircraft. Air Canada performs some engine maintenance, some APU maintenance, some airframe maintenance, some component maintenance and some cabin maintenance. Overhaul tasks are performed by both Aveos and Air Canada depending on the maintenance schedule or the requirements from a particular service event.

(v) Air Canada performs overhaul tasks in its line maintenance operations and line maintenance visits of 72 hours or even a week are known to occur. While scheduled visits are normally arranged for a duration of 24 hours or less, Air Canada's line maintenance bases have maintenance engineers qualified to perform what IAMAW describes as "overhaul" tasks and they do in fact perform such tasks whether on scheduled or unscheduled basis at their line maintenance bases as need or efficiency dictates.

[91] I accept Mr. Bissonette's evidence on these points. He is knowledgeable and his evidence is compelling.

[92] Today, not including employees on secondment to Aveos, Air Canada Maintenance employs approximately 2,188 full-time equivalent employees. The below chart sets out the number and type of those employees located in the centres in Montreal, Toronto and Winnipeg:

City	Operations	Union	Non-Union	Total Employees
Montreal	Line maintenance: All fleet types; Hangar space for 7 narrow-body or 2 B767-300's	464	199	663
Toronto (Miss.)	Line and cabin maintenance, all fleet types; on-wing parts repair.	822	74	896
Winnipeg	Line maintenance on Embraer and narrow-body Airbus	32	6	38
TOTALS at Montreal, Toronto and Winnipeg		1,318	279	1,597

[93] Thus, on this evidence, Air Canada asserts that apart from what Aveos is doing, it is in compliance with its articles by maintaining certain overhaul functions through its line maintenance operations in Montreal, Mississauga and Winnipeg. It asserts that even if Aveos stopped doing work under its contracts with Air Canada, it would still be in compliance with its articles.

[94] There is some force to this argument. Parliament refused to include a provision in ACPPA mandating the number of employees that had to be maintained in the three centres. As stated, the legislation and Air Canada's articles require Air Canada to maintain an overhaul centre in Mississauga although Mississauga has never been an overhaul centre in the sense contended by IAMAW and Air Canada has never conducted heavy maintenance on engines and airframes in Mississauga.

[95] It is the case, as asserted by IAMAW, that the legislation and Air Canada's articles do not refer to "overhaul tasks" but rather to "overhaul centres". However, the natural meaning of the words "overhaul centre" must be that it is a place or centre in which overhaul work is

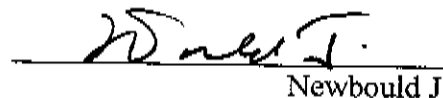
performed. ACPPA did not provide any minimum employment guarantees and gave little guidance as to what would be involved in maintaining operational and overhaul centres. This is understandable as the requirement to maintain these centres was to operate in the future and it would not be possible to know what business conditions or technical airline maintenance requirements would be in the future. Parliament could not have intended that the centres had to remain in the static condition they were in in 1988.

[96] The requirement in ACPPA that Air Canada was to include in its articles an obligation to main operational and overhaul centres was vague, and no doubt purposely so. I conclude that IAMAW has not established on the record that Air Canada has not on its own maintained operational and overhaul centres in Montreal, Winnipeg and Mississauga.

[97] In summary I find that Air Canada does maintain operational and overhaul centres in those cities by maintaining overhaul operations under its contracts with Aveos and by itself maintaining certain overhaul functions through its line maintenance operations.

Conclusion

[98] The application of IAMAW is dismissed. Air Canada and Aveos are entitled to their costs of the application, including the costs of the injunction motion that was dismissed on April 13, 2011. If costs cannot be agreed, written submissions along with a cost outline may be made by Air Canada and Aveos within 10 days and IAMAW shall have 10 further days to respond.



Newbould J.

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ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS and DAVID RITCHIE

Applicants

- and -

AIR CANADA and AVEOS FLEET PERFORMANCE INC.

Respondents

REASONS FOR JUDGMENT

Newbould J.

Released: May 25, 2011