Class actions to watch for in the air transport sector

April 5, 2018

Many Canadians travel by airline. Aside from the pleasure of travel, certain inconveniences may sometimes occur, for both air carriers and passengers alike. A class action suit is often the preferred procedural vehicle for customers to assert their rights.

Recent class actions authorized by the Quebec courts raise interesting issues. The courts will be considering the application of the *Convention for the Unification of Certain Rules for International Carriage by Air* (the "**Montreal Convention**") and of the right of passengers to claim moral damages, as well as the rates and accuracy of pricing under the *Canada Transportation Act*[1] will be a subject of debate.

Claims for moral damages

Whether moral damages may be recovered pursuant to the Montreal Convention remains a thorny issue and the topic of much judicial discussion.

The Court of Appeal decisions in *Croteau* v. *Air Transat AT inc*.[2] and *Plourde* v. *Service aérien FBO inc. (Sky Service F.B .O. Inc.)*[3] appeared to have settled the matter. In each of these cases, the Court of Appeal concluded, among other things, that the initial court judge had reason to refuse to authorize the class action with respect to the conclusions whereby class members sought compensation for psychological damage suffered during a flight. Such damage is not compensable pursuant to Article 17 of the Montreal Convention, which establishes the liability of the air carrier in the event of death or bodily injury of passengers.

However, these cases did not address the matter of moral damages occasioned by a delay pursuant to Article 19 of the Montreal Convention, which stipulates that the air carrier is liable for damage occasioned by a delay.

In 2012, in the matter of *Yalaoui* v. *Air Algérie*[4]*,* the Superior Court authorized a class action for the members of a group of passengers who were on a direct flight from Algiers to Montréal that had been delayed for approximately 15 hours. More specifically, the members claimed moral damages for the inconveniences occasioned by the delay, pursuant to Article 19 of the Montreal Convention. In 2017, the Superior Court[5] dismissed the action on the basis that the air carrier had taken all of the reasonable measures to ensure the proper maintenance and repair of the aircraft, without being able to avoid the delay. The matter of moral damages was, therefore, not addressed.

This question of awarding of moral damages recently resurfaced in *Auguste* v. *Air Transat*[6]*.* The

Copyright (c) Lavery, de Billy, S.E.N.C.R.L. - L.L.P.

group, composed of more than 120 passenger ticketholders, who were left in Port-au-Prince by the air carrier, received authorization to initiate a class action against the air carrier. The members of the group are claiming, pursuant to Article 19 of the Montreal Convention, moral damages occasioned by a two-day delay.

In the same case, the Superior Court[7] authorized in 2016 that the notices to the members, who were directed to the Haitian community, be broadcast over the airwaves of a Haitian radio station so as to reach the maximum number of persons. This method of broadcasting the notice is, at first blush, exceptional, yet the Court, using its discretion, was of the opinion that the interest of the members warranted it. The hearing is scheduled to take place in April 2018.

Overcharging

In 2013, in the case of *Chabot* v. *WestJet,*[8] a class action was authorized against an air carrier. The members of a group allege that the carrier overcharged them for a companion seat or for a seat adapted to their condition due to a disability or surplus weight. The authorized group was composed of passengers with a functional disability and their travelling companions, which occurred on flights operated by the air carrier since December 5, 2005.

The matter is of interest in that it is the result of a decision rendered by the Canadian Transportation Agency. An independent quasi-judicial tribunal and regulator, the Agency has all of the powers of a Superior Court with respect to the exercise of its jurisdiction in connection with national transportation matters. On January 10, 2008, the Agency ruled that air carriers could not demand a fee for additional seats needed to accommodate individuals having certain significant disabilities.[9]

Thus, in the context of the class action pending before the Superior Court, it must be determined whether the air carrier's pricing policy is discriminatory or abusive and, if so, whether moral and punitive damages may be awarded.

In connection with this same matter, the Court of Appeal[10] confirmed in 2016 that the Superior Court had jurisdiction to hear the case, which is based on contractual liability and that, in so doing, it could interpret the *Canada Transportation Act*[11], since the case does not fall within the exclusive jurisdiction of the Canadian Transportation Agency. In 2017, the Superior Court[12] split the class into two groups distinguishing between domestic and international travellers. The matter is pending.

Still on the subject of overcharging, the authorization to exercise a class action was granted in *Choquette* v. *Air Canada*[13] for the members of a group who allege having to pay fuel surcharges when purchasing their airline tickets. As in *Chabot* v. *WestJet,*[14] the Superior Court deemed competent to hear the matter, absent a legal provision granting exclusive jurisdiction to the Canadian Transportation Agency. The proceedings are also ongoing.

Accuracy of Prices

Finally, the matter of the *Union des consommateurs* v. *Air Canada*[15] raises the question of the accuracy of the prices advertised by an air carrier. In 2014, the Court of Appeal authorized the exercise of a class action by customers who would have paid a higher price than that which was posted by the air carrier in its ads and on its website. In February 2018, notices to the attorney generals of Quebec and Canada were filed in the court record to challenge the constitutionality of the *Consumer Protection Act* with regards to travel tickets advertised and sold on an air carrier's website. The case is ongoing.

Copyright (c) Lavery, de Billy, S.E.N.C.R.L. - L.L.P.

Several important questions in the context of class action proceedings against air carriers will be considered by the Courts. The answers could impact the rights of customers and air carriers, as well as those of their insurers.

---

1. *Canada Transportation Act*, S.C. 1996, c 10
2. *Croteau v. Air Transat AT Inc., 2007 QCCA 737*
3. *Plourde* v. *Service aérien FBO inc. (Sky Service F.B.O. Inc)*, 2007 QCCA 739
4. *Yalaoui v. Air Algérie, 2012 QCCS 1393*
5. Yalaoui v. Air Algérie, 2017 QCCS 5479
6. *Auguste* v. *Air Transat*, 2015 QCCS 3923
7. *Auguste* v. *Air Transat*, 2016 QCCS 604
8. *Chabot v. WestJet,* 2013, QCCS 5297
9. Decision no 6— AT-A-2008
10. *WestJet v. Chabot, 2016 QCCA 584; Application for leave to appeal to the Supreme Court of Canada was dismissed WestJet v. Nicole Chabot, in her quality of tutor to her minor child N.C., et al., 2016 CanLII 72704 (SCC)*
11. *Canada Transportation Act, S.C. 1996, c. 10*
12. *Chabot* v. *WestJet*, 2017 QCCS 4942
13. *Choquette v. Air Canada,* 2017 QCCS 234
14. *Westjet v. Chabot,* 2016 QCCA 584
15. *Union des consommateurs v. Air Canada,* 2014QCCA 523

Copyright (c) Lavery, de Billy, S.E.N.C.R.L. - L.L.P.