



Civil Resolution Tribunal

Date Issued: June 12, 2023

File: SC-2022-005637

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Lowey v. Air Canada*, 2023 BCCRT 490

BETWEEN:

JOLENE LOWEY and JOLENE LOWEY as Litigation Guardian of
ALICE LOWEY, minor

APPLICANTS

AND:

AIR CANADA

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Andrea Ritchie, Vice Chair

INTRODUCTION

1. This preliminary decision is about whether the Civil Resolution Tribunal (CRT) should refuse to resolve this dispute because it would be more appropriate for another legally binding process or whether it should pause this dispute pending the outcome of another court proceeding.

2. The applicants, Jolene Lowey and Jolene Lowey as Litigation Guardian of Alice Lowey, minor, say the respondent airline, Air Canada, cancelled a flight and owes them \$2,855 in compensation, including for flight disruption under the *Air Passenger Protection Regulation* (APPR), hotel and meal costs, lost wages, and time spent organizing alternative travel arrangements. Air Canada says the cancellation was due to crew constraints outside of its control, so it says the applicants are not entitled to any compensation.
3. Jolene Lowey represents the applicants. Air Canada is represented by an authorized employee.

JURISDICTION AND PROCEDURE

4. These are the CRT's formal written reasons of the Civil Resolution Tribunal. The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). Section 2 of the CRTA states that the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.
5. Section 39 of the CRTA says that the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary in the interests of justice.
6. Section 42 of the CRTA says that the CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

7. Where permitted by section 118 of the CRTA, in resolving this dispute, the CRT may order a party to do or stop doing something, pay money, or make an order that includes any terms or conditions the CRT considers appropriate.

ISSUE

8. The issue is whether the CRT should refuse to resolve or pause this dispute pending the outcome of another court proceeding.

EVIDENCE AND ANALYSIS

9. In making this preliminary decision I have reviewed the Dispute Notice, the Dispute Response, and the parties' submissions and evidence as documented in a Preliminary Issue Tribunal Decision Plan.

Request to Refuse to Resolve

10. On December 16, 2022, an application for authorization to certify a class proceeding under the *Class Proceedings Act* (CPA) in British Columbia (BC CPA action) was filed. A similar application was filed in Quebec on December 20, 2022.
11. Air Canada argues the applicants will qualify as class members in the BC CPA action. As a result, Air Canada says the CRT should refuse to resolve the applicants' claim because the class action proceeding is a more appropriate avenue for potential recovery and will avoid duplicative proceedings.
12. The applicants argue they started this claim at the CRT before any class proceeding was filed. They also argue the CRT's process is more timely than waiting for another legal process that will require extensive wait times and the need for a lawyer. I also note the BC CPA action has not been certified, and even if certification happens, there is no guarantee the applicants will be eligible class members.
13. Further, the CPA says that BC is an "opt out" jurisdiction for class proceedings, which means that those who qualify as members of a certified class action can decline to

participate as plaintiffs in that class action and instead seek remedies individually. It follows that if certification happens and the applicants are eligible members, they have the option to opt out of the class proceeding.

14. So, I find the CRT is an appropriate venue to hear the applicants' claim, and I decline to refuse to resolve their claim on the basis there is the potential for certification of a similar class action proceeding.

Request to Pause

15. Alternatively, Air Canada argues the applicants' claim should be paused indefinitely to allow the BC CPA action to proceed and/or due to an ongoing Federal Court of Canada (FCA) proceeding.

16. CRT rule 1.17 allows the CRT to pause a dispute and resume it at a later date. In considering such a request, the CRT will consider the follow factors:

- a. The reason for the request,
- b. Whether all parties consent,
- c. Any prejudice to the other parties,
- d. Whether there have been previous delays in the tribunal process, and the reason for those delays,
- e. The tribunal's mandate,
- f. Other legislation which applies to this dispute and to the request,
- g. Whether it is in the interests of justice and fairness, and
- h. Any other factors the tribunal considers appropriate.

17. Air Canada says the FCA proceeding is about the Canadian Transportation Agency's past decision in *WestJet v. Owen Lareau* and involves similar complaints under the APPR. Air Canada argues the FCA judgment "will likely be useful" to the CRT for this

dispute and says the applicants' claim cannot be properly addressed without the FCA proceeding's outcome. However, according to the documents provided as evidence by Air Canada, I find that as of August 2022 WestJet had only applied for leave to appeal. There is nothing before me to indicate whether the motion has been granted, or that the appeal is otherwise going ahead.

18. I find Air Canada's argument that the appeal judgment will be useful to the CRT for this dispute is premature and speculative given there is no guarantee the appeal will proceed. Additionally, none of the parties to this CRT dispute are parties to the FCA appeal. Even if the underlying legal issue may be the same, I disagree with Air Canada's submission that this CRT dispute should be indefinitely paused pending the outcome of an FCA decision in which the applicants are not a party. I find to do so would unfairly deprive these CRT applicants of their rights under the existing common law and legislative framework that includes the APPR and the CRTA, and given the CRT's access to justice mandate that includes speed, efficiency, and proportionality.
19. I acknowledge that Air Canada provided evidence of 2 other proceedings (one from Ontario and one from New Brunswick) where a court has stayed proceedings pending the outcome of the FCA appeal. However, these decisions are not binding on me, nor do they comment on whether the plaintiffs in those proceedings agreed to the stay. So, I place no weight on them.
20. As noted above, Air Canada also says if the BC CPA action and this CRT dispute both proceed, this might lead to different and contradictory outcomes and court decisions across Canada on the same issues.
21. Section 26(2) of the CPA says a judgment on common issues in a class action does not bind a party to the class proceeding in any subsequent proceeding between the party and a person who opted out of the class proceedings. Further, I note that CRT decisions are not binding on Canadian courts. So, I find a CRT decision in this dispute, and a court judgment in a class proceeding the applicants do not participate in, may properly arrive at different conclusions.

22. It does not appear there have been any previous delays in this matter. However, I note the applicants argue the CRT should uphold its mandate to make decisions that are timely, flexible, accessible, affordable, and efficient. As noted above, they say participating in the BC CPA action will burden them with unreasonable delay, lack of information, and the need for a lawyer.
23. Given all the above, I find pausing this dispute for an indefinite period for a speculative reason is not consistent with the CRT's mandate.
24. I also find that Air Canada will not be significantly prejudiced if the CRT dispute proceeds because there is nothing that requires the applicants to participate in any class action, if certified. As of right now, the applicants are not members of any certified class action proceeding, and it appears this CRT dispute is the only active proceeding the applicants have to obtain a decision on the merits of their claim for compensation. Although a future FCA judgment may provide some guidance in deciding future CRT disputes, I find the applicants would be unreasonably prejudiced by indefinitely pausing this CRT dispute in favour of class proceedings, or an FCA proceeding and subsequent decision, when those matters may not proceed. I find it is not in the interest of justice and fairness to delay this dispute.
25. I decline to pause this dispute under CRT rule 1.17.

SUMMARY

26. In summary, I decline to refuse to resolve or pause this dispute. So, it will proceed through the CRT's decision-making process. Nothing in this decision binds a subsequent tribunal member and nothing prevents a party from re-applying to the CRT for a preliminary decision if circumstances change. I am not seized of this dispute.

Andrea Ritchie, Vice Chair