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Strong Exclusivity Upheld

On September 25, 2012, the Federal Court of Appeal released a very important decision on the issue of liability in international carriage by air. A line of Canadian cases stretching back to 1998 deals with the exclusivity of the remedies provided by the *Montreal Convention* and its predecessors (which we will refer to collectively as "the Convention"). The case of *Air Canada v. Thibodeau* represents the culmination of this line of cases, provides explicit guidance, and places Canada clearly in the mainstream of international jurisprudence on the issue.

Canadian courts have previously held that where the Convention provides a remedy that remedy is the only one available to a plaintiff. What has been in some doubt is whether the position now clearly established in England (*Sidhu v. British Airways*) and the United States (*El Al v. Tseng*), which we will refer to as "strong exclusivity" for short, should be accepted in Canada. The doctrine of strong exclusivity requires that "within the timeline and space governed by the Convention" (as the English Court of Appeal puts it in the recent case of *Stott v. Thomas Cook*) the only remedies available are those provided by the Convention. If the Convention provides no remedy, none is available.

Canadian cases, beginning with *Naval-Torres v. Northwest Airlines* in 1998, have decided that, at the least, the doctrine of "weak exclusivity" applies in Canada. That is to say, it has been clear for at least 15 years that where the Convention provides a remedy, that is the only remedy available. A number of cases, including *Croteau v. Air Transat*, *Walton v. Mytravel* and *Gontcharov v. Canjet,* which last case is commented on in this edition, appear to support the doctrine of strong exclusivity, but the matter has not been beyond doubt. Confusion has been compounded by the fact that several cases have been cited as precedents supportive of the strong exclusivity doctrine whereas the cases do not go as far as is sometimes claimed. By way of example, the majority reasons in the *Tseng* case (Supreme Court of the United States) appears to consider *Naval-Torres* as a strong exclusivity case. Justice Stevens, in dissent, recognizes that Justice Sharpe in deciding *Naval Torres*, declined to express a view of the strong versus weak issue. *Connaught Laboratories v. British Airways* is also sometimes cited for the strong exclusivity doctrine. The reasons for judgment do not bear out this characterization and Madame Justice Molloy, in comments from the bench which do not find their way into the reasons, made it clear she did not support strong exclusivity.

Entering this somewhat ambiguous judicial territory, *Thibodeau* provides very useful assistance. The case arose from complaints by two passengers to the effect that certain language rights guaranteed by the *Official Languages Act* ("OLA") were violated in the course of carriage between Canada and the United States. They sought damages for the alleged violation. We have twice commented on the underlying facts and decisions below in this newsletter (July 2011 and January 2012) and will not repeat what we have said before in this note. Rather we will concentrate on the one issue dealt with by the Federal Court of Appeal which is of particular interest to the development of air law in Canada. The Court states that issue as follows:

> "Does Article 29 of the *Montreal Convention* exclude the action in damages brought by the Thibodeaus under Part IV of the OLA for incidents having occurred during international carriage?"

The trial judge had ordered Air Canada to pay damages for the violation of language rights, but arrived at that conclusion in a rather indirect fashion. It is interesting to note that in her decision the trial judge first expressed the view that she could not interpret the Convention as allowing compensation based on a cause of action not contemplated by the Convention. However, she then concluded that she was faced by a conflict of laws and purported to harmonize the two enactments. She found that in this situation of conflict the language legislation should prevail.

Having lost the strong exclusivity versus weak exclusivity argument below, the Thibodeaus (who were supported by the Commissioner of Official Languages) renewed it in the Court of Appeal. That Court reviewed the case law, beginning with *Sidhu*, and concluded that the trial judge was correct in preferring the strong exclusivity argument. The Justices described the weak exclusivity doctrine as one which has been "accepted in a small number of isolated cases" and concluded that the Convention "precludes the award of damages for causes of action not specifically provided for therein, even when the action does not arise out of a risk inherent in air carriage". As examples of claims which are precluded the court refers to invasive body searches and discrimination based on race and physical disability, citing leading authorities for each of these excluded claims. In a sentence likely to find its way in to many legal arguments, the Court affirmed that "even the slightest 'bending' of Article 29 of the *Montreal Convention* will impair the objectives of the *Convention*."

As the trial judge was incorrect in finding that there was a conflict which was to be resolved in favour of the OLA her decision was overturned.

Air Canada v. Thibodeau
2012 FCA 246

Inside This Issue

Right to Limit Marine Liability Upheld

In January 2007, Siemens Canada Limited ("Siemens") contracted with J.D. Irving, Limited ("Irving") to transport three steam turbine rotors. The rotors were very large and complex pieces of equipment used for operating nuclear generating stations – each rotor weighed 115 tonnes and cost $12.5 million to manufacture. Siemens contracted with Irving to transport the rotors by water from Saint John, New Brunswick to Point Lepreau, New Brunswick.

The size and value of the rotors required that special arrangements be made for their transport. In October 2008, Irving chartered a 258 tonne barge and retained Maritime Marine Consultants (2003) Inc. ("MMC") to act as marine architect. MMC was to approve the barge's stability for the move and to create a plan for the safe loading and securing of the rotors on the barge. MMC conducted a number of stability calculations in order to create the plan.

On October 15, 2008, during the course of loading the barge, two rotors fell off the barge and into Saint John Harbour. The rotors were significantly damaged. Transport Canada investigated the incident and concluded that the rotors fell due to the failure to conduct a number of important calculations. On April 8, 2010, Siemens sued Irving and MMC in Ontario for negligence and breach of contract, seeking $40 million in damages. Irving and MMC filed statements of claim in the Federal Court seeking to limit their liability to a sum of $500,000 and for the constitution of a liability fund, pursuant to s. 32(2) of the Marine Liability Act ("MLA"). Pursuant to s. 29(b) of the MLA, maximum liability for a ship of less than 300 tonnes is $500,000.

In the Federal Court proceedings, Siemens brought motions for: (i) an interlocutory stay of the actions as they pertained to constituting a liability fund pursuant to s. 33 of the MLA and (ii) a permanent stay of the actions regarding Irving and MMC's ability to limit their entitlement pursuant to ss. 28 and 29 of the MLA. Siemens further pleaded that MMC failed to make the calculations necessary to ensure that the move from Saint John to Point Lepreau was safe, and that both Irving and MMC were precluded by this failure from limiting their liability pursuant to the MLA.

Irving and MMC brought motions for directions from the Federal Court regarding how their actions were to be determined and for an order enjoining Siemens from pursuing its Ontario action. The motion judge found that the contract between Siemens and Irving was a contract for the carriage of goods by sea and thus, grounded maritime jurisdiction in the Federal Court. She dismissed Siemens' motions for stays, finding that the continuation of the Federal Court actions would cause no prejudice to Siemens requiring an interlocutory injunction and that Irving and MMC were entitled to attempt to demonstrate their entitlement to limit their liability, making Siemens' motion for a permanent stay premature. She further found that the Federal Court was the most efficient forum in which to determine all issues relative to the incident, enjoined Siemens from commencing or continuing proceedings before any court or tribunal other than the Federal Court and ordered the establishment of a limitation fund.

"In the circumstances of this case, and in the circumstances of most actions for limitation of liability, subsection 33(1) of the MLA clearly enables the Federal Court and its judges to provide the ways and means to deal in the most expeditious manner with the issues arising from a shipowner's claim that he is entitled to limit his liability."

Siemens applied to the Federal Court of Appeal, stating that the motion judge had erred in: (i) finding that the Federal Court had jurisdiction over Siemens' action, (ii) enjoining it from pursuing its claims in a tribunal other than the Federal Court and (iii) dismissing its stay motions.

The Federal Court of Appeal found that the motion judge's orders were mostly discretionary orders and were to be accorded deference on appeal. The Court found that the test for determining whether the subject matter of an action was maritime law should be performed by asking whether the subject matter was "so integrally connected to maritime matters as to be legitimate Canadian maritime law". The Court found that the motion judge reviewed the factual context of the contract (safe transport of the rotors) and rejected the argument that the form of the contract (a purchase order) could be relied on to avoid maritime jurisdiction.

Siemens had argued that the Federal Court's power to enjoin other proceedings was not available until the right to limit liability had been determined. The Court of Appeal rejected this argument, stating that s. 33(1) of the MLA "clearly contemplates situations where the right to limit has not been judicially determined," as the section allows a shipowner to seek to limit his liability and enjoin other proceedings where a claim is only "apprehended". The Court further rejected Siemens' argument that the test for enjoining other proceedings should be either the test for anti-suit injunctions (set out in *Anchem Products Inc. v. British Columbia Workers Compensation Board*) or the test for interlocutory injunctions (set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*) The Court found that these tests were inconsistent with the relevant provisions of the MLA, as the power to enjoin did not arise from law or equity, but from a specific grant of power under the statute.

The Court found that the correct test was "appropriateness", as set out in s. 33(1) of the MLA: the Federal Court . . . "may take any steps it considers appropriate, including: . . . (c) enjoining any person from commencing or continuing proceedings . . .". The Court found that the motion judge correctly applied the appropriateness test by relying on such factors as the fact that the Federal Court was the only court which could determine Irving and MMC's right to limit their liability and that enjoining the Ontario action would do away with unnecessary litigation if they were allowed to limit their liability.

The Court concluded by finding that, for all practical purposes, the Federal Court has exclusive jurisdiction regarding the issue of limitation of liability. Subsection 32(2) of the MLA allows a shipowner to choose the forum in which to assert his right to limit his liability, the Federal Court is the only jurisdiction to constitute and distribute a limitation fund and the Federal Court has recognized expertise in admiralty matters:

"The words of subsection 33(1) constitute a clear recognition by Parliament that the Federal Court was the court to which broad powers should be given so as to allow it to deal effectively with all issues pertaining to the limitation fund and the underlying claims for limitation of liability."

The Federal Court of Appeal upheld the motion judge's decision to dismiss the stay motions, finding that the Federal Court proceedings would not cause prejudice to Siemens and that staying the Federal Court proceedings would cause an injustice to Irving and MMC. The Court dismissed Siemens' appeals with costs to the respondents.

Siemens v. J.D. Irving,
2012 FCA 225

Summary Judgment Refused

In 2007 a young boy was killed in a boating accident. One of the boats involved in the accident was operated by Mr. Hamilton; the other, by Mr. Woodbury. Following the accident, a lawsuit was commenced by the boy's mother, in both her personal capacity and her capacity as the boy's litigation guardian. Mr. Woodbury and Mr. Hamilton were the defendants.

At the time of the accident the boy was riding in an inner tube behind the boat operated by Mr. Woodbury. At the same time, Mr. Hamilton was preparing to pull three children on a tube behind his boat. Just as the tow rope attached to the Hamilton boat was drawn tight, the young boy being towed by the Woodbury boat crashed into the side of the Hamilton boat.

As a result of the accident, Mr. Woodbury was charged with operating his vessel in a careless manner. This charge was heard by the Ontario Court of Justice and dismissed due to "weak identification evidence." The Justice of the Peace hearing the matter refused to allow one of the prosecutor's witnesses to testify. This witness was to identify Mr. Woodbury as the operator of the boat in question.

In the civil action, Mr. Hamilton brought a motion for summary judgment. Amendments to the Ontario rule regarding motions for summary judgment came into effect in 2010. Last year, in a case called *Combined Air Mechanical Services Inc. v. Flesch* ("Combined Air"), the Court of Appeal set out the test for deciding whether summary judgment should be granted under the amended rule. The rule states that summary judgment shall be granted if there is no genuine issue requiring a trial. Pursuant to Combined Air, a motion judge will decide whether a trial is required by asking, "Can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?" This is now known as the "full appreciation test." The Court of Appeal in Combined Air found that this question is the benchmark for deciding the broader question of whether, in the interests of justice, a trial is required

It is worth noting at this point that the Court in Combined Air also clarified that there are three types of cases appropriate for summary judgment: (1) where the parties agree to have the issue determined by summary judgment; (2) where it can be determined that there is no chance of success at trial; and (3) where the motion judge is satisfied that the issues can be fairly and justly resolved by exercising his or her powers to weigh evidence, assess credibility and draw inferences. With this said, a determination of whether a case has no chance of success may involve a judge utilizing the powers described for the third type of case. Notwithstanding these categories, in cases where there are many factual issues in dispute, summary judgment motions are not likely to be successful.

While stating that Mr. Woodbury was responsible for the accident, Justice Ellies believed the question of whether he was entirely responsible remained open. Justice Ellies thought it was possible that a jury could find Mr. Hamilton negligent to some extent for failing to notice the Woodbury boat earlier and failing to take adequate steps to avoid the collision.

Justice Ellies also noted that there was some inconsistency between Mr. Hamilton's affidavit filed in support of the motion and his evidence before the Ontario Court of Justice during the trial of Mr. Woodbury's charge. The inconsistency related to the location of the Hamilton boat in the bay at the time of the accident. Transcripts of the proceeding before the Ontario Court of Justice were filed as evidence in support of the motion.

After determining that there was a chance of success against Mr. Hamilton at trial, Justice Ellies considered whether it was in the interests of justice to use his expanded powers to weigh evidence, assess credibility and draw inferences to decide the issue of Mr. Hamilton's negligence on the motion. He wrote,

> "I would not find Mr. Hamilton liable for failing to put the engine into reverse when there were children on a tube in the water behind it. However, I believe that the interests of justice require a trial in order to determine whether the Hamilton boat should have been where it was at the time of the collision and why the Woodbury boat was not noticed until a matter of seconds before the accident. A fuller appreciation of the circumstances existing at the time is required to arrive at a proper verdict in this respect."
>
> Woodbury v. Hamilton
> 2012 ONSC 4817

End of the Line *(cont'd)*

(Continued from page 4)

plain view while the rest of the passengers disembarked)*;* such injury causing events were "unusual" or "unexpected". The defendant did not rely on the "location of the injury" and the U.S. cases where the injury and the injury-causing event occur simultaneously, as relied on by the plaintiff. Rather, the defendant relied on the "location of the injury-causing events" and the chain of causation analysis set out in the recent Ontario case of *Balani v. Lufthansa* (discussed below) to trigger Article 17. Unfortunately, the reasons for decision do not always reflect a clear distinction between the location at which an injury was suffered and that at which the "accident" which led to the injury took place.

In any event, the motions judge correctly held that the unusual and unexpected actions of the carrier that occurred on board or in the course of disembarking were events that formed a link in the chain of causation of the injuries sustained, and therefore constituted an Article 17 accident. The motions judge followed the recent Ontario case of *Balani v. Lufthansa;* in that case, the judge found that the carrier's failure to provide a wheelchair, an event that occurred on board or in the course of disembarking, formed a link in the chain of causation of the passenger's injuries later sustained in the terminal, and was therefore an Article 17 accident.

Having found that Article 17 applied, the motions judge held that the claim for damages related to contracting bronchitis could proceed, but the claims for mental distress and punitive damages could not succeed as they arose from the actions of the police. The fact that these actions were consequent to the accident (namely the calling of the police by the carrier) is irrelevant as they were not caused by bodily injury.

In the conclusion to the reasons, the motions judge went further and noted that the question of the exclusive application of the Convention had not been considered in full by a Canadian appellate court and thus, it remained an open question as to whether the plaintiff could recover psychological damages under the common law if Article 17 did not apply. Interestingly, the motions judge appears to nonetheless embrace strong exclusivity by concluding that even if Article 17 of the Convention did not apply, Article 29 of the Convention precluded the claim for exemplary or punitive damages.

End of the Line *Montreal Article 17 considered*

Although the following decision is not from an appellate court, an appeal to the Court of Appeal was recently abandoned and in this case at least the issues have been finally determined.

The plaintiff, a Canadian resident, purchased a ticket for return travel between Toronto and Puerta Plata, Dominican Republic with the defendant, CanJet Airlines, a Canadian charter airline. On the return trip, the plaintiff had a dispute with members of the flight crew. The plaintiff alleged the dispute was over his denied request for a blanket and his denied request for an increase in cabin temperature. Upon landing at the Toronto airport, the plaintiff was met by police who escorted him off the aircraft and detained him at the airport for questioning.

The plaintiff brought an action against the carrier for damages for pain and suffering and infliction of mental distress and for forcible confinement and false imprisonment. He also claimed damages for severe bronchitis as a result of the carrier's denial of his requests.

The carrier brought a motion to dismiss the action on the basis that the rights and obligations of the parties were governed by the *Montreal Convention* (the "Convention") and therefore, the claim, which was essentially for psychological harm not related to bodily injury, could not succeed. The judge granted the carrier's motion in large part and struck the claim but for the claim for damages for bronchitis.

The carrier's motion was brought under Rule 21 of the Ontario rules. Under this rule, the moving party can request that the court strike a pleading on the basis that it does not disclose a reasonable cause of action. Such motions can only be brought on settled points of law and evidence is not allowed on such a motion. Thus, all of the allegations of fact in the plaintiff's claim were deemed to be true for the purpose of such a motion.

"The allegedly high-handed conduct of the flight attendants, including their refusal to provide heat or blankets and their reporting the plaintiff to the police, caused the plaintiff to be escorted from the aircraft and detained. The conduct of the attendants that began on board was part of the chain of causation of the injuries sustained, therefore constituting an accident within the meaning of the case-law."

At the time this case was argued and decided there was some ambiguity in Canada respecting the nature of the exclusivity of Convention remedies. The Federal Court of Appeal has now released a decision which affirms the doctrine of "strong exclusivity". That decision is the subject of the lead article in this newsletter. However, it has long been settled in Canada that the Convention governs those causes of action for which a remedy is provided under the Convention ("weak exclusivity"). The carrier's motion under Rule 21 was brought on the basis that a remedy for the claim can be found under Article 17 of the Convention and therefore, all claims that fall outside the Convention (ie: mental distress unrelated to bodily injury and punitive damages) should be struck.

The key dispute at the motion was whether any of the plaintiff's claims fit within Article 17, namely the carrier's liability for bodily injury upon the condition that the "accident" which caused the injury took place on board the aircraft or in the course of disembarking. The plaintiff argued that Article 17 did not apply, as the plaintiff's injuries took place after disembarkation, i.e.: in the airport, when he was wrongfully arrested and detained. The defendant argued that Article 17 did apply for the following reasons: the "accident", or "injury causing events" occurred while the plaintiff was on board (i.e.: there was a dispute on board and the crew called the police from the aircraft) and in the course of disembarking (i.e.: the police met the plaintiff on board, escorted him off, then kept him in

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