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Proceedings of the Standing Senate Committee on Transport and Communications

Issue 15 - Evidence

OTTAWA, Wednesday, October 31, 2001

The Standing Senate Committee on Transport and Communications, to which was referred Bill S-33, to amend the Carriage by Air Act, met this day at 5:52 p.m. to give consideration to the bill.

Senator Lise Bacon (*Chairman*) in the Chair.

[*English*]

The Chairman: I wish to welcome you to our first meeting on Bill S-33, to amend the Carriage by Air Act.

Both Senator Fitzpatrick and Senator Oliver spoke to this bill in the Senate at second reading. It is a short bill, but an important one. Those of you who have been on this committee for a while will recall that we reviewed earlier amendments to the Carriage by Air Act in 1999. Much of this, therefore, will be familiar to you.

The present bill will ratify Canada's acceptance of a new international liability regime in air transportation. This new regime will be known as the Montreal Convention and, when in effect, will replace the Warsaw Convention that has been in place since 1929.

Liability can be a fairly technical issue, and dealing with national conventions from time to time, it can be hard to keep clear what is signed, approved, ratified and in effect. We are pleased to start our hearings with officials from the department, who will help us to keep some of those details clear. Ms Dufour appeared before us at the time of the last amendments in 1999. She will, therefore, know well the aspects of the subject that are sometimes difficult to follow.

Welcome to the committee.

[*Translation*]

Mr. Lee is a national policy advisor on air transport. Louis Gautier is a counsel in Legal Services. Welcome; we are here to listen to you.

Valérie Dufour, Director General, Air Policy, Transport Canada: I am pleased to be back here with you this evening. As you said, we were together not that long ago.

[*English*]

The chairman has stolen my opening remarks. I wanted to begin by reminding senators that they have become the champions of the carriage by air legislation.

This is the second time that, together, we have looked at a bill to amend this act. Last time it was Bill S-23. We began the parliamentary process of enacting that bill, passing it in 1999.

Bill S-33 begins a process for a much more dramatic change in the international liability environment. This Montreal Convention will pull together everything that has been part of Warsaw until now. We are pleased that it will be called the "Montreal Convention." There was very active Canadian participation in the drafting of this bill as well as the mothering of it through the processes in the international civil aviation environment.

I am pleased also to note that our opening remarks are being made in the presence of the representative of the Air Transport Association, who will be

your next witness. It has been a joint government activity to bring into effect a liability regime that was desired by the aviation community. Governments are, in fact, catching up with the needs of the private aviation sector.

We have provided for you, through your clerk, a briefing book in which there is considerable detail, history and background on the bill.

As the chairman said, this is a short bill. It has only six clauses. From a legislative drafting point of view, each time we wish to present an amendment to the act, all we do is add or subtract words from the same six sections. In this case, we are adding references to a new schedule. We are adding a new schedule. We are not removing any of the old schedules because, as with most of these complex conventions, they come into effect in a kind of syncopated and slow way, based on a number of ratifications.

It is important that we act quickly, because it is important for Canada and the international aviation community to have a Montreal Convention that is in effect.

As to why we keep the old schedules, until this convention is fully in effect, and even when it is in effect for other signatory countries, for some countries with whom we have air travel relations the old rules will apply until they become parties to the Montreal Convention.

I am not sure what is the easiest way to take you through the bill. If we do it on a clause-by-clause basis, there is not much to do or to see. Five clauses remove and add words and, in each case, add the reference to the Montreal Convention itself, which is now attached to the bill.

There are a number of features to the new Montreal Convention, the most important of which is to move from a regime of unlimited liability. It is a two-phased regime but, at the end of the day, it creates a formal regime in which unlimited liability is available.

The other important feature is that passengers who now have complaints to make under these regimes can choose the country in which they want to take action.

In the documents there is a full description of the various agreements. They also explain how we are making good on the Intercarrier Agreement on Liability. We explain the convention, including the dollar values. The agreement allows for adequate insurance for liabilities and for passengers to choose the country in which they want to take action. There is more authorization for the electronic exchange of information, a much more modern element. The document deals with authorization for simplified modern documents such as electronic tickets and waybills for cargo. Carriers may be required by national law to make advance payments without delay to assist entitled persons in meeting immediate economic needs, the amount of which will be subject to national law and deductions from the final settlement.

Clearly, this is a modern document. It takes into account situations with which you are personally familiar, be it the consequences of the Swiss Air incident or other incidents. The insurance conventions play an important role in the handling, in a humane and appropriate way, of passengers who have the unfortunate requirement to deal with this legislation.

[Translation]

The Chairman: After a few questions, I am going to give my colleagues the floor. Our notes tell us that of the 67 states that have signed the Montreal Convention, 11 have ratified it, whereas 30 states are required to give it force of law. Supposing Canada ratified the Convention, how long would it be before the required number of 30 states was reached?

Ms Dufour: I do not think anyone can say. Since people listen to our country and it sets the example, we are trying to create momentum. We took protocol action at the triannual meeting of the ICAO in Montreal, last month, to encourage other countries to act. I hope that within three years it will be possible. For us, it is important to encourage other countries. It is the same thing for our American colleagues. It is important that developed countries have a tool this size. It is in our interest to make sure that we reach the required number as swiftly as possible for it to come fully into effect.

The Chairman: Does the possibility of unlimited liability not carry with it a risk of bankruptcy for an air carrier? Can that be avoided with adequate insurance? Would such insurance not be very expensive for the carrier?

Ms Dufour: I am going to talk about the situation since September 11. We clearly understood the example of American Airlines. The World Trade Center was evidence of it. There is a point when "unlimited" becomes completely unmanageable. Before September 11, the big carriers had - my fellow witnesses who follow will correct me if necessary - a billion or more in coverage, depending on the size. Normally, that was regarded as adequate. Nowadays, insurers have got scared since September 11. The Canadian government is the one that will provide short-term compensation while a commercial solution for aviation insurance is found.

It is difficult today to foresee what the future will be like, but throughout the system, it is necessary for large carriers like Air Canada to have a minimum of a billion in coverage at all times.

[English]

Senator Oliver: The document you have provided states that one of the features of this bill includes no arbitrary limitation on liability, the recovery of full compensatory damages, and an explicit waiver by airlines of the defences to which they were entitled under the Warsaw Convention. What defences did they have under that system that will now be eliminated since there will no longer be a limitation on liability?

Ms Dufour: It has to do with the presumption of guilt. Before, it was a bit like car insurance. There was a good side and a bad side. The company with which you flew established a contract for carriage and agreed to indemnify you, regardless of the circumstances. They cannot claim non-negligence.

Senator Oliver: To use a practical example, let us say that Air Canada, under the new regime, and after 30 countries have ratified the agreement, has an

accident. Presumably, they will be insured with a group of insurance carriers to cover the loss. The insurance company will likely have a policy that contains many exclusions. They might want to exclude an act of terrorism, for instance. Does that mean that, under this bill, the airlines will require a sufficient supply of cash to personally respond to a claim not covered by their insurer because of insurance exclusion?

Ms Dufour: I will start by putting it the other way. First, this is about third party liability, and this is about international carriage.

Second, war risk insurance was a piece of an overall insurance policy. It was presumed, just as you have certain elements in your house insurance. Recently, while there are still some levels of insurance for hulls, engines and other third party liability, there is now a resistance to provide coverage for accidents as a result of war or terrorism.

We are currently in an in-between situation. The government has said that it will indemnify for those acts for a limited period of time, while encouraging the commercial insurance industry to come back to the table and to reinsure, as they have in the past. It is an in-between time now. It is a very challenging time for the airline industry.

Senator Oliver: Recently, the Minister of Transport arranged a government guarantee of \$75 million to help out a Canadian airline. He indicated that it was having a cash flow problem. What if, under the new regime, after 30 countries have ratified, that particular airline had a claim against it for which the insurer denied coverage, and that company had a cash flow problem? How is an injured claimant to be paid? Do they have to wait, once again, for the Government of Canada to step in?

Ms Dufour: No, I do not think there is a link. The current loan guarantee to Canada 3000 is short-term liquidity support. Further out, we should not be there. They should be once again successfully running a private sector business without the government at the table.

In the meantime, there must be an assumption that commercial insurers will be back at the table. It is the commercial insurers who will, for a fee from all of their customers, carry the risk and be required to pay out.

Canada 3000 will not be able to fly unless it is fully insured. Its lessors will not let it fly. Its bankers will not let it fly. It is a different link from the one that you are suggesting.

Senator Oliver: I understand your response, but that was not a response to my question. Let me put it another way.

An insurance company, in its policy, may have lots of exclusions. Let us say there is a claim for \$300 million. Let us say that a company, like Canada 3000 was having some cash flow problems and the exclusion was applied; the company would not have the \$300 million to pay the claims. Does that mean the Government of Canada will have to step in, in this new unlimited-liability regime?

Ms Dufour: Not at all.

Senator Oliver: Where will the money come from to pay out?

Ms Dufour: The money will come from the commercial insurers to which Canada 3000 paid its premiums, just like the pool of insurance money from whom any other form of claim would take place.

Senator Eyton: I have a supplementary question. I am curious about your assertion that may be a temporary resistance to insurance covering acts of war or terrorism. What happens to legislation if you make the presumption - and I think it is a good one - that it will be impossible to insure either large buildings or airplanes, aircraft, from acts of terror, if that goes on for a very long time?

You have indicated the government will have to step in and you suggested that it would be for a short period. In a conference call this morning I discussed some large buildings in New York that are running out of insurance. Within 30 days or so, they will not be able to get insurance of the kind to which I am referring. I suspect the same policy will apply to aircraft.

We are in a spot where all sorts of flyers will not be able to get the insurance you are talking about. Governments will either have to be there on a much more permanent basis or some other solution that I cannot visualize will have to come along. What happens in that sort of regime?

Ms Dufour: Canada has put in a proposition for indemnification for 90 days. About 50 countries around the world have already come to support their carriers. Some countries have made the carriers pay some form of commercial fee. If, Senator Eyton, the issue continues, we will probably need to put that on the agenda of the Ministerial Conference on Aviation Security that will be convened in Montreal in the ICAO context early next year.

Most people say that we should wait until after Christmas before assessing consumer and commercial confidence. We are still in such an uncertain and volatile environment. That is why we knew we had to be there for at least 90 days.

Once we see how permanent the resistance is, there must be a completely new way of thinking. Every government must sit down and think outside the box about how our carriers can continue to operate in an environment where the assets are so valuable, including the people in them. All this insurance is about hulls, motors and people. We do not have the answers yet, but governments around the world, must get together and talk about this as a group, rather than expecting any individual country to come up with a solution in isolation.

Senator Oliver: There is a presumption that the military can opt out. If a civilian travelling on a DND aircraft suffers an injury, how will a claim be paid out for damages suffered as a result of negligence on the part of DND?

Ms Dufour: DND is always self-insured through the Government of Canada. We insure our military personnel flying on military aircraft. That has been the case since the beginning. I would repeat that DND continues to ask not to be subject to that regime. Their own regime applies. That comes into effect in

the case of a military accident.

Senator Callbeck: In your opening remarks you mentioned the two-tier regime. You said passengers can choose the country in which to take action. Does that mean they can choose between the country where the accident happened and the country where they live?

Ms Dufour: That is right.

Senator Callbeck: A passenger cannot pick just any country.

Ms Dufour: I am not sure the idea is that you can shop for the best legal system but, clearly, in the past, one could only claim in the country of the aircraft. If you were flying on "Air Slobovia," you could only claim in Slobovia which is not fair and not efficient for you. Now a Canadian citizen can make a claim against Air Slobovia in Canada.

Senator Callbeck: What about lost luggage? Does this in any way change the liability for lost luggage?

Ms Dufour: The rules for lost luggage are in an air carriers' terms and conditions of carriage. There is a separate set of regulations which are national and which require carriers to have terms and conditions which include what they do with lost luggage, along with bumping and other things that irritate passengers.

The handling of cargo is partially covered here. Parts of the Guadalajara and Montreal Conventions dealt with baggage, and they continue to apply, but in practical terms the terms and conditions of a carrier's tariff would cover that. Some carriers may offer \$600 for lost luggage; some carriers may offer nothing.

Madam Sénécal, as a carrier representative, may be able to speak more specifically about how ATAC carriers deal with baggage in Canada.

Senator Adams: The taxpayers of Canada have paid close to \$70 million in relation to the crash of Swissair Flight 101, although that aircraft came from another country. If a terrorism attack occurs here in Canada, can the air carrier's country be held responsible, or is it only the insurance company?

Ms Dufour: If a Canadian is on a U.S. flight - for us, that is an international flight because it goes in and out of Canada - the passenger has an insurance relationship with the carrier for that plane. The passenger's family would be able to make a claim against that carrier either in the U.S. or in Canada. There would be a direct relationship with the air carrier.

This is about if you end up having to make a claim when you are not satisfied with what you have been offered under the terms that were written into your contract of carriage. The rules of how they will treat you will be written on the back of an international ticket. Your ticket is your contract of carriage. It includes your baggage insurance, Senator Callbeck.

Senator Adams: What is the liability if there is property damage on the ground when a plane crashes? What if it kills someone? Is it still the same insurer?

Ms Dufour: Yes, it is still in relation to the carrier. It may be a different part of the insurance policy, because this is carriage. Damage on the ground and damage to persons on the ground is not the same as loss of life while flying or as a result of having actually bought a ticket and boarded a plane. The person on the ground or the property owner on the ground does not have a contract of carriage, but the carrier has coverage for those kinds of incidents.

Senator Adams: When you fly over a city you fly over lots of buildings. If an aircraft that crashed into it destroys a building, would that be part of it?

Ms Dufour: Not really. This is about being in an accident while you are a passenger in an aircraft. If an aircraft runs into something on the ground, there is one relationship between the passengers and the airplane and the operator of the aircraft, and there is a different insurance relationship between the building owner and the people on the ground.

[*Translation*]

Senator Gill: You said that the Montreal Convention would not be complete for three years. The government has acted on an ad hoc basis, but three years from now, companies will have become involved and gone bankrupt, and insurance companies will have stopped insuring national and international air carriers. Premiums will have increased so much that the aviation companies will not be able to continue operating or the cost of tickets will be exorbitant. Companies have to cover their expenses. Have transitional measures been provided? Everyone is affected by this situation - the international, national and local companies as much as the regional ones.

Ms Dufour: We have to realize that it is on the international level and that current fears are related to acts of terrorism.

Aside from that, the airline companies, of their own accord, have acquired the level of undertaking to insure that is in the Montreal Convention. The large companies were already there and offering the level of coverage laid down. We are attempting to formalize the obligation in Canada first, because we want to be party to a convention that has full force of law.

Concerning the other aspect, obviously we are living in uncertain times. The governments of all countries should work together to see what can be done with this area of insurance if the big insurers and reinsurers do not regain their confidence that this is an area - once their current fears have been allayed - worth insuring.

For a certain category of insurers, it is a matter of risk management. It may be less true that, between Sept-Îles and Montreal, there are as many risks as between Heathrow and Boston-New York at present. There is a certain relativity.

The insurers have not said they were not doing anything anymore. They have said there are circumstances in which the demand on insurers' resources is so excessive that they no longer wish to get involved. That is where the governments have to come in.

Senator Gill: This nevertheless affects the domestic situation. Are you sure that in the next two or three years the companies will survive and will continue to give essential services because, sometimes, there are not any other means of transportation. We should provide for a solution in case your prediction is not accurate.

Ms Dufour: Incidents have reminded us how governments have to be ready in the circumstances. I must say that the current government took some action demonstrating that the public interest is that there will be air transportation serving Canada adequately. Compensation has been provided for some losses and events are being followed very closely.

[English]

Senator Finestone: Why was the United States so prompt in signing the Montreal Convention? I recognize that they did have their own system. What do you think accounts for their desire to be part of the team so quickly?

Ms Dufour: This is a personal view since I cannot speak on behalf of the Government of the United States, but their industry was so far ahead of the international conventions on insurance that they felt that they were not served by being members of some of the earlier versions, even those we talked about two years ago.

Senator Finestone: Are you referring to the \$135,000?

Ms Dufour: Yes. They were offering higher amounts long before the international community was moving to that. Their large airlines were way ahead of that.

Senator Finestone: In signing on, they signed at \$135,000 per person. Is it if that person is injured or killed?

Ms Dufour: They have signed on to the concept that this includes unlimited liability. It is a regime that is completely compatible with where they wanted to be. They were proponents of the idea that there be a convention to catch up with where the international carrier community had been for a number of years.

Senator Finestone: Is there a limit to the liability above and beyond the \$135,000, or do you then have to go to the courts? Is that being used as a disincentive to go to the courts, which is more expensive?

Ms Dufour: I am not quite sure that is how it works.

Senator Finestone: How does it work?

Ms Dufour: I have never processed an insurance claim for a carrier. I would not be able to explain it. However, I think Madam Sénécal may be able to help you. It is their day-to-day business.

We have few examples of instances where you can make a call of this magnitude on a carrier. We do not want to have them.

Senator Finestone: No, of course not.

Ms Dufour: It is not something about which everyone will say, "I remember," and so on. I think the last Canadian carrier incident was in Cincinnati a long time ago. There was a burned air hull and some loss of passengers by a Canadian carrier. No other Canadian carrier has ever faced the issue you are raising.

Senator Finestone: What about the criteria required to claim a higher amount? If you are a big earner and you are caught in a terrible situation like that, \$135,000 will not cover your annual income.

Ms Dufour: Presumably, that is part of the negotiations with your family and the carrier.

Senator Finestone: With the carrier or the court?

Ms Dufour: It depends on whether the carrier arrives at a settlement with all of the families of the passengers on board, or whether there is litigation.

Senator Finestone: You said 67 states have already signed the Montreal Convention; is that accurate?

Ms Dufour: Yes. There is a list in your book.

Senator Finestone: However, only 11 have ratified. Is that accurate?

Ms Dufour: Yes.

Senator Finestone: Will it go into effect with a low number of ratifications like that? What number of ratifications is required to make it operative?

Ms Dufour: It requires 30 signatories. However, it is important to understand that the signatories can agree among themselves to operate at the level of the Montreal Convention without the convention being ratified. What it means, though, is that they cannot oblige the carriers that have not ratified to operate in the unlimited regime. Those who are still working on the Warsaw Convention levels will interrelate with Canada at that level. You go down to the lower of the two. The big countries are all operating at the levels of Montreal Convention 1999 now.

Senator Finestone: What is the point of ratifying, then?

Ms Dufour: Because we want to turn it into a global convention so that the world works to that standard, not to the 1929 plus-plus standard, but the 1999 standard. The objective here is related to passengers.

Senator Finestone: Earlier, our committee studied the situation involving Air Canada and Canadian. Air Canada was with Star Alliance and Canadian was with One World. Does that make any difference at all in the search for people to sign on? Does it have anything to do with that?

Ms Dufour: No. The difference is that governments, on behalf of their citizens, adhere to this convention. The carriers operate at the level that their state has signed on to or at a level above that, which is the choice of a number of airlines whose countries have not ratified. It is the difference between what governments are saying is the baseline and what carriers are prepared to operate.

Senator Finestone: This has happened to many of us around this table. Say you were planning to take a plane at a certain hour. Unfortunately, your responsibilities delay you and you miss the plane and you travel with another airline. Say I had an Air Canada ticket but I ended up on a WestJet flight. Let's also suppose that, unfortunately, that airline has an accident. Since I had a ticket that was transferred to a different airline, would I still be covered?

Ms Dufour: If you were flying in Canada, this would not cover you at all. This is not about domestic carriage.

Senator Finestone: Does it apply only to international flights?

Ms Dufour: Yes.

Senator Callbeck: My question is about international flights. What is the difference in the liability between domestic and international? We know now what it is for international flights. Is that a question to ask you?

Ms Dufour: I do not know the answer. I think that ATAC will be able to answer that. We only create an obligation that there be an insurance regime. As a government, we do not establish the levels of the regime. That is a commercial arrangement. It is driven by the value of the aircraft involved, and the entire operation that the insurance industry is supporting and assuming risk upon.

[Translation]

The Chairman: We thank Ms Dufour, Mr. Lee and Mr. Gautier for their explanations and we will continue our examination of bill S-33.

[English]

I have just been informed that there is to be a vote in the Senate chamber. We will suspend the meeting and return after the vote.

The committee resumed at 6:59 p.m.

The Chairman: I would welcome the officials from ATAC, the Air Transport Association of Canada, to our review of Bill S-33. As the representative of the air carriers, your views are important to us as we consider these amendments to the Carriage by Air Act.

We are told that you were involved in the development of the Montreal Convention. We understand that you are generally in favour of the convention and wish to see Bill S-33 passed. Now is your opportunity to let us know if you have any concerns.

Welcome to our committee. Please proceed.

Mr. J.C. (Cliff) Mackay, President and Chief Executive Officer, Air Transport Association of Canada: We are very pleased to have been invited to testify here tonight.

You are correct, Madam Chair. This proposed legislation that is very important for the industry.

I would like to introduce my colleague, Ms Sénécal. She is an expert in this area. Her day job is assistant general counsel for litigation for Air Canada. She is very involved in these sorts of issues, not only in Canada but around the world. I am pleased that she has been able to be with us to make a presentation and to answer questions. Without further ado, I turn it over to Ms Sénécal.

[Translation]

Ms Louise-Hélène Sénécal, Assistant General Counsel, Air Transport Association of Canada: On behalf of the Air Transport Association of Canada, we are honoured by the invitation you have made us to present our position respecting Bill S-33 to amend the Carriage by Air Act and to further the Convention on the unification of certain rules respecting international air transport, by incorporating the Montreal Convention, adopted in Montreal on May 28, 1999.

[English]

I am before you as a member of ATAC's legal committee. I am also assistant general counsel, litigation, for Air Canada. I am responsible for all Air Canada litigation across the world. The general claims department also reports to me. They handle the claims for bodily injury, damage to property, and damage or delay to cargo.

The opinions voiced by the undersigned are made on behalf of ATAC today and do not necessarily reflect the opinions of individual airline members of our association.

[Translation]

I am particularly interested in this legislation, having had the honour of being part of the Canadian delegation to the ICAO in connection with the Montreal Convention. Actually, representatives of three airline companies had been invited to take part as technical support for the Canadian negotiating team masterfully led by Gilles Lauzon from Justice Canada and skillfully assisted by Elizabeth MacNab from Transport Canada.

As a privileged observer, I can affirm that the Montreal Convention would never have seen the light of day without the unflagging efforts of these two individuals who, with their diplomacy, thorough legal knowledge, writing skills and credibility, were key contributors to the consensus reached among the various nations with often divergent interests.

[English]

I would thank the Canadian government for providing my colleagues and me with this unique opportunity to participate in writing a page in the history of international air transportation law.

ATAC supports the adoption of this bill. It modernizes a unified liability system that first started in 1929 with the Warsaw Convention. This convention first recognized the international character of air transportation and the need to find a unified system of liability for all international carriage by air. It was only in 1955 that the states met again to try to modify certain provisions; then again in 1961, with the Guadalajara Supplemental Agreement, and in 1975, with Montreal Protocol No. 4. Moreover, in 1995-96, members of IATA, the association which regroups international air carriers and of which Air Canada is a member, met and adopted the Inter-carrier Agreement on Liability, which some carriers, members of IATA, decided to accept contractually and waive the limits of liability.

The difference between the inter-carrier agreement and what is being proposed by the Montreal Convention is that the inter-carrier agreement is a contractual undertaking by the carriers, whereas the Montreal Convention, if adopted, will become law. It will be unified per country. It will not be per carrier. That is the difference.

Why does ATAC believe in the Montreal Convention? First, it purports to unify a liability regime that today could be qualified as patchwork, since certain, though not all, states have ratified the Warsaw Convention. Some have ratified The Hague protocol but may not have ratified the Montreal protocol No. 4.

[Translation]

It incorporates the provisions and commitments undertaken by some air carrier signatories to the inter-carrier agreement, which removes liability limits for bodily injury - including the ultimate bodily injury of death - while keeping, for a certain level of damage, presumptive liability.

These provisions are advantageous to passengers, who may enjoy compensation for bodily injury equivalent to the jurisprudence in the country in which the dispute arises, without falling into the excesses often attributed to our neighbours to the south, who further to civil litigation by jury, grant damages that are more like winning the jackpot than actual compensation.

The Chairman: I am sorry, but a vote is taking place in a few minutes in the Senate Chamber and I am going to have to interrupt your presentation.

Ms Sénécal: All right.

[English]

When you left for the vote, I was listing the advantages of the Montreal Convention. It simplifies the conditions of the contract of carriage, paving the way for electronic commerce. In 1929, it was the inkwell and the quill. Today we have electronic commerce and the Internet. It modifies the language to allow for such things.

In the same way, in the carriage of cargo, the Montreal Convention incorporates provisions that allow the replacement of the traditional paper airway bill with electronically supported documentation.

On the passenger side, there are some requirements encouraging countries to adopt legislation similar to that adopted in the United States to assist the families of victims.

[Translation]

Regarding baggage transportation, liability limits are calculated by passenger and not by baggage weight. This method of calculation is the one used by current Canadian carriers for loss and damage occurring during domestic transportation.

This new method would make it possible to standardize systems, at least in Canada. This Convention acknowledges the changing aspect of the economy

by incorporating mechanisms to review limits of liability based on fluctuations in the cost of living. This will prevent having to wait almost 60 years before being able to revise the limits imposed in another era.

Another element that is important is the addition of another jurisdiction; the Warsaw Convention provided for only certain places where people could take legal action. The passenger's place of residence was not one of them. It was the carrier's residence, where its main place of business was, the place where the contract of carriage was drafted or the destination of the flight concerned. These were the four jurisdictions.

Now, further to the Montreal Convention, a fifth jurisdiction will be introduced, which is not only the passenger's residence, it is the passenger's residence provided the carrier has a place of business or operates flights from this jurisdiction.

This is the main reason why Americans support this new legislation, especially since the Lockerbie incident, in which none of the passengers' families could take action against the U.S.

Thank you again for this invitation, I am available to the Senate committee to answer any questions about this bill or the Warsaw Convention or the legislation.

[English]

The Chairman: Is there any variation among your members with regard to the Montreal Convention? Is there a difference between large and small carriers as to how they are regarded?

Mr. Mackay: Not in any substantial way. As was already mentioned, this is an international carriage bill. In the Canadian context, you are essentially talking about four, possibly five, companies, and they are all of the same view, namely, that this sort of uniformity is good for them and good for their passengers.

The Chairman: Do you believe that unlimited liability could result in a significant increase in insurance premiums for air carriers?

Ms Sénécal: No. We had elaborated on that before supporting and going forward with the Intercarrier Agreement on Liability, in which, personally, the carriers waived their liability. Air Canada is a signatory to the Intercarrier Agreement on Liability of 1995-96.

Litigation costs in this type of situation are high. The limits were so low that the money was being spent in debating whether there was gross negligence or wilful misconduct, because only after that had been established could the limits be lifted. Therefore, there were endless trials by the lawyers for the passengers or lawyers for the cargo, to demonstrate that there was gross negligence. They would examine every mechanical record. It is an advantage to both the carrier and the passenger not to go through that process. That is why there is a presumed liability when an accident occurs on board an aircraft or in the process of embarking or disembarking.

[Translation]

The Chairman: Does the possibility of unlimited liability carry a risk of bankruptcy for an air carrier? Can this be avoided with adequate insurance? Will such insurance not be very expensive for carriers to assume?

Ms Sénécal: The insurers determined that removing the liability limit did not change overall liability very much. It should also be recalled that we are talking here about bodily injury or death; we are talking about damage to cargo, damage to baggage and delays. It is not the aircraft that is a different liability. This is not about damage like the incidents or events of September 11: this would only be for the people in the plane, this would not be the people who were in the tower. This is the "war risk" we are talking about. There are two types of coverage. We are only talking about people who are passengers or who have accidents "in the process of embarking or disembarking the aircraft."

[English]

Senator Oliver: I am interested in limited liability insurance. You mentioned that one of the problems in the past was the cost of litigation. In this new regime, is there any provision for mediation or arbitration as a way of resolving disputes when a person is injured or there has been death, without having to go to the courts?

Ms Sénécal: No specific provision calls for that, but if litigation occurs, it is done in the different courts of the different jurisdictions. In most Canadian, American and British courts, there are procedures that require mandatory mediation. Things are developing in that direction in law. As head of litigation, I have the mandate from our insurers to handle the cases. I do not want to pay large fees. The avenue of mediation is better for everyone. People do not feel bitter. They need not wash their dirty laundry in public. They need not disclose every minute detail of the passenger in open court. We favour mediation when possible.

Senator Oliver: I am aware of that. Would there have been any advantage to including in the legislation a provision strongly encouraging mediation and arbitration as a way of speeding up the process and of reducing costs?

Ms Sénécal: It could have been included. It was not discussed in the convention. However, I can assure you that in Canada and in the United States, where most of the litigation is concentrated, it exists. The different provincial courts that administer the judicial system have established these processes.

There is one provision, however, that requires carriers, in the case of major accidents, to make advance payment to the families of the victims.

Senator Oliver: Swissair did that.

Ms Sénécal: Swissair did it on a voluntary basis. Some carriers have adopted that as a process in their emergency response. I am not sure whether EgyptAir made advance payments.

Senator Oliver: I know that you were in the room when I asked questions of our other witnesses. I would like to have your view on the main question that I was asking.

Let's say a Canadian carrier is carrying Canadian passengers to Europe, and there is negligence and passengers are injured and killed. Let's say that the total amount of the lawsuit is \$200 million. Let's say that the air carrier had insurance, and the insurance policy had certain exclusion clauses in it and they denied coverage on the basis of those certain exclusions.

Under this legislation, in order to protect passengers from possible injuries and death, should our carriers not be self-insuring or setting aside a capital sum sufficient to respond to a claim in the event the insurer denies liability?

Ms Sénécal: We carry between \$1 billion and \$2 billion insurance for our general coverage. That is our general obligation as a carrier. The liability and the unlimited liability are based on per passenger. The two-tier system that we explained is based on per passenger. The first \$150,000, which I calculated, represents the Special drawing rights. The calculation used is based on the gold franc conversion; but you do not want to know that. As a quick calculation, \$100,000 in Special drawing rights is equivalent to about US\$ 117,000. That is the first element.

There is no need to prove negligence. The fact that there is negligence or even gross negligence does not negate coverage under any of the current aviation insurance.

I have never seen any refusal to cover an accident that falls within the Warsaw regime or the Montreal Convention. It is clear that any accident, any bodily injury occurring on board an aircraft on an international flight or in the process of embarking or disembarking is covered by insurance. There is no doubt about that.

Senator Oliver: Let us take a hypothetical passenger, a neurosurgeon, 30 years of age, with a life expectancy of 85 and a family of three. If that passenger dies, would the insurer pay the present value of that claim for general damages?

Ms Sénécal: That would be paid by the insurer.

When we look at this legislation we tend to think of plane crashes. However, the everyday implementation of this legislation relates to the briefcase in the overhead bin that falls on a passenger's head. It deals with the runaway cart, the slip and fall, or the passenger who burns a finger when touching the light instead of touching the flight attendant call button. Those are the situations that this legislation covers. They occur on everyday international flights.

Senator Callbeck: You mentioned that three Canadian carriers participated in the Montreal Convention. They had no major objections to it.

Ms Sénécal: No, they supported it.

Senator Callbeck: You told us why you support it and, you mentioned that it would encourage countries to consider legislation such as they have in the U.S. to assist the families of victims.

Ms Sénécal: Yes. That is in the Montreal Convention. There is a specific provision encouraging countries to adopt legislation similar to the United States. It does not use the words "similar to the United States," but it means legislation to assist families of victims. One of these is the advance payment of a certain amount of money in the event of a plane crash, regardless of the liability.

Senator Callbeck: Is that in the convention?

Ms Sénécal: Yes. I can try to give you the exact provision.

Senator Callbeck: Were you here when I asked another witness about the difference in liability between domestic flights and international flights?

Ms Sénécal: Yes, I was.

Senator Callbeck: Could you explain that, please?

Ms Sénécal: In domestic transportation, the domestic law applies. In Canada we have two regimes, and they are based on contractual liability. If the passenger resides in Quebec, for instance, then the civil law of contractual liability would apply. Did the carrier fail in its obligations or not? There is no presumed liability. Therefore, the passenger in domestic travel must demonstrate that the carrier committed a fault or a tort in common law.

Senator Oliver: Or a breach of contract?

Ms Sénécal: Or a breach of contract. There is no limit of liability. There used to be in the tariff a limit of liability for bodily damage, but that was overturned at some time.

Senator Callbeck: It states here that liability limits are higher for international journeys if that journey involves a stop in the United States. Why is that? It states in brackets, "This is indicated on the back of any airline ticket."

Ms Sénécal: There are three different approaches. There is the pure Warsaw Convention amount, that is, those countries whose carriers have not

adopted in their tariffs the higher limitations. Those amounts were \$15,000 to \$25,000, which is ridiculous when you think of a death on board an aircraft.

The United States Department of Transportation, as a condition of issuance of licences to operate to and from the United States, in order to safeguard their citizens, imposed an increase on the limits of liability to the carriers. That is why it is higher, but it is not as high as that held in the tariffs of Air Canada, for example, or any other carrier that signed the Intercarrier Agreement on Liability. We have incorporated that into our tariffs. Those are the three different approaches to which I referred.

However, there are more. Some ratified The Hague protocol that increased it slightly. There are those that ratified the Montreal Protocol No. 4 and that, again, increased it slightly. I tried to explain the patchwork system.

Senator Finestone: I would go back to Senator Oliver's example of the young neurosurgeon. If the neurosurgeon were sitting near a 24-year-old fellow passenger who had not finished university, and both were hit on the head by the same kind of equipment, would they both receive an equal payment?

Ms Sénécal: No. It depends on their damages.

Senator Finestone: Suppose that both suffered a crushed skull - they suffered identical, serious injuries. I would suggest that equality would not mean the same measures or the same compensation. Would the 24 year old with no job and no particular future receive equal compensation as the neurosurgeon who has a family and a good future? If you are trying to make everything equal and common to all, how do you plan to compensate the family?

Ms Sénécal: Perhaps I did not express myself well. There are two aspects. One is liability. Is the carrier responsible or not? How much should be paid? What is the cap? The other aspect is the assessment of damages. In any liability case there are three elements: Is any liability garnered; is there a fault or a presumed fault? Second, what are the damages? Third, is there a link between the two?

In the Warsaw regime prior to the Montreal Convention and the intercarrier agreement, there may also be caps on liability. In your example, as in any other liability case, the damages suffered by each must be established.

Senator Finestone: Suppose they both died.

Ms Sénécal: It depends on who is entitled to sue. What is the effect on the family and on the estate? What would have been the loss on his estate?

Senator Finestone: Assume that both of them were out of commission or sick for three months. I am trying to determine why there is a differential.

Ms Sénécal: The courts have established that for someone who has an established career, it is easier to quantify the loss of income to the family than it is for the person who has hopes of a career. It is a loss of chances as opposed to a loss of income. You evaluate two different systems. Actuaries are champions in determining this. Forensic accountants establish these quantum.

The estate of a person with young children will probably get more than that of a person who has no children.

Senator Finestone: Where does that \$135,000 figure come into this calculation?

Ms Sénécal: The \$100,000 Special drawing rights is the level where the system of liability changes. Up to \$100,000 Special drawing rights, the carrier basically has little defence, provided that it is an accident that occurred on board the aircraft or in the process of embarking or disembarking. The liability of the carrier cannot be limited or excluded save for the contributory negligence of the passenger. I can give you examples later.

In the second tier, there is no limit. Over \$100,000 Special drawing rights, for the layer on top of that, the carrier has more defence. These defences are the contributory fault of the passenger; if the carrier was not negligent and took all necessary steps; if the damages were not caused by wrongful act or omission of the carrier; or if the damage is solely due to the negligence or wrongful act of a third party. Those are the defences for that amount above the \$100,000 SDR.

Senator Finestone: The first tier assumes that the carrier is strictly liable for claims up to \$135,000. That \$135,000 will not do very much on a long-term basis for a family with three children. What happens then? Do you go to court?

Ms Sénécal: They have their own personal life insurance. That is what life insurance is for.

Senator Finestone: In other words, God forbid something serious happens such as a plane taking a terrible dip, as happened once, falls hundreds of feet, and a lot of people get hurt. The maximum damages that could be paid to anyone would be \$135,000. Is that the cap?

Ms Sénécal: That is not what I am saying. For anything over \$135,000, they can always get compensation provided they demonstrate that there is fault by the carrier.

Senator Finestone: From whom?

Ms Sénécal: From the carrier, if the carrier admits that there is a fault by the carrier or that the carrier did not take all reasonable steps. There is a presumption, and we have to raise the defence. They do not have to demonstrate that. I can say, "I, the carrier, did everything reasonable to prevent this."

One of the perfect examples would be a recent case of a disruptive passenger. This is another of the aspects that I deal with. One passenger basically beat up another passenger.

Senator Finestone: Are you talking about air rage?

Ms Sénécal: Yes. It was a KLM case that went to court in Montreal. KLM said that the fault was that of a third party. A fellow just beat up another passenger. The court held that KLM did not do everything that was reasonable. The court found that the airline knew that the passenger had demonstrated erratic behaviour and had been aggressive to other passengers in the past, and that the airline should have monitored the passenger more.

Senator Finestone: They should have dipped the plane on its side and knocked him off his feet.

Senator Oliver: Was alcohol involved?

Ms Sénécal: I am not sure if the person had consumed alcohol or pills or a combination of both, or if he was just very angry and very aggressive.

Senator Finestone: Is there liability if the airline serves a passenger liquor after they have noted that he is agitated?

Ms Sénécal: It depends on whether or not it is international. In this instance, it was a day flight, so it was not the same.

Senator Finestone: The pilot could have taken a very hard right, then, and tipped him over on his head?

Mr. Mackay: That would not be a good idea. Many other people would have been tipped on their heads, too.

The Chairman: Do not get carried away, Senator Finestone.

Senator Finestone: I have a question about electronic ticketing. Is there any problem with that now?

Ms Sénécal: No, there is not.

Senator Finestone: Is the change advantageous?

Ms Sénécal: Yes. Currently, if you have an electronic ticket for international carriers, you also have to send a paper confirmation, an itinerary receipt, because the Warsaw Convention specifies the delivery of a ticket. It is presumed that you have to deliver something tangible. An e-mail is not sufficient as a confirmation.

Senator Finestone: My electronic ticket was lost through someone else's negligence.

Ms Sénécal: It can be retrieved.

Senator Finestone: The itinerary was not enough. I had to have the retrieval.

Ms Sénécal: You have to segregate international and domestic flights. On domestic flights the ticket can be delivered by e-mail without a problem. It can be sent electronically or you can just give a record number.

The Warsaw Convention was drafted in the days when people would take the time to fill in a ticket by hand. Now you can go up to a kiosk and enter the information on buttons, and that is it.

Senator Adams: If I want to leave Ottawa and go to Europe, do I now have to buy extra insurance with the ticket? How does that system work? Do the insurance company and Air Canada, or whatever airline, work together?

Ms Sénécal: You do not need to do so. It is the passenger's personal decision to have additional coverage. Right now, it depends on where you shop and what you have in your luggage. There are limits of liability on luggage that may not cover everything you have. Most people's home insurance covers the difference, but you may want to purchase extra valuation insurance or insurance that provides you other things that are not related to your vulnerability on board an aircraft. It can be health insurance that allows you to come back earlier. There are a slew of other travel related insurances that are good to hold, depending on the type of ticket you have purchased.

Senator Adams: We have been talking about international flights, and that would then mean we are talking about different monetary units. How is that handled?

Ms Sénécal: There is a unit called Special drawing rights which is the standard unit of account used by the International Monetary Fund. I believe \$100,000 Special drawing rights is US\$ 117,000.S. and about Can. \$170,000, depending on the conversion. It will be the equivalent of approximately U.K. £75,000.

Senator Callbeck: I have a question about domestic flights and lost luggage. What is the maximum amount payable?

Ms Sénécal: Currently, for most Canadian carriers, the maximum is \$1,500 per passenger. Under the Warsaw regime, it was a maximum allowance based on weight. The carriers accepted two pieces of luggage at a maximum weight of 32 kilos each. You calculated the weight of the baggage, and that was the limit of liability. Under the Montreal Convention, the limit will be close to the \$1,500 Canadian per passenger. That is what I meant when I said it could harmonize domestic and international travel.

Senator Oliver: Will it be unlimited?

Ms Sénécal: No, baggage is not unlimited. However, for anything in excess, you have your homeowners insurance and, depending on how you paid for your ticket, often the credit card provides additional coverage. You also have the option of independent additional coverage.

Senator Callbeck: It will be \$1,500. Someone told me that now the figure is \$350.

Mr. Mackay: It is for international travel, yes. It is a formula that is used in the calculation of weight. Historically, it has been significantly lower on international than on domestic. With this convention, the international limit moves up to the standard domestic limit.

Ms Sénécal: That is unusual because if you travel internationally you should have more luggage than if you travel domestically.

The Chairman: You never know.

Senator Adams: If someone wore \$10,000 worth of jewellery what would happen if an accident occurred? You talked about luggage and people using their own insurance for that. What would happen if someone had a mink coat worth \$5,000 and it was lost?

Ms Sénécal: If you check your \$5,000 mink coat in your luggage you should buy additional insurance. Your limits are disclosed, they are public, and you are taking a risk. It is the same as sending anything through Canada Post by regular mail.

[*Translation*]

Thank you very much for your comments. Once again, we are sorry that we had to stay a little later than expected.

[*English*]

Thank you for giving us more information on this bill.

The committee adjourned.

