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Transportation Notes: Should Expert Reports on the Interpretation of the *Montreal Convention* Be Allowed in Challenge to Canadian *Air Passenger Protection Regulations*?

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Canada's *Air Passenger Protection Regulations* (the "APPRs") came into effect in two stages in July and December 2019. Even before the first tranche of provisions came into effect, the International Air Transport Association, Airlines for America and numerous Canadian and foreign air carriers commenced a challenge to the legality of several provisions of the APPRs in the Canadian Federal Court of Appeal (the "FCA"), including on the basis that they violate the *Montreal Convention*.

As with just about everything else, the litigation has been delayed by COVID-19. However, in October 2020, the FCA issued a decision in a motion brought by the Canadian government to strike portions of two expert reports filed by the airlines in support of their position that provisions of the APPRs are contrary to international law.

By way of brief background, the APPRs impose requirements on air carriers relating to flights to, from and within Canada, including connecting flights. These include provisions relating to information obligations, alternate travel obligations, care and accommodation obligations, and compensation for inconvenience obligations in cases of tarmac delays, denied boarding, and delayed and cancelled flights, as well as obligations relating to baggage, which include compensation rules.

An obvious source of inspiration for the Canadian Transportation Agency – which drafted and is responsible for the enforcement of the APPRs – was the European Union's Regulation (EC) No. 261/2004 ("EU261"). EU261 has generated a veritable (and extremely long-lasting) volcanic eruption of legal controversy and litigation since coming into effect 15 years ago. In part, EU261 provides that passengers must be paid specified minimum levels of monetary compensation by carriers in cases of flight disruption, dependent on the duration of the delay and the distance that was to be travelled.

In the opinion of many (if not most) practitioners and scholars with expertise in international aviation law, certain key provisions of EU261 are contrary to international law and, in particular, the exclusive rules governing the liability of air carriers under the *Montreal Convention* (and its predecessor the *Warsaw Convention*). The Convention expressly excludes carriers from liability for "non-compensatory damages" and imposes liability in cases of delay only where it is proved that the damage was "occasioned by delay" and the carrier is unable to show that it took "all measures that could reasonably be required to avoid the damage" or it was impossible to do so. It has been repeatedly argued that the compensation rules of EU261 violate these and other longstanding concepts required by the Convention, which was intended to be the exclusive source of rules governing the liability of commercial air carriers in international aviation.

However, from the beginning, the European Court of Justice ("ECJ") has consistently disagreed with this view. In fact, the ECJ has

interpreted EU261 in such a way as to *expand* the compensation obligations imposed on air carriers beyond what appears to have been intended by the drafters of the regulation: the ECJ held in *Sturgeon and Others* (Cases C-402/07 & C-432/07) and *Nelson v Deutsche Lufthansa AG* (Cases C-581/10 & C-629/10) that monetary compensation must be paid in cases of flight delay, in addition to cases of flight cancellation, even though this is clearly not provided for in its text.

While the ECJ's interpretations of EU261 are binding on the national courts of European Union states, legal practitioners and scholars have continued to take a dim view of its jurisprudence – especially regarding the compatibility of the regulation's compensation rules with the requirements of the *Montreal Convention*.

There is also evidence that many judges of national courts of EU countries also question the ECJ's legal reasoning, based on the continued flow of reference questions put to the ECJ regarding EU261; evidence that lower courts in some countries have often simply ignored the ECJ's jurisprudence on these matters; and the odd direct judicial statement that makes it plain that the ECJ's view is not in line with the jurisprudence of high courts of state parties to the *Montreal Convention*. For example, in *Dawson v Thomson Airways Ltd*, [2014] EWCA Civ 845 and *Gahan v Emirates*, [2017] EWCA Civ 1530 the England and Wales Court of Appeal held that the ECJ's interpretation of EU261 is binding "even though it conflicts with the jurisprudence of the Supreme Court and House of Lords," and that the ECJ's ruling on the key concept of the meaning of "damage" under the *Montreal Convention* had "apparently" been made "without any reference to the international jurisprudence on the point."

Concerns about Canada's EU261-inspired compensation rules (among other provisions) were repeatedly expressed during the Canadian Transportation Agency's consultations prior to promulgating the final version of the APPRs. The court challenge on grounds that they were contrary to Canada's international law obligations under the *Montreal Convention* was therefore anticipated.

Which brings us back to the FCA's October 2020 ruling regarding expert evidence. As noted by Mactavish JA in her decision, the position of the air carriers is that the APPRs "provide for non-compensatory damages that are prohibited by the Convention, that exceed the limit of liability set forth in the Convention, and that ignore the exclusion of liability of the Convention."

Earlier in the proceedings, the Canadian government was granted leave to present expert evidence on foreign law "to demonstrate that the [APPRs]…are similar or analogous to the legislation of numerous other state parties to the *Montreal Convention*" because the practice of state parties "is a recognized means of interpreting a treaty such as the *Montreal Convention*."

This evidence and line of reasoning was met by the air carriers' delivery of two expert reports by eminent scholars on international aviation law, Professors Pablo Mendes de Leon, of Leiden University, and Paul Stephen Dempsey, of McGill University. In part, the purpose of these expert reports is to address "the extent to which the laws of other state parties to the *Montreal Convention* are consistent with the provisions of the Convention." As noted by Mactavish JA, in addition to opining on questions of foreign law, these reports address "whether the laws of the European Union and the United States dealing with air passenger protection can be relied upon as State Practice relevant to the interpretation of the *Montreal Convention*."

The Canadian government's objection to portions of the two expert reports is based on a purported distinction between foreign law and international law. It argues that where questions of foreign law are matters of fact that require proof through the tendering of evidence of qualified experts in Canadian courts, questions of international law are matters of law in respect of which expert opinion evidence is unnecessary and therefore inadmissible.

Mactavish JA acknowledged that in a number of cases Canadian courts have taken the view that international law is a matter over which they could take judicial notice without the need for any expert opinion evidence. On this basis, courts have struck out expert reports as unnecessary and inadmissible.

However, the FCA also noted that courts in Canada have been "uneven in their evidentiary approach to international legal issues."

There are many examples of courts admitting expert evidence on questions international law and of courts, including the Supreme Court of Canada, relying on such evidence. In addition, as pointed out by the air carriers, the Canadian government has itself adduced expert evidence on issues of international law in numerous cases.

On this basis, Mactavish JA held that it was not in the interests of justice to strike the disputed portions of the de Leon and Dempsey reports at this stage. The question of their admissibility will be left to the panel of the FCA that ultimately hears the appeal on its merits. She further held that there is no concern that the panel "may be exposed to or swayed by evidence that is subsequently found to be inadmissible" because "judges are used to ignoring evidence that is ultimately excluded from the record."

The court acknowledged that the decision to defer the evidentiary issue may result in some delay as the Canadian government may wish to file evidence in response to the de Leon and Dempsey reports. However, this was not sufficient to warrant the exclusion of the disputed evidence at this preliminary stage, especially given that it was recognized that the substance of the disputed expert evidence could be put before the court in the air carriers' written argument on the merits of the appeal, in any event.

The question of the compatibility of key provisions of EU261 (and similar regimes inspired by it) with the *Montreal Convention* has been highly controversial and frequently litigated, especially in European courts. That controversy is now squarely before the Canadian Federal Court of Appeal.

Just six years ago, in *Thibodeau v Air Canada*, 2014 SCC 67, Canada's Supreme Court affirmed the strong exclusivity of the *Montreal Convention*, in line not only with the jurisprudence of the highest courts of other state parties like the United States and England, but also with the commentary and scholarship of acclaimed experts in international aviation law like Professors de Leon and Dempsey. When this case finally reaches a hearing on the merits, the FCA will have to grapple with the legal reasoning underlying the ECJ's interpretation of EU261 and the myriad criticisms of that reasoning, including, in all likelihood, those of Professors de Leon and Dempsey.

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