Federal Court  Cour fédérale

Date: 20100721

Dockets: T-488-10
T-692-10

Citation: 2010 FC 774

Toronto, Ontario, July 21, 2010

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

AIR CANADA

Applicant

and

TORONTO PORT AUTHORITY
and PORTER AIRLINES INC.

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] These two applications have been brought by Air Canada and were heard together on common evidence. Both deal with certain steps taken by the Respondent Toronto Port Authority in respect of commercial airport operations carried out at the Toronto Island Airport, now known as Billy Bishop Toronto City Airport. The other Respondent Porter Airlines Inc. is, at present, the only commercial passenger airline operating out of that airport.

[2] For the reasons that follow, I find that the applications are dismissed.

I. The Applications

1) T-488-10

[3] This application deals with what Air Canada characterizes as a decision made by Toronto Port Authority dated December 24, 2009. On that day, TPA released a bulletin entitled:

> ***TPA announces capacity assessment results for Billy Bishop Toronto City Airport, begins accepting formal carrier proposals***

That bulletin read:

> *Third-party, IATA-accredited slot coordinator will be appointed in early 2010 to manage carrier demand and slot allocation process*
>
> ***Toronto** – The Toronto Port Authority ("TPA") today confirmed that it has received a preliminary executive summary outlining the results of an updated noise impact study and capacity assessment for the Billy Bishop Toronto City Airport ("BBTCA"). The findings of the third-party study will now be refined to determine the number of daily commercial flights and equipment mix that can be accommodated at the airport during the coming years.*
>
> *The comprehensive analysis evaluated all key factors impacting airport operations, including:*
>
> - *the 1983 Tripartite Agreement*
> - *noise guidelines*
> - *hours of operation at the BBTCA and the impact of early morning and late evening flights on the neighbouring community*
> - *terminal, runway and passenger ferry infrastructure limitations*
> - *the availability of parking and transportation options to and from Eireann Quay*
> - *mix and types of commercial, private and leisure aircraft*
> - *helicopter and MEDEVAC flights*
>
> *"The Billy Bishop Toronto City Airport is an attractive facility for passengers and carriers alike," said Mark McQueen, Chairman of*

the TPA Board of Directors, "But it has both a modest physical footprint and is governed by the Tripartite Agreement, which serves to cap the number of daily commercial flights that can operate from the BBTCA. Based upon the informal requests we've received from commercial carriers, demand for new slots far exceeds the supply available. This 'slot controlled' situation is no different than other North American airports, such as Pearson, Vancouver, Newark Liberty, JFK, LaGuardia, or Washington Reagan. All major airlines recognize that an airport can only award the slots that exist, even if that won't satisfy every carrier request – a circumstance that exists at most slot-controlled airports."

The third-party study considered current BBTCA usage by leisure aircrafts and helicopters, in addition to the approximate 2,500 life-saving MEDEVAC service operations per annum. The study also considered that existing BBTCA commercial carrier operations will utilize approximately 120 slots in the period leading up to April 2010, some of which are designated as "Night Operations." Night Operations are defined as services operating between 6:45 – 7 a.m. and 10 – 11 pm. Under the existing Tripartite Agreement, the BBTCA is closed to all non-emergency flights between 11 p.m. and 6:45 a.m.

"Now that we have the results in hand, the Toronto Airport Authority will initiate the next phase of the process," said Geoff Wilson, President and CEO of the TPA. "We will solicit formal business proposals for additional BBTCA airline service, while ensuring that the process continues to remain open and transparent."

The next phase of the process will also see the TPA appoint an independent, IATA-accredited slot co-ordinator to manage commercial carrier demand at the BBTCA and allocate available slots. The co-ordinator will act as a neutral party during commercial carrier negotiations and be responsible for awarding slots based on internationally recognized processes.

Based on the initial results of the study, the TPA anticipates that once phase two of the new BBTCA terminal is fully completed in the second half of 2010, between 42 and 92 additional commercial slots will be available for award by the IATA-accredited slot coordinator for utilization by incumbent and new commercial carriers under a number of variables and scenarios. Further refinement to usage patterns by existing BBTCA stakeholders is currently underway to determine the precise number of slots that could be awarded among the incumbent and prospective new carriers. The TPA expects updated data to be available in January 2010.

"Our objective is to increase and diversify the number of destinations services by the airport," added Wilson. "There are many attractive short haul destinations that are still not served by the BBTCA and we are anxious to continue improving choice and convenience for all travellers."

The TPA will announce a process to receive and consider proposals from prospective commercial carriers early in the new year. All proposals will be expected to outline: i) proposed flight destinations; ii) service frequency; iii) proposed equipment; iv) what arrangements will specifically be made to handle a proponent's passengers at the BBTCA, and v) a commercial carrier's long term commitment to BBTCA passengers.

As is customary at many airports, all commercial carriers providing service from the BBTCA will be required to enter into a commercial carrier operating agreement ("CCOA") with the TPA before they can commence flight operations. Commercial carriers must also secure appropriate terminal space from the City Centre Terminal Corp. – BBTCA's terminal operator – which has the exclusive right and contractual obligation to provide all commercial carriers with access to its new facility once the construction project is completed in 2010. To date, the TPA understands that no commercial carriers have responded to the November 9, 2009 public call by City Centre Terminal Corp. soliciting proposals to utilize the new BBTCA terminal.

"I encourage all prospective commercial carriers with a desire to fly into the BBTCA in 2010 to take advantage of the opportunity to utilize the new terminal," said Wilson. "It is unclear how any commercial carrier would expect to be granted slots through this process without a clear plan as to how they intend to manage passenger traffic, security screening and border clearance."

With the rapid increase in monthly traffic and the number of new carriers seeking access to the airport, the BBTCA capacity study also identified the need for the TPA to make further capital expenditures. In January 2009, the TPA Board moved to acquire a new, larger ferry to accommodate the anticipated passenger growth that ultimately came to pass in 2009.

"Despite the difficult recession, Porter's continued passenger growth, combined with new carrier proposals, means that our task of modernizing the BBTCA is not yet complete," continued Mr. McQueen. "Over the near term we will be looking at what

> *immediate steps we need to take to ensure that passengers continue to enjoy the success that has become the BBTCA."*

[4] A copy of this bulletin was sent to an official of Air Canada by an official of TPA on December 24, 2009, under cover of a letter which stated, in part:

> *Thank you for your letter dated December 23, 2009 and Mr. Rovinescu's letter to Mr. Paul dated December 18, 2009.*
>
> *Please refer to the attached Bulletin which was released today and describes the progress on our assessment of airport capacity as well as outlines the concepts for the process which will be used to assess and allocate commercial scheduled service capacity.*
>
> *It would be premature at this time to comment on the information provided by you, as we are preparing a formal process to receive and consider proposals from prospective commercial carriers early in the new year.*
>
> *With respect to terminal arrangements, you will need to contact City Centre Terminal Corp.*

[5] Air Canada, following receipt of this letter and bulletin, filed the first of its two applications for judicial review, T-488-10. The basis for the application was set out in the Notice of Application as follows:

> *This is an application for judicial review of the December 24, 2009 decision (the "Decision") of the Toronto Port Authority (the "TPA") announcing a process (the "Proposed Process") through which it intends to award slots at the Billy Bishop Toronto City Airport (the "Island Airport") commencing in 2010. In the Decision, the TPA announced that pursuant to the Proposed Process:*
>
> *(a) it will appoint an independent, IATA-accredited, slot coordinator to manage commercial carrier demand and allocate slots at the Island Airport; and*
>
> *(b) commercial carriers will be required to make terminal arrangements exclusively with City Centre Terminal Corp. ("CCTC"), a corporation related to or controlled by one or more of the same individuals who are shareholders, directors*

> *or officers of Porter Airlines Inc. ("Porter"), for terminal space at the Island Airport.*

The relief requested was for:

> *(a) an Order setting aside the Decision and the Proposed Process for the allocation of existing and newly available additional slots as the Island Airport;*
>
> *(b) an Order that the TPA act within its jurisdiction pursuant to the Canada Marine Act, S.C. 1998, c. 10 and in accordance with the common law in its allocation of slots in (a) above;*
>
> *(c) an Order enjoining the TPA from taking any steps to implement the Proposed Process;*
>
> *(d) costs of this application; and*
>
> *(e) such further and other relief as to this Honourable Court seems just.*

The balance of the Notice of Application sets out recitals of fact and law of the type commonly found in a Statement of Claim.

2) T-692-10

[6] This is the second of Air Canada's two applications. It deals with what Air Canada characterizes as a decision made by the Toronto Port Authority dated April 9, 2010. On that day, TPA released a bulletin entitled:

> ***Toronto Port Authority issues formal Request for Proposals for additional carriers at Billy Bishop Toronto City Airport***

That bulletin read in part:

> *Appoints world's largest independent airport coordination organization to review formal business proposals and oversee slot allocation for additional airline service*
>
> ***Toronto** – The Toronto Port Authority ("TPA") today announced that a formal Request for Proposals ("RFP") for additional commercial airline carriers at the Billy Bishop Toronto City Airport ("BBTCA") has been issued and is now available to interested, qualified proponents.*
>
> *"As the BBTCA evolves into a world-class city centre airport, it has been our stated objective to diversify the number of destinations offered in an effort to meet the demands of our business and leisure travellers," said Geoff Wilson, President and CEO of the TPA. "The issuance of the formal RFP is the next major phase of the transparent process that we outlined in December. We're excited about the opportunities and additional airline services that this RFP will generate for the people of Toronto, which follows the parameters stipulated by the Tripartite Agreement."*
>
> ***Request for proposals for additional carriers***
>
> *To date, the TPA has received informal expressions of interest from Air Canada (which the carrier has publicly disclosed) and one U.S.-based commercial carrier. The TPA invites all qualified industry parties interested in providing carrier services at the BBTCA to participate in the RFP process.*
>
> *"As the RFP contains commercially-sensitive information, and given that related court proceedings recently initiated against the TPA by Air Canada are ongoing, any party interested in receiving the RFP must first enter into a standard commercial non-disclosure agreement," added Mr. Wilson. "We are committed to respecting the confidentiality of all parties involved, and as such, the TPA will enter into the same form of non-disclosure agreement with each interested party to protect proprietary information contained in each new proposal."*
>
> ***Comprehensive slot allocation process***
>
> *To review the formal business proposals received through the RFP process, the TPA also announced the appointment of Airport Coordination Limited ("ACL"), an independent consultancy firm specializing in demand and capacity assessment and scheduling*

process management, to manage commercial carrier demand and allocate available slots for the BBTCA.

. . .

As part of its responsibilities as an independent slot coordinator for the BBTCA, ACL will implement a slot allocation methodology that is similar to those used at other North American airports such as Pearson, Vancouver, Newark Liberty, JFK, LaGuardia and Reagan.

Capacity assessment factors

The TPA also confirmed that it has received the final results from the capacity assessment report for the BBTCA conducted by a third-party consultant, Jacobs Consultancy, an US$11 billion organization that is one of the world's largest providers of technical services. The study considered that existing BBTCA commercial carrier operations will utilize approximately 112 slots in the period leading up to the pending allocation of additional slots. After an extensive analysis that evaluated the key factors affecting airport operations, Jacobs Consultancy recommended that the maximum number of commercial slots available at the BBTCA is 202 upon the completion of the new terminal.

According to the Jacobs Consultancy analysis, which is based upon the 1983 Tripartite Agreement and obligations contained in existing agreements with incumbents, approximately 90 additional movements per day will be made available for allocation by ACL among the existing commercial carrier and new carriers at the BBTCA upon the successful completion of the new process. The recent acquisition of the Marylin Bell I, as well as the completion of the new terminal facilities, makes possible the increase in the number of slots available for allocation. Importantly, the 202 slot count is predicated upon the 1983 Tripartite Agreement and the necessary NEF Contour analysis, as it governs facility usage and ambient noise. Under the Tripartite Agreement, commercial and recreational flights are not permitted at the BBTCA between 11 p.m. and 6:45 a.m.

The current and earlier NEF Contour analyses heavily weigh Night Operations movements, which meaningfully and artificially lowered slot counts in prior years. Under the NEF Contour formula, a single operation between 10 p.m. and 11 p.m. (defined as a Night Operation) equates to approximately 16 Daytime Operation slots.

"We had a choice to make as an organization: provide for 90 additional Daytime movements and zero Night movements, or 10 Daytime movements and five Night movements," added Mark

> *McQueen, Chairman of the TPA Board of Directors. As the two new airlines proponents have requested more than 100 slots between them, we had no choice but to maximize the number of slots available. We recognize that this approach did not produce the number of slots sought, but we are governed by the airport's limited footprint and the Tripartite Agreement. The decision to prohibit additional commercial Night Operations will uphold our curfew policy and minimize any impact on the Waterfront community."*
>
> ***Carbon offset efforts***
>
> *To further mitigate the impact of the BBTCA's operations on the environment and its neighbouring communities, the TPA will be acquiring carbon offsets in the near term.*
>
> . . .

[7] A copy of this bulletin was sent to an official of Air Canada by an official of TPA on April 9, 2010, under cover of a letter which stated:

> *Further to our letter dated December 24, 2009, and your letter of inquiry dated January 13, 2010 we are attaching a Bulletin which has been released today and announces the Request for Proposals ("RFP") process to consider additional carriers at the BBTCA.*
>
> *As the RPF contains commercially sensitive information, interested parties will need to first enter into a standard commercial non-disclosure agreement ("NDA"). As the TPA is committed to respecting your business confidentiality, we will also enter into the same form of NDA.*
>
> *As you have expressed interest in providing service at the BBTCA, we are enclosing with this letter the Carrier NDA for your perusal and execution. Once we have received your executed NDA, we will forward the RFP and the TPA's executed NDA.*
>
> *We look forward to your participation in this process.*

[8] On May 4, 2010, Air Canada filed its second application for judicial review, T-692-10, the basis for which is set out in its Notice of Application as follows:

> *1. This is an application for judicial review in respect of the April 9, 2010 decision (the "April Decision") of the Toronto*

Port Authority (the "TPA") announcing a Request for Proposals (the "RFP Process") to allocate slots and otherwise grant access to commercial carriers seeking access to the Billy Bishop Toronto City Airport (the "Island Airport").

2. The April Decision purports to implement the TPA's decision regarding a process (the "Proposed Process") for allocation of slots and access to the Billy Bishop Toronto City Airport (the "Island Airport") announced on December 24, 2009 (the "December Decision").

3. The Proposed Process is described in the Applicant's Notice of Application for judicial review of the December Decision in the proceeding bearing Court File T-488-10 (the "December Application").

4. The April Decision of the TPA:

(a) takes steps to have the TPA enter into a contractual relations to award flight slots and otherwise grant access to the Island Airport to commercial carriers participating in the RFP Process;

(b) enables commercial carriers to enter into non-disclosure agreements for the purpose of concluding a commercial carrier operating agreement ("CCOA") with the TPA;

(c) appoints Airport Coordination Limited ("ACL") as an "independent slot coordinator" to manage commercial carrier demand and allocate slots at the Island Airport;

(d) permits ACL to implement a slot allocation similar to that used at "other North American airports such as Pearson, Vancouver, Newark Liberty, JFK, LaGuardia and Reagan";

(e) permits the TPA to receive expressions of interest, including from a U.S.-based commercial carrier, and invites parties to participate in the RFP process.

[9] The relief claimed by Air Canada in this second Notice of Application requested:

> *(a) an Order setting aside the April Decision and the RFP Process for the allocation of existing and newly available additional slots at the Island Airport;*
>
> *(b) an Order setting aside any contractual arrangements that have been made pursuant to or arising from the April Decision or the RFP Process including, inter alia, such arrangements that allocate slots or otherwise grant access to the Island Airport;*
>
> *(c) an Order that the TPA act within its jurisdiction pursuant to the Canada Marine Act, S.C. 1998, c. 10 and in accordance with the common law in its allocation of slots at the Island Airport;*
>
> *(d) an Order enjoining the TPA from taking any further steps to implement the April Decision or the RFP Process;*
>
> *(e) costs of this application; and*
>
> *(f) such further and other relief as to this Honourable Court seems just.*

[10] Unlike the first Notice of Application which set out a Statement of Claim-like narrative, this second Notice set out the grounds for the application briefly as follows:

> *THE GROUNDS FOR THE APPLICATION ARE:*
>
> *5. As part of the December Application, counsel for the TPA made certain representations to the Court on March 23-24, 2010 and at a case management conference on April 12, 2010 concerning the implementation of the Proposed Process while the December Application was pending. As a result, Air Canada seeks to ensure that the implementation of that Proposed judicial review.*
>
> *6. Air Canada, in the December Application, sets out the grounds for its application to set aside and enjoin the implementation of the December Decision.*

> *7. The April Decision in effect implements the Proposed Process outlined in the December Decision.*
>
> *8. Air Canada repeats and relies on the same grounds set out in the December Application in this notice of application challenging the April Decision.*

[11] Although the Respondent Toronto Port Authority was the "decision-maker" in the matters raised in both applications, Porter also was named as a party Respondent and participated fully in these proceedings.

3) At the Hearing

[12] In oral argument at the hearing of these applications, Counsel for Air Canada, Mr. Finkelstein re-stated the relief claimed by his client as being:

1. A declaration that the process followed by the Toronto Port Authority was fatally flawed;

2. That the April 2010 Commercial Carrier Operating Agreement (2010 CCOA) between the Toronto Port Authority, Porter and Porter Aviation Holdings Inc. be set aside;

3. That the process for allocation of slots at Billy Bishop Toronto City Airport be commenced again in a "proper" fashion including consultations with Air Canada.

II. The Parties, BBTCA, Slots and IATA

[13] The Applicant, Air Canada, is Canada's largest domestic and international airline. It has corporate affiliation of one kind or another with Jazz Air and earlier, Air Ontario which are and

were smaller regional airlines operating in Canada and to some extent internationally. Air Canada presently serves the greater Toronto area from facilities located at Pearson International Airport. The Respondent Porter Airlines Inc. does not have facilities at Pearson.

[14] The Respondent Toronto Port Authority (TPA) describes itself this way in bulletins that it has published, such as the bulletin of April 9, 2010:

> *The Toronto Port Authority was incorporated on June 8, 1999 as a government business enterprise under the Canada Marine Act as the successor to the Toronto Harbour Commissioners. It is a federal public authority providing transportation, distribution, storage and container services to businesses. The TPA owns and operates the Billy Bishop Toronto City Airport, Marine Terminals 51 and 52, and the Outer Harbour Marina. The TPA also provides regulatory controls and public works services to enhance the safety and efficiency of marine navigation and aviation in the port and harbour of Toronto.*

[15] The Respondent Porter Airlines Inc. (Porter) is a commercial airline based at Billy Bishop Toronto City Airport (BBTCA). It came into existence through predecessors including those described as Regional Holdings (Regco) beginning in about 2002. Porter has a number of affiliated entities including Porter Aviation Holdings Inc., City Centre Terminal Corp. and others all dealing in one way or another with operations of that airline and at that airport. The Respondent Porter began commercial airline operations in about 2006 with two aircraft and limited regional routes, and now has several more aircraft operating routes to many places in Ontario, Quebec, the Maritimes and the United States.

[16] Not a party, but central to these proceedings, is the airport located at the west end of Toronto Island proximate the downtown core of the City of Toronto. Access is provided by a ferry operating

in what is known as the Western Gap. The airport has operated under a number of names including Toronto Island Airport, Toronto City Centre Airport and Billy Bishop Toronto City Airport (BBTCA). The land is owned by the City of Toronto and leased to the Respondent Toronto Port Authority. Over the years, this airport has served various functions, including providing facilities for medical emergency aircraft and for "general aviation" (GA), which is a term indicating small private and charter aircraft. Commercial passenger airline activities have from time to time been carried out using this airport by City Express (now defunct), Air Ontario, Jazz Air and, more recently, Porter.

[17] Another term that must be discussed at the beginning is "slot". Sometimes the word "movement" is used instead. In commercial aviation terms a "slot" is used to designate the provision for the taking off or landing of an aircraft - each is a "slot". In the context of these proceedings, there are "quiet time" slots which are those occurring between 6:45 a.m. and 7:00 a.m. and 10:00 p.m. and 11:00 p.m. Also used is the term "peak time" slots which indicates those slots assigned at times when passenger traffic is greatest, such as business travel in the early morning and late afternoon.

[18] IATA is the acronym for the International Air Transport Association, founded in 1945. It is an association comprised of airlines which represent over ninety (90%) percent of the world's scheduled international air traffic. Air Canada is a member, Porter is not. No airport is a member; however, several airports can achieve a status with IATA called "airport advisor". BBTCA is not an airport advisor. IATA publishes guidelines which are not mandatory but may be adopted for use by airports for, among other things, slot management. Some airports, such as Pearson, have adopted

these guidelines. Other airports follow them to some degree. Among these guidelines are those respecting slot management, wherein airports are designated as Level l, Level 2 or Level 3. Level 1 essentially means that slots are managed on a co-operative basis; Level 3 means that demand for slots exceeds supply, and a slot co-ordinator has been appointed to manage slots and impose the determinations made on the users. Moving up the levels usually involves some consultation between the users, and on occasion those hoping to be users, of the airport.

III. The Evidence

[19] All of the parties filed evidence in these proceedings. Since the proceedings were taken by way of applications, no live witnesses appeared before the Court. No party raised any serious issue as to the credibility of any witness, nor does the Court make any finding in that regard. All witnesses are considered to be credible. Each party submitted expert evidence. Porter took objection to some of Air Canada's evidence, which I will note below.

[20] Orders were issued in each of these applications to the effect that some of the evidence filed would be sealed and remain confidential unless and until a further Order of the Court was made in that respect. The hearings were held in open Court.

[21] In particular, filed in evidence was:

A) For the Applicant Air Canada

1. Affidavits of Leslie Allan Lupo, sworn February 3, 2010 and May 14, 2010 together with exhibits as identified therein (Applicant's Record, pp. 79-564).

He was cross-examined on June 9, 2010, and certain exhibits identified at that time (Applicant's Record, pp. 2757-2793). Lupo is Senior Legal Counsel at the International Air Transport Association (IATA). It is unclear whether he is giving evidence only as to the practices followed by IATA or going beyond that to speak to expertise on "international standards." To the extent that his evidence goes beyond that of IATA I will give it little weight as his expertise beyond IATA was not established.

2. Affidavits of Gustavo Baumberger sworn February 5, 2010 and May 18, 2010 together with exhibits as identified (Applicant's Record, pp. 565-822). He was cross-examined on June 15, 2010, and an exhibit identified at that time (Applicant's Record, pp. 2906-2961). Baumberger is Senior Vice-President of Compass Lexicon, a consulting firm that specializes in the application of economics to legal and regulatory issues. No objection was taken as to his expertise.

3. Affidavits of Marcel Forget sworn February 8, 2010, May 19, 2010 and June 7, 2010 together with exhibits as identified (Applicant's Record, pp. 823-1235). He was cross-examined on June 14, 2010, and an exhibit was identified at that time (Applicant's Record, pp. 2794-2905). A written response to an undertaking was subsequently provided (Applicant's Record, pp. 2962-2969). Forget is Vice President of Network Planning of Air Canada. He was presented as a fact witness. Porter's Counsel raised concerns that some of Forget's evidence did not come from first-hand

knowledge or was essentially argument of Counsel. I will give this part of his evidence little weight.

4. Affidavit of Alain Boudreau sworn February 8, 2010 together with exhibits as identified (Applicant's Record, pp. 1236-1389). He was cross-examined on June 7, 2010, and exhibits were identified at that time (Applicant's Record, pp. 2521-2682). A written response to an undertaking was produced (Applicant's Record, pp. 2962-2969). Boudreau is Senior Director Air Canada Jetz and Specialty Products for Air Canada. He was presented as a fact witness. Porter's Counsel raises an objection that some of Boudreau's evidence does not arise from first-hand knowledge. I will give this part of his evidence little weight.

5. Affidavits of Elize LeGraw, sworn March 26, 2010 and April 30, 2010 together with exhibits as identified (Applicant's Record, pp. 1390-1394 and 2486-2520). There was no cross-examination. LeGraw is a law clerk in the office of the Applicant's solicitors. Her affidavits serve to provide certain documents.

6. Affidavit of Janet Jones sworn May 19, 2010 together with exhibits as identified (Applicant's Record, pp. 1395-2312). There was no cross-examination. Jones is a law clerk in the office of the Applicant's solicitors. Her affidavit serves to provide certain documents.

B) For the Respondent TPA

1. Certain documents provided in response to the Applicant's request under Rule 318 (Applicant's Record, pp. 2314-2485).

2. Affidavit of Alan J. Paul sworn April 26, 2010 together with exhibits as identified (TPA's Record, pp. 1-1423). He was cross-examined on June 8, 2010, and an exhibit identified at that time (Applicant's Record, pp. 2970-3135). A written answer to undertakings was provided (Applicant's Record, pp. 3233-3325). Paul is Vice-President and Chief Financial Officer of the Toronto Port Authority (TPA). He was presented as a fact witness.

3. Affidavit of Dr. Michael Tretheway sworn April 29, 2010 together with exhibits as identified (TPA's Record, pp. 1424-1648). He was cross-examined on May 28, 2010, and an exhibit identified at that time (Applicant's Record, pp. 3326-3369). Tretheway is Executive Vice-President and Chief Economical of InterVISTAS Consulting Inc. with expertise in transportation economics. His evidence was presented as that of an expert. No challenge was made as to his expertise.

4. Affidavits of Geoffrey Wilson sworn April 30, 2010 and May 27, 2010 together with exhibits as identified (TPA's Record, pp. 1649-2013). Wilson was cross-examined on June 11, 2010 and a written answer provided as to certain undertakings (Applicant's Record, pp. 3136-3325). Wilson is the President and Chief Executive Officer of the Toronto Port Authority (TPA). He is the successor to the witness Paul. He was presented as a fact witness.

C) For the Respondent Porter

1. Affidavits of Michael Deluce sworn April 29, 2010 and May 26, 2010, together with exhibits as identified (Porter's Record, pp. 1-1313). He was cross-examined on June 4, 2010, and an exhibit identified, subject

to objection, at that time (Applicant's Record, pp. 3370-3468). A written answer to undertakings was provided (Porter's Record, p. 1359). Deluce is the Executive Vice-President and Chief Commercial Officer of the Respondent Porter Airlines Inc. (Porter) and several of its affiliate companies. He was presented as a fact witness.

2. Affidavits of Roger Ware sworn April 29, 2010 and June 2, 2010, together with exhibits, as identified (Porter's Record, pp. 1315-1356). He was cross-examined on June 4, 2010, and an exhibit identified at that time (Applicant's Record, pp. 3370-3502). Ware is a PhD Professor of Economics at Queen's University; his expertise focuses on Industrial Organization, including antitrust economics and competition policy and strategic behaviour. He was retained to critique certain of the expert evidence submitted by the Applicant. His evidence was submitted as expert evidence. No objection was taken as to his expertise.

IV. The Issues

[22] Air Canada states the issues in its Factum simply as:

1. Are the Decisions subject to judicial review?
2. Are the Decisions invalid?

[23] Toronto Port Authority set out the matters that it submitted were at issue more fully in its Factum:

> (a) whether Air Canada may rely upon the grounds of denial of procedural fairness and "formal and substantive unreasonableness", and breaches of statutes, none of which were enunciated in the Notices of Applications for Judicial Review;
>
> (b) whether Air Canada can properly pursue these judicial review applications, given that it is not "directly affected", the Court's discretion in respect of such matters, and its past history of re-litigating the same or similar claims;
>
> (c) whether the TPA, in respect of its actions complained of in these applications, is a federal board, commission or other tribunal, subject to judicial review;
>
> (d) whether, if the TPA's actions complained of are subject to judicial review, it was under a duty to consult Air Canada;
>
> (e) whether the Bulletin of December 24, 2009, and the announcement therein with respect to the future process of slot allocation, is an order or matter capable of being judicially reviewed;
>
> (f) whether Air Canada is out of time to judicially review the decision to allocate "grandfathered" slots to Porter;
>
> (g) whether the TPA's actions complained of may be reviewed on the basis off "formal and substantive unreasonableness"; and
>
> (h) whether the decisions at issue were made for an irrelevant or improper purpose.

[24] Porter put the issues more simply in its Factum:

> (a) Can Air Canada properly pursue these judicial review applications?
>
> (b) Has the TPA breached any duty of fairness it may have owed?

(c) Are the impugned "decisions" of the TPA reasonable?

(d) Has the TPA acted with an improper purpose?

[25] Some issues were not pursued, others restated or merged, and new issues arose during the course of oral argument. As matters have evolved, at the end of the hearing, the following issues emerged as those that I must address:

1. In respect of the "decisions" at issue, was the Toronto Port Authority acting as a "federal board, commission or other tribunal" so as to be subject to judicial review of those decisions in this Court?
2. Is Air Canada a "person interested" who has standing to seek judicial review of those "decisions" in this Court?
3. Were the "decisions" of December 24, 2009 and April 9, 2010 of a kind that can be the subject of judicial review in this Court?
4. Has Air Canada properly pleaded some of the grounds that it now urges in seeking judicial review?
5. Was there an obligation upon the Toronto Port Authority to consult with Air Canada before making the "decisions" of December 24, 2009 and April 9, 2010?
6. Were the "decisions" both "formally" and "substantively" reasonable?
7. Did the TPA have any obligation to provide "reasons" for its decisions, and if reasons were provided were they adequate?
8. Were the "decisions" made for an improper purpose?

V. Chronology of Events

[26] The history of events involving the Toronto Island Airport, the City of Toronto, the parties to the proceedings, their predecessors and affiliates and others is lengthy and complex. It would be impractical to set out every event in detail. I will enumerate some of them in more or less chronological order:

1. The Toronto Island Airport (which I will sometimes refer to as BBTCA) was built in the early 1930s on land located on the west end of Toronto Island. This land was, and continues throughout to be, owned by the City of Toronto. Ferry service accessing BBTCA from the mainland commenced in 1964.
2. On June 30, 1983, an agreement was entered into between the City of Toronto, the Toronto Harbour Commissioners (predecessors of the Respondent Toronto Port Authority) and the Minister of Transport respecting the Toronto Island Airport. That agreement is usually referred to as the Tripartite Agreement. That agreement granted to the Toronto Harbour Commissioners (predecessor of the Toronto Port Authority) a 50-year lease for the Island Airport and related facilities subject to a number of terms and conditions such as the payment of rent. Among other things, the lessee (Toronto Harbour Commissioners) was obliged to regulate the overall frequency of aircraft movement so as to respect certain noise restrictions. If the lessee defaulted and the default was not cured in a timely way, the Minister of Transport was entitled to step in and run the airport, failing which the airport would revert to the City of Toronto.

3. In the 1980s, commercial airline service from BBTCA was established and operating as a thriving service by an entity known as City Express. That entity was not affiliated with or related to any of the parties to these proceedings. Service was established linking BBTCA, Ottawa, Montreal, Newark and elsewhere.

4. In 1991 City Express ceased its operations.

5. In about 1990, Air Ontario, an Air Canada subsidiary, had commenced operations from BBTCA. That entity and another Air Canada affiliate, Jazz continued operations at BBTCA until 2006 when all operations by those entities ceased. Initially, these operations were thriving, serving various destinations from BBTCA; however, over the years the number of locations served, the frequency of flights and care and attention paid to the facilities diminished considerably.

6. On June 11, 1998, Royal Assent was given to the *Canada Marine Act*, S.C. 1998, c. 10. That *Act* repealed earlier legislation respecting navigation and shipping including the *Toronto Harbour Commissioners' Act 1985*, 33-34-35 Eliz II, c. 10. The *Canada Marine Act,* S.C. 1986, c. 10, made provision for Letters Patent to be issued to establish a port authority (section 8) which Letters were not to be considered to be regulations but would be published in the Canada Gazette (sub-section 8(3)).

7. On June 8, 1999, Letters Patent became effective establishing the Toronto Port Authority and setting out certain activities to be carried out by that authority. Those Letters were published in the Canada Gazette, Part 1, June 5, 1999. Section 7.2(j) authorized the TPA to operate the BBTCA in accordance with the

Tripartite Agreement. As of June 1999, Air Canada's affiliate airlines were the only commercial airlines operating out of that airport.

8. The BBTCA was operating at a loss while the Air Canada affiliates were operating there. By 2002, those operations had diminished considerably. The TPA had continuing discussions with Jazz requesting that it commit to operations at the airport. In the meantime, the TPA also commenced discussions with Porter's predecessors as to Porter establishing airline services from BBTCA and revitalizing services and facilities there.

9. On July 18, 2002, the Competition Bureau wrote a letter to the TPA with a copy to Transport Canada respecting proposals made by RAH (a Porter predecessor) to the TPA as to commencing a new regional airline service from BBTCA (then referred to as TCCA). That letter stated that the Bureau understood that RAH intended to ramp up operations significantly over a four-year period and was, among other things, seeking an exclusive right to 143 of the 167 slots available. That letter stated, in part:

> *In relation to the RAH proposal, I would like to make three points.*
>
> *First, Lester B. Pearson International Airport ("Pearson") and TCCA are close substitutes for one another for City of Toronto originating passengers with the same destinations. TCAA* [*sic*] *is not a market onto itself. The fact that one carrier may dominate services on a particular service such as Toronto-Ottawa from TCAA* [*sic*] *is only part of the competitive analysis. One would have to consider the competition that would exist from carriers operating out of Pearson. For passengers in the Greater Toronto Area and surrounding areas, other airports such as Hamilton and Buttonville would also be relevant as they fall within the catchment area of Pearson.*
> *AC dominates services out of the Pearson, and Pearson is by far the major airport serving the City of Toronto and surrounding areas. Consequently, even if a carrier other than AC were to provide the majority of services out of TCAA* [*sic*]*, this carrier is unlikely to dominate any city pair service that is also available from Pearson.*

> *Second, as a general rule, exclusivity under the Competition Act is only problematic where it would lead to a substantial lessening or prevention of competition. Given the existing dominance of AC, exclusivity of slots at TCAA* [*sic*] *to another carrier is unlikely to meet this requirement.*
>
> *Third, as a matter of competition policy, exclusivity and the other restrictions contained in the RAH proposal may not be desirable or necessary to encourage new competition. The real concern of RAH is that AC will engage in predatory behaviour by dramatically increasing capacity in the short term in order to eliminate RAH. It is our view that these concerns could be addressed by capping AC at its current slot usage or allocation for a sufficient period of time to see if RAH can execute its business plan. We understand that AC was using 24 of its 44 allocated slots up to the time of the public announcement of RAH and then moved to using 38 slots in May of this year. It would appear, therefore, that AC already has responded to some degree to the potential threat of new entry at TCAA* [*sic*] *by increasing service.*
>
> *Given this fact, combined with its existing dominance at Pearson, a cap on AC at 38 or 44 slots could be justified as an interim measure to see if RAH or other new entrants could be found to offer service out of TCAA* [*sic*]*. We do not think that route exclusivity or change of gauge restrictions are necessary to address the concerns noted above. If the Toronto Port Authority wants to grant RAH exclusivity on all of the slots not used by AC, then we suggest that specific milestones be put in place in order to encourage RAH to implement its business plan in a timely manner.*

10. On September 6, 2002, the TPA and RAH enter into a memorandum of understanding respecting establishment of an RAH airline service at the airport. A press release to that effect was issued on October 4, 2002.

11. The Competition Bureau sent a letter to RAH (Regco) dated February 10, 2003, providing a competition assessment as to the proposals set out in the memorandum of understanding. That letter stated, among other things:

The Proposed Agreement

We understand that Regional Airlines Holdings Inc. ("Regco") and the Toronto Port Authority ("TPA") entered into a Memorandum of Understanding ("MOU") on September 6, 2002. The following is our understanding of the relevant facts related to the MOU:

- *All restriction identified in the MOU are limited in time for a total period of 30 months following completion of Period 2 as outlined in Schedule A of the MOU and defined as the date of completion of the bridge linking the Toronto City Centre Island and the main land ("the Bridge"). Our understanding is that the present target date for completion of the Bridge is May 2004.*

- *TPA shall grant to Regco an irrevocable option exercisable on or before February 28, 2003 to acquire from the TPA the exclusive right to utilize 115 large turbo prop daily movement slots (as that term is defined in Schedule A of the MOU) at the TCCA on a "take or pay" basis.*

- *Regco shall commence operating a regional airline based at the Toronto City Centre Airport ("TCCA") upon completion of the Bridge.*

- *TPA shall only make available to Air Canada and Air Canada Associates (as defined in the MOU) between 22 and 32 large turbo prop movement slots.*

- *TPA shall only lease to Air Canada or Air Canada Associates space in the new terminal if Air Canada or Air Canada Associates cannot renew their existing leases at their current location.*

- *TPA shall limit Air Canada and Air Canada Associates to destinations currently served by them collectively from the TCCA.*

- *TPA shall hold in reserve 20 to 30 large turbo-prop slots. TPA shall not make available or allocate to any other carrier any of the 20-30 movement slots held in reserve to Air Canada and Air Canada Associates, or any other carrier to enable such carrier(s) to provide service to or from the same destination as Regco.*

- *In the event that before the expiration of the roll-out period, either the TPA increases the movement slots*

available for large turbo-prop aircraft at the TCCA beyond 167, or any of the 22-32 large turbo-prop slots allocated or to be allocated to Air Canada or Air Canada Associates become available, TPA shall not grant such additional slots to any party without first offering such movement slots to Regco.

- *The slots allocated for use by small turbo-prop aircrafts are not restricted for routes not served by Regco.*

- *The Agreement does not appear to affect the TPA's ability to respond to demands of cross-border carriers.*

. . .

Competition Assessment

This matter was reviewed under sections 75, 77 and 79 of the Competition Act.

Relevant Product Market

The starting point in assessing Regco's request is to define the relevant market (product and geographic market) and consider the prima facie evidence provided by market shares, and any other factors that might be relevant for interpreting the Act.

It is our view that the relevant product market affected by the MOU is the provision of airline services.

In terms of the geographic dimension of the market, our view is that the relevant geographic market encompasses the provision of airline services to and from the Greater Toronto Area. In this regard, we consider that TCCA and Pearson draw passengers from the same catchment area and that services from these two airports compete with one another.

We understand that each airport has certain locational and other advantages that are not available at the other airport. For example, because of the large scale and scope of Pearson's facilities, it can handle connecting traffic while TCAA [*sic*] *is essentially serving point-to-point passengers. However, it would appear from the evidence that we have reviewed that either air carrier can provide a competitive service for passengers travelling to or from the Toronto area, including passengers located close to the downtown core.*

This was the case in the 1980's when City Express competed with Air Canada on a number of routes offered at both TCCA and Pearson and we do not see any reason why the situation would be different in today's environment. We also note the survey evidence that has been done which shows that even with limited frequency and no significant price differences between the service available at Pearson and at TCAA [*sic*]*, some passengers continue to use air services offered from both airports. It would appear to us very unlikely that even a monopolist carrier at TCAA* [*sic*] *could exercise market power given the competing alternatives of flying to Pearson and possibly other airports (Hamilton and Buttonville) in the region. In light of the proximity of the two airports and the evidence of substitution and competitive interaction from previous periods, it is our conclusion that air services offered from either Pearson or TCCA are part of the same geographic market.*

Given this definition of the relevant market, it is clear that Regco will not be dominant in terms of airline services.

Sections 77 & 79

These sections apply to dominant companies exploiting their market power in a way that substantially lessens or prevents competition in the marketplace. Exclusive contracts when they are entered into by dominant firms or are widespread in the market have the potential to impede entry of new competitors. For this to be a concern under the Competition Act, it would be necessary to show that Regco is a major supplier under section 77 or to show dominance under section 79. Given the definition of the relevant market, this is not the case. It would also have to be shown that the exclusive contract was having the effect of preventing or lessening competition substantially in the market. Given the existing dominance of Air Canada, limited exclusivity of slots at TCCA to a new entrant carrier is unlikely to meet this requirement.

Section 75

One of the elements of the refusal to supply provision that would need to be satisfied in this case is whether a person would be substantially affected or precluded from carrying on business as a result of an inability to obtain slots. The Bureau has noted that the TCCA will make available to Air Canada between 22 to 32 slots. We also note that for many years, Air Canada has only utilized a limited number of slots at the TCCA. In addition, based on the number of slots available to Air Canada and to other carriers at Pearson, it would be difficult to argue that Air Canada or another

carrier has been substantially affected or precluded from carrying on business, as a result of the arrangements set out in the MOU.

Conclusion

In light of the above, it is our opinion that the proposal as set out in the MOU would not contravene the provisions of sections 75, 77 and 79 of the Act, and that the Commissioner would not have grounds for causing an inquiry to be made pursuant to paragraph 10(1)(b) of the Act.

This opinion is predicated on the assumption that the facts are accurate and that no material facts have been omitted or misrepresented in your submission. Finally, this opinion will continue to be valid so long as the material facts on which it was based remain unchanged and the conduct or practice is carried out as proposed. This opinion will also continue to be valid unless there is an amendment of the provisions of the legislation upon which it is based. Should you be uncertain as to the impact of any amendment on the opinion you have received, you should seek legal advice or re-contact the Competition Bureau. Of course, should there be a change in the material facts in the future, our opinion would need to be revisited.

12. Jazz operations at BBTCA diminished. Its lease expired in November 2004 and Jazz continued to operate on a month-to-month basis. By the end of 2005, Jazz had ceased its shuttle bus services and was using only about six (6) slots daily at BBTCA.

13. In February 2006, the Commercial Carrier Operating Agreement (CCOA), under which Jazz had been operating at BBTCA, came to the end of its term. TPA proposed a new CCOA to Jazz but it was never signed. Porter announced the launch of its airline service from BBTCA. Air Canada announced plans to reinstate its service, and meanwhile commenced an action in the Ontario Superior Court against TPA claiming extensive damages. This action has since been discontinued. The Jazz month to month lease ended.

14. In March 2006, Jazz filed an application for judicial review in the Federal Court, T-431-06. This application was converted into an action. A second application was filed by Jazz on August 8, 2006, T-1427-06. Both proceedings have since been abandoned.

15. On May 3, 2005, TPA and Porter (Regco and TCCA) entered into a Commercial Carrier Agreement (the 2005 CCOA). That agreement stipulated that it was subject to the *Canada Marine Act* and the Tripartite Agreement. It provided for an initial "roll out" period during which Porter would receive a guaranteed number of slots, following which Porter would continue to be entitled to those slots on a "use it or lose it" basis. Porter was also entitled to "participate on a fair basis" in respect of any additional slots as may become available from time to time.

16. In July 2006, Air Canada announced resumption of its services from BBTCA and accepted bookings. Such services were never resumed and the bookings were cancelled. In August 2006, the Competition Bureau announced that while it had concerns as to Air Canada's activities, they had been resolved by Air Canada's undertaking to stop such advertising and booking.

17. On October 23, 2006, Porter launched its service from BBTCA with two aircraft flying to Ottawa. Since that time, Porter has acquired several more aircraft and now services many more destinations in Canada and in the United States. By 2008, the BBTCA had become a profitable. No profit was ever made during the period that any of City Express, Air Ontario or Jazz were operating from that airport.

18. In 2008, Jacobs Consultancy, a firm having expertise in airport capacity and slot movement, was retained by TPA to provide advice and report on capacity at

BBTCA having regard to noise limitations imposed by the Tripartite Agreement and other constraints. A report was made in 2008 which resulted among other things in the purchase of a new ferry in 2009 to service the airport.

19. On September 28, 2009, Air Canada wrote to TPA expressing an interest in commencing service from BBTCA early in 2010. This was the first request since February 2006 made by Air Canada or its affiliates for slots.

20. On October 16, 2009, TPA released a public bulletin stating that it had received enquiries from interested parties in participating in expanded services to be offered at BBTCA. TPA indicated that it was in the process of receiving advice as to capacity having regard to noise restrictions imposed by the Tripartite Agreement.

21. On October 22, 2009, officials from TPA and Air Canada met to discuss Air Canada's wish to participate in the expanded facilities at BBTCA. Air Canada was unclear as to the type of aircraft to be used or whether it or Jazz would be the proposed participant. Air Canada expressed an interest in 60 slots. TPA invited Air Canada to participate once further advice had been received respecting the allocation process.

22. In October 2009, TPA met with Transport Canada, who recommended that TPA contact a slot co-ordinator at Pearson airport. It is not clear when that person was contacted or what was discussed. It appears that the person is a Mr. Smith, an employee of Air Canada. There is no document recording these discussions.

23. In November 2009 a Porter affiliate CCTC, which was building new terminal facilities at BBTCA, announced that it would receive enquiries from others as to participating in the use of such facilities.

24. Air Canada representatives met with TPA officials December 17, 2009. On December 18, 2009, Air Canada wrote a letter to TPA requesting that it be assigned seventy-four (74) slots.

25. In December 2009, Jacobs Consultancy provided a draft report to TPA respecting availability of a number of additional slots at BBTCA having regard to noise and other constraints such as the ferry, ferry terminal, parking and other matters. Among the proposals made was that TPA consider the appointment of a slot co-ordinator to manage the allocation of available slots at BBTCA.

26. On December 24, 2009, TPA released the bulletin with a copy to Air Canada which is the subject of the first judicial review herein, T-488-10. The substance of this bulletin has been set out in detail earlier in these reasons.

27. In January 2010 Jacobs Consultancy provided its finalized report to TPA; it is not identical in wording to the draft of December 2009. The recommendation that a slot coordinator be appointed remained.

28. January 7, 2010, Air Canada met with TPA to discuss Porter's existing slots, additional slots and facilities as the Island Airport.

29. January 21, 2010, Air Canada contacted CCTC to inquire about space in the new terminal. CCTC responds January 25, 2010, inviting formal discussion. The parties met February 5, 2010.

30. In February 2010, TPA spoke to a person at London City Airport, London, England; an airport that for years had dealt with slot problems with the assistance of a company called Airport Coordination Limited (ACL). ACL was subsequently retained to assist TPA with slot co-ordination. ACL was IATA accredited.

31. On March 22, 2010, ACL provided a report to TPA making a number of recommendations as to the management of slots at BBTCA.

32. April 9, 2010, TPA released the bulletin that is the subject of the second application for judicial review, T-692-10. That bulletin invited formal proposals from persons interested in acquiring slots at BBTCA. The details have been set out earlier.

33. On the same day, April 9, 2010, Porter and the TPA entered into a new CCOA – the 2010 CCOA. Air Canada was unaware of this event at the time.

34. April 20, 2010, the Commercial Carrier Operating Agreement of 2005 (2005 CCOA) between Porter and TPA expired.

35. May 4, 2010, the second application for judicial review, T-692-10, was filed by Air Canada.

36. Air Canada responded to TPA's request for proposals on May 14, 2010 stating, *inter alia,* that it accepts TPA's mandate, objectives and guiding principles as identified in section 1.2 of TPA's request for proposals. Section 1.2 is too lengthy to repeat in full, but among other things, states that a slot co-ordinator has been appointed (ACL) to:

> *"…allocate slots to carriers in accordance with TPA's slot allocation methodology and scheduling guidelines."*

.

[27] I have not endeavoured to set out all the events, nor set out in detail what was discussed or written, as the case may be. I have endeavoured to highlight major events.

VI. Position of the Parties

[28] These applications were well presented and argued by all Counsel. I thank them for their courtesy and professionalism throughout. All Counsel argued forcefully and well on behalf of their respective clients. As a result, many different points have been raised for resolution. First, however, I will present an overview of the position of each party.

[29] Air Canada is the Applicant. It wants the TPA to undo its slot allocation process and start from scratch, in consultation with Air Canada. It wants the 2010 Commercial Carrier Operating Agreement, as signed with Porter, set aside, and that those parties, in the meantime, abide by the terms of the 2005 CCOA. Air Canada is aware of the fact that it is not well liked by Porter and possibly the TPA; however, its Counsel argues that the applications are not about Air Canada, they are about the TPA and the decisions that it has made. It is about what Air Canada characterizes as the TPA's failure to follow due process in allowing full participation by everyone, not just TPA's favourite partner, Porter, in the "licensing" of slots at the airport. Air Canada's Counsel argues that the TPA is acting as a federal board, commission or other tribunal in this capacity, and is in that capacity subject to the judicial review process of this Court.

[30] TPA argues that it is in respect of its operations at BBTCA acting as a commercial entity, and is not subject to judicial review by this Court in that regard. It argues that the "decisions" under review are not "decisions", but announcements and a request for proposals, and that Air Canada is not a "person interested" therefore lacks standing to seek judicial review. TPA argues that it has frequently consulted with Air Canada concerning the airport. TPA should be free to make the

normal business decisions that any ordinary business corporate entity would make with interference by way of judicial review.

[31] Porter argues that it is the real target of Air Canada's legal activities. It argues that Air Canada and its affiliates left the island airport to deteriorate, preferring to operate from Pearson airport; and only when Porter, who was assuming all the risk, made the island airport viable, did Air Canada wish to muscle its way back in by whatever means. Air Canada should not complain about Porter's dominance at BBTCA, since Air Canada is the dominant airline at Pearson and most other commercial airports in Canada.

[32] What the Court must keep in mind is that what is before it are two discrete applications respecting certain "decisions" made by the TPA and processes followed by it respecting those "decisions". In order to deal with those discrete matters, the Court must address a number of issues raised by the parties.

VII Issue #1: <u>Is the Toronto Port Authority a "federal board, commission or other tribunal" so as to be subject to judicial review?</u>

[33] Sections 18 and 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 give the Federal Court jurisdiction to issue an injunction and other forms of prerogative relief and to judicially review and provide remedies in respect of a decision or order of a "federal board, commission or other tribunal".

[34] The Toronto Port Authority (TPA) was continued as a successor to the Toronto Harbour Commissioners under the provisions of the *Canada Marine Act*, and in particular, subsection 12(1) and Part I of the Schedule of that *Act*. Letters Patent were issued to the TPA effective June 8, 1999. The purpose of the *Canada Marine Act* is set out in section 4, subsections (a) to (h):

4. *In recognition of the significance of marine transportation to Canada and its contribution to the Canadian economy, the purpose of this Act is to*	*4. Compte tenu de l'importance du transport maritime au Canada et de sa contribution à l'économie canadienne, la présente loi a pour objet de :*
(a) implement marine policies that provide Canada with the marine infrastructure that it needs and that offer effective support for the achievement of national, regional and local social and economic objectives and will promote and safeguard Canada's competitiveness and trade objectives;	*a) mettre en oeuvre une politique maritime qui permette au Canada de se doter de l'infrastructure maritime dont il a besoin, qui le soutienne efficacement dans la réalisation de ses objectifs socioéconomiques nationaux, régionaux et locaux aussi bien que commerciaux, et l'aide à promouvoir et préserver sa compétitivité;*
(a.1) promote the success of ports for the purpose of contributing to the competitiveness, growth and prosperity of the Canadian economy;	*a.1) promouvoir la vitalité des ports dans le but de contribuer à la compétitivité, la croissance et la prospérité économique du Canada;*
(b) base the marine infrastructure and services on international practices and approaches that are consistent with those of Canada's major trading partners in order to foster harmonization of standards among jurisdictions;	*b) fonder l'infrastructure maritime et les services sur des pratiques internationales et des approches compatibles avec celles de ses principaux partenaires commerciaux dans le but de promouvoir l'harmonisation des normes qu'appliquent les différentes autorités;*
(c) ensure that marine transportation services are organized to satisfy the needs of users and are available at a reasonable cost to the users;	*c) veiller à ce que les services de transport maritime soient*

	organisés de façon à satisfaire
(d) provide for a high level of safety and environmental protection;	*les besoins des utilisateurs et leur soient offerts à un coût raisonnable;*
(e) provide a high degree of autonomy for local or regional management of components of the system of services and facilities and be responsive to local needs and priorities;	*d) fournir un niveau élevé de sécurité et de protection de l'environnement;*
	e) offrir un niveau élevé d'autonomie aux administrations locales ou régionales des composantes du réseau des services et installations portuaires et prendre en compte les priorités et les besoins locaux;
(f) manage the marine infrastructure and services in a commercial manner that encourages, and takes into account, input from users and the community in which a port or harbour is located;	*f) gérer l'infrastructure maritime et les services d'une façon commerciale qui favorise et prend en compte l'apport des utilisateurs et de la collectivité où un port ou havre est situé;*
(g) provide for the disposition, by transfer or otherwise, of certain ports and port facilities; and	*g) prévoir la cession, notamment par voie de transfert, de certains ports et installations portuaires;*
(h) promote coordination and integration of marine activities with surface and air transportation systems.	*h) favoriser la coordination et l'intégration des activités maritimes avec les réseaux de transport aérien et terrestre.*

[35] Section 5 of the Act defines a number of terms including "airport" and "user":

5. *The definitions in this section apply in this Part.*

"airport"
« aéroport *»*

"airport" means an airport situated in a port.

"letters patent"
« lettres patentes *»*

"letters patent" means letters patent as amended by supplementary letters patent, if any.

"port"
« port *»*

"port" means the navigable waters under the jurisdiction of a port authority and the real property and immovables that the port authority manages, holds or occupies as set out in the letters patent.

"user"
« utilisateur *»*

"user", in respect of a port, means a person that makes commercial use of, or provides services at, the port.

[36] Section 2 defines "port authority":

"port authority"
« administration portuaire *»*

"port authority" means a port authority incorporated or continued under this Act.

[37] Section 7 of the *Act* specifies where a port authority is or is not an agent of the Crown:

7. *(1) Subject to subsection (3), a port authority is an agent of Her Majesty in right of Canada only for the purposes of engaging in the port activities referred to in paragraph 28(2)(*a*).*

Not an agent of Her Majesty

(2) A wholly-owned subsidiary of a port authority is not an agent of Her Majesty in right of Canada unless, subject to subsection (3),

*(*a*) it was an agent of Her Majesty in right of Canada on June 10, 1996; and*

> *(*b*) it is an agent of Her Majesty in right of Canada under an enactment other than this Act.*
>
> *Borrowing restriction*
>
> *(3) A port authority or a wholly-owned subsidiary of a port authority may not borrow money as an agent of Her Majesty in right of Canada.*

[38] Subsection 28(1) of the *Act* provides that, inter alia, the TPA has the powers of a natural person:

> *28. (1) A port authority is incorporated for the purpose of operating the port in respect of which its letters patent are issued and, for that purpose and for the purposes of this Act, has the powers of a natural person.*

[39] Sub-section 28(2)(a) of the *Act* is the provision referred to in section 7 of the *Act* under which an entity like the TPA would be acting as an agent of the Crown. Sub-section 28(2)(b) is directed to activities in respect of which it is not a Crown agent:

> *(2) The power of a port authority to operate a port is limited to the power to engage in*
>
> *(*a*) port activities related to shipping, navigation, transportation of passengers and goods, handling of goods and storage of goods, to the extent that those activities are specified in the letters patent; and*
>
> *(*b*) other activities that are deemed in the letters patent to be necessary to support port operations.*

[40] Section 29 of the *Act* is directed to railways and airports. Sub-section 29(3) specifically deals with airports:

> *(3) Subject to its letters patent, to any other Act, to any regulations made under any other Act and to any agreement with the Government of Canada that provides otherwise, a port authority that operates an airport shall do so at its own expense.*

[41] The Letters Patent issued to TPA pursuant to the *Canada Marine Act* purport to separate the powers exercised by the TPA under paragraph 28(2)(a) of that *Act* (Crown agent) in section 7.1 of the Letters Patent from those exercised under paragraph 28(2)(b) (non-Crown agent) in section 7.2 of the Letters Patent.

[42] Section 7.1 of the Letters Patent, subsections (c), (e) and (p) state:

7.1 Activities of the Authority Related to Certain Port Operations. To operate the port, the Authority may undertake the port activities referred to in paragraph 28(2)(a) of the Act to the extent specified below:	*7.1 Activités de l'Administration liées à certaines opérations portuaires. Pour exploiter le port, l'Administration peut se livrer aux activités portuaires mentionnées à l'alinéa 28(2)a) de la Loi dans la mesure précisée ci-dessous :*
(c) management, leasing or licensing the federal real property described in Schedule B or described as federal real property in any supplementary letters patent, subject to the restrictions contemplated in sections 8.1 and 8.3 and provided such management, leasing or licensing is for, or in connection with, the following:	*c) sous réserve des restrictions prévues aux paragraphes 8.1 et 8.3, gestion, location ou octroi de permis relativement aux immeubles fédéraux décrits à l'Annexe « B » ou dans des lettres patentes supplémentaires comme étant des immeubles fédéraux, à condition que la gestion, la location ou l'octroi de permis vise ce qui suit :*
(i) those activities described in sections 7.1 and 7.2;	*(i) les activités décrites aux paragraphes 7.1 et 7.2;*
(ii) those activities described in section 7.3 provided such activities are carried on by Subsidiaries or other third parties pursuant to leasing or licensing arrangements;	*(ii) les activités décrites au paragraphe 7.3 pourvu qu'elles soient menées par des Filiales ou des tierces parties conformément aux arrangements de location ou d'octroi de permis;*
(iii) the following uses to the extent such uses are not	

described as activities in section 7.1, 7.2 or 7.3:

(A) uses related to shipping, navigation, transportation of passengers and goods, handling of goods and storage of goods;

(B) provision of municipal services or facilities in connection with such federal real property;

(C) uses not otherwise within subparagraph 7.1(c)(iii)(A), (B) or (D) that are described in supplementary letters patent

(D) government sponsored economic development initiatives approved by Treasury Board; provided such uses are carried on by third parties, other than Subsidiaries, pursuant to leasing or licensing arrangements;

(e) granting, in respect of federal real property described in Schedule B or described as federal real property in any supplementary letters patent, road allowances or easements, rights of way or licences for utilities, service or access;

(p) carrying on activities described in section 7.1 on real property other than federal real property described in Schedule C or described as real property other than federal real property in any supplementary letters patent;

(iii) les utilisations suivantes dans la mesure où elles ne figurent pas dans les activités décrites aux paragraphes 7.1, 7.2 ou 7.3:

(A) utilisations liées à la navigation, au transport des passagers et des marchandises et à la manutention et à l'entreposage des marchandises;

(B) prestation de services ou d'installations municipaux relativement à ces immeubles fédéraux;

(C) utilisations qui ne sont pas prévues aux divisions 7.1c)(iii)(A), (B) ou (D) mais qui sont décrites dans des lettres patentes supplémentaires;

(D) projets de développement économique émanant du gouvernement et approuvés par le Conseil du Trésor; pourvu qu'elles soient menées par des tierces parties, à l'exception des Filiales, conformément aux arrangements de location ou d'octroi de permis;

e) octroi d'emprises routières, de servitudes ou de permis pour des droits de passage ou d'accès ou des services publics visant des immeubles fédéraux décrits à l'Annexe « B » ou dans des lettres patentes supplémentaires comme étant des immeubles fédéraux;

> *p) exécution des activités décrites au paragraphe 7.1 sur des immeubles, autres que des immeubles fédéraux, décrits à l'Annexe « C » ou décrits dans des lettres patentes supplémentaires comme étant des immeubles autres que des immeubles fédéraux;*

[43] It must be noted that Schedule B, as referred to in subsection 7.1(c) of the Letters Patent, has been intentionally deleted from the Letters Patent. Schedule C of the Letters Patent describes the airport as "Real Property Other than Federal Real Property".

[44] Section 7.2 of the Letters Patent defines activities under sub-section 28(2)(b) of the *Canada Marine Act*, i.e. non-Crown agent activity. Sub-section 7.2 (j) as amended by Supplementary Letters Patent January 3, 2004 is specifically directed to the operation of the Toronto City Centre Airport.

> *7.2 Activities of the Authority Necessary to Support Port Operations. To operate the port, the Authority may undertake the following activities which are deemed necessary to support port operations pursuant to paragraph 28(2)(b) of the Act:*
>
> *(j) the operation and maintenance of the Toronto City Centre Airport in accordance with the Tripartite Agreement among the Corporation of the City of Toronto, Her Majesty the Queen in Right of Canada and The Toronto Harbour Commissioners dated the 30th day of June, 1983 and ferry service, and the construction operation and maintenance of a bridge or tunnel across the Western Gap of the Toronto harbour to provide access to the Toronto City Centre Airport;*

[45] Air Canada argues that TPA is a "federal board, commission or other tribunal" either because it is a Crown agent under sub-section 28(1)(a) of the *Canada Marine Act* because, as

authorized by section 7.1 of the Letters Patent it is engaged in the "licensing" of slots, or that the source of power under which the TPA was acting was a federal statute, the *Canada Marine Act*, and thus its decisions in the exercise of that power is subject to judicial review.

[46] I will first deal with the Crown agent argument. It is clear that, in enacting sub-sections 28(2)(a) and (b) of the *Canada Marine Act*, Parliament intended that a distinction be made in respect of activities which a corporation such as the TPA could carry out and be a Crown agent, and those which it could not. Those activities were delineated in sections 7.1 and 7.2 of the TPA's Letters Patent.

[47] Sub-sections 7.1(c) and (e) of the Letters Patent relate only to "Federal Real Property" as described in Schedule B to the Letters Patent or in any supplementary letters patent. Schedule B was intentionally deleted, and no supplementary letters patent address the matter. In fact, Schedule C describes the airport as being "Other than" Federal Real Property. Thus, sub-sections 7.1(c) and (e) cannot make the TPA a Crown agent.

[48] Sub-section 7.1(p) addresses "Property Other than Federal Real Property" as described in Schedule C. Schedule C includes the Toronto City Centre Airport. Thus, Air Canada argues, that sub-section is applicable to make the TPA a Crown agent if the allocation of slots is considered to be a licensing activity.

[49] Sub-section 7.2(j), which is part of the "non" Crown agent activity, directly addresses the operation and maintenance of the airport. It is clear that the allocation of slots is a fundamental part

of such an operation. Given this clear language, there can be no doubt that the TPA, in respect of the operation and maintenance of the airport, including the allocation of slots, is intended by the *Canada Marine Act* and Letters Patent created under that *Act*, not to be acting as a Crown agent.

[50] Air Canada's Counsel argued that slots were akin to a licence and should be considered as a section 7.1 "licensing" activity as described by the Letters Patent. I reject this argument. Sub-section 7.2(j) clearly embraces the airport and its operation. No statute or Letters Patent describes a "slot" as a "licence". It cannot have been in the mind of the drafters to separate out the allocation of slots from the operation and maintenance of the airport so as to make the TPA a Crown agent in that narrow respect. As has been expressed many times by the Courts: *"the normal interpretive rule is that a specific provision must prevail over a general one"* e.g. *Canada v. McGregor* (1989), 57 D.L.R. (4th) 317 per Urie J.A. for the Federal Court of Appeal.

[51] Turning to the second argument made as to whether the TPA is a "federal board, commission or other tribunal", the Court must consider what powers were being exercised by the TPA and the source of those powers. The Federal Court of Appeal recently in *Anisman* v *Canada (Border Services Agency)*, 2010 FCA 52 as amended April 29, 2010, has instructed that a two-step exercise has to be conducted. First, it must be determined what jurisdiction or power the body or person seeks to exercise. Second, it must be determined what is the source or the origin of the jurisdiction or power which the body or person seeks to exercise. Nadon JA for the Court wrote at paragraphs 29 and 30:

> *29 The operative words of the s. 2 definition of "federal board, commission or other tribunal" state that such a body or person has, exercises or purports to exercise jurisdiction or powers "conferred by or under an Act of Parliament or by or under an Order made*

> *pursuant to a prerogative of the Crown...". Thus, a two-step enquiry must be made in order to determine whether a body or person is a "federal board, commission or other tribunal". First, it must be determined what jurisdiction or power the body or person seeks to exercise. Second, it must be determined what is the source or the origin of the jurisdiction or power which the body or person seeks to exercise.*
>
> a. *In Judicial Review of Administrative Action in Canada, Vol. 1, looseleaf (Toronto: Canvasback Publishing, 1998) at para. 2:4310, the learned authors, D.J.M. Brown and J.M. Evans, state that in determining whether a body or person is a "federal board, commission or other tribunal", one must look at "the source of a tribunal's authority". They write as follows:*
>
>> - *In the result, the source of a tribunal's authority, and not the nature of either the power exercised or the body exercising it, is the primary determinant of whether it falls in the definition. The test is simply whether the body is empowered by or under federal legislation or by an order made pursuant to a prerogative power of the federal Crown. [...]*

[52] Two earlier decisions of the Federal Court considered the nature of the powers exercised by a port authority: in both cases, the Halifax Port Authority. The first is *Halterm Ltd.* v *Halifax Port Authority* (2000), 184 F.T.R. 16. In that case, the Halifax Port Authority, like the TPA, was created pursuant to the *Canada Marine Act*. The applicant Halterm was a terminal operator providing stevedoring services and equipment used to load and offload vessels. It wanted to renew its leases but found the terms offered by Halifax Port Authority to be unacceptable and sought judicial review. Justice O'Keefe found that the port authority was exercising federal power. He wrote at paragraph 29:

> *29 In the present case, when the Port Authority is leasing or negotiating to lease federal real property to Halterm, it is exercising powers given to it pursuant to the Canada Marine Act. It is not exercising the private powers of a corporation as that wording is used in Cairns, supra. It is exercising the powers specifically given to it in the Canada Marine Act and thus, it is a "federal board, commission or other tribunal" within the Federal*

> *Court Act when negotiating leases. As a result, this Court has jurisdiction to hear Halterm's judicial review application. This ground of the motion is therefore dismissed.*

[53] Subsequently, Justice Mactavish of this Court also had to deal with the Halifax Port Authority in *DRL Vacations Ltd.* v *Halifax Port Authority*, 2005 FC 860, [2006] 3 F.C.R. 516. In that case, the applicant was seeking to lease premises from the port authority to operate a souvenir shop and alleged that it was denied procedural fairness. Justice Mactavish found that the port authority was not acting as a "federal board". She distinguished, and in any event declined to follow, *Halterm.* She wrote at paragraphs 53 to 62:

> ***53*** *While I am satisfied that HPA is an organization with public responsibilities, that is not the end of the matter. It is necessary to go on to examine whether the particular powers which have been exercised in this case are public in nature or are more in the nature of private commercial activity.*
>
> ***54*** *What is in issue in this case is the licensing of port space for what has variously been referred to in these proceedings as a "souvenir shop", a "market" and a "retail outlet". The purpose of the shop was described by counsel as being to "enhance the port experience" of the passengers and crew of cruise ships docking at the Port of Halifax.*
>
> ***55*** *In my view, such a souvenir shop is a purely commercial enterprise, one which is incidental to the HPA's main responsibility for managing port activities relating to shipping, navigation, transportation of goods and passengers and the storage of goods. As such, I find that the HPA was not acting as a "federal board, commission or other tribunal" when it made the decision under review in this case.*
>
> ***56*** *As a consequence, I am satisfied that the Court does not have jurisdiction to deal with this application for judicial review.*
>
> ***57*** *In coming to this conclusion, I am also influenced by the fact that in enacting the Canada Marine Act and in creating the HPA, Parliament clearly intended to ensure that the Port of Halifax is run in a commercially viable fashion. Entitling parties to judicially review every decision made in relation to federally owned port*

property, however incidental that decision may be to the operation of the port itself would, in my view, be the sort of absurd and very inconvenient result contemplated by Justice Thurlow in Wilcox, and, moreover, would be antithetical to the achievement of Parliament's intent in creating the HPA.

58 *The fact that the space in question is on federal land is not determinative of the issue, in my view. A number of the cases referred to above dealt with decisions relating to the expenditure or management of public property -- that is tax dollars. These monies are monies to which ordinary private companies would not have access. Nevertheless, in cases such as Wilcox, Cairns and Toronto Independent Dance Enterprises, the courts have found that the institutions in question were not acting as federal boards, commissions or other tribunals in making the decisions under review.*

59 *In Halterm, the Court was dealing with the lease of real property for a container port terminal, whereas in this case, what is in issue is the licensing of space to be [page534] used for a souvenir shop.*

60 *Halterm is, therefore, arguably distinguishable from the present situation in that the transaction in question in that case was much more directly related to the business of the HPA as a port. In my view, the provision of a souvenir shop for the passengers and crew of cruise ships is considerably more incidental to the business of the Port of Halifax.*

61 *However, for the reasons given, to the extent that Halterm is not distinguishable from the present case, I must respectfully decline to follow it.*

62 *Before closing, I should note that my decision should not be interpreted to mean that the HPA could never be considered to be a "federal board, commission or other tribunal" as contemplated by the Federal Courts Act. It is clear that the question of whether an institution is acting as a "federal board, commission or other tribunal" in a given set of circumstances is one that has to be resolved on a case-by-case basis,*

[54] In the present case, I return to the Letters Patent, which were drafted pursuant to the *Canada Marine Act* and published in the Canada Gazette. The Letters Patent were careful to separate out the operation and maintenance of the airport from other activities to be carried out by the TPA. Subsection 28(1) of that *Act* creates the TPA as a corporate "natural person". Regard must be had to the distinction made by the Federal Court of Appeal in *Aeric, Inc.* v *Chairman of the Board of Directors, Canada Post Corporation*, [1985] 1 F.C. 127 between the exercise of powers expressly mandated by a statue and the exercise of the general powers of management of a corporation. Where a statute expressly mandates that a certain inquiry be conducted or decision made, that is a power reviewable by the Court - general powers of management are not. Ryan J. for the Court wrote at page 138:

> *The decision of the Chairman of the Board which is under review was not made in the exercise of a general power of management conferred on the Canada Post Corporation. His decision was made in the exercise of an authority conferred on him by a regulation approved by the governor in Council pursuant to the Canada Post Corporation Act. The authority is an authority to entertain and dispose of an "appeal". The respondent suggested that the "appeal" is analogous to the sort of procedure often established by a business firm to handle customer complaints. But the procedure under section 6 of the Regulations (which I examine in detail below) is very different from a mere system for settling complaints. The "appeal" provided by section 6 is precisely that: it is an appeal. I am satisfied that the Chairman, in entertaining and disposing of the appeal in this case, is a person within the meaning of that word as it is used in the definition of "federal board, commission or other tribunal" in the Federal Court Act.*

[55] In the present case, the TPA was expressly empowered by its Letters Patent to operate and manage the airport. This is normal business activity. I refer to the decision of the Federal Court of Appeal in *Irving Shipbuilding Inc.* v *Canada (Attorney General)*, 2009 FCA 116, 314 D.L.R. (4th) 340 where that Court warned against judicial interference in circumstances where, even though the

Crown may be involved, normal business activity was being carried on. Evans JA for the Court wrote at paragraph 21:

> *21 The fact that the power of the Minister, a public official, to award the contract is statutory, and that this large contract for the maintenance and servicing of the Canadian Navy's submarines is a matter of public interest, indicate that it can be the subject of an application for judicial review under section 18.1, a public law proceeding to challenge the exercise of public power. However, the fact that the Minister's broad statutory power is a delegation of the contractual capacity of the Crown as a corporation sole, and that its exercise by the Minister involves considerable discretion and is governed in large part by the private law of contract, may limit the circumstances in which the Court should grant relief on an application for judicial review challenging the legality of the award of a contract.*

[56] In the present case, I find that the TPA was not, in respect of the "decisions" under review, acting as a "federal board, commission or other tribunal". It was operating and maintaining the airport as an ordinary commercial activity. This Court lacks jurisdiction to review the "decisions" at issue.

[57] Nonetheless I will address the other issues raised in case of an appeal.

VIII Issue #2: <u>Is Air Canada a "party directly affected" who has standing to seek judicial review of the "decisions" at issue?</u>

[58] I will consider this issue on the assumption that the TPA is, contrary to what I have found, a "federal board, commission or other tribunal".

[59] Section 18 of the *Federal Courts Act* is silent as to who can apply for judicial review except, in subsection 18(3), which directs that remedies can only be obtained by application for judicial review under section 18.1. Sub-sections 18.1(1) and (2) state that an application for judicial review can only be brought by the Attorney General of Canada or anyone "directly affected".

[60] For some time, it has been considered that a commercial interest alone was not sufficient to make a person "directly affected" such that they would have standing to seek judicial review. The leading case often relied upon is *Rothmans of Pall Mall Canada Ltd.* v *Canada (Minister of National Revenue)*, [1976] 2 F.C. 500. In that case, the Federal Court of Appeal dismissed an application for judicial review of an excise tax decision respecting certain configurations of cigarettes manufactured by competitors of the applicant, but not the applicant. LeDain JA for the Court wrote, at paragraphs 12, 13, 14 and 16:

> *12 The complaint of the appellants is that the change in departmental policy was adopted without first giving them an opportunity to be heard and that it had the effect of conferring a competitive advantage on the respondent companies by permitting them to market a longer cigarette for the same amount of excise duty as is paid by the appellants. The appellants do not contend, nor is there any evidence to suggest, that they themselves have had any interest in marketing a cigarette with a tobacco portion of less than four inches but an overall length, including the filter tip, of more than four inches. They do not seek the interpretation which they contend to be the correct one in order to permit them to do anything in particular that they are not able to do now, but rather to prevent the respondent companies from doing something which is thought to give the latter a commercial advantage.*
>
> *13 I am in agreement with the learned Trial Judge that such an interest is not sufficient to give the appellants the required status or locus standi to obtain any of the relief sought in their application. The appellants do not have a genuine grievance entitling them to challenge by legal proceedings the interpretation which the respondent officials have given to the definition of "cigarette" in section 6 of the Excise Act for purposes of their*

administrative application of the Act. Such interpretation does not adversely affect the legal rights of the appellants nor impose any additional legal obligation upon them. Nor can it really be said to affect their interests prejudicially in any direct sense. If it permits the respondent companies to do something which the appellants are not doing, it is because the appellants choose not to do it.

14 The appellants do not derive any rights, procedural or otherwise, from what may have been their own assumption as to how section 6 of the Excise Act would be applied to a cigarette in which the tobacco portion is less than four inches long but the overall length, including the filter tip, is more than four inches. Before May or June, 1975, officials of the Department had not been called on to consider this question so there was no basis in their action for such an assumption. In so far as the interpretation is to be considered a "change" of administrative policy it can only be considered as such in relation to the internal memorandum circulated by Horner at the beginning of June. When the question was raised by the respondent companies in May and June the departmental officials were under no duty to advise the appellant companies and offer them an opportunity to make representations. I know of no authority which supports a general duty, when considering a change of administrative policy to be applied in individual cases, to notify and offer anyone who may be interested an opportunity to make representations.

. . .

16 The circumstances in the present case are quite different and afford no basis for a conclusion that the respondent officials acted unfairly toward the appellants. There had been no previous representations by the appellants as to how the definition in section 6 in the Excise Act should be applied to cigarettes of the kind introduced by the respondent companies. There had been no undertaking to the appellants with respect to this question. Nor did such practice as there was with respect to industry representation give any reasonable expectation that representations of the kind made by the respondent companies, involving a matter of a competitive nature, were such as would come from the industry as a whole or be promptly communicated to the industry as a whole. In any event, the appellant companies learned of the proposed policy soon after it was adopted and had an opportunity to make representations.

[61] I followed this case, as well as others in *Aventis Pharma Inc.* v *Canada (Minister of Health)*, 2005 FC 1396, 45 C.P.R. (4th) 6. I also cited *Merck Frosst Canada Inc.* v *Canada (Minister of National Health and Welfare)* (1997), 146 F.T.R. 249 where Hugessen J. wrote at paragraph 11:

> *11 Some of the cases have used concepts such as absence of standing and non-justiciability as a convenient shorthand to describe this limitation on the patentee's rights. Seizing on this the applicants argue, based on such cases as Canada v. Finlay, [1986] 2 S.C.R. 607, Canada v. Borowski, [1981] 2 S.C.R. 575 and Operation Dismantle v. Canada, [1985] 1 S.C.R. 441, that they do indeed have standing and that the issues that they raise are, in fact, justiciable. The argument mistakes the form for the substance. It is not lack of standing or justiciability in the strict sense of those words which prevents the applicants from raising non-compliance with the health and safety concerns of the Food and Drug Act, and Regulations; it is simply that those matters are of no concern to them and cannot be raised by them in an attack on a decision of the Minister to issue an NOC. It is the Minister himself who is charged with the protection of the public health and safety and no private interest of the applicants arises from his alleged failure to perform his duties with respect to other persons.*

[62] Subsequently in *Ferring Inc.* v *Canada (Minister of Health)*, 2007 FC 300, [2008] 1 F.C.R. 19, I found that a mere economic interest was insufficient to allow standing. I wrote at paragraphs 99 and 100:

> *99 Section 18.1 [as enacted by S.C. 1990, c. 8, s. 5; 2002, c. 8, s. 27] of the* Federal Courts Act*, R.S.C., 1985, c. F-7 [s. 1 (as am.* idem*, s. 14)] affords any person "directly affected" by a decision of a federal board, commission or other tribunal the right to seek judicial review of that decision. As discussed in respect of subsections 3(1) of the NOC Regulations, a generic is not afforded an opportunity to intervene in proceedings respecting the listing of a patent or to seek de-listing since, at that point, no particular generic can be seen to be "directly affected." This is consistent with the law expressed in* Rothmans of Pall Mall Canada Limited v. Minister of National Revenue (No. 1)*, [1976] 2 F.C. 500 (C.A.) that a person who is simply a member of a class generally affected by a decision, without more, has no status to seek judicial review (see also* Apotex Inc. v. Canada (Governor in Council)*, 2007 FC 232).*

> *100 It has been found that a mere economic interest is insufficient to support status to seek judicial review (*Aventis Pharma Inc. v. Canada (Minister of Health) *(2005), 45 C.P.R. (4th) 6 (F.C.), at paragraph 13). That decision was appealed but the appeal was not proceeded with. In that case, the innovator, Aventis, had apparently failed to list its patent in a timely fashion. The generic Novopharm was awarded an NOC by the Minister. Aventis sought judicial review of that decision. The Minister sought to strike out those portions of Aventis' application challenging the issuance of an NOC.*

[63] I was reversed on this point by the Federal Court of Appeal in *Ferring Inc.* v *Canada (Minister of Health)*, 2007 FCA 276, 370 N.R. 263, where Richard CJ for the Court wrote, at paragraph 5:

> *5 We differ from Justice Hughes on only one point. As an alternative basis for dismissing the application of Ferring Inc., Justice Hughes concluded that Ferring Inc. did not have standing to bring an application for judicial review of the decision of the Minister. We do not agree. In our view, Ferring Inc. did have standing to challenge that decision because it was made by the Minister in the course of his administration of the NOC Regulations. However, that does not alter the outcome because Justice Hughes dismissed the application of Ferring Inc. on the merits.*

[64] The matter was recently reviewed by the Federal Court of Appeal in *Irving Shipbuilding Inc.* v *Canada (Attorney General)*, 2009 FCA 116, 314 D.L.R. (4th) 340. In that case, a subcontractor challenged an award of a contract. The subcontractor argued that it would have been engaged by the contractor who lost the bid. The challenge was on the basis of lack of procedural fairness. The Trial Judge found that the subcontractor did not have standing. The Court of Appeal, Evans J.A. writing for the Court, considered the issue of standing on the basis that it had to be addressed in context; in that case, in the context of procedural fairness, and that the court should not become

entangled in a semantic wasteland nor attempt to formulate or apply various “tests”. He wrote at paragraphs 28, 32 and 33:

> *28 In my view, the question of the appellants' standing should be answered, not in the abstract, but in the context of the ground of review on which they rely, namely, breach of the duty of procedural fairness. Thus, if the appellants have a right to procedural fairness, they must also have the right to bring the matter to the Court in order to attempt to establish that the process by which the submarine contract was awarded to CSMG violated their procedural rights. If PWGSC owed the appellants a duty of fairness and awarded the contract to CSMG in breach of that duty, they would be "directly affected" by the impugned decision. If they do not have a right to procedural fairness, that should normally conclude the matter. While I do not find it necessary to conduct an independent standing analysis, I shall briefly address two issues that arose from the parties' submissions.*
>
> ...
>
> *32 To attach the significance urged by the respondents to Parliament's choice of the words "directly affected", rather than any of the common law standing requirements ("person aggrieved" or "specially affected", for example) would, in my view, ignore the context and purpose of the statutory language of subsection 18.1(1). As the Supreme Court of Canada said recently in Khosa (at para. 19):*
>
> - *... most if not all judicial review statutes are drafted against the background of the common law of judicial review. Even the more comprehensive among them ... can only sensibly be interpreted in the common law context ...*
>
> *33 Moreover, since all these terms are somewhat indeterminate, Parliament's choice of one rather than another should be regarded as of relatively little importance. See also Thomas A Cromwell, Locus Standi: A Commentary on the Law of Standing in Canada (Toronto: Carswell, 1986) at 163-64 ("Locus Standi"), especially his apt description (at 163) of the "semantic wasteland" to be traversed by a court in attempting to apply the various "tests" for standing, both statutory and common law. Although directed at differences between the French and English texts of subsection 18.1(4) of the Federal Courts Act, the following statement in Khosa (at para. 39) seems equally apt in the interpretation of the words "directly affected" in subsection 18.1(1):*

- *A blinkered focus on the textual variations might lead to an interpretation at odds with the modern rule [of statutory interpretation] because, standing alone, linguistic considerations ought not to elevate an argument about text above the relevant context, purpose and objectives of the legislative scheme.*

[65] From all of the foregoing, I conclude that there is no simple formula whereby a person having a commercial interest can be said to lack standing simply on that basis. The context of the situation and the basis for judicial review must be considered.

[66] Here Air Canada has had a degree of involvement with the BBTCA and the TPA for some considerable time. Air Canada has, through affiliates, operated from that airport. It has been involved in continuing discussions with the TPA, who is in charge of operating and maintaining that airport. The basis upon which judicial review is sought rests on allegations of lack of procedural fairness. I find that Air Canada has standing to bring these applications but only if TPA were a "federal board, commission or other tribunal", which I have found otherwise.

IX Issue #3: <u>Were the "decisions" of December 24, 2009 and April 9, 2010 of a kind that can be the subject of judicial review in this Court?</u>

[67] Section 18.1 of the *Federal Courts Act* permits judicial review of a "decision or an order" of a "federal board, commission or other tribunal". In addressing this issue I will assume that, contrary to my finding, the TPA is such a "federal board, commission or other tribunal".

[68] When dealing with a body that is clearly a “federal board, commission or other tribunal” the Courts have been quite strict in looking at the appropriate legislation and considering whether what has been done is a “decision” as mandated by that legislation. If it is not, then there can be no judicial review. An example is *Democracy Watch* v *Canada (Conflict of Interest and Ethics Commissioner)*, 2009 FCA 15, 387 N.R. 365 (F.C.A.) where Richard CJ for the court wrote at paragraphs 10 and 11:

> *10 Where administrative action does not affect an applicant's rights or carry legal consequences, it is not amenable to judicial review (*Pieters v. Canada (Attorney General)*, [2007] F.C.J. No. 746, 2007 FC 556 at paragraph 60;* Rothmans, Benson & Hedges Inc. v. Canada (Minister of National Revenue*) (1998), 148 F.T.R. 3 at paragraph 28; see also* Canadian Institute of Public and Private Real Estate Cos. v. Bell Canada*, [2004] F.C.J. No. 1103, 2004 FCA 243 at paragraphs 5 & 7).*
>
> *11 The applicant has no statutory right to have its complaint investigated by the Commissioner and the Commissioner has no statutory duty to act on it. There is no provision in the Act that allows a member of the public to request that the Commissioner begin an examination. Indeed, the Act specifically contemplates the route which a member of the public should take if it wishes to present information to the Commissioner:*
>
> - *44....*
> - *(4) In conducting an examination, the Commissioner may consider information from the public that is brought to his or her attention by a member of the Senate or House of Commons indicating that a public office holder or former public office holder has contravened this Act. The member shall identify the alleged contravention and set out the reasonable grounds for believing a contravention has occurred. ...*
>
> * * *
>
> - *44. [...]*
> - *(4) Dans le cadre de l'étude, le commissaire peut tenir compte des renseignements provenant du public qui lui sont communiqués par tout parlementaire et qui portent à croire que l'intéressé a contrevenu à la présente loi. Le parlementaire doit*

> *préciser la contravention présumée ainsi que les motifs raisonnables qui le portent à croire qu'une contravention a été commise. [...]*

[69] However, a broader approach has been taken by the courts where the functions in question were within the overall scope of the enabling legislation. Such a situation was considered by Justice Mactavish of this Court in *Shea* v *Canada (Attorney General)* (2006), 296 F.T.R. 81, where this Court was asked to review procedures respecting the selection of persons for managerial positions. She wrote at paragraphs 42 to 44:

> *42 The absence of a "decision" is not a bar to an application for judicial review under the* Federal Courts Act*, as Section 18.1 provides the Court with jurisdiction to grant relief to a party affected by "a matter" involving a federal board, commission or other tribunal:* Canadian Museum of Civilization Corp. v. Public Service Alliance of Canada, Local 70396 *[2006] F.C.J. No. 884, 2006 FC 703, at para. 47.*
>
> *43 The role of this Court thus extends beyond the review of formal decisions, and extends to the review of "a diverse range of administrative action that does not amount to a 'decision or order', such as subordinate legislation, reports or recommendations made pursuant to statutory powers, policy statements, guidelines and operating manuals, or any of the myriad forms that administrative action may take in the delivery by a statutory agency of a public programme.":* Markevich v. Canada*, [1999] 3 F.C. 28 (QL) (T.D.), at para. 11, reversed on other grounds, [2001] F.C.J. No. 696, reversed on other grounds, [2003] S.C.J. No. 8. See also* Nunavut Tunngavik Inc. v. Canada (Attorney General) *[2004] F.C.J. No. 138, 2004 FC 85, at para. 8.*
>
> *44 A wide range of administrative actions have been found to come within the Court's jurisdiction: see, for example* Gestion Complexe Cousineau (1989) Inc. v. Canada (Minister of Public Works and Government Services)*, [1995] 2 F.C. 694;* Morneault v. Canada (Attorney General)*, [2001] 1 F.C. 30 (C.A.), and* Larny Holdings (c.o.b Quickie Convenience Stores) v. Canada (Minister of Health)*, [2003] 1 F.C. 541 (T.D.) .), 2002 FCT 750.*

[70] Mactavish J dismissed that application as premature.

[71] Most importantly, *Irving Shipbuilding* must be considered. Evans JA for the Court considered the issue of whether there existed a "reviewable decision" in the context of the enabling legislation. In that case, there was a statutory authority imposed on the Minister to award contracts for, in that case, submarines. Evans JA said that where the exercise of the Minister's discretion is given considerable scope, the Court should be reluctant to step in. However, where a procurement process is closely linked to a statutory power, the greater the likelihood of judicial review. Evans JA wrote, at paragraphs 21 to 25:

> *21 The fact that the power of the Minister, a public official, to award the contract is statutory, and that this large contract for the maintenance and servicing of the Canadian Navy's submarines is a matter of public interest, indicate that it can be the subject of an application for judicial review under section 18.1, a public law proceeding to challenge the exercise of public power. However, the fact that the Minister's broad statutory power is a delegation of the contractual capacity of the Crown as a corporation sole, and that its exercise by the Minister involves considerable discretion and is governed in large part by the private law of contract, may limit the circumstances in which the Court should grant relief on an application for judicial review challenging the legality of the award of a contract.*
>
> *22 This Court reached a similar conclusion in* Gestion Complexe Cousineau (1989) Inc. v. Canada (Minister of Public Works and Government Services), *[1995] F.C.J. No. 735, [1995] 2 F.C. 694 (C.A.) at paras. 7-17 ("*Gestion Complexe*"). The Court held that the exercise by a Minister of a statutory power to call for tenders and to enter into contracts for the lease of land by the Crown could be the subject of judicial review under the former paragraph 18(1)(*a*) of the* Federal Court Act *as a decision of "a federal board, commission or other tribunal".*
>
> *23 Although not addressing the particular issue in dispute in the present case, Justice Décary, writing for the Court, also emphasized the difficulties facing an applicant in establishing a ground of review that would warrant the Court's intervention in the procurement process through its judicial review jurisdiction. Thus, he said (at para. 20):*

> - *As by definition the focus of judicial review is on the legality of the federal government's actions, and the tendering procedure was not subject to any legislative or regulatory requirements as to form or substance, it will not be easy, in a situation where the bid documents do not impose strict limitations on the exercise by the Minister of his freedom of choice, to show the nature of the illegality committed by the Minister when in the normal course of events he compares the bids received, decides whether a bid is consistent with the documents or accepts one bid rather than another.*
>
> *24 This view of the Court's jurisdiction is consistent with that generally adopted by other courts in Canada: see Paul Emanuelli,* Government Procurement*, 2nd ed. (Markham, Ontario: LEXISNEXIS, 2008) at 697-706, who concludes (at 698):*
>
> > - *As a general rule, the closer the connection between a procurement process and the exercise of a statutory power, the greater the likelihood that the activity can be subject to judicial review. Conversely, to the extent that the procurement falls outside the scope of a statutory power and within the exercise of government's residual executive power, the less likely that the procurement will be subject to judicial review.*
> >
> > *English authorities on public contracts and judicial review are considered in Harry Woolf, Jeffrey Jowell and Andrew Le Sueur,* de Smith's Judicial Review*, 6th ed. (London: Sweet & Maxwell Ltd., 2007), 138-45, where courts generally require an "additional public element" before concluding that the exercise by a public authority of its contractual power is subject to judicial review, even when the power is statutory.*
>
> *25 Consequently, on the basis of both authority and principle, I agree that the award of the submarine contract by the Minister of PWGSC is reviewable under section 18.1 of the* Federal Courts Act *as a decision of a "federal board, commission or other tribunal" made in the exercise of "powers conferred by or under an Act of Parliament" (section 2).*

[72] In the present case, the TPA is given a broad mandate respecting the operation and maintenance of the airport. No specific procedural requirements are set down. As I have found, TPA

is acting as any other private sector commercial corporation and not as a “federal board, commission or other tribunal”.

[73] The “decisions” at issue here are not really “decisions” at all. They do not determine anything. The bulletin of December 24, 2009 is an announcement that certain studies had been conducted and that “now that we have the results in hand [the TPA] will solicit formal business proposals” and that “an independent, IATA-accredited slot co-ordinator” will be appointed. The bulletin stated that further announcements will be made.

[74] In the context, there is no “decision or order” made. An announcement was made that soon proposals will be solicited by the TPA. In fact, that was done and Air Canada submitted a proposal. In fact, ACL, an IATA-accredited slot co-ordinator was retained. Air Canada has not complained of that appointment. There simply is no “decision or order” in the December 2009 bulletin.

[75] The April 2010 bulletin requested interested parties (such as Air Canada) “to participate in the RFP (Request for Proposal) process” and announced the appointment of ACL as slot co-ordinator. Again there is no “decision or order” affecting Air Canada. In fact, Air Canada submitted a Proposal and has made no complaint as to the appointment of ACL. In submitting its Proposal, Air Canada agreed with TPA’s guiding principles and appointment of ACL as slot co-ordinator as set out in its response dated May 14, 2010.

[76] The steps taken by TPA, as announced in its December 2009 and April 2010 bulletins, are those respecting the normal commercial operation of the airport. They are not steps specifically

mandated by any legislation, nor are those steps specifically directed to Air Canada. They are not "decisions or orders" of the type for which judicial review is available in this Court.

X Issue #4: <u>Has Air Canada properly pleaded the grounds upon which it is now relying for judicial review?</u>

[77] Both of these cases have proceeded by way of an application. Rule 301 of the Federal Courts Rules sets out what the Notice of Application must contain:

> *301. An application shall be commenced by a notice of application in Form 301, setting out*
>
> *(a) the name of the court to which the application is addressed;*
>
> *(b) the names of the applicant and respondent;*
>
> *(c) where the application is an application for judicial review,*
>
> > *(i) the tribunal in respect of which the application is made, and*
> >
> > *(ii) the date and details of any order in respect of which judicial review is sought and the date on which it was first communicated to the applicant;*
>
> *(d) a precise statement of the relief sought;*
>
> *(e) a complete and concise statement of the grounds intended to be argued, including a reference to any statutory provision or rule to be relied on; and*
>
> *(f) a list of the documentary evidence to be used at the hearing of the application.*

[78] A respondent does not need to file anything more than a Notice of Appearance as set out in Rule 305.

> *305. A respondent who intends to oppose an application shall, within 10 days after being served with a notice of application, serve and file a notice of appearance in Form 305.*

[79] The jurisprudence varies widely as to what a Notice of Application should set out and how detailed it must be. The reason for such varied jurisprudence is because of the various sorts of matters that are considered by way of an application: immigration, public service disputes, citizens challenging government decisions, copyright infringement and, in cases such as this, complex commercial matters. Subsection 18.4(1) of the *Federal Courts Act* directs that an application shall be heard and determined in a summary way without delay. However, subsection 18.4(2) permits an application to be converted into an action, if appropriate. An earlier application brought by Jazz Air was converted into an action and has since been abandoned.

[80] Rule 301 requires a precise statement of the relief sought and a complete and concise statement of the grounds intended to be argued. Rule 75 permits a document, for instance, a Notice of Application, to be amended. The purpose in clearly setting out the relief sought and grounds to be argued is not only that the other parties will know the case to be met and not be caught by surprise, but also so that the Court hearing the matter will know what issues it will have to consider and determine. The Court does not wish to be confronted at the hearing with a new argument or different relief to be sought. An appellate Court should not be confronted with an assertion that the Trial Judge did not appreciate the un-pleaded argument made or direct the reasons and judgement to new or different arguments or relief sought.

[81] The Court has, for instance, in complex cases brought under the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133, taken a strict position respecting not only a Notice of

Allegation, which is not a Court document, but also the Notice of Application instituting the Court Procedure. As an example, there is the decision of Layden-Stevenson J (as she then was) in *AstraZeneca AB* v *Apotex Inc.*, 2006 FC 7, 46 C.P.R. (4th) 418, where she wrote at paragraphs 11, 18 and 19:

> *11 Astra argued, both in its written submission and in oral argument, but did not plead, reliance on the doctrine of issue estoppel. After hearing from both parties, I invited Astra to consider (prior to its reply) whether it wished to abandon its position. It did not. I will therefore address this question.*
>
> **…**
>
> *18 I reject Astra's argument that the requirement in Rule 301(e) can be characterized as a technical argument that elevates form over substance. The rule mandates that an application is to be commenced by a notice of application that must set out a complete and concise statement of the grounds intended to be argued. I also reject the submission that the jurisprudence does not evince the application of the rule to proceedings brought under the Regulations. In this respect, I refer specifically to Pharmacia Inc. et al. v. Minister of National Health and Welfare et al. (1995), 60 C.P.R. (3d) 328 (F.C.T.D.) at pp. 339, 340 aff'd. (1995), 64 C.P.R. (3d) 450 (F.C.A.) at paragraph 1. See also: Bayer AG et al. v. Apotex Inc. et al. (2003), 29 C.P.R. (4th) 143 (F.C.) and Pfizer Canada Inc. and Pfizer Inc. v. Apotex Inc. and the Minister of Health, [2005] F.C.J. No. 1730, 2005 FC 1421.*
>
> *19 If the intervening decision of the Court of Appeal crystallized Astra's issue estoppel argument, as alleged, Astra could have utilized Rule 75 which provides that the Court may on motion, at any time, allow a party to amend a document, on such terms as will protect the rights of all parties. Rule 75 applies to all proceedings. An application is a proceeding (see: Rules 61 and 300). Indeed, Astra was aware of Rule 75 for it utilized it in Court File No. T-1747-00, a matter that concerned the same tablets and the same parties, in its application for an order of prohibition under the Regulations. As for the timing, as Mr. Radomski notes, the Federal Court of Appeal's decision was issued on November 3, 2003. The evidence in this matter was far from complete at that time. Dr. Lindquist's (Astra's expert witness) second affidavit was not sworn until April 15, 2004. Apotex filed four affidavits after that date and Dr. Lindquist's third affidavit was not sworn until*

> *September 24, 2004. At no point, did Astra seek to amend its notice of application.*

[82] However, the Courts have also taken a more flexible approach, particularly where no party has been taken by surprise and some general wording contained in the grounds can be taken to support the arguments made at the hearing. An example of this approach is that taken by de Montigny J in *Kinsey* v *Canada (Attorney General)*, 2007 FC 543, 313 F.T.R. 88 where he wrote at paragraphs 31 to 34:

> *31 Before turning to the substantive issues in this application, I must deal with two preliminary objections made by the respondents. First, counsel argued the constables did not raise the main grounds of their application in either their notice of application or supporting affidavits. Rather, they only raised them in their application records for the first time. Counsel cited* Williamson v. Canada (Attorney General)*, [2005] F.C.J. No. 1186, 2005 FC 954, for the proposition that a party cannot raise issues on judicial review that were not raised in his initial notice of application and supporting affidavits.*
>
> *32 Rule 301(e) of the* Federal Courts Rules*, SOR/98-106 (the Rules), states that applications are commenced by a notice of application setting out,* inter alia*, "a complete and concise statement of the grounds intended to be argued, including a reference to any statutory provision or rule to be relied on." This rule is meant to give a respondent the opportunity to address the grounds of review in his affidavit and ensure no one is taken by surprise.*
>
> *33 In the present case, the applicants submitted in their notices of application that the Commissioner had erred in fact and in law, and had breached a principle of natural justice or procedural fairness. This is no doubt a cryptic way to set out the grounds of review. It reflects, unfortunately, a practice that is becoming more and more common - to simply paraphrase the text of s. 18.1 of the* Federal Courts Act *as the grounds for the application. Such a practice must definitely be discouraged, and counsel should strive to particularize the grounds they intend to argue to conform to the spirit of the Rules. This would certainly help both parties frame their arguments more precisely from the outset and eventually focus the debate.*

> *34 Having said this, I am not prepared to refuse considering the constables' arguments on this basis. First of all, the respondents have not provided any evidence tending to demonstrate that they were taken by surprise or prejudiced in preparing their record or submissions. In light of the fact that the constables' careers are at stake, I would also be extremely reluctant to prevent them from making all the submissions they articulated in their original memorandum. A delay could have been granted if the respondents felt it was necessary, but none was requested. Indeed, counsel for the respondents did not really push that point at the hearing.*

[83] In the present application, Air Canada's Counsel, at the hearing, expressed the relief sought differently from that set out in either Notice of Application. Air Canada now wants the whole allocation of slots process set aside, including the 2010 CCOA between TPA and Porter. It wants a new process begun in which TPA "consults with" Air Canada. The grounds for this relief, as argued at the hearing, were that Air Canada had a right to be consulted essentially because it had a "legitimate expectation" that it would be consulted and that slot allocation decisions made in its absence are a nullity. Further, Air Canada argues that it was unaware, until the evidence was provided by the Respondents in the second application, that a new agreement, the 2010 CCOA, had been entered into.

[84] The Respondents, in their written material and in their argument, have met Air Canada's arguments as to a right to be consulted and had legitimate expectations that it would be. Therefore I will deal with them.

[85] Air Canada raised other arguments, including lack of proper reasons and lack of "formal" or "substantive" reasonableness. These grounds were not set out in its Notice of Application and only the latter, "formal" and "substantive" reasonableness, was raised and met in written and oral

argument. I will deal with these arguments in case of an appeal, but I will nonetheless dismiss them for lack of a proper pleading.

XI Issue #5: Was there an obligation on the Toronto Port Authority to consult with Air Canada before making the "decisions" of December 24, 2009 and April 9, 2010?

[86] The argument made by Air Canada in support of its allegation that it should have been consulted before either of the two "decisions" were made by TPA, is convoluted.

[87] Air Canada points to the Worldwide Scheduling Guidelines formulated by IATA which contains provisions such as section 4.6 to the effect that where a change of level in the manner in which slots are to be allocated is contemplated, "interested parties should be consulted". Air Canada says that TPA's December announcement which stated that an "IATA-accredited slot co-ordinator "would shortly be appointed" was an indication that the TPA would adhere to IATA guidelines. Further, Air Canada says that its affiliate, Jazz, was offered (but never signed) a draft CCOA by TPA in 2006 which contained a provision, article 5.4(f), that Jazz would acknowledge that the airport is "an IATA-constrained airport". Similar language appears in the 2005 CCOA between Porter and TPA but not in the 2010 CCOA between those parties.

[88] The Respondents argue that it is too far a stretch to say that TPA was in any way obligated to follow IATA protocol. It is not a member of IATA and the airport is not an IATA affiliated airport. Further, they argue that the IATA protocol is just a guideline and in the circumstances only users, and not prospective users, of the airport are recommended for consultation. Yet further, the

reference in a draft contract, never signed, to an affiliate of Air Canada several years ago to IATA, and the reference in the December bulletin to an IATA-accredited slot co-ordinator, do not in any way give rise to any obligation assumed by the TPA to follow IATA protocol nor to any reasonable expectation by Air Canada that this would be done.

[89] I have not set out in detail other references to IATA pointed out by Air Canada's Counsel in other TPA documents. Those documents were never seen by Air Canada or any affiliate before the evidence was presented in these proceedings, and the references are as fleeting as those in the documents discussed above.

[90] There clearly was no obligation imposed upon, nor undertaken by, TPA to follow rigorously or at all any IATA protocol. Did Air Canada have "reasonable expectation" that it would?

[91] The doctrine of reasonable or legitimate expectation was considered recently by the Supreme Court of Canada in two decisions. The first is *Mount Sinai Hospital Centre v Quebec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 S.C.R. 281 in which Binnie J for the Court wrote that an existing permit holder was owed a duty of fairness by the permit issuer when modified permits were to be granted. A party has a right to procedural fairness dependent on the nature of that party's interest and the nature of the power exercised by the authority. The remedy, however, is to grant procedural relief even though such relief may result in substantive relief. Binnie J wrote at paragraphs 18, 29, 30, 35 and 36:

> *18 If the respondents did not have a "right" to a modified permit, they nevertheless had a direct financial interest in the outcome of their application sufficient to trigger the duty of procedural fairness. They were, after all, existing permit holders.*

Their request was for permit modifications. As stated by Le Dain J. in Cardinal v. Director of Kent Institution, supra, at p. 653:

- *This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual...*

...

29 Under our case law the availability and content of procedural fairness are generally driven by the nature of the applicant's interest and the nature of the power exercised by the public authority in relation to that interest: Brown and Evans, supra, p. 7-13 et seq.; D. J. Mullan, "'Confining the Reach of Legitimate Expectations' Case Comment: Sunshine Coast Parents for French v. School District No. 46 (Sunshine Coast)" (1991), 44 Admin. L.R. 245, at p. 248. The doctrine of legitimate expectations, on the other hand, looks to the conduct of the [page304] public authority in the exercise of that power (Old St. Boniface, supra, at p. 1204) including established practices, conduct or representations that can be characterized as clear, unambiguous and unqualified (Brown and Evans, supra, at p. 7-41). The expectations must not conflict with the public authority's statutory remit.

30 The doctrine of legitimate expectations is sometimes treated as a form of estoppel, but the weight of authority and principle suggests that an applicant who relies on the doctrine of legitimate expectations may show, but does not necessarily have to show, that he or she was aware of such conduct, or that it was relied on with detrimental results. This is because the focus is on promoting "regularity, predictability, and certainty in government's dealing with the public": S. A. de Smith, H. Woolf and J. Jowell, Judicial Review of Administrative Action (5th ed. 1995), at p. 417, to which the editors add, at p. 426, that insisting on estoppel-type requirements would

- *involve unfair discrimination between those who were and were not aware of the representation and would benefit the well-informed or well-advised. It would also encourage undesirable administrative practice by too readily relieving decision-makers of the normal consequences of their actions.*

The High Court of Australia espouses a similar view:

- *But, more importantly, the notion of legitimate expectation is not dependent upon any principle of estoppel. Whether the Minister can be estopped in the exercise of his discretion is another question; it was not a question raised by the appellant. Legitimate expectation does not depend upon the knowledge and state of mind of the individual concerned, although such an expectation may arise from the conduct of a public authority towards an individual...*

- *(Haoucher v. Minister for Immigration, Local Government and Ethnic Affairs (1990), 19 A.L.D. 577, per Toohey J., at p. 590)*
  See also Minister of State for Immigration and Ethnic Affairs v. Teoh (1995), 183 C.L.R. 273 (H.C.).

...

35 In affirming that the doctrine of legitimate expectations is limited to procedural relief, it must be acknowledged that in some cases it is difficult to distinguish the procedural from the substantive. In Bendahmane v. Canada, supra, for example, a majority of the Federal Court of Appeal considered the applicant's claim to the benefit of a refugee backlog reduction program to be procedural (p. 33) whereas the dissenting judge considered the claimed relief to be substantive (p. 25). A similarly close call was made in Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System), [1996] 3 F.C. 259 (T.D.). An undue focus on formal classification and categorization of powers at the expense of broad principles flexibly applied may do a disservice here. The inquiry is better framed in terms of the underlying principle mentioned earlier, namely that broad public policy is pre-eminently for the Minister to determine, not the courts.

36 The classification of relief as "substantive" however should be made in light of the principled basis for its exclusion rather than as a matter of form. Where, as in Bendahmane v. Canada, relief can reasonably be characterized as procedural in light of the underlying principle of deference on matters of substantive policy, then generally speaking it should be.

[92] The matter was addressed again by the Supreme Court of Canada two years later in

Canadian Union of Public Employees (C.U.P.E.) v *Ontario (Minister of Labour),* 2003 SCC 29,

[2003] 1 S.C.R. 539 where Binnie J for the majority (there were several in dissent) wrote that the doctrine of legitimate expectations required that the Court consider whether there were established practices, conduct or representations that could be characterized as clear, unambiguous and unqualified. He wrote at paragraph 131:

> *131 The doctrine of legitimate expectation is "an extension of the rules of natural justice and procedural fairness":* Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 557. It looks to the conduct of a Minister or other public authority in the exercise of a discretionary power including established practices, conduct or representations that can be characterized as clear, unambiguous and unqualified, that has induced in the complainants (here the unions) a reasonable expectation that they will retain a benefit or be consulted before a contrary decision is taken. To be "legitimate", such expectations must not conflict with a statutory duty. See:* Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170;* Baker, supra*;* Mount Sinai, supra*, at para. 29; Brown and Evans,* supra*, at para. 7:2431. Where the conditions for its application are satisfied, the Court may grant appropriate procedural remedies to respond to the "legitimate" expectation.*

[93] In the present case, I find no clear, unambiguous or unqualified established practice or conduct or representation by the TPA. Notwithstanding Air Canada's Counsel's able argument, there is simply insufficient evidence upon which this Court can find that Air Canada had any legitimate expectation that it would be consulted by TPA before any decision was made as to slot allocation.

[94] I add two matters. First, the evidence is clear that throughout the relevant time period there were meetings and correspondence with and between TPA and Air Canada. Air Canada has never been reluctant to make its views known to the TPA.

[95] The second matter is that Air Canada has provided no evidence as to what it would say if a broader reaching consultation was to be Ordered. We do know that it wants more slots, including slots at favourable times. It already told TPA that. Air Canada's Counsel, Ms. Batner, made a considerable presentation as to how, in her view, the number of slots could be increased; particularly if adjustments were made to the "quiet time" slots. I am in no position to evaluate such submissions, even if relevant. There is no evidence to support those submissions. I have no idea whether the submissions take into account all the relevant factors and constraints. Air Canada has provided no evidence to support these submissions and no evidence that these are the submissions that it would have made to TPA, or that it was in any way precluded from making these submissions.

XII Issue #6: <u>Did TPA "decisions" lack "formal" or "substantial" reasonableness?</u>

[96] Air Canada's Counsel argue that each of the TPA "decisions" at issue lack both "formal" and "substantive" reasonableness. I have dismissed this argument for failure to plead it, but deal with it anyway in case of an appeal.

[97] Counsel argues that the Supreme Court of Canada in *Dunsmuir* v *New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 established new grounds (not standards) for judicial review: a decision must be both "formally" and "substantively" reasonable. Reference is made to the majority decision written by Bastarache and LeBel JJ at paragraph 47:

> *47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific,*

> *particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of [page221] justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.*

[98] I disagree. That Court is directing its mind to a standard, not a ground. Paragraph 47 begins with the words "Reasonableness is a deferential *standard*..." Paragraph 48 begins with the words, "The move towards a single reasonableness *standard*..."

[99] What that Court was addressing in paragraph 47 when it spoke of "formal" reasonableness is as set out in the second last sentence, "...the existence of justification, transparency and intelligibility". What that Court was addressing when it used the word "outcomes" is whether, as set out in the last sentence of paragraph 47, the decision "falls within the range of possible acceptable outcomes."

[100] In the present applications, the December bulletin is clear, as is the April bulletin. Both set out what TPA intends to do and why: it intended to, and then did, appoint a slot co-ordinator. It intended to, and then did, receive proposals from prospective users, including Air Canada.

[101] Not articulated in the "pleadings", but argued, was the validity of the 2010 CCOA between TPA and Porter. Air Canada was not previously advised that this would be entered into by those parties. It did not have a right or expectation to be advised. That was a commercial business

decision that TPA was entitled to make. TPA's actions were within the acceptable range of reasonable actions and should not be set aside on the assumption, which I have found to be otherwise, that TPA is subject to judicial review.

XIII Issue #7: <u>Did the TPA have any obligation to provide "reasons" for its decision and, if reasons were provided, were they adequate?</u>

[102] In addressing this argument I repeat that it has been dismissed for failure to "plead" it and because the TPA is not subject to judicial review in this respect. Nonetheless, in case of an appeal, I will address it.

[103] The "duty" to provide reasons rests on what the Supreme Court of Canada said in *Baker* v *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 where L'Heureux-Dubé J for the Court wrote at paragraphs 43 and 44:

> *43 In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required. This requirement has been developing in the common law elsewhere. The circumstances of the case at bar, in my opinion, constitute one of the situations where reasons are necessary. The profound importance of an H & C decision to those affected, as with those at issue in Orlowski, Cunningham, and Doody, militates in favour of a requirement that reasons be provided. It would be unfair for a person subject to a decision such as this one which is so critical to their future not to be told why the result was reached.*

> *44 In my view, however, the reasons requirement was fulfilled in this case since the appellant was provided with the notes of Officer Lorenz. The notes were given to Ms. Baker when her counsel asked for reasons. Because of this, and because there is no other record of the reasons for making the decision, the notes of the subordinate reviewing officer should be taken, by inference, to be the reasons for decision. Accepting documents such as these notes as sufficient reasons is part of the flexibility that is necessary, as emphasized by Macdonald and Lametti, supra, when courts evaluate the requirements of the duty of fairness with recognition of the day-to-day realities of administrative agencies and the many ways in which the values underlying the principles of procedural fairness [page849] can be assured. It upholds the principle that individuals are entitled to fair procedures and open decision-making, but recognizes that in the administrative context, this transparency may take place in various ways. I conclude that the notes of Officer Lorenz satisfy the requirement for reasons under the duty of procedural fairness in this case, and they will be taken to be the reasons for decision.*

[104] What must be recognized is that the “duty” to provide “reasons” arises only in “certain circumstances” and that duty may be fulfilled, for instance, by the simple provision of notes. Those certain circumstances may arise where there is a legislated provision that reasons should be provided and may also arise where the process is adjudicative or quasi-adjudicative. However, the circumstances are quite different when dealing with normal commercial transactions such as those at issue here. There is no “duty” to provide persons potentially interested with “reasons” for every “decision” made. Transactions would grind to a halt.

[105] No reasons were required here.

XIV Issue#8: <u>Were the "decisions" made for an improper purpose?</u>

[106] Air Canada argues that TPA, throughout the process, favoured Porter, and that its decisions were made to give Porter an unfair advantage respecting the use of the BBTCA.

[107] Air Canada points out that the letters provided by the Competition Bureau in 2003 were based on the premise that Porter would be given exclusivity at BBTCA only for a limited period of time, and that time has now gone by. Porter was initially granted up to 112 slots which, by the 2010 CCOA, were effectively grandfathered. Porter was also given, in the 2005 CCOA, a "fair" share of new slots. Porter was given 45 of the 90 new slots in the 2010 CCOA. Porter continues to enjoy almost all of the prime time slots.

[108] TPA argues that it made a proper business decision. It sought advice from sources, including Jordan and ACL; and based on that advice, while not following every piece of advice, it made rational, unbiased business decisions.

[109] Porter argues that Air Canada or its affiliates essentially abandoned the BBTCA, preferring to run its Toronto operations from Pearson airport where it is the major airline and Porter does not operate. Only when Porter began making a success of BBTCA did Air Canada want to get back in. Porter warns that caution should be exercised in dealing with Air Canada given the past history of neglecting the BBTCA and squeezing out competition there.

[110] It was not unreasonable for TPA to grandfather Porter's existing slots, nor was it unreasonable to interpret a "fair" proportion of allocation of new slots to be one-half of those slots. There is no evidence before me to suggest that TPA and Porter were doing anything more than engaging in normal, reasonable commercial activity. As I have found, there is no expectation that Air Canada should have in some way been consulted during the process.

[111] The situation, while not identical to, is akin to that considered by the Federal Court of Appeal in *Irving Shipbuilding* where Evans J.A. for the Court wrote at paragraph 46:

> *46 The context of the present dispute is essentially commercial, despite the fact that the Government is the purchaser. PWGSC has made the contract pursuant to a statutory power and the goods and services purchased are related to national defence. In my view, it will normally be inappropriate to import into a predominantly commercial relationship, governed by contract, a public law duty developed in the context of the performance of governmental functions pursuant to powers derived solely from statute.*

[112] It is not for this Court to rewrite or set aside what is in reality a commercial contract simply because one of the prospective parties believes it should have gotten a better deal.

CONCLUSIONS AND COSTS

[113] In conclusion, both applications will be dismissed. The TPA is not acting as a "federal board, commission or other tribunal" in the circumstances here; it made no "decision" that is subject to judicial review. Air Canada had no right or legitimate expectation to be consulted before TPA made slot commitments to Porter or otherwise.

[114] Counsel at the hearing advised that the parties may well agree as to the disposition of costs. I will therefore leave that matter to them, provided however that if they cannot agree within a reasonable period any one or more of them may, by a *short* letter addressed to me, seek a further order and directions as to costs.

JUDGMENT

FOR THE REASONS PROVIDED

THIS COURT ORDERS AND ADJUDGES that:

1. These applications are dismissed; and

2. The parties are to agree as to costs within a reasonable time, failing which any of them may by a short letter apply to this Court for an order and directions in that respect.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-488-10/T-692-10
STYLE OF CAUSE:	AIR CANADA v. TORONTO PORT AUTHORITY AND PORTER AIRLINES INC.
PLACE OF HEARING:	Vancouver, BC
DATE OF HEARING:	July 6 – 8, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	HUGHES J.
DATED:	July 21, 2010

APPEARANCES:

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Robert L. Armstrong Orestes Pasparakis Greg Sheahan	FOR THE RESPONDENT Porter Airlines Inc.

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