

COURT OF APPEAL FOR ONTARIO

CITATION: Bombardier Inc. v. AS Estonian Air, 2014 ONCA 41

DATE: 20140117

DOCKET: C57268

Weiler, Rouleau and Strathy JJ.A.

BETWEEN:

Bombardier Inc.

Plaintiff (Appellant)

And

AS Estonian Air and the Republic of Estonia through Its Ministry of  
Economic Affairs and Communications

Defendants (Respondent)

Douglas F. Harrison and Vanessa Voakes, for the appellant

Jonathan Lisus and James Renihan, for the respondents

Heard: January 13, 2014

On appeal from the order of Justice Edward M. Morgan of the Superior Court of Justice, dated May 24, 2013, with reasons reported at 2013 ONSC 3039.

ENDORSEMENT

[1] The essence of the appellant's claim is that the Republic of Estonia (the "Republic"), through its alleged involvement in the economic decision-making process of AS Estonian Air (the "Airline"), engaged in activity that brought it within the "commercial activity" exception in s. 5 of the *State Immunity Act*, R.S.C. 1985, c. S-18 (the "Act").

[2] Section 3(1) of the Act creates a presumption that a foreign state is immune from the jurisdiction of Canadian courts. A court is obliged to give effect to that immunity, even where it has not been raised by the state.

[3] The commercial activity exception provides that a foreign state is not immune from jurisdiction “in any proceedings that relate to any commercial activity of the foreign state.” “Commercial activity” is defined as “any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character.”

[4] In its statement of claim, the appellant alleges that the Republic induced the Airline to breach its contract with the appellant and intentionally interfered with the appellant’s economic relations.

[5] A party seeking to bring a foreign state before the court, by invoking the commercial activity exception, cannot simply plead facts constituting a cause of action and then plead that those facts are commercial activity, thereby grounding jurisdiction: see *Schreiber v. Canada (Attorney General)*, 2002 SCC 62, [2002] 3 S.C.R. 269. It must do more. It must provide an evidentiary record to enable a court to perform the necessary contextual analysis to determine that the state has engaged in commercial activity and that the proceedings relate to that activity: see *Kuwait Airways Corp. v. Iraq*, 2010 SCC 40, [2010] 2 S.C.R. 571, at paras. 30-33.

[6] Although that analysis does not require a determination of the underlying merit of the cause of action, it is a merits-based analysis of the evidence supporting or refuting the assertion that the court has jurisdiction based on the exception: see *Schreiber*, at para. 18.

[7] Moreover, it is an analysis in which the party seeking to overcome the presumption of sovereign immunity bears the burden of proof: *Kuwait Airways* at para. 22. In this regard, we do not accept the appellant's submission that the motion judge should have deferred the motion until a later stage, such as after discoveries, so the issue could be determined on a "full record". As Doherty J.A. noted in this court's decision in *Schreiber*, (2001), 52 O.R. (3d) 577 (C.A.), at para. 16, the action cannot proceed until the issue of sovereign immunity has been decided.

[8] The Republic owns over 90 percent of the shares of the Airline. The parties agree that the Republic is not engaged in commercial activity simply because of this interest. More is required.

[9] Here, the motion judge considered the record and found the appellant failed to meet the onus of establishing that the actions of the Republic intruded into the management sphere of the operation of the Airline. He held that the Republic's activities were restricted to oversight as shareholder and to the furtherance of governmental objectives. He also found, at para. 83, that with one

insignificant exception, all of the evidence before him demonstrated that “there was no involvement by the government and no political interference with [the Airline’s] management in reaching its decision” to cease negotiations with the appellant and to buy aircraft from a competitor.

[10] These findings were squarely based on the evidence before the motion judge, which included affidavits from both the Chief Financial Officer of the Airline and a senior officer of the Ministry of Economic Affairs and Communications. This evidence satisfied the motion judge that the Republic had no involvement in the management, governance or commercial activities of the Airline and that the decision to end negotiations with the appellant was made by the Airline and not by the Republic.

[11] We are not persuaded that any of the evidence identified by the appellant was individually or collectively sufficient to refute this evidence and to discharge the appellant’s burden. Other than a second-hand report contained in a tabloid, the appellant’s evidence does little more than show that the Republic responded to requests that it guarantee loans to the Airline, something it consistently refused to do, and may have urged the Airline to carry out a comparative analysis of competing bids from aircraft suppliers. This falls short of demonstrating the type of commercial activity envisaged by the Act and carries little weight in the face of the denials in the affidavits of the representatives of the Airline and the Republic, on which they were not cross-examined.

[12] We do not agree with the appellant's submission that the motion became a determination of the underlying merits of the action. Both parties put forward an evidentiary record to provide the necessary contextual basis to determine whether the appellant had met the onus of showing that the conduct at issue fell within the statutory exception.

[13] In essence, the motion judge found, on the evidence, that the Republic's activities were sovereign in both purpose and nature and did not cross the line into the management sphere. His conclusions are entitled to deference and are fully supported by the evidence. We would therefore dismiss the appeal, with costs fixed at \$20,000, inclusive of all applicable taxes and disbursements, as agreed by the parties.

"K.M. Weiler J.A."

"Paul Rouleau J.A."

"G.R. Strathy J.A."