Court File No. 14-A-70

FEDERAL COURT OF APPEAL

B E T W E E N :

DR.GÁBOR LUKÁCS

Moving Party

- and -

CANADIAN TRANSPORTATION AGENCY and DELTA AIR LINES, INC.

Respondents

MEMORANDUM OF FACT AND LAW OF THE RESPONDENT DELTA AIR LINES, INC.

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OVERVIEW

1. These are the written submissions of Delta Air Lines Inc. ("Delta") respecting Dr. Lukács' motion for leave to appeal the decision of the Canadian Transportation Agency (the "Agency") dated November 25, 2014 and bearing decision number 425-C-A-2014 (the "Decision").
2. Dr. Lukács' motion engages the following issues:
    a. The Agency's discretionary decision regarding public interest standing; and
    b. The Agency's interpretation of its enabling statute, the *Canada Transportation Act*, S.C. 1996, c. 10 (the "Act") and regulations passed pursuant to the Act, the *Air Transportation Regulations*, SOR/88-58 as amended (the "ATR").
3. Discretionary decisions - including decisions respecting public interest standing - and decisions involving the interpretation of an administrative tribunal's own and closely related statutes and regulations attract a significant degree of deference and a standard of review of unreasonableness.
4. In order to be reasonable, a decision need only fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
5. It is submitted that the Agency's Decision regarding Dr. Lukács' request for public interest standing was reasonable, that no reasonable ground on which leave to appeal might be granted has been established, and that accordingly leave to appeal should be denied.

    Martin v. Canada (Minister of Human Resources Development) (1999), 252 N.R. 141 (F.C.A.).

PART I - STATEMENT OF THE FACTS

THE PROCEEDINGS BELOW

6. On August 24, 2014 Dr. Lukács filed a complaint with the Agency alleging that Delta's practice relating to the transportation of large (obese) persons is discriminatory and contrary to subsection 111 of the ATR.

> Complaint of Dr. Lukács, Motion Record of the Moving Party, Tab 3. ["Lukács' Complaint"].

7. On September 5, 2014 the Agency issued Decision No. LET-C-A-63-2014, in which the Agency noted that it was not clear whether Dr. Lukács had standing in this matter.

> Decision No. LET-C-A-63-2014, Motion Record of the Moving Party, Tab 4.

8. On September 19, 2014 Dr. Lukács filed his submissions on standing with the Agency, arguing that:

a. he was a "certainly a 'large person'" and therefore had direct interest standing; or

b. he ought to be granted public interest standing; or

c. pursuant to the Agency's decisions in *Black* and *Krygier* "any person" has standing to pursue a complaint pursuant to s. 111 of the ATR.

> Memorandum of Fact and Law of Moving Party, Motion Record of the Moving Party, Tab 9. ["Submissions of the Moving Party"].

9. On November 25, 2014 the Agency released the Decision, which concluded that:

a. Dr. Lukács was not "aggrieved", "affected", or "sufficiently interested" in the impugned practice so as to have direct interest standing;

b. public interest standing was not available in the present case; and

c. that the Agency's decisions in *Black* and *Krygier* did not assist Dr. Lukács in the present case.

Decision No. 425-C-A-2014, Motion Record of the Moving Party, Tab 1. ["The Decision"].

10. Dr. Lukács appeals only the second and third conclusions reached by the Agency.

Submissions of the Moving Party, para. 20.

PART II - POINT IN ISSUE

11. The only point in issue is whether leave should be granted to appeal the Decision.

PART III - STATEMENT OF ARGUMENTS

A. PUBLIC INTEREST STANDING

(i) The Legality Principle

12. As recently stated by the Supreme Court of Canada in *Downtown Eastside Sex Workers*, "[i]n determining whether to grant [public interest] standing, courts should exercise their discretion and balance the underlying rationale for restricting standing with the important role courts play in assessing the legality of government action."

Attorney General of Canada v. Downtown Eastside Sex Workers United Against Violence Society, [2012] 2 S.C.R. 524 (S.C.C.), para. 23, Motion Record of the Moving Party, Tab 11. [*"Downtown Eastside"*].

13. It is submitted that for present purposes the Supreme Court of Canada identified two vital points in *Downtown Eastside*, in particular that:

(i) decisions regarding the granting of public interest standing are discretionary decisions; and

(ii) public interest standing is engaged in order to allow courts to assess the legality of government action.

14. Indeed, the latter was considered earlier in both *Finlay* and *Canadian Council of Churches*, where the Supreme Court of Canada stated that the central rationale for granting public interest standing was the recognition that there is a generalized interest in regulating government behavior and in ensuring that government action is not immune from review by the courts.

Finlay v. Canada (Minister of Finance), [1986] 2 S.C.R. 607 (S.C.C.), paras. 34-36. ["*Finlay*"].

Canadian Council of Churches v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 236 (S.C.C), pp.252-253, para. 36. ["*Canadian Council of Churches*"].

15. In Downtown *Eastside* the Supreme Court of Canada termed this concept "the principle of legality", which encompasses two ideas:

a. "state action should conform to the Constitution and statutory authority" and

b. "there must be practical and effective ways to challenge the legality of state action".

Downtown Eastside, *supra*, at para. 31.

(ii) Standard of Review

16. In administrative law, decisions engaging the exercise of discretion - including decisions on public interest standing - attract a high degree of deference in reviewing the manner in which the discretion was exercised, and will only be overturned where they are unreasonable.

> *New Brunswick Board of Management v. Dunsmuir,* [2008] 1 S.C.R. 190 (S.C.C.), paras. 51-53. ["*Dunsmuir*"].
>
> *Dr. Q v. College of Physicians and Surgeons British Columbia*, [2003] 1 S.C.R. 226 (S.C.C.), p. 648.
>
> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), para. 53.
>
> *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2010] 3 C.N.L.R. 233 (MBCA), paras. 250, 261 reversed on other grounds in [2013] 1 S.C.R. 623.
>
> *Water Matters Society of Alberta v. Director, Southern Region Operations Division, Alberta Environment and Water* (2012), 53 Admin L.R (5^{th}) (ABQB), paras. 9-13, 29-30.
>
> *Saskatchewan Regional Council of Carpenters, Drywall, Millwrights and Allied Workers v. CEP*, [2013] 2 W.W.R. 602 (SKQB), paras. 17-27.

17. Furthermore, the Decision involves a question of mixed fact and law and such decisions also attract a high degree of deference and a standard of unreasonableness.

> *Dunsmuir*, *supra*.

18. The subject matter of an appeal must be a decision, not the reasons for that decision.

> *Canada (Minister of Employment & Immigration) v. Burgon*, [1991] 3 F.C. 44 (F.C.A.), para. 45.

19. In order to be reasonable, a decision need only fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

> *Dunsmuir, supra*, at para. 49.

20. Accordingly, in order to overturn the Agency's Decision denying Dr. Lukács' request for public interest standing, it must be found that the Decision did not occupy the range of reasonable, acceptable outcomes based on facts and the law.

(iii) The Agency's Decision on Public Interest Standing

21. In his motion for leave to appeal Dr. Lukács takes particular issue with the Agency's conclusion at paragraph 74 of the Decision, which he frames as "the erroneous premise that public interest standing is not available in the present case".

Submissions of the Moving Party, para. 23.

22. In arguing that the Agency erred in reaching its Decision on public interest standing, Dr. Lukács refers to two authorities, the Federal Courts' decisions in *Thibodeau* and the Agency's own decision in *ATU Local 279*.

Submissions of Moving Party, paras. 25-28.

23. In *Thibodeau*, the central issue before the courts was that Air Canada – which is a "federal institution" pursuant to the *Official Languages Act*, R.S.C., 1985, c. 31 (4th Supp.) (the "OLA")[1] - had breached the language obligations placed upon it by Part IV of the OLA, as well as section 10(2) of the *Air Canada Public Participation Act*, R.S.C., 1985, c. 35 (4th Supp.), which are "quasi-constitutional" enactments. Thus, the decision considered the quasi-constitutional obligations of a federal institution.

Thibodeau v. Air Canada, [2005] F.C.J. No.1395 (Fed. Ct.), paras. 40, 46, Motion Record of the Moving Party, Tab 15.

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[1] Only Air Canada, originally a Crown Corporation, is subject to these quasi-constitutional language obligations, which do not apply to other Canadian carriers or foreign carriers operating in Canada.

24. In *ATU Local 279*, the central issue before the Agency was the municipal government of Ottawa's refusal to purchase automated announcement systems for bus stops, and the allegation that this refusal was a discriminatory practice contrary to the Act.

> *ATU Local 279 v. OC Transpo*, Decision No. 431-AT-MV-2008, Motion Record of the Moving Party, Tab 10.

25. Thus, the *Thibodeau* and *ATU* cases can be properly understood as engaging "the principle of legality" in that these cases concerned challenges to the conformity of state action to Constitutional or statutory authority. These cases are consistent with the guidance provided by the Supreme Court of Canada in *Downtown Eastside*, as well as the decisions in *Finlay* and *Canadian Council of Churches*.

26. In fact, "the principle of legality" is engaged in each of the cases referred to by Dr. Lukács in either the present motion or before the Agency, for example:

a. The *Finlay* decision concerned the legality of payments made by the federal government to a provincial government pursuant to the *Canada Assistance Plan*, R.S.C. 1970, c. C-1;

> *Finlay*, *supra*.

b. In *Canadian Council of Churches*, the Supreme Court addressed whether amendments made to the *Immigration Act, 1976,* S.C. 1976-77 violated the Charter;

> *Canadian Council*, *supra*.

c. In *Fraser v. Canada* the Ontario Superior Court considered whether the combined effect of the *Immigration and Refugee Protection Act* and the *Employment Standards Act* on seasonal employees admitted into Canada under the federal

government's Seasonal Agricultural Workers Program constituted differential treatment in violation of s. 15 of the Charter; and

Fraser v. Canada (Attorney General), 2005 CanLII 47783 (Ont. S.C.J.).

d. Finally, in *Downtown Eastside* the Supreme Court of Canada considered whether the prostitution provisions of the *Criminal Code of Canada* were in violation of the Charter.

Downtown Eastside, *supra*.

27. None of these cases are of any assistance to Dr. Lukács as his proposed complaint against Delta did not involve the conformity of state action to Constitutional or statutory authority, nor a challenge to the legality of state action, and therefore did not engage the "principle of legality".

Downtown Eastside, *supra*.

Lukács' Complaint.

28. It is submitted that in light of the facts and the law, the Agency's conclusion that public interest standing is not available to Dr. Lukács in the present case is reasonable and leave to appeal ought to be denied.

B. STANDING AND SECTIONS 67.2(1) OF THE ACT AND 111 OF THE ATR

(i) Standard of Review

29. In interpreting the Act, the Agency's decisions attract a standard of review of "unreasonableness".

Canadian National Railway Company v. Canadian Transportation Agency, [2011] 3 F.C.R. 264 (F.C.A.), at paras. 21-33. ["*CNR*"].

30. Furthermore, as recognized by the Supreme Court of Canada in *Dunsmuir*, in interpreting provisions of the "home statute and closely related statutes which require the expertise of the administrative decision maker", the standard of unreasonableness applies.

Dunsmuir, *supra*, at para. 128.

(ii) The Agency's Decision: "Any Person"

31. Dr. Lukács' argument that ss. 67.2(1) of the Act and 111 of the ATR should be understood, in light of the *Black v. Air Canada*, *O'Toole v. Air Canada, Lukács v. Air Canada* and *Krygier v. several air carriers* decisions (the "*Black* line of cases"), as permitting "any person" to have standing to lodge a complaint with the Agency is the very same argument that was already dismissed by the Agency in reaching the Decision.

The Decision.

32. Subsection 67.2 of the Act applies only to domestic air transportation. Delta is not licensed, and is not qualified to be licensed, to provide domestic air transportation. However, even if ss 67.2 were applicable it would not support the arguments submitted by Dr. Lukács.

33. It is submitted that the fundamental error in the Moving Party's Memorandum can be seen in paragraph 36 of that document. Dr. Lukács advances the proposition that "Parliament intended to establish a regulatory scheme that includes the Agency *accepting complaints* not only from those affected by the terms and conditions of an airline, but from 'any person'." (emphasis added)

Submissions of the Moving Party, para. 36.

34. It is apparent from the argument developed from this proposition that Dr. Lukács is of the view that the Agency must make a substantial determination, in each case where a person

makes a written complaint, of whether carrier terms and conditions complained of are unreasonable or unduly discriminatory. We will refer to this view as the "mandatory determination theory".

35. With respect to the mandatory determination theory, we would make the following points:

    a. It arises from a provision of the Agency's home statute;

    b. It is not accepted by the Agency;

    c. It is not required, or even supported, by the wording of the Act;

    d. If accepted it would deprive the Agency of the fundamental right of a tribunal to control its process by determining whether a complainant has status to maintain a proceeding.

36. It is submitted that the interpretation of ss. 67(2) of the Act and 111 of the ATR as implicit in the present case involves the following elements:

    a. it contemplates that a complaint in writing may be filed by "any person",

    b. it empowers the Agency to make a finding respecting that complaint, and

    c. it stipulates that the Agency may take certain action following on its findings.

37. There is nothing in s. 67(2), s. 111 of the ATR or the jurisprudence of the Agency to require the conclusion that a person who files a complaint in writing in accordance with that provision automatically has status to have his complaint determined. The statutory provision does not mandate that, on the filing of a complaint in writing, the Agency must make a finding respecting the merits of the complaint. The Agency retains discretion to hear the complaint or not.

38. The *Black* line of cases merely determines that a person will not *necessarily* fail to have standing by reason only of being unable to demonstrate "a real and precise factual background". The Agency, in so deciding, did not fetter its discretion to determine, in a proper case, that a person filing a complaint in writing has no status to pursue the complaint for other reasons.

39. Reduced to the most abstract, the *Black* line of cases holds that lack of "a real and precise factual background" does not entail lack of standing.

40. It is not logically permissible to proceed from this proposition to the conclusion that there are no circumstances which will entail an applicant not having standing.

41. Each of the cases in the *Black* line of cases involved a proposed complainant who was capable of being adversely affected by a carrier's terms and conditions of carriage. The essential concern of the Agency in respect of such persons is captured in the paragraph, taken from the *Black* decision, set out at the bottom of page 63 of the Moving Party's Memorandum: "it would be inappropriate to require a person to experience an incident that results in damages being sustained before being able to file a complaint."

Submissions of the Moving Party, para. 63.

42. The position of Dr. Lukács is materially different from that of the claimants in the *Black* line of cases. There is no possibility that Dr. Lukács could "experience an incident that results in damages being sustained". In that regard it is necessary to recall the following facts:

a. The allegedly discriminatory practice of which Dr. Lukács complains of is one which is said to require "large" persons to buy multiple seats;

b. Dr. Lukács, in his Complaint, asserts that he is a "large person";

c. The Agency found that Dr. Lukács failed to introduce evidence that he is 'large person" and that "he would not be able to sit in his seat without encroaching into the seat next to his."

d. Dr. Lukács does not seek leave to challenge this aspect of the Agency's decision.

43. It is submitted that the Agency properly excluded Dr. Lukács from the class of persons envisaged by the *Black* line of cases and that the Agency's conclusion regarding Dr. Lukács' "any person" argument was reasonable.

CONCLUSION

44. It is submitted that Dr. Lukács has failed to demonstrate that the Agency's Decision was unreasonable, and accordingly leave to appeal the Decision should be denied.

COSTS

45. It is submitted that Dr. Lukács' motion engages principles of law that are neither new, nor novel, having been recently and thoroughly canvassed by the Supreme Court of Canada, or else previously addressed by the Agency.

46. This motion engages the Agency's exercise of discretion and its interpretation of its own enabling and closely related statutes, and accordingly Delta should be entitled to its costs of responding to this motion.

PART IV – ORDER SOUGHT

47. The Responding Party, Delta Air Lines Inc., seeks an Order:

a. dismissing the motion for leave to appeal the Decision;

b. granting it costs of this motion, and

c. granting such further relief as to this Honourable Court may seem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of January, 2015

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LIST OF AUTHORITIES

Legislation

Canada Transportation Act, S.C. 1996, e.10, section 67(2)

Air Transportation Regulations, S.O.R./88-58, section 111

Jurisprudence

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817 (S.C.C.), at para. 53

Canada (Minister of Employment & Immigration) v. Burgon, [1991] 3 F.C. 44 (F.C.A.), at para. 45

Canadian Council of Churches v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 236 (S.C.C), at p.252-3, para. 36 ["*Canadian Council of Churches*"].

Canadian National Railway Company v. Canadian Transportation Agency, [2011] 3 F.C.R. 264 (F.C.A.), at paras. 21-33. ["*CNR*"].

Dr. Q v. College of Physicians and Surgeons British Columbia, [2003] 1 S.C.R. 226 (S.C.C.), at p. 648

Fraser v. Canada (Attorney General), 2005 CanLII 47783 (Ont. S.C.J.)

Finlay v. Canada (Minister of Finance), [1986] 2 S.C.R. 607 (S.C.C.), at para. 34 ["Finlay"].

Manitoba Métis Federation Inc. v. Canada (Attorney General), [2010] 3 C.N.L.R. 233 (MBCA), at paras. 250, 261 reversed on other grounds in [2013] 1 S.C.R. 623

Martin v. Canada (Minister of Human Resources Development) (1999), 252 N.R. 141 (F.C.A.).

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