Federal Court of Appeal | Cour d'appel fédérale

Date: 20201019

Docket: A-311-19

Citation: 2020 FCA 172

Present: **MACTAVISH J.A.**

BETWEEN:

INTERNATIONAL AIR TRANSPORT ASSOCIATION, AIR TRANSPORTATION ASSOCIATION OF AMERICA DBA AIRLINES FOR AMERICA, DEUTSCHE LUFTHANSA AG, SOCIÉTÉ AIR FRANCE, S.A., BRITISH AIRWAYS PLC, AIR CHINA LIMITED, ALL NIPPON AIRWAYS CO., LTD., CATHAY PACIFIC AIRWAYS LIMITED, SWISS INTERNATIONAL AIRLINES LTD., QATAR AIRWAYS GROUP Q.C.S.C., AIR CANADA, PORTER AIRLINES INC., AMERICAN AIRLINES INC., UNITED AIRLINES INC., DELTA AIR LINES INC., ALASKA AIRLINES INC., HAWAIIAN AIRLINES, INC. and JETBLUE AIRWAYS CORPORATION

Appellants

and

CANADIAN TRANSPORTATION AGENCY and THE ATTORNEY GENERAL OF CANADA

Respondents

and

DR. GÁBOR LUKÁCS

Intervener

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on October 19, 2020.

REASONS FOR ORDER BY: MACTAVISH J.A.

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REASONS FOR ORDER

MACTAVISH J.A.

[1] The Attorney General of Canada seeks an order striking portions of two affidavits filed by the appellants in support of their challenge to the validity of the *Air Passenger Protection Regulations*, SOR/2019-150. Amongst other things, the appellants submit that certain portions of the Regulations should be set aside on the basis that they are incompatible with the *Convention for the Unification of Certain Rules for International Carriage by Air*, 1 October 2001, 2242 U.N.T.S. 309 (entered into force 4 November 2003) [*Montreal Convention*]. Canada ratified the *Montreal Convention* in 2002, and incorporated it into domestic law through amendments to the *Carriage by Air Act*, R.S.C. 1985, c. C-26.

[2] The Attorney General contends that to the extent that the appellants' expert witnesses purport to offer opinions on the proper interpretation of the *Montreal Convention*, that evidence is both unnecessary and inadmissible. According to the Attorney General, the proper interpretation of the *Montreal Convention* is a question of international law that does not require proof in Canadian courts, but is, rather, a matter of which judges can take judicial notice.

[3] The Attorney General further submits that the interpretation of the *Montreal Convention* is the central issue in this case. As such, the appellants' expert evidence usurps the Court's role and goes to the very issue that the Court will have to determine. The Attorney General also notes that the appellants failed to obtain leave of this Court to file evidence with respect to international law in this appeal.

I. Background

[4] On May 23, 2018, Parliament adopted the *Transportation Modernization Act*, S.C. 2018, c. 10, which amended the *Canada Transportation Act*, S.C. 1996, c.10, by adding section 86.11. This provision allows the Canadian Transportation Agency to make regulations, after consulting with the Minister of Transport, to prescribe the minimum standards of treatment and minimum compensation (in certain situations) for air passengers in the case of flight delay, flight cancellation, denial of boarding, or lost or damaged baggage.

[5] The *Air Passenger Protection Regulations* created by the Agency were subsequently approved by the Governor in Council in accordance with subsection 36(1) of the *Canada Transportation Act*. Amongst other things, the Regulations provide for:

a) Information that carriers must provide to passengers with respect to the treatment of passengers, minimum compensation owed by carriers and the recourse available to passengers;

b) Minimum standards of treatment for passengers in the case of flight delay, flight cancellation, and denial of boarding that is within the carrier's control;

c) Minimum compensation for inconvenience in the case of flight delay, flight cancellation, and denial of boarding that is within the control of the air carrier, but not required for safety purposes; and

d) Compensation for lost or damaged baggage.

[6] The appellants sought leave of this Court to challenge the legality of the Regulations, asking the Court to determine whether certain provisions of the Regulations are compatible with the exclusive liability regime governing international carriage by air created by the *Montreal Convention*. Leave to appeal was subsequently granted to the appellants by this Court.

[7] The appellants assert in their Notice of Appeal that certain provisions of the Regulations are contrary to the *Montreal Convention*. They further submit that the Regulations are *ultra vires* the regulation-making authority granted to the Agency by Parliament, and that they are therefore invalid, void and of no force and effect.

[8] More precisely, the appellants argue that in regulating flight delays, flight cancellations, denials of boarding and lost or damaged baggage, the Regulations are contrary to the *Montreal Convention*. According to the appellants, the Regulations 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.

[9] The Attorney General subsequently brought a motion seeking leave to present expert evidence on foreign law as fresh evidence on the appeal. The Attorney General was seeking to adduce evidence of foreign law to demonstrate that the Regulations concerning air passenger rights are similar or analogous to the legislation of numerous other state parties to the *Montreal Convention*. The Attorney General submitted that this evidence was relevant to the issues raised by this appeal, as the practice of state parties, including their domestic legislation and judicial decisions, is a recognized means of interpreting a treaty such as the *Montreal Convention*. The

Attorney General's motion was granted, and a date was set for the parties to file their expert reports on this issue.

[10] The appellants subsequently advised the Attorney General that in addition to adducing evidence on foreign law, they also intended to provide evidence addressing the extent to which the laws of other state parties to the *Montreal Convention* are consistent with the provisions of the Convention. The appellants subsequently filed the affidavits of Dr. Pablo Mendes de Leon and Dr. Paul Stephen Dempsey, both of whom are described as experts in aviation law and policy. In addition to opining on questions of foreign law, Drs. de Leon and Dempsey's evidence addresses 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.*

[11] The Attorney General submits that the evidence of the appellants' experts is inadmissible to the extent that it purports to offer legal opinions as to the proper interpretation of the *Montreal Convention*. This involves issues of international law. Unlike foreign law, questions of international law are matters of law, and not of fact, that do not require proof but are, rather, matters of which Canadian judges can take judicial notice. As a result the necessity requirement of the *Mohan* test has not been met: *R. v. Mohan*, [1994] 2 S.C.R. 9, 114 D.L.R. (4th) 419 at paras. 17, 25-29.

[12] The Attorney General further notes that the appellants failed to obtain leave of this Court to file this evidence. In addition, the Attorney General submits that the proper interpretation of

the *Montreal Convention*, insofar as it addresses airline liability for damages in case of death, injury or delay to passengers as well as destruction, loss, and damage or delay to baggage is "the centerpiece" of this appeal. As such, the applicants' experts seek to opine on the ultimate issue, thereby usurping the role of the panel that will hear this appeal.

II. Analysis

[13] The question for determination is thus whether portions of the Dempsey and de Leon affidavits should be struck at this preliminary stage, or whether the admissibility of the disputed evidence should be left to the panel assigned to hear this appeal.

[14] It is settled law that questions of foreign law are treated as questions of fact, and as such, require proof through the evidence of properly qualified experts. However, the law appears to be somewhat less settled when it comes to the need for expert evidence addressing questions of international law.

[15] This Court commented on the use of expert witnesses to prove matters of international law in *Turp v. Canada (Foreign Affairs)*, 2018 FCA 133, [2019] 1 F.C.R. 198. The Court stated that, in its view, parties do not need to file expert reports to prove international law, as international law is a matter of which Canadian judges can take judicial notice: *Turp*, at paras. 82-89. See also the cases cited in *Turp*: *The Ship "North" v. The King*, [1906] 37 S.C.R. 385, 26 C.L.T. 380; *Jose Pereira E Hijos, S.A. v. Canada (Attorney General)*, [1997] 2 F.C. 84, (1996), 126 F.T.R. 167 (T.D.); *Lord Advocate's Reference No. 1*, [2001] ScotHC 15 (BAILII), [2001] S.L.T. 507.

[16] The Court was, however, clear that its comments in *Turp* were made in *obiter*, as the parties had not raised the evidentiary issue, and that its comments should thus not be taken to be a definitive ruling on the question.

[17] The Federal Court has also come to a similar conclusion to that reached in *Turp* with respect to the need for expert evidence regarding issues of international law: *Pan American World Airways v. The Queen*, 1979 CanLII 2790, 96 D.L.R. (3d) 267, at 274-275 (aff'd without comment on this issue 1980 CanLII 2610 (FCA), [1981] 2 S.C.R. 565 (SCC)).

[18] Indeed, in a series of articles, Gib van Ert argues persuasively that, in contrast to questions of foreign law (which are uniformly treated as questions of fact), matters of public international law are questions of law and as such do not require proof: Gib van Ert, "Recent Federal Court Decisions on Expert Evidence of International Law" (31 December 2018) online (blog): Gib van Ert <https://gibvanert.com/2018/12/31/recent-federal-courts-decisions-on-expert-evidence-of-international-law/#more-153>; "The Reception of International Law in Canada: Three Ways We Might Go Wrong", (2018) in Centre for International Governance Innovation in *Canada in International Law at 150 and Beyond*, Paper No. 2; "The Admissibility of International Legal Evidence" (2005) 84 Can Bar Rev.

[19] That said, van Ert acknowledges that Canadian courts have been uneven in their evidentiary approach to international legal issues: van Ert, "Three Ways We Might Go Wrong", above at 6. He cites examples of a contrary approach being taken, including in *Bouzari v. Iran (Islamic Republic)*, [2002] O.J. No. 1624, [2002] O.T.C. 297 (Ont. S.C.J.), aff'd 71 O.R. (3d)

675 (Ont. C.A.) and *Amaratunga v. Northwest Atlantic Fisheries Organization*, 2011 NSCA 73, [2011] N.S.J. No. 453. I note the Federal Court also commented on the unsettled nature of the law on this point in *Boily v. Canada*, 2017 FC 1021, [2017] F.C.J. No. 1275 at paras. 25, 27-31.

[20] The appellants have also identified cases where a contrary view has been taken of the evidentiary issue, including *Holding Tusculum B.V. c. S.A. Louis Dreyfus & Cie*, 2006 QCCS 2827, [2006] Q.J. No. 4878. In that case, the Quebec Superior Court dismissed a motion to strike expert reports with respect to international arbitration law that raised arguments similar to those advanced here: paras. 4, 9-10. The disputed evidence was subsequently relied on by the Court in its decision on the merits: *Holding Tusculum, b.v. c. Louis Dreyfus, s.a.s. (SA Louis Dreyfus & Cie.)*, 2008 QCCS 5904, [2008] Q.J. No. 15012.

[21] There have also been a number of cases where expert evidence with respect to international law (including the meaning of treaty obligations) has been accepted, apparently without objection to its admissibility: see, for example, *Tracy v. Iranian Ministry of Information and Security*, 2016 ONSC 3759, [2016] O.J. No. 3042 (Ont |S.C.J.), aff'd 2017 ONCA 549, leave to appeal to the Supreme Court of Canada ref'd [2017] S.C.C.A. No. 359.

[22] Similarly, in *Najafi v. Canada (Public Safety and Emergency Preparedness)*, evidence of two international law experts as to the legality of the use of force in international law was adduced before the Federal Court, apparently without objection. That evidence informed the analysis of both the Federal Court and of this Court on appeal: 2013 FC 876, aff'd 2014 FCA 262, leave to appeal to the Supreme Court of Canada ref'd [2015] S.C.C.A. No. 2.

[23] A further example of this is found in *Saskatchewan v. Saskatchewan Federation of Labour*, 2012 SKQB 62. There, the Court of Queen's Bench for Saskatchewan received expert evidence on Canada's international treaty obligations with respect to labour relations and the right to strike: paras. 100 and 102. The matter was ultimately appealed to the Supreme Court of Canada. In her majority reasons, Justice Abella referred to the expert evidence on international law adduced by the Saskatchewan Union of Nurses, albeit without comment as to the admissibility of expert evidence on this issue: 2015 SCC 4, at para. 65.

[24] Indeed, as the appellants note, the Attorney General himself has adduced expert evidence with respect to international law issues in numerous cases: see cases listed at paras. 55-56 of the appellants' memorandum of fact and law.

[25] The Attorney General notes that this Court has been prepared to strike inadmissible evidence at an early stage of the proceedings: *Canada (Board of Internal Economy) v. Canada (Attorney General)*, 2017 FCA 43, [2017] F.C.J. No. 255 [*Boulerice*]. While the Court did find that the admissibility issue in *Boulerice* was better resolved at an early stage, this finding was based on the fact that the evidence in question was "so clearly out of bounds ... that it ought to be stopped in its tracks". The Court was further satisfied that there was "simply no point in leaving it on the record, as it is so clearly inadmissible that there is no need to have a full record before coming to a final assessment of its merits": at para. 30.

[26] What is apparent from the above review of the jurisprudence is that the evidentiary issue raised by the Attorney General's motion to strike in this case is not as clear-cut as he contends.

This suggests that it is preferable to leave the admissibility and necessity issues with respect to the evidence of the appellants' expert witnesses to be determined by the panel assigned to hear this appeal.

[27] My finding in this regard is supported by the fact that this case is still at a very early stage. The parties have yet to file their memoranda of fact and law on the appeal, with the result that the issues raised by the appeal have yet to be fully fleshed out. The admissibility issues and the centrality of the disputed evidence to the ultimate issue or issues in this case are better determined once those issues have crystalized.

[28] There is an additional issue with respect to the evidence of Dr. Dempsey that requires comment.

[29] Dr. Dempsey was asked by the appellant, the International Air Transport Association, to provide his opinion on questions of American law relating to air passenger rights. In offering his opinion on these questions, Dr. Dempsey observed that the United States is a "monist" jurisdiction, meaning that, unlike the "dualist" system that we have in Canada insofar as international treaties are concerned, it is not necessary to enact domestic legislation to implement international treaties into American law. According to Dr. Dempsey, instruments such as the *Montreal Convention* are "self-executing", and are essentially deemed to be part of American law. The distinction between domestic law and international law is thus artificial in the American context, and that an opinion on the proper interpretation of international treaties, including the *Montreal Convention*, is an opinion on U.S. law.

[30] Even if I were to accept the Attorney General's position with respect to the general inadmissibility of expert evidence relating to question of international law, it is thus not readily apparent at this point that the disputed portions of Dr. Dempsey's evidence would in fact be inadmissible. This further suggests that it is preferable for the admissibility of Dr. Dempsey's evidence to be determined by the panel assigned to hear this appeal on its merits, as it will be better positioned to understand the use that the appellants wish to make of Dr. Dempsey's evidence, and to determine its admissibility and necessity.

[31] While I recognize that my decision to defer the evidentiary issue to the hearing panel may result in some delay in this case as the Attorney General may wish to file evidence in response to the evidence of the appellants' experts, I am not persuaded that it is in the interests of justice to intervene at this early stage. Nor am I persuaded that the orderly hearing of the appeal will be impaired if the disputed evidence is not struck immediately.

[32] The fact that the hearing panel may be exposed to or swayed by evidence that is subsequently found to be inadmissible is also not a concern. As this Court observed in *Boulerice*, judges are used to ignoring evidence that is ultimately excluded from the record: above at para. 15.

[33] Finally, even if the panel hearing the appeal were to conclude that the disputed evidence is inadmissible, the reality is that the substance of that evidence could well end up before the Court as legal argument. Indeed, the Attorney General acknowledges in his Reply that the substance of the expert's opinion on the international law issues could properly be put before the

Court in the appellants' memorandum of fact and law. This further mitigates any prejudice that may accrue to the Attorney General because the disputed evidence has been left in the record at this point.

III. Conclusion

[34] The Attorney General's motion is accordingly dismissed, with costs to be determined by the panel hearing the appeal.

"Anne L. Mactavish"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-311-19
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MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	MACTAVISH J.A.
DATED:	OCTOBER 19, 2020

WRITTEN REPRESENTATIONS BY:

Pierre Bienvenu Andres C. Garin Virginie Blanchette-Séguin	FOR THE APPELLANTS
Clay Hunter	
Bernard Letarte Benoît de Champlain Lindy Rouillard-Labbé	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Norton Rose Fulbright Canada LLP Montreal, Quebec	FOR THE APPELLANTS
Paterson MacDougall LLP Toronto, Ontario	
Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENTS