Federal Court  Cour fédérale

Date: 20221121

Docket: T-268-22

Citation: 2022 FC 1592

Ottawa, Ontario, November 21, 2022

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

MANSOOR KHAWAJA

Plaintiff

and

HIS MAJESTY THE KING IN RIGHT OF CANADA

Defendant

JUDGMENT AND REASONS

I. Overview

[1] This judgment addresses the Defendant's motion in writing for summary judgment made pursuant to Rules 213, 215 and 369 of the *Federal Courts Rules*, SOR/98-106 [Rules].

[2] The Plaintiff, Mansoor Khawaja, is self-represented. He is a flight instructor who resides in the province of Alberta. In 2017, he was granted a Class 4 Flight Instructor Rating following

his successful completion of an exam and flight test. The Plaintiff disagreed and considered he was eligible for a Class 3 Rating. In 2018, following the completion of further requirements and the submission of an application for a Class 3 rating, Transport Canada granted a Class 3 Rating to the Plaintiff.

[3] On February 15, 2022, the Plaintiff served and filed an action against Transport Canada. The Plaintiff's claim is based on the allegation that he was not granted the Class 3 rating by Transport Canada in April 2017, rather than in 2018. He seeks a declaration that Transport Canada: (i) granted the wrong Flight Instructor Rating; (ii) failed to honour the terms of the North American Free Trade Agreement [NAFTA] / Canada-United States-Mexico Agreement [CUSMA]; (iii) did not exercise its discretionary power; (iv) committed a breach of trust; (v) failed to reply to the Plaintiff's questions on NAFTA / CUSMA; and (v) violated Section 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c 11 [*Charter*]. The Plaintiff further claims that there is an ambiguity in the Civil Aviation Rules and that Transport Canada failed to communicate internally. The Plaintiff alleged inappropriate, unjust, and inhumane treatment by Transport Canada, along with intentional discriminatory practices and harassment. The Plaintiff seeks various administrative relief along with damages in the amount of $390,000 for loss of income and $600,000 for pain and suffering.

[4] The Defendant submits that this Court should grant summary judgment dismissing the claim pursuant to Rule 215(1) on the basis that there is no genuine issue for trial, on the following grounds: (i) the administrative law remedies sought by the Plaintiff are improperly

brought, untimely, and moot; (ii) the claim is a veiled application for judicial review; (iii) no reasonable private law cause of action has been pleaded; (iv) the Plaintiff's theory of liability based on NAFTA / CUSMA has no merit; and (v) the claim is statute-bared pursuant to the Alberta *Limitations Act*, RSA 2000, c L-12 [*Limitations Act*] because the action was commenced more than two years after the claim was discovered.

[5] The Plaintiff pleads in response that: (i) dismissing his claim will amount to a miscarriage of justice; (ii) it is his duty to point out discrepancies in the law to the Federal Court, relying on Rule 16(a) (**Recommendation boxes**) of the Rules; (iii) the Defendant's record shows that his concerns about the ambiguity in the *Canadian Aviation Regulations*, SOR/96-433 were never formally presented to the relevant personnel at Transport Canada; (iv) his argument based on NAFTA / CUSMA is sound; (v) he corresponded with Transport Canada on a timely basis; and (vi) the claim is not time-barred because he "knocked on all available doors for resolution of the issue in question continuously, including the Honourable Minister of Transport before finally approaching the Honourable Court".

[6] For the reasons that follow, I am persuaded that the Defendant has met its evidentiary burden and demonstrated that there is no genuine issue for trial. Consequently, the Defendant's motion is granted and the Plaintiff's action is dismissed.

II. Amendment to the Named Defendant and the Style of Cause

[7] The Defendant requests that Transport Canada be removed as the Defendant in this matter and that the Crown instead be named, on the basis that a government department has no independent legal personality and cannot be sued.

[8] I agree with the Defendant and grant the request. The style of cause shall identify the Defendant as “His Majesty the King in Right of Canada”.

III. Evidence

[9] The Defendant relies on an affidavit from Ms. Fyke, a Service Team Lead at Transport Canada, attaching documentation relating to the Plaintiff’s Class 4 and Class 3 Flight Instructor Ratings. The affidavit further attaches correspondence between the Plaintiff and Transport Canada from 2016 through 2020, and between the Plaintiff and the Minister of Transport in 2021. In excess of 180 pages of evidence was filed by the Defendant.

[10] The Plaintiff relies on his own affidavit to which he attaches a letter from Transport Canada dated November 18, 2021, responding to his access to information request concerning correspondence between Ms. Fyke and “Transport Canada Headquarter” regarding “concerns from Mansoor Khawaja regarding CARs interpretation” during an 11-month period commencing on October 14, 2019. The one-page letter indicated that no records were found that were responsive to the request.

IV. Issue

[11] The issue before the Court is whether there is a genuine issue for trial?

V. Analysis

A. *The Test for a Motion for Summary Judgment*

[12] Before turning to the merits of the Defendant's motion, a review of the law governing motions for summary judgment in the Federal Court is warranted.

[13] The purpose of summary judgment is to allow the Court to summarily dispense with cases that should not proceed to trial because there is no genuine issue for trial, and thus conserving judicial resources and improving access to justice (*Milano Pizza Ltd v 6034799 Canada Inc*, 2018 FC 1112 at para 25 [*Milano Pizza*]; *Canmar Foods Ltd v TA Foods Ltd*, 2021 FCA 7 at para 23 [*Canmar Foods*]; *Manitoba v Canada*, 2015 FCA 57 at paras 15-17; *Hryniak v Mauldin*, 2014 SCC 7 at para 34 [*Hryniak*]).

[14] Summary judgment is "a valuable tool for striking sham claims and defences," however, it is "not intended to deprive a litigant of the right to a trial unless there is a clear demonstration that there is indeed no genuine issue material to the claim or defence which the trial judge must resolve." (*Oriji v Canada*, 2006 FC 1539 at para 31 [*Oriji*]). Recently, in *Canmar Foods*, the Federal Court of Appeal stated that the rationale and goal of summary judgments have been well

summarized in the following paragraph by the Supreme Court in *Canada (Attorney General) v Lameman*, 2008 SCC 14 [*Lameman*]:

> [10] … The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and costs on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.

[15] Rule 215(1) of the Rules provides that the Court shall grant summary judgment where the Court is satisfied that "there is no genuine issue for trial with respect to a claim or defence." The test on a motion for summary judgment is not whether a party cannot succeed at trial, but rather "whether the case is clearly without foundation" (*Canmar Foods* at para 24) or that "the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial" (*Oriji* at para 35; *Milano Pizza* at para 33; *Kaska Dena Council v Canada*, 2018 FC 218 at para 21; *Canmar Foods* at para 24). As such, claims that are "clearly without foundation should not take up the time and incur the costs of a trial" (*Oriji* at para 35).

[16] The foregoing test "obviously translate(s) into a heavy burden on the moving party" (*Canmar Foods* at para 24). The onus is on the party seeking summary judgment to establish the absence of a genuine issue for trial, however, Rule 214 of the Rules requires the responding party to set out specific facts and adduce evidence showing that there is a genuine issue for trial. In other words, while the burden is on the Defendants in the present matter, both parties must put their best foot forward (*Canmar Foods* at para 27; *Milano Pizza* at para 34; *Oriji* at para 33).

[17] It is well settled that this Court may grant summary judgment on the basis of an expired limitation period (*Warner v Canada*, 2019 FC 329 at para 18 [*Warner*]; *Canada (Attorney General) v Utah*, 2020 FCA 224 [*Utah*]; *Lameman* at para 12). If a limitation period is operative, it renders the case so doubtful that it does not deserve to go to trial (*Warner* at para 18).

B. *The Plaintiff's Claim is Statute-Barred*

[18] I will consider the issue of the limitation period first as I find this issue to be determinative.

[19] The Defendant submits that the Crown has a complete defence as the facts alleged in the claim occurred and were discoverable prior to November 28, 2019. Given the claim was filed on February 15, 2022, and accounting for the 75-day suspension of limitation periods due to COVID-19, the claim is out of time based on the two-year discoverability period contained in paragraph 3(1)(a) of the *Limitations Act*.

[20] The Plaintiff submits that his claim is not time-barred because he "knocked on all available doors for resolution of the issue in question continuously, including the Honourable Minister of Transport before finally approaching the Honourable Court". Other than the foregoing submission, the Plaintiff does not address the applicable limitation period or apply it to the facts at hand.

[21] I find that the Plaintiff's causes of action arose in Alberta. As such the I find that Alberta law relating to the limitation of actions applies by virtue of section 39 of the *Federal Courts Act*,

RSC 1985, c F-7 and section 32 of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50.

Subsection 3(1) of the *Limitations Act* provides:

> *Limitation periods*
>
> 3 (1) Subject to subsections (1.1) and (1.2) and sections 3.1 and 11, if a claimant does not seek a remedial order within
>
> (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
>
> (i) that the injury for which the claimant seeks a remedial order had occurred,
>
> (ii) that the injury was attributable to conduct of the defendant, and
>
> (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,
>
> or
>
> (b) 10 years after the claim arose,
>
> whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

[22] The Federal Court of Appeal in *Utah* recently considered the meaning of paragraph 3(1)(a) of the *Limitation Act*, relying heavily on jurisprudence from the Alberta Court of Appeal. The Federal Court of Appeal underscores the obligations on a plaintiff to launch an action within two years and the correlative obligation on the court to dismiss an action launched late, regardless of merit:

> [11] Paragraph 3(1)(a) provides that the limitation period starts to run when the plaintiff "first knew, or in the circumstances ought to have known" three things: "injury…had occurred", "the injury was attributable to the conduct of the defendant" and "the injury…warrants bringing a proceeding": for guidance on the standard "know…[or] ought to have known," see *Gratton v. Shaw*, 2011 ABCA 175, 505 A.R. 340 at para. 32; *Boyd v. Cook*, 2013

> ABCA 27, 542 A.R. 160 at para. 28, *Condominium Corporation No. 0213028 v. HCI Architecture Inc.*, 2017 ABCA 375 at para. 11 and *HOOPP Realty Inc v. Emery Jamieson LLP*, 2020 ABCA 159, 5 Alta. L.R. (7th) 213 at para. 45. The limitation period is two years. After the two years have run, defendants have "immunity from liability in respect of the claim": subsection 3(1).
>
> [12] This statutory language reflects a policy choice of the Legislature of Alberta: when parties know or ought to know injury caused by a defendant has been suffered and warrants an action, they must launch it within two years.
>
> [13] This policy balances the interests of claimants and defendants. On the one hand, claimants deserve access to justice. But, on the other hand, defendants should not have suits hanging over their heads indefinitely. Nor should they have to defend themselves on a stale evidentiary record. See *Yugraneft Corp. v. Rexx Management Corp*, 2010 SCC 19, [2010] 1 S.C.R. 649 at para. 60 (a case concerning Alberta's *Limitations Act*); *James H. Meek Trust v. San Juan Resources Inc.*, 2005 ABCA 448, 37 A.R. 202 at para. 43; *Boyd* at para. 4; *Bowes v. Edmonton (City)*, 2007 ABCA 347, 425 A.R. 123 at paras. 118-121. This policy of balance is expressed not only in paragraph 3(1)(a). It pervades the Act: see, e.g., ss. 3.1, 5 and 5.1.
>
> [14] Some might dislike this legislative policy. It can be harsh. A claimant might plan to bring a suit that, on the merits, is a cinch, with enormous recovery to boot. But if the claimant starts it after the limitation period has run out, the Court must dismiss it, regardless of its merit.

[23] As noted in the overview section of this judgment, the genesis of the present action is the fact that the Plaintiff was not granted a Class 3 Instructor Rating on April 20, 2017. Based on the application submitted and the completion of the flight test, a Transport Canada Inspector determined that the Plaintiff was only entitled to a Class 4 Instructor Rating. In his Statement of Claim, the Plaintiff states that on April 20, 2017, he told the Flight Instructor that he considered himself eligible for a Class 3 Instructor Rating on the basis of his credentials and section 421.70 of the *Canadian Aviation Regulations*.

[24] On May 4, 2017, the Plaintiff contacted Transport Canada in order to advance his view that he was eligible to obtain a Class 3 Instructor Rating. Effectively, the Plaintiff was seeking to have his United States' Federal Aviation Authority Instructor Rating converted to a Canadian one. He sought a reciprocal exemption from Transport Canada from having to hold a Class 4 Instructor Rating, prior to applying for a Class 3 Instructor Rating.

[25] Several exchanges followed. On May 15, 2017, the Service Team Officer at Transport Canada replied to the Plaintiff's correspondence, and explained why it considered that the Plaintiff was not entitled to a Class 3 Instructor Rating.

[26] On July 30, 2018, the Plaintiff completed the documentation in support of an application for a Class 3 Instructor Rating, which was issued by Transport Canada on September 25, 2018. The Transport Canada database indicates that at the time the present motion was filed he held a valid Class 3 Instructor Rating.

[27] On June 12, 2019, the Plaintiff again contacted the Service Team Officer at Transport Canada. He again raised section 421.70 of the Canadian Aviation Regulations and argued he should have been exempted from the usual channels of obtaining the Class 3 Instructor Rating. The Plaintiff raised NAFTA and submitted that it supported his position. The Plaintiff referred to his email of May 2017.

[28] Numerous exchanges followed in 2019 and 2020 between the Plaintiff, Service Team Officers, Ms. Fyke (the Service Team Lead), and the Licensing Program Manager, regarding the

Plaintiff's concerns. The Plaintiff continued to advance his position that based on the *Canadian Aviation Regulations*, he was entitled to have been provided with a Class 3 Instructor Rating in 2017.

[29] By way of example, on July 11, 2019, the Plaintiff expressed his frustration at Transport Canada's position and again advanced his perspective. He stated:

> "[a]m I adversely affected and suffered by not enjoying the benefit of this clause of CARs? … Further to this Transport Canada failed to amend CARs after having signed NAFTA agreement which came into effect after using all resources, making detailed surveys and studies. Am I directly affected and suffered or not by this failure of Transport Canada?"

[30] In the same email, the Plaintiff also stated that he looks forward to "resolving this issue which will go long way to help out many more sufferers like me." The Plaintiff had also commenced his email by referring to himself as "an aggrieved party." In addition, the Plaintiff referenced an email of his from May 2017.

[31] On numerous occasions, Transport Canada responded explaining the regulatory regime, however, the Plaintiff expressed dissatisfaction with the responses. Following a reply from Ms. Fyke on September 3, 2019, the Plaintiff sent several emails to Ms. Fyke including an email dated October 4, 2019, where he states, "[a]s already I have fully explained my sufferings/concerns due to unfair treatment by Transport Canada in my email dated June 12, 2019. It can be very well appreciated as to how much one will stay mentally frustrated and concerned by being deprived of any response of repeated emailed requests and phoned call messages to address legitimate rights by concerned authorities?" In a follow-up email ten days

later, the Plaintiff complains that “issue has been pending with The Transport Canada for a very long time in spite of my continued reminders.”

[32] Numerous exchanges followed. Eventually, on September 14, 2020, Ms. Fyke responded to the Plaintiff’s repeated emails advising him that there were no further updates to provide other than what had been previously stated.

[33] The following year, in 2021, the Plaintiff wrote a number of emails to the Minister of Transport, and received a reply. The Plaintiff’s follow-up emails went unanswered.

[34] I agree with the Defendant that the Plaintiff’s claim was discoverable prior to November 28, 2019. Indeed, all the relevant facts giving rise to the remedies that the Plaintiff now seeks were known to him well before that date.

[35] The Federal Court of Appeal instructs that the *Limitation Act* requires the Court to inquire into when claimants “first knew, or in the circumstances ought to have known” of the criteria in paragraph 3(1)(a) of the *Limitation Act* (*Utah* at para 43). Essentially, when did the Plaintiff know or ought to have known the injury caused by the Defendant had been suffered and warrants an action (*Utah* at para 12).

[36] The Plaintiff was well aware by April 20, 2017, that Transport Canada was not providing him with a Class 3 Instructor Rating and lodged his objection directly with his Flight Instructor the same day. He followed up in writing to Transport Canada on May 4, 2017, to raise the same

issue. By then he was aware of the injury and the fact that his income would be affected by Transport Canada's decision.

[37] The Plaintiff continued to advance his position, even after his Class 3 Instructor Rating was issued by Transport Canada on September 25, 2018. By then, he would have been aware of the exact period during which he was allegedly eligible for a Class 3 Instructor Rating but only held a Class 4 Instructor Rating, and the resulting loss of income.

[38] By June 2019, he had already raised the same NAFTA argument with Transport Canada that was ultimately contained is his Statement of Claim filed in 2022. By July 2019, he was referring to himself as an "aggrieved party" and mentioned the suffering and adverse effects caused by the alleged failures of Transport Canada.

[39] The Plaintiff raises the fact that he continued to "knock on all available doors" in order to resolve the issue, including up to the Minister of Transport. The fact that the Plaintiff continued to send correspondence to Transport Canada and the Minister does not, however, serve to extend time.

[40] I find, even assuming that the allegations made by the Plaintiff disclosed triable issues, the claim is statute-barred by operation of the *Limitations Act*. By April 20, 2017, the Plaintiff knew of the injury that was attributable to the Defendant and ought to have known that warranted a proceeding. Taking the material facts of the Statement of Claim as true, for the purposes of this motion, the Plaintiff states that he was aware of the issue and raised it with Transport Canada on

that date, contacted Transport Canada by email shortly thereafter, and “since then” has been put in “a very miserable situation.” There is thus “no genuine issue” for trial, as were the action allowed to proceed to trial, it would surely fail on this basis (*Lameman* at para 12).

VI. Conclusion

[41] By April 20, 2017, the criteria in paragraph 3(1)(a) of the *Limitations Act* were met and thus the two-year limitation period ran from that time. The Plaintiff filed his claim on February 15, 2022, which was well after the two-year period expired. I am therefore satisfied that there is no serious issue to be tried with respect to the Plaintiffs’ claim and grant summary judgment for the Defendant pursuant to Rule 215(3) of the Rules.

[42] The Respondent has sought costs in the amount of $400, which is in fact on a relatively low scale of Tariff “B” to the Rules. Considering my discretion to award costs on a relatively low scale, costs in the amount of $400, all-inclusive, are granted.

JUDGMENT in T-268-22

THIS COURT'S JUDGMENT is that:

1. The Defendant's Motion for Summary Judgment is hereby granted;

2. The style of cause is amended to name "His Majesty the King in Right of Canada" as the proper Defendant; and

3. Costs in the amount of $400 are awarded to the Defendant.

"Vanessa Rochester"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-268-22
STYLE OF CAUSE:	MANSOOR KHAWAJA v HIS MAJESTY THE KING IN RIGHT OF CANADA

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

JUDGMENT AND REASONS:	ROCHESTER J.
DATED:	NOVEMBER 21, 2022

WRITTEN REPRESENTATIONS BY:

Mansoor Khawaja	FOR THE PLAINTIFF (ON HIS OWN BEHALF)
Katherine Starks	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Attorney General of Canada Edmonton, Alberta	FOR THE DEFENDANT