Federal Court of Appeal | Cour d'appel fédérale

Date: 20240729

Docket: A-336-21

Citation: 2024 FCA 123

CORAM: **STRATAS J.A.**
LOCKE J.A.
ROUSSEL J.A.

BETWEEN:

ABDALLAH ZOGHBI

Appellant

and

AIR CANADA

Respondent

and

CANADIAN HUMAN RIGHTS COMMISSION

Intervener

Heard at Toronto, Ontario, on February 27, 2023.

Judgment delivered at Ottawa, Ontario, on July 29, 2024.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: LOCKE J.A.
ROUSSEL J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

A. Introduction

[1] The appellant, Mr. Zoghbi, made a complaint against Air Canada under the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, and sought, among other things, financial relief.

[2] The Canadian Human Rights Commission screened out the appellant's complaint on the ground that financial relief was not available owing to an international convention incorporated into Canadian domestic law. In the words of the *Canadian Human Rights Act*, s. 41(1)(*d*), it was plain and obvious that the complaint was "trivial".

[3] The appellant applied to the Federal Court to quash the Commission's decision. The Federal Court (*per* Fothergill J.) granted the application in part, finding that while financial compensation was not available, the appellant might have been entitled to other remedies: 2021 FC 1154.

[4] The Federal Court sent the matter back to the Commission with instructions to consider whether these other remedies were available and whether there were other grounds to screen out the complaint. Two other grounds were possible: the appellant had signed a release as part of a settlement and the appellant's complaint might be better decided by the Canadian Transportation Agency.

[5] Disappointed by the fact that most of his complaint was taken off the table, the appellant appeals to this Court. The main target of his appeal is the international convention and whether it barred his claim for financial relief. On that, I find that the appellant's submissions have no merit: it was reasonable for the Commission to find that the international convention applies by virtue of the law incorporating it into Canadian domestic law and does bar his claim for monetary compensation.

[6] However, the appellant's complaint alleged that the law incorporating the international convention into Canadian domestic law violated his equality rights under section 15 of the Charter. The Commission has never considered that issue. Accordingly, the Commission must also consider that issue in the redetermination ordered by the Federal Court, along with the two other grounds. As a result, in order to give effect to that, I would allow the appeal in part.

B. The basic facts

(1) The incident giving rise to the complaint

[7] The appellant is a Lebanese-born Canadian citizen. He alleges that his race, ethnic origin and colour were identifiable to strangers through his name, appearance, accent and his use of Arabic. He booked a flight on Air Canada to travel from Halifax to London.

[8] On the plane, while speaking on the phone in Arabic, the appellant placed his jacket on the seat next to him. A flight attendant told him to remove his jacket. Annoyed at the flight attendant's tone, he expressed his displeasure—he concedes he might have done this a little harshly—and he asked to speak to a manager.

[9] Soon afterward, an Air Canada agent asked the appellant to come out onto the jet-bridge for a discussion. The agent then informed the appellant that Air Canada was banning him from the flight. According to a report prepared by Air Canada, the appellant was "verbally abusive

toward a flight attendant and gate staff". Reacting to the report, Air Canada did more. It imposed a general travel ban on the appellant.

(2) The complaint

[10] The appellant filed a complaint with the Commission alleging discrimination by Air Canada on the grounds of race, national or ethnic origin, colour, and/or religion, all recognized grounds under the *Canadian Human Rights Act*. Among other things, the appellant sought monetary compensation.

(3) The general legal framework concerning international travel

[11] A Canadian statute, the *Carriage by Air Act*, R.S.C. 1985, c. C-26, incorporates the *Convention for the Unification of Certain Rules for International Carriage by Air*, 2242 UNTS 309 [*Montreal Convention*] into Canadian law: see s. 2(2.1).

[12] The *Montreal Convention* sets out exclusive rules on when and to what extent an airline is liable for incidents during international air travel. It bars monetary damages for incidents during international air travel, including, as here, embarkation. Article 17 allows only for monetary compensation in cases of "death or bodily injury of a passenger" where "the accident took place on board the aircraft or in the course of any of the operations of embarking or disembarking". And article 29 of the *Montreal Convention* provides that "punitive, exemplary or any other non-compensatory damages shall not be recoverable".

[13] Throughout these proceedings, Air Canada has contended that the *Carriage by Air Act* bars the appellant's claim for financial compensation owing to a human rights violation.

(4) Proceedings before the Commission

[14] Soon after the appellant filed his complaint, the Commission informed him that it was going to screen his complaint under ss. 40 and 41 of the *Canadian Human Rights Act*. Due to the *Carriage by Air Act*, the Commission was concerned that it would not have jurisdiction to give him financial compensation. After receiving submissions on point, the Commission found that the Tribunal had no jurisdiction to award damages. It screened out the entire complaint.

[15] Having screened out the entire complaint, the Commission did not need to consider the issue of the release or whether the Canadian Transportation Agency would be better suited to handle the appellant's complaint.

[16] The Commission's investigator acknowledged the appellant's equality rights claim under the Charter but never dealt with it. The appellant phrased the equality rights claim as follows:

> Alternatively, if the *Montreal Convention* did apply and if it did limit [the appellant's] rights under the *Canadian Human Rights Act*, then the *Carriage by Air Act* implementing the Convention violates s. 15 of the Charter, and as such should be "read down".

[17] In deciding to screen out the appellant's complaint, the Commission never dealt with his claim that the *Carriage by Air Act* implementing the *Montreal Convention* violated his equality rights under section 15 of the Charter.

(5) Proceedings before the Federal Court

[18] The Federal Court conducted reasonableness review of the Commission's decision. In doing so, it rejected the appellant's submission that it should conduct correctness review.

[19] The Federal Court found the Commission's analysis and conclusions concerning the *Montreal Convention* and its incorporation into Canadian domestic law by the *Carriage by Air Act* to be reasonable.

[20] However, as mentioned above, the Federal Court found (at paras. 46 and 52) that the appellant might be entitled to other human rights remedies not barred by the *Montreal Convention* and the *Carriage by Air Act*. For example, Air Canada might be subject to an order to take "measures to redress the alleged discriminatory practice or prevent similar practices from occurring in future" (at para. 52), for example by training its staff to handle circumstances such as this in a more rights-friendly way. It returned the matter to the Commission to decide these issues.

[21] In the Federal Court, the appellant litigated his equality rights claim under the Charter. The Federal Court declined to deal with it on the ground that insufficient evidence was offered on key aspects of the claim.

[22] The Federal Court also found that it was unnecessary to decide the appellant's equality rights claim in order to determine the application for judicial review. As a result of that finding and the Commission's failure to deal with the appellant's equality rights claim, that claim has never been considered on its merits. It has just fallen through the cracks.

(6) Proceedings before this Court

[23] In this Court, the appellant raises all of the issues that he raised before the Federal Court. He has subdivided his arguments into many parts. I prefer to group his submissions into six broad questions. Merely for clarity of description of the issues, I phrase the questions as if this were a case of correctness review but, as we shall see, the standard of review is reasonableness.

[24] Here are the questions:

(1) What is the standard of review?

(2) Did the Commission have jurisdiction or reasonably find that it has jurisdiction to interpret the *Montreal Convention* and the *Carriage by Air Act*?

(3) As a matter of interpretation, did the *Montreal Convention* and the *Carriage by Air Act* bar the appellant's human rights claim?

(4) Should the Commission have taken into account article 6 of the *International Convention on the Elimination of All Forms of Racial Discrimination*, Can.TS 1970, No. 28?

(5) Does the *Canadian Human Rights Act* prevail over the *Carriage by Air Act*?

(6) Does the *Carriage by Air Act* infringe equality rights under section 15 of the Charter?

[25] Issues (4) and (5) were not raised before the Commission even though they could reasonably have been. This is especially so, as the complainant was represented by Dr. Gábor Lukács, a frequent litigant in the Federal Courts system and a person well-versed in legal matters. In fact, Dr. Lukács argued many legal issues before the Commission but he chose not to raise issues (4) and (5).

[26] The appellant now raises issues (4) and (5) for the first time on judicial review. Issues raised for the first time before a reviewing court should not be entertained: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at paras. 22-23.

[27] The rationale behind this—a sound one—is that the legislation governing an administrative regime gives the administrative decision-maker, not reviewing courts, the power to decide all of the issues going to the merits of cases. Although recently the Supreme Court has sometimes decided new issues going to the merits of cases (see, *e.g.*, *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21, 485 D.L.R. (4th) 583), this should be seen as a one-off situation where it considered, rightly or wrongly, the question before it to be clear, not a displacement of the longstanding, unquestionably sound position set out in *Alberta Teachers*: *Klos v. Canada (Attorney General)*, 2023 FCA 205 at para. 8; *Terra Reproductions Inc. v. Canada (Attorney General)*, 2023 FCA 214 at para. 6; see also P. Daly, "The Signal and the Noise in Administrative Law" (2017) 68 *University of New Brunswick Law Journal* 68-86.

[28] Nevertheless, in the end, to give the appellant the fullest answer to his grounds of appeal, I will deal with issues (4) and (5) and show that his position has no merit anyway.

[29] Issue (6) was raised before the Commission but, as mentioned above, the Commission never dealt with it. The Federal Court dealt with it on its merits. On the authority of *Alberta Teachers*, it should not have done so: see paragraphs 26-27, above, in these reasons.

[30] The fact that issue (6) is a constitutional issue does not change the situation. Where the issue is one of constitutional law and the administrative decision-maker has the jurisdiction to deal with it, the administrative decision-maker, as the merits-decider, is the forum to raise it. In those circumstances, an applicant on judicial review cannot bypass the power of a tribunal to decide an issue, and proceed directly to the reviewing court: *Okwuobi v. Lester B. Pearson*

School Board; Casimir v. Quebec (Attorney General); Zorrilla v. Quebec (Attorney General), 2005 SCC 16, [2005] 1 S.C.R. 257 at paras. 28-55.

[31] Where, as here, the administrative decision-maker failed to deal with a constitutional issue placed before it and an applicant submits that the administrative decision-maker had jurisdiction to decide it, an applicant should attack that failure and ask for the constitutional issue to be remitted back for redetermination. The Commission, not a reviewing court, has the power to consider whether it has jurisdiction to assess the constitutional issue and, if so, whether the constitutional issue, along with any other issues, should be sent to the Tribunal for adjudication. As we shall see, whether it has jurisdiction to assess the constitutional issue turns on the test in *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54, [2003] 2 S.C.R. 504, discussed below.

[32] In light of this, and in light of the fact that the Commission—the proper forum to determine issue (6)—will be dealing with it in its upcoming redetermination, I decline to say more about this issue.

C. Analysis

(1) What is the standard of review?

[33] The Federal Court (at paras. 25-29) selected reasonableness as the standard of review. It noted that screening decisions of the Commission under s. 41 of the *Canadian Human Rights Act*

are “ordinarily subject to review by this Court against the standard of reasonableness” (at para. 25). It added that none of the exceptions to reasonableness review applied.

[34] I agree with the Federal Court for the reasons it gave. I adopt its reasons as my own.

[35] The appellant submits that the Commission’s decision should be reviewed on the basis of correctness because there is a fundamental issue whether the Commission has the jurisdiction to consider questions of law. But whether an administrative decision-maker has such jurisdiction is not a recognized ground for correctness review. Rather, jurisdiction—whether an administrative decision-maker has the power under its legislation to do something—is really a question of legislative interpretation, a matter for which the standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 at para. 115.

[36] The appellant also submits that the interpretation and application of the *Carriage by Air Act* is a general question of law of central importance to the legal system. Such questions are reviewable for correctness. But here we are not dealing with such a question.

[37] The interpretation and application of a statute, here the *Carriage by Air Act*, has significance to those who fly internationally who later wish to assert a claim for damages, but it has no broader ramifications beyond that. It is not the sort of question, such as a quasi-constitutional question that arises in multiple contexts or a question with constitutional ramifications, that requires, for rule of law reasons, a single correct response: *Mouvement laïque*

québécois v. Saguenay (City), 2015 SCC 16, [2015] 2 S.C.R. 3, (the state's duty of religious neutrality); *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555, (the limits to legal professional privilege, an interest under section 8 of the Charter); *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, [2018] 2 S.C.R. 687 (the scope of Parliamentary privilege, a constitutional principle).

[38] The appellant submits that lurking behind the interpretation of the *Carriage by Air Act* is the *Montreal Convention* and its interpretation is a matter of general importance. He submits that treaties, which apply to many different contexts, should receive only one uniform interpretation. As we shall see, the interpretation of the *Montreal Convention* in the context of this case is perfectly clear. Regardless of the standard of review, the *Montreal Convention* bars the appellant's damages claim against Air Canada in this case.

[39] No doubt, an alleged human rights infringement by a private party in these circumstances is very important to the appellant. No doubt, human rights are important, are sometimes controversial and are of wider public concern. But importance to the parties before the Court and important issues in themselves do not trigger this exception giving rise to correctness review: see *Vavilov* at paras. 58-62. I agree with the respondent who notes that the question before us is specific to the *Canadian Human Rights Act*'s administrative regime for the protection of human rights and only concerning one of its available remedies and only in the context of passengers travelling internationally by air.

[40] Therefore, the Federal Court properly selected the standard of review of reasonableness.

(2) Did the Commission have jurisdiction or reasonably find that it has jurisdiction to interpret the *Montreal Convention* and the *Carriage by Air Act*?

[41] The appellant submits that the Commission cannot determine questions of law beyond its enabling statute. Instead, it is limited to assessing the sufficiency of the evidence before it. It cites *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, 140 D.L.R. (4th) 193 at para. 53.

[42] On this issue, the Federal Court held (at paras. 30-39) that the Commission was not so limited. I agree with the Federal Court, for the reasons it gave. In this regard I also substantially agree with the submissions of the Commission, which intervened on this issue.

[43] As the Federal Court noted, the Supreme Court revisited *Cooper* in *Martin*, above, and, substantially overturned it. *Martin* stands for the proposition that if an administrative decision-maker has the authority to decide questions of law, either expressly or implicitly as a matter of legislative interpretation, it can deal with legal questions before it. As *Martin* suggests, this includes issues of constitutional law.

[44] In *Martin*, the Supreme Court stated that its particular holding in *Cooper*—that the Commission had no implicit or explicit authority to decide questions of law under a now-repealed provision of the *Canadian Human Rights Act* (s. 15(*c*))—remained valid. But it continued by stating that "[t]o the extent that [*Cooper*] is incompatible with [*Martin*]…the *ratio* of the majority judgment in *Cooper* is no longer good law" (at para. 47).

[45] In *Cooper*, the Supreme Court attached significance to whether the question of law was general and limited or whether the administrative decision-maker was adjudicative, rather than just performing a screening function. In light of *Martin*, that is no longer the law. In *Martin* (at para. 47), the Supreme Court specifically ruled that adjudicative nature of the administrative decision-maker counts for very little. The clear implication is that screening bodies, such as the Commission, do have the power to consider questions of law necessary to fulfil their screening function.

[46] The notion of implicit jurisdiction or jurisdiction as a matter of legislative interpretation in *Martin* deserves closer examination. At paragraph 41, the Supreme Court in *Martin* observes that heed must be paid to, among other things, the "statutory mandate of the tribunal", "whether deciding questions of law is necessary to fulfilling this mandate effectively", and whether "depriving the tribunal of the power to decide questions of law would impair its capacity to fulfill its intended mandate". This is not unlike the identification of the implicit powers of tribunals the Supreme Court usefully explored in *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394, 92 D.L.R. (4th) 609.

[47] In this case, the Commission's function under the *Canadian Human Rights Act* is to act as a screening body, to winnow out complaints that cannot possibly succeed on the facts or the law. A complaint that cannot possibly succeed on the facts or the law should not be sent to the Tribunal for a time-consuming, resource intensive hearing. The purpose of this is to ensure the wise use of resources and the efficient disposition of complaints. To find that the Commission

cannot look at whether some law makes a complaint doomed to fail is to frustrate that statutory purpose.

[48] For good measure, this Court has thrice decided that the Commission, when conducting its screening function, has a large amount of latitude, including the ability to measure a complaint against applicable law to see whether it can potentially succeed: *Canada (Attorney General) v. Ennis*, 2021 FCA 95, [2021] 4 F.C.R. 154 at para. 61; *Gregg v. Air Canada Pilots Association*, 2019 FCA 218 (dissenting reasons but not opposed by the majority on this point); *Bell Canada v. Communications, Energy and Paperworkers Union of Canada*, [1999] 1 F.C. 113, 167 D.L.R. (4th) 432 (C.A.) at para. 38; see also *Northcott v. Canada (Attorney General)*, 2021 FC 289. On other occasions, it has had to decide whether other administrative decision-makers should handle a complaint, which requires it to examine and interpret the governing statutes of those administrators: *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667 at para. 99; *Eadie v. MTS Inc.* 2015 FCA 173, 475 N.R. 174 at paras. 96-105; *MacFarlane v. Day & Ross Inc.*, 2010 FC 556, [2011] 4 F.C.R. 117 at paras. 73-74.

[49] In this case, the Commission determined whether remedies were legally available for the alleged breach of the appellant's human rights in light of the *Carriage by Air Act* and the *Montreal Convention*. It did not adjudicate the merits of the appellant's complaint but rather assessed whether the complaint should be dealt with using objective benchmarks including relevant law and precedent. It concluded that this task fell within the powers, duties and functions conferred upon it by s. 41 of the *Canadian Human Rights Act*.

[50] The Federal Court held that the Commission's conclusion was reasonable. I agree for the foregoing reasons and the reasons the Federal Court gave.

(3) As a matter of interpretation, did the *Montreal Convention* and the *Carriage by Air Act* bar the appellant's human rights claim?

[51] The Commission answered this in the affirmative. In doing so, it acted reasonably.

[52] In its reasons, the Commission adopted paragraphs 60-68 of the investigation report. The report began (at para. 60) by reviewing the *Montreal Convention* and the *Carriage by Air Act*. It noted, as mentioned above, that article 17 of the *Montreal Convention* allows only for monetary compensation in cases of "death or bodily injury of a passenger" where "the accident…took place on board the aircraft or in the course of any of the operations of embarking or disembarking".

[53] However, the report did not leap to the conclusion that the appellant's claim was excluded. It asked itself whether there was any room under the *Montreal Convention* for claims based on "fundamental, quasi-constitutional rights" (at para. 62).

[54] Here, it found (at para. 62) that the Supreme Court had already decided that issue: *Thibodeau v. Air Canada*, 2014 SCC 67, [2014] 3 S.C.R. 340. The Supreme Court found that damages for breaches on aircraft of language rights—fundamental, quasi-constitutional rights—could not be claimed because of the *Warsaw Convention*, the predecessor to the *Montreal Convention*.

[55] The report went further (at paras. 64-65) and examined the Supreme Court's reasoning in support of that conclusion. The Supreme Court had examined a case where a couple alleged that they were bumped from a flight because of their race: *King v. American Airlines, Inc.*, 284 F.3d 352 (2d Cir. 2002). In that case, like here, the couple enjoyed statutory human rights protections against racial discrimination. Sotomayor J. (as she then was) concluded that the claim was caught by the *Warsaw Convention* which, like the *Montreal Convention*, exhaustively covers claims for injuries suffered while "in the course of [one of] the operations of embarking": *Thibodeau* at para. 68. The Supreme Court agreed with the analysis in *King*: *Thibodeau* at paras. 67-73.

[56] On the authority of *Thibodeau*, *King* (adopted by the Supreme Court) and the specific wording of the *Montreal Convention* and the *Carriage by Air Act*, the report concluded that the appellant's human rights damages claim was barred.

[57] The Commission's decision to adopt this part of the report and its reasoning is reasonable. The outcome is fully consistent with an authoritative decision of the Supreme Court and the meaning of the *Montreal Convention* and the *Carriage by Air Act*. As well, there is a clear, sufficiently articulated chain of reasoning leading from the facts of the case to the outcome.

(4) Should the Commission have taken into account article 6 of the *International Convention on the Elimination of All Forms of Racial Discrimination*?

[58] The appellant submits that the Commission should have taken into account article 6 of the *International Convention on the Elimination of all Forms of Racial Discrimination*.

[59] This submission fails. It was reasonable for the Commission not to take into account this Convention.

[60] The appellant misunderstands how international law can be used when administrative decision-makers and courts decide domestic issues. This issue is now well-settled by a Supreme Court decision that binds administrative decision-makers and courts alike: *Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Association*, 2022 SCC 30, 471 D.L.R. (4th) 391 at paras. 43-48.

[61] In the present case, Canadian domestic law has adopted into Canadian law an international convention, the *Montreal Convention*, with all of its limitations on damages liability in article 29. In cases such as this, we are to interpret and implement article 29: *Office of the Children's Lawyer v. Balev*, 2018 SCC 16, [2018] 1 S.C.R. 398.

[62] The *Montreal Convention*, with its limitations on damages liability in article 29, which is now a part of Canadian domestic law, is clear and unequivocal. It does not leave open exceptions for possible liability, such as international law norms and principles, human rights claims or avenues for liability under other international instruments such as the *International Convention on the Elimination of all Forms of Racial Discrimination*. Nor does the *International Convention on the Elimination of all Forms of Racial Discrimination*, when read and understood, reveal some sort of ambiguity in article 29 of the *Montreal Convention*. The *Montreal Convention* is neither vague nor ambiguous. Nor is there any extrinsic material behind it that helps the

appellant. The *Montreal Convention* slams the door shut. It does not leave even a crack in the door.

[63] The appellant submits that article 6 of the *International Convention on the Elimination of all Forms of Racial Discrimination* requires Canada to provide a remedy of damages for racial discrimination in international aviation despite the *Montreal Convention* and its incorporation into Canadian domestic law by virtue of the *Carriage by Air Act*. But assuming the appellant is correct, this Court has no power to issue *mandamus* requiring Canada to legislate to fulfil that requirement. Nor can this Court use that supposed requirement—not part of domestic law—to somehow amend the clear language of the *Carriage by Air Act* and the *Montreal Convention*.

(5) Does the *Canadian Human Rights Act* prevail over the *Carriage by Air Act*?

[64] As mentioned above, this is a new issue—one that was not raised before the Commission. But it can be dealt with in short order. As a matter of statutory interpretation, the *Carriage by Air Act* and article 29 of the *Montreal Convention* are clear and unambiguous. They prohibit all damages claims however asserted. The appellant has offered nothing in terms of text, context or purpose to suggest that somehow the *Carriage by Air Act* and article 29 of the *Montreal Convention*, despite their clear language, allow for damages claims arising from domestic human rights statutes. As well, the Supreme Court's decision in *Thibodeau* is dispositive. Just as the language rights legislation in that case did not prevail over the *Montreal Convention*, the same must be true here: see paragraphs 54-57, above.

(6) Does the *Carriage by Air Act* infringe equality rights under section 15 of the Charter?

[65] As mentioned above (at paragraph 16), this was part of the appellant's complaint. The Commission has never dealt with it. To complete its task on this application, the Commission needs to examine whether, on the facts pleaded and the submissions made, it has jurisdiction to consider this issue and, if so, whether it is plain and obvious that the section 15 Charter challenge is "trivial" under s. 41 of the Act—in other words, whether it has any chance of success.

[66] In its reasons (at para. 64), the Federal Court required the Commission to give the parties a further opportunity to adduce evidence and arguments on the issue it remitted back to the Commission. That opportunity should extend to this issue as well.

D. The recent motion

[67] Recently, the appellant has moved for an order directing the issuance of a subpoena to the Commission to produce certain documents before it in another case involving Air Canada and an order permitting it to file those documents into the record in this case. The appellant submits that this other case is substantially identical to the case at bar but the Commission decided not to screen the matter out. However, this case has been settled. It will not be tried by the Canadian Human Rights Tribunal.

[68] Air Canada notes that the Commission's screening decision makes no mention of the *Montreal Convention* or the *International Convention on the Elimination of all Forms of Racial*

Discrimination. This is noteworthy, given that Air Canada told the Commission that the complainant would not be able to recover damages due to the *Montreal Convention*.

[69] Rather, the Commission appears to have decided the case solely on the credibility of the particular witnesses before it. Perhaps the Commission felt, as the Federal Court felt here, that the Tribunal could award remedies other than monetary damages. It did not say.

[70] As a result, the documents the appellant seeks to introduce do not seem to be of any probative value in the case before us.

[71] As well, taking matters at their highest, even if the Commission said something supportive of the appellant's case—and from a reading of the evidence filed on the motion, I am not satisfied it did—it is well-established that different adjudicators can reach different results on substantially similar facts and they can all be reasonable: *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770 at para. 17.

[72] Further, the fact that a second decision reached a different result from the first, even on substantially similar facts, does not prove anything. The second decision may be unreasonable. Our focus is whether the Commission's decision before us is unreasonable. I have concluded that it is reasonable. As a result, I am not satisfied that the appellant has met the test for new evidence and, in particular, the requirement that the evidence be capable of changing the result of the case: *Barendregt v. Grebliunas*, 2022 SCC 22, 469 D.L.R. (4th) 1; *Palmer v. The Queen*, [1980] 1 S.C.R. 759, 106 D.L.R. (3d) 212.

[73] The appellant infers from the fact that this other matter was referred to the Tribunal, that the Commission must have concluded that it has no power to determine questions of law beyond its enabling statute generally. That is pure speculation. If it did so decide, its decision is liable to be found to be unreasonable based on the analysis of *Cooper* and *Martin* and subsequent cases, above.

[74] Finally, I query whether the appellant has satisfied the requirements for the issuance of a subpoena on a judicial review, let alone an appeal: *Tsleil Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 at para. 103.

[75] In any event, regardless of what the Commission might have done in some other case, the legal analysis set out above does not change. The decision of the Commission in this case is reasonable.

E. Air Canada's preliminary objection

[76] Air Canada submits that the appellant won in the Federal Court and it is really just appealing the Federal Court's reasons. It submits, correctly, that appeals from the Federal Court lie only against the Federal Court's judgments, not its reasons: *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 27(1); *Ratiopharm Inc. v. Pfizer Canada Inc.*, 2007 FCA 261, 60 C.P.R. (4th) 165 at para. 6; *Fournier v. Canada (Attorney General)*, 2019 FCA 265 at para. 28.

[77] Air Canada had moved on an interlocutory basis to quash the appeal but this Court, citing the high threshold for quashing an appeal, dismissed the motion without prejudice to Air Canada raising this issue again at the hearing of the appeal.

[78] In my view, Air Canada's objection is without merit.

[79] The Federal Court allowed the appellant's judicial review. But that was not unqualified. It remitted the matter back to the Commission "for redetermination in accordance with the [r]easons for [j]udgment". The reasons for judgment left the appellant with only a narrow issue for redetermination: the issue described in paragraph 4 above. Everything else sought by the appellant, arguably far more important to the appellant, was denied. The appellant has every right to appeal to this Court to set aside that denial.

F. Proposed disposition

[80] For the foregoing reasons, I would dismiss the motion with costs.

[81] I would allow the appeal in part. In addition to the matters the Federal Court remitted to the Commission for redetermination, I would order the Commission to consider the appellant's complaint that the adoption of the *Montreal Convention* by s. 2(2.1) of the *Carriage by Air Act* violates the appellant's equality rights under section 15 of the Charter.

[82] Success in this appeal has been divided and so I would award no costs of the appeal.

"David Stratas"

J.A.

"I agree.
George R. Locke J.A."

"I agree.
Sylvie E. Roussel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

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