SUPREME COURT OF NOVA SCOTIA

Citation: Lemieux v. Halifax International Airport Authority, 2011 NSSC 396

Date: 20111409
Docket: Hfx. No. 347469
Registry: Halifax

Between:

RITA LEMIEUX, of Wellesley, Maine,
in the United States of America

Plaintiff

v.

Halifax International Airport Authority,
a body corporate, and AIR CANADA, a body corporate

Defendant

D E C I S I O N

Judge: The Honourable Justice Suzanne M. Hood

Heard: September 14, 2011, in Halifax, Nova Scotia

Written Decision: November 14, 2011 *(Written release of Oral Decision of Sept. 14, 2011)*

Counsel: Glenn E. Jones for the Plaintiff
A. Douglas Tupper, Q.C. for the Defendant

By the Court:

[1] The plaintiff fell on the tarmac at the Stanfield International Airport while boarding an Air Canada flight. She has sued both Air Canada and the Halifax International Airport Authority. The injury occurred on August 11, 2005 and the action was commenced on April 21, 2011, approximately five and one-half years later.

[2] Air Canada moves for summary judgment. It says the Montreal Convention sets a limitation period for bringing actions and, since this action was not brought within the two year limitation period set out in the Convention, it is statutorily barred. Therefore, summary judgment must be granted.

[3] The plaintiff says she can rely on s. 3 of the Nova Scotia *Limitation of Actions* Act, R.S.N.S. 1989, c. 258. She says if a defence were filed pleading a limitation period in the Montreal Convention, she could then move to have it struck.

[4] The parties do not dispute the law with respect to summary judgment applicable in this case. The moving party, the defendant, Air Canada, must

establish there is no genuine issue for trial. In response, the plaintiff must show she has a real chance of success on the issue of s. 3 of the *Limitation of Actions Act*.

[5] The Montreal Convention is a schedule to the Federal *Carriage by Air Act*, R.S.C. 1985 c, C-26. It is a convention adopted for international air travel and Canada is a signatory to the Convention. The Convention provides in part in Article 29:

> In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention . . .

[6] Article 35 of the Convention states in para. 1:

> The right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.

[7] There is no dispute that this was an international flight and that the Convention applies. The question for the court is whether the limitation period may be extended by application of the Nova Scotia *Limitation of Actions Act*,

R.S.N.S., 1989, c. 258 provisions or, put another way, Does the Convention oust local law such as this?

[8] Air Canada has cited the preamble to the *Carriage by Air Act* that it is "An Act to give effect to certain conventions for the unification of certain rules relating to international carriage by air." The preamble to the Convention provides in part:

> Recognizing the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution;
>
> ...
>
> Convinced that collective State action for further harmonization and codification of certain rules governing international carriage by air through a new Convention is the most adequate means of achieving an equitable balance of interests; ...

[9] The second paragraph of Article 35, which is the limitation provision, states:

> 2. The method of calculating that period shall be determined by the law of the court seized of the case.

[10] The plaintiff argues that that there therefore remains a role for the local court.

[11] In *Laroche v. Spirit of Adventure (UK) Limited*, [2009] EWCA Civ 12, the English Court of Appeal said at para. 70, referring to *Aries Tanker Corporation v Total Transport Limited* [1997] 1 WLR 185, 188C-G:

> 70. The judge was in my view right to hold that Article 29(2) does not permit the 2 year period to be suspended, interrupted or extended by reference to domestic law. The only thing that it leaves for determination by the court seised of the case is the calculation of the precise dates of the beginning and end of the relevant two year period and the determination of whether the action has been brought within that two year period.

[12] The Court continued in para. 74 of *Laroche*:

> 74. So to interpret Article 29(1) would also further the object of the convention, that it was to be a "uniform international code which could be applied by the courts of all the high contracting parties without reference to the rules of their own domestic law ...

The Court continued in para. 75:

> 75. I also accept the submission of Mr. Lawson that this interpretation is consistent with the rule that a general provision (such a article 29(2)) cannot give validity to a rule of procedure of the court seised of the case that is in conflict with an express provision of the Convention. ...

[13] Although that decision is not binding on me, it is a decision of a court of appeal. As the Court said in *Laroche,* at para. 14:

> 14. vi) Assistance can be sought from the relevant jurisprudence of this country and of other jurisdictions, and respect should be paid to relevant decisions of courts of other signatories to the convention, particularly those of high standing.

[14] Furthermore, although not binding on me, there is a decision of the Federal Court of Appeal in the United States in *Fishman v. Delta Airlines Inc*., 132 F 3d 138, which was cited in *Laroche.* That court also rejected the proposition that the limitation period could be determined by domestic law.

[15] It must be remembered what the purpose of the Convention is, as is set out in its preamble. In *Tony Hook v. British Airways PLC*, [2011] EWHC 379 (QB), the Court quoted at para. 25 from *Sidhu and others v. British Airways*, [1997] AC 430 at 447 D-H:

> The intention seems to be to provide a secure regime, within which the restriction on the carrier's freedom of contract is to operate. Benefits are given to the passenger in return, but only in clearly defined circumstances to which the limits of liability set out by the Convention are to apply. To permit exceptions, whereby a passenger could sue outwith the Convention for losses sustained in the course of

> international carriage by air, would distort the whole system, even in cases for which the Convention did not create any liability on the part of the carrier. Thus the purpose is to ensure that, in all questions relating to the carrier's liability, it is the provisions of the Convention which apply and that the passenger does not have access to any other remedies, whether under the common law or otherwise, which may be available within the particular country where he chooses to raise his action.

[16] The plaintiff cites Nova Scotia cases where the court has allowed the extension of limitation periods. She says the court should, in this case, exercise its equitable jurisdiction to provide relief and should not grant the motion for summary judgment.

[17] In *Nova Scotia (Workers' Compensation Board) v. Sangati America Inc.*, 1999 CarswellNS 225, 177 N.S.R. (2d) 194, 542 A.P.R. 194 (N.S.S.C.), the court dealt with the Nova Scotia *Fatal Injuries Act*, R.S.N.S. 1989, c. 163 as was the situation in *McGuire v. Fermini*, 1984 Carswell115, 64 N.S.R. (2d) 60. In the former, Justice Gruchy said in para. 18:

> 18 Section 3 stands by itself. It establishes a procedure for extending a limitation found in the provisions of any enactment, other than this *Act*. . . .

[18] However, in *Laroche, supra*, at para. 69 the court said:

> 69. ... It is (rightly) not disputed by Mr. Davey that article 29 provides a substantive and not merely a procedural time bar: ... It is also (again rightly) not disputed that Schedule 1 provides a code that is exclusive of any resort to the rules of domestic law.

[19] The Plaintiff also cites *Tate v. Canadian National Railway,* 1984 CarswellNS 332, 64 NSR (2d) 187, 143 A.P.R. 187 (N.S.S.C.). That case dealt with the Canadian *Railway Act*. That is not a statute dealing with international matters and not intended to be a codification and harmonization with respect to claims made by airline passengers with respect to airlines anywhere in the world.

[20] In *Montreal Trust Co. v. Canadian Pacific Airlines Ltd.*, 1976 CarswellQue 48, cited by Mr. Jones for the Plaintiff, the Supreme Court of Canada in 1976 referred to the Warsaw Convention, predecessor to the Montreal Convention. The court said in para. 16 of that decision:

> 16 I think it must be understood that limitation on the liability of the carrier created by Art. 22 of the Convention in both its original and its amended form constitutes an encroachment on the rights of the individual passenger and as such it is to be strictly construed and can only be invoked when the requirements of the Article have been exactly complied with.

[21] In my view, there is no question that the requirements of the article limiting liability in this case have been strictly complied with. The issue in *Montreal Trust*

was the limiting conditions printed on the airline ticket and the baggage check. In *Foord* v. *United Airlines* Inc., 2006 ABPC 103, the issue as well was the limitation of liability printed on electronic airline tickets and the baggage information referred to on that electronic ticket. In my view, these are issues quite separate from the clear wording of the Convention with respect to limitation periods.

[22] The words of s. 35 of the Convention are clear, in my view, and admit of no other interpretation. This is especially so where specific reference is made in a separate provision to domestic courts in ss. 2 of that Article, giving them only a limited role. The purpose of the Convention is set out in the preamble quoted above. It would be entirely contrary to that purpose to allow different limitation periods to be set by domestic law of all the states, provinces, counties, etc., in each country which is a signatory. That would result in a lack of harmony and unity in the application of the Convention which it was designed to create.

[23] I have also been referred to the preparatory work leading to the adoption of the predecessor convention. In paras. 71 and 73 of *Laroche*, the Court said:

> 71. In reaching his conclusion on this issue, the judge had regard to what was said in the *travaux preparatoires* to the Warsaw Convention in relation to what became article 29. ...

The Court continued in para. 73:

> 73. Although it is difficult to follow the minutiae of these negotiations, in my view it is clear that the signatories to the Warsaw Convention intended to adopt the Italian proposal that, in the interests of certainty, at the expiry of the two year period, all claims under the Convention would be 'extinguished' and that the only matters for determination by the Court seised of the matter would be determination of the dates and whether the action was brought within the two year period. This is a powerful indicator that the words of article 29(1) mean what they say and that the two year period is to subject to suspension, interruption or extension in any circumstances.

[24] I conclude there is no genuine issue for trial. The Montreal Convention is a complete Code on the subject of airline liability and the plaintiff has not brought her action within the two year limitation period set out in the Convention. That provision is a substantive one and ousts the jurisdiction of domestic courts in Nova Scotia (and elsewhere) to apply their own law to the limitation period.

[25] The motion is granted.