

CANADA / JUDGMENT

British Columbia (Workers' Compensation Board) v. Flanagan Enterprises (Nevada) Inc.

2018 BCCA 459

COURT

British Columbia Court of Appeal

DECIDED

23 November 2018

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2018 BCCA 459 British Columbia (Workers' Compensation Board) v. Flanagan Enterprises (Nevada) Inc. COURT OF APPEAL FOR BRITISH COLUMBIA Citation: British Columbia (Workers' Compensation Board) v. Flanagan Enterprises (Nevada) Inc., 2018 BCCA 459 Date: 20181123 Docket: CA44253 Between: Workers' Compensation Board of British Columbia Appellant (Plaintiff) And Flanagan Enterprises (Nevada) Inc., Bill Dause, Attorney General of Canada, and Gary Wendell Johnson Respondents (Defendants) Before: The Honourable Mr. Justice Frankel The Honourable Madam Justice MacKenzie The Honourable Mr. Justice Harris On appeal from: An order of the Supreme Court of British Columbia, dated January 23, 2017 (British Columbia (Workers' Compensation Board) v. Flanagan Enterprises (Nevada) Inc., 2017 BCSC 99, Vancouver Docket S105434). Oral Reasons for Judgment Counsel for the Appellant: J. Fiorante, Q.C. J.L. Thornback M. Kazimirski Counsel for the Respondent, Attorney General of Canada: B. Sokhansanj BJ Wray Acting on behalf of the Respondent, Flanagan Enterprises (Nevada) Inc.: I. Flanagan Place and Date of Hearing: Vancouver, British Columbia November 19 and 20, 2018 Place and Date of Judgment: Vancouver, British Columbia November 23, 2018 Summary: Appeal from an order dismissing a subrogated claim in negligence for injuries sustained in an aircraft crash. The appellant argues the trial judge erred in finding no liability on the part of Transport Canada, the regulator responsible for administering and enforcing Canada's aviation safety rules. Held: Appeal dismissed. The trial judge did not err in finding: (a) Transport Canada did not owe a private law duty of care to the individual injured in the crash; and (b) if such a duty was owed, the standard of care was met.

[1] FRANKEL J.A.: This appeal is brought by the Workers' Compensation Board of British Columbia ("WCB") from the order of Justice Grauer of the Supreme Court of British Columbia dismissing a subrogated claim in negligence for injuries sustained by Jean-Pierre Forest in an aircraft crash that occurred near the Pitt Meadows Airport. The aircraft was owned by Flanagan Enterprises (Nevada) Inc. and registered in the United States of America, under number N17SA. It was operating in Canada pursuant to an arrangement

entered into by the civil aviation authorities of Canada, the United States, and Mexico following the ratification of the North American Free Trade Agreement ("NAFTA"). The trial judge's reasons contain a detailed and comprehensive discussion of the facts and the law: 2017 BCSC 99.

- [2] This appeal focuses primarily on the trial judge's finding of no liability on the part of the Canadian Ministry of Transport ("Transport Canada"). In addition, the WCB contends the judge erred in finding no liability on the part of Flanagan Enterprises and Bill Dause. Mr. Dause is an American business person who leased N17SA from Flanagan Enterprises and, in turn, leased it to Pacific Skydivers Ltd., a British Columbia company. At the time of the crash, Mr. Forest, an experienced parachutist, was employed by Pacific Skydivers to take photographs of its clients during their jump. Ian Flanagan, who was the pilot of N17SA at the time of the crash, is a principal of both Flanagan Enterprises and Pacific Skydivers.
- [3] The trial judge apportioned fault 50% to Mr. Flanagan/Pacific Skydivers and 50% to Gary Wendell Johnson, an American mechanic.
- [4] The trial judge held Transport Canada did not owe a private law duty of care to Mr. Forest because sufficient proximity did not exist between them. The judge further held that if a duty of care was owed, then the standard of care had been met. Last, the judge rejected the WCB's assertion that Flanagan Enterprises and Mr. Dause should be found liable on the basis they had engaged in a scheme or common design to circumvent Canadian aviation safety regulations.
- [5] Transport Canada is responsible for administering and enforcing Canada's aviation safety rules, as set out in the Aeronautics Act, R.S.C. 1985, c. A-2 and the Canadian Aviation Regulations, S.O.R./96-433 [CARS]. Chapter 12 of NAFTA carves out an exemption for "Specialty Air Services" ("SAS")--a class which includes aerial mapping, forest fire management, fire fighting, parachute jumping, and aerial spraying services. Under the NAFTA SAS regime each NAFTA partner agrees to recognize the domestic certification of SAS operators from the other two partner nations. Primary responsibility with respect to airworthiness and other safety-related matters remains with the domestic agency.
- [6] If, as in the present case, the operator of an American-registered aircraft wishes to conduct parachute jumping in Canada, it can apply to Transport Canada for a "Canadian Foreign Air Operator Certificate - Free Trade Agreement (FTA)", sometimes referred to as a "FTA AOC". Before granting such a certificate, Transport Canada requires three certificates issued by the American Federal Aviation Administration ("FAA"):
 - (a) a Certificate of Registration, establishing valid registration in the United States;
 - (b) a Certificate of Airworthiness, indicating that the aircraft is safe to fly; and
 - (c) a NAFTA Certificate of Authorization, certifying that the aircraft and all of the listed pilots satisfy the American requirements for parachute jumping operations.

- [7] An American aircraft with a valid FTA AOC can operate in Canada without having to expressly satisfy the safety and maintenance requirements of the Aeronautics Act and the CARS. This is because, as already mentioned, primary responsibility for ensuring airworthiness remains with the FAA.
- [8] When the crash occurred on August 3, 2008, Mr. Dause was the holder of a FTA AOC for N17SA, valid until April 14, 2009. The FTA AOC was for "parachute jumping".
- [9] The WCB contends that because Mr. Dause had no direct involvement with Pacific Skydivers, as a matter of law, N17SA did not fall within the NAFTA SAS regime and was, therefore, not properly the subject of a FTA AOC. The WCB says for a FTA AOC to be valid the certificate holder--referred to in the FTA AOC as the "foreign air operator"--must be actively involved in Canada in the provision of the service for which an aircraft has been certified. The WCB further submits Pacific Skydivers was the operator of N17SA in Canada and, therefore, Transport Canada had the same primary regulatory responsibilities with respect to N17SA as it has for Canadian aircraft. In this regard, the WCB relies on the definition of "operator" in s. 101.01(1) of the CARS, which reads: "operator, in respect of an aircraft means the person that has possession of the aircraft as owner, lessee or otherwise". Put otherwise, the WCB says the NAFTA SAS regime does not permit a Canadian entity to lease an aircraft for which a FTA AOC has been issued unless the holder of that certificate retains possession of the aircraft by exercising day-to-day control over the aircraft's in-Canada activities.
- [10] However, the holder of a FTA AOC is, by definition an "air operator" and the WCB has not pointed to anything that, in my view, precludes an aircraft covered by a FTA AOC from being leased to what can be described as the air operator's customer. I do not see anything in the NAFTA SAS regime that requires a foreign air operator to retain possession or exercise hands-on control of an aircraft. What is required is that the foreign air operator remain responsible for the aircraft's airworthiness and that it be flown by a listed pilot.
- [11] To accept the WCB's argument based on "operator" would seriously impair the efficacy of the NAFTA SAS regime. To use an example discussed during the hearing, it could preclude British Columbia from leasing an American water bomber for which a FTA AOC had been issued to fight forest fires.
- [12] I would, accordingly, reject the WCB's argument that N17SA was not properly the subject of a FTA AOC.
- [13] The WCB challenges a number of the trial judge's findings of fact. I see no need to discuss those in detail. Suffice it to say I would reject those arguments on the basis that the WCB has not shown the judge committed any palpable and overriding errors.
- [14] What remains are the WCB's challenges to the trial judge's conclusions that: (a) Transport Canada did not owe Mr. Forest a private law duty of care; and (b) if such a duty was owed, then the standard of care was not breached. I would reject those challenges substantially for the reasons given by the trial judge.

[15] In the result, I would dismiss this appeal.

[16] MACKENZIE J.A.: I agree.

[17] HARRIS J.A.: I agree.

[18] FRANKEL J.A.: The appeal is dismissed. "The Honourable Mr. Justice Frankel"

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