

CANADA / JUDGMENT

Chadwick v. Canada (Attorney General)

2010 BCSC 1744

COURT

Supreme Court of British Columbia

DECIDED

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2010 BCSC 1744 Chadwick v. Canada (Attorney General)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Chadwick v. Canada (Attorney General),

2010 BCSC 1744

Date: 20101206

Docket: S065491

Registry: Vancouver

Between:

Linda Lee Chadwick, Jeanne Ng and Douglas Stuart Chadwick

Plaintiffs

And

Attorney General of Canada, Enstrom Helicopter Corporation,

Crane Co., Mountain Aircraft Sales & Maintenance Inc. also

known as A & L Aircraft Maintenance, Art Comeault,

Richard Cooper, Lycoming Engines, a division of Avco Corporation,

and Avco Corporation

Defendants

And

Richard Cooper

Third Party

And

Enstrom Helicopter Corporation, Crane Co., Mountain Aircraft Sales
& Maintenance Inc. also known as A & L Aircraft Maintenance, Art Comeault,
Lycoming Engines, A Division of Avco Corporation and Avco Corporation

Fourth Parties

Docket: S065902

Registry: Vancouver

Between:

Reta G. Honour on her own behalf and as personal representative
of the Estate of Robert David Honour, Deceased

Plaintiff

And

Attorney General of Canada, Enstrom Helicopter Corporation,
Crane Co., Mountain Aircraft Sales & Maintenance Inc. also
known as A & L Aircraft Maintenance, Art Comeault,
Richard Cooper, Lycoming Engines, a division of Avco Corporation,
and Avco Corporation

Defendants

And

Richard Cooper, Mountain Aircraft Sales & Maintenance Inc.
also known as A & L Aircraft Maintenance, Art Comeault, and
Attorney General of Canada

Third Parties

And

Enstrom Helicopter Corporation, Crane Co., Mountain Aircraft Sales
& Maintenance Inc. also known as A&L Aircraft Maintenance, Art Comeault,
Lycoming Engines, A Division of Avco Corporation and Avco Corporation

Fourth Parties

Before: The Honourable Mr. Justice Myers

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.

October 25, 2010

Place and Date of Judgment:

Vancouver, B.C.

December 6, 2010

I. Introduction

- [1] The plaintiffs in these two actions apply to amend their statements of claim. (For ease of reference I will use the nomenclature in place at the time the pleadings were filed.)
- [2] The motions arose from an earlier application by the Attorney General of Canada (sued as representing the Ministry of Transport) to have the actions dismissed on the basis that they disclosed no cause of action. The Attorney General's motions were brought under Rule

19(24) of the previous Rules of Court, B.C. Reg. 221/90, and I heard these motions in July of this year. The statements of claim did not specifically allege a duty of care owed by the Crown (through Transport Canada) to the plaintiffs. Nevertheless, the parties argued the motions on the premise that the pleadings could be amended in due course to allege the duties if the motions to strike were unsuccessful. After considering the matter, I declined to make a decision in the absence of the alleged duties being clearly pleaded.

- [3] The Attorney General says the amendments should not be granted because they do not disclose a cause of action. Thus, although the form of the motions is different, the same issue that was in front of me in July is now before me again, but this time with a proposed pleading that does set out the alleged duties.
- [4] The Attorney General also argues that some of the proposed amendments should not be allowed because they plead evidence as opposed to facts. Further, the Attorney General says that some of the amendments plead similar fact evidence which is inadmissible.

II. The claims as currently pleaded

- [5] These actions arise out of a helicopter crash which occurred in Duncan, B.C., on September 17, 2005. Robert Honour bought the helicopter in June 2005. He was piloting the aircraft at the time of the crash. Mr. Chadwick was a passenger. Both Mr. Chadwick and Mr. Honour were killed in the crash. Mrs. Chadwick and Mrs. Honour bring these lawsuits in their own capacity under the Family Compensation Act, R.S.B.C. 1996, c. 126, and as the personal representatives of their deceased husbands.
- [6] The defendants include the manufacturer of the helicopter, the manufacturer of the engine, the manufacturer of the fuel pump and, through the Attorney General of Canada, Transport Canada. The defendant Art Comeault repaired the helicopter and certified it as airworthy. He was authorised to do so under the Canadian Aviation Regulations (the "CAR") having been designated as an Approved Maintenance Engineer ("AME") by Transport Canada under the CAR. His organisation, A & L Aircraft Maintenance, was designated an approved maintenance organization ("AMO") and Mr. Comeault was certified as the person responsible for maintenance ("PRM") for A & L (collectively, Mr. Comeault and A & L will be referred to as A & L). These designations are at the core of the claim against Transport Canada.
- [7] The statements of claim set out the facts of the helicopter crash, and that A & L repaired and maintained it before the crash. They allege that the cause of the crash was a faulty fuel pump.
- [8] The plaintiffs allege that the crash was caused in part by negligent maintenance performed on the helicopter by the defendants, A & L. This included not recording defects and using a defective fuel pump.
- [9] The allegations against Transport Canada in the statements of claim are as follows:

14. 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 manoeuvring within its territory and every aircraft carrying its nationality mark, wherever such aircraft may be, 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.
15. Pursuant to these obligations and section 4.2 of the Aeronautics Act, Transport Canada was responsible for ensuring compliance of Canadian registered aircraft and Canadian licensed operators with the requirements of the Aeronautics Act and the Canadian Aviation Regulations ("CARs"), the purpose of which was to protect the public from potentially unsafe practices and harmful situations resulting from aviation related activities.
16. At all material times, Transport Canada certified and licenced A & L as an Approved Maintenance Organization ("AMO"). In 1999 only, Transport Canada conducted an audit and inspection as a result of which Transport Canada knew or ought to have known that A & L was maintaining and was continuing to maintain aircraft including the Helicopter in circumstances that were not in compliance with the requirements of the applicable maintenance policy manuals and other required practices of AMOs, particulars of which are as follows:
 - (a) known defects not recorded properly;
 - (b) known accident history not recorded properly;
 - (c) maintenance service performed not recorded properly;
 - (d) aircraft released to service with outstanding defects post-maintenance;
 - (e) required inspections not performed;
 - (f) maintenance performed incorrectly;
 - (g) approving the defendant Art Comeault as a Director of Maintenance or person responsible for maintenance when they knew or ought to have known that he was not competent;
 - (h) maintenance conducted by unlicensed persons; and
 - (i) failure to comply with airworthiness directives as required.

17. As a result of what Transport Canada knew or ought to have known about the infractions and the failures to comply with the requirements of the applicable maintenance policy manuals and other required practices of A & L, Transport Canada failed to take effective measures to ensure compliance or to remove AMO certification in a timely fashion which would have prevented the Accident.

III. The Proposed Amendments

A. Factual amendments

- [10] The proposed amendments allege various prior acts by Mr. Comeault with respect to work done on other aircraft, including when he was a PRM at a prior employer, Galaxie Helicopters. This includes the falsification of log books, for which Mr. Comeault was investigated by Transport Canada. The amendments allege that in 1997 Mr. Comeault pled guilty to making false entries in a journey log required to be kept under Part I of the Aeronautics Act, R.S.C. 1985, c. A-2 [Act], with intent to mislead, contrary to s. 7.3(1)(c) of that Act.
- [11] With respect to another aircraft, the proposed amended notices of civil claim allege that Transport Canada was notified by the Transportation Safety Board that:
- (a) the Schweizer helicopter had been pieced together from the remains of three separate helicopters and was certified by Comeault as airworthy;
 - (b) when the TSB attended at A & L, Comeault was unable to produce documentation verifying the history of the components he had certified;
 - (c) Comeault did not have the manuals necessary to carry out the work he had performed and certified on the Schweizer.

- [12] In relation to the subject helicopter, the proposed amended pleadings say:

On or about March 3, 2004, Comeault certified KEO as airworthy and sold it to Richard Cooper. Comeault failed to record the previous accident involving KEO and failed to carry out mandatory inspections for damage resulting from the rollover accident. In addition, Comeault installed an uncertified tail rotor gearbox on KEO that had been involved in an accident while installed on another helicopter.

B. Transport Canada's alleged duties of care and its breaches

- [13] The proposed amendments set out the following alleged duties owed by Transport Canada:
44. In particular, Transport Canada owed a duty of care to:
- a) remove Comeault from the position of PRM at Galaxie following amendments made to CAR standards 573.03(1)(c) and 573.03(3) on June 1, 1998 which prohibited anyone with a conviction under s. 7.3 of the Aeronautics Act from acting as PRM;

- b) conduct an interview of Comeault to ensure he was knowledgeable about certain topics before considering him for the position of PRM at A & L , pursuant to CAR standard 573.03(5);
- c) refuse to approve Comeault for the position of PRM at A & L because he was not competent to hold the position because of his conviction under s. 7.3 of the Aeronautics Act, contrary to CAR Standard 573.03(1)(c);
- d) refuse to issue an AMO certificate to A & L because A & L did not meet the requirements of CAR Part V, Subpart 73, as required by CAR 573.02(1);
- e) pursuant to s. 6.71 of the Aeronautics Act, refuse to issue an AMO certificate to A & L because of Comeault's aviation record;
- f) pursuant to published policies and manuals, identify A & L as a high-risk AMO due to Comeault's aviation record and history of unsafe maintenance practices;
- g) pursuant to CAR standard 573.09(4) and (5), require A & L to assign quality assurance functions to external agents;
- h) pursuant to published policies and manuals, set audits for A & L more frequently than once every three years as a result of the high risk of Comeault breaching the required standards of maintenance and causing another accident;
- i) pursuant to published policies and manuals, conduct audits and mandatory inspections of A & L on schedule;
- j) pursuant to published policies and manuals, audit A & L and take enforcement action against Comeault and A & L following the Victoria Accident;
- k) pursuant to ss. 6.9(1), 7.(1) or 7.1(1) of the Aeronautics Act, suspend or cancel Comeault's AME licence following his conviction, the Baker Accident, and/or the Victoria Accident;
- l) pursuant to ss. 6.9(1), 7(1), or 7.1(1) of the Aeronautics Act, suspend or cancel A & L's AMO certificate following the Victoria Accident;
- m) issue Airworthiness Directives warning the aviation community that parts certified by or maintenance performed by Comeault, A & L, or Galaxie were suspect and that aircraft should be grounded until certified as airworthy by another AME or AMO, as required by CAR 593.02;

[14] These preceding paragraphs do not specify to whom the alleged duties are owed, but the proposed amended notices of civil claim sets out the alleged breaches of duty to the plaintiffs:

Transport Canada breached its duty of care to Mr. Honour [and Mr. Chadwick] by:

- a) failing to remove Comeault from the position of PRM at Galaxie when it knew that the CARs prohibited Comeault from holding the position due to his conviction for falsifying aircraft records;
- b) approving Comeault for the position of PRM at A & L in bad faith when it knew that the CARs prohibited Comeault from holding the position due to his conviction for falsifying aircraft records;
- c) failing to conduct an interview of Comeault prior to approving him for the position of PRM at A & L;
- d) issuing an AMO certificate to A & L when it knew that A & L did not meet the applicable regulations and standards;
- e) failing to identify A & L as a high risk AMO and set a corresponding audit schedule in accordance with published policies and manuals;
- f) failing to audit Galaxie and A & L following Comeault's conviction, the Baker Accident, the Victoria Accident, and complaints made to Transport Canada about Galaxie, A & L, Comeault, and Gary Parsons;
- g) failing to audit or inspect A & L at any time between the date of its approval and the date of the Accident;
- h) failing to suspend or cancel Comeault's AME licence and A & L's AMO certificate in light of an extensive history of breaches of regulations, unsafe maintenance practices, and accidents;
- i) failing to issue Airworthiness Directives with respect to parts certified by or maintenance performed by Comeault, A & L, or Galaxie; and,
- j) wrongfully protecting the interests of Comeault and A & L over the protection of the flying public in general and Mr. Honour in particular, leaving the flying public and Mr. Honour vulnerable to harm caused by Comeault's unsafe maintenance practices.

IV. Do the alleged duties disclose a cause of action?

- [15] In order to deny an amendment on the basis that it does not disclose a cause of action, I must be convinced that it is plain and obvious that the alleged duties of care do not exist. The facts in the pleadings are to be taken as established. This is the same test as used in a motion to strike a pleading as disclosing no cause of action. The motions to strike the current statements of claim are still extant and there is therefore no point in parsing what was alleged in them from what is proposed to be added in the amendments: the overriding question is whether the alleged duties in the proposed amended pleadings disclose a cause of action.

[16] For the purposes of this application, I think the following summarises the main thrust of the claims against Transport Canada as they are sought to be pleaded:

- Prior to his work which is alleged to have caused the subject crash, Mr. Comeault, in his capacity as an AME and a PRM, performed maintenance work incompetently and dishonestly. He had pleaded guilty to making false log book entries. His corporate alter-ego, A & L, was directly and indirectly tainted by the same factors.
- At the relevant times, Transport Canada had actual knowledge of this.
- Mr. Comeault's work on the helicopter was negligent. A & L ought not to have certified the helicopter as airworthy. His negligence caused or contributed to the crash.
- Transport Canada owed a duty to people in the position of Mr. Honour and Mr. Chadwick (aircraft owners, pilots and passengers) not to approve AMOs, AMEs and PRMs who are dishonest and incompetent and who have been convicted of the offence of falsifying aviation records.

[17] The Ontario Court of Appeal in *Attis v. Canada (Minister of Health)*, 2008 ONCA 660, referred to cases such as the one at bar as cases of government liability for regulatory negligence. As observed recently by Cromwell J., writing for the Supreme Court of Canada in *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5, at para. 18, the question of whether a duty of care exists:

... must be resolved by an analysis of the applicable legal duties, following the approach set down by the Court in a number of cases, including *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537; *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562; *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263; *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643; and *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129. The analysis turns on whether the relationship between the appellants and the defendants discloses sufficient foreseeability and proximity to establish a *prima facie* duty of care and, if so, whether there are any residual policy considerations which ought to negate or limit that duty of care: see, e.g., *Hill*, at para. 20. The analysis must focus specifically on the relationships in issue, as there are particular considerations relating to foreseeability, proximity and policy in each: see, e.g., *Hill*, at para. 27.

[18] The cases referred to by Cromwell J. have - with some modification - applied the analysis of the House of Lords in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.). In *Cooper v. Hobart*, 2001 SCC 79, the Supreme Court of Canada described the approach as follows:

30 In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the *Anns* analysis is best understood as follows. At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the

relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a prima facie duty of care arises. At the second stage of the Anns test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care. It may be, as the Privy Council suggests in *Yuen Kun Yeu*, that such considerations will not often prevail. However, we think it useful expressly to ask, before imposing a new duty of care, whether despite foreseeability and proximity of relationship, there are other policy reasons why the duty should not be imposed.

- [19] The plaintiff bears the burden of showing a prima facie duty of care at the first stage of the analysis. If there is a prima facie duty, it is up to the defendant to establish that it should be negated due to policy considerations (see, *Childs v. Desormeaux*, 2006 SCC 18, at para. 13).
- [20] *Anns* placed great emphasis on whether the alleged negligence occurred in the policy or operational sphere. It was made clear in *Cooper* that that part of the analysis is to be dealt with at the second stage of the *Anns* analysis, as it is applied in Canada. Both *Anns* and *Cooper* stand for the proposition that no liability is to be imposed for negligence at the policy level.
- [21] Lastly, in *Cooper* the court stated:

39 The second step of *Anns* generally arises only in cases where the duty of care asserted does not fall within a recognized category of recovery. Where it does, we may be satisfied that there are no overriding policy considerations that would negative the duty of care.

As will be seen, this is of significance to the case at bar because the parties disagree as to whether a decision of the Federal Court of Appeal in *Swanson Estate v. Canada*, 80 D.L.R. (4th) 741, [1991] F.C.J. No. 452 affirming 32 F.T.R. 129, [1990] F.C.J. No. 195, established the duty of care required for the plaintiffs to succeed. *Swanson Estate* was decided before the Supreme Court of Canada revisited *Anns* in *Hobart*.

A. Does *Swanson Estate* establish a category applicable to this case?

- [22] In *Swanson Estate* the plaintiff's husband was killed in an airplane crash. The plane was operated by a small carrier, who, the plaintiff argued, should not have been approved by Transport Canada due to, amongst other things, its prior and serious breaches of the regulations made under the *Aeronautics Act*. In the trial decision, Walsh J. quoted from *Anns*, *Kamloops* and *Just*. The focus of his reasoning was that the duties alleged to be owed by Transport Canada were in the operational and not the policy sphere. He concluded that there was no meaningful distinction between the case before him and that in *Just* and that the alleged duty of care existed. The Federal Court of Appeal affirmed the decision, for the most part adopting Walsh J.'s analysis.
- [23] In two companion cases dealing with non-aviation matters, the Ontario Court of Appeal declined to regard *Swanson Estate* as having established a duty of care category which should be followed. *Attis v. Canada (Minister of Health)*, 2008 ONCA 660, was a class action

brought on behalf of recipients of breast implants. The action alleged that the Minister of Health owed a duty of care to patients who received breast implants with respect to the regulation of those devices. *Drady v. Canada (Minister of Health)*, 2008 ONCA 659, asserted a similar duty of care to recipients of devices used in temporomandibular joints.

[24] Apart from the obvious fact that *Drady* and *Attis* involved different regulatory regimes, the Ontario Court of Appeal declined to follow *Swanson Estate* because, as stated in *Attis* at para. 44:

[44] Importantly, *Swanson* pre-dates the *Cooper* and *Edwards* decisions that changed the analysis, both by emphasizing the importance of proximity at the first stage and by directing that the operational/policy distinction is properly considered at the second stage of the analysis. *Swanson* was decided on the basis of the policy/operational distinction without a preliminary consideration of the question of proximity. *Cooper* and *Edwards* make it clear that a finding of proximity is a required element of a duty of care. Operational negligence, in the absence of a proximate relationship, is not sufficient to give rise to a duty of care. As such, *Swanson* does not assist the appellants' argument.

The court made a similar comment in *Drady*, at para. 43.

[25] There is a risk of focusing too much - as was done by the plaintiffs in the case at bar - on whether a particular case establishes a "category" for the purposes of the *Anns/Cooper* analysis. Ultimately the issue is a matter of following precedent. This was made clear by the Supreme Court of Canada in *Childs* (a case not involving a governmental authority) where *McLachlin C.J.* stated:

15 A preliminary point arises from a nuance on the *Anns* test developed in *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79. The Court in *Cooper* introduced the idea that as the case law develops, categories of relationships giving rise to a duty of care may be recognized, making it unnecessary to go through the *Anns* analysis. The reference to categories simply captures the basic notion of precedent: where a case is like another case where a duty has been recognized, one may usually infer that sufficient proximity is present and that if the risk of injury was foreseeable, a *prima facie* duty of care will arise. On the other hand, if a case does not clearly fall within a relationship previously recognized as giving rise to a duty of care, it is necessary to carefully consider whether proximity is established. ... [Emphasis added.]

[26] Turning to *Swanson Estate*, the plaintiffs argue that *Walsh J.* did, in fact, analyse proximity, but this is not apparent to me. Furthermore, although both *Swanson Estate* and the case at bar deal with approvals granted by Transport Canada in the aviation industry, they are approvals for quite different things and given under different parts of the Regulation. Finally, the nexus between the plaintiffs and the Ministry is different. In the end result, since there is no other case directly on point, the regulatory regime which, at least in part, sets out and determines the relationships between the parties must be looked at in order to determine whether the alleged duty of care can withstand a motion to strike.

B. Is there a prima facie duty of care?

[27] The first phase of the Anns analysis mandated by the Supreme Court of Canada is to determine whether there is a prima facie duty of care; this requires both foreseeability and proximity.

1. Foreseeability

[28] The plaintiffs allege that Transport Canada should not have designated Mr. Comeault as an AME or a PRM, nor his company as an AMO because it knew that Mr. Comeault was both fraudulent in his log-book keeping and incompetent. It would be foreseeable that someone in that position could cause an aircraft crash which would injure or kill the passengers in it. The foreseeability requirement is therefore met.

2. Proximity

[29] The proximity analysis is more difficult. Most of the cases in which a duty of care has not been established have foundered on this element.

[30] In Fullowka, the plaintiffs' family members were killed by a bomb set in a mine by a striking mineworker. The plaintiffs alleged that the government of the Northwest Territories acted negligently in enforcing mining safety regulations by allowing the mine to operate when it knew of the potential for violence. The Supreme Court of Canada held in favour of the plaintiffs.

[31] Cromwell J. reiterated some relevant factors and legal principles which had been set out by the Supreme Court of Canada in prior cases. He first referred to Childs, noting that it was - as is the case at bar and as was Fullowka - a case where the defendants' conduct did not directly cause the foreseeable harm to the plaintiff; rather, the direct cause of the harm was the action of third parties whom, it was argued, the defendant had a duty to control or regulate. Cromwell J. noted that the court in Childs set out three possible relevant factors in determining whether the proximity between the parties was sufficient to establish a duty of care:

27 ... The first is that the defendant is materially implicated in the creation of the risk or has control of the risk to which others have been invited. The second is the concern for the autonomy of the persons affected by the positive action proposed. As the Chief Justice put it: "The law ... accepts that competent people have the right to engage in risky activities ... [and] permits third parties witnessing risk to decide not to become rescuers or otherwise intervene" (para. 39). The third is whether the plaintiff reasonably relied on the defendant to avoid and minimize risk and whether the defendant, in turn, would reasonably expect such reliance.

[32] At para. 39 Cromwell J. noted the following principles from Syl Apps Secure Treatment Centre v. B.D., 2007 SCC 38:

- o The statute is the foundation of the proximity analysis and policy considerations arising from the particular relationship between the plaintiff and the defendant must be considered.
- o The fact that an alleged duty of care is found to conflict with an overarching statutory or public duty may provide a policy reason for refusing to find proximity. Both Cooper and Edwards are examples. In Cooper, a duty to individual investors on the part of the Registrar of Mortgage Brokers potentially conflicted with the Registrar's overarching public duty; in Edwards, the proposed private law duty to the victim of a dishonest lawyer potentially conflicted with the Law Society's obligation to exercise its discretion to meet a myriad of objectives.
- o A statutory immunity provision may also, as in Edwards, indicate the Legislature's intention to preclude or limit private law duties.

[33] Finally, at para. 40 Cromwell J. referred to *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, and noted:

... The most basic factor relevant to proximity is whether there is a relationship between the alleged wrongdoer and the victim, usually described as "close and direct" (para. 29). The focus is on whether the actions of the alleged wrongdoer have a close and direct effect on the victim. Other considerations include expectations, representations, reliance and the nature of the interests engaged by the relationship. ...

[34] With those principles in mind, I now turn to the case at bar.

(i) The Regulatory Regime

[35] The regulation of aviation safety in Canada is achieved through a system of certification, licensing, surveillance and enforcement, under the authority of the Minister of Transport (Transport Canada). The system includes certification and licensing of aircraft, pilots and maintenance personnel.

[36] In the Appendix, I set out a description of the regime, which, at its highest level, involves commitments by Canada pursuant to the 1944 Convention on International Civil Aviation (the "Chicago Convention"). The Appendix is largely taken from the plaintiffs' arguments.

[37] With respect to policy manuals, the plaintiffs have pleaded the following:

Transport Canada developed policies, procedures, and manuals which defined the duties of Transport Canada employees with respect to oversight of the aviation industry. Among other things, these duties required Transport Canada to:

- a) consider an applicant's and its principals' aviation record when approving an AMO application and setting the audit frequency for the AMO;
- b) audit AMOs at least once every three years, and audit high-risk AMOs more frequently;
- c) carry out mandatory inspections on AMOs that were not audited in a given year;

- d) suspend or cancel the licence of an AME who demonstrated incompetence; and,
- e) observe TSB accident investigations for the purposes of:
 - i. obtaining information relevant to Transport Canada's responsibilities for safety; and,
 - ii. identifying hazards that should be addressed through regulatory or enforcement action.

[38] As will be seen from the Appendix, all aircraft in Canada must be certified as airworthy by an AMO or AME. All repair work must be similarly certified. An AMO's procedures are governed by a detailed maintenance policy manual, which must be approved by Transport Canada.

[39] Transport Canada keeps records of every aircraft, aircraft owner, AME and AMO. Transport Canada notifies aircraft owners when there is a concern with respect to an aircraft's airworthiness.

[40] There are strict criteria for the certification of AMEs, AMOs and PRMs. Of particular significance to the case at bar is that Transport Canada should not have approved Mr. Comeault's appointment as the PRM of A & L in December 1999; he was not qualified to hold that position because of his prior conviction.

[41] One of the criteria the courts have looked at is whether the legislation in question contains an immunity provision which protects employees of Transport Canada from being held liable for negligent actions done in good faith. There is no such provision in the Act or Regulations (see, *Edwards v. Law Society of Upper Canada*, 2001 SCC 80; *McClelland v. Dr. Stewart*, 2003 BCSC 1292).

(ii) Cases dealing with harm caused by someone the defendant regulated or controlled

[42] This case is one where the harm was directly caused by someone whom, it is alleged, a defendant (Transport Canada) had a duty to regulate (Mr. Comeault). There are a number of cases where sufficient proximity has been found to exist in those circumstances. Fullowka was, as I have indicated, such a case. It is instructive to review other such cases.

[43] In *D.N. v. Oak Bay*, 2005 BCSC 1412, Silverman J. held that a parole officer owed a duty of care to youths on a hockey team, and their parents, to warn them that an assistant coach was a convicted sex offender. The parole officer did not do so and the coach sexually abused the plaintiff team member.

[44] In *McClelland*, the plaintiffs were abused by a physician, Dr. Stewart. In addition to suing him, they claimed that the College of Physicians and Surgeons of British Columbia was negligent in allowing Dr. Stewart to practice medicine when it ought to have been aware of his similar past conduct. L. Smith J. refused to strike the claim finding that it was arguable that there was sufficient proximity to found a *prima facie* duty of care.

- [45] In coming to her conclusion, Smith J. relied on two things which are particularly germane to the case at bar. The first was that the case involved physical harm as opposed to economic loss. Smith J. analysed previous cases dealing with the issue of proximity in which that distinction was drawn.
- [46] The second factor was the specific knowledge the college was alleged to have of the doctor's conduct. Smith J. noted, at para. 100, that:
- ... The allegations relate to specific circumstances and a specific doctor, whose misconduct was allegedly known to the College. ...
- [47] The case at bar involves physical damage and it is alleged that Transport Canada had actual knowledge of Mr. Comeault's incompetence, dishonest keeping of records and prior conviction.
- [48] In the recent case of *More v. Bauer Nike Hockey Inc.*, 2010 BCSC 1395, the plaintiff suffered a head injury in a hockey game while wearing a helmet manufactured by Bauer and certified by the Canadian Standards Association. It claimed that the Association, which was a federal Crown corporation, was negligent in granting the certification.
- [49] Macaulay J. determined that a duty of care was owed by the CSA to the plaintiff. In determining proximity, he also drew a distinction between physical injury and a claim for economic loss. After analysing the statutory regime, Macaulay J. posed and answered the following question:
- [212] ... On the question of proximity, I extrapolate from *Cooper* at paras. 32-34. Is the player, who must obtain and wear a certified helmet in order to participate in organized hockey, so closely and directly affected by the CSA decision respecting the adequacy of the certification standard that the latter ought reasonably to have the player's legitimate interest in safety in mind? In my respectful view, the answer must be yes.
- [50] The comment of Macaulay J. in the following paragraph is apt - with suitable transpositions - to aircraft certification insofar as pilots, passengers and purchasers of aircraft are concerned:
- [213] By legislative definition, any hockey helmet that is not certified is a hazardous product and cannot be sold in Canada. No matter how well designed the helmet may, in fact, be, no manufacturer can offer it for sale unless it is certified. The consumer hockey player has no choice and buys, or otherwise obtains, the helmet for the purpose of self-protection in a game that has inherent dangers. Nonetheless, there is some reliance by the consumer on the fact of certification and an expectation that the risk of at least some injuries is reasonably reduced. Otherwise, there would be no need for any helmet at all.
- [51] Transport Canada relies on several cases in support of their position that there is insufficient proximity on which to found a duty of care. I now turn to some of those cases.

[52] In *Edwards*, the plaintiffs were defrauded in a gold purchase scheme. As instructed by the vendor, they deposited the purchase funds into a lawyer's trust account, but the gold was never delivered. The plaintiffs sued the Law Society for being negligent in failing to ensure that the lawyer operated his trust account in the appropriate manner. The Law Society applied to strike the claim. The Supreme Court of Canada held there was insufficient proximity to establish a duty of care.

[53] As noted by Smith J. in *McLelland*, one of the factors which influenced the court in *Edwards* was that the plaintiffs were not clients of the lawyers. That is not paralleled in the case at bar. Further, the case was one of economic harm and not physical harm and the legislation in *Edwards* contained an immunity provision.

[54] Transport Canada also relies heavily on *Drady* and *Attis*. In *Attis* the court stated:

57 The regulations in force during the time frame defined by the appellants simply particularized and provided mechanisms to enforce compliance with the legislation's objective. A reading of the legislative history of the regulations discloses that there was no obligation on Health Canada to undertake safety and efficacy testing, or to engage any other compliance or enforcement mechanism. The regulations simply authorized Health Canada to enforce the various aspects of the compliance requirements if it chose to do so. Thus, Health Canada was akin to an overseer or watchdog, able to employ discretionary, but not mandatory, enforcement of the legislative scheme. Having the means to enforce compliance does not translate into an obligation to do so: see *Street v. Ontario Racing Commission*, (2008), 88 O.R. (3d) 563 at para. 18 (C.A.). Like the FDA, the regulations mandate that the medical devices industry is responsible for product safety, a responsibility that has become increasingly rigorous over time. The government, like the consumer, depends on the manufacturer to ensure product safety.

A similar comment was made in *Drady*, at para. 38.

[55] That passage highlights two major distinctions between *Attis* and *Drady* and the case at bar. First, the allegations in this case concern the AMO, AME and PRM designations given by Transport Canada. The granting of that designation is not something over which the industry maintained control nor was responsibility for the designation shared. Second, in the present case, Transport Canada did not have the discretion to approve Mr. Comeault as a PRM given his criminal conviction.

[56] There is a third distinction between this case and *Drady* and *Attis*. In *Drady*, at para. 54, it was noted that no representations from Health Canada to the plaintiff were pleaded. In the case at bar, the plaintiffs allege:

At all material times, Transport Canada made the following representations to the public and its employees:

- a) Transport Canada and its employees may be held civilly liable for injuries caused or contributed to by negligent oversight of regulated entities;

- b) Transport Canada's primary objective is aviation safety, and therefore decisions made by Transport Canada inspectors should always reflect this objective;
- c) Transport Canada inspectors have an inherent legal responsibility within their Delegation of Authority to act in the interest of public safety;
- d) Enforcement of regulations is not an option, but a commitment to aviation safety;
- e) Transport Canada is working for individual members of the flying public;
- f) The Aeronautics Act was created to protect the public from potentially unsafe aviation practices and activities;
- g) Members of the flying public are indirect clients of Transport Canada;
- h) The provision of oversight services by Transport Canada is intended to provide a level of positive assurance to the travelling public, which is receiving the benefits of rights exercised by regulated entities;
- i) Transport Canada has an obligation to the flying public to ensure that maintenance personnel working on aircraft are properly trained; and,

Comeault and A & L met the regulations and standards required of AMEs and AMOs and were approved to perform maintenance on Enstrom piston-powered helicopters.

Reliance on these representations by the plaintiffs is also pleaded.

[57] Finally, Health Canada had no information about individual users of medical devices. However, as is pointed out in Appendix dealing with the regulatory framework, Transport Canada maintained the names and current addresses of all aircraft owners so that, amongst other things, airworthiness directives could be sent to them.

(iii) Conclusion on Proximity

[58] The negligence alleged against Transport Canada is with respect to something over which it had direct control: the designation of maintenance personnel and organisations who are authorised to perform work on and certify aircraft.

[59] Further, part of the case against Transport Canada is that it breached the stark restriction from approving Mr. Comeault as a PRM because of his prior criminal conviction. This claim does not seek to make Transport Canada a guarantor for the safety of aircraft; rather, it is directed to something far more limited and specific - the duty to exercise care in enforcing its own regulations with respect to whom it designates as competent to work on aircraft.

[60] This case is closer to those that have found proximity to exist than those cases which have not.

[61] I conclude that there is a case to be argued that there was a close and direct relationship between the Ministry of Transport and the plaintiffs (an aircraft owner/pilot and passenger, respectively) and that there is therefore sufficient proximity to found the alleged duties.

3. Do policy considerations negate the prima facie duty

[62] The allegations do not involve activities in the legislative or policy sphere; rather, they are activities occurring exclusively at the operational level.

[63] In several cases, a prima facie duty of care has been negated at this stage of the analysis because an alleged duty would conflict with the defendant's larger responsibilities. For example, in *Cooper* the court stated at para. 52:

In our view, even if a prima facie duty of care had been established under the first branch of the *Anns* test, it would have been negated at the second stage for overriding policy reasons. The decision of whether to suspend a broker involves both policy and quasi-judicial elements. The decision requires the Registrar to balance the public and private interests. The Registrar is not simply carrying out a predetermined government policy, but deciding, as an agent of the executive branch of government, what that policy should be. Moreover, the decision is quasi-judicial. The Registrar must act fairly or judicially in removing a broker's licence. These requirements are inconsistent with a duty of care to investors. Such a duty would undermine these obligations, imposed by the Legislature on the Registrar. Thus even if a prima facie duty of care could be posited, it would be negated by other overriding policy considerations.

[64] Transport Canada says that the Minister of Transport has a wide-ranging mandate and to impose the duty of care alleged here would conflict with that. But that is a conclusion without an argument to support it. There is no doubt that the Minister of Transport has a wide array of responsibilities, even within the area of air transport. However, in and of itself, that is not sufficient to allow me to draw the conclusion that the imposition of the duty would be inconsistent with the Minister's wider responsibilities. As I have said, the alleged duty is very narrow. It is hard to conceive how a duty of care to designate AMEs, PRMs and AMOs who are competent and who have not been convicted of offences under the Act can result in inconsistent obligations. The Attorney General did not provide one example under the legislative scheme of a possible conflict.

[65] The possibility of the duty of care imposing indeterminate liability is also a consideration. There is no possibility of that here.

[66] I therefore do not think it is plain and obvious that the pleadings, as sought to be amended, do not disclose a cause of action.

4. Other arguments made by Transport Canada

[67] Transport Canada argues that the proposed amendments plead evidence. I do not agree. The amendments do not set out how facts are to be proved; they set out the alleged facts.

- [68] Transport Canada also argues that the proposed amendments which deal with Mr. Comeault's work on other aircraft refer to similar fact evidence which is not admissible. I take that objection to stand whether the paragraphs are considered to be factual allegations or, as per the argument that I have rejected, the pleading of evidence.
- [69] I do not accept this submission, which misunderstands the purpose for the allegations. The thrust of the plaintiffs' claims is that Transport Canada knew that Mr. Comeault had been involved in questionable work on other aircraft and therefore should not have approved his PRM and AME designations. That is the purpose of the reference to the other aircraft incidents. That is not similar fact evidence - it is a pleading of Transport Canada's prior knowledge of matters that go to Mr. Comeault's qualification to be an AME and PRM.

V. Conclusion

- [70] I conclude that the amendments are permitted.

"E.M. MYERS, J."

Appendix - The legislative scheme

- [1] The regulation of aviation safety in Canada is achieved through a comprehensive system of certification, licensing, surveillance and enforcement, all under the authority of the Minister of Transport (Transport Canada). The system includes certification and licensing of aircraft, pilots, and maintenance personnel.
- [2] The regulatory regime is set out in:
- (a) Canada's commitments at the international level under the Convention on International Civil Aviation (at the international level);
 - (b) the Aeronautics Act, R.S.C. 1985, c. A-2 (the "Act");
 - (c) the regulations and standards promulgated under the Act;
 - (d) the directives and policies issued to support Transport Canada's implementation of its responsibilities.

International Commitments

- [3] Canada was a Contracting State to the Convention on International Civil Aviation (the "Chicago Convention") on December 7, 1944. The Chicago Convention came into force on March 5, 1947. The purposes of the Chicago Convention included forming the International Civil Aviation Organization ("ICAO") and creating a framework of aviation standards and practices that all parties would adhere to.
- [4] A number of amendments have been made to the Chicago Convention since it came into force. Most relevant to this case is the Seventh Edition of the Chicago Convention, which contains all amendments which were in force as of June 30, 1997.

Convention on International Civil Aviation, Seventh Edition, 1997

[5] Article 12 reads in part:

Each contracting State undertakes to adopt measures to insure that every aircraft flying over or maneuvering within its territory and that every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and maneuver of aircraft there in force. Each contracting State undertakes to keep its own regulations in these respects uniform, to the greatest possible extent, with those established from time to time under this Convention. Each contracting State undertakes to insure the prosecution of all persons violating the regulations applicable.

[6] Article 54 requires the ICAO Council to adopt Annexes to the Convention which set out international standards and recommended practices. Relevant Annexes that have been adopted are:

- (a) Annex 1 - Personnel Licensing
- (b) Annex 6 - Operation of Aircraft
- (c) Annex 8 - Airworthiness of Aircraft

Annex 1 - Personnel Licensing

[7] Annex 1 contains requirements that Contracting States must enforce with respect to licensing individuals involved in the aviation industry, including aircraft mechanics. The following section imposes a duty on a Contracting State, including Canada, to take action if a licence holder is not competent:

1.2.5.1 A Contracting State, having issued a licence, shall ensure that the privileges granted by that licence, or by related ratings, are not exercised unless the holder maintains competency and meets the requirements for recent experience established by that State.

Annex 6 - Operation of Aircraft

[8] Annex 6 contains requirements for the international operation of aircraft, including oversight of aircraft operated by private owners. Although targeted at international operations, its provisions necessarily impact on domestic operations because, in practice, it is impossible to separate maintenance that is performed on aircraft that will only be operated in Canada from those that will be operated internationally.

[9] Section 6.1 of Part III prohibits the operation of helicopters unless they are maintained and released to service by an approved organisation, or under an equivalent system where the person signing the maintenance release is licensed in accordance with Annex 1.

- [10] Appendix 1 to Annex 6 imposes duties on a Contracting State to conduct safety oversight of operators in its jurisdiction. Section 8.1 of the Appendix requires a Contracting State to "use a documented process to take appropriate corrective actions, up to and including enforcement measures, to resolve identified safety issues".

Annex 8 - Airworthiness of Aircraft

- [11] Annex 8 contains requirements that are intended to ensure the airworthiness of aircraft. Section 4.1 provides that Chapter 4 applies to "all aircraft", not just aircraft that are operated internationally. Section 4.2.1 requires a Contracting State to ensure that aircraft are "maintained in an airworthy condition and in compliance with the maintenance requirements of Annex 6."

Aeronautics Act

- [12] The Aeronautics Act is the primary governing legislation for Transport Canada and the aviation industry. Among other things, the Act creates the legislative framework that is necessary for Canada to meet the obligations it has committed to under the Chicago Convention.
- [13] The Act defines responsibilities for Transport Canada, creates powers that can be used in making regulations and overseeing the aviation industry, and sets out certain offences that go to the heart of aviation safety.

Responsibilities

The Act defines responsibilities for Transport Canada, including the following:

4.2 The Minister is responsible for the development and regulation of aeronautics and the supervision of all matters connected with aeronautics and, in the discharge of those responsibilities, the Minister may

- (n) investigate matters concerning aviation safety; and
- (o) undertake such other activities in relation to aeronautics as the Minister considers appropriate or as the Governor in Council may direct.

Powers

- [14] Relevant areas over which Transport Canada may regulate include: the licensing of pilots and maintenance engineers, maintenance of aircraft, inspection of maintenance facilities, the prohibition of certain acts and enforcement of laws for safety reasons, and investigations of aviation incidents and contraventions of regulations:

4.9 The Governor in Council may make regulations respecting aeronautics and, without restricting the generality of the foregoing, may make regulations respecting

- (a) the accreditation or licensing of
 - (i) flight crew members, air traffic controllers, operators of equipment used to provide services relating to aeronautics and other persons providing services relating to aeronautics, and
 - (ii) persons engaged in the design, manufacture, distribution, maintenance, approval, certification or installation of aeronautical products and the installation, maintenance, approval and certification of equipment used to provide services relating to aeronautics;
- (b) the design, manufacture, distribution, maintenance, approval, installation, inspection, registration, licensing, identification and certification of aeronautical products;
- (c) the design, installation, inspection, maintenance, approval and certification of equipment and facilities used to provide services relating to aeronautics;
- (h) the conditions under which aircraft may be used or operated or under which any act may be performed in or from aircraft;
- (m) the prohibition of the doing of any other act or thing in respect of which regulations under this Part may be made;
- (n) the enforcement of such laws as may be deemed necessary for the safe and proper operation of aircraft;
- (q) the investigation of any accident involving an aircraft, any alleged contravention under this Part or any incident involving an aircraft that, in the opinion of the Minister, endangered the safety of persons;
- (r) the taking of statements by investigators for the purpose of an investigation referred to in paragraph (q);
- (s) the keeping and preservation of records and documents relating to aerodromes, to activities, with respect to aeronautics, of persons who hold Canadian aviation documents and to aeronautical products and equipment and facilities used to provide services relating to aeronautics;

[15] The Act also gives Transport Canada the authority to cancel or refuse to issue or amend Canadian aviation documents on grounds related to public safety:

6.71 (1) The Minister may refuse to issue a Canadian aviation document, where the Minister is of the opinion that the public interest and, in particular, the record in relation to aviation of the applicant or of any principal of the applicant warrant it.

6.8 In addition to any ground of suspension, cancellation or refusal of renewal referred to in sections 6.9 to 7.1, the Minister may suspend, cancel or refuse to renew a Canadian aviation document in such circumstances and on such grounds as the Governor in Council may by regulation prescribe.

6.9 (1) Where the Minister decides to suspend or cancel a Canadian aviation document on the grounds that the holder of the document has contravened any provision of this Part or any regulation or order made under this Part, the Minister shall by personal service or by registered or certified mail sent to the holder at his latest known address notify the holder of that decision and of the effective date of the suspension or cancellation, but no suspension or cancellation shall take effect earlier than the date that is thirty days after the notice under this subsection is served or sent.

7. (1) Where the Minister decides to suspend a Canadian aviation document on the grounds that an immediate threat to aviation safety exists or is likely to occur as a result of an act or thing having been, being or proposed to be done under the authority of the document, the Minister shall forthwith by personal service or by registered or certified mail sent to the holder of the document at his latest known address notify the holder of his decision.

7.1 (1) Where the Minister decides

- (b) to suspend or cancel a Canadian aviation document on the grounds that the holder of the document is incompetent or the holder or any aircraft, airport or other facility in respect of which the document was issued ceases to have the qualifications necessary for the issuance of the document or to meet or comply with the conditions subject to which the document was issued, or
- (c) to suspend or cancel a Canadian aviation document because the Minister is of the opinion that the public interest and, in particular, the record in relation to aviation of the holder of the Canadian aviation document or of any principal of the holder, as defined in regulations made under subsection 6.71(2), warrant it,

the Minister shall, by personal service or by registered mail sent to the holder or to the owner or operator of the aircraft, airport or facility, as the case may be, at the latest known address of the holder, owner or operator, notify the holder, owner or operator of the Minister's decision.

[16] The Act gives Transport Canada significant audit and inspection powers to enable it to detect breaches of the regulations and safety standards:

8.7 (1) the Minister may

- (a) enter any aircraft, aerodrome, facility relating to aeronautics or any premises used for the design, manufacture, distribution, maintenance or installation of aeronautical products for the purposes of making inspections relating to the enforcement of this Part;
- (b) enter any place for the purposes of an investigation of matters concerning aviation safety;
- (c) seize anything found in any place referred to in paragraph (a) or (b) that the Minister believes on reasonable grounds will afford evidence with respect to an offence under this Part or the causes or contributing factors pertaining to an investigation referred to in paragraph (b); and

- (d) detain any aircraft that the Minister believes on reasonable grounds is unsafe or is likely to be operated in an unsafe manner and take reasonable steps to ensure its continued detention.

Offences

[17] The Act defines a number of offences which go to the heart of aviation safety:

7.3 (1) No person shall

- (a) knowingly make any false representation for the purpose of obtaining a Canadian aviation document or any privilege accorded thereby;
- (c) make or cause to be made any false entry in a record required under this Part to be kept with intent to mislead or wilfully omit to make any entry in any such record;

These offences may be pursued as summary or indictable offences.

Aeronautics Act, s. 7.3(2), 7.3(3)

CARs

[18] The Canadian Aviation Regulations, S.O.R./96-433 ("CARs") came into effect on September 10, 1996. The CARs are the source of most of the regulations that govern the Canadian aviation industry. The CARs frequently incorporate by reference standards which are contained in other publications.

[19] The CARs are divided into eight parts. The following parts are relevant to this motion:

Part II: Identification, Registration and Leasing of Aircraft

Part IV: Personnel Licensing and Training

Part V: Airworthiness

Part VI: General Operating and Flight Rules

Part II: Identification, Registration and Leasing of Aircraft

[20] Part II prohibits the operation of an aircraft in Canada unless it has been registered with Transport Canada or with the civil aviation authority of another state. If Transport Canada receives an application in accordance with the requirements of the Standards, then it must register the aircraft. When Transport Canada registers an aircraft, it issues a Certificate of Registration to the owner. As a result, Transport Canada has a record of all aircraft that are lawfully registered and operated in Canada.

CAR 202.13(2), 202.16, 202.25

- [21] When the address of an owner changes, the owner must notify Transport Canada within 7 days of the change. Transport Canada has the right to demand that an owner inform it of the location of an aircraft and whether the aircraft is currently serviceable. As a result, Transport Canada has contact information for all owners of registered aircraft, and the ability to determine the location of the aircraft. One of the purposes of this information is to ensure prompt delivery of Airworthiness Directives by Transport Canada to aircraft owners:
- [22] It is incumbent upon owners of Canadian registered aircraft to ensure that Transport Canada (TC) has their correct address to ensure prompt delivery of ADs applicable to their aircraft.

CAR 202.51, 202.46, Standard 593.03(1)(ii)

Part IV: Personnel Licensing and Training

- [23] Part IV prohibits individuals from carrying out aviation activities without a licence issued by Transport Canada. Most importantly, CAR 403.02 prohibits a person from exercising the privileges of an aircraft maintenance engineer ("AME") unless the person:
- (a) holds an AME licence issued pursuant to [Subpart 3 - Aircraft Maintenance Engineer Licences and Ratings];
 - (b) exercises the privileges in accordance with the ratings and any limitations endorsed on the licence; and
 - (c) exercises the privileges in accordance with Part V [Airworthiness]

CAR 403.02(1)

- [24] To obtain an AME licence, an applicant must demonstrate to Transport Canada that he or she is 21 years or older, and has the requisite training, knowledge, experience, and skill.

CAR 403.03

Part V: Airworthiness and Part VI: General Operating and Flight Rules

- [25] Part V deals generally with the airworthiness of aircraft, including maintenance requirements. "Airworthy", in respect of an aircraft, means "in a fit and safe state for flight and in conformity with its type design [i.e. in conformity with the manufacturer's specifications and instructions for continued airworthiness]". Transport Canada has an explicit duty to ensure the airworthiness of aircraft used in Canada:

The responsibility for monitoring the overall airworthiness of aeronautical products used in Canada rests with the Director of Airworthiness, Transport Canada.

CAR 101.01, CAR Standard 593.03(1)

[26] Part VI sets out the rules of flight that all owners and pilots must obey. The operation of an aircraft is prohibited unless a flight authority is in effect. The relevant flight authority in this case is referred to as a certificate of airworthiness.

CAR 605.03(1), 101.01

Certificate of Airworthiness

[27] CAR 507.02 provides that on application by an owner, Transport Canada shall issue a certificate of airworthiness if the aircraft conforms to its certified type design and the aircraft is safe for flight. The application must include a declaration from an AME attesting that these conditions have been met. Transport Canada has the authority to inspect any aircraft for which an application is submitted to ensure that it is airworthy.

CAR 507.02(c), 507.06(3), 507.10

[28] Once a certificate of airworthiness has been issued, an owner must submit annual reports to Transport Canada to maintain the validity of the certificate. Among other things, the annual report must include:

- (a) the total hours the aircraft has been flown since new, and the number of hours the aircraft was flown in the last calendar year;
- (b) the date of the most recent annual or equivalent inspection;
- (c) the name and licence number of the AME who conducted and certified the inspection;
- (d) where an AMO conducted the inspection, the name and approval number of the AMO;
- (e) whether the aircraft was significantly damaged since the last annual report, and if applicable, the date of repair certification.

CAR 501.01, 501.02, Standard 501.02(1)

[29] As a result of these requirements, an aircraft owner has no choice but to have his aircraft inspected annually by a Transport Canada licensed AME or AMO. In granting a certificate of airworthiness, Transport Canada relies on the declaration of an AME that the aircraft has been maintained properly and is safe for flight.

Ongoing Maintenance

[30] After a certificate of airworthiness has been issued for an aircraft, an owner continues to depend on licensed AMEs to perform ongoing maintenance. A pilot is prohibited from conducting a take-off in an aircraft that has undergone maintenance unless a maintenance release has been signed by a licensed AME. The purpose of a maintenance release is to assure users of the aircraft that "the standards of airworthiness applicable to the maintenance performed has been complied with".

CAR 605.85(1), 571.10(1), 571.11

[31] Owners of aircraft may choose to have maintenance performed at an AMO. As suggested by its name, an AMO is an organization that is approved by Transport Canada to perform maintenance on aircraft. AMOs must meet more stringent regulatory requirements than individual AMEs. Generally speaking, commercial operators are required to have maintenance performed by AMOs. Private operators may choose to have maintenance performed by an AMO.

CAR 573

[32] The following relevant regulatory requirements are imposed on AMOs:

- (a) An AMO must have a maintenance policy manual that sets out the policies and procedures that will be in place at the AMO to ensure maintenance is performed safely and in accordance with the CARs. Transport Canada checks and approves every single page of a maintenance policy manual, and may instruct AMOs to amend particular sections of the manual. A maintenance policy manual is required to include, among other things:
 - (i) the names of individuals appointed to management positions, including the Person Responsible for Maintenance;
 - (ii) procedures to ensure that regulatory information and technical data appropriate to the work performed are used;
 - (iii) a detailed description of the AMO's quality assurance program; and,
 - (iv) procedures used for incoming inspection and storage of parts.

CAR 573.10(1),(5),(6), Standard 573.10

- (b) An AMO must establish and maintain a quality assurance program that is described in its maintenance policy manual, and is therefore approved by Transport Canada. Quality assurance duties that relate to specific tasks are to be carried out by individuals who are not responsible for those tasks in the AMO's normal operation.

CAR Standard 573.09

- (c) An AMO may only perform work on aeronautical products that it is authorized by Transport Canada to maintain, such as piston-powered Enstrom helicopters.

CAR 573.02(2)

- (d) An AMO must appoint an individual to the position of Person Responsible for Maintenance, who is then approved by Transport Canada. Before approving an appointee, Transport Canada must:
 - (i) verify that the appointee has no convictions under Section 7.3 of the Aeronautics Act.
 - (ii) interview the appointee to ensure he or she has the relevant knowledge, including quality assurance, record keeping, and parts control and traceability requirements.

CAR Standards 573.03(1)(c), 573.03(3), 573.03(5)

Airworthiness Directives

- [33] Aircraft owners also rely on Transport Canada to notify them of serious safety issues through Airworthiness Directives. Transport Canada has an explicit duty to issue an Airworthiness Directive when it becomes aware of an unsafe condition:

Unless the Minister considers that an alternative action to an airworthiness directive will ensure an equivalent level of safety, the Minister shall issue an airworthiness directive in respect of an aeronautical product for which a type certificate has been issued, or accepted, by the Minister where

- (a) an unsafe condition exists in the aeronautical product and the condition is likely to exist or develop in other aeronautical products.

CAR 593.02(a)

- [34] There is one exception to the duty: If Transport Canada considers that an alternative action to an Airworthiness Directive will ensure an equivalent level of safety, then it need not issue an Airworthiness Directive. Of course, the exception requires Transport Canada to take some action and turn its mind to the question of the level of safety that is provided by the alternative action.
- [35] When Transport Canada becomes aware of an unsafe condition in an aeronautical product that is caused by unsafe maintenance practices, it has a duty to take action to warn users of those products. Transport Canada maintains a database of aircraft and their owners in part for the purpose of notifying them when unsafe conditions exist.

CAR Standard 593.03(1)

Directives and Policies

[36] The directives and policies are not legislative in nature. The allegations in the pleadings with respect to these are set out in the main body of this judgment at para. 37.

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