
CANADA / JUDGMENT

Smith v. Air Canada

2014 BCSC 1648

COURT

Supreme Court of British Columbia

DECIDED

23 July 2014

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2014 BCSC 1648 Smith v. Air Canada

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Smith v. Air Canada,

2014 BCSC 1648

Date: 20140723

Docket: S134374

Registry: Vancouver

Between:

Deborah Phyllis Maureen Smith

Plaintiff

And

Air Canada and Steven Todd Siegner

Defendants

Before: The Honourable Madam Justice Gropper

On appeal from: An order of a Master of the Supreme Court of British Columbia, dated April 23, 2014 (Smith v. Air Canada, Vancouver Registry No. S134374).

Oral Reasons for Judgment

In Chambers

Counsel for Plaintiff:

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M. Dery

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Place and Date of Trial/Hearing:

Vancouver, B.C.

July 17, 2014

Place and Date of Judgment:

Vancouver, B.C.

July 23, 2014

[1] THE COURT: These are my reasons in this case.

Introduction

- [2] Air Canada appeals a decision of Master Baker of April 23, 2014 in which he ordered disclosure of an incident report dated August 18, 2012 that was prepared by a member of Air Canada's personnel following an incident during the boarding of an Air Canada flight scheduled to depart from Vancouver to Toronto.
- [3] The plaintiff, Ms. Smith, was in her seat when a bag allegedly fell on her after a fellow passenger failed to store it securely in the overhead compartment.
- [4] On June 11, 2013, Ms. Smith commenced a proceeding against Air Canada and the defendant John Doe to recover damages that she alleges she suffered. Among other things, Ms. Smith alleges that Air Canada was negligent.

Legal Framework

- [5] The parties agree that the standard of review of a Master's decision is whether the decision is clearly wrong: *Abermin Corporation v. Granges Exploration Ltd.* (1990), 45 B.C.L.R. (2d) 188 (S.C.).
- [6] In respect of the production of documents over which privilege is claimed the legal principles to be applied on such an application are succinctly reviewed by Master Bouck in *Beer v. Nickerson*, 2010 BCSC 718, paras. 17-18:

[17] The legal principles to be applied on this application are well-settled and set out in *Hamalainen (Committee of) v. Sippola* (1991), 62 B.C.L.R. (2d) 254, and *Stevanovic v. Petrovic*, [2007 BCSC 1392]. Those principles are as follows:

1. The party withholding disclosure bears the onus of establishing a claim for privilege over a document.
2. The test for considering whether litigation privilege is established is two-fold:
 - (a) Was litigation a reasonable prospect at the time the document in dispute was created?
 - (b) If so, was the dominant purpose of the document's creation for use in litigation? (commonly known as the "dominant purpose" test.)
3. Litigation can properly be said to be in reasonable prospect when a reasonable person, possessed of all the pertinent information including that particular to one party or the other, would conclude that it is unlikely that the claim for loss will be resolved without it.
4. However, the prospect of litigation alone is not sufficient to meet the claim of privilege. Nor does the denial of liability alone mean that all documents produced thereafter are subject to a claim for privilege. As stated by the court in *Hamalainen v. Sippola*:

Even in cases where litigation is in reasonable prospect from the time a claim first arises, there is bound to be a preliminary period during which the parties are attempting to discover the cause of the accident on which it is based. At some point in the information gathering process the focus of such an inquiry will shift such that its dominant purpose will become that of preparing the party for whom it was conducted for the anticipated litigation. In other words, there is a continuum which begins with the incident giving rise to the claim and during which the focus of the inquiry changes. At what point the dominant purpose becomes that of furthering the course of litigation will necessarily fall to be determined by the facts peculiar to each case.

6. It is not incumbent upon the court to accept without question the opinion of either deponent on one of the very issues that is to be decided. Whether or not litigation was a reasonable prospect is a matter for the court to decide on all the evidence.

[18] To these principles I would add that the dominant purpose test is consistent with "the more contemporary trend favouring increased disclosure": *Blank v. Canada* (Department of Justice), 2006 SCC 39 at paras. 60-61.

Evidence Before the Master

- [7] In support of Air Canada's position that the report not be produced it filed two affidavits; the first by Alexis Soroka, the service director of the flight. She prepared the incident report. In her affidavit she describes her role as including management of onboard customer accidents or injuries. In respect of customer injuries she puts customer safety first, and in performing this duty she speaks with the injured customer, assesses her need for medical attention, calls for medical assistance, and assists the customer with safely disembarking the flight, if

necessary. That is what she did in the incident involving Ms. Smith.

- [8] Ms. Soroka says she was trained that in the case of passenger injury litigation is highly probable. She was trained, and it is her practice, to prepare an incident report following any passenger injury to provide a contemporary incident account of what occurred and what steps were taken in regard to the incident. She says that she prepares the report to provide Air Canada's law branch, or its external legal counsel, with information regarding the event to assist in their representation of Air Canada or its crew in future litigation.
- [9] Ms. Soroka also contemplates alternate reasons for preparing the incident report in her affidavit and rejects them. She says she is not concerned with documenting the facts of the incident for any possible uses aside from litigation.
- [10] Ms. Soroka prepared the incident report and delivered it to the airport duty manager in Vancouver. The report was then delivered to the general claims department which opened a pending claim file for Ms. Smith. After Ms. Smith commenced her action in June 2013 the incident report was forwarded to the law branch to assist in its response to this litigation.
- [11] The second affidavit filed by Air Canada in support of its position is that of Alan Gilchrist, the manager of general claims, who conducts training of Air Canada's service directors in respect of reporting in-flight incidents, particularly involving in-flight customer injury. He says that the incident reports are primarily prepared for the eventuality that Air Canada or its employees are subject to litigation arising from a customer incident and the goal is to provide the law branch or its external legal counsel with information regarding the event to represent Air Canada in the future.
- [12] Mr. Gilchrist said that he highlights in the training that in the case of customer injury litigation is highly probable and the incident report must be drafted for use by the law branch.
- [13] Mr. Gilchrist says that incident reports are confidential documents and are kept that way. Where the incident report involves injuries, the reports are provided to the general claims department who opens a claims file. The general claims department administers the claim under the oversight of attorneys in Air Canada's law branch. If an action is commenced regarding the incident the entire file, including the incident report, is forwarded to the law branch attorney.
- [14] Mr. Gilchrist says that it is Air Canada's policy not to forward an incident report to an employee's manager and it will not form the basis of discipline. Mr. Gilchrist describes the incident report form; he highlights that it is to be completed for information of the company's solicitor and his advice thereon, and it specifies the name and contact information of any key witness to the incident, should it be recorded.

The Master's Decision

- [15] Master Baker identified the two-step process to determine whether the document should be disclosed in accordance with Hamalainen. He reviewed the affidavits provided by Air Canada.
- [16] At paragraph 10 of his decision Master Baker addressed the question of whether litigation was a reasonable prospect at the time the document was prepared. In spite of Ms. Soroka's affidavit, Master Baker questioned how Ms. Soroka would know at the time the incident occurred that litigation was very probable. He considered whether that was a reasonable perception and conclusion at the time the document was prepared.
- [17] Master Baker considered the decision of Mathew v. Delta School District #37, 2010 BCCA 233, that had upheld his conclusion that an incident report prepared at the time of the incident at the school almost simultaneously and in extreme proximity to the event itself was not prepared for the dominant purpose of preparation for litigation.
- [18] Ultimately Master Baker considered this case to be fact driven. He specifically considered the proximity of the event to the preparation of the report, the advent or not or presence or not, of counsel, the gravity of the event itself, and the nature of the injury. Master Baker considered the particular circumstances giving rise to Ms. Smith's injury, that is, luggage apparently dropped on her by a passenger. He then states at paragraph 14:
- [14] I just cannot see how it is reasonable to conclude, as Ms. Soroka said she did, that litigation was a reasonable prospect and that the dominant purpose was litigation. Despite her training -- I am not negating what she says about her training -- to carry on and acknowledge and accede to that position is to give an institution or a corporation such as Air Canada a complete and blanket protection from any requirements of disclosure.
- [19] Master Baker was also apparently concerned about whether the plaintiff was given a choice of whether or not she could travel, notwithstanding the paramedic's determination that she was not fit to fly at paragraphs 1 and 2 of the decision, and at paragraphs 17 to 20 Master Baker addressed his concern about restrictions and control over passengers travelling in an aircraft. I agree with the plaintiff that these comments are obiter.

Position of the Parties

Air Canada

- [20] Air Canada relies on the decision of the Federal Court in *Re Privacy Commissioner of Canada v. Air Canada*, 2010 FC 429. The court in that case considered whether an incident report prepared by a service manager in respect of a passenger's conduct on an aircraft was to be disclosed in the context of the privacy commissioner's hearing under section 15 of the *Personal Information Protection of Electronic Documents Act*, S.C. 2000, c. 5. The Federal Court found the incident report to be privileged.

- [21] Air Canada says it presented almost identical evidence to Master Baker to that which was presented before the court in *Re Privacy Commissioner*. Air Canada argues that the Master's reliance on Mathew was misplaced as that case did not involve a consideration of whether the records were prepared in reasonable contemplation of litigation. Here, Air Canada says, the Master conflated two elements of the test for litigation privilege. Further, Air Canada says the affidavits it tendered explain that the incident report was prepared specifically for consideration by Air Canada's law branch.
- [22] Air Canada argues further that it is extremely vulnerable to liability claims for incidents on board aircrafts and that the Master did not properly consider that factor. Air Canada submits that the Master was clearly wrong when he determined that the incident report was not made in reasonable contemplation of litigation.

Ms. Smith

- [23] Ms. Smith argues that the Master was not clearly wrong. His decision was based on the facts surrounding the preparation of the incident report. It is for the Master to make that factual finding. The Master is not required to accept the assertions of the deponents on the very issue he has to decide. Here, Ms. Smith says, the Master made a finding of fact based on the surrounding circumstances and he applied the correct legal principles. The test is not how Air Canada trains its employees or whether litigation is highly probable. Ms. Smith argues that Air Canada's position is not consistent with the view expressed in *Blank*, that is that the more contemporary trend favours increased disclosure.

Discussion and Analysis

- [24] As noted, the first part of the test, whether the document was prepared in contemplation of litigation, must be satisfied before the court goes on to consider the dominant purpose of the creation of the document. Master Baker considered the first part of the test in light of the affidavits that were provided and as a matter of fact. He properly considered, in my view, that when Ms. Soroka prepared her incident report she was attempting to discover the cause of the accident, whether there were witnesses, and the nature of the injuries sustained by Ms. Smith. She said that her first concern was customer safety.
- [25] As with any claim of privilege, the trier of fact must assess whether the assertion that the document was prepared in contemplation of litigation is reasonable. He cannot simply rely on the statement that the document was prepared in contemplation of litigation. If that were so the mere assertion would determine whether the document was privileged.
- [26] Master Baker assessed the circumstances at the time the report was written and concluded that it was not reasonable to accept that Ms. Soroka prepared the incident report in contemplation of litigation.

- [27] As I stated, the Master applied the appropriate test and reached a reasonable conclusion. The Master's view that litigation was not a reasonable prospect at the time the incident report was created is not clearly wrong.
- [28] Having reached that conclusion, it was not necessary for Master Baker to consider the dominant purpose test. He did not conflate the two-part test as Air Canada suggests. Air Canada did not clear the first hurdle.
- [29] While it is unnecessary for me to consider, I do not find the decision in the Re Privacy Commissioner case to be relevant or binding on this Court. The circumstances giving rise to the incident report prepared in that case are considerably different than exist here. That case involved an incident arising where a flight attendant was involved with a passenger who was caught drinking alcohol on a flight which was not served by Air Canada, which is contrary to the rules. The incident report was provided to Air Canada's legal department, not in respect of a potential claim by the passenger, but to assist Air Canada's lawyer to determine if it should pursue any liability against that passenger, or encourage the police to lay charges. The context was not an injury to a passenger and the circumstances were entirely different.
- [30] I do not accept that the document is privileged because of the vulnerability of Air Canada to litigation claims from its passengers. Air Canada has a specific department to deal with claims, of which Mr. Gilchrist is the manager. Despite the presence of the claims department within the law department of Air Canada, it is clear that the claims department deals with claims until the matter becomes a matter of litigation. It is then that the incident report is forwarded to Air Canada's legal counsel. This too does not establish that the document was prepared in contemplation of litigation.
- [31] The application for a review of the Master's decision is dismissed. The document is to be produced.
- [32] Ms. Smith is entitled to her costs.
- [Submissions re costs]
- [33] THE COURT: The costs of this application are to the plaintiff.
- "Gropper J."

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