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## THE COURT OF APPEAL REITERATES THE ADMISSIBILITY IN EVIDENCE OF REPORTS DONE IN THE COURSE OF ADMINISTRATIVE INVESTIGATIONS

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IN A DECISION RENDERED ON JULY 5<sup>th</sup>, THE COURT OF APPEAL REITERATED THE ADMISSIBILITY IN EVIDENCE OF REPORTS DONE IN THE COURSE OF ADMINISTRATIVE INVESTIGATIONS IN THE CONTEXT OF A CIVIL TRIAL, CONFIRMING THE IMPORTANCE OF ANY ADMINISTRATIVE INVESTIGATION THAT FOLLOWS AN ACCIDENT<sup>1</sup>.

### THE ACTION

Pascale Bouchard-Cannon, a member of the Air Cadet League of Canada (hereinafter "**League**"), was involved in a glider accident causing her serious injuries. The activity, organized and supervised by the **League**, occurred at the Valcartier military base, a facility run by the Department of National Defence (hereinafter "**Department**").

Bouchard-Cannon brought an action for damages in an amount of \$788,004.47 against the **League** and the **Department**.

### THE REPORTS

In support of her claim, Bouchard-Cannon alleged three (3) investigation reports prepared by the Directorate of Flight Safety of the Department of National Defence (hereinafter "**DFS**"), an administrative body that assumes the investigation powers that the *Aeronautics Act*<sup>2</sup> confers on the Minister of Defence. She argued that these reports were admissible in evidence as admission or testimony.

Two of the reports summarized the events surrounding the incident and the immediate preventive measures that were implemented. These reports were made public prior to the filing of the civil proceedings. The third report identified the causes of the incident and the nature of the injuries sustained by the young pilot.

The Attorney General of Canada (hereinafter "**Attorney General**"), on behalf of the **Department**, requested that the allegations to the reports be struck out and the reports themselves removed from the court's file. The arguments were that the documents were not relevant in the context of a civil action for damages and that they were not admissible in evidence because they included hearsay and opinions expressed by persons who did not have the status of experts. In addition, the **Attorney General** argued that the *Canadian Transportation Accident Investigation and Safety Board Act*<sup>3</sup> (hereinafter "**Transportation Safety Board Act**") explicitly provided that the reports made by the **DFS** were not admissible in evidence in a civil trial.

### JUDGMENT OF THE SUPERIOR COURT

At trial, the Superior Court concurred with the arguments of the **Attorney General**<sup>4</sup>. The Court concluded that the reports were not relevant since they added nothing to the merits of the case and that they were not admissible, as they could not serve as evidence of the facts reported by the **DFS** investigators from their interviews with eyewitnesses.

<sup>1</sup> *Bouchard-Cannon c. Canada (Procureur général)*, 2012 QCCA 1241.

<sup>2</sup> R.S.C. 1985, c. A-2; The DFS is also governed by the *Canadian Transportation Accident Investigation and Safety Board Act*, S.C. 1989, c. 3.

<sup>3</sup> Abovementioned, note 2.

<sup>4</sup> 2011 QCCS 7430.

## JUDGMENT OF THE COURT OF APPEAL

The Court of Appeal reversed the judgment of the Superior Court. Justice Jacques Chamberland considered that a party to civil proceedings has the opportunity to allege the reports prepared by the **DFS**.

The Court of Appeal rejected the argument of the **Attorney General** to the effect that the **Transportation Safety Board Act** prohibits the use of these reports in civil matters. The bench considered that the provision providing that an investigator's opinion was inadmissible in evidence in any legal proceeding was inapplicable in the case of the **DFS**<sup>5</sup>. *A contrario*, the absence of a prohibition allows a party to rely on such evidence.

As to relevancy, the Court considered that the results of the investigation carried out by the **DFS** were relevant in the context of a civil dispute:

[30] In short, I believe that the results of the investigation conducted by the same party that Plaintiff holds liable for the incident is relevant, at least in regard to identifying the causes of the incident and to the measures taken in order to prevent the occurrence of a similar incident. In that sense, the reports tend to establish the existence of the right claimed by the Appellants; they are likely to influence the resolution of the issues, subject to the fact that such evidence be administered in accordance with the rules set out in the C.C.Q. and C.C.P.

[Our translation]

Although the Court considered that the reports included the recognition of certain facts likely to produce legal consequences, it refused to rule on whether the reports constitute an admission. The Court considered that it would have been premature to decide whether the **DFS** had the power to admit facts that were contrary to the **Department**, i.e. whether the **DFS** has the authority to bind the National Defence being the prerogative of the trial judge<sup>6</sup>.

On the question of the admissibility of the reports as testimony, the Court rejected the argument of the **Attorney General** to the effect that the reports could not be admitted in evidence because of the application of the rule against hearsay<sup>7</sup>. Even if the reports contained facts that were not to the personal knowledge of the **DFS** or its investigators and on which they could not legally testify, the reports contained information, including measurements and distances, which was likely to be admitted into evidence at trial.

Finally, the Court of Appeal ruled on the argument of the **Attorney General** to the effect that the reports were inadmissible in proof since they contained the opinion of the **DFS** or its investigators on the causes of the incident. The Court rejected this contention and ruled that the opinion of the **DFS** or its investigators on the causes of the glider crash may have an influence or an impact on the decision that the trial judge will have to make with regard to the liability of the **Attorney General**.

## CONCLUSION

This decision illustrates the importance that administrative investigations and resulting reports may have on the potential liability of a party to a civil dispute. Indeed, the evidence that a party will be able to administer during the instruction could be based on some of the findings contained in such reports. However, each report needs to be evaluated in its particular legislative and regulatory context.

Wherever possible, parties to an event triggering such investigations would be well advised to act upstream, during the investigation, rather than downstream, once the report is filed and the civil proceedings instituted.

In addition, an admitted objective of this ruling is facilitating access to justice to plaintiffs in accordance with the applicable proportionality rules governing the administration of justice.

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<sup>5</sup> *Aeronautics Act*, abovementioned note 2, articles 4.2 and 6.4.

<sup>6</sup> Art. 2832 et 2850 C.c.Q.

<sup>7</sup> Art. 2832 et 2870 C.c.Q.

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