Unanimous Supreme Court upholds air passenger protection regulations' requirements for travel disruption compensation on international flights

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Overview

On Oct. 4, 2024, the Supreme Court of Canada (SCC) released its decision in *International Air Transportation Association v. Canada (Transportation Agency),* 2024 SCC 30. A unanimous Court determined that the *Air Passenger Protection Regulations* (the *APPR*s) – which mandate minimum compensation to passengers on international flights in the case of delay, cancellation, denial of boarding or lost or damaged baggage – are valid regulations within the powers of the Canada Transportation Agency (the Agency).

A challenge to the validity of the *APPRs* was advanced by a coalition of air carriers and related organizations. The challenge was dismissed by the Federal Court of Appeal in 2022, and the parties appealed that decision to Canada's highest court.

The Court held that its earlier decision in *Thibodeau v. Air Canada*, 2014 SCC 67 (*Thibodeau*), which considered the scope of the *Convention for the Unification of Certain Rules for International Carriage by Air* (the *Montreal Convention*), did not dispose of the issue. Instead, the SCC was required to now consider whether the standardized compensation provided for under the *APPR*s was precluded by the *Montreal Convention*.

The SCC's final disposition on the issue has far-reaching implications for consumers and airlines, affirming consumer rights to compensation arising from air travel disruptions and the responsibility of airlines to pay that compensation. It clarifies that Canadian regulations can coexist with international agreements.

Background and procedural history

Canada signed the *Montreal Convention* in 2001, ratified the *Montreal Convention* in 2002, and implemented it into Canadian Law by incorporating it by reference into the *Carriage by Air Act,* R.S.C. 1985, c. C-26. The *Montreal Convention* seeks to balance the interests of airlines and international travelers by reversing the burden of proof (such that passengers need not prove fault on the part of an airline to recover damages) while also limiting airlines' liability for such claims.

In 2018, the Federal Government amended the *Canada Transportation Act* (the Act) by mandating the Agency to make regulations related to international air travel. In 2019, the Agency responded by adopting the *APPR*s.

The *APPR*s prescribed standardized compensation rates for international flight delays, cancellations, and/or denials of boarding when there is a disruption within an airline's control. Provisions were also adopted to deal with refunds for baggage fees when the carrier loses or damages passenger baggage during travel.

The International Air Transport Association, the Air Transportation Association of America, and several other carriers (the Airlines) challenged the *APPR*s in a statutory appeal before the Federal Court of Appeal. The Airlines alleged that the *APPR*s were outside the Agency's authority under the Act. They argued that the *APPR*s conflicted with the exclusivity principle under the *Montreal Convention*", under which "any action for damages" could only be maintained pursuant to the *Montreal Convention.* The interpretation of "any action for damages" was the principle issue to be decided by the courts.

The Federal Court of Appeal dismissed the Airlines' challenge, except for the provision relating to the temporary loss of baggage. The Federal Court of Appeal held that the compensation provided for under the *APPR*s does not fall within the meaning of "any action for damages" pursuant to the *Montreal Convention* and the *APPRs* were therefore valid regulations.

SCC decision

The *APPRs*

The Airlines appealed the Federal Court of Appeal decision to the SCC. The Federal Court of Appeal decision was upheld, and the appeal was dismissed.

Like the Federal Court of Appeal, the SCC held that the *APPR*s do not create an "action for damages" and therefore, do not fall within the scope of the *Montreal Convention*. Instead, the SCC held that the provisions create a consumer protection scheme that works alongside the *Montreal Convention*, without encroaching on its jurisdiction.

The SCC clarified that its decision in *Thibodeau* did not dispose of the issue, leaving it to assess the validity of the standardized compensation structure provided for by the *Regulations*. The SCC in *Thibodeau* had addressed the scope of the exclusivity principle under the *Montreal Convention*, specifically addressing whether claims for damages based on Air Canada's failure to provide services in both official languages fell within the types of actions covered by the *Montreal Convention*. The Court concluded that the claims involved individualized damages, and therefore came within the scope of

the convention's exclusivity principle. In reaching its decision in *Thibodeau*, the Court did not consider the distinction between individualized and standardized damages. This appeal required the Court to consider the extent to which the *Montreal Convention* precludes standardized compensation.

The SCC considered foreign jurisprudence and foreign state practice in coming to this conclusion. Specifically, the Court focused on the fact that the European Court of Justice and courts in the United States had also considered the scope of the *Montreal Convention* and found that it governed individual damages and did not conflict with standardized compensation schemes. In the eyes of the SCC, the foreign jurisprudence was objective evidence that the parties to the *Montreal Convention* understood that an "action for damages" looks to address individualized harm on a case-by-case basis. A scheme for standardized compensation such as the *APPR*s was distinct and therefore not in conflict with the exclusivity principle of the *Montreal Convention*.

The SCC held that the *APPR*sdo not provide individualized compensation in the manner of a traditional damage award and do not enable carriers to avoid payment by pointing to any due diligence or contributory defences like individual damages awards would. Finally, the Court held that the fact that the amount owed under the *APPR*s varies depending on the circumstance (*e.g.*, the length of the delay) does not change the standardized nature of the compensation.

The Court framed the *APPRs* as a statutory entitlement under a consumer protection scheme. Writing for a unanimous Court, Rowe J. held that: "in signing on to the *Convention* and the "protective reconciliation" between the interests of passengers and carriers that it engendered, there is no indication that Canada (or any other state party) agreed to forego its ability to provide for minimum standards of treatment for passengers within its jurisdiction."

The Court held since the *APPRs* do not create an "action for damages" within the meaning of the *Montreal Convention*, there is no conflict. The *APPRs* are therefore valid regulations, and they do not exceed the jurisdiction of the Agency set out by the Act.

Expert evidence and International Law

This case is also significant for its treatment and clarification of the admissibility of expert evidence regarding international law. In its reasons, the SCC provided insight on when expert evidence will be admissible in this regard to provide clarification for future courts.

The SCC distinguished foreign law—*i.e.*, the domestic law of foreign jurisdictions, which *is treated as a question of fact requiring* expert evidence—from international law, which is treated as a question of law that may be considered by courts without expert evidence in appropriate circumstances. The SCC held that the test for admissibility of expert evidence in any area of Canadian law as set out in *R. v. Mohan*, [1994] 2 S.C.R. 9 (*Mohan*) should apply in the context of international law. At the first stage of the test there are four threshold requirements that must be met for admissibility: (1) relevance; (2) necessity in assisting the trier of fact; (3) absence of an exclusionary rule; and (4) a properly qualified expert. At the second stage of the test, the discretionary "gatekeeping" stage, judges will still have to balance the potential risks and benefits of admitting the evidence and determine whether the benefits outweigh the risks. In the

international law realm, where expert evidence passes the *Mohan* criteria, the court may use their discretion in deciding if it will be considered.

This guidance from the SCC provides clarity when considering the role of international law experts in Canadian courts.

Key takeaways

- The SCC confirmed that the *Montreal Convention* is not a comprehensive convention that exclusively deals with all aspects of international air carriage. Rather, aspects outside its subject matter can be the subject of further regulation.
- The Agency is permitted to require airlines to compensate passengers for international flight disruptions, including requirements that airlines reimburse passengers for delays, losses, and inconveniences that arise during international air travel.
- The domestic law of foreign jurisdictions is a question of fact that requires expert evidence. In contrast, international law is treated as a question of law that courts can consider without expert evidence in appropriate circumstances.
- The admissibility of expert evidence regarding international law depends on the same legal criteria as the admissibility of expert evidence in any other area of Canadian law and will be assessed under the *Mohan*

Given the numerous contexts in which expert evidence is sought to be adduced on questions of international law, the admissibility of this evidence is a matter of judicial discretion rather than being subject to a fixed and invariable rule.

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