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Montreal Convention Exclusivity Re-enforced in Class Action

On January 14, 2011, Ms. Ashlyn O'Mara was a passenger on Air Canada flight AC878 from Toronto to Zurich. Onboard the aircraft were 95 passengers, six flight attendants and two crew members. This flight gave rise to a proposed class action following an incident described below in greater detail.

The statement of claim in the proposed class action alleges that three hours after departure, the First Officer of AC 878 advised the Captain that he needed to rest — and went to sleep. Approximately 75 minutes later, the Captain made a mandatory position report to Shanwick Oceanic Control. Around the same time, a USAF Boeing C-17 appeared on the Air Canada collision avoidance system. The Captain immediately advised the First Officer of this development.

The statement of claim further alleges that, in the next minute or so, the Captain adjusted the map scale on the aircraft's navigational system and attempted to locate the oncoming C-17 visually, through the windscreen. The claim also alleged that the First Officer mistook the planet Venus for the C-17 despite the Captain's advice that the C-17 was at the 12 o'clock position, 1,000 feet below the altitude of the Air Canada aircraft.

The pleadings further allege that the First Officer continued to erroneously interpret the C-17's position as being above and descending towards the Air Canada aircraft.

As a result, the First Officer was alleged to have aggressively pushed forward on the control column, causing the aircraft to enter into a 46-second steep dive which required the Captain to execute an emergency manoeuver to bring the aircraft to straight and level flight.

The dive caused many passengers and objects in the cabin to be violently tossed about for the duration of the dive. The claim also alleges that for the three hours remaining in the flight, many of the passengers were terrified and feared for their lives.

Following the incident, an Air Canada spokesman publicly stated that the incident was the result of unexpected turbulence. The claim alleges that no further explanation was given by Air Canada — and that many passengers settled claims with Air Canada on the basis of the allegedly false information provided by the Air Canada spokesperson.

A class action was commenced claiming that the incident was an "accident" within the meaning the *Warsaw* and *Montreal Conventions* (the "*Conventions*"). The class members sought to recover damages for "personal, physical and psychological injuries".

The class members also claimed for damages in negligence, as well as "punitive and/or aggravated and/or exemplary damages" for, among other things, misleading the passengers about the true cause of the accident.

The class members also sought a declaration setting aside any signed releases on the basis that they were void *ab initio* because they were signed under false pretenses.

On receipt of the claim, and before filing a defence, Air Canada brought a motion to strike all claims for punitive, aggravated and exemplary damages as well as to strike all claims for pure psychological injury (arguing that none of these are recoverable under the *Conventions*).

The plaintiffs' first argument was that aggravated damages are a form of compensatory damages and, as such, are permitted under the *Conventions*. As to the claims for punitive and exemplary damages, the plaintiffs' position was that the damages sought were for the alleged "cover-up" that occurred after the flight was concluded — and therefore, were not excluded by the *Conventions*.

After some examination of well settled jurisprudence, the Court confirmed that on a motion to strike on the grounds that the claim discloses no cause of action, all allegations in the claim must be taken as capable of proof. The claim will be stricken only if it is "plain and obvious" that it is doomed to failure. No evidence may be adduced on a motion of this sort.

In making its determination on the motion, the Court went through the usual analysis relating to enforceability of the *Conventions* in Canada, recognizing the Canadian cases where the *Conventions* were applied and held that "it is important that there be consistency in interpretation from one country to another, and, thus there must be a very sound reason to depart from the precedents established around the world."

The Court then cited numerous international cases relating to the applicability of Article 17 and concluded that "it is plain and obvious that Ms. O'Mara's claim under the *Conven-*

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Inside This Issue

United Air Lines Faces SLAPP Allegations

Dr. Jeremy Cooperstock is an associate professor of electrical and computer engineering at McGill University in Montreal, but he also considers himself a consumer rights advocate. For more than 15 years, he has operated a website dedicated to criticizing United Air Lines and logging complaints from passengers of the airline.

Until recently, Cooperstock was allowed to operate his website without interference or objection. However, after United Air Lines and Continental Airlines merged, they commenced two proceedings against Cooperstock.

The first, instituted in Canada's Federal Court, claims that Cooperstock had infringed the airlines' copyright and trademark rights on his website. This article is not concerned with that action.

In the second proceeding, the airlines, along with three employees, brought an application for a permanent injunction in Quebec's Superior Court. Specifically, they are requesting that the court order Cooperstock to remove all contact information of the individual plaintiffs from his website. The airlines state that they are not asking that the website be shut down but rather are seeking to protect the privacy rights of their employees.

In response to the motion for a permanent injunction, Cooperstock, acting on his own behalf, brought two motions. It should be noted that Cooperstock has accumulated a fair amount of experience in Québec's court system, having brought actions against several large corporations in the past.

One of Cooperstock's motions was brought pursuant to articles 54.1 and following of Québec's *Code of Civil Procedure* (the "*CCP*"), which were added to the *CCP* in 2009 and are meant "to prevent improper use of the courts and promote freedom of expression and citizen participation in public debate." Provisions of this sort are commonly referred to as "anti-SLAPP" laws, SLAPP being an English acronym for "strategic lawsuit against public participation."

Article 54.1 provides that a court may declare an action or pleading "improper" and impose a sanction. Procedural impropriety may exist where: the action is clearly unfounded or frivolous; there has been vexatious or quarrelsome conduct; an excessive or unreasonable procedure has been used; or if there has been "an attempt to defeat the ends of justice, in particular if it restricts freedom of expression in public debate."

Depending on the circumstances, where a court finds an improper use of procedure under article 54.1, it may dismiss the action, strike out a submission or require its amendment, terminate or refuse to allow an examination to proceed, or annul a writ of summons that has been served on a witness. It also has broad discretion to impose conditions, order costs and otherwise manage the proceedings, if an outright dismissal is not ordered.

Cooperstock argued that the request for an injunction was an improper use of the courts, meant only to silence and/or intimidate him, thus thwarting his right to participate in public debate and restricting his freedom of expression.

Concurrently, Cooperstock brought a second motion before the Québec Superior Court to dismiss the airlines' application under article 165(4) of the *CCP*, which allows for early dismissal if an action is determined to be "unfounded in law, even if the facts alleged are true."

In February 2013, Justice Kirkland Casgrain dismissed both of Cooperstock's motions and proceeded to set out a schedule for documentary and oral discovery in the airlines' application for a permanent injunction. Cooperstock sought leave to appeal the dismissal of his anti-SLAPP motion.

Before Justice Marie St-Pierre of the Court of Appeal, Cooperstock argued that Justice Casgrain had erred by applying the test for a motion to dismiss under article 165 *CCP* to both motions and, thus, had failed to apply the correct legal test for the anti-SLAPP motion.

The essential difference at issue is that a judge considering a motion to dismiss under article 165 *CCP* may not consider any evidence on the motion and must make a decision assuming that the facts alleged by the plaintiff are true. Under the anti-SLAPP provisions, evidence may be filed and, where it is, it must be considered by the judge.

Cooperstock argued before Justice St-Pierre that he had filed evidence before the judge below on several points that supported his claim under article 54.1 *CCP*. Included in this was evidence he claims demonstrates that the contact information posted on his website was made available on the internet by the airlines themselves.

In rendering her decision on Cooperstock's application for leave, Justice St-Pierre neither granted leave nor did she dismiss the motion. Instead, she determined that the application for leave should be heard by a panel of the Court of Appeal and that, if leave were granted, the appeal would be heard at the same time by the panel.

In doing so, she noted that it did appear that Justice Casgrain had failed to follow the proper judicial process for considering an anti-SLAPP motion. Judging from his one paragraph decision issued from the bench, Justice Casgrain appears to have erroneously decided the motions together without weighing any evidence.

However, as noted by Justice St-Pierre, because the ruling to dismiss Cooperstock's anti-SLAPP motion is interlocutory, normally leave to appeal would not be granted. Cooperstock argued that because the entire purpose of this part of the *CCP* is to spare the defendant from onerous legal proceedings, where the motion judge has defeated that purpose by applying the wrong legal test and failing to turn his mind to the evidence, leave should be granted.

In support of this argument, Cooperstock cited several Québec Court of Appeal decisions. Justice St-Pierre quoted directly from these cases before concluding that there might be exceptions to the general rule that a dismissal of an article 54.1 motion is not subject to appeal – for example, if it concerns a new question of law that is in the public interest.

However, Justice St-Pierre determined that because the general rule goes against granting leave to appeal in the circumstances of the case before her, she would be referring that question to a panel of the Court rather than deciding it herself.

It therefore remains to be seen whether Québec's anti-SLAPP legislation can be used to defeat United Air Lines' application for an injunction against Cooperstock in one branch of their ongoing battle.

As Québec is currently the only Canadian province with anti-SLAPP legislation, its jurisprudence could play an important role for other legislatures and courts in the country. On June 4, 2013, the Ontario government introduced a bill in the legislature that would make that province the second jurisdiction with such laws, if the bill passes.

Cooperstock v. United Air Lines Inc, 2013 QCCA 526

Exclusivity of *Montreal Convention (cont'd)*

(Continued from page 1)

tions for pure psychological injury is legally untenable."

The Court ruled that all references to psychological and emotional injuries be deleted from the statement of claim so that class members would not be under any misapprehension that there may be compensation for purely psychological injuries.

The matter then turned to the issue of whether aggravated damages were recoverable under the *Conventions*.

In considering the definition of aggravated damages, the Court made reference to the Supreme Court of Canada's decision in *Norberg v. Wynrib* 2 S.C.R. 226, where Justice LaForest held:

> Aggravated damages may be awarded if the battery has occurred in humiliating or undignified circumstances. These damages are not awarded in addition to general damages. Rather, general damages are assessed "taking into account any aggravating features of the case and to that extent increasing the amount awarded" … These must be distinguished from punitive or exemplary damages. The latter are awarded to punish the defendant and to make an example of him or her in order to deter others from committing the same tort.

Air Canada did not dispute the plaintiffs' ability to make a claim for aggravated damages rather, it argued that such damages are an augmentation of general damages and not a separately calculable head of damages.

The Court accepted Air Canada's argument in this regard, citing the Ontario Court of Appeal's decision in *McIntyr v. Grigg* (2006), 83 O.R. (3d) 161, in which it was held that "a court may separately identify what aggravates damages but, in principle, aggravated damages are not assessed separately from general damages."

Accordingly, all paragraphs relating to aggravated damages were ordered to be struck from the claim.

The Court made short work of finding that claims for punitive and exemplary damages (both of which are non-compensatory in nature) were not recoverable under the Conventions. The trickier analysis related to whether the plaintiffs could recover punitive and exemplary damages for Air Canada's alleged negligence in covering up the cause of the incident. They argued that, because this act took place after the passengers had disembarked the aircraft, the Conventions no longer applied to this portion of the claim.

Air Canada had two counterarguments. The first was that if the Convention applied to the action at all, then it applied to the so-called cover-up because where the Conventions apply, they apply exclusively and they preclude the application of domestic law, including negligence.

The second counterargument, which is very similar to the first, is that the *Conventions* are a complete code for claims arising from the international carriage by air of passengers and, if there is no claim available under the *Conventions*, there is no common law claim either.

The Court accepted both of these arguments outright. In support of its finding, the Court cited the well known cases of *Sidhu v. British Airways plc,* [1997] 1 All E.R. 193 (H.L.) and *El Al Israel Airlines Ltd. v. Tseng*, 525 U.S. 155 (1999) in which the House of Lords and the U.S. Supreme Court held that the Conventions are the exhaustive source of remedies for damages sustained as a result of international carriage by air.

Notably, in this regard, the Court also cited the Federal Court of Appeal's decision in *Air Canada v. Thibodeau* 2012 FCA 246 (under appeal to the Supreme Court of Canada) in which that court held that the *Conventions* constitute:

> … a complete code as concerns the aspects of international air carriage that it expressly regulates, such as the air carrier's liability for damages, regardless of the source of this liability. The purpose of the *Montreal Convention*, following the example of the one preceding it (the *Warsaw Convention*), is to provide for consistency of certain rules regarding the liability incurred during international carriage.

The Court specifically found that "to determine the scope of the *Conventions*, Courts use a chain of causation analysis, and if the alleged wrongdoing is connected to the flight then it is covered by the Conventions."

In the concluding section of the reasons for judgment, the Court noted that, since the alleged cover-up could not have occurred but for the aircraft's steep dive, the *Conventions* apply and the claim for negligence is precluded.

O'Mara v, Air Canada
2013 ONSC 2931 (CanLII)

End of the Line (cont'd)

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sovereign immunity would not apply in this case.

The Court considered two aspects of this argument. First, it had to determine whether the simple fact that the dispute relates to a commercial venture (i.e. a commercial airline) automatically disqualified the Republic from availing itself of the doctrine of sovereign immunity. Justice Morgan accepted the Republic's submission that "the strengthening of the national economy through an increase in direct flight connections has been a strategic goal of the Republic … The pursuit of this goal is the reason why the Republic holds shares in Estonian Air and has invested money in the airline …"

In this respect the Court held that "[t]he fact that Estonian Air is a state-owned enterprise, and the Republic's investment in this national airline is from one perspective a commercial investment, is not itself enough to bring Bombardier's claim within the section 5 exemption."

Central to the analysis is consideration of that nature of the state's acts. Are they "merely incidental" to commercial activity or do they "intrude deeply into the management sphere"? Only if Bombardier could prove the acts were of the latter sort, could it prevail. It failed to do so.

Justice Morgan's reasons were quite critical of Bombardier's evidence on this point, which he stated amounted to an article published in *Eesti Päevaleht* (*Estonian Daily*). He assessed the article dismissively as follows:

> A translation of the article in its entirety appears in the motion record. To say that the reportage, for want of a better word, is colourful is to understate the matter. The article describes Bombardier as a "vampire lover". This vampire lover, according to the writer, demanded "new winter boots after receiving flowers, an opera and dinner." The article goes on to say that Estonian Air preferred Embraer, which it describes as a "Brazilian beauty", and that this beauty prompted the airline to "get rid of the Canadian lady."

The Court found that there is no real evidence pointing to the Republic's intervention in or interference with the transaction. Bombardier's claim against the Republic was permanently stayed.

Bombardier v. AS Estonian Air,
2013 ONSC 3039

End of the Line *(Sovereign Immunity)*

In mid-2011, Estonian Air entered into negotiations with Bombardier for the purchase of five new CRJ900 aircraft. At the time, the Republic of Estonia (the "Republic") owned 97% of the airline's shares. The remaining shares were owned by SAS Group AB. The airline was managed by a board of five executives, none of whom were representatives of the government. The management board, in turn, was overseen by a six-person Supervisory Council (which acted as a board of directors). Three of the six members of the Supervisory Council are government representatives, one of whom was a member of the Estonian parliament.

Estonian Air, SAS and the Republic had a shareholders' agreement stating that:

> The State warrants and represents that this Agreement constitutes a private act, subjecting the State to private civil law in Estonia as well as abroad. State expressly acknowledges that it is bound by the arbitration clause ... and that it waives all defences based on sovereign immunity or other form of immunity.

The shareholders' agreement restricted the Republic's role to oversight and the furtherance of government objectives. The Republic had no role in managing the airline's commercial activities — but the agreement does allow the Republic to identify the strategic goals of the airline as part of the Republic's economic development planning.

In an affidavit filed in support of the matter reported on in this article, the Estonian Deputy Minister of Economic Affairs described two policy goals guiding the Republic's involvement with Estonian Air as follows: (1) creating a transportation hub at Tallinn that will connect the country to key business centres in Europe; and (2) ensuring sustained profitability for the airline. There was persuasive evidence filed that these two goals were acted upon by the Republic in its decision making role within the airline.

In the course of Estonian Air's negotiations with Bombardier for the purchase of the aircraft, Bombardier introduced the airline to Export Development Canada ("EDC") with the hope that EDC could assist with financing. In the course of the financing negotiations, EDC requested a guarantee from the Republic, which was refused. Similarly, although discussed, a "comfort letter" to be issued by the Republic was never signed.

In November 2011, Bombardier entered into an agreement for the purchase of the aircraft, conditional upon financing (which was being worked on by EDC). However, before the agreement was signed, Estonian Air's CEO advised Bombardier's Director of International Sales that Embraer had made a highly competitive bid to supply similar aircraft. The CEO indicated that Embraer was lobbying the Republic directly by "romancing the government". The allegation was later refuted by the Deputy Minister, who claimed that all negotiations with aircraft suppliers was by the management of Estonian Air.

Ultimately, Estonian withdrew from purchase of the Bombardier aircraft, opting to acquire Embraer aircraft instead.

Bombardier commenced legal proceedings in Ontario for the cancelled contract claiming, among other things, that the cancellation of its contract with Estonian Air was the result of the Republic's tortious interference.

The Republic sought to permanently stay the action against it on the basis that it is immune from the jurisdiction of any court in Canada unless it falls into one of the statutory exemptions to that general immunity. Under Canadian law, the onus of proving that the exemption would apply is on Bombardier.

The exemptions are set out in section 5 of the *State Immunity Act*, R.S.C. 1985, c. S-18, which states that:

> A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state.

Bombardier's first position was, if the Republic had a *prima facie* right to sovereign immunity, it had waived such immunity by virtue of the language in its shareholder agreement with Estonian Air and SAS (quoted above). The Court did not accept this argument.

Justice Morgan found that since Bombardier was not a party to that agreement, it had no ability to take advantage its terms. There was no evidence to show that the shareholders agreement was intended to bind the signatories in their dealings with third parties. As Justice Morgan stated, "[i]f Bombardier were relying on a waiver of a sovereign immunity, the place to look for that waiver would be its actual contract with Estonian Air, and not the Shareholders Agreement in which Bombardier had no involvement whatsoever."

The question then became whether the Republic was engaging in commercial activity. If so, the *State Immunity Act* provides that

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