SUPREME COURT OF NOVA SCOTIA
Citation: *Carroll-Byrne v. Air Canada*, 2016 NSSC 354

Date: 20161213
Docket: *Hfx* No. 438657
Registry: Halifax

Between:

Kathleen Carroll-Byrne, Asher Hodara and Georges Liboy

Plaintiffs

v.

Air Canada, Airbus S.A.S., Nav Canada, Halifax International Airport Authority, The Attorney General of Canada, representing Her Majesty the Queen in Right of Canada, John Doe #1 and John Doe #2

Defendants

Decision (Motion for Certification)

Revised Decision: The text of the original decision has been corrected according to the attached erratum dated April 5, 2017.

Judge: The Honourable Justice Denise M. Boudreau

Heard: December 12, 2016, in Halifax, Nova Scotia

Oral Decision: December 13, 2016

Counsel:
Raymond F. Wagner, Q.C., Joe Fiorante, Q.C., Madeline Carter and Kate Boyle, for the Plaintiffs
Angela J. Green and Melissa Chan, for the Defendant Attorney General of Canada, representing Her Majesty the Queen in Right of Canada
Douglas Tupper, Q.C., and Melanie Gillis, for the Defendant Air Canada
John Brown, for the Defendant Airbus S.A.S.
Jason Cooke and Leon Tovey, for the Defendant Nav Canada
Scott C. Norton, Q.C., and Scott Campbell, for the Defendant Halifax Airport Authority

By the Court (Orally):

[1] The matter before the court today is a certification motion brought by the plaintiffs. They seek certification of a class action against a number of defendants: Air Canada, Airbus SAS, NAV Canada, Halifax International Authority, the Attorney General of Canada, representing Her Majesty the Queen in Right of Canada (AG of Canada), John Doe 1, and John Doe 2. This action is in relation to an incident that occurred during and after an Air Canada flight landing at the Halifax International airport on March 29, 2015. The defendants, other than the AG of Canada, are not opposed to the certification of this class action.

[2] In relation to those defendants, I have reviewed the draft order that was provided to me. I have reviewed the common issues that were discussed and agreed upon by counsel, and I have reviewed the litigation plan that was provided by the plaintiffs. It all looks reasonable. I agree that the requirements of s. 7(1) of the *Class Proceedings Act* have been met in relation to those defendants. I shall be certifying the class action in respect of those claims and in respect of those defendants.

[3] There is one question that remains, that of certification of the action against the defendant AG of Canada. The AG of Canada does not consent to the certification of the claims against it. (I note that in this decision I may use

interchangeably the words: “AG of Canada” and “Transport Canada” (the actual affected department), both to refer to the defendant AG of Canada).

[4] Specifically, the AG of Canada submits that the claim should not be certified against them because, in their view, 7(1)(a) of the *Class Proceedings Act* (S.N.S. 2007, c. 28) has not been met, in that the claim does not disclose a cause of action against them.

[5] I will begin with some generally accepted principles in relation to s. 7(1)(a) of the *Class Proceedings Act.* These come from numerous cases and I do not think there is much dispute with respect to these principles.

[6] An analysis of a claim in the context of s. 7(1)(a) is limited to the pleadings. No evidence is to be considered and I have not considered any other evidence.

[7] Such an analysis also takes all pleaded facts and assumes them to be true; unless, of course, they are patently incapable of being proven. I am to read the pleadings in this context generously, and perhaps even with an eye toward amendments in certain cases if such was deemed appropriate.

[8] The question before me in the case at bar, assuming that all pleaded facts are true is: Is it plain and obvious that this pleading discloses no cause of action as against the AG of Canada?

[9] In making this decision, I am not to look at the merits of the claim. I am not to look at the strengths or weaknesses of each party's position. I note the obvious point that while I am assuming alleged facts to be true at this stage and for this purpose, those allegations may or may not be proven at trial. The substantive merits of the matter are left for a trial judge to decide. My role at this stage is merely to weed out claims that, in my view, simply have no reasonable prospect of success.

[10] The plaintiffs, in their submissions, have called this test a low threshold to reach. That is true. However, it is not a nonexistent threshold. There is, in fact, a certain standard that must be met. I take instruction with respect to that particular point from the case of *MacQueen v. Sydney Steel Corp.* 2013 NSCA 143. The instruction I take from our Court of Appeal, is the clear expectation that a certifying judge must examine a claim carefully, to ensure that it meets the basic requirements.

[11] To return to the decision I have to make here, the pleadings before me contain essentially two claims: first, a claim against AG of Canada (Transport Canada) in negligence, as a regulator within the aviation industry; secondly, a claim against AG of Canada (Transport Canada) as landlord of this airport property, pursuant to occupiers' liability law.

[12] The pleadings in relation to AG of Canada (Transport Canada) can be found at paras. 50 and following of the Amended Statement of Claim:

> [50] Transport Canada is the owner and occupier of the Airport and the regulator of the aviation industry in Canada.
>
> [51] The plaintiffs plead and rely on the provisions of the *Occupiers' Liability Act* S.N.S. 1996, c. 27 as amended.
>
> [52] As the owner and occupier of the Airport, Transport Canada owes a duty of care to users of the Airport including members of the flying public. Facts underlying this duty of care include:
>
> > (a) prior to February 1, 2000, Transport Canada was the owner and operator of the airport. During this time period, Transport Canada made the decision not to install an ILS on the Runway;
> >
> > (b) on February 1, 2000, Transport Canada entered into a ground lease arrangement with HIAA. Under the terms of the lease, Transport Canada retained significant responsibility and control over the safety of operations at the Airport including an ongoing responsibility to monitor and audit HIAA to ensure that HIAA meets the lease requirements to operate the Airport in the public interest and in a safe manner; and
> >
> > (c) since February 1, 2000, Transport Canada has continued to be responsible for funding of safety related capital expenditures at the Airport.
>
> [53] Transport Canada, as regulator of the aviation industry in Canada, owes a duty of care to members of the flying public to certify and conduct oversight of aircraft operators, airport operators, and air navigation service providers with reasonable care. Facts underlying this duty of care include:
>
> > (a) As a contracting State of the International Civil Aviation Organization ("ICAO"), the Federal Government of Canada through Transport Canada has an obligation to oversee the safe and efficient operation of all aviation activity for which it is responsible. Canada has agreed to the application of Article 12 of the ICAO Convention, Rules of the Air, which directs that each contracting State adopt measures to ensure that every aircraft flying over or maneuvering within its territory, shall comply with the rules and regulations relating to the flight. As well, Canada committed to ensuring the prosecution of all persons violating applicable regulations;
> >
> > (b) The paramount purpose of the *Aeronautics Act* and *Canadian Aviation Regulations* is to protect members of the flying public;

(c) Transport Canada has undertaken to oversee the activities of aircraft operators, airport operators, and air navigation service providers in Canada;

(d) Transport Canada has issued policies and manuals which set out the actions that its employees must take in relation to the oversight of aircraft operators, airport operators, and air navigation service providers;

(e) Transport Canada makes representations to the public and its employees that:

i) Transport Canada may be held civilly liable for injuries caused or contributed to by negligent oversight of regulated entities;

ii) Transport Canada inspectors have an inherent legal responsibility within their Delegation of Authority to act in the interest of public safety;

iii) Transport Canada is working for individual members of the flying public;

iv) Transport Canada's mandate is the safety of the Canadian public; and

v) Transport Canada is responsible for ensuring the safety of aircraft operations in Canada.

(f) Transport Canada considered the Passengers to be indirect clients of their services; and

(g) The Passengers had a reasonable expectation that Transport Canada would enforce regulations and follow policies with the safety of members of the flying public in mind and do so competently.

[54] Transport Canada was at all material times responsible for the certification and oversight of Air Canada, HIAA, and Nav Canada.

[55] Transport Canada was responsible for ensuring that Air Canada, HIAA, and Nav Canada implemented appropriate SMS programs to identify, assess and mitigate operational risks.

[56] Pursuant to its State Safety Program, Transport Canada was required to verify that Air Canada, HIAA, and Nav Canada were in compliance with their respective SMS programs.

[57] Further, Transport Canada was responsible for assessing the risks associated with Air Canada's non-precision approach procedures to ensure that an adequate margin of safety existed before approving the approach procedures.

[58] Transport Canada breached the duty of care it owed to the Passengers. Particulars of the negligence of Transport Canada include:

(a) Inadequately monitoring HIAA's compliance with the safety requirements of the lease;

> (b) Choosing to not ensure that HIAA had an adequate emergency response plan in place for the operation of the Airport;
>
> (c) Choosing to not install an ILS for the Runway;
>
> (d) Choosing to not require that HIAA install an ILS for the Runway;
>
> (e) Allowing and permitting Air Canada to maintain and operate an inadequate SMS program to identify, assess, and mitigate operational risks;
>
> (f) Allowing and permitting HIAA to maintain and operate an inadequate SMS program to identify, assess, and mitigate operational risks;
>
> (g) Allowing and permitting Nav Canada to maintain and operate an inadequate SMS program to identify, assess, and mitigate operational risks;
>
> (h) Allowing and permitting Air Canada to ignore and to not comply with its SMS program;
>
> (i) Allowing and permitting HIAA to ignore and to not comply with its SMS program;
>
> (j) Allowing and permitting Nav Canada to ignore and to not comply with its SMS program;
>
> (k) Conducting an inadequate and incomplete assessment of Air Canada's non-precision approach procedures; and
>
> (l) Approving Air Canada's non-precision approach procedures when they lacked an adequate margin of safety.

[13] As I have already indicated, the claims against AG of Canada (Transport Canada) essentially are twofold: first, in relation to themselves as "regulator"; secondly, in relation to themselves as owner/occupier of the actual airport property.

Regulator

[14] I will deal first with the claim relating to AG of Canada as industry regulator. This issue took up the bulk of the time of counsel in their submissions. The main subject of debate was whether there existed a duty of care on the part of

Transport Canada vis-à-vis these plaintiffs. More specifically, the crux of the debate centered on the question of proximity. I will deal with that later in this decision.

[15] To put this issue in context: Transport Canada has certain duties and responsibilities pursuant to the *Aeronautics Act* RSC 1985 c. A-3. I was directed, for example, to "Canadian aviation documents" which are defined in ss. 3 as: "any licence, permit, accreditation, certificate, or other document issued by the Minister under Part 1 with respect to any person or in respect of any aeronautical product, aerodrome facility or service".

[16] Canadian aviation documents are further discussed in s. 6.71 of the *Act* which reads:

> The Minister may refuse to issue or amend a Canadian aviation document on the grounds that:
>
> (a) the applicant is incompetent;
>
> (b) the applicant or any aircraft, aerodrone, airport or other facility in respect of which the application is made does not meet the qualifications or fulfill the conditions necessary for the issuance or amendment of the document;
>
> (c) the Minister is of the opinion that the public interest and, in particular, the aviation record of the applicant or of any principal of the applicant, as defined in regulations made under paragraph 3(a), warrants the refusal.

[17] The *Act* gives powers to the Minister to suspend, cancel, refuse to issue, amend, or renew Canadian aviation documents, at ss. 6.9, on the grounds that its

holder, or the owner or operator of any aircraft, airport, or other facility in respect of which it was issued, has contravened the *Act*.

[18] A plain reading of those sections of the *Aeronautics Act*, appear to show the Minister's actions to be, to a great extent, reactive. In other words, when one applies for an aviation document, or an amendment to an aviation document, the Minister can and should do certain things. Following issuance of such a document, there are provisions for contraventions, that the Minister can then deal with. However, the *Act* does not specifically require the Minister to continually monitor the holder of such a certificate, to ensure continued compliance; at least not in any explicit terms. I will come back to that issue.

[19] Having set out the context, I return to the central question here, that of "duty of care". Does the AG of Canada owe a duty of care to these plaintiffs, (who were passengers aboard a commercial aircraft), as the regulator of this industry?

[20] Counsel have submitted, and I would agree, that a first step should be to examine whether a duty of care, in a similar circumstances, has already been recognized by a court. The plaintiffs have directed me to the case of *Swanson Estate v. Canada* 1990 FCJ 195; and the appeal decision of that same case, *Swanson Estate v. Canada* 1991 FCJ 452. The plaintiffs point out that in *Swanson*,

the court found that Transport Canada, as a regulator of the aeronautical industry, owed a duty of care to members of the flying public.

[21] In my view, the *Swanson* case can be distinguished as it relates to this question. Perhaps the most important factor is that the analysis undertaken by the court in *Swanson* was entirely focused on the distinction between the operational functions of government, and the policy functions of government.

[22] That is an interesting and important distinction. That type of analysis was commonly undertaken in more early decisions on this topic. Such an analysis is not how the more recent cases read. These more recent cases are also the more binding cases. I refer most notably to the cases from the Supreme Court of Canada, addressing the issue of proximity in the context of government regulators: *Cooper v. Hobart*, 2001 SCC 79; *Knight v. Imperial Tobacco* 2011 SCC 42.

[23] In those cases, the policy/operational distinction is one aspect of the analysis, but is not the entirety of the analysis. The defendant AG of Canada has argued that in their view, *Swanson* may no longer be correct law, and that it has been overridden by more recent and more binding authority.

[24] In the context of this Motion, I am not satisfied that *Swanson* has settled the issue of duty of care in these circumstances. I need to go further; as in my view, S*wanson* is not determinative of the question.

[25] The subsequent cases I have already alluded to, have discussed more specifically the issue of proximity, as it relates to duty of care within the context of lawsuits involving governmental regulatory bodies. The Supreme Court of Canada provides, as a first step in analysing this "proximity" question, the question of foreseeability of the damages; secondly, the Court deals with the issue of policy/operational considerations.

[26] The Supreme Court cases essentially indicate two ways in which proximity can be made out in these cases.

[27] Firstly, situations where one can show interactions between the governmental body and the intended plaintiffs. In *Imperial Tobacco* (supra), the Supreme Court stated (para. 45):

> [45] The second situation is where the proximity essential to the private duty of care is alleged to arise from a series of specific interactions between the government and the claimant. The argument in these cases is that the government has, through its conduct, entered into a special relationship with the plaintiff sufficient to establish the necessary proximity for a duty of care. In these cases, the governing statues are still relevant to the analysis.

[28] The pleadings here contain allegations that certain representations were made by Transport Canada. I refer to para. 53(e) as quoted hereinabove, where Transport Canada is alleged to have made certain representations to the public, allowing that they have certain mandates and responsibilities.

[29] I have considered that particular question. In my view, even if I take those pleadings as true, they are not enough to ground a claim of proximity as to interactions between Transport Canada and these particular plaintiffs. There are no specific interactions alleged between them. The representations that have been alleged here are representations to the public at large, and to Canadians at large.

[30] In my view, such representations do not ground the necessary proximity between parties that would allow this type of claim to proceed. Counsel for the AG of Canada pointed out, and I agree, that even stronger public statements were made in the *Imperial Tobacco* (supra) case; and that even those stronger statements did not establish proximity in the view of the Supreme Court. On the strength of that case, I can only agree with counsel that the facts alleged here are, similarly, not enough.

[31] The second situation where courts have found proximity to exist in cases involving governmental regulating bodies, is where a duty is found to exist in statute. On that point, I refer to *Cooper* (supra), at paras. 42 and 43:

> [42] … The plaintiffs must also show proximity – that the Registrar was in a close and direct relationship to them making it just to impose a duty of care upon him toward the plaintiffs. In addition to showing foreseeability, the plaintiffs must point to factors arising from the circumstances of the relationship that impose a duty.
>
> [43] In this case, the factors giving rise to proximity, if they exist, must arise from the statute under which the Registrar is appointed. The statute is the only source of his duties, private or public. Apart from that statute, he is in no different

> position that the ordinary man or woman on the street. If a duty to investors with regulated mortgage brokers is to be found, it must be in the statute.

[32] I also refer to a case commonly referred to as *Syl Apps*, (*DB v. Children's Aid Society* 2007 SCC 38) at para. 27:

> When the relationship occurs in the context of a statutory scheme, the governing statute is a relevant context for assessing the sufficiency of the proximity between the parties. As this court said in *Edwards*, factors giving rise to proximity must be grounded in the governing statute where there is one.

[33] The statute that applies here, the *Aeronautics Act*, does not indicate any ongoing duty on behalf of Transport Canada to actively and continually monitor the holders of aviation documents. The plaintiffs, in their arguments, have asked that I find that such a duty can be inferred, from the context of the duties that do exist in the *Act*.

[34] The plaintiffs have referred to municipal building inspection cases, which in their view, are analogous. Those cases involved municipalities which would, by regulation, periodically inspect buildings as they were being built, and provide a check upon the contractor. The plaintiffs point out that in a number of these cases, municipal authorities were found liable to homeowners, where municipal inspectors were found to be negligent in doing their work. These findings would occur despite the fact that, on its face, there would have been no direct contact or proximity between the defendant (the municipality) and the plaintiff (the homeowner).

[35] I have considered that analogy and, frankly, I reject it. It is not the same situation. The building inspector cases might be reasonably compared to situations where someone is first building an airport, or first setting up an airline, and seeking a Canadian aviation document from Transport Canada. It could possibly be argued that, if any such document was issued by Transport Canada inappropriately, without all of the checks and balances, there would be an analogy to the municipal building inspector situations.

[36] The situation here is very different. What is being proposed here, is an obligation which would continue after the document is issued and/or the authorization is given. The plaintiffs ask that I infer a duty on Transport Canada to continually check back and monitor all holders of such authorizations, to ensure continued compliance. That is not at all comparable to the building inspector cases.

[37] Having regard to all of the circumstances, including the duties that are contained in the *Act*, I find that it is simply not reasonable to infer and to impose that ongoing duty on Transport Canada for a number of reasons, not the least of which is its complete impracticality, given the number of airports and airlines that exist, as well as the potential for change at any given time. It would be akin to making the government liable for a motor vehicle driver who was not meeting the

terms of the driver's licence they granted to him, at any given time, because they were not continually monitoring his compliance.

[38] In my view, this continuing duty to monitor cannot be inferred by the duties and responsibilities conferred upon Transport Canada in the *Act*. Therefore, I do not find that proximity can be grounded in the statute either.

[39] I have, in addition, considered the issue of policy considerations that have been raised here, and which are quite significant. I find it difficult to imagine what the extent of the proposed duty on Transport Canada would be: in other words, what method/timetable of constantly checking every airport and every airline would be a reasonable way of showing that the duty had been met? This is simply unworkable and unreasonable from the perspective of a governmental regulator. These policy considerations also mitigate against this proposed duty of care.

[40] Having gone through this analysis, I find that that the claim against the defendant AG of Canada, (Transport Canada) in negligence as a regulator, is a claim without a reasonable chance of success. I do not certify that claim against them.

Occupier's Liability

[41] I move on to the claim against the defendant Transport Canada as landlord, i.e. the occupiers' liability issue.

[42] The pleadings allege (and again, I take them as being proven), that Transport Canada is the owner of the property upon which the airport sits; that there is a lease that exists between themselves and the Airport Authority; and that this lease outlines certain obligations and responsibilities that are held by Transport Canada. The pleadings describe Transport Canada as retaining "an ongoing responsibility to monitor and audit HIAA" for safety of operations, as well as, remaining responsible "for funding of safety related capital expenditures at the airport".

[43] The grounds on which this claim lies are different than the regulatory claim I have discussed so far. The *Occupiers' Liability Act* is pleaded. That *Act* codifies the liability of landlords. It specifically applies to the Government of Canada.

[44] Counsel for the AG of Canada agrees that Transport Canada is the landlord, that the *Occupiers' Liability Act* exists, and that it would apply. However, in their view, there are no facts pleaded that would support the claim itself. I disagree; I find there are facts pleaded that might, if proven, support this claim.

[45] For example, the issue of an "ILS", or "instrument landing system", at this airport was raised in the pleadings. The ILS is defined as:

> The ILS is an instrument landing system ground based radio navigation system that provides lateral, localizer, and vertical glide slope guidance to aircraft flying an approach to a runway.

[46] The plaintiffs plead that there was no ILS system in existence for the particular runway involved in this incident (paras. 58 (c) and (d)). In my view, in the context of the lease described hereinabove, the question of the ILS is potentially a viable question, that requires a trial. Assuming that the pleaded facts are true, Transport Canada under the terms of the lease retained significant responsibility and control over the safety of operations at the airport, including an ongoing responsibility to monitor and audit to ensure that HIAA met the lease requirements. Transport Canada also continued to be responsible for funding of safety related capital expenditures. If a trial court finds that an ILS system was not installed, and that its absence contributed to this incident, in my view it is reasonably possible that there could be liability found against Transport Canada. Another potential example is the emergency response system issue, found at paragraph 58(b) of the pleadings.

[47] In making this analysis, I am reading the pleadings in a generous fashion, as I must. I repeat that nothing I say today addresses the merits of the case. This claim, at the end of the day, may or may not be successful. The only question before me now is: Is it plain and obvious to me that the claim against Transport

Canada, as the landlord and as a signer of the lease, is doomed to fail? I conclude that it is not plain and obvious to me that such a claim is doomed to fail.

[48] In conclusion, I will certify a claim against the defendant, AG of Canada (Transport Canada) only in relation to the claim against them as landlord/owner/occupier of the airport property. I will not certify the claim against them as industry regulator. I might add, I do not think there is any need to amend the pleadings because, in my view, paras. 58(a) to (d) cover the areas relating to the occupiers' liability claims. The plaintiffs could amend to make it more clear that those paragraphs relate specifically to the occupiers' liability claims; however, given that I have not certified the other claim, perhaps that is not necessary.

[49] I would ask counsel to prepare a form of Order acceptable to all.

Boudreau, J.

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Erratum

Judge:	The Honourable Justice Denise M. Boudreau
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Counsel:	Raymond F. Wagner, Q.C., Joe Fiorante, Q.C., Madeline Carter and Kate Boyle, for the Plaintiffs Angela Green and Melissa Chan, for the Defendant Attorney General of Canada, representing Her Majesty the Queen in Right of Canada Douglas Tupper, Q.C., and Melanie Gillis, for the Defendant Air Canada John Brown, for the Defendant Airbus S.A.S. Jason Cooke and Leon Tovey, for the Defendant Nav Canada Scott C. Norton, Q.C., and Scott Campbell, for the Defendant Halifax Airport Authority
Erratum Date:	April 5, 2017
Erratum:	On page 2, paragraph 1, of the decision, the words “have consented to” should read “are not opposed to”.