HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S138/2024
File Title:	Evans & Anor v. Air Canada ABN 29094769561
Registry:	Sydney
Document filed:	Form 27D - Respondent's submissions
Filing party:	Respondent
Date filed:	21 Jan 2025

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

RENAE EVANS
First Appellant

STEPHANIE EVANS
Second Appellant

and

AIR CANADA ABN 29 094 769 561
Respondent

RESPONDENT'S SUBMISSIONS

PART I CERTIFICATION

1. These submissions, which respond to the submissions of the Appellants filed on 28 November 2024 (**AS**), are in a form suitable for publication on the internet.

PART II ISSUES

2. The issues that arise on the appeal are best formulated as follows (cf AS [2]):

   (a) ***First***, is Art 21(2) of the "Montreal Convention"[1] properly characterised as: (i) (as per the Appellants) a provision that sets a financial limit on damages that would otherwise be awarded under Art 17(1); or (ii) (as per the Respondent (**Air Canada**)) part of a broader scheme that provides for unlimited liability for carriers in respect of damages arising from the death or bodily injury of passengers (with such unlimited liability being divided into two tiers and the amount of SDRs stated in Art 21 representing a threshold at which the lower tier with strict liability ends and the upper, unlimited tier, in which the carrier can disprove liability by showing that the relevant damage was not due to its negligence or other wrongful act or omissions, commences)?

   (b) ***Secondly***, does r 105(C)(1)(a) of the Respondent's "International Tariff General Rules" (**Tariff**) operate, pursuant to the mechanism provided for by Art 25 of the Montreal Convention, (as the Appellants contend and Air Canada denies), to preclude Air Canada from relying on Art 21(2) to reduce its liability to the Appellants to the amount of stated SDRs?

   (c) ***Thirdly***, can Art 25 of the Montreal Convention ever be utilised to preclude a carrier from availing itself of Art 21(2) or is its function limited to permitting a carrier to stipulate a higher financial limit or no financial limit at all for provisions like Arts 22(1)-(3) that provide expressly for limits on carriers' liability?

PART III SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

3. No s 78B notice is necessary.

PART IV FACTS

4. The Appellants (Ms Renae Evans and her daughter Stephanie) were passengers on Air Canada flight AC033 from Vancouver to Sydney on 11 July 2019: AJ [4] (**CAB 60**).[2] The flight experienced turbulence and each of the Appellants alleges that she has sustained

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1 *Convention for the Unification of Certain Rules for International Carriage by Air*, opened for signature 28 May 1999 (entered into force 4 November 2003) (**Montreal Convention**).

2 The judgment below has been reported at *Air Canada v Evans* (2024) 114 NSWLR 433 (cf AS [4]).

personal injury as a result of the incident: AJ [5] (**CAB 60**).

5. On 28 June 2021, the Appellants commenced proceedings against Air Canada in the Supreme Court of New South Wales: PJ [7] (**CAB 10**). The Appellants' statement of claim sought "damages for bodily injuries against [Air Canada] pursuant to Article 17 of the Montreal Convention" as given effect by s 9B of the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) (**CACL Act**): AJ [6] (**CAB 60**). In its defence, Air Canada pleaded (inter alia) that it "is not liable for any damages which might be recovered by either Plaintiff to the extent the amount exceeds the sum of 128,821 SDRs[3], in accordance with Art 21 of the Montreal Convention": AJ [11] (**CAB 62**). As noted at AJ [11], Air Canada has subsequently indicated that the reference to 128,821 SDRs was erroneous and an amendment to refer to 113,100 SDRs has been anticipated.

6. The Appellants' reply alleged that (see AJ [11] (**CAB 62**)):

> Rule 105(C)(1)(a) of the Defendant's International Tarriff General Rules, applicable to the transportation of the Plaintiffs by the Defendant on flight AC033 on 11 July 2019 to which the Montreal Convention applies, provides that there are no financial limits on the compensatory damages recoverable in respect of bodily injuries sustained by the Plaintiffs.

7. Rule 105 of the Tariff can be found at **RBFM 112-118 and 121-123**.[4] The most important (but not the only relevant) parts of that rule read as follows (in the 2022 Tariff version):

> **Rule 105 — LIABILITY OF CARRIERS**
>
> …
>
> (B) Laws and provisions applicable
>
> …
>
> (5) For the purpose of international carriage governed by the Montreal Convention, the liability rules set out in the Montreal Convention are fully incorporated herein and shall supersede and prevail over any provisions of this tariff which may be inconsistent with those rules.
>
> (C) Limitation of liability
>
> (1) Where the Montreal Convention applies, the limits of liability are as follows:
>
> (a) There are no financial limits in respect of death or bodily injury.
>
> (b) In respect of destruction, loss of, or damage or delay to baggage, 1,288

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[3] "SDRs" refers to "Special Drawing Rights" as that term is defined by the International Monetary Fund: see Art 23(1) of the Montreal Convention. As made, Art 21(1) and (2) of Montreal each referred to an amount of 100,000 SDRs. Those amounts were increased to 113,100 SDRs (effective 30 December 2009) and then 128,821 SDRs (effective 28 December 2019): see ICAO, "Review of limits of liability conducted by ICAO under Article 24 of the Montreal Convention of 1999 — Notification of revision of limits of liability", ICAO State Letter LE 3/38.1-09/47 (30 June 2009); and ICAO, "Revision of limits of liability under the Montreal Convention of 1999 — Notification of effective date of revised limits", ICAO State Letter LE 3/38.1-19/70 (11 October 2019) (**2019 Review**). In Australia, these increases were given effect by the *Notice Pursuant to Civil Aviation (Carriers' Liability) Act 1959* (11 December 2009) and the *Notice Pursuant to Civil Aviation (Carriers' Liability) Act 1959* (Cth) (6 December 2019).

[4] Note that there were two versions of the Tariff in evidence before the Courts below: (i) a complete version of the Tariff that appears to date from around 16 October 2022 (**2022 Tariff**) — see **RBFM 6**; and (ii) an excerpt of r 105 from July 2019 (**2019 Tariff excerpt**) — see **RBFM 121-123**.

Special Drawing Rights per passenger in most cases.

(c) For damage occasioned by delay to your journey, 5,346 Special Drawing Rights per passenger in most cases.

8. At the parties' request, orders were made for the determination of separate questions, including as to whether r 105(C) operates so that each plaintiff can recover compensatory damages exceeding 128,281 SDRs even if Air Canada "can prove that the damages were not due to the negligence or other wrongful act or omission of the carrier or its servants or agents or such damage was solely due to the negligence or other wrongful act or omission of a third party": PJ [2]-[3] (**CAB 9**). The primary judge answered that question affirmatively: PJ [146] (**CAB 41-42**). Air Canada appealed from the part of the primary judgment that held that r 105(C) of the Tarriff "constitutes a stipulation for the purposes of Article 25 that displaces the application of Article 21(2) of the Montreal Convention": **CAB 51**. A unanimous Court of Appeal (Leeming and Payne JJA and Griffiths A-JA) granted leave to appeal and allowed the appeal: AJ [93] (**CAB 94**).

PART V ARGUMENT

Introduction

9. The central question in this appeal concerns the interpretation of r 105(C)(1)(a) of the Tariff and whether that provision operates to preclude Air Canada from relying on the ability provided for by Art 21(2) of the Montreal Convention — an instrument that is given statutory effect by the CACL Act as well as being incorporated into the Tariff itself in full by r 105(B)(5) — to reduce its liability to 113,100 SDRs. For the cogent reasons given by Leeming JA in the Court of Appeal, when read in their proper context, the words of r 105(C)(1)(a) cannot bear the meaning which the Appellants attribute to them. On no view do they rise to the high level of certainty needed to establish that Air Canada has abandoned the rights conferred on it by statute. The Appellants' arguments to the contrary: (i) proceed by reference to an inaccurate understanding of the provisions of the Montreal Convention; (ii) adopt an impermissibly narrow focus on the words of the provision to the exclusion of other relevant parts of the Tariff; and (iii) fail to engage with numerous points raised in the judgment of the Court below. Once consideration is given to these matters, it is clear that r 105(C)(1)(a) does not operate in the manner that the Appellants contend.

10. The structure of these submissions is as follows:

(a) ***First***, explain the significance of the fact that the Appellants' claims arise under a Commonwealth statute that gives effect to a treaty ([11]-[14] below).

(b) ***Secondly***, set out the background to and operation of the Montreal Convention, which

constitute essential context for r 105(C)(1)(a) of the Tariff (see [15]-[37] below).

(c) ***Thirdly***, articulate the proper construction of r 105(B)-(C) and explain the errors in the Appellants' approach to interpreting the Tariff (see [38]-[54] below).

(d) ***Fourthly***, set out an additional, alternative basis on which the appeal should be dismissed, which is advanced under the cover of the notice of contention (**NoC**) (**CAB 106-107**) being that the stipulation mechanism provided for by Art 25 can never be utilised to waive a carrier's rights under Art 21(2) (see [55] below).

Nature of the Appellants' claims: a statutory cause of action that gives effect to a treaty

11. The starting point in this appeal is that the Appellants' claims are brought under s 9B of the CACL Act. That section gives the Montreal Convention (as set out in Sch 1A to the CACL Act) "the force of law in Australia in relation to any carriage by air to which the … Montreal Convention applies, irrespective of the nationality of the aircraft performing that carriage".[5] Two significant points follow from this detail.

12. ***First***, this is a case in which "[t]he source of rights sought to be enforced by the [Appellants] is the federal statute" (i.e. the CACL Act): AJ [8] (**CAB 61**).[6] This means that the dispute about the construction and operation of r 105(C)(1)(a) of the Tariff concerns how, if at all, that contractual clause has modified the operation of these statutory rights. Consequently, the provisions of the Montreal Convention, which are given effect by that statute, constitute an indispensable piece of context for the exercise of construing r 105(C)(1)(a).

13. ***Secondly***, even though the Montreal Convention would have no effect as part of Australian domestic law but for s 9B of the CACL Act, once it is transposed into our national law, the provisions of the treaty are to be construed "apply[ing] the rules of interpretation of international treaties that the Vienna Convention on the Law of Treaties [(**VCLT**)] has codified".[7] These rules of interpretation include that:

(a) in the words of Art 31(1) of the VCLT, "a treaty shall 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";[8]

(b) Article 31(1) requires an "ordered yet holistic approach" to be taken to interpretation in which "[p]rimacy is to be given to the written text of the Convention but the context,

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5 See ***Povey*** *v Qantas Airways Ltd* (2005) 223 CLR 189 at [12]. See, also, AJ [6] (**CAB 60**).

6 See, also, *Bradshaw v Emirates* (2021) 395 ALR 97 at [120] and the cases cited therein.

7 *Povey* (2005) 223 CLR 189 at [60] (McHugh J). See, also [24]-[25]; ***Applicant A*** *v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 230-231, 239-240, 251-252, 277, 294.

8 VCLT, opened for signature 23 May 1969 (entered into force 27 January 1980), Art 31(1).

object and purpose of the treaty must also be considered";[9]

(c) "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty" including for the purpose of "confirm[ing] the meaning resulting from the application of Art 31";[10] and

(d) international treaties should be interpreted uniformly by contracting states — it follows that Australian courts "will be slow to adopt a different view" on the meaning of a treaty's provisions from that which was arrived at by "earlier courts of high authority in other treaty States".[11]

14. Subject to one possible qualification, the process undertaken by the Court of Appeal in interpreting the Montreal Convention conformed with these principles: see AJ [7] (**CAB 61**). The qualification is that Leeming JA made no reference to the *travaux préparatoires* for the Montreal Convention. However, as will be shown below, those documents only confirm the interpretation of the Convention arrived at by his Honour.

Montreal Convention: genesis and operation

(i) Background to the Montreal Convention — AS [13]

15. At AJ [30]-[57] (**CAB 72-80**), Leeming JA undertook a careful review of the background to and operation of the Montreal Convention drawing on case law, academic literature and the "authoritative and uncontroversial account of the context and object of the Convention and the tariff" contained in the expert report of Professor Paul Stephen Dempsey (**Dempsey Report**): AJ [20] (**CAB 65**); see **RBFM 259-289**. The Montreal Convention is the most recent of a series of international conventions governing claims for damages for personal injury arising from international carriage by air and which are intended to "achieve uniformity in the law relating to liability of air carriers".[12]

16. The first of these conventions was the "Warsaw Convention" done on 12 October 1929: AJ [30] (**CAB 72**).[13] That convention was modified subsequently by a number of other international agreements, including: the "Hague Protocol" in 1955;[14] the "Guadalajara

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9 *Applicant A* (1997) 190 CLR 225 at 254 (McHugh J).
10 VCLT, Art 32.
11 *Povey* (2005) 223 CLR 189 at [134] (Kirby J). See, also [25], [60], [128], [142] and in the context of conventions on liability of air carriers: *Corocraft Ltd v Pan American Airways Inc* [1969] 1 QB 616 at 655; *Thibodeau v Air Canada* [2014] 3 SCR 340 at [50].
12 *Parkes Shire Council v South West Helicopters Pty Ltd* (2019) 266 CLR 212 at [36] (Kiefel CJ, Bell, Keane and Edelman JJ).
13 *Convention for the unification of certain rules relating to international carriage by air*, opened for signature 12 October 1929 (entered into force 13 February 1933).
14 *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air*, opened for signature 28 September 1955 (entered into force 1 August 1963).

Convention" in 1961;[15] and the "Montreal Protocol No 4" in 1975.[16] It is convenient to refer to these instruments together as the "Warsaw regime". As Leeming JA observed at AJ [31] (**CAB 72**), the Montreal Convention "represents a departure from the Warsaw regime" because it is "a self-standing regime, rather than a further amendment to the Warsaw Convention". However, any attempt to construe the Montreal Convention must be informed by an understanding of the earlier conventions not only because the later instrument "employs language and concepts taken from the Warsaw regime" (AJ [34] (**CAB 73**)) but also because key elements of the Montreal Convention were a response to perceived deficiencies in the Warsaw Convention system.[17]

17. At AJ [35]-[37] (**CAB 74**), Leeming JA describes the operation of the Warsaw Convention in terms that echo a similar description provided by the plurality in *Povey*.[18] Articles 17 to 19 of the Warsaw Convention "impose liabilities on a carrier".[19] Most relevantly, Art 17 imposes a form of strict liability on carriers in the following terms (which closely resemble Art 17(1) of the Montreal Convention):

> The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

18. Articles 20 to 22 then "limit the liabilities thus created" by Arts 17 to 19.[20] Article 20(1) states that a carrier it not liable "if he proves that he and his servants agents have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures". Article 22(1) is particularly significant and provides that:

> In the carriage of passengers the liability of the carrier for each passenger is limited to the sum of 125,000 francs. Where, in accordance with the law of the Court seised of the case, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability. (underlining added)

19. Thus, Art 22 "imposes a cap on the liabilities of the carrier"[21] at a specific monetary amount,

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15 *Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier*, opened for signature 18 September 1961 (entered into force 1 May 1964).

16 *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*, opened for signature on 25 September 1975 (entered into force 14 June 1998).

17 See, also, *Gulf Air Company GSC v Fattouh* (2008) 251 ALR 183 at [60], [73]; Dempsey Report at **RBFM 264-265** and the authorities cited therein; G Leloudas et al (eds), *The Montreal Convention: A Commentary* (Edward Elgar Publishing, 2023) at [0.07], [0.13], [0.18]-[0.19], [0.25].

18 (2005) 223 CLR 189 at [20]-[23].

19 *Povey* (2005) 223 CLR 189 at [20] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

20 *Povey* (2005) 223 CLR 189 at [21] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

21 *Povey* (2005) 223 CLR 189 at [21].

which was later increased to 250,000 francs by the Hague Protocol: AJ [38] (**CAB 74**). This limit on liability was subject to two qualifications (AJ [39] (**CAB 75**)):

(a) ***First***, pursuant to Art 25, the cap in Art 22 does not apply where a claimant can prove that a carrier engaged in wilful misconduct. However, Art 25 imposes a heavy burden on a claimant because wilful misconduct requires either "the intentional performance of an act with knowledge that the performance of that act will probably result in injury" or "the intentional performance of an act in such a manner as to imply reckless disregard of the probable consequences".[22]

(b) ***Secondly***, pursuant to the final sentence of Art 22(1), which is underlined at [18] above, carriers and passengers could enter into a "special contract" to agree a higher limit of liability for the purposes of Art 22(1).

20. For decades leading up to the adoption of the Montreal Convention, there was significant dissatisfaction (particularly in the United States) with the monetary limit for passenger death or bodily injury under the Warsaw regime: AJ [40] (**CAB 75**).[23] This dissatisfaction precipitated various attempts to increase the monetary limit in the Warsaw Convention.[24] By the 1990s, it also resulted in airlines, including Air Canada, entering into the "IATA Intercarrier Agreement on Passenger Liability" of 31 October 1995 pursuant to which they agreed "to take action to waive the limitation of liability on recoverable compensatory damages in Art 22(1) of the Warsaw Convention": AJ [44] (**CAB 76; RBFM 124**). This was achieved by carriers using the "special contract" mechanism in Art 22(1) of the Warsaw Convention: AJ [45] (**CAB 77**).[25] Specifically, pursuant to the "Agreement on Measures to Implement the IATA Intercarrier Agreement" of May 1996 (**1996 IATA Agreement**), carriers agreed to incorporate into their tariffs terms that provide (see AJ [46] (**CAB 77**)):

> 1. {Carrier} shall not invoke the limitation of liability in Art 22(1) of the Convention as to any claim for recoverable compensatory damages arising under Art 17 of the Convention.
> 2. {Carrier} shall not avail itself of any defence under Art 20(1) of the Convention with respect to that portion of such claim which does not exceed 100,000 SDRs …
> 3. Except as otherwise provided in paragraphs 1 and 2 hereof, {Carrier} reserves all defences available under the Convention to any such claim …

21. Broadly, the combined effect of these terms was that the carrier would be subject to strict liability for claims under Art 17 of the Warsaw Convention up to the amount of

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22 *Pekelis v Transcontinental & Western Air,* 187 F.2d 122 at 124 (2d Cir. 1951).

23 See, also, Dempsey Report at **RBFM 271-277**; B Cheng, "A New Era in the Law of International Carriage by Air: From Warsaw (1929) to Montreal (1999)" (2004) 53 *International and Comparative Law Quarterly* 833 at 835-842.

24 See Dempsey Report at **RBFM 271-273**.

25 See Dempsey Report at **RBFM 275, 277**.

100,000 SDRs. Above that amount the carrier could escape liability if it could prove, within Art 20(1), that it and its servants and agents had taken all necessary measures to avoid the damage or that it was impossible for them to take such measures. However, even these developments were "not enough to appease the United States"[26] and so ICAO announced that it would convene the diplomatic conference that ultimately adopted the Montreal Convention in 1999 ("Montreal Diplomatic Conference" or "MDC"): AJ [48] (**CAB 77**).

22. While AS [13] refers to the Warsaw regime as having been "eclipsed" by Montreal, those treaties remain operative because not all States have ratified the later agreement.[27] The applicable legal regime for a claim will "depend[] upon which of the Conventions, and Protocols, the origin and destination State, as identified in the … travel documents, have ratified".[28] As explained at AJ [58]-[61] (**CAB 80-82**), "the liability in relation to passengers and cargo on the same flight may be governed by different conventions". That is an important detail for the purpose of construing the present Tariff: AJ [63] (**CAB 82**).

(ii) Operation of the key provisions of the Montreal Convention — AS [13]-[22]

23. Articles 17 to 19 of the Montreal Convention impose liability on carriers for certain forms of damage. Article 17(1) is in very similar terms to Art 17 of the Warsaw Convention (see [17] above) in imposing strict liability on carriers for death or bodily injury to a passenger. Articles 20 to 22 go on to qualify the manner and extent of the liabilities created by the provisions that precede them. In order of importance for the purposes of this appeal:

24. ***Article 21*** provides (with the relevant SDR amounts for this appeal inserted):

> **Article 21 — Compensation in Case of Death or Injury of Passengers**
>
> 1. For damages arising under paragraph 1 of Article 17 not exceeding [113,100] Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability.
> 2. The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger [113,100] Special Drawing Rights if the carrier proves that:
>   (a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or
>   (b) such damage was solely due to the negligence or other wrongful act or omission of a third party.

25. Read together, the effect of the two paragraphs of Art 21 is to:

(a) confirm that the liability imposed on a carrier by Art 17(1) is unlimited in monetary terms — in this regard the words of Art 21 of the Montreal Convention must be

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26 Dempsey Report at **RBFM 277**.
27 See Leloudas, *The Montreal Convention: A Commentary* at [0.23].
28 Leloudas, *The Montreal Convention: A Commentary* at [0.22].

understood as a deliberate departure from Art 22(1) of the Warsaw Convention (see [18] above), which imposed a monetary limit on such claims;[29] and

(b) divide the liability imposed by Art 17(1) into two tiers:[30]

(i) ***First***, a lower tier up to the amount of 113,100 SDRs, in which the carrier cannot limit or exclude its liability by proving an absence of fault.[31]

(ii) ***Secondly***, an upper tier that starts at 113,100 SDRs and has no upper limit, in which liability is presumptive in the sense that the carrier can avoid liability but only if it can prove that it was not at fault or that some third party was.[32]

26. ***Article 20*** provides that a "carrier shall be wholly or partly exonerated from its liability" to a passenger where it can show that the damage in question "was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights".[33] The final sentence of Art 20 clarifies that this contributory negligence defence applies for all of the Convention's liability provisions. This means that: (i) unlike Art 21(2), this defence is available in respect of liability imposed under any of Arts 17 to 19; and (ii) Art 20 can be relied on even when the lower tier of liability provided for by Arts 17 and 21 is engaged.

27. ***Article 22*** imposes limits on a carrier's liability for certain forms of damage, including damage caused by delay or relating to the carriage of baggage and cargo. Notably, the language used to impose these limits, in paras 1 to 3 of the article, includes the words "the liability of the carrier … is limited to" a nominated amount of SDRs.

28. Finally, it is important to note that Arts 25 to 27 provide the rules for determining the extent to which carriers and passengers can modify the rights and obligations provided for by the Montreal Convention. Those articles state:

Article 25 — Stipulation on Limits

A carrier may stipulate that the contract of carriage shall be subject to higher limits of liability than those provided for in this Convention or to no limits of liability whatsoever.

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29 Leloudas, *The Montreal Convention: A Commentary* at [21.11].

30 *Bradshaw v Emirates* (2021) 395 ALR 97 at [116], [171]; *O'Mara v Air Canada* (2013) 115 OR (3d) 673 at [35]; Cheng, "A New Era in the Law of International Carriage by Air: From Warsaw (1929) to Montreal (1999)" at 843, 849; A Hocking et al (eds), *Shawcross & Beaumont: Air Law* (LexisNexis, 2024), Div VII, Ch 33 at [222], Ch 36 at [503]; Dempsey Report at **RBFM 280**.

31 *Gibson v Malaysian Airline System Berhad* [2016] FCA 1476 at [12]; Leloudas, *The Montreal Convention: A Commentary* at [21.01].

32 *South West Helicopters Pty Ltd v Stephenson* (2017) 98 NSWLR 1 at [297]. See, also, *Dyczynski v Gibson* (2020) 280 FCR 583 at [34]; *Baillie v Medaire, Inc*, 764 Fed. Appx. 597 at fn. 2 (2019); Leloudas, *The Montreal Convention: A Commentary* at [21.02].

33 Note that s 9H of the CACL Act provides for the method by which a Court should go about assessing damages when this defence is relied on by a carrier.

Article 26 — Invalidity of Contractual Provisions

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.

Article 27 — Freedom to Contract

Nothing contained in this Convention shall prevent the carrier from refusing to enter into any contract of carriage, from waiving any defences available under the Convention, or from laying down conditions which do not conflict with the provisions of this Convention.

(iii) Preparatory documents for the Montreal Convention

29. The *travaux préparatoires* for the Montreal Convention demonstrate that the compromise which Art 21 represents was arrived at following hard-fought negotiations.[34] At the Montreal Diplomatic Conference, there were a number of proposals for how Art 21 (or "draft Art 20" as it was described at the conference) should operate, including:

(a) The draft convention presented for consideration at the conference provided for two tiers of liability: (i) up to the amount of 100,000 SDRs a carrier's liability for death or injury would be strict; and (ii) above that threshold, the carrier would not be liable for damage if it could prove that it had taken all necessary measures to avoid the damage; it was impossible for the carrier to take such measures; or the damage was solely due to the negligence or other wrongful act or omission of a third party.[35] In discussions at the conference, this proposal was repeatedly described as providing for "unlimited" liability that was strict in the first tier and then subject to a "presumption of fault" in the second tier (in which the carrier could only avoid liability if it established a "defence" by proving one of the nominated matters).[36] In effect, this proposal mirrored what was achieved under the Warsaw regime by those carriers who chose to adopt the IATA Intercarrier Agreements (see [20]-[21] above).[37]

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34 See Leloudas, *The Montreal Convention: A Commentary* at [21.04]-[21.10]; Hocking, *Shawcross & Beaumont: Air Law* at Div VII, Ch 33 [219], [222]. One of the key tensions at play in these negotiations was between developed and developing nations as both sought to agree a scheme for liability of carriers that was uniform while also operating fairly notwithstanding the "diversity of socio-economic circumstances and variance in the cost of living in different parts of the world": JC Batra, "Modernization of the Warsaw System — Montreal 1999" (2000) 65 *Journal of Air Law and Commerce* 429 at 435. See, also, ICAO, "International Conference on Air Law – Volume I – Minutes" (10-28 May 1999) Doc 9775-DC/2 (**MDC Documents Vol I**) at 87 [32], 88 [41] (**RBFM 143-144**); "Comments on Article 20: Compensation in Case of Death or Injury of Passengers (Presented by 53 African Contracting States)" (**DCW Doc No 21)** in ICAO, "International Conference on Air Law – Volume II – Documents" (10-28 May 1999) Doc 9775-DC/2 (**MDC Documents Vol II**) at 165-185.

35 See "Draft Convention for the Unification of Certain Rules for International Carriage by Air", DCW Doc No 3 in MDC Documents Vol II at 19-20.

36 See MDC Documents Vol I at 88-89 [41]-[42], 91 [3], [6], 92 [12], 92-93 [14], 123 [64]-[65], 124 [67], [69], 125 [70], [72]-[73], [76], 126 [79], [81], [82], 131 [7] (**RBFM 144-145, 147-149, 179-183, 187**); "Liability of the Carrier and Extent of Compensation for Damage — Death and Injury of Passengers (Presented by India)" (**DCW Doc No 18**) and DCW Doc No 21 in MDC Documents Vol II at 129, 138.

37 See MDC Documents Vol I at 84 [20], 88 [37], 127 [83] (**RBFM 140, 144, 183**).

(b) 53 African states proposed a regime with three tiers of liability: (i) a strict liability tier up to 100,000 SDRs; (ii) for claims exceeding that amount and up to 500,000 SDRs "the liability of the carrier would be based on the principle of presumptive liability, i.e. the carrier will have the defen[c]e of non-negligence"; and (iii) there would be an upper tier for claims exceeding 500,000 SDRs in which the burden of proof would shift to the claimant and "the liability of the carrier would be based on fault, without a numerical limit of liability".[38]

(c) India, Pakistan and Vietnam each proposed a two-tier scheme in which carriers' liability would be either strict or presumed up to 100,000 SDRs and beyond that the carrier would be liable only if the claimant proved certain matters.[39]

30. During discussions of these proposals, the Chairman of the ICAO Legal Committee remarked on the widespread support for "the principle of unlimited liability", which provided "significant common ground on which … to build".[40] The questions that remained outstanding were "as to what circumstances and what burden of proof would be required" to unlock unlimited liability. Consideration of the various proposals continued among a subset of participants referred to as the "Friends of the Chairman".[41] As part of these discussions, there was general support for a first tier of strict liability up to 100,000 SDRs and an uppermost tier of unlimited liability.[42] The unresolved questions remained whether there should be two or three tiers of liability and whether the carrier or passenger should bear the burden of proving or disproving the presence of fault on the part of the carrier in upper tiers.[43]

31. Ultimately, the Friends of the Chairman's Group was able to develop a final "consensus package" in which draft Art 20 took the form that was later adopted as Art 21.[44] As the Chairman explained (at the meeting of the Commission of the Whole on 25 May 1999 at which the consensus package was adopted), the structure of this revised draft Art 20 was

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38 DCW Doc No 21 in MDC Documents Vol II at 138. See, also, MDC Documents Vol I at 85 [25]-[26], 94-95 [21] (**RBFM 141, 150-151**). Note that Saudi Arabia also proposed a three-tiered liability regime on behalf of Member States of the Arab Civil Aviation Commission, see MDC Documents Vol I at 96 [24] (**RBFM 152**) and "Draft Convention for the Unification of Certain Rules for International Carriage by Air: Comments on Articles 20 and 27 (Presented by Member States for the Arab Civil Aviation Commission)" (DCW Doc No 29) in MDC Documents Vol II at 161-162.

39 MDC Documents Vol I at 87 [31], [33], [35] (**RBFM 143**); DCW Doc No 18 in MDC Documents Vol II at 127-131; "Comments on Article 20: Compensation in Case of Death or Injury of Passengers (Presented by Viet Nam)" (DCW Doc No 25) in MDC Documents Vol II at 145.

40 MDC Documents Vol I at 94 [19] (**RBFM 150**). See, also, 129-130 [2], [5] (**RBFM 185-186**).

41 See, eg, MDC Documents Vol I at 128-139, 163-165 (**RBFM 184-195, 219-221**).

42 Leloudas, *The Montreal Convention: A Commentary* at [21.07]; "Summary Report on the First and Second Meetings of the 'Friends of the Chairman Group'" (DCW Doc No 35) in MDC Documents Vol II at 202.

43 See MDC Documents Vol I at 168-169 [4]-[8] (**RBFM 224-225**).

44 See "Consensus Package (Presented by the President of the Conference)" (DCW Doc No 50) in MDC Documents Vol II at 272.

similar to the form of the original version of the draft article described at [29(a)] above: there would be two tiers of liability and for the upper tier above 100,000 SDRs the burden of proof remained on the carrier; however, what the carrier was required to prove to avoid liability had been made less demanding.[45] In the plenary session on 28 May 1999, the President of the Conference summarised the effect of the proposal as:[46]

> … establishing a two-tier system: a system of strict liability up to 100,000 SDRs; a principle of unlimited liability thereafter, but with the burden of proof on the carrier - a burden of proof, however, which could be discharged by the carrier establishing that the accident was not caused by the negligence of its servants or agents, or that it was caused by the wrongful act or negligence of some other person [emphasis added].

(iii) Problems with the Appellants' account of the Montreal Convention — AS [29]-[33]

32. At AS [33], the Appellants advance a series of propositions about Arts 17, 20, 21 and 25 of the Montreal Convention that are inaccurate and so provide an unsound foundation for the interpretation of the Tariff. The Appellants' key propositions are:

(a) properly understood, Art 21(2) "is a provision that sets a financial limit for damages that would otherwise be awarded" under Art 17(1) (see sub-paras (a), (c) and (d));

(b) the purpose of Art 25 is to enable "deviation" from the limits of liability prescribed by the Convention, in the sense of prescribing higher limits or no limits whatsoever (see sub-paras (e), (h) and (l)); and

(c) because Art 21(2) "is not a defence to actions pursuant to Art 17(1)" — in fact, there are no "true defence[s] to the strict liability regime imposed by" Art 17(1) — and instead imposes a limit on damages, the provision "fall[s] squarely within the capacity of Art 25 to agree on higher limits or no limit" (see sub-para (l)-(m) and AS [41(l)]).

33. These propositions are irreconcilable with the correct view as to how Arts 17, 20 and 21 of the Montreal Convention operate as set out at [23]-[25] and confirmed by the preparatory documents referred to at [29]-[31] above. That is so for four reasons:

34. ***First***, it is inapposite to describe Art 21(2) as imposing a "financial limit" on damages when the central feature of the scheme created by Arts 17 and 21 is that it creates *unlimited* liability that is divided into two tiers: see AJ [80] (**CAB 89**). That point was made on numerous occasions at the MDC (see [29(a)], [30]-[31] above). It has, since that time, been repeated in many judicial decisions and academic works which the Appellants wholly overlook. [47]

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45 See MDC Documents Vol I at 201-202 [10], 206 [19] (**RBFM 249-250, 254**).
46 MDC Documents Vol I at 246 (**RBFM 257**).
47 See Dempsey Report at **RBFM 283-285**, citing (inter alia) *Somwar v Fly Jamaica Airways Ltd* [2019]

35. ***Secondly***, contrary to AS [33(d)] the words used in Art 21(2) cannot be described as a "natural way of imposing" a limit on a carrier's liability. The provision states that where the carrier proves the nominated matters it "shall not be liable for damages" — those words are apt to "relieve" a carrier of liability rather than to "fix a lower limit" beyond which the passenger cannot recover (drawing on the language of Art 26). By contrast, Arts 22(1)-(3), which plainly *do* impose limits on liability, say so expressly (see [27] above).

36. ***Thirdly***, the suggestion that Art 21(2) "sets a financial limit for damages that would otherwise be awarded under Art 17(1)" (see AS [33(c)]) is particularly misconceived given that Art 21(2) is more accurately understood as placing a floor below which a carrier cannot extinguish liability, rather than a cap above which a passenger cannot recover damages. Noting again, that Art 21(2) presents no impediment to a claimant recovering *any amount* unless the carrier can show that it was not at fault.

37. ***Fourthly***, the Appellants are mistaken in denying that Arts 20 and 21(2) of the Montreal Convention operate as "defences" (as Leeming JA had stated at AJ [1], [3], [10]-[11], [18], [21], [25], [29], [31], [76], [80]-[82], [88], [90] (**CAB 59, 62, 64, 66, 69, 71, 72, 88-90, 92-93**)). Both of these articles operate in the same manner: they identify factual matters which, if established by a carrier, do not negative an element of the claimant's cause of action but rather provide a new reason why their claim should fail. In other words, both Arts 20 and 21(2) have all the hallmarks of "affirmative defences".[48] These provisions were repeatedly described as providing for defences in the *travaux préparatoires* for Montreal.[49] That term has also been used to describe Arts 20 and 21(2) in subsequent cases and academic commentary.[50] In providing for a partial defence above a particular threshold, it has been said that the effect of Art 21(2) is to impose a "limit" on the strict liability regime provided

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ONSC 5439 at [7]; R Bartsch, *Aviation Law in Australia* (4th ed, Thomson Reuters, 2010) at 377-378; P Mendes de Leon and W Eyskens, "The Montreal Convention: Analysis of Some Aspects of The Attempted Modernization and Consolidation of the Warsaw System" (2001) 66 *Journal of Air Law and Commerce* 1155 at 1172. See, also, Batra, "Modernization of the Warsaw System — Montreal 1999" at 441; A Masutti and P Mendes de Leon (eds), *Elgar Concise Encyclopedia of Aviation Law* (Edward Elgar Publishing, 2023) at 382: "The two-tier system provides strict liability up to a fixed amount with a presumption of unlimited liability and reversed burden of proof above that amount".

48 See BA Garner (ed), *Black's Law Dictionary* (Deluxe 8th ed, Thomson West, 2004) at 451 "affirmative defense"; R Stevens, *The Laws of Restitution* (Oxford University Press, 2023) at 353.

49 See MDC Documents Vol I at 84 [17], 118 [41], 123-124 [64]-[65], [67], [69], 125 [70], [72]-[73], [76], 126 [79], [81], 127 [82], 131 [7], 134-135 [19] (**RBFM 140, 174, 179-183, 187, 190-191**).

50 See *Kern v Qantas Airways Ltd* [2015] NSWSC 1565 at [43]; *O'Mara v Air Canada* (2013) 115 OR (3d) 673 at [35]; *Zoungrana c Air Algérie* [2016] QCCS 2311 at [49]; Opinion of Advocate General Emiliou delivered on 12 January 2023, *DB v Austrian Airlines AG*, Case C-510/21, Document No. 62021CC0510 at [84]; Opinion of Advocate General Emiliou delivered on 20 January 2022, *JR v Austrian Airlines AG*, Case C-589/20, Document No. 62020CC0589 at [24], [41]; Leloudas, *The Montreal Convention: A Commentary* at [21.26], [27.09]; Hocking, *Shawcross & Beaumont: Air Law*, Div VII, Ch 33 at [222 (fn 4)]; PS Dempsey, *Aviation Liability Law* (LexisNexis, 2010) at [16.72], [16.98].

for by the Convention.[51] Critically, however, that is only true in the specific sense of meaning a boundary or threshold between the two-tiers of the unlimited liability system, rather than a financial or monetary limit on the damages recoverable by a passenger.[52]

Proper construction of the Tariff — AS [34]-[41]

(i) Overview

38. The purpose of the above detailed description of the regime that governs the liability of air carriers is to provide a clear exposition of the background to r 105(C)(1)(a) of the Tariff. The AS contends that where r 105(C)(1)(a) applies, it fundamentally alters that regime by precluding Air Canada from relying on Art 21(2) of the Montreal Convention to reduce its liability under Art 17(1) to an amount of 113,100 SDRs per passenger. That conclusion should be rejected. The Appellants' submissions take an erroneous approach to the process of interpreting r 105(C)(1)(a) (see [39]-[45] below). They also ignore numerous features of r 105(C)(1)(a) (in terms of its text, context and purpose) that are strongly supportive of the construction arrived at by the Court of Appeal (see [46]-[54] below).

(ii) Overarching errors in the Appellants' approach to interpreting the Tariff

39. The Appellants submit that the meaning of r 105(C)(1)(a) is "clear" and "unambiguous" (see AS [40], [41(a)-(b), (e)-(f), (k)-(l)]): the rule is a straightforward example of a provision increasing the "financial limit" in Art 21 "in the manner allowed by Art 25". However, the process of construction by which the Appellants have arrived at that characterisation of r 105(C)(1)(a) suffers from the following four defects:

40. ***First***, at their core, the Appellants' submissions are an invitation to the Court to focus on a few words in r 105(C)(1)(a) "independent of their context".[53] That approach is not, and has never been, the correct way to construe a commercial agreement.[54] Further, as Leeming JA explained at AJ [25]-[26] (**CAB 60-70**), not only is it true that "[e]very clause in a contract … must be construed in context",[55] even a conclusion that a contractual provision is unambiguous cannot be arrived at without regard having been had to the provision's context (at least in the narrow sense[56] of the entire text of the instrument in question as well as any

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51 See M Clarke, *Contracts of Carriage by Air* (2nd ed, Lloyd's List, 2010) at [3.3.1].
52 See Leloudas, *The Montreal Convention: A Commentary* at [24.16].
53 *Re Bidie; Bidie v General Accident Fire and Life Assurance Corp Ltd* [1949] Ch 121 at 129-130.
54 See JD Heydon, *Heydon on Contract: The General Part* (Lawbook Co, 2019) at [8.320]-[8.350]; *Cave v Horsell* [1912] 3 KB 533 at 543; *Towne v Eisner* 245 US 418 at 425 (1918).
55 *Rinehart v Hancock Prospecting Pty Ltd* (2019) 267 CLR 514 at [83] (Edelman J).
56 See P Herzfeld and T Prince, *Interpretation* (3rd ed, Lawbook Co, 2024) at [22.20], citing (inter alia) ***Mount Bruce Mining*** *Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at [46].

other document referred to in it).[57] For that reason, the matters at [46]-[54] below should be considered at the outset and cannot be marginalised by asserting that the words of r 105(C)(1)(a) are unambiguous if looked at in isolation.

41. ***Secondly***, the Appellants' account as to how r 105(C)(1)(a) should be construed proceeds by reference to an inaccurate explanation as to how the Montreal Convention operates (see [33]-[37] above). The notion that r 105(C)(1)(a) provides an unremarkable example of Art 25 being used to increase the financial limit in Art 21 assumes that Art 21(2) imposes a "financial limit": (i) of the kind that is referred to in r 105(C)(1)(a); and (ii) that is thus capable of being modified by operation of that provision. However, as was explained at [34]-[36] above, the more accurate view is that Art 21(2) provides carriers with a partial defence which, if established, reduces their liability to pay damages. It is, for that reason, "decidedly not natural" to construe the reference to "financial limits" in r 105(C)(1)(a) as operating on Air Canada's entitlement to rely on the Art 21(2) defence: AJ [80] (**CAB 90**).

42. ***Thirdly***, whatever terminology is used to describe the effect of Art 21(2), plainly it confers a valuable entitlement on carriers that permits them to reduce their liability under Art 17. That entitlement has been given statutory force by s 9B of the CACL Act. Where it is alleged that a carrier has given up that entitlement, the starting point must be that:[58]

> … a court is unlikely to be satisfied that a party to a contract has abandoned valuable rights arising by operation of law unless the terms of the contract make it sufficiently clear that that was intended. The more valuable the right, the clearer the language will need to be.

43. It follows that Air Canada should not be held to have precluded itself from relying on the defence provided for by Art 21(2) unless the Tariff "clearly excluded [it], whether expressly or by necessary implication".[59] Ordinarily, for a clause to have that effect it would need to refer expressly to the right or entitlement being surrendered by the carrier.[60]

44. ***Fourthly***, the prism through which the Appellants seek to have this Court analyse r 105(C)(1)(a) is: what would an Australian customer understand the rule to mean (see, eg,

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57 *Burns Philp Hardware Ltd v Howard Chia Pty Ltd* (1987) 8 NSWLR 642 at 657; *Hancock Prospecting Pty Ltd v Wright Prospecting Pty Ltd* (2012) 45 WAR 29 at [76]. As Leeming JA observed at AJ [28] (**CAB 70**), it is unnecessary for the purposes of this appeal to resolve the question of whether evidence of surrounding circumstances may be considered in order to determine whether a contractual term is ambiguous: see *Mount Bruce Mining* (2015) 256 CLR 104 at [49], [111], [113], [123].

58 *Triple Point Technology Inc v PTT Public Company Ltd* [2021] AC 1148 at [110] (Lord Leggatt JSC with whom Lord Burrows JSC agreed), quoting *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2010] QB 27 at [23] (Moore-Bick LJ). See, also, *CSL Australia Pty Ltd v Tasmanian Ports Corp Pty Ltd (Goliath)* [2024] FCA 824 at [62]-[68]; *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312 at [23].

59 *Bahamas Oil Refining Company International Limited v The Owners of the Cape Bari Tankschiffahrts GMBH & Co KG* [2016] UKPC 20 (***The Cape Bari***) at [36] (Lord Clarke JSC).

60 *The Cape Bari* [2016] UKPC 20 at [36], [38]-[39]. See, also, *Knapfield v Cars Holdings Ltd Company* [2022] EWHC 1437 (Comm) at [124] (Charles Hollander QC); Dempsey Report at **RBFM 288**.

AS [28])? Consistent with that approach, ground 3 of the notice of appeal criticises the Court of Appeal for having referred to "previous and inapplicable treaties" (notwithstanding the fact that the Warsaw Convention is incorporated into the Tariff expressly): see **CAB 103-104**. Similarly, at AS [41(g)], the Appellants describe r 122 of the *Air Transportation Regulations*, SOR/88-58, which is considered further at [51]-[52] below, as "non-binding on Australian contracting parties, and arguably not relevant".[61]

45. This is an unduly narrow and simplistic approach to interpreting r 105(C)(1)(a). In assessing what meaning the Tariff would convey to a reasonable person, it is appropriate to take into account that the terms contained in that document were intended to cover various cases of carriage some of which would be governed by the Montreal Convention, others by the Warsaw regime, others by no convention at all (see [22] above). Additionally, it could reasonably be expected by a reader of the Tariff that, by reason of Air Canada's home base being Canada, the carriage governed by the Tariff would: (i) in most cases be to or from Canada; (ii) in many cases have no connection with Australia at all; and (iii) be subject to rules and procedures of Canadian law that may govern Air Canada and the contract — in this regard, it is significant that r 5(A)(1)(5) of the Tariff provides that:

> … any contract for the carriage of passengers and baggage and all services incidental thereto governed by this tariff is deemed to be made and entered into in Calgary, Canada, without regard to conflicts of law principles.

(iii) Features of the Tariff that support the Court of Appeal's construction

46. There are six features of the text, context and purpose of r 105(C)(1)(a) that were relied upon by the Court of Appeal in concluding that it was "tolerably clear" that the sub-rule did not operate to preclude Air Canada from availing itself of the partial defence in Art 21(2) of the Montreal Convention. The Appellants have largely failed to engage with these matters, which are fatal to their preferred construction. Dealing with each in turn:

47. ***First***, central to the Court of Appeal's reasoning is r 105(B) of the Tariff, which the Appellants barely refer to in their submissions. The heading for r 105(B) is "[l]aws and provisions applicable": **RBFM 112, 121**. As Leeming JA explained at AJ [67]-[72] (**CAB 84-86**), this sub-rule identifies the various international conventions on liability of air carriers and explains what departures there will be from the liability rules set out in those conventions when they apply to carriage governed by the Tariff. Notably, r 105(B)(1) states that where the Warsaw regime applies Air Canada "shall not invoke the limitation of liability

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[61] The matter proceeded below on an assumption that the contract of carriage was either governed by Australian law or that, even if governed by some other law, the principles of construction did not differ.

in Art 22(1)" and "shall not avail itself of any defense under Art 20(1) … with respect to that portion of such claim which does not exceed 113,100 SDRs" (sub-paras (a)-(b)).[62] Rule 105(B)(5) states that for international carriage governed by the Montreal Convention the "liability rules" set out in that Convention "are fully incorporated herein and shall supersede and prevail over any provisions of this tariff which may be inconsistent with those rules". As is pointed out at AJ [78] (**CAB 89**), if the effect of r 105(C)(1)(a) is, as the Appellants contend, to enhance the rights of passengers to whose carriage the Montreal Convention applies, one would expect that provision to be included in sub-rule (B) alongside the sub-paras that effect just such modifications for carriage governed by the Warsaw regime.

48. ***Secondly***, what one instead finds in r 105(B)(5) is "an explicit confirmation that the Montreal Convention applies in full": AJ [78]. The unambiguous language of r 105(B)(5) provides a strong indication that Air Canada was not waiving any rights or defences available to it under Montreal. Further, in light of this language in r 105(B)(5), a Court would not lightly conclude that another provision of the Tariff operates to undo the central feature of the Montreal Convention (being the two-tier unlimited liability system): AJ [85] (**CAB 91-92**). Indeed, the Appellants' construction of r 105 gives rise to an "internal inconsistency", which Leeming JA pithily encapsulated at AJ [82] (**CAB 90**): "[w]hy ever would r 105(C)(1)(a) be construed so as to take away the partial defence in art 21(2) when the immediately preceding sub-paragraph of the tariff preserves the entirety of the Montreal Convention?" Even having regard only to this inconsistency, it is clear that the words of r 105(C)(1)(a) do not rise to the high level of clarity required to show that Air Canada has abandoned the valuable forensic opportunity provided for by Art 21(2) (see [42]-[43] above).

49. ***Thirdly***, it is also important to note the differences between the language used in r 105(B) and r 105(C)(1)(a) respectively: see AJ [77] (**CAB 89**). In particular, in r 105(C)(1)(a) no reference is made to Arts 21(2) and 25 of the Montreal Convention. By contrast, in r 105(B)(1), the provisions of the Warsaw Convention that confer the rights being surrendered (Arts 20 and 22(1)) and the provision being used to achieve that result (Art 22(1)), are invoked expressly (as one would expect where a party is surrendering a valuable statutory entitlement — see [43] above). Additionally, r 105(C)(1)(a) states only that where the Montreal Convention applies "[t]here are no financial limits" — the language is neutral and does not suggest waiver of any defences available to Air Canada under that Convention. At AS [41(h)] it is suggested that "[c]learer words could not have been used" to waive any rights under Art 21(2), however one only needs to look at the language in those

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62 Note that this language reflects the terms of the 1996 IATA Agreement (see [20] above).

paras of r 105(B) that state expressly that Air Canada will not rely on its full entitlements under the Warsaw regime to see that that assertion is plainly wrong: see AJ [79] (**CAB 89**).[63] The Appellants' construction also leaves unexplained why Air Canada would have accepted far greater potential liability for passengers whose carriage is governed by the Montreal Convention than for those subject to the Warsaw Regime. By contrast, Air Canada's construction of the Tariff produces a more coherent result in which the scope of potential liability is similar regardless of which convention applies for any given passenger.

50. ***Fourthly***, contrary to the primary judge's suggestion that Air Canada's construction of the Tariff rendered r 105(C)(1)(a) nugatory (see PJ [59] (**CAB 22**)), the provision in fact serves the purpose of concisely notifying passengers that, consistent with the incorporation of the Montreal Convention into the Tariff pursuant to r 105(B)(5), where that Convention applies there shall be no financial limit on Air Canada's liability for death or bodily injuries (without surrendering any of Air Canada's rights to rely on Arts 20 and 21(2)): AJ [75], [80] (**CAB 87, 89-90**). In this regard, it should be noted that, consistent with these provisions having a notification purpose, and contrary to AS [41(h), (k)], in both versions of r 105(C) of the Tariff that were in evidence in the Courts below (see fn 4 above), all of r 105(C)(1)(a)-(c) and (2) do no more than accurately summarise the limits on liability in the international conventions referred to in r 105(B) as they stood at the time.[64] Further, the inclusion of equivocal language in r 105(C) — such as "in most cases" in paras (1)(b)-(c) and "limits of liability may apply" in para (2) — is consistent with: (i) this sub-rule serving only a notification purpose; and (ii) the fact that Air Canada had already waived some of the relevant limits in r 105(B).

51. Leeming JA placed some reliance on r 122 of the Canadian *Air Transportation Regulations*,

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63 See sub-rules 105(B)(1)(a) ("shall not invoke the limitation of liability"); 105(B)(1)(b) ("shall not avail itself of any defence"); and 105(B)(4)(a) ("limit of liability will be waived").

64 Note, for example that, contrary to AS [41(k)], r 105(C)(1)(b)-(c) do not "enhance the entitlement of passengers by increasing the SDR amounts payable" under the Montreal Convention. Those sub-rules merely reflect the revised limits for Art 22(1) and (2) of the Montreal Convention nominated in the ICAO's 2009 Review (for the 2019 Tariff excerpt) and the ICAO's 2019 Review (for the 2022 Tariff) (see fns 3 and 4 above). Similarly, the amounts stated in r 105(C)(2)(a)-(b) reflect that: (i) since the adoption of the ***Additional Protocol No 1*** *to Amend the Convention for Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929*, opened for signature on 25 September 1975 (entered into force on 15 February 1996), the limit of liability under Art 22(1) of the Warsaw Convention is set at 8,300 SDRs (see Art II); (ii) since the adoption of the ***Additional Protocol No 2*** *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*, opened for signature on 25 September 1975 (entered into force 15 February 1996), the limit of liability under Art 22(1) of the Warsaw Convention as amended by the Hague Protocol is set at 16,600 SDRs (see Art II); and (iii) pursuant to *Additional Protocols Nos 1 and 2* for both the unamended Warsaw Convention and the version of that instrument as amended by the Hague Protocol, there are limits of 17 SDRs per kilogram for damages in respect of checked baggage and 332 SDRs for unchecked baggage (see Art II of each additional protocol).

SOR/88-58 as providing the "core explanation" for r 105(C)(1)(a): see AJ [76] (**CAB 88-89**). That regulation, which applies to any air carrier operating between Canada and another country (such as the flight in this case),[65] relevantly provided (see **RBFM 293**):

> Every tariff shall contain:
>
> (a) the terms and conditions governing the tariff generally, stated in such a way that it is clear as to how the terms and conditions apply to the tolls named in the tariff;
>
> …
>
> (c) the terms and conditions of carriage, clearly stating the air carrier's policy in respect of at least the following matters, namely,
>
> …
>
> (xviii) limits of liability respecting passengers and goods,
>
> (xix) exclusions from liability respecting passengers and goods …

52. Air Canada defends the correctness of the reasoning at AJ [76], which does not depend on the Canadian regulation being a complete explanation for r 105(C) (contra AS [39]); nor does it require evidence that that sub-rule was inserted into the Tariff to comply with this regulation (contra AS [41(i)]). The real point is that this regulation forms part of the "history, background and context and the market in which the parties were operating"[66] and reflects a policy concern that passengers should be notified of the effect of the Montreal Convention in governing carriers' liability, which also finds expression in Art 3(4) of the Convention itself and in regulations in other jurisdictions.[67] It is that concern that explains the inclusion of a short-hand summary of the effect of Arts 17 and 21 of Montreal in r 105(C)(1)(a).

53. ***Fifthly***, as is explained at [37] above, both Arts 20 and 21(2) of the Montreal Convention provide for defences, whereby a carrier can reduce its liability to a passenger by proving certain matters. In the Court below, the Appellants accepted that r 105(C)(1)(a) of the Tariff did *not* disentitle Air Canada from relying on the contributory negligence defence in Art 20 but they were unable to explain the differential operation of the rule as between Arts 20 and 21(2): AJ [81] (**CAB 90**). The Appellants have again failed to engage with this problem in their submissions. However, if, as the Appellants contend, r 105(C)(1)(a) should be construed as removing entirely the limit down to which Air Canada can extinguish its liability in reliance on Art 21(2) (which would otherwise be 113,100 SDRs), then why should it not also operate to remove the limit down to which Air Canada can exonerate itself pursuant to Art 20(1) (which would otherwise be 0 SDRs)? Such an extreme result could

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65 See s 55(1) of the *Canada Transportation Act*, SC 1996, c 10 and r 108 of the *Air Transportation Regulations*, SOR/88-58 (**RBFM 291**).

66 *Mount Bruce Mining* (2015) 256 CLR 104 at [50] (French CJ, Nettle and Gordon JJ).

67 See, eg, *Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents* [1997] OJ L 285, Art 6(1); *Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents* [2002] OJ L 140, Arts 8, 10.

scarcely be justified in light of the vague language in r 105(C)(1)(a). These interpretative difficulties serve to underscore the problems with the Appellants' approach.

54. ***Sixthly***, the Appellants' construction of r 105(C)(1)(a) is uncommercial and should be rejected on that basis.[68] The Appellants' contention is that Air Canada voluntarily chose to eschew the hard-fought compromise position embodied in the Montreal Convention, which is itself heavily weighted towards the interests of passengers,[69] and instead accepted unlimited liability for death or bodily injury on a no-fault basis. Leeming JA suggested that such an choice may be "unprecedented in a century of international commercial aviation": AJ [86] (**CAB 92**).[70] The Court would not accept that r 105(C)(1)(a) had that effect in the absence of the clearest possible language — no such words can be found in the Tariff (see [48]-[49] above).

PART VI NOTICE OF CONTENTION

55. This appeal ought to be able to be resolved without reaching the issues raised under the cover of the NoC. Those issues are raised for completeness because there is an available view on the text of Arts 21(2) and 25 of Montreal that Art 25 cannot be engaged in relation to a liability that is already unlimited in amount (as is the case for liability under Arts 17 and 21), whereas it can sensibly operate for other provisions (e.g. Arts 22(1)-(3)) where the Convention imposes a monetary limit on liability. On this construction, a waiver of a defence, such as the defences under Arts 20 or 21 occurs, if at all, under Art 27, a provision that the Appellants eschew. Although the preparatory documents for the Convention provide no assistance either way,[71] leading commentaries on the treaty support this interpretation.[72] If this view of Art 25's scope is correct, it provides another reason why the appeal must fail.

PART VII ESTIMATE

56. The respondent estimates that it will require up to 2 hours to present its oral argument.

Dated 21 January 2025

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68 *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at [35].
69 See Clarke, *Contracts of Carriage by Air* at [3.2.3].
70 See, also, A Sipos, *International Aviation Law: Regulations in Three Dimensions* (Springer, 2024) at 382.
71 See MDC Documents Vol I at 101 [23] (**RBFM 157**); Leloudas, *The Montreal Convention: A Commentary* at [25.02].
72 Leloudas, *The Montreal Convention: A Commentary* at [25.07], [27.09]; Dempsey, *Aviation Liability Law* at [16.72], [16.74], [16.78].

ANNEXURE TO RESPONDENT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
	Australian legislation and statutory instruments				
1.	*Civil Aviation (Carriers' Liability) Act 1959* (Cth)	Compilation No. 29 (21 October 2016 to 16 June 2021)	ss 9B, 9H; Sch 1A (Arts 3(4), 17- 23, 25-27), Sch 1 (Arts 17-22, 25)	Version in force at the time of the incident	11 July 2019: date of the incident
2.	*Notice Pursuant to Civil Aviation (Carriers' Liability) Act 1959* (Cth) (11 December 2009) see Commonwealth, *Gazette*, No. GN50, 23 December 2009 at 3139	Version as made	Entire instrument	Version as made and in force at the time of the incident	11 July 2019: date of the incident
3.	*Notice Pursuant to Civil Aviation (Carriers' Liability) Act 1959* (Cth) (6 December 2019)	Version as made	Entire instrument	Version in force at the date of the 2022 Tariff	16 October 2022: date of the 2022 Tariff
	Foreign legislation and statutory instruments				
4.	*Air Transportation Regulations*, SOR/88-58	Version in force from 1 July 2021 to 14 May 2024	rr 108, 122	Version in force at the date of the 2022 Tariff	16 October 2022: date of the 2022 Tariff
5.	*Canada Transportation Act,* SC 1996, c 10	Version in force from 11 July 2019 to 9 June 2020	s 55(1)	Version in force on the date of the incident	11 July 2019: date of the incident
6.	*Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents* [1997] OJ L 285	Version as made	Art 6(1)	For illustrative purposes only	N/A
7.	*Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the*	Version as made	Arts 8, 10	For illustrative purposes only	N/A

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
	event of accidents [2002] OJ L 140				
	International conventions and instruments				
8.	*Additional Protocol No 1 to Amend the Convention for Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929*, opened for signature on 25 September 1975 (entered into force on 15 February 1996)	Version as made	Art II	Version as made	N/A
9.	*Additional Protocol No 2 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*, opened for signature on 25 September 1975 (entered into force 15 February 1996)	Version as made	Art II	Version as made	N/A
10.	*Convention for the Unification of Certain Rules Relating to International Carriage by Air,* opened for signature 12 October 1929 (entered into force 13 February 1933)	Version as made	Arts 17-22, 25	Version as made	N/A
11.	*Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier,* opened for signature 18 September 1961 (entered into force 1 May 1964)	Version as made	Entire instrument	Version as made	N/A

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
12.	*Convention for the Unification of Certain Rules for International Carriage by Air,* opened for signature 28 May 1999 (entered into force 4 November 2003)	Version as made	Arts 3, 17-23, 25-27	Version as made and in force at the time of the incident	11 July 2019: date of the incident
13.	International Civil Aviation Organization (**ICAO**), "Review of limits of liability conducted by ICAO under Article 24 of the Montreal Convention of 1999 — Notification of revision of limits of liability", ICAO State Letter LE 3/38.1-09/47 (30 June 2009)	Version as made	Entire instrument	Version as made and in force at the time of the incident	11 July 2019: date of the incident
14.	ICAO, "Revision of limits of liability under the Montreal Convention of 1999 — Notification of effective date of revised limits", ICAO State Letter LE 3/38.1-19/70 (11 October 2019)	Version as made	Entire instrument	Version in force at the date of the 2022 Tariff	16 October 2022: Date of the 2022 Tariff
15.	*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*, opened for signature on 25 September 1975 (entered into force 14 June 1998)	Version as made	Entire instrument	Version as made	N/A
16.	*Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air*, opened for signature 28 September 1955 (entered into force 1 August 1963)	Version as made	Entire instrument	Version as made	N/A

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
17.	*Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969 (entered into force 27 January 1980)	Version as made	Arts 31, 32	Version as made	N/A