Federal Court of Appeal Cour d'appel fédérale

Date: 20160907

Docket: A-135-15

Citation: 2016 FCA 220

CORAM: **WEBB J.A.**
SCOTT J.A.
DE MONTIGNY J.A.

BETWEEN:

DR. GÁBOR LUKÁCS

Appellant

and

CANADIAN TRANSPORTATION AGENCY AND DELTA AIR LINES, INC.

Respondents

Heard at Halifax, Nova Scotia, on April 25, 2016.

Judgment delivered at Ottawa, Ontario, on September 7, 2016.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: WEBB J.A.
SCOTT J.A.

Federal Court of Appeal

Cour d'appel fédérale

Date: 20160907

Docket: A-135-15

Citation: 2016 FCA 220

CORAM: **WEBB J.A.**
SCOTT J.A.
DE MONTIGNY J.A.

BETWEEN:

DR. GÁBOR LUKÁCS

Appellant

and

CANADIAN TRANSPORTATION AGENCY AND DELTA AIR LINES, INC.

Respondents

REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] This is a statutory appeal under section 41 of the *Canada Transportation Act*, S.C. 1996, c. 10 [the *Act*] of a decision rendered by the Canadian Transportation Agency (the Agency) dismissing a complaint of discriminatory practices filed by Dr. Gábor Lukács (the appellant) against Delta Air Lines Inc. (the respondent) on the preliminary basis that he lacks standing to bring this complaint.

[2] This case essentially raises the issue of standing in proceedings before the Agency. The appellant argues that the Agency applied the wrong legal principles and fettered its discretion in denying him public interest standing to challenge Delta's policies and practices. Having carefully considered the parties' written and oral submissions, I am of the view that the appeal must be granted.

I. Background

[3] On August 24, 2014, the appellant filed a complaint with the Agency alleging that certain practices of the respondent relating to the transportation of "large (obese)" persons are discriminatory, contrary to subsection 111(2) of the *Air Transportation Regulations*, SOR/88-58 (the *Regulations*) and also contrary to a previous decision of the Agency concerning the accommodation of passengers with disabilities. The appellant relied on an email dated August 20, 2014 from a customer care agent of Delta responding to a concern of a passenger ("Omer") regarding a fellow passenger who required additional space and who therefore made Omer feel "cramped".

[4] In that email, Delta apologized to Omer and set out the guidelines it follows to ensure that large passengers and people sitting nearby are comfortable. It reads as follows:

> Sometimes, we ask the passenger to move to a location in the plane where there's more space. If the flight is full, we may ask the passenger to take a later flight. We recommend that large passengers purchase additional seats, so they can avoid being asked to rebook and so we can guarantee comfort for all.
>
> Appellant's Appeal Book, p. 21

[5] Since it was not clear to the Agency whether Dr. Lukács had an interest in Delta's practices on the basis of the facts before it, he was provided with the opportunity to file submissions with the Agency regarding his standing. Dr. Lukács filed his submissions on September 19, 2014, Delta responded on September 26, 2014, and Dr. Lukács replied on October 1, 2014. In its Decision No. 425-C-A-2014 dated November 25, 2014, the Agency dismissed Dr. Lukács' complaint for lack of standing.

II. The impugned decision

[6] The Agency first distinguished *Krygier v. WestJet et al.*, Decision No. LET-C-A-104-2013 [*Krygier*] and *Black v. Air Canada,* Decision No. 746-C-A-2005 [*Black*], on the basis that the issue in those cases was not the standing of the complainants but the need for a "real and precise factual background". Furthermore, the Agency found that although Dr. Lukács was not required to be a member of the group discriminated against in order to have standing, he must nonetheless have a "sufficient interest". The use of the term "any person" in the *Act* did not mean that the Agency should determine issues in the absence of the persons with the most at stake. On that basis, the Agency found that, at 6 feet tall and 175 pounds, nothing suggested that Dr. Lukács himself would ever be subject to Delta's policy regarding large persons that would not be able to sit in their seat without encroaching into the neighbouring seat.

[7] With respect to public interest standing, the Agency took note of the three-part test established by the Supreme Court in the trilogy of *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, 43 D.L.R. (3d) 1; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265, 55 D.L.R. (3d) 632; and *Minister of Justice (Can.) v. Borowski*, [1981] 2 S.C.R. 575, 130

D.L.R. (3d) 588. The Agency further relied on *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, 88 D.L.R. (4th) 193 [*Canadian Council of Churches*] and *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, 33 D.L.R. (4th) 321 [*Finlay*] in expressing the view that public interest standing does not extend beyond cases in which the constitutionality of legislation or the non-constitutionality of administrative action is contested. Such being the case, Dr. Lukács could not rely on public interest standing to bring his complaint before the Agency.

III. Issues

[8] Dr. Lukács conceded at the hearing that he does not have a direct and personal interest in this case, and as a result he does not claim standing on that basis. The issues upon which the parties disagree can be formulated as follows:

A. Did the Agency err in applying the general law of standing on a complaint for discriminatory terms and conditions under subsections 67.2(1) of the *Act* and 111(2) of the *Regulations*?

B. Did the Agency err in finding that public interest standing is limited to cases in which the constitutionality of legislation or the non-constitutionality of administrative action is challenged?

[9] As I dispose of the current matter on the basis of the issues raised in the above point A, the following analysis will not address the questions raised in point B.

IV. Relevant statutory provisions

[10] Airlines operating flights within, to or from Canada are required to create a tariff that sets out the terms and conditions of carriage. The tariff is the contract of carriage between the passenger and the airline, and includes the terms and conditions which are enforceable in Canada (see ss. 67 of the *Act* and 100(1) of the *Regulations*).

[11] For the purposes of this proceeding, a few provisions are of particular relevance. The first is section 37 of the *Act*, which grants the Agency the power to inquire into a complaint:

37 The Agency may inquire into, hear and determine a complaint concerning any act, matter or thing prohibited, sanctioned or required to be done under any Act of Parliament that is administered in whole or in part by the Agency.	37 L’Office peut enquêter sur une plainte, l’entendre et en décider lorsqu’elle porte sur une question relevant d’une loi fédérale qu’il est chargé d’appliquer en tout ou en partie.

[12] The second, subsection 67.2(1) of the *Act*, sets out the powers of the Agency if it finds terms or conditions in a tariff that are unreasonable or unduly discriminatory:

67.2 (1) If, on complaint in writing to the Agency by any person, the Agency finds that the holder of a domestic licence has applied terms or conditions of carriage applicable to the domestic service it offers that are unreasonable or unduly discriminatory, the Agency may suspend or disallow those terms or conditions and substitute other terms or conditions in their place.	67.2 (1) S’il conclut, sur dépôt d’une plainte, que le titulaire d’une licence intérieure a appliqué pour un de ses services intérieurs des conditions de transport déraisonnables ou injustement discriminatoires, l’Office peut suspendre ou annuler ces conditions et leur en substituer de nouvelles.

[13] Lastly, subsection 111(2) of the *Regulations* further expands on prohibited discrimination:

111(2) No air carrier shall, in respect of tolls or the terms and conditions of carriage,	111 (2) En ce qui concerne les taxes et les conditions de transport, il est interdit au transporteur aérien :
(a) make any unjust discrimination against any person or other air carrier;	a) d'établir une distinction injuste à l'endroit de toute personne ou de tout autre transporteur aérien;
(b) give any undue or unreasonable preference or advantage to or in favour of any person or other air carrier in any respect whatever; or	b) d'accorder une préférence ou un avantage indu ou déraisonnable, de quelque nature que ce soit, à l'égard ou en faveur d'une personne ou d'un autre transporteur aérien;
(c) subject any person or other air carrier or any description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatever.	c) de soumettre une personne, un autre transporteur aérien ou un genre de trafic à un désavantage ou à un préjudice indu ou déraisonnable de quelque nature que ce soit.

V. The standard of review

[14] At its core, this case calls into question the general principles the Agency should apply when determining whether a party has standing to file a complaint under subsection 67.2(1) of the *Act*. Of course, the actual decision of whether to grant standing engages the exercise of discretion, and as such it must be reviewed by this Court on a standard of reasonableness. To the extent that determining the standing requirements for a complaint under subsection 67.2(1) also requires an analysis of the particular requirements of the *Act* and the related statutes and case law, it is also entitled to a high degree of deference.

[15] Of course, it could be argued that since Parliament has provided, through legislation, a right of appeal from the Agency to this Court on questions of law, correctness is the applicable standard. Such a view would be mistaken, however, as it is clear since the Supreme Court of

Canada decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 that the correctness standard will only apply to constitutional questions; questions of law of central importance to the legal system as a whole and that are outside of the adjudicator's expertise; questions regarding the jurisdictional lines between two or more competing specialized tribunals; and the exceptional category of true questions of jurisdiction. The highest Court has repeated on a number of occasions that this is a very narrow exception to the general principle that an adjudicative administrative tribunal's interpretation of its enabling legislation is reviewable on a standard of reasonableness (see, for example, *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at paras. 33-34, [2011] 3 S.C.R. 654; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 at para. 24, [2011] 3 S.C.R. 471; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40 at para. 55, [2014] 2 S.C.R. 135; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at paras. 26−27, [2013] 3 S.C.R. 895; *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval,* 2016 SCC 8 at para. 34, 481 N.R. 25). In my view, the criteria for standing under subsection 67.2(1) does not raise broad questions relating to the Agency's authority, and does not raise a question of central importance to the legal system as a whole; on the contrary, that question falls squarely within the Agency's expertise. As a result, the task of this Court is rather limited and is restricted to determining whether the decision of the Agency falls within a range of possible, acceptable outcomes which are defensible in light of the facts and the law.

A. *Did the Agency err in applying the general law of standing on a complaint for discriminatory terms and conditions under subsections 67.2 (1) of the Act and 111(2) of the Regulations?*

[16] As recently stated by this Court in *Lukács v. Canadian Transport Agency*, 2016 FCA 202 at paragraphs 31-32, the *Act* does not create a general obligation for the Agency to deal with each and every complaint regarding compliance with the *Act* and its various regulations. Section 37 of the *Act*, in particular, makes it clear that the Agency "may" inquire into, hear and determine a complaint. There is no question, therefore, that the Agency retains a gatekeeping function and has been granted the discretion to screen the complaints that it receives to ensure, among other things, the best use of its limited resources.

[17] Counsel for the respondent infers from the permissive (as opposed to mandatory) nature of section 37, the power of the Agency to refuse to inquire into, hear and decide complaints lodged by complainants who do not have standing to bring forward the complaint. It is not clear, however, on what basis the principles governing standing before courts of law ought to be transposed to a regulatory regime supervised and enforced by an administrative body like the Canadian Transportation Agency.

[18] The rationale underlying the notion of standing has always been a concern about the allocation of scarce judicial resources and the corresponding need to weed out cases brought by persons who do not have a direct personal legal interest in the matter. Such preoccupations are warranted in a judicial setting, where the objective is to determine the individual rights of private litigants, the accused and individuals directly affected by state action (see *Canada (Attorney*

General) v. Downtown Eastside Sex Workers United Against Violence Society, 2012 SCC 45 at para. 22, [2012] 2 S.C.R. 524; *Canadian Council of Churches* at p. 249). As such, the general rule required that a person have a sufficient personal interest in the matter to bring a claim forward. The ability to seek declaratory or injunctive relief in the public interest is usually reserved for the Attorney General, who might allow a private individual to bring such a claim only on consent (*Finlay* at para. 17). Similar rules may also be appropriate before a quasi-judicial tribunal, established to dispose of disputes between a citizen and the government or one of its delegated authorities. It is far from clear that these strict rules developed in the judicial context, however, should be applied with the same rigour by an administrative agency mandated to act in the public interest.

[19] I agree with the appellant that the Agency erred in superimposing the jurisprudence with respect to standing on the regulatory scheme put in place by Parliament, thereby ignoring not only the wording of the *Act* but also its purpose and intent. In enacting the *Act*, Parliament chose to create a regulatory regime for the national transportation system, and resolved to achieve a number of policy objectives (set out in section 5 of the *Act*). Within that framework, the role of the Agency is not only to provide redress and grant monetary compensation to persons adversely affected by national transportation actors, but also to ensure that the policies pursued by the legislator are carried out.

[20] Administrative bodies such as the Agency are not courts. They are part of the executive branch, not the judiciary. Their mandates come in all shapes and sizes, and their role is different from that of a court of law. Often, such bodies are created to provide greater and more efficient

access to justice through less formal procedures and specialized decision-makers that may not have legal training. Moreover, not all administrative bodies follow an adversarial model similar to that of courts. If an administrative body has important inquisitorial powers, ensuring that the particular parties before them are in a position to present extensive evidence of their particular factual situations may be less important than in a court of law, where judges are expected to take on a passive role and decide on the basis of the record and arguments presented to them by the parties.

[21] For that reason, the Supreme Court of Canada has recognized that the procedure before administrative bodies must be consistent, above all, with their enabling statute, and need not replicate court procedure if their functions are different from that of a traditional court (see *Innisfil Township v. Vespra Township*, [1981] 2 S.C.R. 145 at pp. 167-168, [1981] A.C.S. No. 73. In a similar vein, the Supreme Court recognizes the importance of the particular statutory regime and the procedural choices made by the administrative body itself when it comes to determining the content of the duty of fairness (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 24 and 27, 174 D.L.R. (4th) 193 [*Baker*]). To the extent that courts have exhibited a tendency to impose court-like procedures on administrative bodies in the context of judicial review for breach of procedural fairness obligations in the wake of *Baker*, they have often been met with criticism (see, for example, David Mullan, “Tribunal Imitating Courts – Foolish Flattery or Sound Policy?” (2005) 28 Dal. L.J. 1; Robert Macaulay and James Sprague, *Practice and Procedure before Administrative Tribunals*, vol. 2 (Toronto: Carswell, 2010) at pp. 901 to 905).

[22] Recognition of the particularity of administrative bodies has been reflected as well in decisions on standing and participation rights before administrative bodies. For example, this Court recently considered the particular language of the National Energy Board's enabling statute (most notably, the terms "directly affected", and "relevant information or expertise" used therein), and gave a wide margin of appreciation to the Board in deciding who should participate in its own proceedings. In so doing, this Court recognized the Board's expertise in managing its own process in light of its particular mandate (see *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245 at para. 72, [2015] 4 F.C.R. 75).

[23] Turning now to the Agency, it has a role both as a specialized economic regulator and a quasi-judicial body that decides matters in an adversarial setting. For example, the Agency has regulation-making powers and specialized enforcement officers with investigative powers that verify compliance of carriers with the *Act* and its relevant regulations (see ss. 177 and 178 of the *Act*). The Agency also hears applications for a variety of licenses and other authorizations and complaints which may, or may not, involve disputes between opposing parties (consider, for instance, air travel complaints under s. 85.1; applications to interswitch railway lines under s. 127; and competitive line rate-setting applications under s. 132).

[24] The *Act* distinguishes between "complaints" and "applications", and uses different terminology to describe the types of persons who are entitled to file them. The term "application" is used in Part III of the *Act* on Railway Transportation, and is usually accompanied by a specific descriptor of the party entitled to bring the application. For example, an application to establish competitive line rates is made "[o]n the application of a shipper" (s. 132(1) of the *Act*); an

application to determine the carrier's liability is made "on the application of the company" (s. 137(2) of the *Act*); an application regarding running rights and joint track usage may be made by a railway company (s. 138 of the *Act*); and an application to determine the net salvage value of a railway line is made "on application by a party to a negotiation" (s. 144(3.1) of the *Act*). Applications are governed by the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings*), S.O.R./2014-104, which are generally based on an adversarial model, with some variations. Of particular note are Rules 21 and 29 which allow the Agency to grant intervener status to a person that has a "substantial and direct interest", and Rule 23 which allows an "interested person" to file a position statement.

[25] In contrast, the term "complaint" is mainly used in Part II – Air Transportation, and is almost always accompanied by the broad phrase "any person" (ss. 65, 66, 67.1, 67.2 of the *Act*). It is particularly telling that the phrase "any person" appearing in section 67.1 and subsection 67.2(1) is used to refer to those complainants who can bring a complaint in writing to the Agency. This is to be contrasted to the phrase "person adversely affected" appearing in subsection 67.1(b) and subparagraph 86(1)(h)(iii), which is more restrictive and determinative of who can seek monetary compensation. The use of those different phrases in the same act must be given effect and is indicative of Parliament's intention to distinguish between those who can bring a complaint to obtain a personal remedy and those who can bring a complaint as a matter of principle and with a view to ensuring that the broad policy objectives of the *Act*, which includes the prevention of harm, are enforced in a timely manner, not just remedied after the fact.

[26] Dr. Lukács' complaint is brought under subsection 67.2(1). To the extent that this provision is at play (an issue that is not for this Court to decide and which is not the subject of this proceeding), it is incumbent on the Agency to intervene at the earliest possible opportunity, in order to prevent harm and damage that could result from unreasonable and unduly discriminatory terms or conditions of carriage, rather than to merely compensate those who have been affected *ex post facto*. This is precisely why the Agency is given the authority not only to compensate individuals who were adversely affected by an airline's conduct (s. 67.1(a)) and to take corrective measures (s. 67.1(b)), but also to disallow any tariff or tariff rule that is found to be unreasonable or unduly discriminatory and then to substitute the disallowed tariff or tariff rule with another one established by the Agency itself (*Regulations*, s. 113).

[27] In that perspective, the fact that a complainant has not been directly affected by the fare, rate, charge, or term or condition complained of and may not even meet the requirements of public standing, should not be determinative. If the objective is to ensure that air carriers provide their services free from unreasonable or unduly discriminatory practices, one should not have to wait until having been subjected to such practices before being allowed to file a complaint. This is not to say, once again, that each and every complaint filed with the Agency has to be dealt with and decided, but that complaints that appear to be serious on their face cannot be dismissed for the sole reason that the person complaining has not been directly and personally affected or does not comply with other requirements of public standing. When read in its contextual and grammatical context, there is no sound reason to limit standing under the *Act* to those with a direct, personal interest in the matter.

[28] This interpretation is indeed consistent with the Agency's own analysis in a number of previous decisions. In *Black*, for example, the respondent submitted that the complainant had not established that he was sufficiently affected by the policies challenged and that he did not have the requisite direct personal interest standing or public interest standing. The Agency dismissed that argument and wrote:

> […] The Agency is of the opinion that the term "any person" includes persons who have not encountered "a real and precise factual background involving the application of terms and conditions", but who wish, on principle, to contest a term or condition of carriage. With respect to section 111 of the ATR [Air Transportation Regulations], the Agency notes that there is nothing in the provisions that suggests that the Agency only has jurisdiction over complaints filed by persons who may have experienced "a real and precise factual background involving the application of terms and conditions". The Agency further notes that subsection 111(1) of the ATR provides, in part, that "All tolls and terms and conditions of carriage […] that are established by an air carrier shall be just and reasonable […]". The Agency is of the opinion that the word "established" does not limit the requirement that terms or conditions of carriage be just and reasonable to situations involving "a real and precise factual background involving the application of terms and conditions", but extends to situations where a person wishes, on principle, to challenge a term or condition that is being offered.
>
> […]
>
> Furthermore, it would be inappropriate to require a person to experience an incident that results in damages being sustained before being able to file a complaint. To require a "real and precise factual background" could very well dissuade persons from using the transportation network.
>
> *Black*, paras. 5 and 7

[29] That ruling was followed more recently in *Krygier*. Contrary to the respondent's submissions, these decisions do not only stand for the proposition that the absence of a real and precise factual background does not deprive the Agency of jurisdiction to hear a complaint, but also for the (overlapping) principle that it is not necessary for a complainant to have been

personally affected by a term or condition for the Agency to assert jurisdiction under subsection 67.2(1) of the *Act* and section 111 of the *Regulations*.

[30] For all of the foregoing reasons, I am of the view that the Agency erred in law and rendered an unreasonable decision in dismissing the complaint of Dr. Lukács for lack of standing. The Agency does not necessarily have to investigate and decide every complaint and is certainly empowered to dismiss without any inquiry those that are futile or devoid of any merit on their face; it cannot, however, refuse to look into a complaint on the sole basis that the complainant does not meet the standing requirements developed by courts of civil jurisdictions. In so doing, the Agency unreasonably fettered its discretion.

[31] Having so decided, it will not be necessary to address the second, alternative ground of appeal raised by the appellant. The public interest standing is a concept that has been developed in a judicial setting to bring more flexibility to the strict rules of standing. It is meant to ensure that statutes and regulations are not immune from challenges to their constitutionality and legality as a result of the requirement that litigants be directly and personally affected. Such a notion has no bearing on a complaint scheme designed to complement a regulatory regime, all the more so in a context where the administrative body tasked to apply and enforce the regime may act of its own motion pursuant to sections 111 and 113 of the *Regulations*.

VI. Conclusion

[32] For these reasons, I would allow the appeal, set aside Decision No. 425-C-A-2014 of the Canadian Transportation Agency, and direct that the matter be returned to the Agency to

determine, otherwise than on the basis of standing, whether it will inquire into, hear and decide the appellant's complaint. I would also award the appellant his disbursements in this Court and a modest allowance in the amount of $750, such amounts to be payable by the Agency.

"Yves de Montigny"
J.A.

"I agree
Wyman W. Webb J.A."

"I agree
A.F. Scott J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-135-15
STYLE OF CAUSE:	DR. GÁBOR LUKÁCS v. CANADIAN TRANSPORTATION AGENCY AND DELTA AIR LINES, INC.
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	APRIL 25, 2016
REASONS FOR JUDGMENT BY:	DE MONTIGNY J.A.
CONCURRED IN BY:	WEBB J.A. SCOTT J.A.
DATED:	SEPTEMBER 7, 2016

APPEARANCES:

Dr. Gábor Lukács	FOR THE APPELLANT (ON HIS OWN BEHALF)
Allan Matte	FOR THE RESPONDENT CANADIAN TRANSPORTATION AGENCY
Gerard Chouest	FOR THE RESPONDENT DELTA AIR LINES, INC.

SOLICITORS OF RECORD:

Legal Services Branch Canadian Transportation Agency Gatineau, Quebec	FOR THE RESPONDENT CANADIAN TRANSPORTATION AGENCY
Bersenas Jacobsen Chouest Thomson Blackburn LLP Barristers and Solicitors Toronto, Ontario	FOR THE RESPONDENT DELTA AIR LINES, INC.