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TRANSPORTATION NOTES

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Passenger claim extinguished because it was too late and an abuse of process

In July 2011, Abdourahmane Diallo purchased a return ticket to fly from Montreal to Conakry, Republic of Guinea, via Casablanca with Morocco's national carrier, Compagnie Nationale Royal Air Maroc ("RAM"). Mr. Diallo was due to depart Montreal on August 7, 2011 and to return from Guinea on November 5, 2011.

While Mr. Diallo departed on his scheduled outbound flight and arrived in Guinea in August 2011, he did not return to Canada until more than one year after his scheduled return date. After several discussions between Mr. Diallo and RAM's staff, Mr. Diallo purchased a one-way return ticket to Montreal in February 2013 for CAD$987.66 and did return near the end of that month.

In June 2015, Mr. Diallo sued RAM, claiming $100,000 in damages for economic loss, loss of enjoyment and humiliation. He claimed that RAM had cancelled his return flight and refused to provide him with an alternate flight.

In June 2016, Mr. Diallo's statement of claim was struck and his action was dismissed in a decision by Justice Carole Brown of Ontario's Superior Court of Justice.

RAM based its motion to strike on three grounds, namely, that it is plain and obvious that the claim:

1. is precluded by Article 35 of the *Montreal Convention*;
2. in the alternative, is statute-barred by Ontario's *Limitations Act, 2002*; and
3. is barred pursuant to the doctrines of issue estoppel, collateral attack and abuse of process.

The Court held that Mr. Diallo's claim should be dismissed under each of the grounds advanced by RAM.

Unlike a summary judgment motion, a motion to strike is based almost entirely on the pleadings. On such motions, the court must treat the facts pleaded by the plaintiff as though they had been proven and the parties can only introduce external evidence in certain circumstances and for certain purposes.

Article 35 of the *Montreal Convention*

In this case, RAM's primary argument was that Mr. Diallo's claim was governed by the *Montreal Convention* and that it was clear on the face of the statement of claim, taking the allegations of fact as having been proven, that it had been commenced after the expiry of the two year limitation period provided under Article 35 of the *Convention*.

In his statement of claim, Mr. Diallo alleged that he had been informed on November 4, 2011 that his November 5, 2011 return flights had been cancelled. While RAM's position was that the return flights had not been cancelled in anything other than a technical sense—Mr. Diallo and all other passengers had been informed that they had confirmed seats on flights bearing different flight numbers that departed on November 5, 2011—for the purpose of the motion to strike, it accepted the allegation that Mr. Diallo's flights had been cancelled outright. Even on that basis, Mr. Diallo was required to commence his claim on or before November 6, 2013, more than a year and a half before it was actually commenced.

In coming to her decision, Justice Brown relied on the Supreme Court of Canada's 2014 affirmation of the "strong exclusivity" of the *Montreal Convention*:

> [8] The *Montreal Convention* is the uniform and exclusive scheme of damages liability for international air carriers, such as RAM: *Thibodeau v Air Canada*, 2014 SCC 67. The Supreme Court of Canada has affirmed the strong exclusivity of the *Montreal Convention*: *Thibodeau v Air Canada*, *supra*.

Article 35 provides that an action must be brought "within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped."

RAM's position was that, even accepting Mr. Diallo's allegation that his November 5, 2011 flights had been cancelled, the two year period provided for under Article 35 commenced on that date pursuant to Article 35. Justice Brown agreed:

> [11] As regards the plaintiff's scheduled flight on November 5, 2011, any action for damages brought pursuant to Article 35 of the *Montreal Convention* must have been brought within two years after the date on which the aircraft ought to have arrived or from the date on which the carriage stopped, namely by on or before November 6, 2013. Thereafter, pursuant to the *Montreal Convention*, the right to damages was extinguished. However, this action was not commenced until June 16, 2015, some 19 months after the plaintiff's right to damages pursuant to the *Montreal Convention* was extinguished.

Ontario's domestic limitation period

Justice Brown next took on RAM's second ground that the claim was out of time under Ontario's statutory limitations regime. This ground was put forward as an alternative to the first, "even if the *Montreal Convention* does not cover all claims advanced by the plaintiff".

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Passenger claim extinguished, too late and abuse of process *(cont'd)*

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As Justice Brown noted, citing a 2014 decision of Justice Perell also of the Ontario Superior Court of Justice, Article 35 "is not an ordinary limitation provision. It contains a time bar of a special kind—one which extinguishes the claim and not just the remedy." The two year period under Article 35 cannot be modified or tolled in the way that is possible for most domestic limitation periods.

Ontario's basic limitation period is also two years, but unlike Article 35, it is subject to the principle of discoverability. The two year period commences on the day on which the plaintiff "discovered" the claim, or on which a reasonable person ought to have discovered it.

According to Mr. Diallo's statement of claim, a representative of RAM told him at the time he alleges that his November 2011 return flights were cancelled that he would not have to pay for another return ticket. Again, while RAM disputes this, this allegation is taken as proven for the purpose of the motion to strike. Even doing so, Justice Brown held that the latest possible date on which Mr. Diallo could have discovered his claim was in February 2012. At that time, according to his pleading, Mr. Diallo spoke to another representative of RAM and was told that he *would* have to purchase his return ticket:

> By that date, if not before, the plaintiff knew sufficient material facts to make a claim against the defendant discoverable by February 2012. He knew that he would have to incur additional costs, whether by the payment of money or through the use of frequent flyer miles, or a combination of the two, in order to complete his return journey. Thus, at the very latest, the plaintiff had until February of 2014 to commence his claim against the defendant.

Issue Estoppel, Collateral Attack & Abuse of Process

The basis for RAM's third ground was the fact that prior to commencing his action in Superior Court, Mr. Diallo had already complained to the Canadian Transportation Agency (the "Agency" or the "CTA") and sought compensation from RAM in that forum. On June 29, 2015, the same date of Mr. Diallo's statement of claim, the Agency dismissed his complaint, holding that his flights had not in fact been cancelled. It further held that Mr. Diallo had chosen not to show up for his flights or to take RAM up on an offer to apply the value of his return flight to a new ticket so long as he travelled by February 27, 2012 (CTA Decision 201-C-A-2015).

Justice Brown summarized the principles underlying the similar and somewhat overlapping doctrines of issue estoppel, collateral attack and abuse of process in the following way:

> [17] It has long been recognized that respect for the finality of a judicial or administrative decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice. On the other hand, re-litigation of issues that have been previously decided in an appropriate forum, may undermine the confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings. The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review mechanisms that are intended by the legislature. Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision.

Justice Brown recognized that the Agency is a specialized administrative tribunal that has been authorized by Parliament to perform a quasi-judicial function and that the issues and parties to the dispute before the Agency were the same as those before the Court:

> [20] In bringing this action, the plaintiff seeks to collaterally attack the final decision of the CTA, a specialized, quasi-judicial administrative tribunal. By commencing this action, the plaintiff now seeks to circumvent the appropriate review mechanisms that were available to him and re-litigate the same issues originally brought before the CTA. Such re-litigation of matters which have already been litigated in the appropriate forum causes unnecessary expenditure of resources and serves to undermine the finality of a judicial or administrative decision, which cannot be permitted. As a result, I am satisfied that the doctrines of issue estoppel, collateral attack and abuse of process all preclude the bringing of the plaintiff's action before this Court.

There was no dispute that Mr. Diallo had not sought to have the Agency's decision reviewed or appealed through the various mechanisms available under the *Canada Transportation Act* and *Canadian Transportation Agency Rules*. These mechanisms include a party's rights to request that the Agency review, rescind or vary any of its decisions, or re-hear an application; to petition the Governor in Council to vary or rescind any of the Agency's decisions; or to seek leave to appeal to the Federal Court of Appeal from any of the Agency's decisions.

While he chose not to pursue any of these avenues of review in respect of the Agency's June 2015 decision, Mr. Diallo has opted to revisit Justice Brown's June 2016 decision by commencing an appeal to the Ontario Court of Appeal.

Diallo v Compagnie Nationale Royale Air Maroc, 2016 ONSC 3247

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