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Federal Court of Appeal rules on liability of international air carriers

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August 06 2013

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Introduction

International air carriers' potential exposure to liability for passenger claims has increased as the rate of international travel has increased. However, in many cases this potential liability is limited by the Montreal Convention, a unified code governing international air travel. Domestic laws, and the extent to which passengers may seek to claim under them for harm suffered during international air transit, seem to be relegated to the proverbial backseat.

In the recent decision of *Thibodeau v Air Canada*(1) the Federal Court of Appeal invoked the Montreal Convention, holding that passengers of international air carriers are not permitted to claim for damages or other remedies under domestic statutes if the harm arose in the course of international air travel. The court made clear that the limits on liability prescribed by the Montreal Convention bar claims made under domestic laws in virtually all cases.

The Montreal Convention purports to balance the rights of passengers and air carriers; air carriers forgo their ability to exclude liability for damage suffered during travel, and passengers generally forgo their ability to bring claims outside the prescribed limits of the convention. Importantly, the convention limits the grounds on which passengers can seek compensation in damages to loss of baggage, delay, personal injury or death.(2) Further, the extent of compensable damages is, for the most part, capped at prescribed limits.(3)

Decision

As Canada has two official languages, English and French, it enacted the Official Languages Act – quasi-constitutional federal legislation that gives Canadians the right to communicate with federal institutions in either of the two official languages.(4) Air Canada was formerly a crown corporation and is subject to the act; it must provide services in both official languages.(5) In general, Air Canada complies by employing bilingual staff for its ground services and in-flight attendants.

In *Thibodeau*, Mr and Mrs Thibodeau were passengers on two separate round-trip flights leaving from Canada and travelling out of the country: the first to the United States, and the second to St Maarten connecting through the United States. In seeking declaratory relief, they alleged that Air Canada had breached its obligations under the Official Languages Act by failing to provide services in French onboard three of those flights. The Thibodeaus sought various remedies provided for by the act. Two key issues were whether the Montreal Convention applied to prevent recovery under the act and whether it functioned as the remedy for the Thibodeaus. Breaches of language rights do not fall under the three prescribed areas of potential air carrier liability.

At first instance, the Federal Court gave effect to the act and the remedial provisions thereunder, rather than applying the Montreal Convention. The Federal Court granted compensation to the Thibodeaus for violations of their language rights incurred in the course of international air travel. The Federal Court found that the plaintiffs were entitled to a remedy under the act because of a provision implying the precedence of its remedial provisions and the quasi-constitutional nature of the act. The judge found that denying such a remedy would unduly dilute Canadian law protecting the equal treatment of both official languages.

On appeal, Air Canada argued that the Montreal Convention provides the only remedy for individuals against an air carrier; remedies found in domestic statutes are

precluded during international air carriage. Conversely, the Thibodeaus argued that where the Montreal Convention does not provide a remedy for a specific loss suffered, an applicant can seek damages under domestic law.

The Federal Court of Appeal agreed with Air Canada's position and rejected the Federal Court's determination that domestic law trumped the Montreal Convention. Canvassing case law from a variety of different jurisdictions, all of which are signatories to the Montreal Convention, the Federal Court of Appeal unequivocally held that passengers have no remedies outside the Montreal Convention while in the course of international air travel. Citing with approval the US Supreme Court decision in *El Al Israel Airlines v Tseng*,(6) the Federal Court of Appeal noted that a passenger remedy "if not allowed under the Convention, is not available at all".

Comment

The Montreal Convention does not shield air carriers from all claims (and remedies) based on domestic laws; it applies to limit the liability of air operators from the time before the passenger's embarkation of the aircraft to the time of disembarkation from the aircraft. Incidents that may occur at the time of check-in or at the baggage carrousel, for example, are likely fair game for carriers to be sued pursuant to domestic laws if an incident takes place. By extension, air carriers may also face whatever remedies are allowed in the jurisdictions in which an incident takes place.

Following *Thibodeau*, the Montreal Convention appears to apply regardless of the right violated or the domestic statute breached. *Thibodeau* not only precludes any award of damages for causes of action that are not expressly enumerated in the Montreal Convention, but in fact goes further to preclude causes of action even where the cause of action does not arise out of a risk inherent in air carriage. This circumscribes the ability of passengers to seek compensation from air carriers further.

International cases have demonstrated a consistent approach in denying passenger claims where, for instance, invasive bodily searches were conducted before boarding, and where discrimination was found based on both race and physical disability. *Thibodeau* echoes decisions of other courts, making clear that for international air carriers, the Montreal Convention is a "complete code for liability, regardless of the source of that liability".(7)

Air carriers are shielded from liability that may be founded in domestic laws of a passenger's home country, including and not likely limited to rights-based statutes that afford and protect quasi-constitutional rights within a given country.

Thibodeau is under appeal to the Supreme Court for a final determination on the strength of the limits outlined by the Montreal Convention. The appeal is set to be heard in January 2014.

For further information on this topic please contact Kathryn McCulloch at Dentons Canada LLP by telephone (+1 416 863 4511), fax (+1 416 863 4592) or email (kathryn.mcculloch@dentons.com).

Endnotes

(1) 2012 FCA 246.

(2) Articles 17 to 19 of the Convention for the Unification of Certain Rules for International Carriage by Air, May 28 1999, ICAO Doc No 9740 (the 'Montreal Convention').

(3) Under certain circumstances, if an applicant can prove negligence on the part of the air carrier, then the air carrier's liability for damages may not be capped by the Montreal Convention.

(4) Official Languages Act, RSC 1985, c 31 (4th Supp).

(5) Section 10 of the Air Canada Public Participation Act, RSC 1985, c 35 (4th Supp).

(6) 25 US 155 (1999) 119 S Ct 662.

(7) *Thibodeau*, *supra* note 1 at paragraph 33.

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