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# TRANSPORTATION NOTES

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# Supreme Court of Canada Applies *Montreal Convention*

We have been following the progress of *Thibodeau v. Air Canada* in *Transportation Notes* since the July 2011 edition when we reported on the flawed decision of the Federal Court. The case has now wound its way through the Canadian courts to the highest level: the Supreme Court of Canada. The decision was released in late October.

We are pleased to inform our readers that the decision emanating from the majority of that Court firmly places the Canadian position on the exclusivity of the *Montreal Convention* (which is the law of Canada by operation of the *Carriage by Air Act*, R.S.C. c. C-26) on par with the position of other courts of last resort, such as the U.S. Supreme Court in *Tseng v. El Al Airlines Ltd*, 919 F.Supp. 155 (S.D.N.Y.) and the House of Lords in the U.K. in *Sidhu v. British Airways Plc* [1997] A.C. 430. More specifically, we refer to the conclusion that, when determining what remedies are available against air carriers as a result of damages incurred in the course of international carriage by air, if no cause of action exists within the four corners of the *Montreal Convention*, then no remedy exists.

Given the importance of the ultimate Canadian decision on this principle in *Thibodeau* to aviation lawyers in Canada (and elsewhere), we have chosen to devote an entire edition of *Transportation Notes* to summarize the reasons of the majority of the Court.

We will begin by providing some background. Michel and Lynda Thibodeau were passengers on three international flights operated by Air Canada (and its regional affiliate, Air Canada Jazz) between Canada and the United States over the course of four months. On one of those flights, the Thibodeaus did not receive service in the French language because no bilingual flight attendants were on duty. On another flight, there were no French in-flight announcements made by the pilot, nor was a translation broadcast to the passengers over the public announcement system onboard the aircraft. In yet another instance, upon arrival at Toronto, an Air Canada announcement concerning baggage collection was made only in English.

There is no dispute that these circumstances amounted to a breach of section 22 of the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), which provides that:

> Every federal institution has the duty to ensure that any member of the public can communicate with and obtain available services from its head or central office in either official language, and has the same duty with respect to any of its other offices or facilities,
>
> (a) within the National Capital Region; or
>
> (b) in Canada or elsewhere, where there is a significant demand for communications with services from that office or facility in that language.

The *Official Languages Act* is of peculiar application to air carriers in that it applies only to Air Canada and not its Canadian rivals, such as WestJet or Porter Airlines. This is because the provision was in place when Air Canada was a Crown corporation owned exclusively by the Canadian government. Although the airline privatized in 1989, a decision was taken in the course of the privatization to continue to apply the provisions of this legislation to Air Canada even though it was no longer a "federal institution".

As a result of the inconvenience suffered by the Thibodeaus, they filed eight complaints with the Commissioner of Official Languages (the "Commissioner"), of which four (relating to the above referenced incidents) were upheld by the Commissioner at first instance.

The Commissioner's ruling was later also upheld by the Federal Court of Canada, which awarded damages to each of the Thibodeaus in the amount of CAD$6,000 (CAD$1,500 per incident) to compensate them for "moral prejudice, pain and suffering and loss of enjoyment of their vacation".

In making this decision, Justice Bédard made an unequivocal finding that the *Official Languages Act* prevailed over the *Montreal Convention*, acknowledging that she was "depart[ing] from the Canadian and international case law."

The Federal Court also made a curiously worded two-part structural order requiring Air Canada to:

- make every reasonable effort to comply with all of its duties under … the *Official Languages Act*; and
- introduce, within six months …, a proper monitoring system and procedures to quickly identify, document and quantify potential violations of its language duties, … particularly by introducing a procedure to identify and document occasions on which Jazz does not assign flight attendant able to provide services in French on board flights on which there is a significant demand for services in French.

Air Canada appealed this decision to the Federal Court of Appeal. The three judge panel of the appellate court unanimously overruled the lower court.

The appellate court found that, in fact, there was no conflict between the *Official Languages Act* and the *Montreal Convention* on the basis that the *Official Languages Act* only offered aggrieved persons a remedy that was "appropriate and just".

*(Continued on page 2)*

## Inside This Issue

# Supreme Court Ruling in *Thibodeau vs. Air Canada* ***(cont'd)***

*(Continued from page 1)*

In determining the proper relief to be granted for violations under that legislation, the Federal Court of Appeal noted that a court should consider the fact that the *Montreal Convention* prohibits damages of this sort from being awarded (because such damages are not contemplated thereunder) and that Canada had committed itself to honouring that liability regime.

The Federal Court of Appeal also overruled the structural order on the basis that "it was not appropriate in the circumstances in this case because the evidence was insufficient and because the order was too vague to be properly enforced."

The Thibodeaus appealed the decision of the Federal Court of Appeal to the Supreme Court of Canada, which defined the dilemma as follows:

> …[t]he issue of damages sits at the intersection of Canada's domestic commitment to official languages and at its international commitment to an exclusive and uniform scheme of damages liability for international air carriers. The question thus implicates two important values.

In a 5-2 split decision, the Supreme Court of Canada upheld the decision of the Federal Court of Appeal and did what the highest courts of the United States, United Kingdom and France had already done: judicially recognize the exclusivity of the remedies granted under the *Montreal Convention*.

The majority of the Court, lead by Justice Cromwell, dealt first with the issue of whether the *Official Languages Act* and the *Montreal Convention* were at odds with each other.

The Court began with a careful analysis of the *Montreal Convention* and its predecessor, the *Warsaw Convention*.

Justice Cromwell noted that the key provision of the *Montreal Convention*, as applied to this case, is Article 29, which states:

> In the carriage of passengers, baggage and cargo, and <u>any action for damages, however founded</u>, whether under the *Convention* or in contract or in tort <u>or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this *Convention*</u> without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.
>
> [<u>underlining appears in original text</u>]

Justice Cromwell noted that the "exclusivity principle" (i.e. that if a remedy is not contemplated in the *Montreal Convention*, it does not exist) was expressed even more clearly in the broadly worded *Montreal Convention* than in Article 24 of the *Warsaw Convention* which only spoke to excluding non-*Convention* claims covered by Articles 17 (accident), 18 (destruction/ loss/ damage to cargo) and 19 (delay) of that treaty.

The Court then conducted an inquiry into the purpose and object of the *Montreal Convention*. In doing so, Justice Cromwell went through the usual analysis noting that the treaty was historically intended to:

- create a uniform set of rules governing claims arising from international air transportation;
- limit the amount of liability and restrict the class of damages that may be sought against air carriers for the recovery of damages by injured/aggrieved shippers and passengers; and
- strike a bargain between the shippers and passengers who seek a simple recovery of their damages (through reversed burdens of proof) and air carriers who require protection "against potentially ruinous multi-state litigation and virtual unlimited liability".

Justice Cromwell then turned to what he described as the "fatal flaw" in the Thibodeaus' argument. He found that, in making their argument, the appellants attempted to challenge the exclusivity for the *Montreal Convention* — which, in the majority of the Court's mind, was unassailable. He intimated that the appellants may have had a greater chance of success in their appeal had they argued that the sort of damages being sought by the Thibodeaus were, indeed, contemplated by Articles 17 to 19 of the *Montreal Convention*.

Justice Cromwell then went on to discuss the well known decisions of *Sidhu* (UK), *Tseng* (US) and *Gillet* (France) which applied similar reasoning to dismiss claims that were not explicitly contemplated under the *Montreal Convention*. He also cited decisions from appellate Courts in Hong Kong, Ireland, New Zealand, Singapore, South Africa and Germany, concluding his analysis in this part of the majority decision by adopting the Supreme Court of the United Kingdom's finding in *Stott v. Thomas Cook Tour Operators Ltd.* [2014] UKSC 15 that:

> … [t]he *Convention* is intended to deal comprehensively with the carrier's liability for whatever may physically happen to passengers between embarkation and disembarkation.

The Court then turned to addressing the three specific submissions made by the Thibodeaus on the issue of exclusivity.

<u>First</u>, the Thibodeaus submitted that their complaint under the *Official Languages Act* did not fall within the substantive scope of the *Montreal Convention* because it was of a public, not private law nature. More specifically, the argument was that the wrong committed in this case was of a "breach of statute" or "quasi-Constitutional" variety for infringement on their language rights, as opposed to being the resolution of a dispute between two parties over monetary compensation for a loss.

This argument was firmly rejected by the majority of the Court.

In the first place, the Court referenced the specific language of Article 29 of the *Montreal Convention*, which broadly exempts any claims by passengers "for damages, <u>however founded</u>, whether under this *Convention* or in contract or in tort <u>or otherwise</u>" [<u>underling appears in decision</u>]. Justice Cromwell also noted that the Thibodeaus' pleading in the Federal Court specifically sought "damages".

In the second place, the Court noted that the Thibodeaus' first submission conflicted with the jurisprudence from other jurisdictions where plaintiffs unsuccessfully sought damages for violations of their quasi-constitutional rights. For example, the Court cited *King v. American Airlines*, 284 F.3d 352 (2d Cir. 2002) where the plaintiffs alleged that American Airlines had "bumped" them from an overbooked flight as a result of their race, as well as *Gibbs v. American Airlines, Inc.* 191 F.Supp2d 144 (D.D.C. 2002), where a passenger alleged that the same carrier "refused to perform its contract to transport him … on the basis of his race".

The Court also placed significant reliance on *Stott*, where the Supreme Court of the United Kingdom refused monetary relief to a passenger who launched a claim for compensation under EU regulations designed to protect disabled passengers. In that case, the Court denied the passenger a remedy on the basis that the claim was barred by the *Montreal Convention* because "what matters is not the quality of the cause of action but the time and place of the accident or mishap."

<u>Second</u>, the Thibodeaus argued that the *Montreal Convention* excludes only "individual damages" and not "standardized damages." By this, the Thibodeaus meant that the treaty was not intended to cover situations where the remedy is fixed for all persons in like situations — as is the case for relief to be granted to passengers for delays under *EU Regulation 261/ 2004*, which imposes a predetermined formula for flight delay compensation based on the length of the journey. In this respect, the Thibodeaus relied on the

*(Continued on page 3)*

# Supreme Court Ruling in *Thibodeau vs. Air Canada* ***(cont'd)***

*(Continued from page 2)*

decision of the European Court of Justice in *International Air Transport Association v. Department of Transport* [2006] E.C.R. I-403 (Grand Chamber) which was followed in several other decisions of the European Court of Justice, such as *Wallentin-Hermann v. Alitalia* [2008] E.C.R. I-11061, *Sturgeon v. Condor Flugdienst GmbH* [2009] E.C.R. I-10923 and *Nelson v. Deutsche Lufthansa AG* [2013] 1 C.M.L.R. 42.

In the above referred cases, the European Court of Justice carved out an exception to the liability-limiting provisions of the *Montreal Convention* where "damage is almost identical for every passenger, redress for which may take the form of standardised and immediate assistance or care for everyone concerned."

The Supreme Court of Canada had no trouble distinguishing this line of authority from the matter at hand, noting that:

> Even if we were to adopt the distinction between "individual damages" and "standardized damages" relied upon by the European Court of Justice, it would not assist the Thibodeaus. The damages which they seek in this case cannot be described as "damage … redress for which may take the form of standardised and immediate assistance or care for everyone concerned."

Rather, the damages being sought by the Thibodeaus was found by the Federal Court to be "at least in part, geared to and depended on the impact on the Thibodeaus of the particular breaches."

Third, the Thibodeaus argued that their claim did not fall within the class of claims contemplated by the *Montreal Convention* because the wrong did not occur within the temporal limits prescribed by the *Convention*. Put differently, the Thibodeaus alleged that Article 17 of the *Montreal Convention* applies only to accidents that occur between embarkation and disembarkation.

The Thibodeaus argued that, in their case, the alleged wrong occurred well before the embarkation of the passengers — as the failure arose in the improper staffing decisions made by Air Canada when it did not assign bilingual flight crew to the relevant flights. This argument was supplemented by noting that the Federal Court found that the staffing of Air Canada's flights was a "systemic" problem, and not idiosyncratic to the flights on which the Thibodeaus travelled.

The Supreme Court of Canada ruled that this argument was not well-founded, citing *Stott* as support.

The Court held that:

> …[c]ourts must focus their application of the exclusivity principle on the location or the activity of the passenger when the accident or occurrence directly causing the particular injury giving rise to the claim occurred, not on some antecedent fault.

The Court found that the breach of language rights suffered by the Thibodeaus in this case occurred aboard the aircraft and, as a result, "fall squarely within the exclusion established by the *Montreal Convention*."

> ***… the [Thibodeaus] try to escape the application of the* Montreal Convention *by claiming that [their claim does] not constitute an "action for damages" covered by the substantive scope of the* Montreal Convention. *… These submissions fail because they are inconsistent with the exclusivity principle that underlies the* Montreal Convention *and because they are not consistent with its clear text.***

Having dismissed these arguments, as did the Federal Court of Appeal, the Court then waded into the issue of whether the *Official Languages Act* and the *Montreal Convention* truly are at odds with each other — and, if they are, which legislative enactment prevails.

In short, the Supreme Court of Canada held that the two pieces of legislation can operate together harmoniously without conflicting.

The Court began this analysis by turning to the often cited principle of statutory interpretation that courts are to presume that the legislature does not intend to create enactments that contradict or are inconsistent with each other. Overlapping legislation does not necessarily conflict and courts should make attempts to interpret overlapping legislation in a manner that avoids conflict wherever possible.

With this *dicta* setting the background, the Court then looked at the remedial provisions of the *Official Languages Act* and particularly emphasized the contextual and flexible nature of the remedy that could be applied — requiring only that the ultimate instrument of enforcement be "appropriate and just".

The Court then identified the three principles that are to be followed in determining whether two pieces of legislation are in conflict with each other, namely:

- courts are to take a restrictive approach to what constitutes a conflict;
- courts should only find a conflict, in the restrictive sense of the word, where a conflict cannot be avoided by interpretation; and
- only where a conflict is unavoidable should the court resort to statutory provisions and principles of interpretation concerned with which law takes precedence over the other.

Having laid out these principles, and relying on its previous jurisprudence on this point, the Court determined that a conflict would only exist where competing legislative provisions are "so inconsistent with or repugnant to each other that they are incapable of standing together".

The Court also noted, from another of its previous decisions, that a "'direct contradiction' exists if the application of one law excludes the application of the other".

This was found not to be the case in *Thibodeau*. The Court noted that the *Official Languages Act* and the *Montreal Convention* have "markedly different purposes and touch on distinct subject matters". One aims to strengthen the language rights of Canadians through broadly worded language; the other to create a uniform international liability regime for air carriers through very specific liability rules that apply to narrowly prescribed circumstances.

In applying these principles, the Court proposed the following rhetorical question:

> … the issue here is whether it defies common sense to assume that by permitting a court to grant an "appropriate and just" remedy for violation of the [*Official Languages Act*], Parliament intended that the court would be free to make an order violating Canada's international treaty obligations. In other words, does it make sense that Parliament intended that a court order in breach of Canada's international obligations would be an "appropriate and just" remedy? The [Thibodeaus] would have us answer yes to both questions.

The Court found that it was impossible to discern any such intent in the broad and gen-

*(Continued on page 4)*

# Supreme Court Ruling in *Thibodeau vs. Air Canada* ***(cont'd)***

*(Continued from page 3)*

eral language of the *Official Languages Act*.

The Court also reviewed the legislative history of the legislation and noted that, at the time the *Official Languages Act* was debated, the focus of the Members of Parliament was not on the specific remedies to be applied in the case of breaches but, rather, on the jurisdiction of the courts to require compliance and enforce the application of language rights.

The Court concluded that upholding the liability-limiting provisions of the *Montreal Convention* did not "empt[y] the remedial provisions" of the *Official Languages Act* as damages are not the only remedial provision available under that legislation.

Justice Cromwell (and the majority of the Court), concluded on this point that the highly discretionary remedial provisions did not conflict with the *Montreal Convention* and, further, that there was no intention by Parliament to permit the courts to make orders that were in breach of Canada's international undertakings which had been incorporated into federal law.

The last issue to be determined on the appeal was the validity of the structural order. The Court reviewed the jurisprudence in Canada on the issuance of structural orders, noting that such orders play an important, but limited role in the enforcement of rights through the courts. Justice Cromwell identified two problems with this sort of order:

- they are prone to having insufficient clarity; and
- they require ongoing judicial supervision.

***As I see it, when they are properly interpreted, there is no conflict between the general remedial powers under the* [Official Languages Act] *and the exclusion of damages under the* Montreal Convention *and there is no need to consider which would prevail if there were.***

With respect to these concerns with structural orders in a general sense, the Court cited the decision of *Pro Swing Inc. v. Elta Golf Inc.*, [2006] SCC 52, where the Supreme Court of Canada held:

> The terms of the order must be clear and specific. The party needs to know exactly what has to be done to comply with the order… While the specificity requirement is linked to the claimant's ability to follow up non-performance with contempt of court proceedings, supervision by the courts often means relitigation and expenditure of judicial resources.

In applying these principles to the matter at hand, the Court was unimpressed by the order which was made by Justice Bédard. The Court noted that even the Thibodeaus made no serious attempt to defend the first part of the structural order — which Justice Cromwell described as a direction to Air Canada to simply "obey the law."

As to the second part of the structural order, the court had trouble with the fact that it did not:

- define what constituted a 'proper' monitoring system; and
- provide any guidance how 'quickly' a 'potential violation' must be identified.

Moreover, the Court noted that the Commissioner has statutory powers and the institutional expertise to monitor compliance with the *Official Languages Act*. The existence of these powers and expertise make it less appropriate to involve the courts in on-going monitoring of this type of remedial action.

This lack of precision resulted in the Court striking out the structural order.

The Court held that the declaration, apology (already provided by Air Canada) and costs of the application were "appropriate and just" remedies in this case.

Since the provisions of the *Official Languages Act* had been satisfied with the above non-monetary relief, the appeal was dismissed.

Air Canada did not request costs from the Thibodeaus and none were ordered.

*Thibodeau v. Air Canada,*
2014 SCC 67

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