

CITATION: Abdulrahim v. Air France, 2010 ONCA 403
DATE: 20100607
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COURT OF APPEAL FOR ONTARIO

Goudge, MacPherson and Simmons JJ.A.

BETWEEN

Hussein Abdulrahim and Fadi Abedrabbo

Plaintiffs (Respondents)

and

Air France, Greater Toronto Airports Authority, Nav Canada, Alain Rosaye, Frédéric Naud, Goodrich Corp. and Airbus S.A.S.

Defendants (Appellant)

Robert Fenn, Richard Rohmer, O.C., Q.C., Ryan Moriarty, and Patrick Floyd, for the appellant, Nav Canada

J. J. Camp and Joe Fiorante, for the Class Plaintiffs

Timothy Trembley, for Air France

Robert B. Bell, for Goodrich Corp.

John P. Brown, for Airbus S.A.S.

Heard: June 2, 2010

On appeal from the Order of Justice Joan L. Lax of the Superior Court of Justice, dated 24 December, 2009.

BY THE COURT:

[1] The appellant Nav Canada appeals the order of Lax J. of the Superior Court of Justice dated 24 December 2009, which approved partial settlement in a class action relating to serious aviation accident at Lester B. Pearson International Airport on 2 August 2005.

[2] Pursuant to the terms of the settlement between the class plaintiffs and the Air France defendants, Air France has agreed to pay \$10 million plus accrued interest (about \$1.1 million) to the class plaintiffs in settlement of the claims against them.

[3] Pursuant to the terms of the settlement between the class plaintiffs and the defendants Airbus S.A.S. and Goodrich Corp., Airbus and Goodrich have agreed to pay \$1.65 million to the class plaintiffs in settlement of the claims against them.

[4] A further settlement with the defendant Greater Toronto Airports Authority for an additional two million dollars has been reached pending the outcome of this appeal.

[5] Nav Canada, the only remaining defendant, has not reached a settlement with the class plaintiffs.

[6] The settlements include so-called bar orders which prohibited further discovery of the settling defendants in the class action so as to permit the settling defendants to completely extract themselves as parties from the action.

[7] Broadly speaking, Nav Canada raises two issues on this appeal.

[8] First, Nav Canada contends that the motion judge's approval of the bar order component of the settlement agreements will improperly prevent the trial court from allocating fault to Air France for its "share" of Extra Convention Damages (i.e. damages outside the Warsaw and Montreal Conventions) in the course of determining the basic issue at trial, namely, Nav Canada's several liability for Extra Convention Damages.

[9] The answer to this contention is that there is nothing in the motion judge's order that prevents Nav Canada from raising this issue before the trial judge. On this point, we agree with the motion judge's reasoning at paras. 41 and 42:

However, neither the settlement agreements nor the bar order purport to determine whether class members' claims represent Convention Damages or Extra-Convention Damages for the purposes of NavCan's liability. While the settling parties have agreed to a standard for ascertaining the limits of carrier liability for the purposes of settlement, they are not attempting to impose the standard on NavCan. The plaintiffs undertake to amend the statement of claim to limit the damages sought to those that are not available from a carrier under Article 17 of the *Warsaw* or *Montreal Convention*. Consequently, NavCan cannot be held liable for any damages that are judicially determined to fall within Article 17, regardless of whether the settling parties considered those damages to constitute Convention Damages for the purposes of the settlement agreements.

The language of the bar order in both settlement agreements leaves unresolved as matters for trial these questions: (a) is NavCan liable to pay compensation for damages for Extra - Convention damages? (b) if so, what is NavCan's several share of liability for these damages? (c) what is the extent of damages for "bodily injury" under the *Conventions*? Stated in this way, I am satisfied that the bar order does not seek to deprive NavCan of any substantive defence it has to the allegations of liability for damages or to the manner in which

"bodily injury" is to be defined. It is also entirely consistent with the March 2, 2007 direction of Winkler J. that whether the plaintiffs' claims for damages for psychological injury are recoverable would be heard as common issues in the liability portion of the trial.

[10] Although the motion judge stated at para. 47 of her reasons that the court would never be asked to apportion of liability for Extra Convention Damages between the Air France defendants and the other defendants, nothing in the formal order prohibits such an apportionment.

[11] In short, if Nav Canada loses on this argument, the loss will come in the trial court. Moreover, the loss will flow from some combination of international law (the two Conventions) and domestic law (for example, the application of the decision of the Supreme Court of Canada in *Giffels Associates Ltd. v. Eastern Construction Co.*, [1978] 2 S.C.R. 1346). The loss will not be caused by the bar order in the settlement agreements.

[12] Nav Canada's second submission is that the bar order's prohibition of further discovery of the settling defendants will greatly prejudice its defence.

[13] We disagree. There have already been 24 days of discovery in this class action. Crucially, Nav Canada has examined various Air France defendants for eight days. Moreover, in four years of litigation Nav Canada has not conducted any discovery of the Airbus, Goodrich and GTAA defendants. There is also a very comprehensive record relating to the accident, in particular the report of the Transportation Safety Board.

[14] Finally, it is important to balance the rights of Nav Canada, the non-settling defendants, with the rights and interests of the settling defendants in class plaintiffs: see *Amoco Canada Petroleum Co. v. Propak Systems Ltd.*, [2001] A. J. No. 600 (C.A.), at paras. 24-27, leave to appeal dismissed, [2001] S.C.C.A. no. 383.

[15] The motion judge engaged in this balancing exercise and concluded at para. 52:

In considering the interests that must be balanced, it is my view that the benefits of the settlement to class members favour its approval as it is fair and reasonable and in the best interests of the class as a whole. Without approval of the bar order, the settlement will fail. This will seriously prejudice class members who will be exposed to the costs and risks of continuing with the litigation. This prejudice is substantial when measured against the prejudice to the procedural rights of NavCan which I regard as remote and negligible.

[16] We see no basis for interfering with this reasoning or with the motion judge's exercise of discretion in approving the 'no further discovery' component of the bar order.

[17] The appeal is dismissed. The respondents are entitled to their costs of the appeal fixed as follows: the class plaintiffs-\$23,000; Air France-\$4500; Airbus-\$3500; Goodrich-\$3500, all inclusive of disbursements and GST.

RELEASED: JUN 4 2010 ("S.T.G.")

"S. T. Goudge J.A."

"J. C. MacPherson J.A."

"J. Simmons J.A."