SUPREME COURT OF CANADA

CITATION: International Air Transport Association *v.* Canada (Transportation Agency), 2024 SCC 30

APPEAL HEARD: March 25, 2024
JUDGMENT RENDERED: October 4, 2024
DOCKET: 40614

BETWEEN:

International Air Transport Association, Air Transportation Association of America doing business as Airlines for America, Deutsche Lufthansa AG, Air France, 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 Attorney General of Canada
Respondents

- and -

Gábor Lukács, Council of Canadians with Disabilities, National Pensioners Federation, Public Interest Advocacy Centre and Société québécoise de droit international
Interveners

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

REASONS FOR JUDGMENT: (paras. 1 to 104)	Rowe J. (Wagner C.J. and Karakatsanis, Côté, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ. concurring)

International Air Transport Association,
Air Transportation Association of America doing
business as Airlines for America,
Deutsche Lufthansa AG, Air France, 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*

v.

Canadian Transportation Agency and
Attorney General of Canada *Respondents*

and

Gábor Lukács, Council of Canadians with Disabilities,
National Pensioners Federation, Public Interest Advocacy Centre
and Société québécoise de droit international *Interveners*

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File No.: 40614.

2024: March 25; 2024: October 4.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Transportation law — Air transport — Passenger compensation — Federal transportation agency adopting regulations providing for minimum compensation to passengers on flights to and from Canada in case of delay, cancellation, denial of boarding and lost or damaged baggage — Provisions challenged by air carriers on basis that they conflict with exclusivity principle of international convention implemented in Canadian law governing damages liability of international air carriers — Whether impugned provisions of regulations ultra vires agency — Convention for the Unification of Certain Rules for International Carriage by Air, 2242 U.N.T.S. 309, Article 29 — Air Passenger Protection Regulations, SOR/2019-150.

Evidence — Admissibility — Expert evidence — International law — Airlines challenging regulations adopted by federal agency on basis of conflict with international convention implemented in Canadian law — Parties seeking to rely on expert affidavits on questions of international law — Framework governing admissibility of expert evidence in context of international law.

In 2018, the *Canada Transportation Act* ("*CTA*") was amended to allow the Canadian Transportation Agency ("Agency") to make regulations in relation to

flights to and from Canada with respect to a number of areas. The Agency thereafter adopted the *Air Passenger Protection Regulations* ("*Regulations*"), which came into force in 2019. The *Regulations* include provisions dealing with standardized amounts of compensation for international flight delays, cancellations and denial of boarding when the disruption occurs for reasons within a carrier's control and is not required for safety purposes (ss. 12(2)(d), (3)(d) and (4)(d), 19 and 20), and refunds of baggage fees paid by passengers when the carrier has lost or damaged their baggage on international flights (s. 23).

In a statutory appeal to the Federal Court of Appeal, the International Air Transport Association, the Air Transportation Association of America, and several air carriers serving Canadian and international airports (collectively, "airlines") challenged those provisions. The airlines alleged that the *Regulations* conflict with the exclusivity principle of the *Convention for the Unification of Certain Rules for International Carriage by Air* ("*Montreal Convention*") and are *ultra vires* the Agency's regulation-making authority under the *CTA*. Canada signed the *Montreal Convention* in 2001, and it was implemented into Canadian law by amendments to the *Carriage by Air Act* ("*CAA*"). Article 29 of the *Montreal Convention* codifies its exclusivity, by stating that "any action for damages" is subject to the conditions and limits of liability that it sets out.

The Federal Court of Appeal dismissed the challenge brought by the airlines, with the exception of the provisions relating to the temporary loss of baggage.

The court considered the compatibility of the *Regulations* with the *Montreal Convention*, and held that the compensation provided for under the *Regulations* is not an action for damages, and that cancellation, denial of boarding, and delay are factual and legal concepts that do not fall within the scope of the exclusivity principle. The court also addressed the admissibility of expert affidavits on questions of international law.

Held: The appeal should be dismissed.

The *Montreal Convention* is exclusive within the scope of the matters that it addresses, but does not deal comprehensively with all aspects of international carriage by air. Pursuant to the text of its Article 29, there must be an "action" that leads to "damages" for the exclusivity principle to apply. The *Regulations* do not provide for an "action for damages" because they do not provide for individualized compensation; rather, they create a consumer protection scheme that operates in parallel with the *Montreal Convention*, without trenching on its liability limitation provisions. Accordingly, they do not fall within the scope of the *Montreal Convention*'s exclusivity principle. Since the *Regulations* do not give rise to liability that is pre-empted by Article 29, they do not conflict with the *Montreal Convention* as implemented by the *CAA* and there is no basis to conclude that they exceed the jurisdiction of the Agency, as conferred by the *CTA*.

The *Vienna Convention* is the starting point for determining the scope of the *Montreal Convention* and the exclusivity principle. Article 31 of the *Vienna*

Convention directs that the *Montreal Convention*, like all treaties, should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. Therefore, the analysis begins with the words chosen by the state parties to the *Montreal Convention*. Article 29, in explaining the exclusivity principle, states that it applies to "any action for damages, however founded". The ordinary meaning of an "action for damages" points towards an action that shares the characteristics of a judicial proceeding and that seeks individualized compensation that is tied to an injury caused by another. Damages awards are individualized in that they seek to compensate the plaintiff for the loss suffered as a result of an injury caused by another. An action for damages is distinct from standardized compensation, which may be owed identically to all claimants irrespective of the harm (if any) they have suffered. The broader context of the *Montreal Convention* supports an understanding of the words "action" and "damages" consonant with their "ordinary meaning" in Canadian law: the relevant articles of the *Montreal Convention* are framed in a way that plainly envisages actions which share the characteristics of judicial proceedings in a court of law. The object and purpose of the *Montreal Convention*, including the history of its development, support this conclusion, as does foreign jurisprudence and state practice. Article 29 should therefore be understood as precluding actions for damages that share the characteristics of judicial proceedings in courts of law, and that seek individualized compensation for death or bodily injury, damage or loss of baggage and cargo, and for delay in international carriage.

The *Regulations* are best understood as providing for statutory entitlements under a consumer protection scheme. Passengers claiming under the *Regulations* need not show what harm, if any, they have suffered in order to claim compensation. The *Regulations* do not tie compensation to harm or inconvenience: they mandate compensation for delay, cancellation or denial of boarding based on the time by which a passenger's arrival at their ultimate destination is delayed, and compensation owed for lost or damaged baggage is tied to the baggage fees charged by the carrier, not to the harm. Unlike the *Montreal Convention*, the *Regulations* do not enable a carrier to avoid having to pay compensation otherwise due to a passenger by invoking a due diligence defence or pointing to contributory negligence. As long as the disruption in question occurred for a reason within the carrier's control and was not required for safety purposes, the compensation is fixed. Moreover, the Agency is empowered to extend a finding that compensation is owed to one passenger to other passengers similarly situated.

To find a conflict between the *Montreal Convention* and the impugned *Regulations*, the latter must be so inconsistent with the former that they are incapable of standing together. As the *Montreal Convention* has been implemented in Canadian law, the established test for statutory conflicts applies and there is no need to have regard to the presumption that Parliament legislates in conformity with international law. Because the *Regulations* do not provide for an action for damages, but instead create an entitlement to standardized compensation that does not seek to measure a passenger's actual loss, they fall outside the scope of Article 29 and do not conflict

with the *Montreal Convention*. The two forms of passenger compensation envisaged by the *Regulations* and the *Montreal Convention* are capable of standing together. The bargain at the centre of the *Montreal Convention* remains undisturbed: passengers continue to enjoy certain evidentiary presumptions on proof of damage, while carriers remain shielded from unlimited liability arising from actions for damages related to claims for death or bodily injury, damage or loss of baggage and cargo, and for delay. In signing on to the *Montreal Convention*, 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.

Finally, clarification is needed as to the treatment of expert evidence on questions of international law. The test from *R. v. Mohan*, [1994] 2 S.C.R. 9, should be applied in the context of international law as it is in other circumstances where expert evidence is sought to be admitted. The appropriate framework is the following: where expert evidence satisfies *Mohan*'s criteria, it may be considered. Otherwise, judges should proceed as they would for any other question of law — that is, on the basis of the submissions of the parties before the court and authorities on which they rely. In applying *Mohan*, the admissibility of expert evidence is within the court's discretion so long as the threshold requirements of admissibility are satisfied. Given the variety of contexts in which expert evidence is sought to be adduced on questions of international law, the admissibility of such evidence is best left as a matter of judicial discretion rather than being subject to a fixed and invariable rule.

Cases Cited

Applied: *R. v. Mohan*, [1994] 2 S.C.R. 9; **considered:** *Thibodeau v. Air Canada*, 2014 SCC 67, [2014] 3 S.C.R. 340; *International Air Transport Association v. Department for Transport*, C-344/04, [2006] E.C.R. I-403; *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217 (1996); *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155 (1999); *King v. American Airlines, Inc.*, 284 F.3d 352 (2d Cir. 2002); *Brake v. PJ-M2R Restaurant Inc.*, 2017 ONCA 402, 135 O.R. (3d) 561; **referred to:** *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650; *Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 79, [2018] 2 F.C.R. 573; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Thibodeau v. Air Canada*, 2011 FC 876, [2013] 2 F.C.R. 83; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Thomson v. Thomson*, [1994] 3 S.C.R. 551; *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 S.C.R. 431; *Sullivan v. Old Colony St. Ry. Co.*, 83 N.E. 1091 (Mass. 1908); *Nelson v. Deutsche Lufthansa AG*, C-581/10 and C-629/10, [2013] 1 C.M.L.R. 42 (p. 1191); *R. v. McGregor*, 2023 SCC 4; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; *R. v. Kirkpatrick*, 2022 SCC 33; *Yugraneft Corp. v. Rexx Management Corp.*, 2010 SCC 19, [2010] 1 S.C.R. 649; *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, I.C.J. Reports 1999, p. 1045; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289; *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, [2020] 1 S.C.R. 166; *Turp v. Canada (Foreign Affairs)*, 2018 FCA 133, [2019] 1 F.C.R. 198; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC

1, [2002] 1 S.C.R. 3; *Holding Tusculum B.V. v. S.A. Louis Dreyfus & Cie*, 2006 QCCS 2827; *Fédération des travailleurs du Québec (FTQ - Construction) v. Procureure générale du Québec*, 2018 QCCS 4548; *R. v. Abbey*, [1982] 2 S.C.R. 24; *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182; *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011 SCC 27, [2011] 2 S.C.R. 387; *Clayson-Martin v. Martin*, 2015 ONCA 596, 127 O.R. (3d) 1; *R. v. Abdullahi*, 2021 ONCA 82, 399 C.C.C. (3d) 397; *Quebec (Attorney General) v. Canada*, 2008 FC 713, 359 F.T.R. 1, aff'd 2009 FCA 361, 400 N.R. 323, aff'd 2011 SCC 11, [2011] 1 S.C.R. 368; *Surrey Credit Union v. Willson* (1990), 45 B.C.L.R. (2d) 310; *Daniels v. White*, [1968] S.C.R. 517; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292; *Boland v. APV Canada Inc.* (2005), 250 D.L.R. (4th) 376.

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Act to amend the Carriage by Air Act, S.C. 2001, c. 31.

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APPEAL from a judgment of the Federal Court of Appeal (Pelletier, de Montigny and Locke JJ.A.), 2022 FCA 211, [2022] F.C.J. No. 1702 (Lexis), 2022 CarswellNat 5115 (WL), dismissing in part a challenge to the validity of regulations adopted by the Canadian Transportation Agency. Appeal dismissed.

Pierre Bienvenu, *Clay Hunter*, *Virginie Blanchette-Séguin*, *Jean-Simon Schoenholz* and *Jiwan Son*, for the appellants.

Barbara Cuber, for the respondent the Canadian Transportation Agency.

Bernard Letarte and *Lindy Rouillard-Labbé*, for the respondent the Attorney General of Canada.

Gábor Lukács, on his own behalf.

Katrine Dilay and *Marina Pavlovic*, for the interveners the Council of Canadians with Disabilities, the National Pensioners Federation and the Public Interest Advocacy Centre.

Charles-Emmanuel Côté and *Bruno Gélinas-Faucher*, for the intervener Société québécoise de droit international.

The judgment of the Court was delivered by

ROWE J. —

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[1] This appeal addresses the *vires* of the *Air Passenger Protection Regulations*, SOR/2019-150 ("*Regulations*"), and the nature and scope of the "exclusivity principle" set out in Article 29 of the 1999 *Convention for the Unification of Certain Rules for International Carriage by Air*, 2242 U.N.T.S. 309 ("*Montreal Convention*").

[2] The appellants submit that, because the *Regulations* require that air carriers compensate passengers on international flights when their flights are delayed or cancelled, or when passengers are denied boarding or their baggage is lost or damaged, the *Regulations* conflict with the *Montreal Convention*'s exclusivity principle. In light of this purported conflict, and because the *Montreal Convention* has been implemented by way of the *Carriage by Air Act*, R.S.C. 1985, c. C-26 ("*CAA*"), the appellants assert that the *Regulations* are *ultra vires* the regulation-making authority given to the Canadian Transportation Agency ("Agency") by the *Canada Transportation Act*, S.C. 1996, c. 10 ("*CTA*"). I will hereafter refer to the issue of whether the *Regulations* are within the jurisdiction of the Agency, as conferred by the *CTA*, as the *Regulations* being "*ultra vires* the *CTA*" or "*intra vires* the *CTA*".

[3] The parties also disagree concerning the admissibility of expert affidavits on questions of international law; such affidavits were introduced in the proceedings below regarding state practice. The law relating to the admissibility of expert evidence, as I explain below, has been settled since this Court's decision in *R. v. Mohan*, [1994] 2 S.C.R. 9.

[4] This Court examined the scope of the exclusivity principle under the *Montreal Convention* in *Thibodeau v. Air Canada*, 2014 SCC 67, [2014] 3 S.C.R. 340 ("*Thibodeau*"), and in that case affirmed that the *Montreal Convention* is exclusive within the scope of the matters that it addresses, but that the *Montreal Convention* does not deal comprehensively with all aspects of international carriage by air (para. 47). The same conclusion guides the result in this case. The exclusivity principle in Article 29 of the *Montreal Convention* applies to any "action for damages". However, the *Regulations* do not provide for an "action for damages" because they do not provide for individualized compensation. The entitlements provided for are not tied to harm suffered by the claimant as a result of injury caused by another. Rather, the *Regulations* create statutory entitlements as part of a consumer protection scheme that operates irrespective of the harm (if any) suffered by the claimant. Thus, the *Regulations* do not give rise to liability that is pre-empted by Article 29 and so do not conflict with the *Montreal Convention* as implemented by the *CAA*. Accordingly, the appeal is dismissed.

I. Facts

A. *The Parties*

[5] The appellant International Air Transport Association ("IATA") is a trade association whose members include 290 airlines from 120 countries, which carry approximately 82 percent of the world's air traffic. The appellant Air Transportation Association of America (doing business as Airlines for America) is a trade association which brings together passenger and cargo airlines based in the United States. The remaining 16 appellants are air carriers serving Canadian and international airports.

[6] The respondent Agency is a quasi-judicial tribunal and an economic regulator with a mandate to deal with transportation matters under Parliament's legislative authority, including aviation. The Agency performs two functions. First, it applies rules that establish rights and responsibilities of transportation service providers and users and that level the playing field among competitors. As part of its regulatory function, the Agency makes determinations as to the issuance of licences and permits. It is empowered to enforce, through administrative monetary penalties, the *CTA* and regulations made thereunder. Second, it adjudicates commercial and consumer transportation-related disputes and accessibility issues.

[7] This Court in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650, described the *CTA* as "highly specialized regulatory legislation with a strong policy focus" (para. 98) and the Agency as "responsible for interpreting its own legislation, including what that statutory responsibility includes" (para. 100).

B. *The Montreal Convention Under Canadian Law*

[8] As this Court explained in *Thibodeau* (at para. 47), the *Montreal Convention*, like its predecessor, the *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, 137 L.N.T.S. 11 ("*Warsaw Convention*"), was designed to achieve a number of objectives, including but not limited to the following:

> . . . achieve a uniform set of rules governing damages liability of international air carriers and to provide limitation of carrier liability. These purposes can only be achieved by the *Montreal Convention* if it provides the exclusive set of rules in relation to the matters that it covers. The *Montreal Convention* of course does not deal with all aspects of international carriage by air: it is not comprehensive. But within the scope of the matters which it does address, it is exclusive in that it bars resort to other bases for liability in those areas: M. Clarke, *Contracts of Carriage by Air* (2nd ed. 2010), at pp. 8 and 160-62; G. N. Tompkins, Jr., "The Continuing Development of Montreal Convention 1999 Jurisprudence" (2010), 35 *Air & Space L.* 433, at pp. 433-36.

I return to the purpose of the *Montreal Convention* and the role of the exclusivity principle referenced in *Thibodeau* later in these reasons. For now, it suffices to note that this Court has recognized three central objectives of the *Montreal Convention*: first, it limits carrier liability related to claims for damages for death or bodily injury, damage to or loss of baggage and cargo, and for delay; second, it protects the interests of passengers and shippers by creating presumptive liability for carriers with respect to those claims; and third, it seeks "to create uniform rules governing claims arising from international air transportation" (paras. 41-42 and 44-46).

[9] Canada signed the *Montreal Convention* on October 1, 2001, and deposited its instrument of ratification on November 19, 2002. The *Montreal Convention* was implemented into Canadian law by amendments to the *CAA* (*An Act to amend the Carriage by Air Act*, S.C. 2001, c. 31); these incorporated the *Montreal Convention* in its entirety by reference (*CAA*, Sch. VI; Library of Parliament, *Canada's Approach to the Treaty-Making Process*, Hill Studies 2008-45-E, April 1, 2021, at pp. 2-5).

C. *The Development and Content of the Regulations*

[10] In 2014, the Minister of Transport ("Minister") launched a review of the *CTA*. Following this review, Parliament enacted the *Transportation Modernization Act*, S.C. 2018, c. 10, in 2018; this amended the *CTA* to add s. 86.11, which stated that "[t]he Agency shall, after consulting with the Minister, make regulations in relation to flights to, from and within Canada, including connecting flights" with respect to a number of areas, notably including carriers' obligations in case of flight delay, flight cancellation or denial of boarding, and lost and damaged baggage. The Agency published draft regulations thereafter; these came into force in 2019.

[11] As mandated by the addition of s. 86.11 to the *CTA*, the *Regulations* establish minimum air carrier obligations towards passengers when flights are delayed, cancelled, when a passenger is denied boarding, or when baggage is lost or damaged. This appeal concerns the provisions of the *Regulations* dealing with:

(a) standardized amounts of compensation for international flight delays, cancellations and denial of boarding when the disruption occurs for reasons within a carrier's control and is not required for safety purposes (ss. 12(2)(d), (3)(d) and (4)(d), 19 and 20); and

(b) refunds of baggage fees paid by passengers when the carrier has lost or damaged their baggage on international flights (s. 23).

[12] The *Regulations* also establish air carrier obligations to passengers with respect to other topics not at issue in this appeal including: tarmac delays, seating assignment of children, and the transportation of musical instruments.

II. Federal Court of Appeal, 2022 FCA 211 (de Montigny J.A., Pelletier and Locke JJ.A. Concurring)

[13] The appellants brought their challenge to the *Regulations* in a statutory appeal to the Federal Court of Appeal, which hears appeals from decisions of the Canadian Transportation Agency on questions of law or jurisdiction, per s. 41 of the *CTA*.

[14] Preliminary motions addressed the admissibility of expert evidence. First, the Attorney General of Canada sought leave to present expert evidence on the state practice with respect to air passenger rights under the *Montreal Convention*. Justice

Rennie granted the motion and both parties submitted affidavits by experts (No. A-311-19, January 27, 2020, reproduced in A.R., vol. I, at p. 139).

[15] Second, the Attorney General moved to strike the appellants' expert affidavits, to the extent that they "purported to opine on the interpretation of the *Montreal Convention* and the compatibility of foreign regimes with the *Convention*" (R.F., at para. 18). In an interim order by Justice Mactavish, the motion was dismissed to allow the panel hearing the appeal on the merits to determine the admissibility of the evidence (2020 FCA 172).

[16] In the merits hearing, Justice de Montigny (as he then was), for a unanimous court, dismissed the challenge brought by the airlines, with the exception of the provisions relating to the "temporary loss" of baggage. In arriving at this conclusion, he identified three principal issues:

1. Is the minimum compensation to passengers required by the *Regulations* in the case of delay, cancellation, denial of boarding and lost or damaged baggage, when applied to international carriage by air, authorized by s. 86.11(1)(b)(i) of the *CTA* and compatible with the *Montreal Convention*?

2. Are any of ss. 5 to 8, 10(3), 11(3) to (5), 12(2) to (4), 13 to 18, 23 or 24 of the *Regulations ultra vires* the *CTA* insofar as they apply to

international service because of an impermissible extraterritorial application?

3. Is the *Direction Respecting Tarmac Delays of Three Hours or Less*, SOR/2019-110, issued by the Minister in April 2019 *intra vires* of the authority of the Minister under s. 86.11(2) of the *CTA*?

[17] In reaching that decision, Justice de Montigny agreed that portions of the expert affidavits adduced by the appellants should be struck.

[18] Turning to the substance of the arguments advanced by the appellants, the court considered the compatibility of the *Regulations* with the *Montreal Convention*, and held that the compensation provided for under the *Regulations* is not an action for damages, and that cancellation, denial of boarding, and delay are factual and legal concepts that do not fall within the scope of the exclusivity principle.

[19] Although the Court of Appeal held that the baggage fee provisions of the *Regulations* did not contravene the *Montreal Convention*, it concluded that s. 23(2) of the *Regulations* was *ultra vires* the *CTA* under s. 86.11. It held that s. 86.11 did not provide authority to the Agency to make regulations with respect to the "temporary loss" of baggage. The Agency and Attorney General have not appealed this aspect of the ruling.

[20] The Court of Appeal also rejected the appellants' submission that the *Regulations* were *ultra vires* the *CTA* because they had impermissible extraterritorial application insofar as they apply to flights operating outside of Canada and connecting two foreign states. The appellants have not appealed this aspect of the ruling.

III. Issues

[21] The principal issue on appeal is whether the provisions of the *Regulations* that mandate minimum compensation to passengers on international flights in the case of delay, cancellation, denial of boarding and lost or damaged baggage are *ultra vires* the *CTA*.

[22] The appellants submit that the *Regulations* are *ultra vires* because the impugned provisions run afoul of the exclusivity principle codified in Article 29 of the *Montreal Convention*, and incorporated in the *CAA*. They submit that the Federal Court of Appeal erred by circumventing the exclusivity principle in the *Montreal Convention*, and rely on this Court's decision in *Thibodeau* for the proposition that Articles 17 to 19 of the *Montreal Convention* exhaustively set out the types of air carrier liability that are available in international carriage. The appellants also seek to overturn the decision of the Federal Court of Appeal with respect to the admissibility of portions of the expert affidavits that they rely on to support their arguments with respect to state practice.

[23] The Attorney General and the Agency respond that the *Regulations* are not *ultra vires* the *CTA*, because the *Regulations* do not provide for actions for damages;

rather, they address matters outside the scope of the *Montreal Convention*, including circumstances relating to non-performance of the contract of carriage. They point to foreign jurisprudence, notably from the European Union and the United States, that has interpreted the exclusivity principle in a manner that does not prohibit standardized compensation under passenger protection schemes. They further submit that state practice confirms that the *Regulations* are compatible with the *Montreal Convention* as a majority of the state parties to the *Montreal Convention* have established passenger compensation schemes comparable to Canada's.

[24] The Attorney General argues in the alternative that, even if the *Regulations* are inconsistent with the *Montreal Convention*, they are not *ultra vires* the *CTA* as s. 86.11 of the *CTA* overrides any conflicting provisions of the *Montreal Convention*.

IV. Standard of Review

[25] Section 41(1) of the *CTA* provides for a statutory appeal from the Agency to the Federal Court of Appeal, with leave of that court, on questions of law or a question of jurisdiction (*Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 79, [2018] 2 F.C.R. 573, at paras. 7 and 11). A statutory right of appeal indicates Parliament's intention for appellate standards of review to apply. As the challenge to the *Regulations* is on a question of law, the correctness standard applies (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8).

[26] That said, findings of fact by the Court of Appeal, including those related to questions of foreign law, are reviewable on the standard of palpable and overriding error (*Housen*, at paras. 10, 19 and 26-37).

V. Analysis

[27] As I will explain, the disposition of this appeal turns on the *vires* question, which I answer in the negative. Because the *Regulations* do not provide for an "action for damages", they do not fall within the scope of the *Montreal Convention*'s exclusivity principle. Instead, the *Regulations* are better understood as creating a consumer protection scheme that operates in parallel with the *Montreal Convention*, without trenching on its liability limitation provisions. Because the *Regulations* do not conflict with the *Montreal Convention* as implemented by the *CAA*, there is no basis to conclude that they are *ultra vires* the *CTA*. For that reason, it is not necessary to consider the alternative arguments by the Attorney General and the Agency regarding: first, whether denial of boarding and cancellation qualify as "delays" for the purposes of Article 19; and, second, whether Parliament has directed the Agency to regulate in a manner that is inconsistent with Canada's obligations under the *Montreal Convention*.

[28] My analysis proceeds in three parts.

[29] First, I consider the scope of the *Montreal Convention* and the exclusivity principle. In this, I am guided by this Court's consideration of the *Montreal Convention* in *Thibodeau*.

[30] As I explain below, while state practice is not dispositive in giving meaning to the *Montreal Convention* and resolving this appeal, it still plays a role under the approach to treaty interpretation set out in the *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37 ("*Vienna Convention*"). Thus, I also address the evidentiary issue raised by the appellants, and deal with the circumstances in which expert evidence concerning state practice, and international law more broadly, is and is not admissible.

[31] Second, I consider the scope of the *Regulations*, and explain how they function as a consumer protection scheme that provides for statutory entitlements that are not contingent on showing harm to the claimants suffered as a result of an injury caused by another.

[32] Third, I examine what constitutes a legislative conflict and conclude that, because the *Regulations* fall outside the scope of Article 29, no conflict exists between the *Regulations* and the *Montreal Convention* (as implemented by the *CAA*). As a result, I conclude that the *Regulations* are not *ultra vires* the *CTA*.

A. *What Is the Scope of the Montreal Convention and the Exclusivity Principle?*

[33] The *Montreal Convention* "applies to all international carriage of persons, baggage or cargo performed by aircraft for reward" (Article 1). Article 17 deals with death and bodily injury that occurs between embarkation and disembarkation and destruction, loss, and damage to baggage while the baggage was on board the aircraft

or in the charge of the carrier. Carriers are presumptively liable for "damage sustained" in relation to these sorts of incidents. Similarly, Article 18 provides that a carrier is presumptively liable for "damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the event which caused the damage so sustained took place during the carriage by air". Article 19 states that a carrier is liable for "damage occasioned by delay in the carriage by air of passengers, baggage or cargo". A carrier can exonerate itself from presumptive liability under Article 19 "if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures". Article 20 additionally enables carriers to obtain whole or partial exoneration from liability if the carrier is able to prove that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation.

[34] The *Montreal Convention* also regulates the amount of compensation owed in relation to claims for death or bodily injury, damage or loss of baggage and cargo, and for delay (Articles 21 and 22). Article 26 prevents a carrier from entering into a contract which relieves it of liability or fixes a lower limit for compensation than that set out in the *Montreal Convention*. Article 27 expressly permits carriers to contractually waive defences available under the *Montreal Convention*. Finally, Article 29 codifies the "exclusivity principle" which reads:

> In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract

> or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

[35] This appeal requires the Court to resolve what falls within the scope of an "action for damages". In so doing, I am guided by *Thibodeau*'s instruction that "the terms 'action' and 'damages' must be understood in a broad sense" (para. 60) and "cannot be modeled on national definitions of damages" (para. 77).

(1) *Thibodeau* Does Not Resolve the Question

[36] The scope of the exclusivity principle codified at Article 29 was left open in *Thibodeau*. In that case, passengers on an international flight operated by Air Canada brought claims for damages pursuant to the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), on the basis that Air Canada failed to provide services in both official languages as required by the *Official Languages Act*. The Federal Court awarded damages to compensate the Thibodeaus for breach of their language rights, which "caused them a moral prejudice, pain and suffering and loss of enjoyment of their vacation" (*Thibodeau v. Air Canada*, 2011 FC 876, [2013] 2 F.C.R. 83, at para. 88).

[37] This Court's reasons in *Thibodeau* focused on whether the *Official Languages Act* claims "fall outside the type of actions covered by the *Montreal Convention*" in light of "the underlying source of the claim" (paras. 73 and 75). The Court concluded that the claim was for individualized damages and came within the

scope of the *Montreal Convention*'s exclusivity principle. However, the Court expressly declined to consider the significance of the distinction between individualized damages and standardized damages when it comes to applying the exclusivity principle (para. 81).

[38] This appeal, by contrast, requires the Court to address that which was left open by *Thibodeau*, namely whether the *Montreal Convention* precludes standardized compensation of the kind provided for by the *Regulations*.

(2) The Ordinary Meaning of the Words Chosen by the State Parties When Read in Their Context

[39] The *Vienna Convention* is the starting point for determining the scope of the *Montreal Convention* (see *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at paras. 51-52; *Thomson v. Thomson*, [1994] 3 S.C.R. 551, at pp. 577-78). Article 31 of the *Vienna Convention* directs that the *Montreal Convention*, like all treaties, should be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Or, as this Court has put it, "[t]he point of departure for interpreting a provision of a treaty is the plain meaning of the text" (*Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 S.C.R. 431, at para. 16). The English text of Article 31 of the *Vienna Convention* refers to "ordinary meaning" and this Court in *Febles* referred to "plain meaning", in the English version of its reasons. In French, both the text of the *Vienna Convention* and the Court's

reasons in *Febles* use the expression "*sens ordinaire*". I take these expressions to mean the same thing, that being that the analysis begins with the words chosen by the state parties to the *Montreal Convention*.

[40] Article 29, in explaining the exclusivity principle, states that the *Montreal Convention* applies to "any action for damages, however founded" (*Thibodeau*, at para. 37 (emphasis in original)). The text of Article 29 thus discloses two criteria that guide the application of the exclusivity principle: there must be an "action" that leads to "damages". The term "action" has a meaning well known to the law: *Black's Law Dictionary* defines an "action" as "any judicial proceeding, which, if conducted to a determination, will result in a judgment or decree" ((11th ed. 2019), at p. 37). Similarly, Barron's *Canadian Law Dictionary* defines an "action at law" as "[a] judicial proceeding whereby one party . . . prosecutes another for a wrong or injury done [or] for damage caused" or "[a] proceeding by which one party seeks in a court of justice to enforce some right" ((7th ed. 2013), at p. 9). Recalling that the term "action" must be understood in "a broad sense", I would add that it should be read in light of the growing prominence of non-judicial tribunals and quasi-judicial adjudicators in Canada and elsewhere (see *Thibodeau*, at para. 60). Thus, I do not foreclose the possibility that a proceeding that occurs outside a court of law may, if it shares the characteristics of a judicial proceeding, also fall within the ambit of an "action" for the purposes of Article 29.

[41] *Black's Law Dictionary* defines "damages" as "[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury" or as "the sum of money which a person wronged is entitled to receive from the wrongdoer as compensation for the wrong" (p. 488, citing F. Gahan, *The Law of Damages* (1936), at p. 1). Barron's defines "damages" as "[m]onetary compensation the law awards to one who has suffered damage, loss, or injury by the wrong of another" (p. 89). In the aviation context, tort actions provide for damages so as to "compensate the plaintiff for his injury" by giving "the plaintiff 'the equivalent in money for the actual loss caused by the wrong of another'" and in so doing attempt to "make the plaintiff whole" (P. S. Dempsey, *Aviation Liability Law* (2nd ed. 2013), at p. 705, quoting *Sullivan v. Old Colony St. Ry. Co.*, 83 N.E. 1091 (Mass. 1908), at p. 1092).

[42] The "ordinary meaning" of an "action for damages" thus points towards an action that shares the characteristics of a judicial proceeding and that seeks individualized compensation that is tied to an injury caused by another. Damages awards are "individualized" in that they seek to compensate the plaintiff for the loss suffered as a result of an injury caused by another. An action for damages is distinct from standardized compensation which, as I explain below, may be owed identically to all claimants irrespective of the harm (if any) they have suffered. However, Article 29 cannot be understood in isolation from the broader context of the *Montreal Convention*.

[43] Article 19 focuses on liability for "damage occasioned by delay", indicating a causal relationship between the carrier's actions and the resulting loss or injury to a passenger for which compensation is sought. It also enables carriers to avoid liability by showing that they "took all measures that could reasonably be required to avoid the damage", suggesting that the *Montreal Convention* envisages defences related to due diligence akin to those that can be invoked in a court of law. Article 20 similarly enables a carrier to avoid liability by showing contributory negligence by the person claiming compensation.

[44] Article 22(6) addresses the compensation limits prescribed in Article 21 in a manner that assumes the existence of an action with the characteristics of a judicial proceeding, noting that the limit "shall not prevent the court from awarding . . . the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff". Article 29 refers to individuals "who have the right to bring suit". In framing the exclusivity principle, Article 29 also refers to claims in tort and contract, and the concept of punitive damages, underscoring the link between the limitation of liability and causes of action that can be pursued in courts of law. Article 33(1) states that "[a]n action for damages must be brought . . . before the court of the domicile of the carrier . . . or before the court at the place of destination". Article 35(2), which addresses limitation periods, refers to the "law of the court seised of the case".

[45] The context in which Article 29 must be read thus supports an understanding of the words "action" and "damages" consonant with their "ordinary

meaning" under Canadian law. The relevant articles are framed in a way that plainly envisages actions which share the characteristics of judicial proceedings in a court of law. These elements of the *Montreal Convention* take aim at individualized damages that a passenger must show were "sustained" or "occasioned" as a result of the conduct of a carrier, and the defences a carrier can invoke to exonerate itself.

(3) The Object and Purpose of the *Montreal Convention*

[46] The object and purpose of the *Montreal Convention*, including the history of its development, support the above conclusion. This Court in *Thibodeau* considered the history of the *Montreal Convention*, and how that history informs our understanding of its purpose:

> The *Warsaw Convention* (and therefore its successor the *Montreal Convention*) had three main purposes: to create uniform rules governing claims arising from international air transportation; to protect the international air carriage industry by limiting carrier liability; and to balance that protective goal with the interests of passengers and others seeking recovery. [para. 41]

[47] Limitations on carrier liability were balanced against "a reversal of the burden of proof in [passengers' and shippers'] favour such that, on proof of damage, fault on the part of the carrier would be presumed" (*Thibodeau*, at para. 42 (emphasis added)).

[48] In *Thibodeau*, Justice Abella, dissenting on another point, expanded in her reasons on the history and purpose of the *Montreal Convention*, as received from its predecessor:

> The predecessor *Warsaw Convention* came into being in 1929 to assist the fledgling airline industry take flight. At that time, aviation technology was in its initial stages. Accidents were common, and many pilots and passengers were injured or died as a result. . . .
>
> Airlines responded by requiring passengers to sign waivers relieving carriers of any and all liability in the event of an injury. When accidents happened, those passengers were left with no remedy for their injuries or losses.
>
> The *Warsaw Convention* attempted a protective reconciliation for both airlines and passengers. Airlines would benefit from the introduction of a uniform scheme of limited liability to protect against the financial risks and uncertainty posed by accidents, passengers would benefit from access to predetermined amounts of limited compensation for death or injury — about US$8,300 per passenger — and a prohibition on airlines requiring passengers to waive all liability . . . . [paras. 151-53]

As Justice Abella explained, growing recognition that liability limitations set by the *Warsaw Convention* were too low and a broader shift in the attention of governments towards a more passenger-friendly legal regime resulted in patchwork efforts to expand carrier liability. This led to efforts to update the *Warsaw Convention*, culminating in the *Montreal Convention* of 1999. In comparison to the earlier agreement,

> the state parties to the *Montreal Convention* were more focused on the importance of "ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution" (*Montreal Convention*, preamble; *Ehrlich v. American Airlines, Inc.*, 360 F.3d 366 (2d Cir. 2004), at p. 371 (fn. 4)).
>
> (*Thibodeau*, at para. 159)

[49] From the foregoing, I draw two conclusions relevant to understanding the scope of Article 29. First, the textual focus of the *Montreal Convention* on actions with the characteristics of judicial proceedings that seek to vindicate individualized claims for damages related to death or bodily injury, damage or loss of baggage and cargo, and for delay is consonant with the history of the *Montreal Convention* and predecessor agreements. Efforts over time to find a balance between limitations on carrier liability and the interests of passengers led the state parties and airline industry stakeholders to the approach set out in the *Montreal Convention*. Second, the state parties to the *Montreal Convention* framed the exclusivity principle so as to ensure that such claims could proceed only within the framework provided for therein. This ensured that the compromise struck in the *Montreal Convention* could not be undercut by recourse to actions for damages under local law.

(4) Foreign Jurisprudence

[50] In light of the *Montreal Convention*'s objective of "achieving international uniformity, we should pay close attention to the international jurisprudence and be especially reluctant to depart from any strong international consensus that has developed in relation to its interpretation" (*Thibodeau*, at para. 50). Having considered the text and context of the *Montreal Convention* along with its history and purpose, I turn now to the manner in which courts of other state parties have considered the *Montreal Convention*.

[51] As noted in the reasons of the Federal Court of Appeal, the European Court of Justice ("ECJ") has considered the scope of Articles 19 and 29 in decisions addressing (and rejecting) challenges to the European Union's standardized passenger compensation scheme on the basis that it conflicts with the *Montreal Convention*.

[52] In the first such decision, the ECJ characterized Article 19 as governing "individual" damage resulting from delay that is "inherent in the reason for travelling" and which requires "a case-by-case assessment of the extent of the damage caused" so as to provide "compensation granted subsequently on an individual basis" (*International Air Transport Association v. Department for Transport*, C-344/04, [2006] E.C.R. I-403 (Grand Chamber), at paras. 43-44). The ECJ further noted that Article 19 and the other provisions in Chapter III "lay down the conditions under which any actions for damages against air carriers may be brought by passengers who invoke damage sustained because of delay" (para. 42 (emphasis added)). Determining the nature of the damage sustained by a given passenger as a result of a flight delay implicates a case-by-case analysis. This is distinct from a standardized approach:

> Any delay in the carriage of passengers by air . . . may, generally speaking, cause two types of damage. First, excessive delay will cause damage that is almost identical for every passenger. . . . Second, passengers are liable to suffer individual damage, inherent in the reason for travelling, redress for which requires a case-by-case assessment of the extent of the damage caused and can consequently only be the subject of compensation granted subsequently on an individual basis.
>
> It is clear from Articles 19, 22 and 29 of the Montreal Convention that they merely govern the conditions under which, after a flight has been delayed, the passengers concerned may bring actions for damages by way

> of redress on an individual basis, that is to say for compensation, from the carriers liable for damage resulting from that delay.
>
> It does not follow from these provisions, or from any other provision of the Montreal Convention, that the authors of the Convention intended to shield those carriers from any other form of intervention, in particular action which could be envisaged by the public authorities to redress, in a standardised and immediate manner, the damage that is constituted by the inconvenience that delay in the carriage of passengers by air causes, without the passengers having to suffer the inconvenience inherent in the bringing of actions for damages before the courts. [paras. 43-45]

[53] The ECJ built on this decision in noting that compensation for the loss of time inherent in a delay that is "suffered identically by all passengers" falls outside the scope of Article 19 and is not subject to the exclusivity principle (*Nelson v. Deutsche Lufthansa AG*, C-581/10 and C-629/10, [2013] 1 C.M.L.R. 42 (p. 1191), at paras. 49-56).

[54] Courts in the United States have also considered the scope of the *Montreal Convention* and its predecessors. The United States Supreme Court, in an appeal addressing what was covered by the liability cap associated with "damage sustained" in international carriage, linked damages recoverable under the *Warsaw Convention* to "compensation for harm incurred" as determined by the domestic law of contracting parties (*Zicherman v. Korean Air Lines Co.*, 516 U.S. 217 (1996), at p. 227). Three years later, in *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155 (1999), at p. 175, the United States Supreme Court described the *Warsaw Convention*'s pre-emptive effect (as amended by *Montreal Protocol No. 4 to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at*

Warsaw on 12 October 1929 as amended by the Protocol done at The Hague on 28 September 1955, 2145 U.N.T.S. 31) as "preclud[ing] passengers from bringing actions under local law when they cannot establish air carrier liability under the treaty" (emphasis added). The United States Supreme Court concluded that "the [Warsaw] Convention's preemptive effect on local law extends no further than the Convention's own substantive scope" (p. 172).

[55] And, in an appeal before the Second Circuit Court of Appeals considering whether a private suit for discrimination was precluded by the *Warsaw Convention*, Circuit Judge Sotomayor (as she then was) described the remedial system it created as one that is "designed to protect air carriers against catastrophic, crippling liability by establishing monetary caps on awards and restricting the types of claims that may be brought against carriers" (*King v. American Airlines, Inc.*, 284 F.3d 352 (2002), at p. 357). She further noted that, while the discrimination claim was barred by the *Warsaw Convention*, the plaintiffs could avail themselves of "other remedies", including filing "a complaint with the Secretary [of Transportation]" who, under United States law, "has the authority to address violations of [*Federal Aviation Act*, 49 U.S.C. § 41310(a)] provisions, including the power to file civil actions to enforce federal law" (p. 362).

[56] The appellants submit that the ECJ decisions addressed are "highly controversial" and "wrong and irreconcilable with *Thibodeau*" (A.F., heading of para. 60). They refer to academic articles criticizing the decisions, and submit that this

Court should consider *International Air Transport Association v. Department for Transport* and its progeny as having no persuasive effect. While academic articles can provide useful insights and perspectives, they can only be persuasive, not binding (*R. v. McGregor*, 2023 SCC 4, at para. 102; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at para. 274, per Abella and Karakatsanis JJ., concurring; see also *R. v. Kirkpatrick*, 2022 SCC 33, at para. 247).

[57] More importantly, there is no basis on which to disavow the reasoning in the ECJ or the American decisions. Rather, they help to illustrate the meaning of an "action for damages" and the scope of the *Montreal Convention*, and suggest a meaning that is consonant with the text, context and purpose considered above. These cases establish that an "action for damages" seeks to address individualized harm on a case-by-case basis. The term, within the context of the *Montreal Convention*, does not include standardized compensation that is owed identically to all passengers impacted by a given set of circumstances irrespective of the harm suffered.

(5) Consideration of State Practice

[58] Before concluding my review of the scope of the *Montreal Convention* and Article 29, I would address the question of state practice, which both parties rely on.

[59] Per Article 31(3) of the *Vienna Convention*, "[t]here shall be taken into account together with the context . . . any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" (see

also *Yugraneft Corp. v. Rexx Management Corp.*, 2010 SCC 19, [2010] 1 S.C.R. 649, at para. 21). The Attorney General notes that the practice of parties to a treaty is of utmost importance in its interpretation because "it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty" (R.F., at para. 80, quoting *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, I.C.J. Reports 1999, p. 1045, at para. 49). Thus, I cannot agree with the appellants when they submit that state practice should be considered only "when the text of the treaty is obscure or ambiguous" (A.F., at para. 100).

[60] The Federal Court of Appeal found that 73 state parties to the *Montreal Convention* have adopted schemes providing for minimum standardized compensation in case of cancellation, denied boarding and/or delay. The adoption of these schemes, without objection from other state parties, reveals common acceptance by state parties that they are compatible with the *Montreal Convention* and can operate in parallel to it (paras. 167-68). The Federal Court of Appeal stated:

> . . . state practice confirms that standardized compensation for the inconvenience resulting from flight cancellation, denial of boarding and/or delay is compatible with and can operate alongside the individual damages prescribed by the *Montreal Convention*. The jurisprudence of the ECJ and Regulation 261/2004 constitute the law in Europe, and the criticism of scholars (including those of the two professors who have filed expert reports on behalf of the appellants) does not supersede state practice when it comes to interpreting an international treaty. [para. 170]

[61] The appellants argue that this finding was in error, and that state practice that is "driven by considerations other than the member States' obligations pursuant to

the [*Montreal*] *Convention*" cannot constitute state practice for the purposes of Article 31(3) of the *Vienna Convention* (para. 133). The Attorney General responds that "state practice" means "any practice that shows that the parties 'have taken a position regarding the interpretation of the treaty'" (R.F., at para. 84).

[62] For present purposes, I will take the appellants' argument at its highest and assume that the practice of the 73 state parties who have adopted schemes providing for minimum standardized compensation in case of cancellation, denied boarding and/or delay does not constitute "state practice". Even assuming, without deciding, that there is no state practice supporting the view that an "action for damages" does not include a scheme for standardized compensation, I nonetheless conclude that an "action for damages" does not include a scheme for standardized compensation. This conclusion is supported by the ordinary meaning of "action for damages", the history, object and purpose of the *Montreal Convention*, and foreign jurisprudence interpreting the *Montreal Convention*.

(6) The Exclusivity Principle Precludes Actions for Individualized Damages

[63] Based on all the foregoing, Article 29 should be understood as precluding actions for damages that share the characteristics of judicial proceedings in courts of law, and that seek individualized compensation for death or bodily injury, damage or loss of baggage and cargo, and for delay in international carriage. The text, object, and purpose reflect the compromise that lies at the heart of the *Montreal Convention*. Passengers benefit from an evidentiary presumption under Articles 17 to 19 that allows

them to pursue damages without showing fault by a carrier. Articles 21 and 22 shield carriers from unlimited liability in these matters. Foreign jurisprudence has given the *Montreal Convention* a meaning consistent with that which I have set out above.

[64] In light of this, I need not have recourse to the "supplementary means of interpretation" provided for under Article 32 of the *Vienna Convention*, though I note that the Attorney General points to the preparatory work of the treaty (one of the supplementary means provided for under Article 32) as further reinforcing my conclusion above.[1]

B. *The Test for Expert Evidence on Questions of International Law*

[65] In the course of dealing with state practice, the Federal Court of Appeal and the parties addressed the admissibility of expert evidence regarding international law. Before I address this, I would note an important distinction between foreign law and international law. Foreign law is the domestic law of other states (*Hunt v. T&N plc*, [1993] 4 S.C.R. 289, at pp. 308-9). International law is "the law among states, but it is also a body of law enunciating certain rights and obligations that states have vis-à-vis non-state actors (such as individuals, international organizations, and other entities) and, to a more limited extent, imposing certain obligations on non-state actors in areas

[1] The Attorney General notes that minutes from the International Conference on Air Law in Montréal in May 1999 suggest that the focus for the drafters of Article 29 was on "the types of actions which could be brought before the Courts" and on ensuring that it would not be "possible to circumvent [the *Montreal Convention*'s] provisions by bringing an action for damages in the carriage of passengers, baggage and cargo in contract or in tort or otherwise" (International Civil Aviation Organization, *International Conference on Air Law*, vol. I, *Minutes*, Doc. 9775-DC/2 (2001), at p. 235).

of concern to the international community" (J. H. Currie et al., *International Law: Doctrine, Practice, and Theory* (3rd ed. 2022), at p. 14). Foreign law is treated as a question of fact that has to be pleaded and proved, generally by way of expert evidence (*Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, [2020] 1 S.C.R. 166, at para. 97). International law is treated as a question of law. As I explain below, the admissibility of expert evidence concerning international law depends on the same legal criteria as the admissibility of expert evidence in any other area of Canadian law.

[66] In the proceedings before the Federal Court of Appeal, the Attorney General, under r. 369 of the *Federal Courts Rules*, SOR/98-106, sought an order striking out portions of expert affidavits filed by the appellants.

[67] In the merits proceedings, Justice de Montigny ruled that "[t]he normative content of international law falls within the bailiwick of the court's exclusive jurisdiction" and therefore the offending paragraphs of the affidavits should be struck (C.A. reasons, at para. 66).

[68] Justice de Montigny noted that the case law has not been consistent in its treatment of expert evidence regarding international law. Some appellate courts have taken judicial notice of international law (see *Turp v. Canada (Foreign Affairs)*, 2018 FCA 133, [2019] 1 F.C.R. 198) or have otherwise considered questions of customary and conventional international law without recourse to expert evidence (e.g., *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3 (considering peremptory norms of international law); *Yugraneft Corp.*, at paras. 19 and

21 (considering the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Can. T.S. 1986 No. 43)). However, on at least two occasions, courts have admitted expert evidence on questions of international law (*Holding Tusculum B.V. v. S.A. Louis Dreyfus & Cie*, 2006 QCCS 2827, at para. 16 (CanLII); *Fédération des travailleurs du Québec (FTQ - Construction) v. Procureure générale du Québec*, 2018 QCCS 4548, at para. 20 (CanLII)).

[69] The appellants, the Attorney General and the Federal Court of Appeal have sought clarification on this issue. I agree that such clarification is timely.

(1) *Mohan* Governs Expert Evidence on Questions of International Law

[70] The appellants and the Attorney General are, for the most part, *ad idem* that the *Mohan* framework be used to determine the admissibility of the expert evidence. The appellants submit that "[e]xpert evidence is necessary when it is likely to provide information outside the judge's experience and knowledge" (A.F., at para. 107). The appellants submit that it may be "necessary for a court to receive expert evidence where the normative content of international law is unsettled, controversial or emerging" (para. 111). They further argue that Canadian judges may find it difficult to ascertain the content of international law because it implicates practice in foreign states, making expert evidence important in this context. The Attorney General agrees that *Mohan* governs, but argues that expert evidence on a legal issue before the court is inadmissible as such expert evidence would usurp the court's role. Justice de Montigny, in weighing

these arguments, noted that whether "international law [should] be treated as a question of fact" is "a vexed question" (C.A. reasons, at para. 46).

[71] While some courts of first instance deal infrequently with international law, others do so with more regularity. For example, the Federal Court often encounters international legal issues due to the nature of its jurisdiction. The approach of some courts of first instance to expert evidence has been described as "inconsistent, and often under-reasoned" (G. van Ert, *Recent Federal Courts decisions on expert evidence of international law*, December 31, 2018 (online); see also G. van Ert, "The Admissibility of International Legal Evidence" (2005), 84 *Can. Bar Rev.* 31). As a result, clarification of how to determine the admissibility of expert evidence, when such is necessary, may be beneficial.

[72] The test from *Mohan* should be applied in the context of international law as it is in other circumstances where expert evidence is sought to be admitted. Under the *Mohan* test, expert evidence is admissible when it is "necessary in the sense that it provides information 'which is likely to be outside the experience and knowledge of a judge . . .'" (p. 23, quoting *R. v. Abbey*, [1982] 2 S.C.R. 24). The test is as follows: At the first stage, judges must consider the threshold requirements of admissibility set out in *Mohan*. There are four threshold requirements: ". . . (1) relevance; (2) necessity in assisting the trier of fact; (3) absence of an exclusionary rule; and (4) a properly qualified expert . . ." (*White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182, at para. 19, citing *Mohan*, at pp. 20-25). At the

second stage — the discretionary "gatekeeping" stage — judges must balance the potential risks and benefits of admitting the evidence and determine whether the benefits outweigh the risks. *Mohan*'s "basic structure for the law relating to the admissibility of expert opinion evidence" is applicable in a wide range of contexts outside the experience of judges (*White Burgess*, at para. 19). See, for example, *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011 SCC 27, [2011] 2 S.C.R. 387, at para. 75 (intellectual property); *Clayson-Martin v. Martin*, 2015 ONCA 596, 127 O.R. (3d) 1 (medical reports); and *R. v. Abdullahi*, 2021 ONCA 82, 399 C.C.C. (3d) 397, at para. 34 (linguistics and translation).

[73] As with areas of the law such as those noted above, from time to time difficult and contentious questions of international law will arise where judges will be assisted in carrying out their functions by appropriate expert evidence. Questions of conventional international law may require judges to have regard to questions of fact that are susceptible to expert evidence including, *inter alia*, foreign law (in applying a treaty, for example), state practice in a treaty's application, or the authentic text of a treaty in a foreign language (see G. van Ert, *Using International Law in Canadian Courts* (2nd ed. 2008), at pp. 57 and 63). Similarly, in the context of customary international law, "alleged customs may be contested and require proof" (p. 67). *Mohan* is sufficiently flexible to enable courts to admit expert evidence on such questions, where it is needed for a court to carry out its functions.

[74] To summarize, then, the appropriate framework is the following. Where expert evidence satisfies *Mohan*'s criteria, it may be considered. Otherwise, judges should proceed as they would for any other question of law — that is, on the basis of the submissions of the parties before the court and authorities on which they rely.

[75] This Court on various occasions has considered the meaning of treaties without recourse to expert evidence, including in *Thibodeau* and *Yugraneft Corp.* Looking to the principles of treaty interpretation codified in the *Vienna Convention*, and undertaking an examination of the text, object, and purpose of a treaty, is within the capacity of Canadian courts.

[76] In *Suresh*, this Court considered the peremptory norm of international law regarding the prohibition of torture; this required the Court to have regard to international conventions which Canada has ratified and to *jus cogens* norms of international law. The Court had recourse to academic texts, foreign jurisprudence, as well as the submissions of parties and interveners. These sources sufficed for the Court to consider the status of the prohibition against torture as a matter of international law.

[77] Though the Court did not rely on *Mohan* in these cases, its approach to dealing with questions of international law without recourse to expert evidence is consistent with *Mohan*'s suggestion that "[i]f on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary" (p. 24).

[78] Finally, I note that evidence law jurisprudence establishes a number of cautionary rules that apply with equal force in the context of expert evidence sought to be admitted regarding international law. First, as noted in *Quebec (Attorney General) v. Canada*, 2008 FC 713, 359 F.T.R. 1, aff'd 2009 FCA 361, 400 N.R. 323, aff'd 2011 SCC 11, [2011] 1 S.C.R. 368, the role of an expert is "only to assist the court in assessing complex and technical facts. It must never be forgotten that, ultimately, it is the court that must decide questions of law" (para. 161). Furthermore, "[e]xpert opinions will be rendered inadmissible when they are nothing more than the reworking of the argument of counsel participating in the case" (*Surrey Credit Union v. Willson* (1990), 45 B.C.L.R. (2d) 310 (S.C.), at p. 315).

[79] In applying *Mohan*, the admissibility of expert evidence is within the court's discretion so long as the threshold requirements of admissibility are satisfied. Given the variety of contexts in which expert evidence is sought to be adduced on questions of international law, the admissibility of such evidence is best left as a matter of judicial discretion rather than being subject to a fixed and invariable rule.

C. *What Is the Scope of the Regulations?*

[80] I now turn to the *Regulations*, the manner in which they are enforced and the compensation that they provide for passengers who are affected by a delay, cancellation, denial of boarding, or damage or loss of baggage.

(1) Compensation

[81] Under the *Regulations*, a carrier must pay compensation to a passenger when the carrier cancels or delays a flight for reasons within its control and notifies the passenger 14 days or less before the flight, except if the cancellation or delay is required for safety purposes (ss. 11 and 12(2)(d) and (3)(d)). Compensation must also be paid when a passenger is denied boarding for reasons within the carrier's control, unless required for safety (s. 12(4)(d)).

[82] Sections 19 and 20 of the *Regulations* set out the amount of compensation payable in the event of delay, cancellation or denial of boarding. The amount of compensation is calculated, in the case of delay or cancellation, by reference to the size of the carrier and the time by which the passenger's arrival at the intended destination is delayed (s. 19(1)). For denial of boarding, compensation is calculated by reference to the time by which the passenger's arrival at the intended destination is delayed.

[83] Passengers are also entitled to compensation for lost or damaged baggage. In those instances, the *Regulations* stipulate that the passenger is to be paid the compensation they would be owed under the *Montreal Convention*, in addition to a refund of their baggage fees (s. 23(1)).

[84] So, although the *Regulations* purport to address "compensation for inconvenience" (see ss. 12(2)(d), (3)(d) and (4)(d) and 21), the compensation is not contingent on inconvenience *per se*, as ss. 19 and 20 do not have regard to individualized harm or inconvenience. For example, a passenger whose flight is delayed and who uses the opportunity to visit a relative during the layover enjoys the

same entitlement to compensation under the *Regulations* as does a fellow passenger for whom the delay occasioned considerable inconvenience.

[85] The *Regulations* do not provide for compensation that is individualized in the manner of a damage award. The compensation for delay, cancellation, denial of boarding or loss or damage to baggage is not contingent "on proof of damage", is not linked to a showing of "damage sustained" or "occasioned by delay" to the claimant, and does not vary depending on the extent of the harm (if any) that results from wrongdoing by the carrier. The fact that the compensation owed under the *Regulations* may vary depending on whether it relates to a cancellation, delay, or denial of boarding, the amount of time that a passenger was delayed, and the size of the carrier does not change the standardized nature of the compensation, which addresses conditions experienced "identically by all passengers" (*Nelson*, at para. 52).

(2) Enforcement

[86] The obligations imposed on carriers by the *Regulations* "are deemed to form part of the terms and conditions set out in the carrier's tariffs in so far as the carrier's tariffs do not provide more advantageous terms and conditions of carriage than those obligations" (*CTA*, s. 86.11(4)). When the *Regulations* were promulgated, the *Air Transportation Regulations*, SOR/88-58 ("*ATR*"), were also amended to require carriers to incorporate the *Regulations* into tariffs applicable to international carriage (s. 122(c)(xxi)). In this manner, the obligations with respect to compensation set out in the *Regulations* become part of the carrier's conditions of carriage.

[87] If a carrier fails to compensate a passenger in accordance with the *Regulations*, the passenger can file a complaint with the Agency (*CTA*, ss. 85.04(1)(a) and (c) and 86.11(4)). A complaint resolution officer first attempts to resolve the complaint through mediation (s. 85.05(1)). If unsuccessful, the officer will adjudicate the matter (s. 85.06). If the officer finds that a carrier has not applied the terms and conditions of carriage set out in its tariff (including the *Regulations*), that officer can order the carrier to apply the relevant terms and conditions, including by paying the amount set out in the *Regulations* (*ATR*, s. 113.1; *CTA*, s. 85.07(1) and (3)). Complaint resolution officers can also consider prior decisions regarding whether a flight delay, cancellation or denial of boarding was within a carrier's control (*CTA*, ss. 85.08 and 85.14). The *CTA* (s. 86(1)(h)(iii.1)) further enables the Agency to make applicable to some or all passengers on the same flight a decision respecting a complaint in the case of flight delay, cancellation, or denial of boarding. In addition to addressing passenger complaints, the Agency can also enforce the *Regulations* by imposing administrative monetary penalties not exceeding $5,000 (in the case of an individual) or $250,000 (in the case of a corporation) (s. 177(1)).

[88] Read together, these provisions of the *CTA* and the *Regulations* enable the Agency to enforce carrier compliance with the compensation provided for in the *Regulations*, and to extend compensation owed to one passenger to others who are impacted by the same disruption.

(3) The *Regulations* Operate as a Consumer Protection Scheme

[89] The Attorney General and the Agency submit that the *Regulations* mark an evolution in the government's approach away from a "piecemeal" system that relied on carrier-led tariff development towards one that ensures predictable payments to passengers who are inconvenienced during carriage by air to, from or within Canada. The *Regulations* were put in place, following a review of the *CTA*, with a view to correcting an "'acute imbalance in market power' between air passengers and air carriers, and the 'unusual situation' where Canadian air passengers had to rely on foreign customer protection measures when traveling abroad" (R.F., Attorney General, at para. 11). Parliament responded to this situation by directing the Agency to put in place a system of standardized compensation.

[90] The *Regulations* are, thus, best understood as providing for statutory entitlements under a consumer protection scheme. Passengers claiming under the *Regulations* need not show what harm, if any, they have suffered in order to claim compensation. The *Regulations* do not tie compensation to harm and inconvenience; rather they mandate compensation for delay, cancellation or denial of boarding based on the time by which a passenger's arrival at their ultimate destination is delayed. Unlike the *Montreal Convention*, the *Regulations* do not enable a carrier to avoid having to pay compensation otherwise due to a passenger by invoking a due diligence defence or pointing to contributory negligence. As long as the disruption in question occurred for a reason within the carrier's control and was not required for safety purposes, the compensation is fixed. Moreover, the Agency is empowered to extend a finding that compensation is owed to one passenger to other passengers similarly

situated. Compensation owed under the *Regulations* for lost or damaged baggage is tied to the baggage fees charged by the carrier, not to the harm. The *Regulations* are enforced by Agency-designated complaint resolution officers whose primary adjudicative duty consists of ensuring that carriers adhere to terms set in their tariffs.

D. *The Regulations Do Not Conflict With the Montreal Convention and Thus Are Not Ultra Vires the CTA*

[91] I now turn to the central issue in this appeal: are the *Regulations ultra vires* the *CTA*? As I shall explain, they are not. The *Regulations* fall outside the scope of Article 29 of the *Montreal Convention* and therefore there is no conflict between the *CTA* and the *Montreal Convention*, as implemented by the *CAA*.

(1) What Constitutes a Conflict?

[92] In *Thibodeau*, this Court explained that

> [c]ourts presume that legislation passed by Parliament does not contain contradictions or inconsistencies and only find that they exist when provisions are so inconsistent that they are incapable of standing together. Even where provisions overlap in the sense that they address aspects of the same subject, they are interpreted so as to avoid conflict wherever this is possible. [para. 89]

Thus, to find a conflict between the *Montreal Convention* and the impugned *Regulations*, the latter must be "so inconsistent with" the former that they are "incapable of standing together" (*Daniels v. White*, [1968] S.C.R. 517, at p. 526).

[93] The inquiry into whether one statute conflicts with another is distinct from the presumption that Parliament legislates in conformity with international law and "the rule of judicial policy that, as a matter of law, courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations" (*R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at para. 53). Where, as here, the treaty in question has been implemented in Canadian law, the test for statutory conflicts applies and there is no need to have regard to the presumption of conformity.

(2) The *Regulations* Do Not Provide for an "Action for Damages" and, as a Consequence, There Is No Conflict

[94] Because the *Regulations* do not provide for an action for damages, but instead create an entitlement to standardized compensation that does not seek to measure a passenger's loss, they fall outside the scope of Article 29 and do not conflict with the *Montreal Convention*. The two forms of passenger compensation envisaged by the *Regulations* and the *Montreal Convention* are capable of "standing together". The bargain at the centre of the *Montreal Convention* remains undisturbed. In actions for damages, passengers continue to enjoy certain evidentiary presumptions "on proof of damage" (*Thibodeau*, at para. 42) which address "the need for equitable compensation based on the principle of restitution" (*Montreal Convention*, preamble). Carriers remain shielded from unlimited liability arising from actions for damages related to claims for death or bodily injury, damage or loss of baggage and cargo, and for delay.

[95] It is helpful to look beyond the context of the *Montreal Convention* to other instances in which courts have considered whether a statutory entitlement is an award of damages. In *Brake v. PJ-M2R Restaurant Inc.*, 2017 ONCA 402, 135 O.R. (3d) 561, the Court of Appeal dealt with whether a plaintiff was entitled to statutory entitlements (termination and severance pay) under the *Employment Standards Act, 2000*, S.O. 2000, c. 41, in addition to damages, or whether this would result in double recovery. In concluding that the compensation owed under the *Employment Standards Act* was not an award of damages and there was no double recovery, the court characterized the compensation payable under the *Employment Standards Act* as "minimum entitlements" that "are not linked to any actual loss suffered by the employee, but are payable in any event" (para. 116, quoting *Boland v. APV Canada Inc.* (2005), 250 D.L.R. (4th) 376 (Ont. Div. Ct.), at para. 22). The entitlements could be contrasted with damages in the employment context, which seek to correct the loss suffered by a plaintiff through monetary compensation, having regard to factors such as "the age of the employee, the likely length of time to find another position, the actual finding of another position etc." (para. 117, quoting *Boland*, at para. 23). Concluding that no conflict exists between the statutory entitlements provided for under the *Regulations* and the damages limitations under the *Montreal Convention* is consistent with the approach in *Brake* and a correct interpretation of the *Regulations*.

[96] The appellants raise two further arguments with respect to the purported incompatibility of the *Regulations* with the *Montreal Convention*, neither of which changes the outcome. First, they submit that the compensation provided for under the

Regulations amounts to "non-compensatory damages" under the meaning of Article 29. This argument does not get off the ground. The meaning of "damages" examined above also applies to preclude a finding that the compensation provided for by the *Regulations* amounts to "non-compensatory damages". Furthermore, the text of Article 29 places "non-compensatory damages" alongside "punitive" and "exemplary" damages deriving from "any such action", i.e., any such "action for damages". This construction establishes that the non-compensatory damages in question are a subset of the damages precluded by Article 29's exclusivity principle and not a standalone category. I therefore do not accept that this wording in Article 29 serves to broaden the exclusivity principle.

[97] Second, the appellants submit that, because claims for compensation under the *Regulations* can be vindicated in court, the *Regulations* do in fact give rise to "actions for damages" despite the primacy of the administrative enforcement mechanism under the *CTA*. But the fact that claims payable pursuant to the *Regulations* can be vindicated by way of an action in court does not change the nature of the compensation or the *Regulations* themselves. The *Regulations* make no provision for claims to be filed in court. And even assuming, without deciding, that judicial proceedings that seek to vindicate a claim under the *Regulations* amount to an "action" for the purposes of the *Montreal Convention*, the claim would not be for "damages". Where such claims are filed in courts of law, the claim is not in the nature of one for damages, because the claim is not tied to any harm suffered by the claimant and does not require any "case-by-case assessment" or relate to "compensation for harm

incurred" (*International Air Transport Association v. Department for Transport*, at para. 43; *Zicherman*, at p. 227). Instead, the claim is for payment of an amount that is already owed as a matter of standardized entitlements provided for under a consumer protection scheme.

[98] The *Regulations* impose additional costs on carriers by incorporating certain terms in their tariffs, but these costs are simply a condition of licensure for domestic and international carriers to access the Canadian air carriage market. In signing on to the *Convention* and the "protective reconciliation" between the interests of passengers and carriers that it engendered (*Thibodeau*, at para. 153, per Abella J., dissenting), 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.

[99] This conclusion is consistent with this Court's holding, in *Thibodeau*, that the *Convention* is "not comprehensive" but is exclusive "in relation to the matters that it covers", those being "rules governing damages liability of international air carriers" (para. 47). In the absence of any conflict between the *Montreal Convention* (as implemented by the *CAA*) and the *Regulations*, there is no basis to find that the *Regulations* are *ultra vires* the *CTA*.

E. *It Is Unnecessary To Deal With Alternative Arguments in Favour of Validity of the Regulations*

[100] The respondents raise two alternative arguments in favour of the validity of the *Regulations*. First, they argue that the *Regulations* are *intra vires* the *CTA* because the *Montreal Convention* does not address cancellation and denial of boarding and therefore does not preclude compensation relating to these sorts of travel disruptions.

[101] Second, the respondents submit that, even if the *Regulations* are inconsistent with the *Montreal Convention*, they reflect Parliament's clear intent and, as such, s. 86.11 of the *CTA* overrides any conflicting provision of the *Montreal Convention*.

[102] In light of my conclusion above that none of the impugned *Regulations* provisions provide for an "action for damages", it is unnecessary to address these alternative arguments.

VI. Conclusion and Disposition

[103] The appellants urge this Court to conclude that the exclusivity principle codified in Article 29 prevents Canada from putting in place an air passenger protection scheme through statutory entitlements. For the reasons outlined above, I disagree.

[104] The appeal is dismissed. Costs will go to the Attorney General of Canada. The Agency did not seek costs and, accordingly, no costs are awarded to the Agency.

Appeal dismissed with costs.

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