

CANADA / JUDGMENT

Aviation Portneuf Ltd. v. Canada (Attorney General)

2001 FCT 1299

COURT

Federal Court

DECIDED

28 November 2001

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Aviation Portneuf Ltd. v. Canada (Attorney General) Court (s) Database Federal Court Decisions
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Content Date: 20011128 Docket: T-1239-00 Neutral citation: 2001 FCT 1299 BETWEEN: AVIATION
PORTNEUF LTD. Applicant and ATTORNEY GENERAL OF CANADA Respondent Docket: T-1245-00
BETWEEN: AVIATION ROGER FORGUES INC. Applicant and ATTORNEY GENERAL OF CANADA
Respondent REASONS FOR ORDER AND ORDER BLAIS J.

- [1] This is a motion by the plaintiffs (applicants) [hereinafter "applicants"] under rules 369 and 51 of the Federal Court Rules, 1998, appealing part of the order of Prothonotary Richard Morneau [hereinafter "Prothonotary"] dated March 16, 2001, on the ground that the paragraphs in the statement of claim that seek relief against the defendants (respondents) [hereinafter "respondents"] in contractual and extra-contractual liability should not be struck out.

FACTS

- [2] The applicants, Aviation Portneuf Ltd. and Aviation Roger Forgues Inc., operate a floatplane passenger transportation business in Quebec.
- [3] The applicants use Lac Saint-Augustin as a floating airfield for their floatplane business.
- [4] In about 1984-1985, they began to expand the operation of their floatplane business by offering sightseeing flights, also out of their Lac Saint-Augustin base, to enable tourists to tour Québec city from the air aboard the applicants' floatplanes.
- [5] At all material times until January 23, 1997, there was a relationship between the applicants and the respondents by which the respondents allegedly encouraged, protected and promoted the expansion and development of this aerial sightseeing business.

- [6] However, as a result of pressure from certain local mayors, the Minister of Transport announced on January 23, 1997, that he would be prohibiting this type of aerial sightseeing flights from Lac Saint-Augustin effective January 1, 1998.
- [7] On January 1, 1998, by SOR/98-20, section 105.01 of the Canadian Aviation Regulations, SOR/96-433 [hereinafter "Regulations"], which were made under the Aeronautics Act, came into effect.
- [8] The effect of this section was to eliminate aerial sightseeing flights to or from Lac Saint-Augustin completely.
- [9] Consequently, this section eliminated the applicants' entire aerial sightseeing business since aerial sightseeing accounted for about 95% of the applicants' total activities and sales.
- [10] On July 14, 2000, the applicants served a statement of claim against the respondents and filed it in the registry of this Court.
- [11] In the statement of claim, the applicant, Aviation Portneuf Ltd., is claiming \$3,150,000 in damages and the applicant, Aviation Roger Forgues Inc., is claiming \$3,376,765.
- [12] The applicants assert four causes of action in their statement of claim: contractual liability; extra-contractual (delictual) liability; disguised expropriation without compensation; and violation of the Canadian Bill of Rights and the Canadian Charter of Rights and Freedoms.
- [13] On August 10, 2000, the respondents filed a notice of motion to strike out the applicants' statement of claim on the ground that it discloses no reasonable cause of action.
- [14] The motion was heard on February 28, 2001, by the Prothonotary.
- [15] The applicants are appealing the order of the Prothonotary dated March 16, 2001.
- RELEVANT LEGISLATION SUBPART 5--AERIAL SIGHTSEEING FLIGHTS 105.01 (1) In this section, "aerial sightseeing flight" means a flight carried out as part of a sightseeing operation or any other commercial flight in an aircraft conducted for the purpose of sightseeing from the air.
- (2) No person shall conduct an aerial sightseeing flight, or any portion of an aerial sightseeing flight, in the control zone of the Québec/Jean Lesage International Airport unless the flight commences at that airport. SOR/98-20, s. 1. SOUS-PARTIE 5 -- VOLS TOURISTIQUES 105.01 (1) Dans le présent article, « vol touristique » s'entend d'un vol effectué dans le cadre d'une excursion aérienne ou tout autre vol commercial effectué au moyen d'un aéronef aux fins d'observation touristique depuis les airs.
- (2) Il est interdit d'effectuer des vols touristiques, ou toute partie de ceux-ci, dans la zone de contrôle de l'aéroport international Jean-Lesage de Québec, sauf si ces vols débutent à cet aéroport. DORS/98-20, art. 1. DECISION SOUGHT

- [16] The applicants are seeking to have the motion allowed by setting aside the order of the Prothonotary with respect to two causes of action: contractual liability and extra-contractual liability. ISSUE
- [17] Did Prothonotary Richard Morneau err by allowing the respondents' motion to strike in part and striking out the paragraphs of the statement of claim relating to the respondents' contractual and extra-contractual liability?

ANALYSIS

The applicable standard of review

- [18] In *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425 (C.A.), the Federal Court of Appeal held that discretionary orders (such as the one in this case) made by prothonotaries will be set aside only if they are clearly wrong in law: [para 94] I also agree with the Chief Justice in part as to the standard of review to be applied by a motions judge to a discretionary decision of a prothonotary. Following in particular Lord Wright in *Evans v. Bartlam*, [1937] A.C. 473 (H.L.) at page 484, and *Lacourciere J.A. in Stoicevski v. Casement* (1983), 43 O.R. (2d) 436 (Div. Ct.), discretionary orders of prothonotaries ought not to be disturbed on appeal to a judge unless: (a) they are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts, or (b) they raise questions vital to the final issue of the case. [para 25] Where such discretionary orders are clearly wrong in that the prothonotary has fallen into error of law (a concept in which I include a discretion based upon a wrong principle or upon a misapprehension of the facts), or where they raise questions vital to the final issue of the case, a judge ought to exercise his own discretion de novo. RULE 221 OF THE FEDERAL COURT RULES, 1998
- [19] Rule 221 allows the Prothonotary to strike out in whole or in part any cause of action that he regards as having no basis in law:
221. (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it
- (a) discloses no reasonable cause of action or defence, as the case may be,
 - (b) is immaterial or redundant,
 - (c) is scandalous, frivolous or vexatious,
 - (d) may prejudice or delay the fair trial of the action,
 - (e) constitutes a departure from a previous pleading, or
 - (f) is otherwise an abuse of the process of the Court, and may order the action be dismissed or judgment entered accordingly.

221. (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas:
- a) qu'il ne révèle aucune cause d'action ou de défense valable;
 - b) qu'il n'est pas pertinent ou qu'il est redondant;
 - c) qu'il est scandaleux, frivole ou vexatoire;
 - d) qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;
 - e) qu'il diverge d'un acte de procédure antérieur;
 - f) qu'il constitue autrement un abus de procédure. Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.
- [20] The applicants are of the view that the Prothonotary could not have been satisfied that it is "plain and obvious that the pleading is unsustainable before it is struck out" as stated by Prothonotary Morneau in *A. Lassonde Inc. v. Sunpac Foods Ltd.* (1998), 149 F.T.R. 237 (F.C.T.D.), and that the action is "so clearly futile as to have no possible chance of success" as stated by Prothonotary Lafrenière in *Merck & Co. v. Apotex Inc.* (1999), 2 C.P.R. (4th) 484 (F.C.T.D.). The respondents submitted in this case that the Prothonotary could have been so satisfied on a simple motion to strike.
- [21] The Prothonotary found that the two causes of action, in contractual and extra-contractual liability, would be struck from the statement of claim. He stated on page 8, at paragraph 25:
- [25] It is obvious that a complete reading of the plaintiffs' statement of claim leads to the central conclusion that it is the enactment of section 105.01 on January 1, 1998 that, in the plaintiffs' eyes, constitutes the source of all the errors, contractual or otherwise, that they cite. Now, the cases are clear that the establishment of regulations is a policy decision in nature for which the Crown or one of its ministers cannot be held liable. See, to this effect, the decision of the Superior Court of Ontario in *Ontario Black Bear/Ontario Sportsmen & Resource Users Assn. v. Ontario* (2000), 19 Admin. L.R. (3d) 29. CONTRACTUAL LIABILITY
- [22] The applicants submit that there is a contractual relationship between the parties in this case. In fact, there is no written or oral contract between the parties and thus there could not have been a contractual relationship. The applicants claim that they relied on the promises, guarantees and commitments made by the respondents. In their submission, when the respondents adopted section 105.01 of the Regulations, this was a breach of the contractual relationship. Plainly, the respondents were merely fulfilling one of their governmental duties: to legislate. Fulfilling an ex officio federal duty does not in any way constitute a breach. It appears to me that the applicants are using the wrong terminology in their argument on this point. They claim that there was a contractual relationship, while the evidence shows that what they are actually arguing is the administrative doctrine of "legitimate or reasonable expectations" instead. That evidence is found on page 5, at paragraph 14 of the statement of claim of *Aviation Roger Forgues Inc.*: [TRANSLATION]

Until January 22, 1997, the plaintiffs had always received the support and encouragement of TRANSPORT CANADA and of the defendant federal authorities for continuing, expanding, and developing this aerial sightseeing business.

- [23] On page 8, at paragraph 28 of the statement of claim, there is additional evidence that reads as follows: [TRANSLATION] The defendants and their representatives, including the then Minister of Transport, Douglas Young, at all times and in all circumstances continuously guaranteed and repeated to the plaintiffs as well as to all parties involved, including the local politicians, orally as well as in various documents, that the plaintiffs had acquired rights and that their rights could not be taken away from them in any way unless there was a safety risk, which was always recognized as not being the case; or unless the operating companies, including the present plaintiff, were purchased by the municipalities by mutual agreement or expropriated by them
- [24] The Prothonotary relied on *Ontario Black Bear/Ontario Sportsmen & Resource Users Assn. v. Ontario*, [2000] O.J. No. 263 several times in his decision in this case. That decision addresses the doctrine of legitimate expectations in relation to the legislative function. In that case, Cameron J. stated: [para 58] It is clear from *Gustavson Drilling, Cosyns, A & L. Investments and Reclamation Systems*, cited above, as enunciated in *Gustavson Drilling* at pp. 282-283: No one has a vested right of continuance of the law as it stood in the past. In tax law it is imperative that legislation conform to changing social needs and governmental policy. A taxpayer may plan his financial affairs in reliance on the tax laws remaining the same; he takes the risk that the legislation may be changed. The doctrine of legitimate expectations does not apply to a body exercising purely legislative functions including a purely ministerial decision based on broad grounds of public policy. A minister cannot fetter his or her own freedom, or that of Parliament or the Legislative Assembly, to change laws. [para 59] A government and a legislature must be left free to change policy to reflect changing social needs; to permit otherwise in the name of legitimate expectations would paralyze parliament, the legislature and ministerial powers to respond to changing social circumstances: see *Reference Re: Canada Assistance Plan*, [1991] 2 S.C.R. 525 at pp. 557-560.
- [25] In *Apotex Inc. v. Canada (Attorney General)*, [2000] 4 F.C. 264 (C.A.), Décary, Sexton and Evans J.J.A. stated: [para 102] Indeed, in *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at pages 557-560, it was specifically said that the doctrine of legitimate expectations has no application to the exercise of legislative powers. In addition, in *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, at page 1204, the Court rejected a challenge to the validity of municipal bylaws that was based on an allegation that they were passed in breach of a legitimate expectation of prior consultation.
- [26] Furthermore, in *Edmonton Telephones Corp. v. Stephenson*, [1994] A.J. No. 720 (B.R. Alta.), Ritter J. said: [para 85]... Moreover, the Rules governing procedural fairness do not apply to a body exercising purely legislative functions. Meggary, J. said so in *Bates v. Lord Hailsham of St. Marylebone*, [1972] 1 W.L.R. 1373 and this was approved by Estey, J. for the Court in *Inuit Tapirisat of Canada v. Canada (A.G.)* supra, at 758 [S.C.R.]. In *Martineau v. Matsqui*

Institution, [1980] 1 S.C.R. 602, 13 C.R. (3d) or 1, 15 C.R. (3d) 315, 50 C.C.C. (2d) 353... Further at p. 34 Sopinka, J. states: Parliamentary government would be paralyzed if the doctrine of legitimate expectations could be applied to prevent the government from introducing legislation in Parliament. Such expectations might be created by statements during an election campaign. The business of government would be stalled while the application of the doctrine and its effect were argued out in the courts. Furthermore it is a fundamental of our system of government that a government is not bound by the undertakings of its predecessor. The doctrine of legitimate expectations would place a fetter on this essential feature of democracy.

- [27] In short, the Prothonotary was right to strike out the paragraphs relating to contractual liability. Under rule 221(a) of the Federal Court Rules, 1998, contractual liability discloses no reasonable cause of action in this case given that there is no contractual relationship between the parties, and the doctrine of legitimate expectations does not apply to the legislative function. EXTRA-CONTRACTUAL LIABILITY
- [28] The applicants have brought action against the respondents for the fault and abuse by the Governor in Council and the Minister of Transport in the process of adopting and in adopting section 105.01 of the Regulations, the effect of which was to eliminate aerial sightseeing flights to or from Lac Saint-Augustin completely. The respondents argued that the adoption of section 105.01 of the Regulations and the consequences thereof constitute a delictual act, which resulted in a breach of the duty of care. The Prothonotary struck out that argument solely because the abusive exercise of regulatory powers cannot found a delictual action. The Prothonotary referred again to Ontario Black Bear, supra, in which Cameron J. stated: [para 38] The law is clear that no one has a vested right in the continuance of a law or a cause of action against the government or the Crown based upon the passing of a valid statute or regulation which deprives the plaintiff of a benefit he or she had before the change in the law and which does not constitute an expropriation by government.... [para 39] It is fundamental to a liberal democracy that the government must be free to change its policy and change legislation to meet changing societal needs.... [para 40] Policy or planning decisions by governments or municipal councils, being those based on financial, economic, social or political factors, and generally made by high ranking government officials, are immune from private claims in tort even if the decisions are ultimately held by a court to be invalid. Governments should not be restricted by the courts in making policy decisions. Operational decisions, being administrative decisions, adjudicative decrees or decisions implementing policy and generally made by lower ranking government officials, do not carry such immunity and may be the subject of tort liability....
- [29] On page 9, at paragraph 27 of the order, the Prothonotary cited several decisions that support the concept of the non-existence of a cause of action for making regulations that entail a change in the law: Gustavson Drilling (1964) Ltd. v. Minister of National Revenue, [1977] 1 S.C.R. 271; Cosyns v. Canada (Attorney General) (1992), 7 O.R. (3d) 641 (Ont. C. div.); A & L Investments Ltd. v. Ontario (1997), 36 O.R. (3d) 127 (Ont. C.A.) and Reclamation

Systems Inc. v. The Honourable Bob Rae et al. (1996), 27 O.R. (3d) 419 (Ont. Gen. Div.).
CROWN LIABILITY AND PROCEEDINGS ACT[HEREINAFTER THE "ACT"]

[30] Section 3 of the Act makes the Crown liable in respect of a tort committed by a servant of the Crown and reads as follows:

3. The Crown is liable in tort for the damages for which, if it were a private person of full age and capacity, it would be liable
 - (a) in respect of a tort committed by a servant of the Crown; or
 - (b) in respect of a breach of duty attaching to the ownership, occupation, possession or control of property.
3. En matière de responsabilité civile délictuelle, l'État est assimilé à une personne physique, majeure et capable, pour :
 - a) les délits civils commis par ses préposés;
 - b) les manquements aux obligations liées à la propriété, à l'occupation, à la possession ou à la garde de biens.

[31] However, neither the Governor in Council nor the Minister of Transport are "servants" of the Crown within the meaning of the Act, in accordance with *Kealey v. Canada* (Attorney General), [1991] F.C.A. No. 403, in which Teitelbaum J. defines the concept of "servant" within the meaning of the Act: [para 18]The Crown is liable for the torts of her servants by virtue of section 3 of the Crown Liability Act, R.S.C., 1985, c. C-50, as amended. However, the Crown is only liable if the servant himself could, apart from the provisions of the Crown Liability Act, be found liable. It is submitted that the statement of claim fails to sufficiently delineate what torts are alleged to have been committed and by whom. [para 37] Counsel for plaintiff submits that the definition of "servant" found in the Crown Liability Act covers all the defendants. With respect, I do not agree with the submission.

[32] The Act does not apply in this case since the respondents do not meet the definition of the word "servant," but it has now been established that merely making a regulation will not result in delictual liability. LEGISLATURE NOT LIABLE

[33] According to J.-L. Beaudoin and P. Deslauriers, *La responsabilité civile*, 5th ed., Cowansville (Quebec), Les Éditions Yvon Blais, 1998, the legislature enjoys absolute immunity from delictual proceedings in Canada. At page 78, we read: [TRANSLATION]

2. Legislative Act The principle that the legislature may not be held liable is firmly settled in Canada. It is logically impossible to sue the Crown to obtain financial compensation as a result of an Act being passed.

[34] On that point, in *Pack M. J. Inc. v. Canada*, [1997] F.C.J. No. 801 (F.C.T.D.), affirmed by the Federal Court of Appeal at [1998] F.C.J. No. 1922, Hugessen J.A. states: [para 5] In my view, even if the plaintiffs are ultimately successful on the question of the unconstitutionality of

the impugned statutes, it is impossible that the Crown would then be civilly liable. It is not a civil offence for a sovereign parliament to legislate, even when it does so ultra vires. In a free and democratic society, the enactment of a statute in good faith to promote what is perceived to be the public interest does not result in liability on the part of the Crown (or, for that matter, of the other components of Parliament: senators and members of Parliament). Our system of government requires that, in the public interest, Parliament not be liable in damages for the consequences of its legislation.

- [35] In short, the Prothonotary was correct when he struck out the paragraphs of the statement of claim regarding extra-contractual liability. Under rule 221(a) of the Federal Court Rules, 1998, extra-contractual liability discloses no reasonable cause of action in this case given that the respondents cannot be held liable on a delictual basis for the consequences arising from the adoption of section 105.01 of the Regulations.
- [36] The order of the Prothonotary is valid since it is not clearly wrong under the principles established by the Court in Aqua-Gem Investments, supra. The Prothonotary was correct to strike out the causes of action in contractual and extra-contractual liability. O R D E R
- [37] THE COURT ORDERS THAT this motion be dismissed. Pierre Blais Judge OTTAWA, ONTARIO November 28, 2001 Certified true translation Sophie Debbané, LL.B. FEDERAL COURT OF CANADA TRIAL DIVISION NAMES OF COUNSEL AND SOLICITORS OF RECORD COURT FILE NO.: T-1239-00 and T-1245-00 STYLE OF CAUSE: Aviation Portneuf Ltd. and Attorney General of Canada Aviation Roger Forgues Inc. and Attorney General of Canada PLACE OF HEARING: Quebec, Quebec DATE OF HEARING: 15-NOV-2001 REASONS FOR ORDER OF AND ORDER OF BLAIS J. DATED: 28-NOV-2001 APPEARANCES: Pierre G. Gingras FOR THE APPLICANT Francis Archambault FOR THE RESPONDENT SOLICITORS OF RECORD: Des Rivières Vermette (Pierre G. Gingras) FOR THE APPLICANT Morris Rosenberg Deputy Attorney General of Canada FOR THE RESPONDENT

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