



By: Clay Hunter

Holden v. ACE Aviation Inc.

The Ontario Divisional Court clarifies the interpretation of the *Montreal Convention, 1999* and its provisions governing the limits of liability for checked baggage

The *Montreal Convention, 1999* among other things places a limit of 1000 Special Drawing Rights (SDRs) on the liability of air carriers for the destruction, loss, damage or delay of checked baggage in the course of international carriage by air. *The Montreal Convention, 1999* is incorporated into the law of Canada by way of the *Carriage by Air Act*, R.S.C. 1985, c. C-26.

Depending on the day, 1000 SDRs equates to approximately CAD \$1700.00 and for this reason it is extremely rare that actions based on baggage claims arising from international carriage by air ever see the light of day beyond the jurisdiction of the Small Claims Court and its particular brand of rough justice. Despite the fact that baggage claims provide a relatively large and, it seems, never ending number of litigated claims for carriers, the Small Claims Court has traditionally been loath to embrace the *Montreal Convention, 1999* or its predecessor the *Warsaw Convention* as amended and their strict regimes restricting the liability of carriers.

However, we have recently been given the benefit of the well reasoned, lucid and dare we say, elegant decision of the Ontario Divisional Court in *Holden v. ACE Aviation Inc.* (2008) 296 D.L.R. (4th). Part I, an appeal from the trial decision of the Ontario Small Claims Court 2007 CarswellOnt 8609 which this firm successfully argued on behalf of the carrier. We hope that *Holden* at a minimum will serve to guide the Small Claims Court in its future determination of baggage claims governed by the *Conventions*.

Synopsis

Given the relative paucity of Canadian jurisprudence on the still new *Montreal Convention, 1999*, the *Holden* decision is important in three respects. The Divisional Court held:

1. In interpreting the meaning of the text of the *Montreal Convention, 1999*, recourse must be made to the canons of interpretation of international treaties and to the *Vienna Convention on the International Law of Treaties* notwithstanding that this had not been specifically brought to the attention of the trial judge.
2. There is no requirement under the *Montreal Convention, 1999* to bring the limits of liability contained therein to the attention of the passenger. Article 3(5) of the *Convention* governs and the quantum of recovery is limited even in the absence of notice. Further, Article 3(4) is clearly intended to be directory only.

3. Only a passenger who has checked a bag is entitled to compensation for damages arising from the destruction, loss, damage or delay of that checked bag up to the limits stipulated by the *Montreal Convention, 1999*.

Background

The husband and wife Holdens were passengers onboard a flight from Toronto to New York in 2005. Mrs. Holden checked one piece of baggage. Mr. Holden did not check any baggage. Mrs. Holden's checked bag was lost and never recovered. At trial, it was held that Mrs. Holden's checked bag held items belonging to both Mr. and Mrs. Holden.

The Holdens commenced an action in the Ontario Small Claims Court against the carrier claiming \$5000 for the loss of property, out of pocket expenses, bailment, loss of enjoyment, inconvenience and negligence. They pleaded that their damages resulted from an act or omission of the carrier, its servants or agents, done recklessly and with knowledge that damage would probably result (essentially Article 22(5) of the *Montreal Convention, 1999*)

Trial Decision: the good and the bad

First, the good.

The trial judge held that the *Montreal Convention, 1999* applied. He found that the limits of the *Convention* apply even if the passenger or passengers are not provided with notice of the limitations as set out in Article 3(5) of the *Convention*.

With respect to the plaintiffs' allegations of the carrier exposing their baggage to the likelihood of theft, the trial judge without offering more found simply that the plaintiffs had not proven that any acts or omissions on the part of the carrier were done with intent to cause damage or recklessly and with knowledge that damage would probably result. Accordingly, he determined that the monetary limits of the *Convention* applied.

Finally, the trial judge held simply that the *Montreal Convention, 1999* does not permit recovery of damages for psychological damage or loss of enjoyment.

Then, the bad.

Although not referred to specifically in his endorsement, the trial judge's ruling was based on Article 22(2) of the *Montreal Convention, 1999* which states:

In the carriage of baggage, the liability of the carrier in the case of destruction, loss, damage or delay is limited to 1,000 Special Drawing Rights for each passenger unless the passenger has made, at the time when the checked baggage was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the passenger's actual interest in delivery at destination.

The trial judge determined that the *Montreal Convention, 1999* (Article 22(2)) provides that each passenger can make a claim and that both Mr. and Mrs. Holden were passengers within the meaning of the *Convention*. It is clear from his Reasons that the

judge placed great emphasis on the fact (as he found it to be) that the Holdens jointly packed their belonging in Mrs. Holden's bag stating "...if one plaintiff jointly packs his luggage with his spouse that does not mean he is not a passenger." And, that "it is unreasonable (for the carrier) to take the position that couples or families should be penalized as opposed to those who pack separate suitcases."

Accordingly, having found that each of the Holdens was a passenger, the trial judge held that each was entitled to claim up to the limit of 1000 SDRs.

The Appeal

The decision at trial was appealed to the Divisional Court by the carrier solely on the basis that the trial judge had erred in law in his interpretation of "passenger" within the meaning of Article 22(2) of the *Convention*. The Holdens cross-appealed on the basis that the trial judge erred in finding that there was no requirement on the carrier to bring the provisions limiting liability to their attention.

Madame Justice Low of the Divisional Court dismissed the Holdens' cross-appeal finding that the trial judge was correct in holding that "the language of Article 3(5) governs and that the quantum of recovery is limited even in the absence of notice. Clearly the provision in Article 3(4) ("The passenger shall be given notice ..." etc.) is intended to be directory only and does not negative the monetary limitation of liability.

Justice Low then proceeded to employ the canons of interpretation of international treaties as codified by the *Vienna Convention on the International Law of Treaties* employing a purposive interpretation of the *Convention* and having regard to the travaux préparatoires. She did so notwithstanding that this argument and authority had not specifically been placed before the trial judge.

Justice Low accepted that "the primary objective and purpose of the *Montreal Convention, 1999* and its predecessor, the *Warsaw Convention*, is uniformity, consistency, certainty and predictability with respect to the rights and obligations of carriers and passengers engaged in international carriage by air."

Finally, Justice Low concluded: "In my view, the proper construction of the word "passenger" in the context of Article 22(2) is the one which denotes an individual who is a passenger and who has checked the piece of baggage that is lost. That construction is consonant with the purposes of the *Convention* and results in all of the language of the Article having meaning and internal logic. It avoids the potential for exposure to an uncertain quantum of liability and exposure to an uncertain number of claimants. There is no prejudice to the passenger as he or she is at liberty to check his or her own bag and/or make the special declaration contemplated in the Article." To hold otherwise, the court found, could lead to the anomalous result of any passenger on board an aircraft being entitled to claim for the loss of some other passenger's checked bag.

The result – only Mrs. Holden was entitled to claim up to the limits of 1000 SDRs for the loss of her one checked bag.

Summary

The Ontario Divisional Court's decision in Holden is a welcome addition to the courts' proper approach to the interpretation of the *Conventions* and follows on the recent decisions of the Quebec Court of Appeal in *Plourde v. Service aérien F.B.O inc.*

(*Skyservice*), 2007 CarswellQue 4562 (Que. C.A.) leave to Appeal dismissed, 2007 CarswellQue 11028 (S.C.C.) and *Simard v. Air Canada*, 2007 CarswellQue 8916 (Que. S.C.). Notably, on this issue it goes a long way in correcting the Alberta Provincial Court's decision in *Foord v. United Airlines Inc.* (2006) 407 A.R. 117.

Of importance particularly before the Small Claims Courts is that Holden reiterates the dicta of Justice Malloy in *Connaught v. British Airways* (2002) 61 O.R. (3d) 204 that the Conventions' purposes are of prime importance and are not to be set aside to achieve an equitable result in specific circumstances.

Further, we now have authority that dispenses with the argument that the *Montreal Convention, 1999* is silent with respect to whom the carrier is liable to for destruction, loss, damage or delay in checked baggage. No longer should it be open to the owner of contents, separate and apart from the passenger who checked the bag, to argue that they be entitled on domestic principles of bailment to compensation under the *Montreal Convention, 1999*. Arguably, the reasoning in Holden can be applied to registered baggage claims under the provisions of the *Warsaw Convention* as amended by the Hague Protocol, further serving to distinguish the B.C. Supreme Court decision in *George Straith v. Air Canada* (1991) 59 B.C.L.R (2d) 241 as one solely concerned with cargo.

Moving forward, it is our hope that Holden will ensure that Small Claims Courts, at least in Ontario, will not be so quick to dismiss the *Carriage by Air Act* and the international conventions incorporated therein as the governing law with respect to the liability of carriers in international carriage by air.