Federal Court of Appeal

Cour d'appel fédérale

Ottawa, December 6, 2022 – A judgment was issued today by the Federal Court of Appeal (Pelletier, de Montigny and Locke JJ.A.) in file A-311-19: *International Air Transport Association v. Canadian Transport* Agency, 2022 FCA 211. This is an unofficial summary of the Court's reasons for judgment.

Background

In May 2018, Parliament adopted the *Transportation Modernization Act*, S.C. 2018, c. 10, which amended the *Canada Transportation Act*, S.C. 1996, c. 10 (the CTA) by creating the new section 86.11. This new provision requires the Canadian Transport Agency (the Agency) to make regulations imposing certain obligations on air carriers, notably in relation to flight delays, flight cancellations, denial of boarding, and loss of or damage to baggage. In April 2019, pursuant to subsection 86.11(2) of the CTA, the Minister of Transport (the Minister) issued the *Direction Respecting Tarmac Delays of Three Hours or Less*, S.O.R./2019-110 (the *Direction*) requiring the Agency to adopt regulations imposing obligations on air carriers to provide timely information and assistance to passengers in cases of tarmac delays of three hours or less. Around the same time, the Agency adopted the *Air Passenger Protection Regulations*, S.O.R./2019-150 (the Regulations), imposing obligations – including liability – on air carriers with respect to tarmac delays, flight cancellations, flight delays, denial of boarding and damage or loss of baggage in the context of domestic and international air travel.

The appellants challenge numerous provisions of the Regulations on the basis that they exceed the Agency's authority under the CTA. They claim that these provisions contravene Canada's international obligations under the *Convention for the Unification of Certain Rules for International Carriage by Air*, 28 May 1999, 2242 U.N.T.S. 309 (the *Montreal Convention*). They also allege that many of the Regulations' provisions are *ultra vires* because they have impermissible extraterritorial effects, which violate fundamental notions of international law. Finally, the appellants challenge the Minister's *Direction* on the basis that it exceeds the limitations imposed by its enabling statute.

Decision

Dealing with two preliminary matters, the Court first concluded that it had jursidiction to rule on the validity of the Minister's *Direction* since it was not raised as a stand-alone issue, but rather, in the course of a challenge of the impugned provisions of the Regulations. Second, the Court held that courts ought to take judicial notice of customary international law and of treaties that have been ratified and implemented in Canadian law. Evidence purporting to give a legal opinion on the interpretation or application of an international convention is therefore inadmissible. Consequently, the expert evidence provided by the parties on the interpretation of the *Montreal Convention*—a matter that is to be decided by the judge—was disregarded by the Court.

The minimum compensation to passengers required by the Regulations in the case of delay, cancellation, denial of boarding and lost or damaged baggage is compatible with the *Montreal Convention*. In the context of the minimum compensation for delay, the scheme of the Regulations with regards to air carrier liability is of an entirely different nature than what was contemplated by the *Montreal Convention*. The minimum compensation scheme set out in the CTA and the Regulations is markedly different from an action for damages under the *Montreal Convention*. Not only is it based on a form of standardized and uniform compensation with a view to providing passengers with clear and transparent information and protection, and to avoiding the haphazard application of the various tariffs applicable to the carriers, but it is also enforced through an administrative mechanism rather than through an action for damages. For the same reasons, the minimum compensation for cancellation and denied boarding found in the Regulations falls outside the scope of Article 19 of the *Montreal Convention*. Finally, the requirement to reimburse baggage fees for lost or damaged baggage does not contravene the *Montreal Convention*. However, Parliament only intended to authorize the Agency to regulate minimum compensation relating to lost or damaged baggage, not delayed baggage. Subsection 23(2) of the Regulations, which imposes liability for temporary loss of baggage for "21 days or less," is therefore *ultra vires* the CTA.

The Regulations do not have impermissible extraterritorial effects that violate the territorial sovereignty of foreign states since they do not infringe foreign states' sovereignty over the airspace above their territories. They impose obligations on carriers with respect to information provided at service desks and self-service terminals, on printed tickets and at airport gates, as well as compensatory obligations relating to delayed and cancelled flights, and denied boarding. Strictly speaking, none of these obligations affect how air carriers operate in flight, nor do they purport to affect or alter another state's airspace. Moreover, the overall scheme governing air transportation under the CTA and the Regulations, and the way they have been applied and interpreted since their enactment, supports the view that Parliament's intent was to give the Regulations extraterritorial reach. Finally, the extraterritorial reach of the Regulations does not contravene the principles of international law governing state sovereignty and territoriality. The Regulations do not purport to allow for their enforcement on foreign soil, nor to authorize investigation in a foreign country for non-compliance occurring in that country. Quite to the contrary, the Regulations provide that affected passengers may claim the respective compensation directly with the air carrier.

The Minister's *Direction* requiring the Agency to make regulations in respect of tarmac delays of three hours or less, does not exceed the power that he has been granted under subsection 86.11(2). The power granted to the Minister is quite broad, and there is no indication that it was meant to limit the discretion of the Minister to those matters that are strictly speaking extraneous and unrelated to those listed in subsection 86.11(1). The *Direction* and section 8 of the Regulations are not only consistent with the wording of subsection 86.11(2) of the CTA, but also with the context and purpose of the CTA as a whole. Since the Minister has not exceeded the scope and limits of his power under subsection 86.11(2) of the CTA, both the *Direction* and section 8 of the Regulations are valid.

Next steps

An application for leave to appeal can be submitted to the Supreme Court of Canada within 60 days.

Relevant documents

Reasons for the judgment rendered by the Court:
https://decisions.fca-caf.gc.ca/fca-caf/decisions/en/item/521067/index.do (ENG)
https://decisions.fca-caf.gc.ca/fca-caf/decisions/fr/item/521067/index.do (FR)